STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON JARED S. O'CONNELL AND HARMONY A. O'CONNELL, Plaintiffs, vs. HOUSE THERAPY HOLDINGS, LLC, AMANDA F. DEMPSEY, WILLIAM T. PHILLIPS, MATTHEW B. SWAIN, DANIEL RAVENEL COMPANY SOTHEBY'S INTERNATIONAL REALTY, ARTIS CONSTRUCTION, LLC; OCEANAIRE, LLC; HERO HEATING AND AIR, LLC; CUSTOM CLIMATE HEATING & AIR, INC.; P.J. SANCHEZ MASONRY, LLC; DONNIX CONSTRUCTION, LLC; GUILLEN CARPENTRY, LLC; CHARLESTON EXTERIORS, LLC; ASHLEY OAK CONTRACTING, LLC; H20 PRO, LLC; LA ROCA MASONRY, LLC; APEX CONTRACTORS, LLC; SOUTH POINT HARDWOOD FLOOR, LLC; BLUETAPE SOLUTIONS, LLC; CAROLINA CLIMATE CONTROL, LLC; MOVAR, LLC; ECL DESIGN, LLC; AND AFFORDABLE SPRAY FOAM INSULATION OF THE CAROLINA'S, LLC F/K/A AFFORDABLE SPRAYFOAM INSULATION OF THE CAROLINAS, LLC, Defendants.	IN THE COURT OF COMMON PLEAS 2021-CP-10-03090 ORDER DENYING ARTIS CONSTRUCTION, LLC'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS

THIS MATTER came before the Court upon Artis Construction, LLC's (hereinafter Artis) Motion for Summary Judgment against Jared S. O'Connell and Harmony A. O'Connell's (hereinafter "Plaintiffs") claim for South Carolina Unfair Trade Practices. The Court heard oral arguments regarding this matter on August 15, 2023, at the Charleston County Courthouse.

Cameron D. Berthelsen was present on behalf of Artis and Amanda M. Blundy was present on behalf of Plaintiffs. After hearing the arguments and reviewing the memorandum of Plaintiffs, the Court Denies Artis' Motion for Summary Judgment.

FINDING OF FACTS

This case arises out of the allegations of failure to disclose known defective conditions and allegations of multiple deficiencies arising out of the construction of Plaintiffs' single-family home located at 5 Palmetto Road in Charleston County, South Carolina (hereinafter the "Residence"). Defendants House Therapy Holdings, LLC, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain (hereinafter collectively "HTH") purchased the Residence on July 9, 2018. HTH entered into a Cost/Plus Construction Agreement with Artis on July 6, 2018. Artis hired subcontractors to perform various scopes of work at the Residence pursuant to the Cost/Plus Construction Agreement.

Plaintiffs discovered the various construction deficiencies upon observations made by a licensed professional engineer, Russell T. Mease, P.E. on September 3, 2021. Mr. Mease's Construction Deficiencies report dated October 5, 2021, sets forth the various deficiencies. Plaintiffs also hired a licensed mechanical engineer, Warren E. Maddox, P.E., F.NSPE, to evaluate the mechanical system of the Residence. Mr. Maddox's Preliminary Report dated December 14, 2021, sets forth the various deficiencies with the mechanical system including the improper installation of the PVC ductwork installed below the slab.

Artis holds an active Residential Builders license with the South Carolina Department of Labor and Licensing Regulations, which was issued on October 16, 2019. Artis has an active website which advertises new construction and "historic preservation." Artis continues to operate as a general contractor in South Carolina at the time of this Order.

The improper installation of the underground ductwork has resulted in the PVC ductwork filling with water. Plaintiffs had environmental testing performed of the water present in the PVC ductwork, which revealed that the ductwork contains 100ML of Coliform and that E.Coli is also present. These conditions have resulted in Plaintiffs experiencing illness due to quality of the air blowing from the PVC ductwork, such that they have had to move out of the Residence.

CONCLUSIONS OF LAW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Summary judgment is proper when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. On summary judgment, the court's task is not to try issues of fact but to determine if genuine issues of material fact exist. Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct. App. 2002). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct. App. 1999).

