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**Sep 06 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

CASE NO. 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of others  
similarly situated.....Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50, .....Defendants,

D.R. Horton, Inc., .....Third-Party Plaintiff,

vs

A&J Framing, Inc.;;  
A-Z, Inc.;;  
AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;  
Allpro Textures, LLC;  
Alpha E.M.C.;;  
Alpha Omega Construction Group, Inc.;;  
American Concrete And precast, Inc.;; A/K/A ACP Concrete, Inc.;;  
Atlanta Floor Designs Center;  
A Grade Above Others, LLC;  
BFK Builders, Inc.;;  
BMC East LLC D/B/A Coleman Floor, LLC;  
Brand-Vaughn Lumber Co, Inc.;;  
Bravo Carpenters, Inc.;;  
Builders Designhouse, LLC;  
Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;;  
Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale  
Industries, Inc. D/B/A Gale Contractor Services;  
Cannaday Siding & Gutter, Inc.;;  
Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;;

CBU Enterprises, Inc.;  
 Cortes Painting, LLC;  
 CPI Security Systems, Inc.;  
 Dom Group, LLC;  
 Dupree Plumbing Company, Inc.;  
 Ferguson Enterprises, Inc.;  
 Five Star Construction Inc.;  
 Five Star Foundations, LLC;  
 Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II;  
 GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.;  
 General Shale Brick Inc.;  
 Get Floored, LLC;  
 Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;  
 Installed Building Products, LLC A/K/A Installed Building Products II, LLC;  
 IBP Asset, LLC D/B/A Blue Ridge Building Products;  
 JLS Masonry, Inc.;  
 Kings Landscaping, LLC;  
 L&M Electric, Inc.;  
 Lade-Danlar, Inc.;  
 Landshapers, LLC;  
 Lansing Building Products, Inc.;  
 Long Heating & Air Conditioning, Inc.;  
 M&L General Construction, LLC, A/K/A M&L General Construction, Inc.;  
 M&L Reyna Construction, LLC;  
 M&M Foundations, LLC;  
 Manale Landscaping, LLC;  
 MJ Cowboys, LLC;  
 Nazareth Builders, LLC;  
 NB Contractors, LLC;  
 Poinsett Development, LLC;  
 Poinsett Homes, LLC;  
 P&L Enterprises, LLC;  
 P&T Construction, Inc., A/K/A P&T Construction, Inc.;  
 Probuild Company, LLC A/K/A Probuild Holdings, Inc.;  
 Rite Rug Co.;  
 Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.;  
 Sandlapper Concrete, LLC;  
 Silver Line Building Products Corporation;  
 Sodfather Inc., Landscape Contractors;  
 Stock Building Supply, LLC;  
 Topbuild Home Services., Inc., A/K/A Gale Contractors Service;  
 Tucker Materials, Inc., A/K/A Gypsum;  
 UTM Enterprises, Inc;  
 and  
 Willow Tree Landscaping, Inc .....Third-Party Defendants,

and

Aaron D. Peris;  
Harrelson Painting, LLC;  
Huttig Building Products; et al ..... Fourth and Fifth-Party  
Defendants and Plaintiffs,

D.R. HORTON, INC..... Appellant/Petitioner.

Natalie Zitek, individually, and on behalf of others  
similarly situated;

Jane Doe #1-10; and John Doe #1-50;

A&J Framing, Inc.;;  
A-Z, Inc.;;  
AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;  
Allpro Textures, LLC;  
Alpha E.M.C.;;  
Alpha Omega Construction Group, Inc.;;  
American Concrete And precast, Inc.;; A/K/A ACP Concrete, Inc.;;  
Atlanta Floor Designs Center;  
A Grade Above Others, LLC;  
BFK Builders, Inc.;;  
BMC East LLC D/B/A Coleman Floor, LLC;  
Brand-Vaughn Lumber Co, Inc.;;  
Bravo Carpenters, Inc.;;  
Builders Designhouse, LLC;  
Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;;  
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Cannaday Siding & Gutter, Inc.;;  
Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;;  
CBU Enterprises, Inc.;;  
Cortes Painting, LLC;  
CPI Security Systems, Inc.;;  
Dom Group, LLC;  
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Five Star Construction Inc.;;  
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General Shale Brick Inc.;;

Get Floored, LLC;  
Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;  
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Toribio Islas; and  
Alejandro Soto..... Respondents.

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**Petition for Writ of Supersedeas**

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Appellant D. R. Horton, Inc. moves for an order imposing a supersedeas to delay the trial of this case pending final decision of its appeal of two orders granting summary judgment. Notice of Appeal was served on September 1, 2023. After hearing arguments that day, the Hon. R. Scott Sprouse declined to delay the trial in a verbal order delivered from the bench. Horton filed a motion for reconsideration, which was denied by the trial court verbally from the bench yesterday. The trial is scheduled for a month. Testimony has just begun. The orders granting summary judgment and transcript of the September 1 order are included with this writ of supersedeas.

Appellant Horton is a developer of single-family homes. The case involves alleged defects in approximately 220 homes developed and sold by it in the years 2012 to 2017. Horton did not self-perform the construction of the homes. Construction, including site work, was done entirely by contractors for the various trades involved in home construction. In its construction contracts Horton required each of its contractors to indemnify it for claims of faulty workmanship and materials and defend it against such claims or pay its attorneys' fees for defense. No contractor has provided a defense to Horton.

The two orders granting summary judgment on appeal are in favor of two of Horton's contractors on their construction contracts. One is Builder Services Group, which installed garage doors, gutters, downspouts, and insulation. The other is IBP Assets, which installed gutters and insulation. Judge Sprouse held the contractual indemnities to be entirely unenforceable.

The appeal also includes three other orders, which may be either interlocutory or, because of their profound effects, immediately appealable or final orders. Either way, they are appealable now. "Courts have made a practice of accepting appeals of denials of interlocutory orders not immediately appealable when these appeals are companion to issues that are reviewable." *Brown v. County of Berkeley*, 366 S.C. 354, 363, n. 5, 622 S.E.2d 533 (2005). If not final, the orders have "a sufficient nexus or companionship to justify this Court's exercise of immediate appellate review." *Id.* These three orders involve novel issues: (1) prejudicial bifurcation of liability among parties rather than neutral bifurcation between liability and damages, (2) class certification without regard to commonality of liability or damages, and (3) severe limitation of discovery concerning liability and damages. These orders are likewise included with this writ of supersedeas.

Granting a writ of supersedeas lies within the discretion of the appellate court. ("...[t]his Court must determine if we should exercise our discretion ...") *State v. Smith (In re Decker)*, 322

S.C. 212, 214, 471 S.E.2d459 (1995) “In light of these novel questions” the South Carolina Supreme Court granted Decker’s requested supersedeas. *Id.* Writs should also be granted to avoid “an irreparable injury or the miscarriage of justice.” *Kuhn v. Electric Manufaturig & Power Co.*, 92 S.C. 488, 75 S.E. 791 (1912); *Andrews v. Sumter Commercial & Real Estate Co.*, 87 S.C. 301, 69 S.E. 604, 606 (1910). Also, in considering such a writ the “judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” *Rule 241(c)(2) SCACR STAY AND SUPERSEDEAS IN CIVIL ACTIONS.* “Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal.” *Rule 205 SCACR.* The jurisdiction of the lower court is limited to “matters not affected by the appeal.” *Id.*

The opinion in *Tillman v. Oaks*, 398 S.C. 245, 728 S.E.2d 45 (Ct.App. 2012), written by then Chief Judge Few, now Justice Few, lays out the critical, and often misunderstood, interplay between *Rules 241 and 205.*

“This is the purpose of a stay under Rule 241—to determine whether the appealed *order* may be carried out or enforced—not to determine whether the *action* may proceed in the lower court while the appeal is pending. The second question is whether the lower court may proceed with the action during the pendency of the appeal, and its answer is governed by Rule 205, SCACR. \*\*\* Thus, the existence or nonexistence of a stay under Rule 241 does not control the family court’s power to proceed with the action and address matters not affected by the appeal. Rather, the lower court’s power to proceed is determined by whether the issue sought to be litigated in the lower court during the appeal is a ‘matter affected by the appeal’ under Rules 205 and 241(a).” *Id.*

The fact that *Tillman* was an appeal from the Family Court rather than the Circuit Court is irrelevant. Rule 205 is not so limited, and, as Justice Few noted, the Family Court exceptions to automatic stay of *orders* in Rule 241 were not involved in the question of whether the lower court *action* could proceed under Rule 205.

The summary judgments alone are sufficient to require that the trial be halted. The reason is that under Rule 205 they affect the rest of the case. This is because there are other identical or virtually identical contractual indemnifications with six other contractors in favor of Horton still in the case. These indemnify Horton against both claims of homeowners and the expenses of defense, including attorneys' fees. A verdict in Horton's favor will require allocation of these items. Without supersedeas, however, the two contractors that received summary judgment in their favor will not be in the case, which means that they will not pay. In that event, Horton will not receive what it is due from them, or the other contractors will be assessed more than their respective fair shares. That is clearly unjust.

Added to this is the injustice of a bifurcated trial. Bifurcation typically separates liability from damages for a single defendant or group of defendants. That is not how this trial is bifurcated. Despite the fact that Horton contracted with other companies to build the houses—and has sued those companies as third-party defendants—in the first phase of the bifurcated trial, Horton will be the sole defendant. It has been set up as the sole target. If the jury believes that there is anything wrong with construction of the houses, it has only one defendant to blame. That defendant is Horton. If it blames Horton, the third-party defendants that caused the harm will then escape equitable indemnification of Horton on the theory that the jury has found Horton at fault. Counsel is unaware of any case in South Carolina that allows such a bifurcated trial. It is not only unjust. It is also a novel issue.

The lower court's refusal to decertify the class is also unjust. That is because the class in this case is not certified as classes are typically and correctly certified. Classes are typically certified according to common liability, that the same act or delict of the defendant caused harm to the plaintiff class. A classic example is product liability, where, for example, a certain drug harmed a multitude of plaintiffs. Another classic example is securities fraud involving a publicly traded company, where, for example, its prospectus was misleading to thousands of investors. That is not the type of class certified in this case. Liability was originally spread among virtually every contractor involved in the construction of the homes, as well as Horton. There was no commonality of liability. With six contractors plus Horton remaining, there is still no commonality of liability. And Horton did not even perform the construction at issue, but it is put into a class action with those who did. The law in South Carolina is clear that a general contractor is not automatically liable because its subcontractors are found to be negligent. Nor is there commonality among the plaintiff class members. The court has created two classes. One involves direct purchasers from Horton. The other involves homeowners who purchased from other homeowners and, therefore, have different issues concerning liability and damages. In addition, there are statutes of limitation issues throughout both classes, which Horton has been unable to develop given the limited discovery allowed. Based on the ten class member depositions that were allowed, in addition to the class representative, Horton was able to determine that certain affirmative defenses were available to include but are not limited to statute of limitation and waiver defenses. Despite bringing this issue before the lower court as a basis for pursuing discovery with the remaining class members, Horton has been prevented from doing so and as a result has been precluded from providing a proper defense and denied its due process rights. Again, counsel is

unaware of any case in South Carolina that allows such a trial under these circumstances. It is not only unjust. It also involves novel issues.

