

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Aug 10 2021

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Diane Goodstein, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2012-CP-10-7594
Appellate Case No.: 2018-001230

One Belle Hall Property Owners Association, Inc., and Marvin T. Meek and Francis E. Hill,
individually, and on behalf of all others similarly situated,

Respondents,

v.

Builders FirstSource-Southeast Group, LLC,

Petitioner.

**RESPONDENTS' RETURN TO
PETITION FOR WRIT OF CERTIORARI**

JUSTIN O'TOOLE LUCEY, PA
Justin O'Toole Lucey (Bar No. 15438)
Dabny Lynn (Bar No. 78703)
Anna McCann (Bar No. 102314)
415 Mill Street
Mt. Pleasant, SC 29464
Telephone: (843) 849-8400
Facsimile: (843) 849-8406
jlucey@lucey-law.com
dlynn@lucey-law.com
amccann@lucey-law.com
Attorneys for the Respondents

August 10, 2021
Mount Pleasant, South Carolina

Respondents (“Association”) submit this Return to Petitioner’s (“BFS”) Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals correctly dismissed this appeal for lack of jurisdiction due to BFS’ failure to timely appeal the Trial Court’s Final Order that ended this case five years ago. (June 15, 2021 Order, p. 1) (“[B]ecause [BFS] did not timely serve its notice of appeal within 30 days after receiving the final order ending this action. . .we agree this court does not have jurisdiction to hear this appeal.”) (hereinafter “Order Dismissing Appeal”).

The September 26, 2016 Final Order was entered *nunc pro tunc* on September 1, 2016 and received by BFS on September 27, 2016. (R. p. 28). The September 26, 2016 Final Order expressly provided:

“This order **ends** the case.”

(R. p. 28) (emphasis added).

It is undisputed that within ten days after receiving the Final Order (or by October 16th) that BFS did not file a Rule 59(e) Motion or any other motion addressing the September 26, 2016 Final Order. It is undisputed that within thirty days after receiving the Final Order (or by October 28th) that BFS did not serve a Notice of Appeal of the September 26, 2016 Final Order. It is undisputed that BFS waited almost two years before it finally served its Notice of Appeal on June 28, 2018.¹ It is therefore hornbook law that no appellate court, including this one, has jurisdiction to alter the Final Order and the \$2,163,493 judgment it entered against BFS. *See, e.g., Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) (“The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks

¹ BFS’ Notice of Appeal was filed with the Court of Appeals on July 2, 2018.

jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of notice.”); *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 604-605, 567 S.E.2d 514, 518 (Ct. App. 2002) (acknowledging the finality of a Form 4 Order and indicating “absolutely nothing remains to be done by [the Court] after the signing of the order.”).

Because this Court lacks jurisdiction to address BFS’ appeal of the Final Order, there is nothing left for this Court to review. The question BFS attempts to present in its Petition – whether it is entitled statutory setoff despite its many substantive and procedural missteps – is irrelevant because ultimately the Final Order stands.

STATEMENT OF THE CASE

This action concerns leaky windows supplied by BFS to the One Belle Hall Condominiums (“One Belle Hall” or “OBH”) and the resulting, substantial damage. Contrary to BFS’ attempt to spin the procedural record:

- At trial, BFS was represented by Attorney Davi Dyer (of the Kernodle, Taylor, and Root Law Firm) who is referred to as BFS’ “trial counsel”. BFS is now represented by William C. Wood, Jr., C. Mitchell Brown, and Nicholas Charles (of the Nelson Mullins Law Firm), who are referred to as BFS’ “post-trial counsel”.
- BFS’ trial counsel orally moved for JNOV by renewing “the directed verdict motion previously heard by the [Trial Court]” at the close of Plaintiff’s case – not at the close of all evidence. (R. pp. 491:15-494:19; 635:9-10; 744:2-5).²
- BFS’ trial counsel did not ask the Trial Court to reconsider its denial of this oral JNOV Motion, did not present any other post-trial motions, and did not request leave of court to file post-trial motions. (R. pp. 27; 744:6-12).

² BFS’ spins regarding the impending hurricane should also be ignored. (Petition, p. 3). Trials often conclude at 10:30 p.m. at the end of a week as the Court and parties attempt to conclude a case in lieu of a weekend break. The undersigned’s I’On case pending before this Court on Cross-Petitions for Certiorari concluded at 1:30 a.m. in the morning after separate gross negligence and punitive damage phases. *Walbeck, et. al., v. The I’On Company, et. al.*, Appellate Case No. 2015-001590.

- BFS' trial counsel filed a Motion to Compel the production of settlement documents on September 8, 2016.
- BFS' newly hired, post-trial counsel was ignorant to the foregoing, so post-trial counsel filed a Second JNOV Motion on September 12, 2016 which did not reference "reconsideration", "alter", or "amend" anywhere and attempted to renew a directed verdict motion never made. (R. pp. 4494-4506).
- The Trial Court entered a Final Order that "ended this case" on September 22, 2016. (R. pp. 22-23). The Court dated the order "9-1-16 *nunc pro tunc*" to comply with, not violate, Rule 58, SCRCP (contrary to what BFS suggests). (Petition, pp. 3-4).
- BFS received the Final Order on September 27, 2016 but did not move to reconsider this Order by October 10, 2016 and did not appeal this Order by October 28, 2016.³ (R. pp. 29-30; 4673-75).
- BFS did not learn of "unpreserved JNOV grounds" at the November 18, 2016 post-trial hearing (Petition, p. 5); rather, this is when BFS' post-trial counsel learned that BFS had already orally moved for JNOV based on the trial transcripts that the Association provided at this hearing. (R. pp. 748:9; 778:6-8; 781:8-9; 784:13-25; 787:20-792:18; 795:1-799:25).
- BFS did not later drop portions of its Second JNOV Motion because they were unpreserved, they were dropped because BFS's oral JNOV Motion had already been denied. *Id.*; (R. pp. 4618-21).
- BFS does not appeal the Trial Court's denial of BFS' oral JNOV Motion. (R. pp. 4673-75).
- BFS also does not appeal the "denial of its setoff rights" because there is no such "denial" for BFS to appeal. *Id.*; (Petition, p. 16) (BFS admitting that the Trial Court granted its September 8, 2016 Motion to Compel); (Petition, p. 16) (BFS admitting that the Trial Court did not rule on its September 12, 2016 Second JNOV Motion).
- The only Order on appeal that matters is the Trial Court's September 16, 2016 Final Order that BFS did not challenge until July 2, 2018 when it filed its Notice of Appeal. (R. pp. 4673-75).
- Due to BFS' delay, no appellate court can consider the Final Order "that ended this case". (R. pp. 22-23). The Court of Appeals therefore correctly dismissed this appeal for lack of jurisdiction. (Order Dismissing Appeal).