The South Carolina Unfair Trade Practices Act (hereinafter "SCUTPA") provides, "Unfair methods of competition and unfair or deceptive act or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "To recover in an action under the [Act], the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected

public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

To be actionable under the SCUTPA, an unfair or deceptive practice or act must adversely affect the public interest. Florence Paper Co. v. Orphan, 298 S.C. 210, 379 S.E.2d 289 (1989); Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986). Therefore, conduct which only affects the parties to the transaction provides no basis for a SCUTPA claim. See Key Co. v. Fameco Distribs., Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). This adverse effect on the public must be proved by specific facts. "Without proof of specific facts disclosing that . . . members of the public were adversely affected by [the unfair conduct] or that they were likely to be, all we are left with is a 'speculative [claim] of adverse public impact' and that will not suffice for a recovery under the SCUTPA." Daisy Outdoor Advertising Co. v. Abbott, Op. No. 2224 (S.C. Ct. App. filed Sept. 6, 1994) (Davis Adv. Sh. No. 20, at 47, 51) (quoting Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc., 974 F.2d 502, 507 (4th Cir. 1992)).

An impact on the public interest may be shown if the acts or practices have the potential for repetition. Crary v. Djebelli, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998). The potential for repetition may be shown by (1) proving that the same kind of actions occurred in the past or (2) by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices. *Id.* at 388, 496 S.E.2d at 23. After alleging and proving facts demonstrating the potential for repetition of the defendant's actions, the Plaintiff has proven an adverse effect on the public interest. Daisy Outdoor Advertising v. Abbott, 322 S.C. 489, 473 S.E.2d 47 (1996). The Plaintiff need not allege or prove anything further.

Based on the evidence in this case, there is a genuine issue of material fact as to whether Artis defectively constructed and renovated the Residence in violation of the South Carolina Residential Code and as to whether Artis violated SCUPTA. Artis is in the business of renovating homes, which they advertise to the public they are experts in doing.

Artis held themselves out to HTH as knowledgeable in the installation of underground PVC ductwork and suggested that HTH install underground PVC ductwork at the Residence. Artis and their subcontractors installed the PVC ductwork at the Residence. As a result of Artis' suggestion and improper installation of the PVC ductwork at the Residence, Coliform and E.Coli are now present at the Residence. Artis' fraudulent and deceptive act of installing a PVC ductwork system that could not work in the environment present at the Residence, has resulted in the presence of water damage, microbial growth, Coliform, and E.Coli, which has uprooted Plaintiffs and their children from their home.

Artis is still in operation and still advertising their expertise to the public. Evidence shows that there is a reasonable inference in Plaintiffs favor that Artis is still in the business of renovating homes and is actively advertising their expertise to the public without knowledge of the necessary building code requirements.

Therefore, the Court finds that there is evidence that Artis engaged in an unfair or deceptive act in the conduct of trade or commerce; the unfair or deceptive act affected public interest; and the Plaintiffs suffered monetary or property loss as a result of the defendant's unfair or deceptive acts.

WHEREFORE, based on the foregoing, Artis Construction, LLC's Motion for Summary Judgment as to Plaintiffs' claims under the South Carolina Unfair Trade Practices Act is DENIED.

IT IS SO ORDERED.

The Honorable Bentley Price
The Ninth Judicial Circuit

Charleston Common Pleas

Case Caption: Jared S O'Connell , plaintiff, et al VS Amanda F Dempsey , defendant, et al

Case Number: 2021CP1003090

Type: Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2021-CP-10-3090
JARED S. O'CONNELL AND HARMONY A. O'CONNELL,	)	
Plaintiffs,	)	**ORDER DENYING MOTION FOR SUMMARY JUDGMENT**
vs.	)	
HOUSE THERAPY HOLDINGS, LLC, AMANDA F. DEMPSEY, WILLIAM T. PHILLIPS, MATTHEW B. SWAIN, et al	)	
Defendants.	)	
AND RELATED CROSS-ACTIONS AND THIRD-PARTY CLAIMS	)	

This matter is before the Court on Defendant Artis Construction's ("Artis") Motion for Summary Judgment against Defendants House Therapy Holdings, LLC; (hereinafter "HTH"), Amanda F Dempsey; William T Phillips; and Matthew B. Swain (hereinafter collectively referred to as "Individuals"). A hearing was convened on August 15, 2023, at the Charleston County Courthouse with Cameron D. Berthelsen appearing on behalf of Artis and William W. Watkins, Jr., appearing on behalf of HTH and the Individuals. After careful consideration of Artis' motion, the filed memoranda, and the oral argument of counsel, the Court DENIES Artis' motion.

