

Dec 21 2023

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
THE HONORABLE BENTLEY D. PRICE, CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2023-001853
CIVIL ACTION NO. 2021-CP-10-03090

Jared S. O'Connell and Harmony A. O'Connell,

Respondents,

versus

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 & Air;
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 Sprayfoam Insulation of the Carolinas, LLC,

Defendants,

and

Artis Construction, LLC is

Third-Party Plaintiff/Appellant,

versus

Brian R. Wells, PE, LLC; Perryman Engineering, LLC; 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; and South Point Hardwood
Floor, LLC,

Third-Party Defendants,

and

House Therapy Holdings, LLC; Amanda F. Dempsey; William T. Phillips;
and Matthew B. Swain,

Respondents,

versus

Carolina Climate Control, LLC; and Bluetape Solutions, LLC,

Third-Party Defendants.

**MEMORANDUM OF APPELLANT ARTIS CONSTRUCTION, LLC
REGARDING APPEALABILITY**

Artis Construction, LLC, Appellant in the above-captioned appeal, submits this memorandum regarding appealability in response to the Court’s inquiry on December 12, 2023 and states that the appealed orders are immediately appealable under S.C. CODE ANN. § 14-3-330 for the reasons set forth herein.

I. PROCEDURAL BACKGROUND

This case arises out of alleged construction defects in a residence owned by Plaintiffs Jared S. O’Connell and Harmony A. O’Connell. The Plaintiffs purchased the property from Defendant House Therapy Holdings, LLC (“HTH”). Prior to the Plaintiffs’ purchase of the residence, HTH contracted with Artis Construction to renovate the property.

The Plaintiffs filed suit against a number of defendants for the alleged construction defects, including Artis Construction, HTH, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain. A Fifth Amended Complaint was filed November 16, 2022. See Fifth Am. Compl., attached hereto as Exhibit “**A**.” The Plaintiffs asserted

claims for negligence, breach of warranties, and violation of South Carolina's Unfair Trade Practices Act against Artis Construction.

Artis Construction answered the Fifth Amended Complaint and asserted cross-claims against HTH, as well as against Dempsey, Phillips, and Swain (the "HTH Individual Defendants"), for indemnity, breach of contract, and fraud. See Answer and Cross-Claims, attached hereto as Exhibit "**B**." The cross-claims arose out of the breach of and material misrepresentations made by HTH and the HTH Individual Defendants in connection with a settlement agreement executed to resolve previous litigation between Artis Construction, HTH, and the HTH Individual Defendants involving the renovation of the Plaintiffs' property and the same construction defects now alleged by the Plaintiffs.

On May 5, 2023, Artis Construction moved for summary judgment against HTH and the HTH Individual Defendants on its cross-claims for indemnity, breach of contract, and fraud. See Artis Mtn. for Summary Judgment against HTH and HTH Individual Defendants, attached hereto as Exhibit "**C**." On June 23, 2023, Artis Construction also moved for summary judgment on the Plaintiffs' claim for violation of the Unfair Trade Practices Act, arguing that the Plaintiffs had not presented any evidence supporting a finding that Artis Construction engaged in any unfair or deceptive act or practices which affected the public interest as required to succeed on a claim for Unfair Trade Practices. See Artis Mtn. for Summary Judgment against Plaintiffs, attached hereto as Exhibit "**D**."

A hearing was held before the Trial Court on August 15, 2023 on both motions for summary judgment. The Trial Court denied the motions from the bench. See Hearing Transcript Excerpts attached hereto as Exhibit "**E**," pp. 26, ll. 18-19; 29, ll. 6-11; 34, l. 25 – 35, l. 1.

Even though the Trial Court had simply orally denied the motions for summary judgment and had specifically instructed the Plaintiffs' counsel to submit a "short order" reflecting the same, Hearing Tr. pp. 34, l. 25 – 35, l. 1, the Plaintiffs, as well as HTH and the HTH Individual Defendants, submitted proposed orders which included multiple findings of fact and conclusions of law which, if signed by the Trial Court, would amount to a summary judgment in favor of the Plaintiffs, HTH and the HTH Individual Defendants. Artis Construction submitted competing proposed orders which simply denied the motions for summary judgment without making any findings of fact or conclusions of law.

