

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Diane Goodstein, Circuit Court Judge

Appellate Case No. 2021-000739

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.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The appellate courts have jurisdiction over this appeal. The Court of Appeals is in error in deciding otherwise and in dismissing the appeal. Here, there was a jury verdict and an oral JNOV motion made immediately after trial, which was denied. Subsequently, and within 10 days, there was a written post-trial motion made. Under this Court’s precedent, regardless of the name of the motion, the written motion following the oral motion should be treated as one for reconsideration and as part of a “single bite at the apple.” *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004); *Fields v. Reg’l Med. Ctr. Orangeburg*, 363 S.C. 19, 28, 609 S.E.2d 506, 511 (2005). Moreover, during the same 10 days, a motion was made for the production of documents needed for the court to address setoff, and for setoff. The Court of Appeals ruled that

the motion was technically not one for setoff, but instead one asking only for the production of documents in order for there to be a consideration of setoff. Petitioner disagrees. Regardless, Petitioner made other subsequent set off requests, including a later oral motion for set off, all while the trial court maintained jurisdiction.

In the end, the trial court issued a lengthy order denying set off. Further, the trial court declined to address the written post-trial motion, on grounds that it was redundant. Finally, the Court of Appeals dismissed this appeal, finding that a separate *nunc pro tunc* Form 4 order from the trial judge ended the case and, because there was not a post-trial motion or setoff motion directed precisely at the *nunc pro tunc* order, or an immediate appeal, all proceedings are ended and the appellate courts are powerless.

There are several fundamental problems here. This Court should grant certiorari and review and reverse the Court of Appeals. If it does not, the Court of Appeals will likely repeat its errors in other similar matters.

First, *nunc pro tunc* orders should not be used as traps to eliminate post-trial or appellate rights of litigants. Here, not only are Respondents urging this result and the Court of Appeals condoning such a trap, but the trial judge herself did not view her own *nunc pro tunc* order as ending anything, as she proceeded for months after its entry to hold hearings, order the production of documents, and issue subsequent orders.

Second, the *nunc pro tunc* order, properly understood, is not to be viewed as an order entered on the date file stamped. Rather, its effective date is the past, earlier date for when it *should* have been entered. Here, a Form 4 judgment *should* have been entered immediately after the jury verdict. It was not. The *nunc pro tunc* Form 4 judgment was meant to correct this failure as if the failure had not occurred. That is what a *nunc pro tunc* order is for. Properly understood,

the *nunc pro tunc* judgment order is deemed to have been entered just after the jury verdict. Within 10 days of that verdict, the written post-trial motions were made. Those motions stay any and all appeal deadlines. And the trial judge acted as if they did, holding subsequent hearings and making rulings. Only after the trial court ruled with finality on Builders FirstSource-Southeast Group, LLC (“Builders”)’s motion for set off did Builders finally appeal. The trial court declined to consider Builders’ other written post-trial motion (for JNOV), calling it redundant and not cognizable under the law. This was error.

Third, Builders appealed the set off ruling, the refusal of the trial judge to rule on the written post trial motion, and the Form 4 judgment. It wasn’t timely for Builders to appeal until the trial court ruled on the set off motion and stated it was declining to rule on the written post-trial motion. The Court of Appeals has it wrong in its order of dismissal, wherein it finds that the *nunc pro tunc* order triggered, as of the date of written receipt, some new, additional post-trial motion or appeal. It did not.

Fourth, this Court should pick which rules govern, those suggested by Builders (which Builders states are this Court’s rules already), or those suggested by the Court of Appeals.

The Court of Appeals’ Order of Dismissal creates the following rules:

1. The technical name or label of the motion matters most, form is placed over substance;
2. When an oral JNOV motion is made and denied, there can be no subsequent written JNOV motion made on the same ground, and the subsequent written motion will not be treated as a motion to reconsider;
3. A *nunc pro tunc* judgment on a jury verdict is given jurisdictional impact both at the time of its written receipt *and* back in time for when it was supposed to have been entered;
4. When a *nunc pro tunc* Form 4 judgment on a jury verdict is received, this triggers a specific requirement, as of that date, of a targeted post-trial motion or appeal as to that specific judgment document within 10 days, or an appeal within 30 days, regardless of the effective date of the *nunc pro tunc* judgment as stated thereon; and

5. Under the above facts, any earlier-filed written post-trial motion filed after the jury verdict, but before the written receipt of the *nunc pro tunc* judgment, does not count.

