Rel: 06/03/2016

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2015-2016

1141230

Har-Mar Collisions, Inc.

v.

Scottsdale Insurance Company

1141267

Scottsdale Insurance Company

v.

Har-Mar Collisions, Inc.

Appeals from Mobile Circuit Court
(CV-11-838)

BRYAN, Justice.

Har-Mar Collisions, Inc. ("Har-Mar Collisions"), appeals from a judgment of the Mobile Circuit Court ("the trial court") following a jury verdict of $101,054.40 in favor of Har-Mar Collisions on its breach-of-contract claim against Scottsdale Insurance Company ("Scottsdale"). The trial court offset the jury verdict by the amounts Har-Mar Collisions had recovered from a settlement agreement it had entered into with Auto-Owners Insurance Company and Owners Insurance Company (hereinafter collectively referred to as "Auto-Owners") and from a settlement agreement it had entered into with CRC Insurance Services, Inc. ("CRC"). Because the total amount Har-Mar Collisions recovered from those two settlement agreements exceeded the amount of the jury verdict, the trial court entered a judgment awarding Har-Mar Collisions $0. Har-Mar Collisions appeals, challenging the setoff. Scottsdale cross-appeals from the judgment against it.

Facts and Procedural History

In March 2004, Wayne Hartung began operating an automobile paint-and-body shop ("the auto shop") in Mobile.

Wayne incorporated the auto shop as Har-Mar Collisions, Inc., but operated the auto shop under the trade name Marshall Paint & Collision. The auto shop consisted of four buildings owned by Hartung Commercial Properties, Inc. ("Hartung"), which leased the property to Har-Mar Collisions. First National Bank of Baldwin County ("First National") financed Hartung's purchase of the property and retained a mortgage on the property to secure its interest. Wayne is the principal and sole shareholder of both Har-Mar Collisions and Hartung.

Before 2010, Wayne had insured the auto shop with, among other insurance companies, Farmers Insurance Co. ("Farmers"). However, sometime in 2010, Farmers informed Wayne that it would no longer be providing insurance coverage for wind damage for properties south of Highway 90 in Mobile; the auto shop was located approximately 180 feet south of Highway 90. Because Wayne wanted to maintain insurance coverage for wind damage, he elected not to renew the Farmers policy. Instead, Wayne contacted Kris Kahalley, a certified insurance counselor employed with International Assurance, Inc. ("International Assurance"), a company that assists businesses with procuring commercial insurance, to inquire about obtaining insurance for

the auto shop. Wayne provided Kahalley with his Farmers policy and told Kahalley that he wanted coverage identical to the coverage provided in the Farmers policy.

To receive proposals from various insurance companies, Kahalley was required to complete a "commercial insurance application" on behalf of Har-Mar Collisions. Using the Farmers policy as a guide, Kahalley listed the prospective insured's name on the application as "Marshall Paint & Collision" and listed the mailing address of the prospective insured as

> "HARMAR Inc dba
> 2869 Government Boulevard
> Mobile, AL 36606."

(Capitalization in original.)

Kahalley then provided the application to CRC, an insurance broker, to be submitted to various insurance companies that would then offer Har-Mar Collisions proposals for insurance coverage. After receiving proposals, Wayne ultimately decided to split the insurance coverage for the auto shop between two insurance policies, one with Auto-Owners ("the Auto-Owners policy") and one with Scottsdale ("the Scottsdale policy"), both of which were effective from

December 15, 2010, to December 15, 2011. The Auto-Owners policy provided garage-liability coverage and commercial umbrella-liability coverage.[1] The Scottsdale policy provided commercial-property coverage and lists the insured's name and mailing address as:

> "HARMAR, INC.
> DBA MARSHALL PAINT & COLLISION
> 2869 GOVERNMENT BOULEVARD
> MOBILE, AL 36606."

(Capitalization in original.)

On January 24, 2011, a fire destroyed the auto shop. The following day, Kahalley submitted a "property-loss notice" to Scottsdale and, either that day or the next, requested on behalf of Har-Mar Collisions a $50,000 advance on the claim for Har-Mar Collisions' lost "business income." On January 27, 2011, Scottsdale sent Wayne a letter informing him that it had engaged an independent claims adjuster to inspect the auto shop and to evaluate the loss. That letter also included a

---

[1]Owners Insurance Co., a subsidiary of Auto-Owners Insurance Co., provided the garage-liability coverage for Har-Mar Collisions, and Auto-Owners Insurance Co. provided the commercial umbrella-liability coverage. For simplicity, and because the separate identities of Owners Insurance Co. and Auto-Owners Insurance Co. are not relevant to the issues on appeal, we collectively refer to the policy providing garage-liability coverage and the policy providing commercial umbrella-liability coverage as "the Auto-Owners policy."

$50,000 check payable to "HARMAR, INC. (DBA): MARSHALL PAINT & COLLISION; AND FIRST NATIONAL BANK OF BALDWIN COUNTY." (Capitalization in original.) Wayne testified that he was uncertain why First National was listed as a payee on the check but that he deposited the check into Har-Mar Collisions' bank account and used the money to pay the ongoing expenses associated with the business operations of the auto shop.

On March 22, 2011, Scottsdale sent Wayne a letter indicating that it had not concluded the investigation of his claim. Concerning Scottsdale's investigation, that letter stated, in pertinent part:

> "In response to our request for the Articles of Incorporation for Harmar, Inc. d/b/a Marshall Paint & Collision, we received the Articles of Incorporation for Har-Mar Collisions, Inc. We are unclear how one corporation relates to the other. In order that we can further our investigation of the financial interest of the Named Insured, please provide us with documentation of the financial interest of Harmar, Inc. d/b/a Marshall Paint & Collision in the property for which claim has been submitted. Please provide us with copies of the Articles of Incorporation, which specify the names of the officers of the corporation known as Harmar, Inc. d/b/a Marshall Paint & Collision."

Over the next month, the parties exchanged correspondence in which Wayne, through counsel, asserted that the Scottsdale policy insured the auto shop, incorporated as Har-Mar

Collisions; that he had never incorporated a business under the name "'Harmar, Inc. dba Marshall Paint and Collision'"; and that the use of that name in the Scottsdale policy must have been "a typo or abbreviation." Scottsdale, on the other hand, continued to contend that Harmar, Inc., was the named insured in the Scottsdale policy and, as a result, sought documentation from Wayne indicating what, if any, insurable interest Harmar, Inc., had in the auto shop.

In May 2011, Wayne, as principal of Har-Mar Collisions, submitted a proof-of-loss form to Scottsdale. Although Scottsdale never formally denied the claim, it continued to investigate the claim over the next several weeks and refused to make any additional payments on the claim on the basis that its investigation was ongoing. During that time, Scottsdale continued to assert that it was unclear as to what interest Harmar, Inc., the named insured in the Scottsdale policy, had in the auto shop.

On or around June 8, 2011, Mike Norden, a commercial lender with First National, received a letter from Scottsdale informing him that First National, as mortgagee of the insured property, had a right under the Scottsdale policy to receive

"loss payment" for the loss of the buildings composing the auto shop, regardless of whether the policyholder's claim was denied. In response to that letter, First National submitted a proof-of-loss form to Scottsdale. On August 4, 2011, Scottsdale issued a check to First National in the amount of $473,268.60, which was approximately $39,000 less than Hartung's mortgage indebtedness at that time. Norden inquired of Scottsdale why the check First National received was approximately $39,000 less than First National's interest in the insured property, to which Scottsdale replied that it had already paid Wayne $50,000 and that it was under the impression that those funds had been, or should have been, applied to the mortgage. To make up the difference, First National liquidated a certificate of deposit Wayne had provided as additional collateral for the mortgage and applied part of the proceeds to the mortgage, thereby extinguishing the mortgage and satisfying First National's interest in the auto shop.

On August 10, 2011, Har-Mar Collisions sued Scottsdale and CRC. That complaint sought a judgment declaring that Har-Mar Collisions was the named insured on the Scottsdale policy,

asserted breach-of-contract and bad-faith-failure-to-pay claims against Scottsdale, and asserted negligence and misrepresentation/fraud claims against CRC for its alleged failure to procure insurance for the auto shop.