The lower court's extreme limitation of discovery infiltrates class certification and for that reason affects the trial. Although there are over 200 homes in the plaintiff class, the lower court restricted discovery to only ten class members plus the class representative. That sampling hamstrung Horton in its challenge to the class. Accordingly, the trial is a matter affected by the appeal of the discovery orders.

The restrictive discovery orders have also undermined Horton's ability to cross-examine the plaintiffs' witnesses. That affects the trial. They also serve as the foundation for class counsel to present its case not through direct testimony of homeowners, but rather through "experts" who extrapolate both liability and damages from facts that are withheld from Horton. Once again, counsel is unaware of any South Carolina case that allows such a trial. It is both novel and unjust.

Finally, in the interest of judicial economy, the Court should grant the writ of supersedeas. By addressing at this time the issues raised in the Notice of Appeal, the Court can avoid two appeals and possibly two trials, as well. Counsel well understands that the timing of the writ is not ideal, but it did not choose the timing of the motions for summary judgment, nor the court's order granting them. It was required to appeal when it did or otherwise lose the right to appeal. The silver lining, however, is that the timing of summary judgment now provides the Court the opportunity avoid a waste of judicial resources.

For all the foregoing reasons, Appellant Horton prays that the Court grant its writ of supersedeas, and that the trial be held in abeyance pending final decision of its appeal.

**SIGNATURES TO FOLLOW**

September 6, 2023  
Greenville, SC

Respectfully Submitted,

*s/ Carl F. Muller*

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*s/ John T. Crawford Jr.*

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*Attorney for Fourth-Party Defendant Zenon Guterrez Antunez*

**RECEIVED**  
**Sep 06 2023**  
**SC Court of Appeals**

VERIFICATION

Personally appeared before me Cammy Kennedy, who, upon being duly sworn states and deposes that:

I am Cammy Kennedy, employed by the Defendant/Appellant D. R. Horton, Inc. as Assistant Vice President and authorized to sign this verification on its behalf. I am generally familiar with the facts described in the attached Writ of Supersedeas. The facts described therein are true and correct to the best of my knowledge and belief.

Executed on September 5, 2023

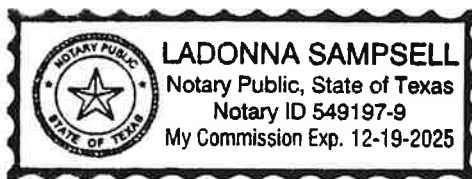
Cammy Kennedy

SWORN TO before me this 5 day of September, 2023.

Ladonna Sampsell

Notary Public for Texas

My Commission Expires: 12/19/25



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Sep 06 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

CASE NO. 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of others  
similarly situated.....Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50, .....Defendants,

D.R. Horton, Inc., .....Third-Party Plaintiff,

vs

- A&J Framing, Inc.;
- A-Z, Inc.;
- AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;
- Allpro Textures, LLC;
- Alpha E.M.C.;
- Alpha Omega Construction Group, Inc.;
- American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.;
- Atlanta Floor Designs Center;
- A Grade Above Others, LLC;
- BFK Builders, Inc.;
- BMC East LLC D/B/A Coleman Floor, LLC;
- Brand-Vaughn Lumber Co, Inc.;
- Bravo Carpenters, Inc.;
- Builders Designhouse, LLC;
- Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;
- Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A Gale Contractor Services;
- Cannaday Siding & Gutter, Inc.;
- Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;
- CBU Enterprises, Inc.;
- Cortes Painting, LLC;
- CPI Security Systems, Inc.;

Dom Group, LLC;  
Dupree Plumbing Company, Inc.;  
Ferguson Enterprises, Inc.;  
Five Star Construction Inc.;  
Five Star Foundations, LLC;  
Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II;  
GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.;  
General Shale Brick Inc.;  
Get Floored, LLC;  
Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;  
Installed Building Products, LLC A/K/A Installed Building Products II, LLC;  
IBP Asset, LLC D/B/A Blue Ridge Building Products;  
JLS Masonry, Inc.;  
Kings Landscaping, LLC;  
L&M Electric, Inc.;  
Lade-Danlar, Inc.;  
Landshapers, LLC;  
Lansing Building Products, Inc.;  
Long Heating & Air Conditioning, Inc.;  
M&L General Construction, LLC, A/K/A M&L General Construction, Inc.;  
M&L Reyna Construction, LLC;  
M&M Foundations, LLC;  
Manale Landscaping, LLC;  
MJ Cowboys, LLC;  
Nazareth Builders, LLC;  
NB Contractors, LLC;  
Poinsett Development, LLC;  
Poinsett Homes, LLC;  
P&L Enterprises, LLC;  
P&T Construction, Inc., A/K/A P&T Construction, Inc.;  
Probuild Company, LLC A/K/A Probuild Holdings, Inc.;  
Rite Rug Co.;  
Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.;  
Sandlapper Concrete, LLC;  
Silver Line Building Products Corporation;  
Sodfather Inc., Landscape Contractors;  
Stock Building Supply, LLC;  
Topbuild Home Services., Inc., A/K/A Gale Contractors Service;  
Tucker Materials, Inc., A/K/A Gypsum;  
UTM Enterprises, Inc;  
and  
Willow Tree Landscaping, Inc .....Third-Party Defendants,

and

Aaron D. Peris;

Harrelson Painting, LLC;  
Huttig Building Products; et al ..... Fourth and Fifth-Party  
Defendants and Plaintiffs,

D.R. HORTON, INC..... Appellant/Petitioner.

Natalie Zitek, individually, and on behalf of others  
similarly situated;

Jane Doe #1-10; and John Doe #1-50;

A&J Framing, Inc.;

A-Z, Inc.;

AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;

Allpro Textures, LLC;

Alpha E.M.C.;

Alpha Omega Construction Group, Inc.;

American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.;

Atlanta Floor Designs Center;

A Grade Above Others, LLC;

BFK Builders, Inc.;

BMC East LLC D/B/A Coleman Floor, LLC;

Brand-Vaughn Lumber Co, Inc.;

Bravo Carpenters, Inc.;

Builders Designhouse, LLC;

Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;

Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A Gale Contractor Services;

Cannaday Siding & Gutter, Inc.;

Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;

CBU Enterprises, Inc.;

Cortes Painting, LLC;

CPI Security Systems, Inc.;

Dom Group, LLC;

Dupree Plumbing Company, Inc.;

Ferguson Enterprises, Inc.;

Five Star Construction Inc.;

Five Star Foundations, LLC;

Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II;

GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.;

General Shale Brick Inc.;

Get Floored, LLC;

Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;

Installed Building Products, LLC A/K/A Installed Building Products II, LLC;

IBP Asset, LLC D/B/A Blue Ridge Building Products;

JLS Masonry, Inc.;  
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NB Contractors, LLC;  
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Poinsett Homes, LLC;  
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Promesa Flooring; and  
Vinny's Perfection Flooring, LLC;

Jesus Jimenez; and  
Jesus Robles Montez A/K/A Robles Construction ;

Toribio Islas; and  
Alejandro Soto..... Respondents.

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**APPENDIX TO PETITION FOR WRIT OF SUPERSEDEAS**

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STATE OF SOUTH CAROLINA )  
COUNTY OF ANDERSON )

IN THE COURT OF COMMON PLEAS )  
FOR THE TENTH JUDICIAL CIRCUIT )

C.A. No. 2019-CP-04-1942

Natalie Zitek, individually, and on behalf of all )  
others similarly situated, )

Plaintiff, )

vs. )

D.R. Horton, Inc., Jane Doe #1-10; and, John )  
Doe #1-50, )

Defendant, )

\_\_\_\_\_  
D.R HORTON, INC., )

**ORDER**

Third-Party Plaintiff, )

vs. )

AJ LANDSCAPING & GRADING LLC, )  
A/K/A AJ LANDSCAPNG & GRADING, )  
INC; ALLPRO TEXTURES, LCC; ALPHA )  
OMEGA CONSTRUCTION GROUP, INC.; )  
AMERICAN CONCRETE AND PRECAST, INC., )  
A/K/A ACP CONCRETE, INC.; A&J FRAMING, )  
INC; ALPHA E.M.C; A-Z, INC.; ATLANTA )  
FLOOR DESIGNS CENTER; A GRADE ABOVE )  
OTHERS, LLC; BRAND-VAUGHAN LUMBER )  
CO., INC.; BKF BUILDERS, INC; BUILDERS )  
DESIGNHOUSE, LLC; BMC EAST, LLC D/B/A )  
COLEMAN FLOOR, LLC; BUILDERS )  
FIRSTSOURCE SOUTHEAST GROUP, LLC, )  
A/K/A BUILDERS FIRSTSOURCE, INC; )  
BRAVO CARPENTERS, INC.; CARYL )  
MECHANICS II, INC.; CARYL MECHANICALS, )  
INC.; CANNADAY SIDING AND GUTTER, INC;) )  
CORTES PAINTING, LLC; CBU ENTERPRISES, )  
INC.; CPI SECURITY SYSTEMS, INC.; DOM )  
GROUP, LLC; FERGUSON ENTERPRISES, INC. )  
;FIVE STAR CONSTRUCTION INC.; FIVE )  
STAR FOUNDATIONS, LLC; GALLOWAY- )  
BELL, INC.; A/K/A GALLOWAY-BELL, INC. II )  
BGET FLOORED, LLC; GBS BUILDING )  
SUPPLY-US LBM, LLC, A/K/A GBS )



- 3) The Motions deadline shall be extended to Friday, June 23, 2023.
- 4) The Defendant shall be allowed to reconvene the deposition of Nick Dalton, not to exceed three additional hours.
- 5) The Defendant shall be allowed to ask the witness about any community newsletters providing information about the lawsuit. However, any communications directly from legal counsel shall be deemed privileged. The witness may be questioned regarding the date on which legal counsel was retained.
- 6) The Defendant's request for further testing of the Zitek home is denied.
- 7) The Plaintiff's Motion to Quash as to other matters is granted.
- 8) The Court vacates its prior ruling on the IBP Asset, LLC d/b/a Blue Ridge Building Products' Motion for Summary Judgment as the Motion was already moot at the time of the Order. IBP Asset, LLC d/b/a Blue Ridge Building Products' active Motion for Summary Judgment shall be held in abeyance to allow responses to issues of material fact raised by the Plaintiff at the April 21, 2023 hearing.
- 9) The Defendant(s) shall not be allowed to issue surveys to Class Members.
- 10) Unless expressly modified by this Order, all previous orders remain in full force and effect.

AND IT IS SO ORDERED!

May 1, 2023

---

R. Scott Sprouse  
Judge, Tenth Judicial Circuit



Anderson Common Pleas

**Case Caption:** Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al  
**Case Number:** 2019CP0401942  
**Type:** Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-05-08 10:48:52 page 4 of 4

ELECTRONICALLY FILED - 2023 May 08 10:52 AM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CIVIL ACTION NO.: 2019-CP-04-01942

Natalie Zitek, et al  
PLAINTIFF(S)

DR Horton, et al  
DEFENDANT(S)

|   |   |
|---|---|
| <b>Submitted By:</b> the Court<br><b>Address:</b> | Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant<br>or <input type="checkbox"/> Self-Represented Litigant |
|---|---|

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- x **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

The Court took the Motions to Decertify under advisement after hearing arguments from counsel on Monday, July 17, 2023. The Court considered the arguments of counsel, the thorough briefing of the matter, the exhibits and the applicable law.