³ These facts are conveniently omitted by BFS in its Statement of the Case.

STATEMENT OF FACTS

A. Introduction and Pre-Trial Matters

OBH is a condominium complex located in Mount Pleasant, South Carolina that consists of four, three-story buildings housing a total of 59 residences. After discovering many deficiencies and severe damage existing throughout all four buildings, the Association filed an initial Complaint on November 19, 2012, asserting distinct claims of negligence, breach of warranty, strict liability, and other causes of action. (R. pp. 48-64). On December 31, 2013, the Association filed an Amended Complaint to identify certain “John Doe” defendants, including BFS. (R. pp. 65-105). BFS was named in three causes of action: negligence, breach of warranty, and strict liability. *Id.* A few weeks later, BFS filed its Answer to the Amended Complaint. (R. pp. 95-105). BFS’ Answer made no mention of setoff. *Id.* Two additional, Amended Complaints were filed, and BFS’ Amended Answers again failed to raise setoff. (R. pp. 106-136; 137-147; 148-175; 176-186).

B. The Trial

This case was tried before a jury in Charleston County between August 29, 2016 and September 1, 2016. After the Association rested, BFS moved for a directed verdict on each of the three claims against it, all of which the Trial Court denied. (R. pp. 491:15-494:19).

After BFS completed its case, the Association moved for a directed verdict on each of its claims, all of which the circuit court denied. (R. pp. 622:4-635:10). BFS made no motions; BFS did not renew the directed verdict motions it previously made at the close of the Association’s case. (R. p. 635:9-10).

On September 1, 2016, the jury returned a general verdict for the Association in the amount of \$2,163,493 on the breach of warranty and strict liability claims. (R. pp. 46-47). The jury found

BFS was not liable in negligence. *Before* excusing the jury, the Trial Court asked whether there were any matters that needed to be taken up, and both parties answered no. (R. pp. 28; 740:16-22).

C. Trial Court’s Denial of BFS’ JNOV Motion

After the jury was excused, BFS orally made its JNOV Motion. (R. p. 744:2-5); *see also* (R. p. 27); (BFS Petition at 3) (admitting “[BFS’] trial counsel orally moved for JNOV. . .”). The Trial Court denied this Motion. (R. p. 744:6-12); *see also* (R. p. 27). BFS never moved for reconsideration of this oral denial; and BFS has never appealed the denial of this JNOV Motion. (R. pp. 4676-7).

D. BFS’ Motion to Compel and Second JNOV Motion

On September 8, 2016, BFS filed a “Notice of Motion and Motion to Compel and Motion for Determination of Setoff” (R. pp. 4492-3) requesting the Trial Court to compel the production of certain settlement agreements. (R. p. 4493). Despite the title of the Motion, the substance of the Motion did not request a setoff; rather, BFS informed the Trial Court that following the production of the requested documents: “BFS will move to seek a determination [of the] setoff to be taken against the judgment awarded by the jury.” *Id.* (emphasis added).

On September 12, 2016, BFS’ post-trial counsel filed a “Motion for Judgment, New Trial Absolute, or, in the alternative, for New Trial *Nisi Remittitur*” (R pp. 4494-4506). This Motion does not reference “reconsideration”, “alter”, or “amend” anywhere; and is clearly and expressly a JNOV motion that completely ignored the existence of a prior oral JNOV motion and the Court’s denial thereof. (R. pp. 4494; 4505); (Petition for Rehearing, p. 4) (admitting BFS filed another motion “raising grounds for JNOV”).

E. Trial Court’s Final Order

On September 22, 2016, the Trial Court issued a Form 4 Order (“Final Order”) entering judgment against BFS in the same amount the jury awarded (\$2,163,493) on the Association’s

breach of warranty and strict liability claims. (R. p. 28); *see also* (R. p. 22). The Form 4 Order is the Final Order – it indicates “This order ends the case.” *Id.* On September 27, 2016, the parties received written notice of the Final Order. (R. p. 4539). BFS never filed a motion requesting that the Trial Court alter, amend or reconsider this Order. (R. p. 28).

F. The Initial Post-Trial Hearing on BFS’ Written Post-Trial Motions

The Trial Court’s first, post-trial motion hearing occurred on November 18, 2016. (R. p. 28). Prior to the hearing, the Association served a Memorandum Opposing BFS’s Second JNOV Motion, arguing that this Motion was procedurally precluded because, *inter alia*: (1) BFS already moved for JNOV; (2) BFS never requested ten days to file post-trial motions; and, (3) BFS failed to renew its directed verdict motions. (R. pp. 4507-43). The Association also served a Memorandum Opposing BFS’s Motion to Compel, arguing, *inter alia*, that the Motion was only a “compel” motion – not a setoff motion; and, that the Motion was procedurally barred because BFS did not move to reconsider the Trial Court’s Final Order. (R. pp. 4544-80).⁴

During the hearing, BFS’ post-trial counsel argued that the September 12, 2016 Motion was the JNOV Motion; and, it was evident that BFS’ post-trial counsel did not understand that BFS’ trial counsel already made a JNOV Motion at trial and that this Motion had been denied. *See, e.g.*, (R. pp. 748:9; 778:6-8; 781:8-9) (BFS’ post-trial counsel repeatedly describing its motion as one for “JNOV”). In responding, the Association’s counsel argued that BFS’ Second JNOV Motion was untimely and improper:

We shouldn’t be starting over from scratch. [The] JNOV motion right now is untimely. The motion was made at the close of the case and denied. The law in this state is clear, you cannot have successive JNOV motions. [BFS] cannot pull one ground out of that JNOV motion that’s proper for this Court to hear today because

⁴ On the day of the hearing, BFS served a Memorandum Supporting its Second JNOV Motion as well as a “Memorandum in Support of its Motion to Compel Production of Settlement Agreements and Motion for Setoff” (R. pp. 4581-86; 4587-4608). The “Motion for Setoff” referenced in BFS’s Memorandum was never filed. (R. p. 29).