On April 6, 2012, Auto-Owners filed a motion to intervene in the action. In that motion, Auto-Owners indicated that a separate action had been filed in the trial court by Hartung against, among other defendants, Har-Mar Collisions, in which Hartung alleged that Har-Mar Collisions was leasing from Hartung the buildings in which Har-Mar Collisions was operating the auto shop and that Har-Mar Collisions had negligently/wantonly caused the fire that had destroyed the auto shop. Because the Auto-Owners policy provides coverage for Har-Mar Collisions' liabilities, and because Wayne is the principal of both Hartung and Har-Mar Collisions, Auto-Owners maintained that there were "significant questions regarding coverage under the [Auto-Owners policy]." As a result, Auto-Owners asked the trial court to grant its motion to intervene so that a determination of Auto-Owners' obligations could be determined. The trial court granted the motion to intervene.

On January 22, 2013, Har-Mar Collisions amended its complaint to add International Assurance, Kahalley, and Auto-Owners as defendants and to add the following claims: a negligence claim against International Assurance and Kahalley for their alleged failure to obtain insurance for the auto shop and breach-of-contract and bad-faith-failure-to-pay claims against Auto-Owners.

On August 4, 2014, Har-Mar Collisions and CRC entered into a "pro tanto release and settlement agreement" under which Har-Mar Collisions agreed to release all claims it had or could have asserted against CRC arising from the January 24, 2011, fire in exchange for a payment of $12,500 from CRC. Pursuant to the settlement agreement, Har-Mar Collisions and CRC filed a "joint stipulation of dismissal" requesting that the trial court dismiss with prejudice Har-Mar Collisions' claims against CRC. On August 8, 2014, the trial court entered an order dismissing with prejudice all claims against CRC.

On November 18, 2014, Har-Mar Collisions and Auto-Owners entered into a "mutual general pro tanto release and settlement agreement" under which Har-Mar Collisions agreed to

release all claims it had or could have asserted against Auto-Owners arising from the January 24, 2011, fire in exchange for a payment of $135,000 from Auto-Owners. The settlement agreement indicated that $130,000 of that $135,000 payment would be paid to Hartung on behalf of Har-Mar Collisions. On November 26, 2014, Har-Mar Collisions and Auto-Owners filed a "joint motion for voluntary dismissal with prejudice" requesting that the trial court dismiss with prejudice Har-Mar Collisions' claims against Auto-Owners and dismiss Auto-Owners' complaint in intervention. On November 26, 2014, the trial court entered an order in accordance with that motion.

Before trial, the parties agreed that the jury would not be informed of Har-Mar Collisions' settlement agreements with Auto-Owners and CRC and that the issue of a setoff against a jury verdict against Scottsdale would be reserved for the trial court's determination after the jury returned its verdict. On May 4 through May 7, 2015, the trial court held a jury trial on Har-Mar Collisions' remaining claims against International Assurance, Kahalley, and Scottsdale. At the close of evidence, Scottsdale filed a motion for a judgment as a matter of law in which it argued that there was no evidence

upon which the trial court could grant Har-Mar Collisions' request for a judgment declaring that Har-Mar Collisions was the named insured in the Scottsdale policy. Thus, Scottsdale argued, in the absence of a reformation of the Scottsdale policy to that effect, Har-Mar Collisions lacked standing to maintain its action against Scottsdale. The trial court, although it did not enter an order to that effect, orally denied Scottsdale's motion.

At the close of all the evidence, the parties' attorneys argued (outside the jury's presence) to the trial court whether reformation of the policy to reflect Har-Mar Collisions as the named insured was proper. After hearing the attorneys' arguments, the trial court made the following statement:

> "I focused on the language [that] the parties had agreed upon at the time the instruments were executed, what they had agreed upon. And to me what they had agreed upon was a -- what's clear to me is that they had agreed to insure Marshall Paint and Collision, whatever the corporate entity was, Marshall Paint and Collision, a body shop, South Government Boulevard, at that location, for whatever the ... coverages were, and neither side thought they were insuring some nonexistent company with no corporate existence or anything. I don't believe either side figured that's what they were doing. So I'm going to find that the reformation is appropriate, there was a mutual mistake, and I'm

> going to reform the contract so that the insured is Har-Mar Collisions, Inc. d/b/a Marshall Paint and Collision, which puts us in a position to go forward with other matters."

The trial court also indicated to the parties that it would offset any verdict against Scottsdale with the $135,000 and $12,500 settlements Har-Mar Collisions had received from Auto-Owners and CRC, respectively.

After closing arguments, the jury returned a verdict in favor of Har-Mar Collisions on its breach-of-contract claim and awarded damages of $101,054.40, returned a verdict in favor of Scottsdale on Har-Mar Collisions' bad-faith-failure-to-pay claim, and returned a verdict in International Assurance's and Kahalley's favor on Har-Mar Collisions' negligence claim. Pursuant to that verdict, the trial court entered a judgment stating, in pertinent part:

> "Prior to the verdict, [Har-Mar Collisions] entered into a pro tanto settlement with [Auto-Owners] for $135,000 and [CRC] for $12,500, for a total amount of $147,500. The pro tanto settlements were not disclosed to the jury, and thus the verdict must be offset by the amount of the pro tanto settlements.
>
> "It is therefore Ordered and Adjudged by the Court that a final judgment in the amount of $0 is entered in favor of [Har-Mar Collisions] and against [Scottsdale]."

On June 15, 2015, Har-Mar Collisions filed a motion to alter, amend, or vacate the judgment. In that motion, Har-Mar Collisions argued that the trial court erred in offsetting the jury verdict by the amounts Har-Mar Collisions had recovered through the Auto-Owners and CRC settlement agreements and that Har-Mar Collisions was entitled to prejudgment interest on the jury verdict. Har-Mar Collisions also filed a motion to tax costs against Scottsdale. The trial court denied both motions on July 17, 2015. Har-Mar Collisions timely appealed, and Scottsdale timely cross-appealed. Because the issues in Scottsdale's cross-appeal could be dispositive of all issues, we first address the cross-appeal.

Case No. 1141267

Scottsdale raises two arguments on appeal: (1) that the trial court erred in reforming the contract to reflect Har-Mar Collisions as the named insured; and (2) that, assuming the correction of that alleged error, Har-Mar Collisions lacked standing to maintain its breach-of-contract and bad-faith-failure-to-pay claims.

Standard of Review

"The standard applicable to reformation cases is that the decision of a trial judge who heard ore tenus evidence will not be overturned on appeal if it is supported by competent evidence and is not manifestly unjust or plainly and palpably erroneous." Powell v. Evans, 496 So. 2d 723, 726 (Ala. 1986).

Discussion

> "In Alabama, reformation of contracts is governed by § 8-1-2, Ala. Code 1975; that Code section provides:
>
> > "'When, through fraud, a mutual mistake of the parties or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised by a court on the application of the party aggrieved so as to express that intention, so far as it can be done without prejudice to the rights acquired by third persons in good faith and for value.'
>
> "This Court has stated that '[t]he terms of the statute [§ 8-1-2] are plain and unambiguous and give the equity court power to reform or revise a written contract only when the requirements of the statute have been met.' American Liberty Ins. Co. of Birmingham v. Leonard, 270 Ala. 17, 21, 115 So. 2d 470, 473 (1959). Moreover, it is the burden of the party seeking reformation to establish by clear and convincing evidence that those requirements have been met. Clemons v. Mallett, 445 So. 2d 276, 279 (Ala. 1984)."

Goodwyn, Mills & Cawood, Inc. v. Markel Ins. Co., 911 So. 2d 1044, 1047-48 (Ala. 2004).