Background & Facts

This matter concerns, *inter alia*, construction defect claims resulting from the development and renovation of single-family residence located at 5 Palmetto Road, Charleston, South Carolina (the "Property"). HTH is the former owner of the Property and contracted with Artis to perform renovative work at the Property in 2018. Artis filed a mechanics' lien on January 22, 2022, in the Charleston County Register of Deeds and filed a lawsuit against HTH on July 6, 2020, arising

from the alleged nonpayment by HTH of monies owed to Artis (the "2020 Lawsuit"). HTH asserted several counterclaims in response to the 2020 Lawsuit, including claims for construction defect. The parties attended a mediation conference on October 21, 2020, and reached a settlement agreement that was ultimately executed on December 4, 2020 (the "Settlement Agreement"). The parties filed a Stipulation of Dismissal on December 7, 2020.

Prior to executing the Settlement Agreement, HTH sold the Property to current Plaintiffs, Jared and Harmony O'Connell. (Artis' Motion, Exhibit 3 at p. 14.) The O'Connells filed the instant lawsuit against HTH, Artis, and others alleging construction defect claims. Artis filed this motion alleging that HTH breached the Settlement Agreement because of "Representations" made in it that HTH owned the Property. Specifically, the Settlement Agreement contained the following representation:

> The Parties further represent and warrant that, as of the Effective Date, they are the sole owners of the claims being released and that no other person, firm, or entity owns any interest in the claims that are covered by this Settlement Agreement by any mechanism, including but not limited to by assignment, subrogation, purchase, or otherwise.

Standard of Review

Summary judgment is inappropriate where material facts are in dispute and further inquiry into the facts is necessary to clarify the application of the law. Rule 56(c), SCRCP ("[s]ummary judgment may only be granted where "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 any party is entitled to a judgment as a matter of law.") (emphasis added); *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000) (summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts). Summary judgment is also

inappropriate "where further inquiry into the facts of the case is desirable to clarify the application of the law." *Jackson v. Swordfish Invs., L.L.C.*, 365 S.C. 608, 612, 620 S.E.2d 54, 56 (2005). This is because a court considering summary judgment neither makes factual determinations nor considers the merits of conflicting evidence with respect to a disputed fact. *S.C. Prop & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001); *see also Anderson v. Liber Lobby, Inc.*, 477 U.S. 242, 249 (1986) (In deciding summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."). Rather, the court must view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 59, 518 S.E.2d 301, 304 (Ct. App. 1999); *see also Anderson*, 477 U.S. at 248 ("A disputed fact presents a genuine issue if the evidence is such that a reasonable jury could return a verdict for the non-moving party.").

In cases applying the preponderance of the evidence standard, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt.*, Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). This standard requires only "the slightest amount of relevant evidence on an issue to warrant denial of summary judgment." *Harris Teeter, Inc. v. Moore & Van Allen PLLC*, 390 S.C. 275, 294, 701 S.E.2d 742, 752 (2010) (internal quotations omitted). However, in cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) (addressing fraud claims). Further, summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be

drawn from those facts. *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 684 S.E.2d 756 (2009).