This Court previously has certified the class. Significant discovery has taken place since the issuance of the Honorable Cordell Maddox’s order on January 27, 2021. The Defendant, along with several other parties, have moved that the class be decertified due to new evidence that they allege shows that the Plaintiff’s home is distinct from the other members of the class and that the conditions necessary for classification under Rule 23 of the SC Rules of Civil Procedure are not present.

Extensive analysis of the various homes was presented to the Court both in the presentations and the various briefs filed. While the Court notes that there are many variances between the homes in the subdivisions, there are some common issues. Aside from the issues expressed at the hearing regarding whether a decertification in this case would in essence be in violation of the long-established rule that one circuit judge cannot overrule another, I find that there is sufficient commonality and typicality present in the case for a class action under Rule 23 to be appropriate. I find that the issues are sufficiently similar that the class action as ordered is a more efficient means of trying the case. Extensive evidence showing commonality in brickwork, stonework, landscaping, windows, doors and other areas was presented. The Court notes that there is evidence of commonality even in the evidence from some defense experts. There also is sufficient evidence of the typicality of the Plaintiff’s home to maintain the class. The long-established law is that every issue need not be identical with each class member. The individual differences in the homes, along with the sufficiency and accuracy of expert opinions are factual questions for trial.

Accordingly, the Defendant and Third/Fourth Party Defendants’ Motions to Decertify are DENIED.

ELECTRONICALLY FILED - 2023 Jul 19 4:03 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

**ORDER INFORMATION**

This order  ends  does not end the case.  
 Additional Information for the Clerk: \_\_\_\_\_

| <b>INFORMATION FOR THE PUBLIC INDEX</b>   |  |  |
|---|--|--|
| <b>Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.</b> |  |  |
| Judgment in Favor of<br>(List name(s) below)  | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
|   |  |  |
|   |  |  |
|   |  |  |
| If applicable, describe the property, including tax map information and address, referenced in the order:<br>_____<br>_____<br>_____  |  |  |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

\_\_\_\_\_  
 Circuit Court Judge

2752  
 \_\_\_\_\_  
 Judge Code

\_\_\_\_\_  
 Date





Anderson Common Pleas

**Case Caption:** Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al  
**Case Number:** 2019CP0401942  
**Type:** Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-07-19 15:47:52 page 4 of 4

ELECTRONICALLY FILED - 2023 Jul 19 4:03 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

CIVIL ACTION NO: 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., et al.,

Defendants.

**PROPOSED ORDER GRANTING BUILDERS SERVICES GROUP, INC. D/B/A GALE CONTRACTOR SERVICES' MOTION FOR SUMMARY JUDGMENT**

---

D.R. Horton, Inc.

Third-Party Plaintiff,

v.

AJ Landscaping & Grading, LLC a/k/a A J Landscaping & Grading, LLC, et al.

Third-Party Defendants.

---

ProBuild Company, LLC; et al.,

Fourth-Party Plaintiffs,

v.

Harrelson Painting, LLC, et al.,

Fourth-Party Defendants.

---

Nicholas Soto a/k/a Nicolas Soto, Individually and d/b/a Soto HVAC,

Fifth-Party Plaintiffs,

v.

Toribio Islas and Alejandro Soto,

Fifth-Party Defendants.

---

This matter came before the Court on July 21, 2023, on Defendant Builder Services Group, Inc. D/B/A Gale Contractor Services' (hereinafter "Defendant" or "Gale") Motion for Summary Judgment pursuant to Rule 56(C) of the South Carolina Rules of Civil Procedures ("SCRCP").

Gale argued that the record reflects there is no genuine issue as to any material fact as it relates to D.R. Horton's Third-Party Complaint against Gale and Gale is entitled to a judgment as a matter of law.

### **BACKGROUND**

This litigation arises out of the development and construction of the Rose Hill subdivision in Anderson County, South Carolina. The Rose Hill subdivision consists of approximately 270 single-family homes. D.R. Horton served as the developer and builder for the Rose Hill subdivision, taking over the project from Poinsett Development, LLC and Poinsett Homes, LLC. Gale served as a subcontractor to D.R. Horton, providing labor and materials for 91 of the homes in the Rose Hill subdivision. Gale's scope of work at the Rose Hill subdivision consisted of installing the garage doors, gutters, downspouts, and batt and blown insulation.

On September 25, 2019, Plaintiff Natalie Zitek ("Plaintiff Zitek") brought a class action lawsuit on behalf of herself and a proposed class of other similar situated Rose Hill homeowners (collectively the "Class") against D.R. Horton, Inc. and Jane and John Does. On February 23, 2022, D.R. Horton filed a Second Amended Answer and Third-Party Complaint, naming Gale as a Third-Party Defendant. In its Third-Party Complaint, D.R. Horton demanded that Gale defend D.R. Horton in this lawsuit and indemnify D.R. Horton for the damages it has and will sustain as a result of Gale's work in the Rose Hill subdivision. However, during a status conference before the Court on April 21, 2023, counsel for Plaintiff Zitek confirmed that the gutters, downspouts, and insulation were not defects for which Plaintiff Zitek would be seeking damages. Counsel for Plaintiff then filed the said stipulation with the Court on July 20, 2023 (the "Stipulation"). Upon entry of the Stipulation, D.R. Horton agreed to dismissal of its' breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness

claims against Gale. Only D.R. Horton's claim for indemnification remained at issue during summary judgment arguments.

The universe of documents upon which D.R. Horton relied for its indemnity claims consists of 1) The "First Amendment to Master Addendum to Independent Contractor Agreement" executed March 8, 2006; 2) the "Master Addendum to Independent Contractor Agreement" executed October 23, 2015 respectively, (the foregoing collectively referred to herein as the "Addendum Contracts")<sup>1</sup> and 3) Plaintiff Zitek's Notice and Opportunity to Cure Improper Construction Conditions and Resulting Damages correspondence served December 11, 2019 (the "NOC Letter"). D.R. Horton contends the indemnity provision cited in its Indemnification and Additional Insured Tender (the "Tender")<sup>2</sup> creates Gale's duty to defend and indemnify D.R. Horton and reimburse them for attorney's fees relating to litigation for the case. However, the Independent Contracting Agreement where the indemnification clause was cited was never produced to Gale. The only Independent Contractor Agreement pertaining to Gale produced by D.R. Horton is a compilation of the Addendum Contracts, identified above. Notably, in the Addendum Contracts the indemnification clause states in pertinent part:

Indemnity and Insurance. Any defense, indemnification hold harmless or similar obligation (collectively "Indemnification") imposed on Contractor under the Standard Agreement shall be limited to any claims, demands, damages, defense expenses (including attorneys fees and litigation costs) or liabilities (collectively "Loss") covered by the terms of the Indemnification in the Standard Agreement that are caused by Contractor's negligence or the negligence of its subcontractors or its Work (including any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's Work).

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<sup>1</sup>The Addendum Contracts, Bates Stamped KDC13229-13251, were attached as Exhibit 25 to Gales' Mem. in Supp. of Mot. for Sum. J.

<sup>2</sup> D.R. Horton's Indemnification and AI Tender were attached as Exhibit 27 25 to Gales' Mem. in Supp. of Mot. for Sum.J.

## LEGAL STANDARD

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” See *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). “In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment.” *Id.*; *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). Furthermore, the “construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment.” *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995).

## CONCLUSIONS OF LAW

### **I. D.R. Horton’s Third-Party Complaint against Gale must be dismissed because the defects common to the class do not implicate the work of Gale.**

As reflected in the Stipulation, Plaintiff Zitek is not alleging a common defect that implicates Gale’s work. Specifically, there are no allegations of common defects in Plaintiff Zitek's pleadings, the deposition testimony, or expert reports as to gutters, downspouts, batt and blown insulation, or garage doors. Accordingly, because D.R. Horton has not incurred, nor will it incur, any damages in this lawsuit resulting from Gale’s work, Gale cannot be compelled to defend and

indemnify D.R. Horton in this lawsuit. The Court finds in the absence of any derivative claim, the entire Third-Party Complaint by D.R. Horton against Gale warrants dismissal.

**II. D.R. Horton Cannot prove the Addendum Contracts apply to the construction of Rose Hill and Cannot prove that Gale is bound by the Indemnification Clause Referenced in its Tender.**

A breach of contract claim is a failure to perform a contractual promise without legal excuse. The action is one at law, predicated on the existence of a contract. *See Sterling Development Co. v. Collins*, 309 S.C. 237, 421 S.E.2d 402, 404 (1992); *Cain v. United States Insurance, Co.*, 232 S.C. 397, 102 S.E.2d 360 (1958). A binding, valid contract must exist for there to be a cause of action for breach of contract. *Id.* The party asserting such a claim must, therefore, allege and prove each material element of the contract sued on. *Rabon v. State Financial Corp.*, 203 S.C. 183, 26 S.E.2d 501 (1943). A contract only arises when there is actual agreement by parties in which they demonstrate mutual intent to be bound. *Electro-Lab of Aiken, Inc. v. Sharp Construction Co. of Sumter, Inc.*, 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004).

First, the Addendum Contracts entered into between D.R. Horton and Gale do not encompass terms governing the construction of Rose Hill. Without the underlying Independent Contractor Agreement, the Addendum Contracts do not define the scope of work Gale was hired to perform. There was no “meeting of the minds” in the Addendum Contracts for the installation of insulation, gutters, downspouts and garage doors at Rose Hill. The terms of a contract speak for themselves; however, without the underlying Independent Contractor Agreement, the terms to which the Addendum Contracts apply cannot be known.

In addition, the lack of the Independent Contractor Agreement, to which the Addendum Contracts refer, inherently creates an issue of ambiguity as to the terms governing the relationship between Gale and D.R. Horton as it applies to Rose Hill and the conditions of any indemnity

obligations imposed on Gale. Any such ambiguity must be construed against the drafter, D.R. Horton. A court will construe any doubts and ambiguities in an agreement against the drafter of the agreement. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 499–500, 649 S.E.2d 494, 502 (Ct.App.2007). (“Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.” (quoting *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (internal quotation marks omitted))).

Read as a whole, the Addendum Contracts are ambiguous as to what scopes of work they contemplate. “A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause.” *McGill v. Moore*, 381 S.C. 179 at 185, 672 S.E.2d 571 at 574 (citation omitted). Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975) (citation omitted). Nowhere in the Addendum Contracts is the scope of work Gale was hired to perform at Rose Hill even discussed nor is the Rose Hill subdivision identified. Accordingly, the Addendum Contracts do not apply to the insulation, gutters, downspouts and garage doors Gale installed at Rose Hill.

Second, D.R. Horton failed to produce any contract with Gale containing the Indemnification clause cited in its Tender. D.R. Horton cannot reasonably assert Gale is bound by an indemnification clause in a contract which has never been produced and to which D.R. Horton cannot prove Gale agreed. Again, there was no “meeting of the minds” between D.R. Horton and Gale with respect to the indemnification clause cited in the Tender. Therefore, the Third-Party

Claims based on the indemnification clause cited in the Tender fail and any Third-Party Claims that are based on the Addendum Contracts are not enforceable as a matter of law.