None of these rules make sense, nor are they in accord with this Court's precedent. Certiorari should be granted.

Respondents and the Court of Appeals erroneously focus on September 27, 2016—the date on which Builders received written notice of the trial court's September 1, 2016 *nunc pro tunc* order entering judgment on the jury's verdict—as the date which triggered Builders' deadline to appeal. However, by the time the trial court entered its belated, *nunc pro tunc* judgment on the verdict, Builders had already filed its September 12, 2016 post-trial motion, which is not a nullity and is properly viewed as a Rule 59(e) motion that stayed the time to appeal the verdict, the denial of Builders' oral JNOV motion, and the judgment. Consequently, written notice of the *nunc pro tunc* order did not trigger Builders' deadline to appeal. Respondents' and the Court of Appeals' position that the appellate courts lack jurisdiction because Builders failed to appeal within thirty days after September 27, 2016, and failed to file a Rule 59(e) motion asking the trial court to reconsider the denial of Builders' oral JNOV motion is therefore erroneous.

Regardless of which of Builders' multiple setoff motions is deemed a proper setoff motion, Builders moved for setoff while the time to appeal the judgment and verdict remained stayed. Builders then filed a timely Rule 59(e) motion after the trial court denied its setoff motion on November 13, 2017, and timely appealed after the trial court denied the 2017 Rule 59(e) motion relating to the set off motion. This Court should grant certiorari and reverse the Court of Appeals' dismissal of this appeal.

Argument

I. The *nunc pro tunc* order did not trigger Builders’ deadline to appeal.

Respondents ask this Court to focus on the fact that the trial court checked a box stating the *nunc pro tunc* order “ends the case” and dispense with any further analysis. Because the trial court checked that box, Respondents argue Builders was required to promptly appeal that order and nothing else matters. (Return at 1–2, 5–6, 10–11, 12–13). However, Respondents evade the rest of the procedural history and the law of appellate jurisdiction. A thorough analysis of the complete procedural history—which Builders provided in its petition—shows that the September 27, 2016 written notice of the *nunc pro tunc* order did not trigger Builders’ deadline to appeal and did not alter the below analysis under *Elam* and *Fields*. See Part II, *supra*.

Respondents cite no authority—and Builders has been unable to find any—supporting their position that checking the “ends the case” box on a Form 4 order destroys the trial court’s jurisdiction, precludes the trial court from considering any further filings, bars a party from filing a Rule 59(e) motion, and mandates that an aggrieved party’s only option is to serve a notice of appeal within thirty days after receiving written notice of the order. Such a position elevates the standard form language over substance, law, and procedural rules. See *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 633, 779 S.E.2d 826, 832 (Ct. App. 2015) (“[W]hile the forms are provided for in the Rules, see Rule 84, SCRCP, and are designed to assist courts to carry out the Rules, the forms themselves are not the law.”). Thus, whether the *nunc pro tunc* order was a “final order” is not dispositive as to the deadline to appeal. The relief granted in the order—judgment on the jury’s general verdict—was stayed by the filing of Builders’ September 12 post-trial motion, which is properly treated as a Rule 59(e) motion to reconsider.

In support of their arguments, Respondents rely on *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 604, 567 S.E.2d 514, 518 (Ct. App. 2002). *Cheap-O's Truck Stop* is inapplicable to this case. The question in *Cheap-O's Truck Stop* was whether a Form 4 order enforcing a settlement under Rule 43(k) was a “final order” such that the appellant could properly be held in contempt. *Cheap-O's Truck Stop*, 350 S.C. at 604, 567 S.E.2d at 518 (“The appellants maintain the circuit court erred in holding Chris Cloyd in contempt because there was no final order.”). The Court of Appeals found the order was a final order and the contempt ruling was therefore valid. *Id.* at 604–05, 567 S.E.2d at 518. The court did not analyze the timeliness of an appeal from that order and did not consider whether a motion to reconsider that order stayed the time to appeal. Thus, *Cheap-O's Truck Stop* provides no guidance on the issues here.

II. A correct reading of *Elam* and *Fields* shows Builders’ September 12 post-trial motion should be viewed as a proper motion to reconsider under Rule 59(e), which stayed the time to appeal.