With respect to Artis Construction's motion for summary judgment on the cross-claims against HTH and the HTH Individual Defendants, the Trial Court signed and entered both the proposed order submitted by HTH and the HTH Individual Defendants and the proposed order submitted by Artis Construction. See HTH Order Denying Motion for Summary Judgment entered September 1, 2023 at 10:54 a.m., attached hereto as Exhibit "F" and Artis Order Denying Motion for Summary Judgment entered September 1, 2023 at 11:00 a.m., attached hereto as Exhibit "G."

Likewise, as to Artis Construction's motion for summary judgment on the Plaintiffs' Unfair Trade Practices Act claim, the Trial Court also signed and entered both the proposed order of the Plaintiffs and the proposed order of Artis Construction. See Plaintiffs Order Denying Motion for Summary Judgment entered September 1, 2023 at 10:58 a.m., attached hereto as Exhibit "H" and Artis Order Denying Motion for Summary Judgment as to Plaintiffs entered September 1, 2023 at 11:02 a.m., attached hereto as Exhibit "I."

Therefore, as to each of Artis Construction's motions for summary judgment, the Trial Court had entered both short orders simply denying the motions, as well as full and complete orders rendering findings of fact and conclusions of law against Artis Construction. Due to the confusion, the Trial Court eventually entered a Form 4 Order on September 27, 2023 indicating that the proposed orders submitted by Artis Construction which were entered at 11:00 a.m. and 11:02 a.m. on September 1, 2023 were vacated. See Form 4 Order filed September 19, 2023, attached hereto as Exhibit "J" and Form 4 Order filed September 27, 2023, attached hereto as Exhibit "K."

Therefore, on September 27, 2023, the Trial Court adopted the proposed orders submitted by the Plaintiffs and HTH and the HTH Individual Defendants. These orders did more than simply deny the motions for summary judgment of Artis Construction. Rather, the Trial Court's orders made binding findings of fact and conclusions of law against Artis Construction which prevent Artis Construction from pursuing its cross-claims against HTH and the HTH Individual Defendants and strip Artis Construction of its defenses to the Plaintiffs' claims.

A. Order as to HTH and the HTH Individual Defendants.

The Trial Court's order titled "Order Denying Motion for Summary Judgment" as to HTH and the HTH Individual Defendants [Exhibit "F"] makes the following rulings as a matter of law which preclude Artis Construction from pursuing its cross-claims for indemnity, breach of contract, and fraud:

1. The Trial Court ruled that the indemnity provision in the settlement agreement at issue is unenforceable and invalid as a matter of law under South Carolina law and therefore Artis Construction's claims for indemnity and breach of contract fail as a matter of law [Id. at pp. 4-7; 10];

2. The Trial Court further ruled, as a matter of law, that there were no misrepresentations which breached the settlement agreement and therefore, Artis Construction's breach of contract cross-claim failed as a matter of law on this additional basis [Id. at pp. 7, 10];
3. The Trial Court ruled that Artis Construction's claim for fraud failed as a matter of law because it did not prove any damages [Id. at p. 9]; and
4. The Trial Court ruled that there was no basis for liability against the HTH Individual Defendants under any of Artis Construction's causes of action as a matter of law [Id. at pp. 9-10].

In its conclusion, the Trial Court explicitly stated that as to the cross-claims against HTH and the HTH Individual Defendants, "the known facts [made] it clear that Artis' claims fail as a matter of law." [Id. at p. 10].