**III. D.R. Horton's claims for contractual indemnity fail as a matter of law and public policy.**

As a matter of law, D.R. Horton's claim for indemnity for its own negligence fails if the language contained in the indemnity clause does not clearly and unequivocally provide indemnity for D.R. Horton's own negligence. *See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018). Our Supreme Court has ruled that "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Id.* *Concord* held a general contractor must "meet the very high standard of eliminating any possibility that the contract language on which [it] rel[ies] can be read to limit indemnification to the [general contractor's] own negligence" and "if any other interpretation of the contract language is reasonably possible, [the general contractor] cannot prevail on their contract claims as a matter of law." *Id.*

First, the trigger point for the indemnification provision in the Addendum Contracts is damage "caused by Contractor's [Gale's] negligence or the negligence of its subcontractors or its Work (including any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's Work). With the Plaintiff's stipulation there are no allegations of defective work by Gale in the record.

Second, the Court finds the indemnity provisions contained in the Addendum Contracts fall directly in line with the *Concord* decision and are unenforceable as a matter of law. The Addendum Contracts' Indemnification provision does not clearly and unequivocally state what Gale's indemnification responsibilities are as they relate to the sole or concurrent negligence of

D.R. Horton. Although recognizing that “there is no verbatim phrase that must be used to meet the clear and unequivocal standard,” *Concord*, 424 S.C. at 657, 819 S.E.2d at 176, the Court notes that there is no reference to the sole negligence of D.R. Horton in the indemnity provision. There is also a lack of clarity between the inclusion of liability for Builder for its supervision of the Contractor but the exclusion of work, negligence or misconduct of Builder, which by definition includes supervision of the subcontractors. The language contained in the Addendum Contracts appears to require indemnity for concurrent acts and omissions of D.R. Horton, as it states Gale must indemnify D.R. Horton for “any liability of Builder for its supervision of Contractor”. Further, “supervision” is broad and undefined. The Court finds this clearly creates ambiguity as to whether D.R. Horton is seeking indemnification for its own concurrent negligence and must be construed against D.R. Horton. Accordingly, the Court finds the indemnification agreement is unenforceable because it is vague, ambiguous, and implies D.R. Horton is to be indemnified for its own negligence contrary to the clear and unequivocal standard in *Concord*.

Third, the indemnity provision in the Addendum Contracts also states, “Contractor shall then have the duty to reimburse Builder *only for the proportion of Builder's defense expenses that are attributable to Loss caused by Contractor*”. (Emphasis added). The Court finds D.R. Horton cannot attribute any loss Gale caused since Plaintiff Zitek is not seeking damages for the scope of work Gale performed. Without damages or a loss caused by Gale, D.R. Horton has no claim. D.R. Horton has provided no evidence of what it has spent defending claims against it related to Gale’s scope of work. Moreover, a demand for attorney’s fees is not ripe until entry of a judgment. *See Bayles v. Marsh Realty & Assocs., LLC*, Civil Action No. DKC 20-3322, 2021 U.S. Dist. LEXIS 61066, at \*9 (D. Md. Mar. 30, 2021). Since there will be no judgment attributable to damages from Gale’s work pursuant to Plaintiff Zitek’s Stipulation, the Court finds it is inequitable for D.R.

Horton to demand that Gale defend and indemnify it. As a result, D.R. Horton's claim for contractual indemnification against Gale fails as a matter of law.

#### **IV. D.R. Horton's Unclean Hands Preclude it from Recovering under a Theory of Equitable Indemnification.**

In general, there is no right to indemnity between joint tortfeasors. *Atl. Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 70, 132 S.E.2d 172, 176 (1963). Equitable indemnity arises in scenarios where "the first party is at fault, but the second party is not." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); *see also Fowler v. Hunter*, 697 S.E.2d 531, 388 S.C. 355 (S.C. 2010). "If the second party is also at fault, he comes to court without equity and has no right to indemnity." *Id.* For a party to recover under the theory of equitable indemnity, it must satisfy the following three elements: (1) the party from whom indemnity is sought is liable for causing the plaintiff's damages; (2) the party seeking indemnity is exonerated from any liability for those damages; and (3) the party seeking indemnity incurred damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor. *Id.* However, South Carolina law is clear that "[t]he most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault." *Id.*

Pursuant to the Stipulation, Plaintiff Zitek is not seeking any damages related to Gale's scope of work because there are no defects in Gale's work. Thus, D.R. Horton cannot prove it has incurred damages as a result of defending against Plaintiff Zitek's claims that are the fault of Gale. Further, by virtue of the Stipulation, D.R. Horton has been exonerated from liability relating to any defects in Gales' work. Therefore, is no genuine issue of material fact for a jury to consider with respect to D.R. Horton's equitable indemnity claim against Gale.

**CONCLUSION**

This Court finds there is no genuine issue as to any material fact as to DR Horton’s Third-Party Complaint against Gale, and that the moving party is entitled to judgment as a matter of law, pursuant to Rule 56(c). SCRCP. Therefore, it is hereby **ORDERED** that Gale’s Motion for Summary Judgment as to all of D.R. Horton’s third-party claims is **GRANTED** and D.R. Horton’s Third-Party Complaint against Gale is **DISMISSED WITH PREJUDICE**.

**IT IS SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_ 2023.**

\_\_\_\_\_  
The Honorable Judge Sprouse



Anderson Common Pleas

**Case Caption:** Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al  
**Case Number:** 2019CP0401942  
**Type:** Order/Summary Judgment

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-08-07 15:19:17 page 11 of 11

ELECTRONICALLY FILED - 2023 Aug 07 3:39 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

FORM4

STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019-CP-04-01942

Natalie Zitek, et al  
PLAINTIFF(S)

DR Horton, et al  
DEFENDANT(S)

|   |  |
|---|--|
| <b>Submitted By:</b><br><b>Address:</b> | Attorney for : Plaintiff Defendant or<br>Self-Represented Litigant |
|---|--|

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 4l(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40U), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends  does not end the case.  
Additional Information for the Clerk:

| INFORMATION FOR THE PUBLIC INDEX   |  |  |
|--|--|--|
| Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below. |  |  |
| Judgment in Favor of<br>(List name(s) below)   | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
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| If applicable, describe the property, including tax map information and address, referenced in the order:  |  |  |
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The Judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court for judgment details.

R. SCOTT SPROUSE

2752

8/17/2023

Circuit Court Judge

Judge Code

Date

ELECTRONICALLY FILED - 2023 Aug 17 2:31 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942



STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON

IN THE CIRCUIT COURT OF THE  
TENTH JUDICIAL CIRCUIT  
CASE NO: 2019-CP-04-1942

Natalie Zitek, individually, and on  
behalf of all others similarly situated,

PLAINTIFF

vs

D.R. Horton, Inc., Jane Doe #1-10; and,  
John Doe #1-50

DEFENDANTS

TRIAL PLAN ORDER

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DR Horton, Inc.,

THIRD-PARTY PLAINTIFF

vs

AJ Landscaping & Grading, LLC a/k/a  
AJ Landscaping & Grading, Inc;  
AllPro Textures, LCC; Alpha Omega  
Construction Group, Inc; American  
Concrete And Precast, Inc., a/k/a ACP  
Concrete, Inc.; A&J Framing, Inc;  
Alpha EMC; A-Z, Inc; Atlanta Floor  
Designs Center; A Grade Above Others,  
LLC; Brand-Vaughan Lumber Co.,  
Inc. BKF Builders, Inc.; Builders  
Designhouse, LLC; BMC East,  
LLC D/B/A Coleman Floor, LLC;  
Builders Firstsource  
Southeast Group, LLC, a/k/a Builders  
Firstsource, Inc;  
Bravo Carpenters, Inc.; Caryl  
Mechanics II, Inc.; Caryl  
Mechanicals, Inc.; Cannaday  
Siding and Gutter, Inc.; Cores Painting,  
LLC; CBU Enterprises Inc.; CPI  
Security Systems, Inc.; DOM Group,  
LLC; Ferguson Enterprises, Inc.; Five  
Star Construction, Inc.; Five Star

Foundations, LLC; Galloway Bell Inc.;  
a/k/a Galloway-Bell, Inc. II; BGET  
Floored, LLC; GBS  
Building Supply-US LBM, LLC, a/k/a  
GBS Building Supply, Inc. General Shale  
Brick, Inc.;  
Greener Pastures, Inc., a/k/a Greener  
Pastures of Aiken, Inc; IBP Asset, LLC  
D/B/A Blue Ridge Building Products; JLS  
Masonry, Inc.; Kings Landscaping, LLC;  
Landscapers, LLC; Lade-Danler, Inc.;  
Lansing Building Products Inc.; Long  
Heating & Air  
Conditioning, Inc.; L&M  
Electric, Inc.; Manale Landscaping,  
LLC; MJ Cowboys, LLC; M&L General  
Construction, LLC. a/k/a M&L General  
Construction, Inc.; M&L Reyna  
Construction, LLC; M&M Foundations,  
LLC; Nazareth Builders, LLC, NB  
Contractors, LLC; Poinsett Development,  
LLC; Poinsett Homes, LLC; P&T  
Construction, LLC; P&L Enterprises,  
LLC; Probuild Company, a/k/a Probuild  
Holdings, Inc.; Rite Rug Co.; Rodney  
Howard Grading Co.; Sandlapper  
Concrete, LLC; Sodfather, Inc.,  
Landscape Contractors; Stock Building  
Supply, LLC; Topbuild Home Services,  
Inc., a/k/a Gale Contractors Service;  
Tucker Materials, Inc., a/k/a Gypsum  
UTM Enterprises, Inc.; Dupree Plumbing  
Company, Inc.; Willow Tree  
Landscaping, Inc.

THIRD-PARTY DEFENDANTS

This case involves complex issues and presents a significant challenge to the Court to ensure that the issues are presented to the jury in an organized and understandable manner. The Court heard from the parties at the July 21, 2023 hearing regarding a trial plan. Opportunity for the submission of additional trial plans was given to the parties. The following parties moved for bifurcation and/or submitted/joined in the submission of trial plans:

The Plaintiff Natalie Zitek, et al

The Defendant D.R. Horton

Third Party Defendants      P&L Enterprises  
    M&L Reyna Construction LLC  
    Aaron D. Peris  
    Installed Building Products LLC  
    JLS Masonry Inc.  
    Topbuild Home Services, Inc.

The Court received correspondence from the parties requesting that the Court not issue a final trial plan order until August 17, 2023, given that the parties were actively involved in settlement negotiations. The Court granted that request.

### **I. Trial Bifurcation**

The Court finds that the most judicially economical method of presenting this case will be by bifurcating the trial. The Court previously denied the Plaintiffs motion to bifurcate the entire case, in that a complete bifurcation would require a new jury and new trial. The Court finds that the same jury should hear all of the issues in this case. However, the claims of the Defendant against the Third-Party Defendants (and the claims against the Fourth-Party/Fifth-Party Defendants that flow from those) are affected by any liability attributed to the Defendant by the jury. Accordingly, Phase I of the trial shall be that of liability of the Defendant to the Plaintiff. The issue of punitive damages shall be heard by the jury immediately after Phase I should the jury have found the Defendant liable to the Plaintiff and if the Defendant has elected bifurcation of that issue. The jury shall render a verdict on the issues of liability and punitive damages. Should the jury find for the Plaintiff on any issue of liability and/or punitive damages, Phase II of the trial shall consist of the Defendant proceeding with its claims against the Third-Party Defendants (and any Fourth/Fifth Party claims).