Builders’ September 12, 2016 post-trial motion should be treated as a valid, proper motion to reconsider filed within ten days after the trial court denied Builders’ oral JNOV motion, which stayed the time for Builders to appeal the verdict and oral JNOV ruling and prolonged the trial court’s jurisdiction. Builders properly moved for setoff while the trial court retained jurisdiction.

In *Elam*, this Court endorsed a written Rule 59(e) motion repeating the same grounds as a prior, oral JNOV or new trial motion. Respondents obfuscate this Court’s holding in *Elam*, and the Court of Appeals misapplied the holding. The application of *Elam* to this case is simple: when an oral JNOV or new trial motion made immediately after the verdict is followed by a written Rule 59(e) motion repeating the same grounds raised in the prior oral motion, the Rule 59(e) motion stays the time to appeal. *Id.* at 21–22, 602 S.E.2d at 778–79 (“[A] party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made

orally or in writing, *without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely.* In essence, 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. . . . [A] party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. . . . This view holds true even when a party mislabels a post-trial motion.” (emphases added)).

The *Elam* Court did **not** hold that a motion to reconsider is proper only if it “do[es] not parrot previous JNOV/New Trial Motions.” See (Return at 11). The *Elam* Court held the opposite. *Elam*, 361 S.C. at 21–22, 602 S.E.2d at 778–79. Further, *Elam* expressly overruled *Matthews v. Richland County School District One*, 357 S.C. 594, 594 S.E.2d 177 (Ct. App. 2004), and thus rejected the arguments Respondents assert here. See *Elam*, 361 S.C. at 21, 602 S.E.2d at 778 (“After studied review, we reject the rationale and result reached by the Court of Appeals in the present case and in *Matthews*.”); *Matthews*, 357 S.C. at 599, 594 S.E.2d at 179 (holding, “Because School District’s Rule 59(e) motion was nothing but a restatement of the arguments it made in its post-trial motion, the Rule 59(e) motion did not stay the time to file the notice to appeal.”); see also (Petition at 18–19) (explaining this Court has already rejected the same arguments Respondents make here). Thus, Builders’ September 12 motion is not the improper, successive Rule 59(e) motion prohibited by this Court in *Elam*.

Moreover, this Court’s holding in *Fields* requires that a written JNOV or new trial motion should be treated as a Rule 59(e) motion to the extent it repeats the same grounds as an oral JNOV or new trial motion made after the verdict. 363 S.C. at 27, 609 S.E.2d at 510. Respondents’ laundry list of purported differences between *Fields* and this case fails to distinguish *Fields* in any

meaningful way. *See* (Return at 16–17). For example, the fact that counsel in *Fields* restated each of her grounds for a new trial in her oral motion or that counsel in *Fields* challenged evidentiary rulings are not part of the Court’s holding in *Fields*. The facts material to the analysis are the same in *Fields* as in this case. The appellant in *Fields* filed a written new trial motion which raised the same grounds that supported its oral new trial motion, and this Court deemed the latter, written motion to be properly treated as a Rule 59(e) motion to reconsider the oral ruling. *Fields*, 363 S.C. at 27, 609 S.E.2d at 510 (“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. It is proper to treat Plaintiff’s written motion as a Rule 59(e) motion even though it was erroneously captioned as a motion for new trial.” (citation omitted)).¹

Here, Builders made an oral JNOV motion which renewed its previously-asserted grounds for directed verdict. *See* (R. 744) (stating, “The defense would move for a judgment notwithstanding the verdict. We renew our grounds for the directed verdict motion previously heard by the Judge.”). Builders’ written motion repeated those grounds and, contrary to Respondents’ representation, invoked Rule 59 in the first sentence. (R. 4494) (moving “[p]ursuant to Rules 50 and 59 and all other applicable rules of the South Carolina Rules of Civil Procedure”). Although Builders’ written motion admittedly added other grounds, those grounds were subsequently withdrawn because they had not been raised at trial, leaving grounds renewed in the oral JNOV motion as grounds for the written motion. (R. 4618–23); *see also Fields*, 363 S.C. at 26–27, 609 S.E.2d at 509–10. Like *Fields*, Builders’ written JNOV motion should be treated as a