It is evident from the trial court's on-the-record statement that it reformed the Scottsdale policy on the basis of a mutual mistake, a proper ground under § 8-1-2, Ala. Code 1975, for reforming a contract. "This Court has adopted the definition of 'mutual mistake' found in Restatement (Second) of Contracts § 152 (1981), which defines it as a 'mutual misunderstanding concerning a basic assumption on which the contract was made.' Finley v. Liberty Mut. Ins. Co., 456 So. 2d 1065 (Ala. 1984) ...." EBSCO Indus., Inc. v. Royal Ins. Co. of America, 775 So. 2d 128, 131 (Ala. 2000). Thus, if the parties to a contract enter into that contract with a "'mutual misunderstanding concerning a basic assumption on which the contract was made,'" a trial court, upon application by an aggrieved party to the contract and the presentation of clear and convincing evidence of that "mutual misunderstanding," may reform the contract to express the parties' true intent in entering into the contract. Although our research has not unearthed an Alabama case directly on point with the facts of this case, the Court of Appeals of Ohio in Gooslin v. B-

Affordable Tree Serv., (No. S-10-045, Aug. 12, 2011) 2011-Ohio-4048, had before it facts that are nearly identical to those of this case.[2]

In Gooslin, William Mira, a 50% shareholder in B-Affordable Tree Service, Inc. ("B-Affordable"), a tree-trimming business, was involved in an automobile accident with Heather Gooslin while he was driving his personal automobile, which displayed advertisements for B-Affordable. Mira had a personal automobile-insurance policy issued by State Automobile Mutual Insurance Company ("State Auto"), and B-Affordable believed that it had automobile insurance under a separate State Auto policy that provided coverage for

---

[2]We recognize that Gooslin, an unpublished decision of the Court of Appeals of Ohio, carries no precedential value in this jurisdiction. However, the unpublished status of Gooslin does not affect its precedential value in Ohio. See Rule 3.4, Ohio Supreme Court Rules for the Reporting of Opinions. Furthermore, this Court, in Ex parte Miltope Corp., 823 So. 2d 640 (Ala. 2001), stated the following after relying on an unpublished decision from the Court of Appeals of Ohio:

> "Pearce's unpublished status ... does not preclude us from using it in our analysis. No opinion from another state court is binding on the courts of Alabama, but we often cite such an opinion as persuasive authority. We cite Pearce because it is a well-reasoned opinion that addresses the precise issue before us."

823 So. 2d at 645 n. 5.

accidents involving B-Affordable's employees' personal automobiles when those automobiles were being used in the scope of the employees' employment. Gooslin filed a claim for damages against Mira and B-Affordable on the theories of negligence and respondeat superior, respectively.

State Auto intervened as a defendant in Gooslin's action and filed a motion for a judgment declaring that it was not obligated to provide insurance coverage for B-Affordable. State Auto then moved for a summary judgment on the ground that the insurance policy B-Affordable believed insured its employees' personal automobiles identified the named insured as "Mike Weber & Bill Mira DBA Affordable Tree Service."[3] After considering B-Affordable's motion and supporting materials, the trial court determined that the insurance policy did insure B-Affordable and, thus, denied State Auto's summary-judgment motion. Following a bench trial, State Auto's claim for declaratory relief was denied, and insurance coverage for B-Affordable was established.

On appeal, State Auto argued that the trial court erred in reforming the insurance policy to provide coverage for B-

[3]Weber was the other 50% shareholder of B-Affordable.

Affordable. Mira argued that the clear intent of the parties was for State Auto to insure the tree-trimming business owned by Mira and Weber and, therefore, that the trial court's reformation of the contract was proper.

In affirming the trial court's reformation of the insurance policy on the basis of a mutual mistake, the Court of Appeals of Ohio stated:

> "T]he issue we must address is whether the contract provision in question -- that the insured is 'Mike Weber & Bill Mira DBA Affordable Tree Service' -- is clearly and convincingly contrary to the understanding of all the parties. We hold that it is.
>
> "The record in this case provides clear and convincing evidence that the parties understood and intended that State Auto was to insure the tree trimming business owned by Weber and Mira. ...
>
> "However, despite the parties' intention, the insurance contract as written does not provide coverage to the business. The contract specifically identifies 'Mike Weber & Bill Mira DBA Affordable Tree Service' as the insured. Yet, all the parties agree that no such business entity has ever existed. It follows then that the contract did not provide coverage to the non-existent business. Consequently, both parties mistakenly believed that, under the insurance contract, Weber and Mira's tree trimming business was insured by State Auto. Because a mutual mistake as to a material fact exists, reformation is appropriate to bring the contract into conformity with the parties' intent. Here, the parties intended to insure a tree trimming business owned by Weber and Mira, and B-Affordable

> is the only tree trimming business those two ever owned. Accordingly, the trial court did not err when it reformed the contract to name B-Affordable as the insured. See Justarr Corp. d.b.a. The Terrace at Westside v. Buckeye Union Ins. Co. (1995), 102 Ohio App. 3d 222, 656 N.E.2d 1345 (reformation appropriate where evidence supported a finding of mutual mistake of fact as to whether coverage was intended for a corporation that was not a named insured)."

Gooslin, at ¶13, ¶14, and ¶15.

Similarly, the issue in this case is whether the contract provision in question -- naming the insured as "Harmar, Inc." -- is clearly and convincingly contrary to the understanding of the parties. Like the Court of Appeals of Ohio in Gooslin, we conclude that it is. The undisputed evidence in this case indicates that Scottsdale and Har-Mar Collisions intended for the Scottsdale policy to insure the auto shop, regardless of under what name the auto shop is incorporated. However, the Scottsdale policy does not reflect that intent because it lists Harmar, Inc., as the corporate entity being insured, a corporation Scottsdale concedes has not and does not exist. As the trial court noted when it reformed the Scottsdale policy, there is no evidence indicating that Scottsdale intended to provide insurance coverage for a nonexistent corporation, and certainly Wayne did not intend to pay

premiums on the Scottsdale policy with the understanding that only a nonexistent corporation would ever be able to make a claim for coverage under the policy.

Further, we are unpersuaded by Scottsdale's argument that there was no mutual mistake because, Scottsdale says, it did not make a mistake. In support of that argument, Scottsdale contends that the only mistake resulting in Harmar, Inc., being named the insured in the Scottsdale policy was the mistake in the application for insurance provided by Kahalley and, thus, that reformation of the policy on the basis of a mutual mistake was improper. State Auto made the same argument in Gooslin, and the Court of Appeals of Ohio found it unpersuasive.

> "[I]n the context of contracts, mistake means 'a belief that is not in accord with the facts.' Restatement of the Law 2d, Contracts (1981) 383, Mistake Defined, Section 151. Here, the belief is that the insurance contract as written provided coverage to the tree trimming business owned by Weber and Mira. The facts, on the other hand, indicate the opposite. Thus, even if there was a unilateral error on the part of Weber and Mira for filing an application with the wrong business name, mutual mistake still exists, and reformation is appropriate."

Gooslin, at ¶17.

We find the well reasoned analysis of the Court of Appeals of Ohio persuasive. As noted above, both Scottsdale and Har-Mar Collisions, at the time Wayne purchased the Scottsdale policy, believed that the Scottsdale policy as written insured the auto shop. However, neither party's belief was "'in accord with the facts,'" id., because the Scottsdale policy, in its original form, insured Harmar, Inc., a nonexistent corporation. As the Court of Appeals of Ohio noted, a mutual mistake may be "'a belief that is not in accord with the facts,'" id. (emphasis added), or, as this Court has defined it, a mutual misunderstanding of the parties that affects a basic assumption on which the contract was made. EBSCO, supra.

In this case, there is clear and convincing evidence in the record showing that Scottsdale and Har-Mar Collisions intended for the Scottsdale policy to insure the auto shop and that the parties had a mutual misunderstanding that the policy as written did so. Accordingly, we affirm the trial court's judgment insofar as it reformed the Scottsdale policy to

reflect that Har-Mar Collisions was the named insured in the policy based on its finding of a mutual mistake.[4]

Scottsdale's "standing" argument is based on the assumption that the trial court erred in reforming the Scottsdale policy. Because we find no error in the trial court's reformation of the policy, Scottsdale's "standing" argument is moot. Accordingly, insofar as it found Scottsdale liable on the breach-of-contract claim, the trial court's judgment is affirmed.