### **II. Pretrial Submissions**

The parties shall make the following pre-trial submissions by the end of business on **Friday, August 25, 2023:**

- A. Witness lists.
- B. Proposed deposition designations under S.C.R.C.P Rule 32.

The parties shall make the following pre-trial submissions by the end of business on **Monday, August 28, 2023:**

- A. Notice by the Defendant of election of punitive damages bifurcation. Should the Defendant file no notice in this regard, punitive damages will not be bifurcated.
- B. Proposed voir dire questions.
- C. Exhibit lists.
- D. Motions in limine.
- E. Proposed verdict forms.

- F. Counter designations and objections to any deposition designations. Counter designations must clearly specify which designations are supplemental to the portions designated to be published to the jury (and need to be incorporated by original designating party) and which portions are simply counter-publications (to be published by the counter party at the conclusion of the original publication in the nature of rebuttal information). The parties are encouraged to make an earnest effort to reach an agreement on publication of deposition summaries in lieu of verbatim reading given the limited amount of time for the trial.

The parties shall file any objections to witness or exhibit lists by the end of business on **Tuesday, August 29, 2023.**

Service of any of these materials shall be by electronic transmission.

The parties shall confer before submissions of the above-listed items and determine where disagreements exist. The Court will hear arguments surrounding any of these items at the Pre-Trial Hearing.

### **III. Pre-Trial Hearing**

The attorneys in the case shall appear at an in-person Pre-Trial Hearing on Friday, September 1, 2023 at 9:30 AM. The Court will rule on any disputes regarding the Pre-Trial submissions and announce the voir dire questions that will be used. The attorneys shall bring hard copies of any documents in dispute to the hearing, unless excused from this requirement by the Court. The parties are expected to have their exhibits ready to be marked by the Court reporter. All exhibits shall be marked. The parties shall be prepared to enter any stipulated exhibits and inform the Court which exhibits will require foundation testimony and a ruling on admissibility. No attorney shall exit the courthouse until all of his or her exhibits have been marked. The parties also should be prepared to notify the Court of whether or not they would be willing to accept a verdict of fewer than twelve jurors should issues arise where it is impossible for a full jury to finish the case. This will not be an option if any party objects.

The parties also shall bring any multimedia presentations and/or demonstrative exhibits requiring use of the courtroom's electrical system/outlets with them to this hearing. The courtroom shall be available to the parties after the hearing. Should a party plan on using a technician to operate their presentation, that person shall attend the Pre-Trial Hearing so that all of that party's technological equipment can be tested in the courtroom.

### **IV. Jury Selection**

Due to the nature of the case, the Court has directed the Clerk of Court to summon a very large jury pool, making the facilities at the Anderson County Courthouse insufficient to house all of the persons in attendance. Therefore, the Court has directed jury qualification and selection to take place at the Anderson Civic Center, which is located at 3027 Martin Luther King, Jr. Blvd. Anderson, SC 29625, on Tuesday, September 5, 2023 at 9:30 AM.

The Plaintiff and Defendant shall have the customary four (4) strikes. The Third-Party Defendants shall be grouped according to trade, not to exceed five (5). The Third-Party Defendants shall submit proposed groups to the Court by the end of business on Monday, August 28, 2023 along with the other items in Paragraph II above. The Court will make a final decision on which group each party is assigned to at the Pre-Trial Hearing. Each group shall have four (4) strikes. The group shall elect one attorney to announce that group's strikes.

Due to the anticipated length of the trial, it is the Court's intention for four (4) alternates to be selected, departing from normal procedure. In the event a party has an objection to this unusual number of alternates, it must file that objection with the other materials set forth in Paragraph II above.

The Court's intention is that the jury be selected and sworn before lunch, with the trial to begin at 2 PM on the same day.

#### **V. Trial Commencement and Opening Statements.**

The Plaintiff and Defendant shall make opening statements at the commencement of Phase I of the trial. Then, one attorney from each trade group (to be elected by the group) shall be allowed to make an opening statement. Should the group be unable to agree on an attorney to make an opening statement, the Court will select one from the group randomly. The Plaintiff should be prepared to call the first witness at the conclusion of the opening statements on September 5, as time permits.

#### **VI. Trial Procedure.**

Court shall commence each day at 9 AM, unless the Court instructs otherwise. The attorneys should anticipate, and communicate to their witnesses, that the trial will extend past 5 PM on some days in order for a witness' testimony to be concluded. The time allotted to this case is limited given the large number of parties. Requests have been made for the Court to either set specific days for each party or to limit examination/cross-examination of witnesses by hours. The Court hesitates to set arbitrary time limits for each witness given the highly technical nature of this case and the need for counsel to make tactical decisions regarding witnesses in the prosecution and defense of this case. However, the Court recognizes the potential of the case bogging down in minutiae and the need for guidelines. The guidelines will be followed and counsel should prepare to complete their portion of the case inside the days allotted. Accordingly, the following schedule shall govern the trial:

September

|   |           |  |
|---|-----------|--|
| 5 | Tuesday   | Jury Selection, Opening Statements, First Witness (if time permits). |
| 6 | Wednesday | Plaintiffs Case.   |
| 7 | Thursday  | Plaintiffs Case.   |
| 8 | Friday    | Plaintiffs Case.   |

|    |           |    |  |
|----|-----------|----|--|
| 11 | Monday    |    | Plaintiff's Case.  |
| 12 | Tuesday   | AM | Plaintiff's Case.  |
|    |           | PM | Defendant's Case.  |
| 13 | Wednesday |    | Defendant's Case.  |
| 14 | Thursday  |    | Defendant's Case.  |
| 15 | Friday    |    | Defendant's Case.  |
| 18 | Monday    |    | Defendant's Case.  |
| 19 | Tuesday   | AM | Plaintiffs Reply.  |
|    |           | PM | (Time available for site visit should the Court order such).                                   |
| 20 | Wednesday |    | Closing Arguments/Jury Verdict on Phase I.   |
| 21 | Thursday  |    | Punitive Damages Phase (should the Defendant elect bifurcation).                               |
| 22 | Friday    |    | Phase II Opening Statements/ Defendant/Third-Party Plaintiffs Case.                            |
| 25 | Monday    |    | Defendant/Third-Party Plaintiffs Case.   |
| 26 | Tuesday   | AM | Defendant/Third-Party Plaintiffs Case.   |
|    |           | PM | Third-Party Defendants' Case.  |
| 27 | Wednesday | AM | Third-Party Defendants' Case.  |
|    |           | PM | Fourth/Fifth-Party Defendants' Case.   |
| 28 | Thursday  |    | Defendant/Third-Party Plaintiff Reply.<br>Third-Party Defendants/Fourth-Party Plaintiff Reply. |
| 29 | Friday    |    | Phase II Closing Arguments/Submission to Jury  |

While the Court does not put specific hourly limits on any examination, the Court reserves the right to terminate the questioning of a particular witness by any attorney if the questions being asked are repetitive, unduly argumentative or merely for the purpose of slowing the pace of the trial. In Phase I, the Plaintiff and Defendant shall be allowed to fully examine each witness. One attorney representing each group shall be allowed to cross examine any witness regarding matters not covered in the direct or cross examination by the Plaintiff or Defendant. The attorney representing a party may participate in full if their client or expert is called as a witness by the Plaintiff or Defendant. In that case, that particular attorney will represent his client's group.

Should a part of the trial finish early, the next part of the trial will proceed at that time. For instance, should the Plaintiff rest a day early, the Defendant should be prepared to immediately move forward with its case.

**VII. Post-Trial Motions**

The parties shall have ten (10) days from the conclusion of the trial in which to file any post-trial motions.

The Court reserves the right to modify this plan. The parties should notify the Court immediately should any settlements be reached which removes parties and simplifies the case.

AND IT IS SO ORDERED!

This 17<sup>th</sup> day of August, 2023

Walhalla, South Carolina

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R. Scott Sprouse, Judge

Tenth Judicial Circuit



Anderson Common Pleas

**Case Caption:** Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al  
**Case Number:** 2019CP0401942  
**Type:** Order/Jury Trial

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-08-17 14:27:11 page 10 of 10

ELECTRONICALLY FILED - 2023 Aug 17 2:31 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

CIVIL ACTION NO: 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50,

Defendants.

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

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D.R. Horton, Inc.

Third-Party Plaintiff

v.

IBP Asset, LLC d/b/a Blue Ridge Building Products, et al.

This matter is before the Court upon the Motion of IBP Assets, LLC d/b/a Blue Ridge Building Products (“Blue Ridge”) seeking an Order granting Summary Judgment in its favor on the claims by D.R. Horton, Inc. set forth in the Second Amended Answer and Third-Party Complaint. For the reasons set forth herein, the Motion is GRANTED.

**Procedural History**

On September 25, 2019, Plaintiff Natalie Zitek (“Plaintiff Zitek”) brought a class action lawsuit on behalf of herself and a proposed class of other similar situated Rose Hill homeowners (collectively the “Class”) against D.R. Horton, Inc. and Jane and John Does. In her Complaint, Plaintiff Zitek alleged that the prerequisites of South Carolina Rule of Civil Procedure (SCRCP) 23(a) had been satisfied and that class certification is appropriate. Pertinent to the present

Motion, Plaintiff Zitek alleged in her Complaint that her claims are “typical of the class” and that “questions of law and fact common to the Class predominate over questions affecting only individual members.”

On October 20, 2020, Plaintiff Zitek moved for an Order certifying the Class under SCRCR Rule 23, wherein she re-alleged that her claims are “typical of the Class members’ claims.” Plaintiff Zitek filed an affidavit contemporaneously with the motion for class certification, identifying the defects common to the Class.

On January 27, 2021, this Court certified the Class, finding, *inter alia*, that Plaintiff Zitek’s claims are typical of the Class.

On March 11, 2021, Horton filed an Amended Answer and Third-Party Complaint, naming Blue Ridge as a Third-Party Defendant. On February 23, 2022, Horton filed a Second Amended Answer and Third-Party Complaint. In its Third-Party Complaint, Horton demands that Blue Ridge defend Horton in this lawsuit and indemnify Horton for the damages it has and will sustain as a result of Blue Ridge’s work in the Rose Hill subdivision.

Blue Ridge first filed a Motion for Summary Judgment on August 1, 2022, which was argued September 8, 2022. However, due to administrative oversight, no ruling was issued based on the initial arguments and the Court heard the Motion again on April 21, 2023. At that time, the factual issues concerning the underlying allegations of defect that had been asserted against Blue Ridge were largely conceded as not being included in the class claims. However, Zitek’s counsel suggested that there could be a class issue related to doors that had been tested and found to leak through or around the doorknob. Blue Ridge’s counsel requested additional opportunity to investigate that suggested concern.

A hearing was held again on July 21, 2023. All parties to this motion were present and participated in the presentation to the Court. Multiple briefings have been submitted by all parties and considered by the Court.