B. Order as to the Plaintiffs.

The Trial Court's order titled "Order Denying Artis Construction, LLC's Motion for Summary Judgment as to Plaintiffs" [Exhibit "**H**"] makes the following binding findings of fact and conclusions of law in favor of the Plaintiffs, thus precluding Artis Construction's ability to defend:

1. The Trial Court's order makes multiple findings of fact predetermining the existence of construction deficiencies which resulted in damage to the Plaintiffs, including experiencing illness which forced the Plaintiffs to move out of the home due to air quality, even though the existence of construction deficiencies, causation, and damages was and continues to be a disputed issue in the case [Id. at pp. 2-3];
2. The Trial Court's order further makes findings of fact that because Artis Construction suggested underground PVC ductwork and improperly installed the PVC ductwork, Coliform and E.Coli are now present at the Plaintiffs' property, which factual findings are conclusive of liability and causation against Artis Construction [Id. at p. 3 (finding "improper installation of underground ductwork" causing ductwork to fill with water resulting in Plaintiffs' illnesses); p. 5 (same factual finding)]; and

3. The Trial Court ruled that Artis Construction committed a “fraudulent and deceptive act” by installing a PVC ductwork system that could not work in the environment for the Plaintiffs’ property resulting in damage to the Plaintiffs [Id. at p. 5].

While the Trial Court’s order purports to deny Artis Construction’s motion for summary judgment on the Plaintiffs’ Unfair Trade Practices Act claim, the Trial Court’s order instead makes numerous conclusive factual findings in favor of the Plaintiff, including determinations on the existence of construction deficiencies, the existence of deceptive acts, causation, and damages which now Artis Construction is precluded from contesting at trial.

C. Denial of Reconsideration.

On October 9, 2023, Artis Construction moved the Trial Court to reconsider its order as to HTH and the HTH Individual Defendants, as well its order as to the Plaintiffs. See Mtns. to Reconsider, attached hereto as Exhibits “**L**” and “**M**.” In such motions, Artis Construction argued that it was inappropriate for the Trial Court to make binding factual findings and conclusions of law in orders which purported to deny Artis Construction’s motions for summary judgment. The Trial Court denied the motions on November 8, 2023. See Order on Motions to Reconsider, attached hereto as Exhibit “**N**.” This appeal followed.

II. ARGUMENT

The Trial Court’s orders which purport to deny Artis Construction’s motions for summary judgment are immediately appealable because such orders make binding findings of fact and conclusions of law against Artis Construction which preclude its ability to pursue its cross-claims against HTH and the HTH Individual Defendants and prohibit it from presenting a defense against the claims of the Plaintiffs. Accordingly, the

appealed orders are immediately appealable because such orders involve the merits and affect the substantial rights of Artis Construction.

“The determination of whether a trial court's order is immediately appealable is governed by statute.” Morrow v. Fundamental Long–Term Care Holdings, LLC, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015). Absent a specialized statute, S.C. CODE ANN. § 14-3-330 grants this Court jurisdiction over appeals from:

- (1) Any intermediate judgment, order or decree in a law case involving the merits; [and]
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

Id.

South Carolina appellate courts decide whether an order is immediately appealable by examining the nature and effect of the order to determine whether the order fits S.C. CODE ANN. § 14-3-330's parameters. Morrow, 412 S.C. at 539-40, 773 S.E.2d at 147. Nothing in the text or application of § 14-3-330 excludes any one procedural variety of order from its scope. An appellate court's review of a circuit court order “is not constrained by how the order is styled.” Id. at 539, 773 S.E.2d at 147. Instead, the statute's terms look to an order's substance – whether the order “affect[s] a substantial right” and is thus immediately appealable. S.C. CODE ANN. § 14-3-330(2).

Consequently, because the appealability of an order hinges on its “nature and effect” rather than on its title, Tillman v. Tillman, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017), “the question of whether an order is immediately appealable is determined on a case-by-case basis.” Stone v. Thompson, 426 S.C. 291, 295, 826 S.E.2d

868, 870 (2019); see also Wetzel v. Woodside Dev. Ltd. P'ship, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (noting courts must consider the **effect** of the order, not its label, in determining appealability). Courts must evaluate “the particular circumstances” of each order and case to decide an order’s appealability. See Stone, 426 S.C. at 295, 826 S.E.2d at 870.