JNOV was denied on September 1st. [A]fter that [the Final Order] was entered, entering the jury's verdict, and the box checking this case is ended was checked, the appeal period has already run. This case has sailed. There's nothing here. . . There's no exception; there's no grounds in the DV motion. There was no second DV motion. The [first] JNOV motion [was] denied. This [second] JNOV motion is untimely. It doesn't exist in the eyes of [the] law. This motion does not exist. . .

(R. pp. 783:19-784:11).

Association's counsel then provided relevant portions of the trial transcript which showed that: (a) BFS' JNOV Motion was already raised and ruled upon by the Trial Court; (b) BFS had not renewed its directed verdict motions at the close of evidence; and, (c) BFS had not requested ten days leave to file post-trial motions. (R. pp. 784:13-25; 787:20-792:18). In response, BFS' post-trial counsel requested the Trial Court continue the hearing so they could order and review the trial transcript in full. (R. pp. 795:1-799:25).⁵

G. The Continued Post-Trial Hearing

The post-trial motion hearing resumed on April 20, 2017. On April 18, 2017, BFS submitted a Supplemental Memorandum that – for the first time – attempted to characterize its Second JNOV Motion as one for reconsideration of the Trial Court's denial of its first JNOV Motion. (R. p. 4621) (“[T]his Court should reconsider the denial of JNOV and enter judgment in favor of BFS.”). In this same Memorandum, BFS withdrew 20 grounds initially asserted in its Second JNOV Motion as well as its new trial arguments in their entirety. (R. pp. 4618-21).

On April 20, 2017, the Association submitted a Supplemental Memorandum opposing BFS' Motion to Compel, again briefing that BFS was not entitled to any relief whatsoever because the case was over. (R. pp. 4609-17).

⁵ BFS' post-trial counsel did not offer a plausible explanation as to why it as a Movant had not procured a copy of the transcript.

At the hearing, BFS' post-trial counsel argued BFS was entitled to credit for the Association's pre-trial settlements and that its Second JNOV Motion was not successive. The Association reiterated, *inter alia*: (1) setoff was not appropriate; and, (2) BFS' Second JNOV Motion was not a Motion to Reconsider. (R. p. 29).

H. Association Produced Settlement Documents and BFS Failed to Move for Setoff

Following counsels' arguments, the Trial Court instructed the Association to produce its pre-trial settlements so there would be an adequate record regardless of the court's eventual ruling. (R. p. 29). The Association provided the settlements to BFS. (R. p. 29). ("On April 20, 2017, the [Trial Court] orally ordered [the Association] to produce the [s]ettlement [a]greements. . . [The Association] complied shortly thereafter."). BFS never filed the setoff motion it indicated it would file **after receiving these agreements**. *Id.* ("Although [BFS] has possessed the settlement agreement for some time, the indicated subsequent setoff motion has not been filed and no further briefing has been received from [BFS] as to its entitlement to a setoff"). Six months lapsed, and no evidence of entitlement to setoff or amount thereof was ever proffered by BFS.

I. Denial of BFS' Motion to Compel and Subsequent Appeal

On November 16, 2017, the Trial Court issued an Order denying BFS' Motion to Compel. (R. pp. 26-44). On December 11, 2017, BFS filed its third, post-trial motion, a Motion to Reconsider this Denial. (R. pp. 4624-48). On June 27, 2018, the Trial Court denied BFS' final Motion. (R. p. 45).

On June 29, 2018, BFS served its Notice of Appeal on Plaintiffs; and on, July 2, 2018, the Notice was filed with the Court of Appeals. According to this Notice, BFS appeals from the: (1) 2016 Final Order; (2) 2017 Order Denying BFS's Motion to Compel; and, (3) 2018 Order Denying

BFS's Motion to Reconsider (R. pp. 4673-75). The oral order denying BFS' first JNOV Motion has not been appealed.

J. The Court of Appeals Dismissal

On June 15, 2021, the Court of Appeals issued its Order Dismissing Appeal finding that:

Respondents filed a motion to dismiss this appeal, asserting this court lacks appellate jurisdiction because [BFS] did not timely serve its notice of appeal within 30 days after receiving the [F]inal [O]rder ending this action. **[BFS] received written notice of the [F]inal [O]rder on September 27, 2016.** Thus, [BFS] was required to either move for reconsideration of the [F]inal [O]rder within ten days after receipt, by October 10, 2016, or appeal the [F]inal [O]rder within thirty days of receipt or by October 28, 2016. **[BFS] did not file a Rule 59(e), SCRPC, motion to reconsider the [F]inal [O]rder within ten days, and [BFS] filed its notice of appeal with this court on July 2, 2018, almost two years later.** Therefore, we agree the court **does not have jurisdiction to hear this appeal.** [citation omitted].

[BFS] argues its post-trial motions stayed the time for appeal. [BFS] filed a motion **titled motion to compel and motion for determination of set-off on September 8, 2016.** However, [BFS] only sought to compel settlements, and despite saying that *following the production of the requested documents* [BFS] would move to seek a determination on set-off, **[BFS] never filed its subsequent set-off motion or any further briefing as to its entitlement to a set-off.** [BFS] also filed a second motion for judgment notwithstanding the verdict (JNOV) as well as a new trial absolute and a new trial nisi remittitur on September 13, 2016. **[BFS] never filed a Rule 59(e) motion asking the trial court to reconsider its denial of its first motion for JNOV.** The trial court found the filing of [BFS'] **second JNOV motion was a successive JNOV motion that was a nullity in the eyes of the law** and did not suspend the time for appeal. *See Elam*, 361 S.C. at 16, 602 S.E.2d at 776 (holding successive post-trial motions do not stay the time for serving notice of appeal). **We agree. . .and find [BFS'] post-trial motion did not stay the time for [BFS] to file its appeal.**

(Order Dismissing Appeal, pp. 1-2) (emphasis added).⁶

⁶ The Association moved to dismiss BFS' appeal on December 10, 2018. The Court of Appeals denied this motion but stated "[t]he parties may address the issue of timeliness of [BFS'] notice of appeal in their briefs". The parties filed their briefs; the Court of Appeals scheduled oral arguments; but oral arguments were cancelled because "after further consideration, [the Court decided the] case will be submitted on the record on appeal and briefs during the March 2021 term without oral argument." On March 15, 2021, the Court of Appeals issued an order dismissing the appeal. BFS filed a Petition for Rehearing and Request for *En Banc* Review, both of which were denied. On June 15, 2021, the Court of Appeals issued its substituted Order Dismissing Appeal,