### **Finding of Fact**

Based upon the evidence submitted to the Court, the Stipulation of the Plaintiff and the statements of counsel on the record, I find that the following material facts are not in dispute:

1. Blue Ridge and Horton entered a “South Carolina Independent Contractor Agreement” (hereinafter “Subcontract”) on or about January 12, 2010. In the paragraph entitled “Scope of Work,” reference is made to Exhibit A for a list of “construction-related” activities that Blue Ridge was contracted to undertake. However, Exhibit A is not attached to the Subcontract and no party has produced the document. The Court finds that Exhibit A does not exist.
2. The Subcontract also references a “Pricing Schedule” at Paragraph 3.1. No Pricing Schedule has been submitted in evidence.
3. According to excerpt from a “Vendor Spend” spreadsheet produced by Horton, Blue Ridge installed a number of different products on various homes in the Rose Hill subdivision between 2012 and 2017. Relevant to the allegations and motions before the Court is the installation of gutters, attic insulation and door hardware. Blue Ridge did not work on every house in Rose Hill and did not perform the same work on each of the houses where it did work.
4. Blue Ridge did not work on the home of the Class Representative, Natalie Zitek.
5. Plaintiff has stipulated that batt and blown insulation and gutters are not included in the class claims.
6. Plaintiff has submitted evidence that water may have infiltrated the patio door at 8 Duxbury Lane through a doorknob when tested by Plaintiff’s Expert, Dr. Rhett Whitlock. Blue Ridge did not perform any work at this residence. There is no evidence that Blue Ridge installed door hardware on any patio door. Furthermore, Dr. Whitlock testified that he did not know why the doorknob leaked and did not testify that this is a systemic issue throughout the neighborhood. Thus, there is no evidence that Blue Ridge contributed to the water infiltration on any residence in the Class.

## Conclusions of Law

### **I. Summary Judgment Standard**

Summary judgment is appropriate when the movant demonstrates that the material facts of the case are undisputed, and the moving party is entitled to judgment as a matter of law. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); Rule 56(c), SCRPC. If the moving party meets its initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party cannot simply rest on mere allegations or denials contained in the pleadings. *Singleton v. Sherer*, 377 S.C. 185, 197–98, 659 S.E.2d 196, 203 (Ct. App. 2008). Instead, the nonmoving party must come forward with specific evidentiary support showing there is a genuine dispute for trial. *Rife v. Hitachi Const. Mach. Co.*, 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005).

“[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). Here, there is no dispute regarding any material fact.

### **II. Summary Judgment Should be Granted on all Causes of Action Against Blue Ridge**

Blue Ridge seeks Summary Judgment on all causes of action brought by Horton in the Second Amended Answer and Third-Party Complaint (“Third-Party Complaint”).

In its First Cause of Action of the Third-Party Complaint, Horton claims that Blue Ridge is liable under a theory of Contractual Indemnification and demands that Blue Ridge indemnify Horton for the damages it has and will incur as a result of Blue Ridge's work in the Rose Hill subdivision. The specific contract provision is not cited in the Third-Party Complaint, nor attached as an exhibit. The Subcontract has been submitted to the Court in conjunction with this Motion.

Horton demands contractual indemnification under Section 10 of the contract between itself and Blue Ridge. The contractual indemnity provision demands that Blue Ridge “hold harmless, indemnify, protect and defend” Horton from and against all “losses . . . arising out of, or resulting from, or related in any way to the work performed and/or the materials supplied under this contract . . . .” The full text is as follows:

**10. CONTRACTOR'S INDEMNITY.**

**10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO HOLD HARMLESS, INDEMNIFY, PROTECT AND DEFEND OWNER, ITS PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THE AFOREMENTIONED ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "INDEMNITEE"), FROM AND AGAINST ANY AND ALL DEMANDS, CLAIMS, ACTIONS, CAUSES OF ACTION, PROCEEDINGS, LAWSUITS, SETTLEMENTS, JUDGMENTS, FINES, PENALTIES, LOSSES, ATTORNEYS FEES, LITIGATION COSTS, INTEREST, AND EXPENSES OF ANY KIND (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "LOSSES") FOR DAMAGES FROM BODILY OR PERSONAL INJURY, DEATH, THE DESTRUCTION OR LOSS OF PROPERTY (INCLUDING LOSS OF USE), OR ANY OTHER KIND OF DAMAGES OR HARM, ARISING OUT OF, OR RESULTING FROM, OR RELATED IN ANY WAY TO THE WORK PERFORMED AND/OR THE MATERIALS SUPPLIED UNDER THIS CONTRACT, REGARDLESS OF WHETHER OR NOT CAUSED IN PART BY INDEMNITEE. SUCH LOSSES SPECIFICALLY INCLUDE, BUT ARE IN NO WAY LIMITED TO LOSSES ARISING OUT OF OR ATTRIBUTABLE TO: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS OR OBLIGATIONS OF CONTRACTOR SET FORTH HEREIN; (2) THE WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR, CONTRACTOR'S AGENTS OR EMPLOYEES, SUPPLIERS OR SUBCONTRACTORS AND THEIR RESPECTIVE AGENTS AND EMPLOYEES, AND/OR ALL OTHER ENTITIES OVER WHOM THE CONTRACTOR MAY EXERCISE CONTROL (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "CONTRACTOR'S AGENTS"); (3) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF CONTRACTOR AND/OR CONTRACTOR'S AGENTS; OR (4) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK, NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE INDEMNITY FOR LOSSES CAUSED SOLELY BY FAULT OR NEGLIGENCE OF THE INDEMNITEE. THE LOSSES DESCRIBED HEREIN SHALL INCLUDE, BUT ARE NOT LIMITED TO, DEMANDS, CLAIMS, OR ACTIONS ASSERTED BY (1) ANY PRESENT OR FUTURE OWNER OF THE HOUSE INCORPORATING THE WORK; AND (2) ANY OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR AND/OR CONTRACTOR'S AGENTS). THE INDEMNIFICATION OBLIGATION UNDER THIS CONTRACT SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. THE INDEMNITY PROVISIONS CONTAINED HEREIN ARE INTENDED TO BE AS BROAD AND INCLUSIVE AS PERMITTED BY LAW.**

For the reasons set forth below, Summary Judgment is Granted as to the First Cause of Action.

First, Summary Judgment is appropriate because there is no evidence that Horton has sustained “losses . . . arising out of, or resulting from, or related in any way to the work performed and/or the materials supplied under this contract . . . .” As set forth above, Plaintiff is not pursuing a claim for work within the scope that Blue Ridge performed. Thus, there are no losses within the defined scope of the indemnity agreement.

Horton contends that it is entitled to recovery for losses incurred prior after the Notice of Claim was received and prior to the Stipulation being filed. However, there is no evidence in the

record that any such losses were incurred or what they might have been. However, irrespective of any proof of losses, Horton is not entitled to recover from Blue Ridge because the indemnity agreement is unenforceable as a matter of law.

In South Carolina, contracts purporting to relieve an indemnitee from the consequences of its own negligence must be stated in “clear and unequivocal terms.” *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018) (citing, *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)) (“Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.”). The Court of Appeals in *Federal Pacific Electric v. Carolina Prod. Enterprises* addressed the issue of contracts attempting to seek indemnification of damages arising from the indemnitee’s concurrent negligence:

A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. Because it is somewhat unusual for an indemnitor to indemnify the indemnitee for losses resulting from the indemnitee’s own negligence, a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed.

*Fed. Pac. Elec.*, 298 S.C. at 26 (internal citations omitted). “[B]road, comprehensive, and general terms” are inadequate to show the parties intended the indemnitor to indemnify the indemnitee for the indemnitee’s own concurrent negligence. See, *Concord & Cumberland*, 424 S.C. at 656–57, 819 S.E.2d at 176. The Court of Appeals in *Concord & Cumberland* explains that in *Federal Pacific*, the same Court found the use of general terms such as ‘indemnify . . . against any damage suffered or liability incurred . . . or any loss or damage of any kind in connection with the leased premises during the term of the lease’ did not disclose an intention to indemnify for consequences arising from the indemnitee’s own negligence.” *Id.* at 651, 819 S.E.2d at 173 (citing, *Fed. Pac.*

*Elec.* 298 S.C. at 29, 378 S.E.2d at 58-59) (brackets removed). “Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in the indemnity clause that **clearly shows** the parties intent to absolve the indemnitee of the consequences of its own concurrent negligent.” *Concord & Cumberland*, 424 S.C. at 657, 819 S.E.2d at 176 (emphasis added). Our Court of Appeals noted the challenges that this standard presents to attorneys as quoted by the Texas Supreme Court:

As the Texas Supreme Court has observed, this strict construction test has caused drafters of indemnity provisions to write them in a way that can be read as indemnifying the indemnitee for its own negligence, “yet be just ambiguous enough to conceal that intent from the indemnitor.” *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 707-08 (Tex. S. Ct. 1987). What results are law suits that burden courts with deciding whether the parties’ intent was camouflaged or “clear and unequivocal.”

*Concord & Cumberland*, 424 S.C. at 658 n.6, 819 S.E.2d at 176 (Ct. App. 2018).

I find that the indemnification provisions of the Subcontract between Horton and Blue Ridge are not clear and unequivocal for the following reasons:

First, nowhere does the provision expressly state that Blue Ridge is responsible to indemnify Horton for its concurrent liability to a homeowner. Rather, it uses exception clauses to avoid the broad form indemnity that is statutorily prohibited. The Subcontract requires indemnity for losses “regardless of whether or not caused in part by [Horton].” But, then inserts a vague exception for “losses caused solely by fault of negligence of [Horton].” This structure is not unequivocal.

This confusion is amplified by the extremely complicated grammatical structure of the provision itself. The indemnification requirement is described within a single sentence containing 260 words, 48 commas and 34 conjunctions/disjunctions. The sentence includes multiple serial

lists, definitions, sub-parts, sub-ordinate clauses, parenthetical notes and prepositional phrases. As a result, the indemnity provision of this contract is manifestly unclear.

Finally, the Subcontract itself does not clearly set forth the material term of the “scope of work” that triggers the obligations for indemnity. The contract must be “clear and unequivocal” to the parties at the time of its acceptance. Otherwise, a subcontractor cannot fairly appreciate the risks that it might be accepting through an indemnity provision. Because there is nothing in this contract that established the work to be performed, it cannot be said that the work that was performed was part of the bargain at the time the indemnification provision was offered.

In its Second Cause of Action, Horton demands equitable indemnification based on the “special relationship” existing between Horton and Blue Ridge and because Horton has and will incur damages as a result of Blue Ridge’s work in the Rose Hill subdivision. As stated above, there is no evidence of wrongdoing by Blue Ridge for which Horton is exposed to liability from the Plaintiff Class. Therefore, there is no basis for equitable indemnity.