The Trial Court’s orders in this case may be labeled as a denial of a motion for summary judgment, but the label does not reflect the true nature of the appealed orders. The orders instead grant summary judgment against Artis Construction and in favor of HTH, the HTH Individual Defendants, and the Plaintiffs. Because the effect of the orders is to grant summary judgment, they are immediately appealable. See Atl. Specialty Ins. Co. v. City of Coll. Park, 357 Ga. App. 556, 559 n.5, 851 S.E.2d 189, 192 n.5 (2020), rev'd on other grounds, 313 Ga. 294, 869 S.E.2d 492 (2022) (holding that although the trial court's order by its express terms denied summary judgment and therefore was interlocutory, review of the order's substance revealed that the order appealed from was more in line with that of a declaratory judgment ruling which in substance granted judgment as a matter of law for which appellant was authorized to seek a direct and immediate appeal).

In its order as to HTH and the HTH Individual Defendants, the Trial Court does not merely deny Artis Construction’s motion for summary judgment. The Trial Court instead ruled as a matter of law that (1) the indemnity provision in the settlement agreement which Artis Construction sought to enforce is unenforceable and invalid; (2) Artis Construction cannot recover on its claim for breach of the settlement agreement as a matter of law; (3) the fraud claim of Artis Construction fails as a matter of law because it

did not prove damages; and (4) there was no basis for liability against the HTH Individual Defendants. [Exhibit “F.”]

The Trial Court’s order as to HTH and the HTH Individual Defendants finds in favor of these defendants on the entirety of Artis Construction’s cross-claims for indemnity, breach of contract, and fraud as a matter of law. The effect of the Trial Court’s order is to determine Artis Construction’s cross-claims on the merits and strike the cross-claims, which rulings are immediately appealable under S.C. CODE ANN. § 14-3-330(1), (2)(a), and (2)(c). See Stone, 426 S.C. at 294, 826 S.E.2d at 869-70 (“An order involves the merits under § 14-3-330(1) when it finally determines some substantial matter forming the whole or part of a cause of action or defense.”); Lebovitz v. Mudd, 289 S.C. 476, 479, 347 S.E.2d 94, 96 (1986) (holding an order striking out part of a pleading is immediately appealable); Harbert v. Atlanta & C. Air Line Ry. Co., 74 S.C. 13, 53 S.E. 1001, 1002 (1906) (“If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings.”).

While the Trial Court’s order as to HTH and the HTH Individual Defendants may purport to be a denial of a motion for summary judgment, the order in fact grants summary judgment to these defendants on the cross-claims of Artis Construction because the Trial Court finally determined substantial matters forming Artis Construction’s cross-claims. See Stone, 426 S.C. at 295, 826 S.E.2d at 870 (concluding lower court’s

determination of common law marriage was immediately appealable where the court weighed the evidence and finally determined a substantial matter forming the claims for divorce and equitable distribution). The grant of a summary judgment is immediately appealable. Link v. Sch. Dist. of Pickens Cty., 302 S.C. 1, 6, 393 S.E.2d 176, 178–79 (1990).

Likewise, the Trial Court’s order as to the Plaintiffs does not merely deny Artis Construction’s motion for summary judgment on the Unfair Trade Practices Act claim, but instead makes numerous factual determinations as a matter of law that construction deficiencies exist, that Artis Construction improperly completed the construction work, that Artis Construction acted fraudulently and deceptively, and that the acts of Artis Construction caused the construction deficiencies and the Plaintiffs’ damages. These were disputed factual issues that were to be determined at trial, but now the Trial Court has ruled upon and determined these factual disputes as a matter of law, in effect granting summary judgment to the Plaintiffs on these issues of fact. See id. at 6, 393 S.E.2d at 178–79 (observing an order granting partial summary judgment may be appealable under either the “involving the merits” or “substantial right” categories of section 14–3–330(1) and (2)(c)).

The Trial Court’s rulings against Artis Construction on the disputed factual issues involve the merits, determine substantial matters forming the basis of the Plaintiffs’ action against Artis Construction, and strike Artis Construction’s defenses to the Plaintiffs’ claims. By making these rulings, including that Artis Construction acted deceptively, the Trial Court has predetermined that Artis Construction is liable for a violation of the Unfair Trade Practices Act which exposes Artis Construction to treble

damages without an opportunity to present a defense. See S.C. CODE ANN. § 39-5-140(a) (providing that “[i]f the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court shall award three times the actual damages sustained . . .”).