LAW & ANALYSIS

I. The indemnity provision of the Settlement Agreement is unenforceable.

The Court finds that the indemnity provision at issue is unenforceable because it is both overly broad and fails to demonstrate the required intent that HTH would indemnify Artis for Artis' own negligence. Overly broad indemnity agreements violate the public policy of South Carolina and cannot be enforced. *Fisher v. Stevens*, 355 S.C. 290, 297, 584 S.E.2d 149, 153 (Ct. App. 2003); *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 149, 810 S.E.2d 41, 44 (Ct. App. 2018). Indemnity agreements are generally overly broad when they relieve a party from "any and all liability." *Id.* When an agreement purports to indemnify the indemnitee from its own negligence, the agreement must show such an intent in clear and unequivocal terms. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 651, 819 S.E.2d 166, 172 (Ct. App. 2018). Such contracts are subject to strict interpretation. *Id.*

Here, the Plaintiffs have sued Artis for Artis' alleged negligent work at the Property. Artis argues that HTH must now indemnify Artis because the Settlement Agreement requires it. The indemnity provision states:

> HTH, at their own expense, agree to indemnify, defend, and hold Artis, its heirs, executors, successors, related entities, parent companies, subsidiaries, assigns, owners, agents, employees, attorneys, and representatives, free and harmless from all claims, demands, losses, costs, expenses, obligations, liabilities, damages, recoveries, and deficiencies, including interest, penalties, attorneys' fees, and costs, that Artis may incur as a result of a breach by HTH of any representation or agreement contained in this Settlement Agreement, or in connection with any act or omission of HTH in connection with the provisions of this Settlement Agreement.

This provision's scope includes not only Artis, but also any number of unknown and unidentified persons or entities who may qualify as a "related entit[y], parent compan[y], subsidiar[y]" or another one of the 12 categories of indemnitees. This broad and vague contemplation of any number of indemnitees goes beyond the specific contemplations required of indemnity agreements. *See, e.g.*, *Keith v. River Consulting, Inc.*, 365 S.C. 500, 508, 618 S.E.2d 302, 306 (Ct. App. 2005).

Further, the current Plaintiffs are suing Artis for Artis' alleged own negligence. Thus, if any indemnification is to be owed, then the provision must adhere to the heightened clear and unequivocal standard. *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018); *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (reversing summary judgment); *Fed. Pac. Elec. v. Carolina Prod. Enterprises*, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989). Likewise, a contract to absolve a party of liability must clearly demonstrate the intent of the parties to do so. *McCune v. Myrtle Beach Indoor Shooting Range, Inc.*, 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (requiring "explicit language clearly indicating intent" in waivers). This court and many others have reviewed indemnity agreements and found that it is rare that an indemnity agreement is upheld as meeting this heightened standard. *Concord & Cumberland Horizontal Property Regime*, at 658 n. 6, 819 S.E2d at 176 n. 6 (noting that "none of our precedents appear to have found a provision that have met the standard.") Here, there is no language evidencing an intent that HTH would be required to defend and indemnify Artis against claims by third-parties that Artis acted negligently. This is perhaps why Artis' motion frames the genesis of the current lawsuit as HTH's sale of the Property and its nondisclosure of the same. Nonetheless, the Plaintiffs allege that Artis negligently performed work at the Property

and Artis seeks indemnification from HTH for those allegations. This Settlement Agreement is neither clear nor unequivocal that HTH agreed to do so.

As an additional basis for denial, the only consideration outlined within the Settlement Agreement was payment by HTH to Artis of $163,000. Artis did not offer any separate consideration in exchange for a promise from House Therapy Holdings to indemnify Artis from anything, let alone third-party construction defect claims. A binding contract requires a meeting of the minds as to all essential and material terms and sufficient consideration to support the terms. *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 877 S.E.2d 486 (Ct. App. 2022). "Contractual indemnity involves a transfer of risk *for consideration* . . ." *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). Without any such consideration, the indemnity provision is unenforceable as a matter of law.

A contractual agreement to indemnify a party requires separate and valuable consideration to be enforceable. In this case, if the indemnity provision is found to be enforceable at all, separate consideration other than the mutual release of asserted claims must be apportioned and set aside to support such a promise. *E.g., Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, at 389, 611 S.E.2d at 237. In a similar context, our courts have held that noncompete agreements follow the same principle. *See, e.g., Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 548 S.E.2d 208 (2001); *Carolina Chem. Equip. Co. v. Muckenfuss*, 322 S.C. 289, 293, 471 S.E.2d 721, 723 (Ct. App. 1996). Likewise, the Fourth Circuit has construed arbitration provisions within contracts to be stand-alone contracts that are void without sufficient consideration. *Noohi v. Toll Bros.*, 708 F.3d 599, 612 (4th Cir. 2013). Here, in the light most favorable to the non-moving party, the Settlement Agreement does not specify separate consideration in exchange for the indemnity provision that Artis seeks to enforce, and, without consideration, the provision fails as a matter of law.