Finally, Horton also brings causes of action against Blue Ridge for breach of contract (Third Cause of Action), breach of express warranties (Fourth Cause of Action), breach of implied warranties (Fifth Cause of Action), and negligence, gross negligence, and recklessness (Sixth Cause of Action). Again, as stated above, there is no evidence that Plaintiff is asserting any claim on behalf of the class arising out of work performed by Blue Ridge, thus there is no basis for a derivative claim. Likewise, Horton has produced no evidence of negligence, breach of contract or breach of warranty for which Horton has sustained independent damages for which it is entitled to recovery.<sup>1</sup> Whether Blue Ridge procured insurance as may have been required

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<sup>1</sup> Blue Ridge contends that, because these causes of action are dependent solely on the potential liability that may arise from Plaintiff Zitek’s claims against Horton and because Horton’s damages arise exclusively from having to defend itself from Plaintiff Zitek’s lawsuit, these causes of action are in reality claims for equitable indemnification and should be dismissed in accordance with the South Carolina Court of Appeals’ ruling in *Stoneledge at Lake*

under the Subcontract was not pled in the Third-Party Complaint and is therefore not before this Court.

**Conclusion**

For the reasons stated above, Summary Judgment is GRANTED to Blue Ridge on all causes of action against in the Second Amended Answer and Third-Party Complaint of D.R. Horton.

IT IS SO ORDERED.

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*Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 635, 776 S.E.2d 434, 437 (Ct. App. 2015). See also, *Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc.*, 2018 WL 3475472, at \*1-2 (D.S.C. July 19, 2018). Because the Court has found that there is no evidence of any wrong-doing or breach on the part of Blue Ridge, this question is rendered moot and is not addressed in this Order.



Anderson Common Pleas

**Case Caption:** Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al  
**Case Number:** 2019CP0401942  
**Type:** Order/Summary Judgment

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-08-23 15:49:31 page 10 of 10

ELECTRONICALLY FILED - 2023 Aug 23 3:55 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON

IN THE CIRCUIT COURT OF THE  
TENTH JUDICIAL CIRCUIT  
CASE NO: 2019-CP-04-1942

Natalie Zitek, individually,  
and on behalf of all others  
similarly situated,

PLAINTIFF

-vs-

TRANSCRIPT OF RECORD

D.R. Horton, Inc., Jane Doe  
#1-10; and, John Doe #1-50

DEFENDANTS

---

DR Horton, Inc.,

THIRD-PARTY PLAINTIFF

vs

AJ Landscaping & Grading, LLC  
a/k/a AJ Landscaping &  
Grading, Inc; AllPro Textures,  
LCC; Alpha Omega Construction  
Group, Inc; American Concrete  
And Precast, Inc., a/k/a ACP  
Concrete, Inc.; A&J Framing,  
Inc; Alpha EMC; A-Z, Inc;  
Atlanta Floor Designs Center;  
A Grade Above Others, LLC;  
Brand-Vaughan Lumber Co., Inc.  
BKF Builders, Inc.; Builders  
Designhouse, LLC; BMC East,  
LLC D/B/A Coleman Floor, LLC;  
Builders Firstsource  
Southeast Group, LLC, a/k/a  
Builders Firstsource, Inc;  
Bravo Carpenters, Inc.; Caryl  
Mechanics II, Inc.; Caryl  
Mechanicals, Inc.; Cannaday  
Siding and Gutter, Inc.; Cores  
Painting, LLC; CBU Enterprises  
Inc.; CPI Security Systems,  
Inc.; DOM Group, LLC; Ferguson  
Enterprises, Inc.; Five Star  
Construction, Inc.; Five Star

September 1, 2023  
ANDERSON, SC

Foundations, LLC; Galloway Bell Inc.; a/k/a Galloway-Bell, Inc. II; BGET Floored, LLC; GBS Building Supply-US LBM, LLC, a/k/a GBS Building Supply, Inc. General Shale Brick, Inc.; Greener Pastures, Inc., a/k/a Greener Pastures of Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landscapers, LLC; Lade-Danler, Inc.; Lansing Building Products Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC. a/k/a M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC, NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, LLC; P&L Enterprises, LLC; Probuild Company, a/k/a Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractors Service; Tucker Materials, Inc., a/k/a Gypsum UTM Enterprises, Inc.; Dupree Plumbing Company, Inc.; Willow Tree Landscaping, Inc.

THIRD-PARTY DEFENDANTS

B E F O R E:

THE HONORABLE R. SCOTT SPROUSE

1 Bell has the same scope of work as Chip's client and Rett's  
2 client that you granted the summary judgment motion for. And  
3 as Justin said earlier, the installation has been completely  
4 removed from the case. He's made a statement to the Court  
5 it's not a part of the case, he's filed a response to the  
6 request to admit. It's not part of the case, so I agree with  
7 Justin on this issue, and I just want to bring that to the  
8 Court's attention. Thank you, Your Honor.

9 MRS. WOOTEN: Well, Your Honor, now I feel I have to  
10 respond to that. The problem is, with the summary judgment  
11 order that you issued with IBP, there is a ruling in there  
12 that our contract is not clear and unequivocal as to  
13 contractual indemnity. All these parties are still part of  
14 this case, and that's what the final ruling was. And that's  
15 why it is immediately appealable, and that's one of the things  
16 we're seeking that has to do with issues that are still in  
17 this case.

18 THE COURT: Okay. Thank you, Mrs. Wooten. All right.  
19 We will be in recess for a little while.

20 (Brief recess.)

21 THE COURT: Thank you, thank you. Be seated please. All  
22 right, let's go back on the record. Counsel, I have reviewed  
23 the cases that the parties have cited and I will say, this is  
24 a complicated case. It is designated a complex case, 2019  
25 case. I have been involved in it for a little over a year.

1 Multiple orders have been issued and I am going to deal with  
2 each one of these in order, I believe, of the arguments,  
3 although I may take one of order. But the first is that of  
4 discovery. There have been multiple orders in this case  
5 regarding discovery. The initial one was in November of last  
6 year setting the parameters and dates of discovery. There was  
7 another order issued in the winter, and then that order was  
8 extended. We have a February order, and that was extended.  
9 Discovery, except for under extremely narrow circumstances is  
10 an interlocutory issue. The Eldridge case was handed up to  
11 the Court in which an injunction becomes an appealable --  
12 discovery becomes an appealable issue when it constitutes an  
13 injunction. That's very narrow circumstances.

14 The Court would note that if that was considered an  
15 injunction an appealable issue, that should have been appealed  
16 back in February when the order was issued. The test is  
17 whether it affects the substantial right. This is something,  
18 again, I find that this is a matter that is interlocutory that  
19 should not be coattailed, I believe was the word used, to  
20 granting summary judgment.

21 The other issue is bifurcation of the case. Now,  
22 ordinarily, bifurcation is not on appealable issue. That's in  
23 the Flagstar case. Now, when we talk about these other cases,  
24 the Morrow case sets forth also the standard that it affects  
25 the fundamental right -- it uses the term substantial right.

1 Now, that case involved a nursing home and that case is  
2 distinguished from our present case in that it broke up the  
3 Plaintiff's claims. The Plaintiff in that case brought suit  
4 and had different claims and it broke up the actual  
5 Plaintiff's claims. This is not the case in our present case  
6 and the standard -- and I quote the case. It says effects of  
7 this order is to prevent the Morrows from being architects of  
8 their own complaint and deprives them of bringing their case  
9 against the defendant of their choosing. The right of the  
10 Plaintiff to choose her defendant is a substantial right and  
11 it was immediately appealable. That's not the situation here.

12 The Plaintiff did not bring suit against to the third-  
13 party defendants, and furthermore, the right of the defendant  
14 to have a jury trial in this matter is unaffected by this  
15 Court's order. The Court did not bifurcate the entire case.  
16 The Court merely bifurcated the phases of the case. The  
17 issues, the same jury will hear the Plaintiff's case that will  
18 hear the defense's case against the third-party defendants and  
19 the fourth-party defendants against any fifth-party defendants  
20 that may be still in the case. While Phase 2 would be a  
21 simplified proceeding in that liability would have to had been  
22 established in the first phase, it becomes merely a matter for  
23 the jury to determine what liability any third-party  
24 defendants would have to the defendant and the fourth-party  
25 issues as well.

1           But it's a simplified proceeding with the same jury, so  
2 it would not be necessary for an entirely new trial to take  
3 place and no one would be prejudiced by that. The Court's  
4 order does not take away any party's rights to have a jury,  
5 the same jury, decide the issues in this case. And I would  
6 note, and we're going to hear this in a minute -- the Court  
7 reserved the right to modify this trial plan should there be  
8 developments. And a number of parties have settled, and I had  
9 the Clerk come and ask you who was still in the case.  
10 Certainly, that takes some people out of it. And it affects  
11 how we do groups and how we do strikes, and I'm going to hear  
12 from you on that.

13           Now, let's go down to the next issue, the granting of  
14 summary judgment. Now, it is correctly stated by counsel for  
15 the defense that that is an immediately appealable issue.  
16 That is correct. Now, however, the Court would note the  
17 following, summary judgment was granted in this case because  
18 the only issue between the defendant and these third-party  
19 defendants was that of contractual indemnity. It was a  
20 provision in the contract in which the defendant alleges the  
21 third-party defendant is bound to indemnify them for the sole  
22 negligence of the defendant because there simply was no  
23 evidence in the record of any defective or negligent work by  
24 any of these defendants -- these third-party defendants. That  
25 was conceded at the hearing by the defense. There simply was

1 no evidence and the Court found that the provisions of that  
2 contract indemnifying the party for the sole negligence of  
3 that party was not clear and unequivocal in the Concord and  
4 Cumberland standard.

5       These third-party defendants are not similarly situated  
6 to the other third-party defendants in that there is some  
7 evidence in the record of negligent work or defective work by  
8 these other parties. That's a jury question. And it also  
9 changes the nature of the indemnification issue, so they are  
10 not similarly situated.

11       Furthermore, the defendant can appeal those rulings of  
12 summary judgment and it would not affect the ability of the  
13 case to go forward and in this situation, it would not affect  
14 the claims against the other parties. And under the language  
15 of Rule 241, the Court can continue to try cases that are not  
16 affected by the appeal.

17       Now, I would say, that the other issues, decertification  
18 -- now the decertification motion, again, I find this is an  
19 interlocutory matter. This matter was originally decided by  
20 the Court back before I got involved in it. I think Judge  
21 Maddox issued the original order, and then I heard the motions  
22 for decertification. This is an interlocutory matter, and  
23 I've read the Ferguson case that was handed up, and I do not  
24 find this is a matter that is proper to put off this case or  
25 stay this case. I would also note that there are motions,

1 multiple motions for reconsideration pending where an appeal  
2 is filed with the motion still pending, which I would note  
3 that for the record. And I would also talk about the Tillman  
4 case. That's handed up. That is a Family Law case. It  
5 affects a case involving custody and visitation rights, and  
6 there was a question of what issue had been appealed. The  
7 party appealed the custody order but did not appeal the  
8 visitation, and it was a situation where the rights of parents  
9 regarding children and everyday life regarding the children  
10 were being affected. That's a completely different situation  
11 than what we have in this case.

12         So, where do we go from here? This case is four years  
13 old. There has been vast amounts of time and resources spent  
14 on discovery and preparation of this case. We've had multiple  
15 hearings on this case. The Clerk and I have met many times.  
16 I had a meeting with her entire staff. Over 500 jurors have  
17 been summoned to appear. Arrangements had to be made for the  
18 Anderson Civic Center to accommodate these -- we can't get all  
19 the people, if they all show up, into this courtroom.  
20 Arrangements had to be made with the sheriff's department, the  
21 County government, substantial resources have been placed into  
22 this case.