¹ Contrary to Respondents’ suggestion, *see* (Return at 3, 14), the Court in *Fields* and *Elam* did not require that the motion include the words “alter,” “amend,” or “reconsider.” *See generally Fields*, 363 S.C. 19, 609 S.E.2d 506; *Elam*, 361 S.C. 9, 602 S.E.2d 772.

proper Rule 59(e) motion to reconsider “to the extent it addressed the . . . rulings which [Builders] challenged in [its] briefly stated oral motion at the end of trial.” *See Fields*, 363 S.C. at 27, 609 S.E.2d at 510. Accordingly, Builders’ September 12 post-trial motion was not a nullity and stayed the time for Builders to appeal the jury verdict and the denial of its oral JNOV motion. *See id.*; *Elam*, 361 S.C. at 26, 602 S.E.2d at 781.

The date on which the parties received written notice of entry of the *nunc pro tunc* order (September 27, 2016) therefore has no significance in the jurisdictional analysis. Builders moved for setoff while the time to appeal the verdict and oral JNOV ruling remained stayed by the September 12 motion regardless of which of Builders’ multiple setoff motions is deemed a proper setoff motion.

Finally, Respondents’ repeated arguments that Builders failed to move for directed verdict at the close of all the evidence do not affect the jurisdictional analysis. *See, e.g.*, (Return at 14). Although a party must move for a directed verdict at the close of all the evidence to preserve the directed verdict motion and any subsequent JNOV motion for appellate review, preservation rules are not jurisdictional requirements. *See Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006) (“Craft moved for a directed verdict at the close of Wright’s case, but failed to renew the motion after concluding his presentation of evidence. Consequently, the denial of Craft’s motion is ***not preserved*** for our review.” (emphasis added)). A party’s failure to properly preserve its JNOV motion for appeal may be a ground to affirm the trial court’s ruling, but it is not a ground for dismissal of an appeal based on lack of appellate jurisdiction. *See, e.g., Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) (distinguishing between non-judicial claim-processing rules and mandatory jurisdictional requirements provided by statute).

Regardless, Builders preserved its JNOV grounds. In opposing Respondents' directed verdict motion at the close of all the evidence, Builders argued Respondents failed to present any evidence supporting their strict liability and breach of warranty claims. *See* (R. 625) ("As far as the strict liability cause of action Mr. Woodward's testimony is that windows can be unreasonably dangerous. We would argue that there isn't actually testimony here that the windows at One Belle Hall are unreasonably dangerous."); (R. 630) (referring to Respondents' breach of warranty claim and arguing, "The plaintiff has the burden to prove that the windows were illegal. And here we just have an absence of that proof."). The trial court found both claims presented issues for the jury. (R. 635) ("I believe that what has been laid out are issues for the jury and I am respectfully going to deny the motion for . . . directed verdict."). Although Builders did not subsequently state that it was moving for a directed verdict, it had already argued the substance of a directed verdict motion and the trial court had already found the strict liability and breach of warranty claims presented jury questions, and it would have been futile for Builders to then repeat its arguments that no question of fact existed and that it was entitled to a directed verdict. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) ("Staubes knew from the order that the trial court had decided to grant summary judgment for the City on any negligence claim he might raise. Thus, requesting permission to add a negligence claim to his complaint would have been futile. This Court does not require parties to engage in futile actions in order to preserve issues for appellate review."). The substance of Builders' arguments sufficiently conveyed its position that Respondents failed to present evidence supporting the elements of their claims. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue."). Accordingly,

although preservation rules are not jurisdictional, Builders sufficiently preserved the grounds on which it moved for JNOV.

III. Builders timely appealed the denial of its setoff rights.

The simple truth is that Builders moved for setoff in a timely manner, moved in a timely manner to reconsider the trial court’s refusal to grant a setoff,² and appealed in a timely manner from the trial court’s denial of the motion to reconsider the setoff ruling.³ This Court should reject Respondents’ attempts to create new procedural rules and to manufacture purported distinctions between this case and the setoff precedent supporting Builders’ position.

Builders was not required to repeat its setoff motion after production of the settlement documents. *See* (Return at 19–20). Respondents’ production of those documents in April 2017 did not somehow cancel out the pending setoff motion and require Builders to file a new setoff motion. Builders already had a setoff motion pending, as Respondents now concede, *see* (Return at 19), and Respondents cite no authority—because there is no authority—for the new rule they wish to create that a setoff motion is proper only if it is made or renewed after the plaintiffs produce settlement documents.