II. HTH did not breach the Settlement Agreement and therefore Artis' motion on its breach of contract claims should be denied.

The only obligation that Artis alleges HTH breached is the indemnity obligation of the Settlement Agreement. (*See* Artis' Mot., p. 7 at ¶¶ 24-25.) Because the Court finds that the indemnity provision is unenforceable, the Court must necessarily find that HTH has not breached the settlement agreement. Moreover, the Court finds that the sale of the Property and nondisclosure does not breach the "representations" of the Settlement Agreement. Artis alleges that HTH represented that they were the sole owners of the Property despite having already sold the Property to the Plaintiffs. Upon review of the Settlement Agreement, the Court notes that the only representations that HTH made were that it was the sole owner of "the claims being released." (*See* Artis Mot., Exhibit 7 at p. 3.)[1] There is nothing in the record indicating that the sale of the Property included any transfer or assignment of HTH's claims against Artis or that they had otherwise been diminished. HTH alleged in a prior lawsuit that it incurred damages resulting from Artis' negligence and those claims were the subject of the Settlement Agreement, not the sale or ownership of the Property.

III. Genuine issues of material fact preclude summary judgment on Artis' fraud claim.

Artis alleges that HTH "committed fraud by agreeing to facts and representations that they knew were not true[.]" (Artis' Mot., p. 5.) Artis has not set forth uncontested facts proving all nine elements of fraud and there are genuine issues of material fact precluding summary judgment. Artis' motion cannot survive any standard of proof, let alone the "clear, cogent, and convincing" standard required to demonstrate fraud. *Burns v. Wannamaker*, 285 S.C. 336, 333 S.E.2d 358 (Ct.

[1] The Court further notes and finds that the "Whereas" clause of the agreement upon which Artis relies is neither a "representation" nor part of the agreement. Instead, it is a recital that serves only to provide background and context to the Settlement Agreement.

App. 1985). "The failure to prove any element of fraud ... is fatal to the claim." *Schnellmann v. Roettger*, 645 S.E.2d 239, 241 (S.C. 2007).

First, as noted above, the representation that HTH made in the Settlement Agreement was not that it owned the Property. Thus, it is unclear whether the fact that the Property had been sold was "material" in the context of fraud. A fact is "material" in the context of a fraud claim when a plaintiff demonstrates that "she could have done something else" but for the false statement. DeCecco v. Univ. of S.C., 918 F. Supp. 2d 471, 523 (D.S.C. 2013). Specifically, Artis and HTH were previously parties to a lawsuit concerning claims asserted against each other, and Artis has not alleged that it would not have settled those claims but for the representations in the settlement agreement. *See, e.g., Culbreath v. Investors Syndicate*, 203 S.C. 213, 26 S.E. 809 (1943) (a representation is material when knowledge (or lack thereof) of a fact would cause a person to act in a different manner). The Court finds there is more than a mere scintilla of evidence regarding the issue of whether the alleged representations are material.

Additionally, HTH argues that even if ownership of the Property was a material term then Artis could not have reasonably relied upon the representations of the Settlement Agreement when the truth of the matter was public record. "[G]enerally, one cannot rely upon misstatements of facts, if the truth is easily within his reach." *O'Shields v. S. Fountain Mobile Homes, Inc.*, 262 S.C. 276, 282, 204 S.E.2d 50, 52 (1974). Even where evidence supports justifiable reliance, the issue is usually one for the jury to decide. *Harrington v. Mikell*, 321 S.C. 518, 524, 469 S.E.2d 627, 630 (Ct. App. 1996). This issue involves factual questions about the specific knowledge of the parties involved in a transaction, the specific statements and representations made formally and informally, and also the outside knowledge and legal counsel available to the parties. The Court finds that these issues must be resolved by a jury rather than the Court.