BFS' PETITION FOR CERTIORARI SHOULD BE DENIED

I. BFS' Petition Does Not Meet the Standards Required for Certiorari Under Rule 242, SCACR

This Court should deny BFS' Petition because BFS' Petition avoids the question that is dispositive of this entire appeal; offers only moot and speculative arguments; and fails to satisfy certiorari requirements.⁷

A. BFS' Failure to Timely Appeal the Final Order which "ENDED" This Case is Jurisdictional.

The question that matters here is "did the Court of Appeals err in dismissing BFS' appeal on the ground that BFS failed to timely serve its notice of appeal [of the Final Order]?" (Petition, p. 2) (emphasis added). BFS' Petition ignores this question, and instead, focuses on two, extraneous arguments:

- (1) Whether it made a setoff motion that was denied; and,
- (2) Whether "the Court of Appeal's dismissal conflicts with this Court's decisions in *Elam* and *Fields*".⁸

BFS misses the point. Both arguments are mooted by BFS' failure to timely challenge the Final Order.⁹ Stated differently, neither of these arguments revive appellate jurisdiction over the

which was the same as its March 15, 2021 Order except for the deletion of a cite to *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006) (dealing with issue preservation).

⁷ Rule 242, SCACR, states that the following are generally accepted reasons warranting certiorari: (1) where there are novel questions of law; (2) whether there is a dissent in the Court of Appeals' decision; (3) where the Court of Appeals' decision is in conflict with this Court's decisions; (4) where constitutional issues are directly involved; and, (5) where a federal question is included and the Court of Appeal's decision conflicts with the United States Supreme Court's decisions.

⁸ BFS' cursory claim that "the Order Dismissing Appeal conflicts with *Elam* and *Fields*" is the only basis that BFS expressly asserts in support of certiorari. (Petition, p. 1). Yet, BFS does not mention *Elam* or *Fields* until the last five pages of its 21-page Petition.

⁹ See, e.g., Rule 59(e), SCRCP; Rule 203(b)(1), SCACR; *Cheap-O's*, 350 S.C. at 602, 567 S.E.2d at 517 ("Appellate court[s] will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.").

Final Order that BFS waited too long to appeal. As such, these arguments are irrelevant to the key question presented here and do not warrant this Court's review. *Cheap-O's*, 350 S.C. at 605, 567 S.E.2d at 518 (“As a matter of practice and convenience, a Form 4 Order is used on a plethora of occasions as a **FINAL ORDER. IF** the Form 4 Order is **NOT** efficacious as a final order, the circuit court will specifically and with certitude signify [such]”). (emphasis in the original).

B. Even if BFS' *Elam/Fields* and Setoff Arguments Were Relevant They Are Still Erroneous

Elam and *Fields* do not help BFS. *Elam* held that only proper Rule 59(e) Motions (*i.e.*, Rule 59(e) Motions that are actually made; do not parrot previous JNOV/New Trial Motions; and do not follow another Rule 59(e) Motion that changed nothing about a ruling) toll the time for appeal. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). Here, BFS did not make any such Motion as to either the denial of its oral JNOV Motion or the Final Order. Rather, BFS filed a Second JNOV Motion and its appeal clock expired. *See* Section III.

Fields held that a party's second “new trial” motion may constitute a Rule 59(e) Motion, but only for the same, specific grounds that were stated in support of the party's first new trial motion. *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005). BFS' oral JNOV Motion was not supported by a single, specific ground; therefore, all grounds newly raised in BFS' Second JNOV Motion are still improper regardless of whether this Motion may or may not constitute a Rule 59(e) Motion. Further, there are five other distinguishing characteristics which make the *Fields* exception unavailable to BFS including:

- BFS did not renew its directed verdict motions whereas *Fields* did;
- BFS did not request ten days to file a written JNOV Motion whereas *Fields* did;
- BFS' Second JNOV Motion was not, in substance, a Rule 59(e) Motion whereas *Fields*' second new trial motion was;

- BFS' Second JNOV Motion did not discuss the subject matter of its oral JNOV Motion whereas Fields' second new trial motion did; and,
- BFS does not appeal the denial of its oral JNOV Motion; cannot appeal the denial of its Second JNOV Motion; and did not timely appeal the Final Order "ending this case" whereas Fields appealed his "single bite at the apple".

See Section IV.

As to setoff, BFS argues that it "filed a timely setoff motion and properly appealed the denial of its setoff rights". (Petition, p. 8). BFS is misleading this Court. BFS never made a "setoff" motion that was "denied". See Section V. Further, regardless of whether "BFS properly moved for setoff and properly appealed the denial of setoff", (Petition, p. 11), the Final Order stands and cannot be setoff. See Section VI.

In sum, there is nothing "special and important" about BFS' Petition. BFS repeats the same arguments about a "setoff motion" that was never made, a "setoff denial" that never happened, and a successive JNOV Motion that did not toll the appeal deadline. There is no reason to grant certiorari on these issues when it is undisputed that BFS failed to timely appeal the Final Order. Nevertheless, the Association addresses BFS' arguments below.

II. The Order Dismissing Appeal Does Not "Misconstrue" the Final Order

BFS argues that the Court of Appeals "misconstrued" the *nunc pro tunc* effect of the Final Order and suggests that because BFS filed its Motion to Compel and Second JNOV Motion within ten days of September 1, 2016, that these Motions were timely. (Petition, pp. 13-16). The Court did not "misconstrue" anything. It correctly found that, even though BFS' Motion to Compel and Second JNOV Motion were filed within ten days of the Final Order, BFS' current attempt to reverse the Final Order is untimely:

[BFS] did not file a Rule 59(e), SCRC, motion to reconsider the [F]inal [O]rder within ten days, and [BFS] filed its notice of appeal with this court on July 2, 2018,

almost two years later. Therefore, we agree this court does not have jurisdiction to hear this appeal. . .