Under the Trial Court’s order, Artis Construction is precluded from defending against the Plaintiffs’ causes of action due to the binding factual findings made by the court. See S.C. CODE ANN. § 14-3-330(1), (2)(a), and (2)(c); see also Nauful v. Milligan, 258 S.C. 139, 143, 187 S.E.2d 511, 513 (1972) (finding lower court’s interlocutory determination that defenses interposed by defendant were without merit was immediately appealable). For this reason, the Trial Court’s order as to the Plaintiffs is also immediately appealable.

III. CONCLUSION

For the reasons set forth herein, Appellant Artis Construction respectfully requests this Court to determine that the appealed orders are immediately appealable under S.C. CODE ANN. § 14-3-330(1), (2)(a), and (2)(c) or, in the alternative, permit the issue of appealability to be further briefed in the appellate briefs on the merits.

(signature on following page)

Respectfully submitted,

/s/ Carmen V. Ganjehsani

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ATTORNEYS FOR APPELLANT

ARTIS CONSTRUCTION, LLC

December 21, 2023.

EXHIBIT “A”

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2021-CP-10-03090
	)	
JARED S. O'CONNELL AND HARMONY	)	
A. O'CONNELL,	)	FIFTH AMENDED SUMMONS
	)	(Jury Trial Demanded)
	)	
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; H2O 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.	)	

YOU ARE HEREBY SUMMONED and are required to answer the Fifth Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers, at 234 Seven Farms Drive, Suite 111-A, South Carolina, 29492, within thirty (30) days after the service thereof, exclusive of the day of such service, and if you

fail to answer the Fifth Amended Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Fifth Amended Complaint.

BLUNDY LAW FIRM, LLC

s/:Amanda M. Blundy
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Attorneys for Plaintiffs

Charleston, South Carolina
November 16, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2021-CP-10-03090
	)	
JARED S. O'CONNELL AND HARMONY	)	
A. O'CONNELL,	)	FIFTH AMENDED COMPLAINT
	)	(Jury Trial Demanded)
	)	
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.	)	

NOW COME the Plaintiffs above-named, complaining of the Defendants above-named, who allege and show unto this Honorable Court as follows:

1. That the Plaintiffs, Jared O'Connell and Harmony O'Connell, are citizens and residents of the County of Charleston, State of South Carolina, and at all times hereinafter mentioned, own the Residence located at 5 Palmetto Road, Charleston, South Carolina.

2. That, upon information and belief, Defendant, House Therapy Holdings, LLC is a Texas limited liability company, conducting business in Charleston County, State of South Carolina, and are the developers and previous owners of the real property located at 5 Palmetto Road, Charleston, South Carolina (hereinafter referred to as the “Residence”), which is the subject Residence of this action, and sold the property to the Plaintiffs and had the duty to disclose defects that were known or should have been known prior to the sale of the Residence to the Plaintiffs.

3. That, upon information and belief, Defendant, Amanda F. Dempsey, is a citizen and resident of State of Texas conducting business in Charleston County, State of South Carolina, and was/is the principal of Defendant, House Therapy Holdings, LLC and at all times relevant hereto managed, supervised, and participated in the development, supervision, construction, and/or repair and sale of the Residence and had the duty to disclose damage and other defects that were known or should have been known prior to the sale of the Residence to the Plaintiffs. The Defendants, House Therapy Holdings, LLC, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain are the agents and/or alter egos of each other, and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendants is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

4. That, upon information and belief, Defendant, William T. Phillips, is a citizen and resident of Charleston County, and was/is the principal of Defendant, House Therapy Holdings, LLC and at all times relevant hereto managed, supervised, and participated in the development, supervision, construction, and/or repair and sale of the Residence and had the duty to disclose damage and other defects that were known or should have been known prior to the sale of the Residence to the Plaintiffs. The Defendants, House Therapy Holdings, LLC, Amanda F. Dempsey,

William T. Phillips, and Matthew B. Swain are the agents and/or alter egos of each other, and the corporate interest of the Defendants were amalgamated so that they in effect operated as one and the same entity.