Additionally, Artis makes no mention how exactly it has been damaged by the alleged misrepresentations of the Settlement Agreement. "Fraud and deceit, to be actionable, must be accompanied by some injury or damage which was proximately caused by the fraud." *Prickett v. A&B Elec. Service, Inc.*, 280 S.C. 123, 125, 311 S.E.2d 402, 403 (Ct. App. 1984). Litigation expenses and attorneys fees are not recognizable damages in the context of fraud. *Id.*; *see also Collins Music Co., Inc. v. FMC Corp.*, 355 S.C. 446, 451, 586 S.E.2d 128, 131 (2003). In this case, Artis has not alleged any pecuniary harm that has befallen it by settling with HTH. It has not alleged a loss of funds, loss of assets, or any other cognizable damage that resulted from its reliance on any representation made in the Settlement Agreement or otherwise. Instead, Artis merely seeks to pass on the burden of defending construction defect claims. Given that Artis did not pay any money for the specific purpose of settling these claims, it cannot be said that they have suffered any damage by entering into the Settlement Agreement.

IV. Summary judgment should be denied as to the Individuals.

Finally, Artis also seeks to hold three individuals liable for HTH's alleged fraud and breach of contract. Artis seemingly alleges that these individuals acted "on behalf of HTH" in carrying out its bad acts and allowed Artis be misled during settlement negotiations. The Court notes, however, that two of these Individuals did not sign the Settlement Agreement and the third only did so on behalf of HTH as its "Authorized Signator." The Individuals were not parties to the Settlement Agreement nor has Artis presented any evidence that they made any other promises or guarantees to Artis. Finally, these Individuals are not even members of HTH; they are members of other limited liability companies which, in turn, are members of HTH. Thus, Artis asks this Court to disregard the statutory protections afforded to not one but four limited liability companies. The Court will not do so. At most, there remain genuine issues of material fact regarding the knowledge, intent, and acts of each member; however, Artis' consistent reference to the members'

actions *on behalf of HTH* demonstrates that liability, if any exists at all, rests with the HTH and not its members.

Conclusion

For the reasons set forth above, this Court finds that the indemnity provision that Artis seeks to enforce in invalid under South Carolina law; that HTH did not breach the terms of the Settlement Agreement because it is not required to indemnify Artis; that genuine issues of material fact preclude summary judgment as to Artis' claim of fraud; and that there is no basis for liability against the Individuals under any of Artis' causes of action. Therefore, this Court DENIES Artis' motion for summary judgment because the known facts make it clear that Artis' claims fail as a matter of law and if any issues remain unclear then they should be left to the jury to decide.

IT IS SO ORDERED!

The Honorable Bently Price
Ninth Judicial Circuit

Charleston Common Pleas

Case Caption: Jared S O'Connell , plaintiff, et al VS Amanda F Dempsey , defendant, et al

Case Number: 2021CP1003090

Type: Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1003090

Jared S O'Connell et al
PLAINTIFF(S)

Amanda F Dempsey et al
DEFENDANT(S)

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.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **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:

Both Orders titled "ORDER DENYING ARTIS CONSTRUCTION, LLC'S MOTION FOR SUMMARY JUDGMENT AS TO DEFENDANTS HOUSE THERAPY HOLDINGS, LLC; AMANDA F. DEMPSY; WILLIAM T. PHILLIPS; AND MATTHEW B. SWAIN" were signed in error due to a clerical error and are therefore vacated.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/19/2023 .

Charleston Exteriors Llc
La Roca Masonry LLC
Bearden Contracting Services Llc
H2O Pro Llc
Guillen Carpentry LLC
Brian R Wells PE LLC
Artis Construction LLC
Apex Contractors Llc
Pj Sanchez Masonry Llc
Charleston Exteriors Llc
Ashley Oak Contracting Llc
Matthew B Swain
William T Phillips
Amanda F Dempsey
House Therapy Holdings Llc
Bluetape Solutions, Llc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Charleston Common Pleas

Case Caption:	Jared S O'Connell , plaintiff, et al VS Amanda F Dempsey , defendant, et al
Case Number:	2021CP1003090
Type:	Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766