Case No. 1141230

Har-Mar Collisions first argues that the trial court erred in applying the amounts recovered from Har-Mar

---

[4]Scottsdale argues in its reply brief that, assuming reformation of the Scottsdale policy was proper, the trial court nevertheless erred in reforming the contract because, Scottsdale says, the parties' intent at formation of the contract was for Scottsdale to insure the interest of the owner of the auto shop. Because it is undisputed that Hartung owned the auto shop, Scottsdale argues that a proper reformation of the policy would require Hartung, not Har-Mar Collisions, to be substituted as the named insured and that the substitution of Har-Mar Collisions "transformed the [p]olicy into a contract contrary to the intent of the parties." Scottsdale's reply brief, at 14 (emphasis in original). However, Scottsdale did not raise that argument in its initial brief to this Court, and it is well settled that this Court will not address arguments raised for the first time in an appellant's reply brief. Walden v. Hutchinson, 987 So. 2d 1109, 1121 (Ala. 2007). Accordingly, we do not address that argument.

Collisions' settlement agreements with Auto-Owners and CRC against the jury verdict of $101,054.40, thus negating the jury verdict and leaving Har-Mar Collisions with no recovery. Whether Scottsdale is entitled to a setoff is a legal question and thus is reviewed de novo by this Court. Nationwide Mut. Fire Ins. Co. v. Austin, 34 So. 3d 1238, 1243 (Ala. 2009).

Har-Mar Collisions cites Alabama Farm Bureau Mutual Casualty Insurance Co. v. Williams, 530 So. 2d 1371 (Ala. 1988), in support of its argument that, when an insured enters into a settlement agreement with one of its insurers, the nonsettling insurer is not entitled to a setoff if the two insurers "owe separate and distinct contractual obligations" to the insured. Har-Mar Collisions' brief, at 17.

In Williams, the Williamses obtained a fire-insurance policy in March 1981 from Alabama Farm Bureau Mutual Casualty Insurance Company ("Farm Bureau") on a house they owned and had financed with First Federal Savings and Loan Association of Jasper ("First Federal"). The Williamses paid the policy premiums to First Federal at the rate of 1/12th of the annual premium per month, and First Federal in turn paid the premiums on the policy to Farm Bureau.

Sometime between December 1982 and March 1983, problems arose with the coverage on the Williamses' house. In February 1983, Jimmy Holderfield, a Farm Bureau agent, instructed First Federal to discontinue premium payments until notified otherwise. Unaware of that instruction, the Williamses continued to pay the monthly premium payments to First Federal, despite the fact that First Federal was no longer making the premium payments to Farm Bureau.

In December 1983, the Williamses' house burned. The Williamses filed a claim with Farm Bureau, but Farm Bureau denied the claim because the premiums on the policy had not been paid and because the policy had not been renewed. The Williamses filed an action against Farm Bureau, Holderfield, and First Federal. Before trial, however, the Williamses entered into a "pro tanto settlement agreement and release" with First Federal for $46,337.06, the remaining mortgage indebtedness on the Williamses' house. 530 So. 2d at 1373.

The Williamses continued to trial on their claims against Farm Bureau and Holderfield, and a jury returned a verdict in the Williamses' favor in the amount of $74,800, plus interest. Farm Bureau, in an effort to mitigate its liability, made an

offer of proof to the trial court of the Williamses' settlement agreement with First Federal. The trial court denied the offer of proof and entered a judgment in accordance with the jury verdict.

On appeal, Farm Bureau argued that it was entitled to offset its liability by the amount of the settlement agreement between the Williamses and First Federal because, Farm Bureau reasoned:

> "[T]he liability and obligations of First Federal and [Farm Bureau] are joint and, therefore, because the plaintiffs suffered only one injury, that it should be allowed to produce as evidence the fact of the partial satisfaction to mitigate or reduce the damages for which it ultimately may be found liable, just as in the case of joint tort-feasors."

530 So. 2d at 1373.

The Williamses, on the other hand, argued that the obligations of First Federal and Farm Bureau to the Williamses were "separate and distinct," 530 So. 2d at 1373, and, thus, that evidence of the settlement agreement was properly excluded. This Court agreed with the Williamses, holding:

> "We are of the opinion that appellant's joint liability theory must fail for the simple reason that there is no evidence that appellant and First Federal either undertook or assumed any joint obligation toward the Williamses. We agree with the Williamses that the obligations owing them from Farm

> Bureau and First Federal are separate and distinct. The evidence shows that Farm Bureau contracted with the Williamses to provide fire insurance on their house. On the other hand, the only obligation assumed by First Federal was to act as an escrow agent for the Williamses for the payment of the insurance premiums on their home."

530 So. 2d at 1373.

From Williams, it is evident that the relevant inquiry as to whether Scottsdale is entitled to a setoff is whether the obligations Scottsdale owed Har-Mar Collisions under the Scottsdale policy are "separate and distinct" from the obligations Auto-Owners and CRC owed Har-Mar Collisions.

As to Auto-Owners' obligations to Har-Mar Collisions, the evidence at trial unequivocally shows that the Auto-Owners policy provided insurance coverage for Har-Mar Collisions' liabilities. The Scottsdale policy, on the other hand, provided insurance coverage for the commercial property itself. Thus, the evidence does not support a conclusion that Scottsdale and Auto-Owners "undertook or assumed any joint obligation toward [Har-Mar Collisions]." Williams, 530 So. 2d at 1373. See Employers Nat'l Ins. Co. v. Holliman, 287 Ala. 123, 128, 248 So. 2d 717, 721 (1971) ("'"The character of liability insurance is quite different from insurance against

damage to, or loss of, the property insured, where the insured is required to have some real interest in the property insured; in the case of liability insurance the risk and hazard insured against is not the damage to, or loss of, the property named in the policy, but against loss and injury caused by the use of the property therein named, for which the insured might be liable ...."'" (quoting Bendall v. Home Indemnity Co., 286 Ala. 146, 151, 238 So. 2d 177, 181 (1970), quoting in turn Blashfield Automobile Law and Practice § 291.4 (3d ed.) (emphasis omitted))).[5]

We are unpersuaded by Scottsdale's argument that Har-Mar Collisions, by entering into the Scottsdale policy, agreed to the setoff pursuant to the following policy provision:

---

[5]An example illustrates the point. Given the respective coverages provided in the Scottsdale policy and the Auto-Owners policy, in a scenario where the auto shop was damaged in a manner that did not give rise to any liability on the part of Har-Mar Collisions, the Scottsdale policy would provide coverage for that damage (assuming no applicable policy exclusion), in spite of the fact that damage to the auto shop alone would not trigger coverage under the Auto-Owners policy. Conversely, in a scenario where Har-Mar Collisions incurred some liability during the course of its business operations, but the auto shop did not sustain any damage, the Auto-Owners policy would provide coverage for that liability (assuming no applicable policy exclusion), in spite of the fact that the liability would not trigger coverage under the Scottsdale policy.

"G. OTHER INSURANCE

> "....
>
> "2. If there is other insurance covering <u>the same loss or damage</u>, ... we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not."

(Capitalization in original; emphasis added.) That subsection provides that Scottsdale's obligation to Har-Mar Collisions might be limited if other insurance covering <u>the same loss or damage</u> exists. As noted above, there is no evidence in this case indicating that the Auto-Owners policy covers loss or damage to the auto shop. Rather, as we have already noted, the evidence indicates that the insurance coverage provided in the Auto-Owners policy was for Har-Mar Collisions' liabilities arising from its operation of the auto shop. Thus, Scottsdale's argument that the money Auto-Owners paid Har-Mar Collisions pursuant to the settlement agreement "was intended to address loss/damage to the property at issue," Scottsdale's brief, at 23, is unsupported by the evidence.

We are also unpersuaded by Scottsdale's argument that the setoff was proper because, Scottsdale says, "[t]he claims against Scottsdale ... and Auto-Owners were based on the same

allegations of non-payment under policies providing coverage to the same property for the same types of loss." Scottsdale's brief, at 24. As noted above, the Scottsdale policy and the Auto-Owners policy did not provide coverage for the same types of loss. Furthermore, it is not the nature of the <u>claims and allegations</u> against separate insurers that determines whether a setoff is applicable; rather, it is the nature of the <u>obligations</u> to the insured undertaken by the separate insurers. <u>Williams</u>, 530 So. 2d at 1373 (stating that Farm Bureau's argument "must fail for the simple reason that there is no evidence that [Farm Bureau] and First Federal either undertook or assumed any <u>joint obligation</u> toward the Williamses" (emphasis added)).