Respondents also argue that because the trial court was required to apply the statutory setoff prior to entering judgment on the verdict, Builders must be required to file its motion for setoff prior to the entry of the judgment. (Return at 20). Respondents are incorrect. The trial court has a duty *imposed by law* to apply the setoff, even in the absence of a motion, according to

² *See* (R. 26–44) (November 13, 2017 order addressing, among other things, the merits of Builders’ entitlement to setoff and concluding Builders’ “September 8, 2016 Motion for Setoff is DENIED.”).

³ *See* (R. 45) (June 22, 2018 order denying Builders’ motion to reconsider the November 13, 2017 order).

the very authority cited by Respondents. (Return at 20); *Smith v. Widener*, 397 S.C. 468, 471–72, 724 S.E.2d 188, 190 (Ct. App. 2012) (“Therefore, 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, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. When the settlement is for the same injury, the nonsettling defendant’s right to a setoff *arises by operation of law*. Under this circumstance, ‘[s]ection 15–38–50 grants the court no discretion . . . in applying a set-off.’” (alterations in original) (emphases added) (citations omitted)). The trial court failed to do so here. Under Respondents’ logic, an aggrieved party would have no remedy if a trial court enters judgment on a jury verdict without applying the mandatory statutory setoff. No authority supports Respondents’ argument.

Further, to the extent Respondents argue Builders was required to file a setoff motion “in the temporal, ten-day window it had to challenge Final Order,” (Return at 20), the Court of Appeals rejected that argument in *Ellis v. Oliver*. See 335 S.C. 106, 109, 112, 515 S.E.2d 268 270, 271 (Ct. App. 1999) (“Mrs. Ellis first argues that the trial court erred by not requiring Dr. Oliver to follow the rules of civil procedure in requesting the set-off. She contends the trial court erred by not treating Dr. Oliver’s motion for set-off as an untimely Rule 59(e) motion. We disagree. . . . Mrs. Ellis’s agreement to release Richland Memorial discharged a portion of the judgment against Dr. Oliver by operation of law without the need to file a motion under the South Carolina Rules of Civil Procedure.”).

Respondents’ arguments as to the merits of the setoff issue—i.e., their arguments that Builders is not entitled to setoff because it was not found liable in negligence and that equitable setoff is discretionary, among other arguments addressing the merits—are irrelevant to the question of appellate jurisdiction. Respondents’ remaining efforts to distinguish *Ellis* and *Tilley*

v. Pacesetter Corp., 355 S.C. 361, 585 S.E.2d 292 (2003), on the ground that those opinions stated a few facts inapposite to the circumstances here also fail. Although the courts in *Ellis* and *Tilley* recited the timing of the setoff motion in each case, the *facts* related to the timing of setoff motions in those cases do not create *law* that a party must do the same in every case. See *Ellis*, 335 S.C. at 108–09, 515 S.E.2d at 269–70; *Tilley*, 355 S.C. at 376–77, 585 S.E.2d at 300.

Builders filed its motion to compel and for determination of setoff on September 8, 2016—one week after the verdict. (R. 4492–93). On November 17, 2016, Builders filed a memorandum in support of its motion expressly seeking both statutory and equitable setoff. (R. 774–75). Builders then repeated its arguments orally at a hearing and made an oral setoff motion to the extent the trial court deemed the motion not yet made, and Respondents concede the making of the November 18, 2016 oral setoff motion. (R. 4581–86); (Return at 19) (“It is undisputed that, ‘following the production of’ the settlement documents in April 2017, [Builders] never moved for setoff as it said it would. *The only ‘setoff’ motion made by [Builders] occurred months before this date on November 18, 2016*” (bold and italics emphases added)). The parties and the trial court were thus on notice one week after the verdict—or at the latest on November 18, 2016, while Builders’ September 12 post-trial motion remained pending and the time to appeal the judgment remained stayed—that Builders was seeking a setoff.

Conclusion

This Court should grant certiorari and vacate the dismissal order because it is inconsistent with this Court’s precedent and deprives Builders of its right to appellate review, and the Court should either consider the merits of Builders’ appeal or direct the Court of Appeals to do so, including instructing the Court of Appeals to direct the trial court to consider the written motion requesting reconsideration of the oral JNOV motion denial.

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