5. That, upon information and belief, Defendant, Matthew B. Swain, is a citizen and resident of Charleston County, and was/is the principal of Defendant, House Therapy Holdings, LLC, and at all times relevant hereto managed, supervised, and participated in the development, supervision, construction, and/or repair and sale of the Residence and had the duty to disclose damage and other defects that were known or should have been known prior to the sale of the Residence to the Plaintiffs. The Defendants, House Therapy Holdings, LLC, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain are the agents and/or alter egos of each other, and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Hereinafter, Defendants, House Therapy Holdings, LLC, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain shall be referred to as “Defendant Sellers.”

6. Matthew Swain was also acting as realtor and agent of Defendant Sellers and at all times relevant herein was conducting business as an agent of Defendant Daniel Ravenel Company Sotheby’s International Realty.

7. Defendant Daniel Ravenel Company Sotheby’s International Realty is a corporation organized pursuant to the laws of the State of South Carolina and regularly conducts business in Charleston County, South Carolina and acted as realtors, brokers, and the agents of Defendant Sellers. Hereinafter, Defendant Matthew Swain and Defendant Daniel Ravenel Company Sotheby’s International shall be referred to as “Defendant Sellers’ Agent.”

8. That, upon information and belief, Defendant, Artis Construction, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston

County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically, constructed and/or repaired, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

9. That, upon information and belief, Defendant, Oceanaire, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the construction and/or repair of the Plaintiffs' residence and specifically the design of the heating and air conditioning system, installed the heating and air conditioning system, ductwork, and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina. That the Defendant, Oceanaire, LLC, is the agent and/or alter ego of Defendants, Hero Heating and Air, LLC and Custom Climate Heating & Air, Inc., and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendants is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

10. That, upon information and belief, Hero Heating And Air, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the construction and/or repair of the Plaintiffs' residence and specifically the design of the heating and air conditioning system, installed the heating and air conditioning system, ductwork, and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina. That the Defendant, Hero Heating and Air, LLC, is the agent and/or alter ego of Defendants, Oceanaire, LLC and Custom Climate Heating & Air, Inc, and the corporate interests of these Defendants were

amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendants is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

11. That, upon information and belief, Custom Climate Heating & Air, Inc., is a corporation organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the construction and/or repair of the Plaintiffs' residence and specifically the design of the heating and air conditioning system, installed the heating and air conditioning system, ductwork, and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina. That the Defendant, Custom Climate Heating & Air, Inc, is the agent and/or alter ego of Defendants, Oceanaire, LLC and Hero Heating and Air, LLC, and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Accordingly, jurisdiction over the Defendants is proper in this Court under South Carolina Code Ann. § 36-2-802 (1976).

12. That, upon information and belief, Defendant, P.J. Sanchez Masonry, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically installed the concrete slabs and footings, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

13. That, upon information and belief, Defendant, Donnix Construction, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically installation

of the windows and doors, secondary weather barrier, window and door flashings, framing and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

14. That, upon information and belief, Defendant, Guillen Carpentry, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically, installation of the windows and doors, secondary weather barrier, window and door flashings, framing, siding, trim, flooring and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

15. That, upon information and belief, Defendant, Charleston Exteriors, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically, installed the exterior gutters and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

16. That, upon information and belief, Defendant, Ashley Oak Contracting, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically installed the roof and related flashings and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

17. That, upon information and belief, Defendant, H2O Pro, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically installed the plumbing system, gas system, and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

18. That, upon information and belief, Defendant, La Roca Masonry, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically installed the fireplace, stucco, and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

19. That, upon information and belief, Defendant, Apex Contractors, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically installed the flooring and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

20. That, upon information and belief, Defendant, South Point Hardwood Floor, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically installed

the flooring and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

21. That, upon information and belief, Defendant, Bluetape Solutions, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically the installation of the windows, related flashings, and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

22. That, upon information and belief, Defendant, Carolina Climate Control, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically the installation of the heating and air conditioning system, and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

23. That, upon information and belief, Defendant, Movar, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically the installation of the exterior paint, sealants and caulks, and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

24. That, upon information and belief, Defendant, ECL Design, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the design,

development, construction and/or repair of residential housing and specifically performed grading and site work services and all related components, in and to the Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

25. That, upon information and belief, Affordable Spray Foam Insulation of the Carolina's, LLC f/k/a Affordable Sprayfoam Insulation of the Carolinas, LLC, is a limited liability company organized in the State of South Carolina, conducting business in Charleston County, State of South Carolina, and at all times relevant hereto was engaged in the construction and/or repair of the Plaintiffs' residence and specifically the installation of the insulation and all related components, in and to Plaintiffs' residence located at 5 Palmetto Road, Charleston, South Carolina.