Scottsdale also argues that the setoff was proper because, Scottsdale says, Har-Mar Collisions suffered only one injury, i.e., the loss by fire of the auto shop. However, this Court expressly rejected that same argument in <u>Williams</u>, stating: "Furthermore, we do not accept [Farm Bureau's] argument that if the breach of different contractual obligations produces only one injury then evidence of a pro tanto settlement agreement should be allowed into evidence."

Williams, 530 So. 2d at 1373. We reiterate that the dispositive question in determining whether a setoff is applicable under these circumstances is not whether the insured has suffered a single injury but whether the insurers undertook a joint obligation as to the insured.

As to CRC's obligation, we note that CRC did not assume any obligation to provide Har-Mar Collisions with insurance coverage for either the auto shop or for Har-Mar Collisions' liabilities. CRC's sole obligation was to procure insurance for Har-Mar Collisions. The obligation to procure insurance on behalf of an insured is not the same obligation as the duty to provide coverage once insurance has been procured. Accordingly, CRC did not undertake with Scottsdale a joint obligation as to Har-Mar Collisions.

The applicability of a setoff arising from a settlement agreement is an affirmative defense. Morris v. Laster, 821 So. 2d 923, 930 (Ala. 2001). Therefore, the party offering the defense -- in this case, Scottsdale -- carries the burden of proof. Ex parte Rogers, 68 So. 3d 773, 780 (Ala. 2010). There is no evidence in this case to indicate that either Auto-Owners of CRC undertook a joint obligation with

Scottsdale as to Har-Mar Collisions. Thus, Scottsdale did not meet its burden of proof. Accordingly, the trial court's application of the settlement agreements against the jury verdict was error. On remand, the trial court should enter a judgment reinstating the jury verdict of $101,054.40 in favor of Har-Mar Collisions.[6]

---

[6]Har-Mar Collisions argues that the trial court erred in excluding evidence of the replacement costs of the auto shop. On May 4, 2015, before the commencement of the trial, the trial court and the parties' attorneys addressed a motion in limine filed by Scottsdale to exclude evidence of the replacement costs of the auto shop and to limit the evidence to the actual cash value of the auto shop. Scottsdale argued that the policy did not provide coverage for replacement costs until Har-Mar Collisions repaired or replaced the auto shop and offered Hilley v. Allstate Insurance Co., 562 So. 2d 184 (Ala. 1990), in support of its argument. There is no indication in the record that the attorney for Har-Mar Collisions ever provided the trial court with an argument that Scottsdale's interpretation of Hilley was incorrect or that Har-Mar Collisions was entitled to replacement costs.

On appeal, Har-Mar Collisions argues that "Hilley is completely contrary to the longstanding concept of anticipatory repudiation" and that Hilley "invites more insurance companies to deny claims." Har-Mar Collisions' brief, at 23-24. However, although Har-Mar Collisions had multiple opportunities before trial, at trial, and after trial to argue that Scottsdale's attorney had misinterpreted Hilley or that Hilley was otherwise inapplicable to the circumstances of this case, it failed to do so. Thus, because there is no indication in the record that Har-Mar Collisions ever raised this argument to the trial court, the issue has not been preserved for appellate review.

Har-Mar Collisions argues that the trial court erred in denying its prejudgment motion to add, pursuant to § 8-8-8, Ala. Code 1975, interest to the jury verdict of $101,054.40.[7] The parties agree that the dispositive question in determining whether prejudgment interest should be awarded in a breach-of-contract action is whether the "damages were reasonably certain at the time of the breach." Goolesby v. Koch Farms, LLC, 955 So. 2d 422, 429 (Ala. 2006). However, Har-Mar Collisions has not argued or directed this Court's attention to any evidence indicating that the damages it sought were "reasonably certain at the time of [Scottsdale's] breach." Id. Rather, in a one-paragraph argument, Har-Mar Collisions states that the date of Scottsdale's breach was June 11, 2011, and that 6% interest calculated from June 11, 2011, to May 7, 2015, equates to $23,702.47.[8] That argument is insufficient

---

[7]Section 8-8-8 provides:

> "All contracts, express or implied, for the payment of money, or other thing, or for the performance of any act or duty bear interest from the day such money, or thing, estimating it at its money value, should have been paid, or such act, estimating the compensation therefor in money, performed."

[8]The Scottsdale policy provides that payment for covered loss or damage will be made within 30 days after Scottsdale

for this Court to reverse the trial court's decision refusing to award prejudgment interest when Har-Mar Collisions has failed to provide this Court with any indication that the trial court had before it any evidence that the damages at the time Har-Mar Collisions alleges Scottsdale breached the contract were reasonably certain. Accordingly, we affirm the judgment insofar as it denies prejudgment interest on the jury verdict.

Lastly, Har-Mar Collisions argues that the trial court erred in failing to tax costs against Scottsdale. Pursuant to Rule 54(d), Ala. R. Civ. P., a trial court has discretion in determining whether to award costs to the prevailing party. Classroomdirect.com, LLC v. Draphix, LLC, 992 So. 2d 692, 713 (Ala. 2008). Because, as a result of the setoff, Har-Mar Collisions did not recover damages from Scottsdale despite the fact that a judgment was entered in Har-Mar Collisions' favor as to its breach-of-contract claim, Har-Mar Collisions was not

---

receives a sworn proof-of-loss form from the insured. Har-Mar Collisions contends in its brief to this Court that it provided Scottsdale with a sworn proof-of-loss form on May 11, 2011, which, Har-Mar Collisions argues, means that Scottsdale breached the contract when it failed to provide payment on or before June 10, 2011. The record on appeal, however, appears to indicate that Scottsdale received the sworn proof-of-loss form on May 5, 2011.

the prevailing party at trial. See Alabama State Univ. v. Danley [Ms. 1140907, April 8, 2016] ___ So. 3d ___, ___ (Ala. 2016) (noting that the Supreme Court of the United States has held that "'[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail'" (quoting Hewitt v. Helms, 482 U.S. 755, 760 (1987))). However, because we are reversing the judgment insofar as it applied a setoff against the jury verdict, the trial court's judgment entered on remand will award Har-Mar Collisions damages, and, consequently, Har-Mar Collisions will be the prevailing party as to its breach-of-contract claim against Scottsdale. Accordingly, on remand the trial court should reconsider Har-Mar Collisions' motion to tax costs in light of the fact that Har-Mar Collisions will then be the prevailing party.[9]

Conclusion

As to case no. 1141230, we reverse the judgment to the extent it applied a setoff against the jury verdict returned against Scottsdale and remand the case for the trial court to

[9]The decision to tax costs rests with the trial court. We are merely giving the trial court the opportunity to award costs in light of the fact that Har-Mar Collisions has prevailed on its breach-of-contract claim.

enter a judgment reinstating the jury verdict of $101,054.40. On remand, the trial court should also reconsider Har-Mar Collisions' motion to tax costs. As to the remainder of case no. 1141230, the judgment is affirmed. As to case no. 1141267, the judgment is affirmed.

1141230 -- AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Stuart, Parker, Shaw, Main, and Wise, JJ., concur.

Bolin, J., concurs in the result.

Murdock, J., dissents.

1141267 -- AFFIRMED.

Stuart, Bolin, Parker, Shaw, Main, and Wise, JJ., concur.

Murdock, J., concurs in the result.

MURDOCK, Justice (dissenting as to case no. 1141230 and concurring in the result as to case no. 1141267).

As to the cross-appeal of Scottsdale Insurance Company, I concur in the result as to the issue whether Har-Mar Collisions, Inc., is entitled to recover under the Scottsdale Insurance Company policy. I write specially to explain where my rationale varies from that offered in the main opinion and to address the issue of "standing" raised by Scottsdale in its appellate brief.

As to the appeal of Har-Mar Collisions, Inc., I respectfully dissent for the reasons hereinafter stated.