[BFS] argues its post-trial motions stayed the time for appeal. [BFS] filed a motion **titled motion to compel and motion for determination of set-off on September 8, 2016.** . .[BFS] also filed a second motion for judgment notwithstanding the verdict (JNOV) as well as a new trial absolute and a new trial nisi remittitur on September 13, 2016. . . We agree with the [T]rial [C]ourt and find [BFS'] post-trial motions did not stay the time for [BFS] to file its appeal.

(Order Dismissing Appeal, pp. 1-2) (emphasis added).

BFS also falsely asserts that the Court of Appeals did not explain why it relied on September 27, 2016 “as the date triggering BFS’ deadline to appeal.” (Petition, p. 13). The Court clearly explained that BFS received the Final Order on this date and thus BFS’ appeal clock started to run on this date:

[BFS] received written notice of the [Final Order] on September 27, 2016. Thus, [BFS] was required to either move for reconsideration of the [F]inal [O]rder within ten days after receipt, by October 10, 2016, or appeal the [F]inal [O]rder within thirty days of receipt or by October 28, 2016.

(Order Dismissing Appeal, p. 1) (emphasis added). BFS did neither. *Id.*

BFS’ claim that “September 27th has no significance to the timeliness of this appeal” is therefore ludicrous. (Petition, p. 13). It is the most significant date in this appeal.

III. The Court of Appeals Correctly Treated BFS’ Second JNOV Motion as a “Nullity” that Did Not Toll BFS’ Time to Appeal the Final Order

BFS argues that the Court of Appeals erred in finding that its Second JNOV Motion is a “nullity”. (Petition, pp. 17-20). This argument also does not warrant review.

A. BFS’ Second JNOV Motion is a Nullity Under *Elam* for Numerous Reasons

The Court of Appeals correctly found that BFS’ Second JNOV Motion is a “nullity” based on *Elam* which held:

We conclude a party usually is free to file an initial Rule 59(e) motion. . . We view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e)

Motion, as part and parcel of a party’s “single bite at the apple” in presenting his case to the trial court.

Elam, 361 S.C. at 21, 602 S.E.2d at 778 (emphasis added).¹⁰

Here, BFS did not file an “initial Rule 59(e) Motion” as to either the Trial Court’s denial of its oral JNOV Motion or the Final Order. Rather, BFS’ filed a Second JNOV Motion that:

- Expressly moves for “JNOV” (R. p. 4494);
- Attempts to renew the directed verdict motion which was never made “at the close of the evidence in full.” (R. p. 4494);
- Argues that “BFS is entitled to JNOV” without mention of the denial of BFS’ first JNOV Motion. (R. pp. 4495-99);
- Indicates that “if the Trial Court denies BFS’ JNOV Motion,” BFS moves for a New Trial Absolute as its first alternative. (R. pp. 4499; 4503);
- Claims that “if the Trial Court denies both BFS’ JNOV Motion and New Trial Absolute Motion, BFS moves for a New Trial Remittitur as its last alternative. (R. p. 4504); and,¹¹
- Concludes without mentioning the words “alter,” “amend”, or “reconsideration” anywhere throughout its 12 pages. (R. pp. 4494-4505).

¹⁰ *Elam* also “reaffirmed the rationale and principles expressed in *Coward Hund*; *Quality Trailer*, and *Collins Music*” that:

An appeal may be barred due to untimely service of the notice of appeal when a party—instead of serving a notice of appeal—files a successive Rule 59(e) motion, where the trial judge’s ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment. . .An appeal also may be barred due to untimely service of the notice of appeal when a party—instead of serving a notice of appeal—recaptions a written JNOV/new trial motion, which has been ruled on, and resubmits it as a virtually identical, written Rule 59(e).

Elam, 361 S.C. at 20, 602 S.E.2d at 778.

¹¹ BFS later withdrew these New Trial motions in full as well as twenty of the grounds it initially asserted in support of its Second JNOV Motion. (BFS Brief at 4, n. 7). Notably, on appeal, BFS does not argue those grounds it did not withdraw or that the Trial Court should have considered any aspect of its Second JNOV Motion. BFS’ abandonment of these arguments is telling – if BFS truly believed that its Second JNOV Motion was properly made, it would treat its JNOV motion as constructively denied and brief its JNOV arguments on appeal.

The Court of Appeals recognized this, and in line with *Elam*, correctly found that BFS' Second JNOV Motion is a successive JNOV Motion that did not toll BFS' appeal deadline. (Order Dismissing Appeal) (“[BFS] never filed a Rule 59(e) motion asking the trial court to reconsider the denial of its first motion for JNOV. . .we agree with the trial court and find [BFS'] post-trial motions did not stay the time for [BFS] to file its appeal”).

B. BFS' Second JNOV Motion is a Nullity Because It Is Untimely

A party must also request ten days to file post-trial JNOV Motions. *See, e.g.*, Rule 50(e), SCRCP (“The [JNOV Motion] shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter”) (emphasis added); Rule 59(b), SCRCP (“The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter.”) (emphasis added);¹² *Boone v. Goodwin*, 314 S.C. 374, 444 S.E.2d 524 (1994) (noting “a request to file post-trial motions must be made promptly after the jury is dismissed”) (emphasis added).

Here, BFS made one post-trial motion (its first JNOV Motion) at the end of trial and did not request additional time to file any other post-trial motions. (R. pp. 29-30). Because BFS did not request leave to its file its Second JNOV Motion as required by applicable court rules, this Motion is improper and not preserved for appellate consideration. *See, e.g.*, Rules 50, 59, SCRCP

IV. BFS' Reliance on *Fields* is Misplaced as all Grounds in the Second JNOV Motion were Improper

BFS' Petition omits the fact that the *Fields* Court did not find the entirety of the second new trial motion proper; rather, the Court found only certain grounds, relating to evidentiary

¹² The Official Notes accompanying the 1986 Amendment to Rule 59 further clarify this point: “In jury trials, post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them.” (emphasis added).

rulings, were properly raised because only these grounds were stated in support of the first new trial motion. *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005). Where, like here, no specific grounds were raised in support of an initial JNOV Motion, it follows that all grounds newly raised in a second JNOV motion are improper.