23         So, for that reason, I would rule that this matter is not  
24 stayed and that we are going to proceed in the case. And the  
25 Defense's arguments are noted for the record. And if the

1 Court of Appeals rules otherwise, that is their prerogative,  
2 but I'm going to find that we are going to proceed. So, at  
3 this point, I want to hear from the parties regarding the  
4 trial plan. Now, again, I reserved the right to change to the  
5 trial plan.

6 This is -- this is my concern. I don't want 30 lawyers  
7 questioning every witness in the Plaintiff's case. That would  
8 unnecessarily bog down the case. Juror strikes is another  
9 issue, is one reason why I chose the group method. However,  
10 even the third-party defendants in Phase 2 would still --  
11 they're still having input in the case, and I believe the  
12 Plaintiff had objected, saying that gives them  
13 disproportionate influence over the case. And then there's  
14 objections on the other side that it's not sufficient, that  
15 everything ought to be according to normal strikes and normal  
16 procedure.

17 My concern is we have four weeks to the try the case. We  
18 have to get everything done in orderly fashion. I have gone  
19 through the witness lists of the parties, and I will -- let me  
20 get my -- the number of witnesses that I came up with, based  
21 on the parties that have submitted them -- now, again, I got  
22 witness lists from 15 parties in the case. Fifteen different  
23 parties submitted a list, and the aggregate of witnesses that  
24 have been listed is 272. Now, I don't know how many of those  
25 are actually going to be called. A lot of those are class

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ANDERSON )

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED MONA L. MANLEY, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF ALL REQUESTED PROCEEDINGS RECORDED AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT OF ANDERSON COUNTY, SOUTH CAROLINA, ON THE 1<sup>ST</sup> DAY OF SEPTEMBER, 2023.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

September 3, 2023

---

MONA L. MANLEY  
Official South Carolina Court Reporter  
Circuit Reporter for the 10<sup>th</sup> Circuit  
(850) 983-6662  
mmanley@sccourts.org

**RECEIVED**

**Sep 06 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

CASE NO. 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of others  
similarly situated.....Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50, .....Defendants,

D.R. Horton, Inc., .....Third-Party Plaintiff,

vs

A&J Framing, Inc.;;  
A-Z, Inc.;;  
AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;  
Allpro Textures, LLC;  
Alpha E.M.C.;;  
Alpha Omega Construction Group, Inc.;;  
American Concrete And precast, Inc.;; A/K/A ACP Concrete, Inc.;;  
Atlanta Floor Designs Center;  
A Grade Above Others, LLC;  
BFK Builders, Inc.;;  
BMC East LLC D/B/A Coleman Floor, LLC;  
Brand-Vaughn Lumber Co, Inc.;;  
Bravo Carpenters, Inc.;;  
Builders Designhouse, LLC;  
Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;;  
Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale  
Industries, Inc. D/B/A Gale Contractor Services;  
Cannaday Siding & Gutter, Inc.;;  
Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;;

CBU Enterprises, Inc.;  
 Cortes Painting, LLC;  
 CPI Security Systems, Inc.;  
 Dom Group, LLC;  
 Dupree Plumbing Company, Inc.;  
 Ferguson Enterprises, Inc.;  
 Five Star Construction Inc.;  
 Five Star Foundations, LLC;  
 Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II;  
 GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.;  
 General Shale Brick Inc.;  
 Get Floored, LLC;  
 Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;  
 Installed Building Products, LLC A/K/A Installed Building Products II, LLC;  
 IBP Asset, LLC D/B/A Blue Ridge Building Products;  
 JLS Masonry, Inc.;  
 Kings Landscaping, LLC;  
 L&M Electric, Inc.;  
 Lade-Danlar, Inc.;  
 Landshapers, LLC;  
 Lansing Building Products, Inc.;  
 Long Heating & Air Conditioning, Inc.;  
 M&L General Construction, LLC, A/K/A M&L General Construction, Inc.;  
 M&L Reyna Construction, LLC;  
 M&M Foundations, LLC;  
 Manale Landscaping, LLC;  
 MJ Cowboys, LLC;  
 Nazareth Builders, LLC;  
 NB Contractors, LLC;  
 Poinsett Development, LLC;  
 Poinsett Homes, LLC;  
 P&L Enterprises, LLC;  
 P&T Construction, Inc., A/K/A P&T Construction, Inc.;  
 Probuild Company, LLC A/K/A Probuild Holdings, Inc.;  
 Rite Rug Co.;  
 Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.;  
 Sandlapper Concrete, LLC;  
 Silver Line Building Products Corporation;  
 Sodfather Inc., Landscape Contractors;  
 Stock Building Supply, LLC;  
 Topbuild Home Services., Inc., A/K/A Gale Contractors Service;  
 Tucker Materials, Inc., A/K/A Gypsum;  
 UTM Enterprises, Inc;  
 and  
 Willow Tree Landscaping, Inc .....Third-Party Defendants,

and

Aaron D. Peris;  
Harrelson Painting, LLC;  
Huttig Building Products; et al ..... Fourth and Fifth-Party  
Defendants and Plaintiffs,

D.R. HORTON, INC..... Appellant/Petitioner.

Natalie Zitek, individually, and on behalf of others  
similarly situated;

Jane Doe #1-10; and John Doe #1-50;

A&J Framing, Inc.;;  
A-Z, Inc.;;  
AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;  
Allpro Textures, LLC;  
Alpha E.M.C.;;  
Alpha Omega Construction Group, Inc.;;  
American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.;;  
Atlanta Floor Designs Center;  
A Grade Above Others, LLC;  
BFK Builders, Inc.;;  
BMC East LLC D/B/A Coleman Floor, LLC;  
Brand-Vaughn Lumber Co, Inc.;;  
Bravo Carpenters, Inc.;;  
Builders Designhouse, LLC;  
Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;;  
Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale  
Industries, Inc. D/B/A Gale Contractor Services;  
Cannaday Siding & Gutter, Inc.;;  
Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;;  
CBU Enterprises, Inc.;;  
Cortes Painting, LLC;  
CPI Security Systems, Inc.;;  
Dom Group, LLC;  
Dupree Plumbing Company, Inc.;;  
Ferguson Enterprises, Inc.;;  
Five Star Construction Inc.;;  
Five Star Foundations, LLC;  
Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II;  
GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.;;  
General Shale Brick Inc.;;

Get Floored, LLC;  
Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;  
Installed Building Products, LLC A/K/A Installed Building Products II, LLC;  
IBP Asset, LLC D/B/A Blue Ridge Building Products;  
JLS Masonry, Inc.;  
Kings Landscaping, LLC;  
L&M Electric, Inc.;  
Lade-Danlar, Inc.;  
Landshapers, LLC;  
Lansing Building Products, Inc.;  
Long Heating & Air Conditioning, Inc.;  
M&L General Construction, LLC, A/K/A M&L General Construction, Inc.;  
M&L Reyna Construction, LLC;  
M&M Foundations, LLC;  
Manale Landscaping, LLC;  
MJ Cowboys, LLC;  
Nazareth Builders, LLC;  
NB Contractors, LLC;  
Poinsett Development, LLC;  
Poinsett Homes, LLC;  
P&L Enterprises, LLC;  
P&T Construction, Inc., A/K/A P&T Construction, Inc.;  
Probuild Company, LLC A/K/A Probuild Holdings, Inc.;  
Rite Rug Co.;  
Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.;  
Sandlapper Concrete, LLC;  
Silver Line Building Products Corporation;  
Sodfather Inc., Landscape Contractors;  
Stock Building Supply, LLC;  
Topbuild Home Services., Inc., A/K/A Gale Contractors Service;  
Tucker Materials, Inc., A/K/A Gypsum;  
UTM Enterprises, Inc;  
and  
Willow Tree Landscaping, Inc;

Aaron D. Peris;  
Harrelson Painting, LLC;  
Huttig Building Products; and  
Therma-Tru, Ltd;  
Arcides Garcia;  
Brandon Chaves;  
C&H Wood Flooring, Inc.;  
Dora Maria Pina;  
Felix Tile;  
Filadelfo Avila Carrillo;  
Francisco Sanchez;

J&K Floor Corp;  
JCT Flooring;  
Jose Javier Marin;  
Lemus Tile;  
Leos Flooring, LLC;  
Martin Garcia;  
Nora Canales;  
Othon Delgado Ramas;  
Resendiz Flooring;  
Richard Bumbalough;  
Richard Gerardo Loredo Gomez;  
Robert Gillespie;  
Roberto Morales Ferretiz;  
Roberto Tile, Inc  
Scorpio Tile Glass Work; and  
Urias Flooring, Co., LLC;  
Zenon Gutierrez Antunez;  
Jesus Perez;  
Fredy Perez and Venustiano Perez, Individually and D/B/A Fredy's HVAC;  
Nicholas Sota a/k/a Nicholas Soto, Individually and D/B/A Soto HVAC;  
Jason Weaver, Individually and D/B/A Tiger Mechanical; and  
Panuncio Victoriano Martinez, Individually and D/B/A Victoriano HVAC, LLC;  
Brothers Contractors, Inc.;  
Brothers Contactors, LLC;  
Nataren Contractors, LLC;  
Jimenez Contactors, LLC;  
Jimenez Contractors, Inc.;  
Henry Construction, LLC;  
SL Commercial Construction, Inc.;  
Rogelio Basilio-Vazquez;  
Geovany Leiva;  
Geovany Leiva D/B/A GSF Renovations, LLC;  
GSF Renovations, LLC;  
RJ Quality Construction, Inc.;  
Rafael Bonzalez-Colazo, Individually and D/B/A RJ Commercial Construction, Inc.;  
Santos Metal Works, LLC;  
AHR Construction, Inc.;  
Denny Concepcion;  
RJ Commercial Construction, Inc.;  
Safeway Roofing;  
Torres Quality Construction;  
JJS Commercial Construction, Inc.;  
Jose Hernandez;  
Bonilla Construction, Inc.; and  
Jose P. Jimenez, Individually and D/B/A Bonilla Construction, Inc.;  
Carlos Humberto Landaverry;

Ngan My Giang;  
Landaverry Flooring, LLC;  
Hector Flooring;  
Scorpio Tile & Glassworks, Inc.;  
Jose Javier Marin;  
O&E Flooring;  
Othon Ramos;  
Saguay Flooring; and  
Cruz Flooring;  
AJ&I Flooring, LLC;  
Antonio’s Flooring, LLC;  
Bryan’s Flooring Services, LLC;  
Enriquez Floors, LLC;  
Garcia’s Carpet, Inc.;  
Hector Flooring, Inc.;  
Carolina Hernandez D/B/A Josue’s Flooring, LLC;  
NM Alex Carpet, Inc.;  
Promesa Flooring; and  
Vinny’s Perfection Flooring, LLC;

Jesus Jimenez; and  
Jesus Robles Montez A/K/A Robles Construction ;

Toribio Islas; and  
Alejandro Soto..... Respondents.

---

**PROOF OF SERVICE**

---

I certify that I have caused Appellant D. R. Horton, Inc.’s Petition for Writ of Supersedeas with Verification and Appendix to be electronically served on all counsel of record to the following email addresses on this 6<sup>th</sup> day of September 2023.

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