A. Scottsdale's cross-appeal: case no. 1141267

As the main opinion notes, the Restatement (Second) of Contracts § 152 (1981) defines a "mutual mistake of fact" as "'a "mutual misunderstanding concerning a basic assumption on which the contract was made."'" ___ So. 3d at ___ (quoting EBSCO Indus., Inc. v. Royal Ins. Co. of America, 775 So. 2d 128, 131 (Ala. 2000), quoting in turn Finley v. Liberty Mut. Ins. Co., 456 So. 2d 1065 (Ala. 1984)). I do not find that the circumstance presented in this case involving the misnaming of the named insured falls within this definition.

The result reached by the main opinion is nonetheless correct, in my view, on the ground that the reference in the insurance policy to "Har-Mar, Inc.," as the named insured is a latent ambiguity, because no such company exists, and that the trial court correctly discerned on the basis of parol evidence that the intent of the parties was for the insurance policy to insure Har-Mar Collisions, Inc.

I take this opportunity as well to express my concern regarding the framing by Scottsdale of one of its arguments in this case as a "standing" argument. Essentially, Scottsdale argues that Har-Mar Collisions, Inc., because it is not the named insured, lacks "standing" to bring its claims. That is not the case. The issue, were it not mooted as explained in the main opinion, would not be one of "standing" but simply whether Har-Mar Collisions, Inc., had a cognizable claim against Scottsdale under the applicable facts and law. As this Court explained in Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31 (Ala. 2013):

> "[T]he concept of standing is used to differentiate between those complaints regarding governmental action that are shared generally by the citizenry and that therefore must be addressed politically and those complaints that reflect a sufficient specific injury and consequent adverseness to make for a

> 'case' that is within the purview of the judicial branch. Accordingly, the concept appears to have no necessary role to play in respect to private-law actions, which, unlike public-law cases (for example, a suit against the Secretary of Interior to construe and enforce an environmental regulation designed to protect wildlife), come with established elements that define an adversarial relationship and 'controversy' sufficient to justify judicial intervention. In private-law actions (e.g., a claim of negligence or, as here, a statutory claim for ejectment), if the elements are met, the plaintiff is entitled to judicial intervention; if they are not met, then the plaintiff is not entitled to judicial intervention. Everything necessary to justify judicial intervention, by definition, inheres in those elements that we say constitute a 'cause of action' in and by our courts. ... At a very fundamental level, the concept of standing is already embodied in the various elements prescribed, including the common requirement of proof of a sufficient existing or threatened injury.
>
> "Professors Wright and Miller are just two of the commentators who have recognized that the concept of standing was formulated by the United States Supreme Court in the field of 'public law' -- constitutional or other challenges to the actions of officials or administrative agencies -- and is out of place in private-law cases."

159 So. 3d at 44 (referencing 13A Charles Alan Wright, Arthur K. Miller, and Edward H. Cooper, Federal Practice & Procedure § 3531 (2008)) (emphasis added); see also Whitty v. Montgomery Cty., 141 So. 3d 1015, 1021 (Ala. 2013) (noting that, in BAC, "this Court rejected the notion that questions such as those

raised by the defendants ... present a 'standing' issue rather than a 'cause of action' issue").

This is not the first time since this Court's decision in BAC that counsel in a case before this Court has presented a brief making a "standing" argument that fails to account for our recent precedents as to the inapplicability of "standing" to private-law actions. I encourage members of the bench and bar to be mindful of those precedents.

B. The appeal of Har-Mar Collision, Inc.: case no. 1141230

As to the money judgment against Scottsdale in favor of Har-Mar Collisions, Inc. (hereinafter referred to as "Har-Mar"), I respectfully disagree with the conclusion in the main opinion that Scottsdale was not entitled to a setoff in the amount of the settlement payment made by Auto-Owners Insurance Company and Owners Insurance Company (hereinafter referred to as "Auto-Owners") to Har-Mar. The main opinion relies for this conclusion on Alabama Farm Bureau Mutual Casualty Insurance Co. v. Williams, 530 So. 2d 1371 (Ala. 1988). I submit that Williams provides an incomplete, if not inaccurate, statement of the law as to setoff and that that case is distinguishable from the present case in any event.

To begin, I disagree with the generalized denigration of the single-injury theory that I read in the 1988 opinion of this Court in Williams and with the main opinion's reliance on, or embracement of, the Williams Court's suggestion that the fact of a single injury is no basis for disallowing additional or double recovery by a plaintiff. As a general rule, I believe our jurisprudence should, and actually does, take heed of the fact that a plaintiff suffering from a single, indivisible injury may not recoup a windfall of more than the amount of his or her injury by recovering from multiple defendants for the same loss. Thus it is that a joint tortfeasor is entitled to a setoff or credit of another joint tortfeasor's payments to the plaintiff for the same injury.

> "Appellant on rehearing states the proposition as follows:
>
> > "'In view of Alabama law which permits no right of contribution among joint tort-feasors the plaintiff is at liberty to execute against either defendant and the other defendant has no right to set off or claim a credit by way of contribution.'
>
> "This statement is not a correct statement of the law of contribution between joint tort-feasors. This principle is only applicable to an action to enforce contributions between the joint

> tort-feasors. It is entirely inaccurate to say that a joint tort-feasor cannot claim credit as against the plaintiff for any sums paid her by another joint tort-feasor.
>
> "A plaintiff may not sue tort-feasors jointly, recover judgment against both and recover the full amount of the judgment from both. Such plaintiff may recover for her single injury, though proximately caused by joint tort, only once. If either tort-feasor pays the judgment, recovery may not be had from the other. This principle is made clear in the first paragraph of the opinion in the case cited by appellant -- Gobble v. Bradford, 226 Ala. 517, 147 So. 619 [(1933)].
>
> "The defense of no contribution as between joint tort-feasors is available only in actions seeking such contribution between such joint tort-feasors."

Boles v. Steel, 48 Ala. App. 268, 272, 264 So. 2d 191, 194 (Civ. App. 1972) (emphasis added); see also, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 348 (1971) ("It is settled that entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment.").

Similarly, two insurance companies insuring the same loss are afforded by law the right of pro rata contribution:

> "If the policies of two insurance companies are in force at the date of the loss and the status of

> the two insurers is that of insurers of the same property of the same insured against the same hazard, they are each proportionately and severally liable for the loss at the ratio which the amount of their respective policies bears to the whole insurance covering the property against the perils involved."

Nationwide Mut. Fire Ins. Co. v. Wilborn, 291 Ala. 193, 200-01, 279 So. 2d 460, 466 (1973). Resort to this general principle is typically unnecessary because, as in the present case, insurance companies normally expressly contract for the right to reduce loss payments to an insured based on payments the insured receives from other insurers for the same loss.

Even when an action pairs as defendants an insurer and an unrelated tortfeasor, the law provides the principle of equitable subrogation. See, e.g., McGuire v. Wilson, 372 So. 2d 1297, 1300 (Ala. 1979) ("'The general rule is that when an insurer pays the insured in accordance with the insurance contract for a loss of property proximately resulting from fire caused by the actionable misconduct of a third party, the insurer becomes, by the doctrine of equitable subrogation, the owner, pro tanto, of the claim of the insured against the third party. ... The equity of such principle is said to be that the insured has only one claim and is entitled to one

payment only, and that the loss should ultimately fall on the third party who caused it.'" (quoting City of Birmingham v. Walker, 267 Ala. 150, 154, 101 So. 2d 250, 252 (1958))). Here too, of course, resort to the relief afforded by the law (in this case, equitable subrogation) is rarely necessary given the fact that most insurers include in their insurance policies express contractual provisions entitling them to subrogation rights vis-à-vis such a third party.

The problem in Williams is that there is no acknowledgment or discussion of the mechanism generally afforded by the law to prevent a double recovery as to a single injury as between an insurer and a third-party tortfeasor, i.e., subrogation. And absent a contractual provision in the Farm Bureau policy allowing Farm Bureau to reduce its loss payment by way of setoff of amounts paid by the third-party tortfeasor, the result in Williams may have been correct.