To be clear, BFS' trial counsel's oral JNOV Motion consisted of the following statement: "We renew our grounds for the directed verdict motion previously heard by the Judge." (R. p. 744:2-5). This is different than what happened in *Fields* where trial counsel asserted, "The Trial Court's previous evidentiary rulings constituted reversible error," and the Court held that:

We conclude Plaintiff's written motion is properly viewed as a motion for reconsideration under Rule 59(e), SCRPC to the extent **it addressed the trial court's evidentiary rulings which Plaintiff challenged** in her briefly stated oral motion at the end of the trial. *See e.g. C.A.H. v. L.H.*, 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993) (party may not use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not).

Fields, 363 S.C. at 27, 609 S.E.2d at 510 (emphasis added). BFS' oral JNOV motion did not challenge any rulings, evidentiary or otherwise; did not point to any error; and did not mention a single, specific basis supporting JNOV. (R. p. 744:2-5). Further, the generic grounds that BFS did mention were made at the close of Plaintiff's case – not at the close of all evidence.¹³

BFS' claim that the Supreme Court addressed this "exact scenario" in *Fields* is therefore incorrect. (Petition, p. 18) The circumstances in *Fields* are entirely different from here because:

¹³ While perhaps a matter of "issue preservation" versus "jurisdiction," this is another important distinction between *Fields* and this case that the Association points out due to BFS' exclusive reliance on *Fields*. *Fields* recognizes that a party may not use a Rule 59(e) motion "to present to the court an issue the party could have raised prior to judgment but did not". *Fields*, 363 S.C. at 27, 609 S.E.2d at 510 (internal quotations and citations omitted). All issues raised in BFS' Second JNOV Motion could have been raised at the close of all evidence, but they were not. (R. p. 635:5-22). Thus, even if this Motion was captioned as a Rule 59(e) Motion, it remains a nullity under *Fields*.

- Trial counsel in *Fields* asked the Court for leave to file post-trial motions which the Court denied, forcing trial counsel to make an oral motion;¹⁴ BFS’ trial counsel did not ask for leave at all;¹⁵
- The *Fields* post trial motion contained adequate substance of a Rule 59 Motion to be construed as such;¹⁶ BFS’ Second JNOV Motion does not;¹⁷
- The *Fields* motion actually referenced Rule 59;¹⁸ BFS’ Second JNOV Motion does not and nowhere can a reference to reconsideration or similar words be found;¹⁹
- The *Fields* motion actually referenced and discussed the subject matter of the prior new trial motion;²⁰ BFS’ Second JNOV Motion does not (nor could it, since post-trial counsel did not know a JNOV occurred at the end of trial);²¹
- The *Fields* motion had legitimate new trial grounds to refer to;²² BFS’ Second JNOV Motion did not as the stated JNOV grounds were “We renew our grounds for the directed verdict motion previously heard by the Judge.”;²³ and, as there had been no Directed Verdict motion made at the close of evidence, the grounds stated in the Directed Verdict motion made at the close of Plaintiff’s case were not preserved, and there were no grounds for the JNOV to incorporate, so there were no grounds for a Rule 59 motion to seek reconsideration of.
- Fields appealed his “single bite at the apple”²⁴ whereas BFS does not appeal the denial of its oral JNOV Motion; cannot appeal the denial of its Second JNOV Motion; and did not timely appeal the Final Order “ending this case”.²⁵

¹⁴ *Fields*, 363 S.C. at 26, 609 S.E.2d at 509 (“Plaintiff requested ten days to file a new trial motion. . .the trial judge denied the request, stating he would prefer to consider the motion immediately. . .”).

¹⁵ (R. p. 27).

¹⁶ *Fields*, 363 S.C. at 26-27, 609 S.E.2d at 510 (“Plaintiff filed a written motion for a new trial, citing Rule 59, SCRCP. Plaintiff asserted that, *inter alia*, the trial judge erred in excluding testimony about her expert witness’ qualifications on the grounds of hearsay, and in refusing to allow Plaintiff to use a medical treatise to cross-examine Physician on the ground the treatise had not been listed in Plaintiff’s discovery responses.”).

¹⁷ (R. pp. 4494-4505).

¹⁸ *Fields*, 363 S.C. at 26-27, 609 S.E.2d at 510.

¹⁹ (R. pp. 4494-4505).

²⁰ *Fields*, 363 S.C. at 26-27, 609 S.E.2d at 510.

²¹ (R. pp. 4494-4505).

²² *Fields*, 363 S.C. at 27, 609 S.E.2d at 510.

²³ (R. pp. 639:9-10; 744:2-5).

²⁴ *Fields*, 363 S.C. at 29, 609 S.E.2d at 511 (“Plaintiff timely filed a Rule 59(e) motion, which was denied, and Plaintiff then timely served and filed her notice of appeal”).

²⁵ (R. pp. 4673-75).

V. **BFS' Entire Argument Relies on the Denial of a Motion it Never Made**

BFS' Petition is about one thing – its purported right to set off a Final Order that it did not timely appeal. BFS knows that it did not timely appeal the Final Order, so BFS argues (1) that it “filed a timely setoff motion and properly appealed the denial of its setoff rights” and (2) that the “Court of Appeals holding to the contrary contains three primary errors”. (Petition, p. 8). This is false – BFS never made a “setoff” motion that was “denied”.

BFS misleads this Court by mischaracterizing its alleged “setoff” motions, and their timing, throughout its Petition. To be clear, there are only two Motions. First, BFS filed a Motion to Compel on September 8, 2016. The Trial Court granted BFS the relief it sought in this Motion (*i.e.*, production of settlement documents). BFS' Petition concedes this point:

[T]he [T]rial [C]ourt *ultimately* **granted the motion to compel** production of settlement documents at the April 20, 2017 hearing.

(Petition, p. 16) (emphasis added and in the original). The Trial Court went on to find that BFS never made the setoff motion that BFS indicated it would make after receiving these settlements. (2017 Order, R. p. 29, paras. 13-14) ([“BFS] has possessed the settlement agreements for some time, [but] the indicated subsequent setoff motion has not been filed.”) (emphasis added). The Trial Court's 2017 Order did not, as BFS claims, “deny [BFS]' setoff motions”. (Petition, p. 11). Second, BFS made an oral Setoff Motion on November 18, 2016 after jurisdiction lapsed and before BFS received the settlement documents it requested. (Petition, p. 5). The Trial Court never ruled on this Motion, finding that the case had already ended. (R. pp. 29-30).

Therefore no “denial” of a “setoff” motion that BFS could, or did, appeal exists.

Nevertheless, the Association responds to BFS' argument about the “errors” it claims the Court of Appeals made below.