But even to the extent Williams may have correctly discussed the pertinent law applicable to the facts of that case, Williams did not purport to address under what circumstances an insurance company is entitled to a setoff or

credit for payments made by another insurance company. Williams involved claims against a single insurance company under a contract of insurance and a tortfeasor, the plaintiffs' mortgage company.

In Williams, the Williamses' fire-insurance policy with Farm Bureau lapsed because their mortgagee, First Federal Savings and Loan Association of Jasper, failed to pay the policy premiums from the insurance-premium escrow First Federal had collected from the Williamses. First Federal ceased paying the premiums after Jimmy Holderfield, an agent for Farm Bureau, advised First Federal to cease paying the premiums until he advised it differently. Thereafter, in violation of First Federal's internal policies, it failed to ascertain whether the Williamses' home had fire-insurance coverage. The Williamses continued to make escrow payments to First Federal that included amounts intended for use as premiums for fire insurance, but First Federal failed to pay those premiums to Farm Bureau. After the Williamses' house was destroyed by fire, they filed an insurance claim with Farm Bureau; Farm Bureau denied coverage. The Williamses sued, alleging breach of contract and fraud against Farm Bureau and

its agent, Holderfield, for failing to pay their loss claim and against First Federal alleging negligence and breach of contract in failing to pay the premiums on the policy when the premiums came due.

Shortly before trial, First Federal was dismissed from the case pursuant to a pro tanto settlement agreement between the Williamses and First Federal. As a condition of the settlement, First Federal agreed to waive any claim it might have to any moneys to be recovered from Farm Bureau. The case went to trial against Farm Bureau, and the jury returned a verdict in favor of the Williamses on their breach-of-contract claim; the trial court subsequently entered a judgment against Farm Bureau in the amount of $74,800, plus interest. See 530 So. 2d at 1372-73. Just as First Federal waived any claim to moneys to be paid by Farm Bureau, there is no mention in Williams of Farm Bureau's pursuing a subrogation claim as to the payments made by First Federal.

The issues in Williams were explained by the Court as follows:

> "At trial, Farm Bureau made an offer of proof .... That offer ... showed that the pro tanto agreement released First Federal from liability ... for the sum of $46,337.06. First Federal agreed to

apply that amount against the mortgage indebtedness it had outstanding on the Williamses' property. The outstanding indebtedness at that time was $46,337.06, and thus, the mortgage debt was extinguished. Furthermore, First Federal disclaimed any interest in any proceeds recovered by the Williamses in their pending action against Farm Bureau and Holderfield. The trial court denied this offer of proof.

"Farm Bureau argues that it is entitled to plead and prove the existence of the pro tanto settlement in order to mitigate its liability. Appellant reasons that the liability and obligations of First Federal and itself are joint and, therefore, because the plaintiffs suffered only one injury, that it should be allowed to produce as evidence the fact of the partial satisfaction to mitigate or reduce the damages for which it ultimately may be found liable, just as in the case of joint tort-feasors. See generally, Williams v. Colquett, 272 Ala. 577, 133 So. 2d 364 (1961); Steenhuis v. Holland, 217 Ala. 105, 115 So. 2 (1927).

"Appellees, the Williamses, argue that the obligations under the respective contracts of First Federal and Farm Bureau are separate and distinct. They conclude that the evidence of the pro tanto release was properly excluded because First Federal was not a party to the contract of insurance.

"We are of the opinion that appellant's joint liability theory must fail for the simple reason that there is no evidence that appellant and First Federal either undertook or assumed any joint obligation toward the Williamses. We agree with the Williamses that the obligations owing them from Farm Bureau and First Federal are separate and distinct. The evidence shows that Farm Bureau contracted with the Williamses to provide fire insurance on their house. On the other hand, the only obligation assumed by First Federal was to act as an escrow

> agent for the Williamses for the payment of the insurance premiums on their home. Furthermore, we do not accept appellant's argument that if the breach of different contractual obligations produces only one injury then evidence of a pro tanto settlement agreement should be allowed into evidence. The appellant has not cited this Court to any authority to support such a proposition."

530 So. 2d at 1373 (emphasis added).

Importantly, then, all that occurred in Williams is that this Court, in the face of an absence of cited authority to support its doing so, refused to allow a setoff of payments made by a third-party tortfeasor against a sum an insurance company specifically obligated itself by contract to pay to the insured in the event of a particular type of loss.[10] Most importantly for present purposes, no issue was presented in Williams as to the propriety of a setoff between two insurance

---

[10]Indeed, for all that appears, the disallowance of the setoff in Williams might be explained simply on the ground that the value of the insured's total loss was an amount equal to or greater than the combined amounts paid by the insurance company and the third-party tortfeasor. If this is correct, it would explain why First Federal agreed to settle at a cost of only approximately $46,000 and to waive any right to receive any part of the insurance proceeds. For reasons discussed hereinafter, I do not agree.

companies that had insured the Williamses against the same loss.[11]

In a case such as Williams, where an insurance company undertakes a specific contractual liability to the plaintiff in the event of a specified loss, if there is to be a safeguard against the insurance payment overlapping with moneys that might be received by the insured from a third party for that same loss, that safeguard is to be either subrogation, interposed either by law or by the terms of the insurance contract itself, or some other contractually agreed upon reduction in liability in the event of a payment by a third party of all or some of the same loss. And, as noted, I see no reference in Williams to the issue of subrogation or, in particular, any attempt by Farm Bureau in that case to invoke a subrogation right. Likewise as to protection against overlap, i.e., windfall, based on third-party payments, the insurer in Williams could have provided for a reduction in its liability based on any payment from a third party, whether in

[11]The main opinion premises its holding on its conclusions that the loss insured by Scottsdale and the loss insured by Auto-Owners are not the same loss. I do not agree. See discussion, infra.

the form of a payment of the mortgage or otherwise. But no such policy provision is discussed in Williams.

In contrast to the relationship of the parties and the liabilities presented in Williams, the present case entails insurance-contract obligations of two insurance companies that issued policies that, to some extent, both undertake to provide insurance coverage to Har-Mar for the amount of rent it would owe Hartung Commercial Properties, Inc. ("Hartung"), in the event a fire caused by Har-Mar destroyed the premises Har-Mar leased from Hartung. See discussion, infra. In the situation, like here, where two insurance companies provide overlapping coverage, the law is different than the law applied in Williams. Of course, there well can be, and often are, express setoff or liability-reduction clauses in one or both of the policies. But even in the absence of express setoff provisions in a policy, the law overlays such an arrangement as noted above. See Nationwide Mutual Fire Insurance Co., supra. Moreover, as the main opinion notes, the Scottsdale policy in this case provides that, in the event there is a second insurance carrier (Auto-Owners in this case) as to a covered loss, the Scottsdale policy will pay for only

<u>the amount of the loss that is in excess of the amount paid by the other insurance company. I therefore find</u> Williams <u>inapposite.</u>

Further, as to whether Har-Mar is entitled to reversal of the trial court's judgment on the ground that Har-Mar did <u>not</u> obtain a double recovery based on overlapping coverage, I note that it cannot be determined what losses make up the $101,054.40 jury verdict at issue and that the inability to make that determination must be laid at Har-Mar's feet. Specifically, the jury's verdict against Scottsdale appears to be attributable in substantial part, if not entirely, to the "business-income" coverage in the Scottsdale policy, which included Har-Mar's operational expenses and had a $120,000 coverage limit. As to its operational-expenses claim, at trial Har-Mar presented evidence of rent it owed Hartung, the lessor, at the time of the fire and that it paid Hartung after the fire. But, as hereinafter noted, Hartung's action against Har-Mar, i.e., the action that resulted in the Auto-Owners' settlement, was by Har-Mar's own admission an action seeking loss of rents. Thus, Har-Mar, having received compensation from Auto-Owners for its liability to Hartung for rent,

nevertheless chose to introduce evidence at trial of rental obligations it owed Hartung in an effort to justify a recovery against Scottsdale. Having thus invited a potentially erroneous verdict, Har-Mar is not now in a position to complain about the trial court's decision to set off the payment previously received from Auto-Owners against the amount awarded by the jury.