A. The Court of Appeals Did Not Err in Finding that BFS Never Moved for Setoff After Receiving Settlement Agreements

BFS argues that the Court of Appeals erred in finding that “BFS never moved for setoff” (Petition, p. 10). This issue does not warrant review because it is an improper ground for certiorari.²⁶ According to the Court of Appeals:

[BFS] filed a motion **titled motion to compel and motion for determination of set-off on September 8, 2016**. However, [BFS] only sought to compel settlements, and despite saying that **following the production of the requested documents** [BFS] would move to seek a determination on set-off, [BFS] never filed its subsequent set-off motion or any further briefing as to its entitlement to a set-off.

(Order Dismissing Appeal, pp. 1-2) (emphasis added).

It is undisputed that BFS’ Motion to Compel says exactly what the Court of Appeals found that it says. In BFS’ own words:

[BFS] filed its written motion **titled ‘Defendant’s Notice of Motion and Motion to Compel and Motion for Determination of Setoff** seven days after the verdict.’ The motion sought to compel [the Association] to produce settlement information to the [T]rial [C]ourt and parties could calculate the required setoff and stated, **‘Thereafter, pursuant to S.C. Code § 15-38-50, BFS will move** to seek a determination by the Court of the amount of setoff to be taken against the judgment awarded by the jury.’

(Petition, p. 9) (emphasis added); *see also* (R. p. 4493); (R. p. 28).

It is undisputed that, “following the production of” the settlement documents in April 2017, BFS never moved for setoff as it said it would. The only “setoff” motion made by BFS occurred months before this date on November 18, 2016:

To the extent the original [Motion to Compel] is somehow deemed not be a motion for setoff, [BFS] November 17 [2016] memorandum requests setoff. . . Moreover, at the hearing the following day [November 18, 2016]. . .[BFS] orally moved for setoff. . .

²⁶ See Footnote 7.

(Petition, p. 10) (emphasis added). It is also undisputed that BFS never briefed the Trial Court on its setoff claim after it received the settlement documents.

Ultimately, as shown by the above, BFS never took the steps necessary to satisfy its setoff burden or obtain a set off ruling that it could appeal.

B. Statutory Setoff Occurs Prior to Judgment

BFS next argues that “even if it never properly moved for setoff” this Court has jurisdiction to consider setoff because setoff can be raised at any time and BFS raised setoff after final judgment was entered. (Petition, pp. 9-10). This is incorrect.

South Carolina courts acknowledge that statutory setoff occurs prior to the Court’s entry of judgment on a jury verdict. *Smith v. Widener*, 397 S.C. 468, 471-472, 724 S.E.2d 188, 190 (Ct. App. 2012) (noting “before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant. . .”) (emphasis added).

Here, BFS never moved for setoff in the temporal, ten-day window it had to challenge the Final Order; rather, it filed a Motion to Compel that said it “would” move for *statutory* setoff – *not equitable* setoff – and this motion never happened. (R. p. 4493) (emphasis added); *see also* (R. p. 28). As such, the Trial Court entered final judgment because it was unopposed, and the Court of Appeals did not err in finding the same. (Order Dismissing Appeal).

C. BFS’ Ellis and Tilley Arguments Are Without Merit

BFS relies on two cases, *Ellis* and *Tilley*, in support of its argument that setoff motions can be made at any time. (Petition, pp. 11-13) *citing* *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 585 S.E.2d 292 (2003); *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999). BFS’ reliance is misplaced for multiple reasons.

First, neither *Ellis* nor *Tilley* involved an unchallenged verdict or an untimely Notice of Appeal. *Tilley*, 355 S.C. at 366-67, 585 S.E.2d at 294-95 (“The Court affirmed summary judgment on the issue of liability and remanded for a determination of damages. This appeal was taken following the circuit court’s damage determination” [which included deciding Pacesetter’s setoff request]”) (emphasis added); *Ellis*, 335 S.C. at 109-10; 515 S.E.2d at 269-70 (indicating Doctor Oliver immediately appealed the “jury award” and “during the pendency of his appeal, he filed a motion seeking to reduce the jury’s award by the amount of the settlement [Ellis] received from [hospital].”) (emphasis added).

Second, both *Ellis* and *Tilley* involved setoff motions that were actually made before jurisdiction was lost. *Id.* In *Tilley*, for example, the Court did not hold that a setoff motion could be made after the ten-day window for post-trial motions; rather, it held that there was nothing precluding a defendant from raising setoff to the trial court between the liability and damages phases of a trial. *Tilley*, 355 S.C. at 377, 585 S.E.2d at 300 (“[W]e see no reason why Pacesetter cannot request setoff before the circuit court during the damages portion of the case.”) (emphasis added). BFS did not request setoff during any portion of this case; rather, it filed a Motion to Compel and waited until jurisdiction lapsed before orally moving for setoff.

Third, *Ellis* involved a “negligence action” with joint “tortfeasors” and the settlement amount ultimately subtracted from Ellis’s jury award equaled “the [hospital] bills incurred by Ellis as a result of the hospital’s alleged negligence.” *Ellis*, 335 S.C. at 109; 515 S.E.2d at 269 (emphasis added). Here, negligence is not at issue because BFS was not found liable in negligence and therefore BFS is not subject to setoff under the joint tortfeasor statute.

Fourth, *Tilley* involved “equitable” setoff which is not at issue because BFS did not ask for an equitable setoff until it was too late. *Compare* (MTC Denial, p. 12) (“[BFS’s] Motion

specifically limits itself to statutory setoff, not equitable. In addition to not requesting equitable setoff in its [M]otion, BFS never plead equitable setoff in any of its three Answers.”) *with* (BFS Brief, p. 12) (acknowledging *Tilley* involved equitable setoff). Moreover, as illustrated by *Smith* and the other cases briefed by the Association, equitable set offs are discretionary, not mandatory, and the burden of proving entitlement to the set off is on the party seeking to obtain it. *See, e.g., Rutland v. Dep’t of Transp.*, 390 S.C. 78, 86, 700 S.E.2d 451, 456 (2010) (When viewed through the lens of equity, a trial court’s discretion to setoff a judgment should only be “exercised when necessary to provide justice between the parties”) (emphasis added).

Fifth, *Tilley* involved an order that still stood allowing the party seeking setoff to produce evidence showing its entitlement to setoff. *Tilley*, 355 S.C. at 377, 585 S.E.2d at 300 (“The circuit court’s post-trial order requires Pacesetter to produce evidence of its entitlement to setoff prior to disbursement of funds, and that order still stands. In order to receive any setoff, Pacesetter will have to produce this evidence.”). Here, there is no standing order from the Trial Court finding BFS is entitled to setoff because BFS never proved to the Court that was entitled a setoff.

Sixth, the amount set off in *Tilley* had nothing to do with joint tortfeasors or the same claims for the same damages; rather, prior to judgment, the trial court ordered that any damages awarded were to be set off by unpaid debt already written off by a corporation. The trial court entered the judgment without making this reduction because it previously ordered that the corporation was entitled to a setoff and it was just a question as to what amount should be set off based upon the corporation’s records. *Tilley*, 355 S.C. at 367, 585 S.E.2d at 295 (“[The trial court] ordered Pacesetter to pay damages in an amount equal to the total of the finance charges actually paid by Buyers in all of the consumer credit transactions. . . [The trial court] allowed Pacesetter to set off the damages owed by the amount of the unpaid debt written off by Pacesetter. . . The order

calculated the total amount of the judgment, prior to setoff, to be \$3,273,010.52”). Since there was a setoff motion made in *Tilley* before the damages phase of trial which the trial court ruled on before calculating the judgment, *Tilley*, like *Smith*, stands for the proposition that setoff is to occur before the judgment is entered. *Tilley, Smith, supra.* ²⁷ This is contrary to BFS’s main argument that a court may decide setoff at any time – with or without a motion being made within the Trial Court’s jurisdictional window.

VI. No Argument BFS Asserts Can Change the Fact that the Final Order Stands

Regardless of whether BFS moved for setoff or whether its Second JNOV Motion qualifies as a proper Rule 59(e) Motion, the ultimate result of this appeal is that the Final Order and the \$2,163,493 judgment it entered against BFS stands. In addition to the fact that this Court lacks

²⁷ Both *Tilley* and *Ellis* were decided before this Court’s 2012 decision in *Smith*, which clarified the difference between statutory/automatic setoff, and equitable setoff/setoff for partially overlapping claims. While BFS’ Petition cites a post-*Smith* decision which BFS has never cited before, this decision still relies on *Smith* and further supports the Association’s point that statutory setoff occurs prior to the entry of judgment on a jury’s verdict:

Once there is a verdict against a defendant, it becomes the trial court’s function to determine whether the defendant is entitled to a setoff and the amount of the setoff, if any. *See Smith*, 397 S.C. at 471-72, 724 S.E.2d at 190 (“[B]efore entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury.”). . .

Huck v. Oakland Wings, LLC, 422 S.C. 430, 437, 813 S.E.2d 288, 291 (Ct. App. 2018) (emphasis added).

appellate jurisdiction over the Final Order, the law of the case doctrine,²⁸ the two-issue rule,²⁹ and issue preservation principles all apply such that the Final Order cannot be amended. While perhaps not “jurisdictional” rules, these rules show the futility of BFS’ Petition and why certiorari is unnecessary. Essentially, this Court would be reviewing this appeal just so that the Court can rule that the Final Order stands, which is what the Court of Appeals has already ruled. This is a waste of this Court’s time.

CONCLUSION

In sum, this Court should deny BFS’ Petition because the Court of Appeals correctly dismissed this appeal for lack of jurisdiction due to BFS’ failure to timely appeal the Final Order ending this action. Dismissal is not “unfair” to BFS. (Petition, p. 19). What is “unfair” is that for the past five years, BFS has unfairly delayed the resolution of this case by blaming its trial counsel and an incoming storm for errors made during trial; by prosecuting a successive JNOV motion based on a directed verdict motion never made and leave of court never requested; by delaying post-trial hearings for six months because it did not order the trial transcript; by filing a motion to compel settlement agreements but never filing a motion for setoff after receiving these agreements;

²⁸ The law of the case doctrine applies because both the denial of BFS’ oral JNOV Motion and the Final Order are unappealed rulings that cannot be changed on appeal. *Atlantic Coast Buildings and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“While [a trial court’s] calculation of damages may have been incorrect, an unappealed ruling, right or wrong, is the law of the case.”) (emphasis added); *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (“[D]ifferent preservation rules apply to an *appellant*—the losing party in the lower court. An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.”) (emphasis in original and added).

²⁹ The two-issue rule also applies because the jury returned a general verdict that involved two or more issues and the verdict is supported as to at least one of these issues (breach of express warranty). *See Gold Kist, Inc. v. C & S Nat’l Bank*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985) (under the two-issue rule, when a jury returns a general verdict involving two or more issues, and the verdict is supported as to one issue, the verdict stands).

by waiting to appeal the Final Order ending this case; by ignoring the record and wordsmithing arguments on appeal; and by filing this Petition which merely rehashes these same flawed arguments – all in an effort to avoid paying the verdict it owes to these homeowners for the leaky windows it supplied that it guaranteed were “defect-free”. The fact that BFS thinks it is “unfair” that it will finally have to pay a judgment that it did not timely challenge is no basis for certiorari.

JUSTIN O’TOOLE LUCEY, P.A.

By: /s/ Justin O’Toole Lucey
Justin O’Toole Lucey, Esquire (Bar No. 15438)
Dabny Lynn, Esquire (Bar No. 78703)
Anna McCann, Esquire (Bar No. 102314)
415 Mill Street
Mt. Pleasant, SC 29464
Telephone: (843) 849-8400
Facsimile: (843) 849-8406
jlucey@lucey-law.com
dlynn@lucey-law.com
amccann@lucey-law.com
Attorneys for the Respondents

August 10, 2021
Mount Pleasant, South Carolina

Other Counsel of Record:

NELSON MULLINS RILEY & SCARBOROUGH LLP
C. Mitchell Brown (Bar No. 12872)
William C. Wood, Jr. (Bar No. 15111)
Nicholas A. Charles (Bar No. 101693)
1320 Main Street/17th Floor
P.O. Box 11070 (29211-1070)
Columbia, SC 29201
Telephone: (803) 799-2000
Mitch.brown@nelsonmullins.com
Bill.wood@nelsonmullins.com
Nick.charles@nelsonmullins.com
Attorneys for Petitioner