To be more specific, at trial Har-Mar presented testimony that it had a rent obligation to Hartung of $4,200 per month. Har-Mar also presented testimony that, when the fire occurred, Har-Mar owed Hartung "over $50,000.00 in rent" arrearage. During the colloquy discussing the setoff, which occurred before the close of the evidence, Har-Mar conceded that Hartung's action against Har-Mar -- the basis for Har-Mar's recovery against Auto-Owners -- was for loss of rents: "What Hartung sued Har-Mar for was lost rents. You did something that caused us to lose rent. We were getting rent, $4,200 a month, on our buildings. And now because of you setting the buildings on fire, we don't get any more rent."[12]

---

[12]According to testimony of Wayne Hartung, which Har-Mar presented at trial, the rental agreement between Har-Mar and Hartung initially was required by Hartung's mortgagee, which

Nevertheless, during its case-in-chief, Har-Mar presented testimony that part of its claim against Scottsdale was for operating expenses, including rent payments:

> "Q: ... In addition to rent, utilities, payroll and other recurring expenses of the business, can you tell the jury approximately how much that would have been?
>
> "A. [Wayne Hartung:] I know that there was a breakdown of the -- what they were calling business interruption.
>
> "Q. Okay.
>
> "A. Uh, and I know that that capped at 120. And Scottsdale had their own forensic firm that did that, and it far exceeded 120 --
>
> "Q. Okay.
>
> "A. -- because the amount of time we were shut down."

Har-Mar likewise presented testimony that it continued to make rent payments to Hartung after the fire. But it is not

"wanted a lease showing that even though I owned both companies, one company was going to pay the other rent so that Hartung ... would in fact have an income, at least enough to pay the mortgage note." Thus, it is clear that the "rent" payments were simply a disguised way of protecting the mortgagee's interests. And, as the main opinion notes, Scottsdale paid off the mortgage after the fire. In light of the nature of the relations between the single-owner entities at issue, Har-Mar and Hartung, it is questionable whether any past-due rents or post-fire rents could even legitimately be said to be owing by Har-Mar.

possible from the record to discern the total amount of rent Har-Mar claimed as operating expenses or whether such rents were attributable to past-due rent or rent paid after the fire, or what the amounts of the other operating expenses that Har-Mar claimed were.[13] The record merely contains substantial evidence that the total operating expenses Har-Mar claimed as business-income losses under the Scottsdale policy, including rent, exceeded Scottsdale's policy limits of $120,000.

After Har-Mar presented its case-in-chief, the trial court entertained arguments as to the issue of setoff, which the parties had agreed would not be discussed with the jury. At one point during the parties' rather confusing arguments as to whether setoff was proper, the trial court stated to Har-Mar's counsel: "Well, it would certainly be easier if there was more clarity in your damages claims than there really was at trial. I can tell you that. I hadn't even

[13]The testimony presented by Har-Mar as to the operating expenses is merely general in nature. For example: "We had vendors. I think we had $30,000 being billed to us from Sherwin Williams, the paint automotive supplier"; "we started getting hit with the power bill, the gas bill, you know, mortgage notes, insurance, an array of expenses, and we kept payroll going for several months as we were working with the insurance company on this claim."

thought about the issue of the offset being different." Thereafter, the trial court indicated that it would allow a setoff as to the Auto-Owners' settlement payment.

Upon resumption of the trial, Scottsdale and the other defendants rested their case without submitting any evidence beyond that offered during Har-Mar's case-in-chief. Har-Mar then requested that it be allowed to offer "rebuttal" evidence, but the trial court denied that request. Har-Mar did not make a proffer as to what the "rebuttal" evidence might concern. Further, Har-Mar, with knowledge that the trial court would apply a setoff as to the Auto-Owners' settlement and that Har Mar had submitted evidence as to rent expenses as to which the setoff would be applicable, did not request a special verdict or general verdict accompanied by answers to interrogatories as to damages. See Rule 49(b) and (c), Ala. R. Civ. P.

As noted, the jury returned a verdict awarding Har-Mar $101,054.40 against Scottsdale under the Scottsdale policy. The postverdict colloquy includes the following:

> "THE COURT: ... The verdict would be adjusted to zero based on the amount of the offset; so --

> "[Counsel for Har-Mar]: Judge, that's not correct. That money was paid to a different corporation. As Ms. Clement has pointed out, these were all separate corporations. There was only $5,000 of that allotted to Har-Mar Collisions, Inc. and that was for a different coverage. It's not for the same damages. That's why there were two policies.
>
> "THE COURT: Okay. That's why I think I previously indicated that was my belief and that's what I was going to rule; so I am going to stay consistent with what I had previously said; so I am going to offset the whole amount of the prior pro tanto with Auto-Owners and that will effectively reduce this verdict to zero."

Based on the foregoing, I conclude that the trial court correctly applied a setoff. Based on Har-Mar's own actions, the jury was presented with evidence as to damages that were duplicative of the loss-of-rents settlement previously paid by Auto-Owners. After the trial court informed Har-Mar that it would allow a setoff, Har-Mar was fully capable of protecting its interests by requesting a special verdict or a general verdict accompanied by answers to interrogatories as to damages, which it failed to do. Instead, Har-Mar invited error as to the lack of specificity as to its damages claim, and that error has left us unable to determine as a matter of law that the jury award was for damages that were not subject to setoff. Cf. CNH Am., LLC v. Ligon Capital, LLC, 160 So. 3d

1195, 1204 (Ala. 2013) ("[F]ollowing the close of evidence, CNH submitted a proposed verdict form that again treated Ligon's and HTI's individual fraudulent-suppression claims as a single collective claim. It was not until after the verdict was returned and a judgment entered thereon that CNH argued for the first time, in its postjudgment motion, that Ligon had a separate fraudulent-suppression claim, the elements of which were not proven even if HTI proved the elements of its own separate claim."). The lack of clarity in the record as to the nature of the damages sought by Har-Mar and in turn awarded by the jury inures, at least in this case, to Har-Mar's detriment.

I also note that the trial judge, who heard all the evidence at trial and received argument as to the nature of the payment by Auto-Owners, concluded that a setoff was appropriate. He did not explain his reasons. In the absence of an indication in the record otherwise, where the trial court fails to make specific factual findings or to explain the legal rationale for its ruling, and yet there is sufficient evidentiary support for factual findings that would support its judgment and a proper legal theory upon which such

findings will yield the judgment entered, we will assume the court made such findings and that it applied the correct legal principles thereto in reaching its judgment. See, e.g., Merchants Bank v. Head, 161 So. 3d 1151, 1154 (Ala. 2014); Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So. 2d 375, 378 (Ala. 1992); see also Clark v. Albertville Nursing Home, Inc., 545 So. 2d 9, 13 (Ala. 1989) ("The trial court's judgment in such a case will be affirmed, if, under any reasonable aspect of the testimony, there is credible evidence to support the judgment.").

Further still, it is up to the appellant to make a record that will support his or her appeal. If Har-Mar had a problem with setoff, it should have sought to establish at trial or in its postjudgment motion, based on evidence presented to the jury, why the $101,054.40 could not be attributed to the same loss for which the Auto-Owners' settlement had been paid. See Zaden v. Elkus, 881 So. 2d 993, 1008 (Ala. 2003) ("The party seeking to place the trial court in error must establish in the record an adequate predicate for our review.").[14]

---

[14]Likewise, had the trial court ruled against Scottsdale as to the issue of setoff, it would be in the same position as Har-Mar, i.e., Scottsdale would have been required to take

In sum, Har-Mar makes general assertions on appeal that it suffered damage in excess of the policy limits under the Scottsdale policy and that it has not been "made whole." Har-Mar, however, directs us to no part of the record that establishes the specific breakdown of the $101,054.40 verdict against Scottsdale or on what basis we can determine how much of that verdict cannot be attributed to losses covered by the payment made by Auto-Owners. Accordingly, Har-Mar has not shown enough to warrant a reversal of the trial court's judgment.

---

actions such that it could establish both to the trial court and on appeal that the verdict actually included an award for damages already paid Har-Mar by Auto-Owners.