JURISDICTION

26. That this Court has jurisdiction over the parties and subject matter hereto and that the allegations out of which this action arises all involve the Plaintiffs' Residence located at 5 Palmetto Road, Charleston, South Carolina.

FACTUAL BACKGROUND

27. That the Plaintiffs purchased the Residence located at 5 Palmetto Road, Charleston, South Carolina and recently became aware of construction defects as a result of the development and renovation of the Residence done prior to their obtainment.

28. Upon information and belief, Defendant Sellers and/or Defendant Sellers' Agent knew or should have known of the defects present with the Residence and made false representations and concealed defects at the Residence and failed to disclose these defective conditions that were known or should have been known and induced the Plaintiffs to purchase the

Residence by concealing and/or failing to disclose latent defects and damages that were not apparent to a reasonable person.

29. That, as a direct and proximate result of the Defendants' acts and omissions herein complained of, Plaintiffs have been damaged and have or will have to expend large sums of money to repair, fix, correct, and replace various parts and components of their Residence and reconstruct major portions of their Residence, which have been exposed to and will be subject to loss of use, enjoyment and depreciation of the value of their property.

30. That, as a result of the various construction deficiencies, building code violations, deviations from manufacturers' specifications and substantial resulting damage, the Plaintiffs have been damaged and have or will have to expend large sums of money to repair, fix, correct, and replace various parts and components of their residence and reconstruct major portions of their residence, which have been exposed to and will be subject to loss of use, enjoyment, and depreciation of the value of their property.

FOR A FIRST CAUSE OF ACTION

**(Negligence, Gross Negligence, Carelessness, Recklessness, Willfulness and Wantonness)
(AS TO ALL DEFENDANT SELLERS; DEFENDANT SELLER' AGENT; 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; H2O 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)**

31. The Plaintiffs re-allege the allegations contained in Paragraphs 1 through 30 of this Complaint and incorporates the same herein as if repeated verbatim.

32. That at all times material hereto, the Defendant Sellers and Defendant Sellers' Agent, by and through their agents, servants, and/or employees, undertook and were under a duty

to fully and truthfully inform the Plaintiffs of all material facts affecting the Residence, including to disclose, inform, and truthfully represent the true nature of the Residence.

33. The Defendant Sellers and Defendant Sellers' Agent were negligent, grossly negligent, careless, reckless, willful, and wanton in that they knew or should have known their Residence was not build and/or repaired in accordance with applicable building codes, and in conformance with accepted construction and industry standards and concealed and failed to disclose damage and defects that were known or should have been known. Such negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness includes but is not limited to the following, to wit:

- a. in concealing defects and damages that existed at the residence;
- b. negligently developing, marketing, and selling the Residence;
- c. in failing to disclose defective conditions that were known or should have been known;
- d. in failing to use due care in construction and/or repair of the subject residence;
- e. in failing to adequately supervise the construction, repair, and building of the subject residence;
- f. in failing to hire competent subcontractors or specialty contractors or employees;
- g. in failing to adequately and competently supervise and/or train subcontractors or specialty contractors or employees;
- h. in building, constructing, and repairing the subject Residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- i. in constructing a residence which allowed water to intrude into the residence allowing deterioration of building components;
- j. in failing to disclose defective conditions that were known or should have been known;
- k. in improperly installing the windows, window flashings, and related components;
- l. in improperly installing the HVAC system and related components;
- m. in improperly performing grading and site work services; and
- n. other deficiencies or failures as will be proved at trial.

34. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness, and wantonness of the Defendant Sellers and Defendant Sellers' Agent,

the Plaintiffs have suffered actual, direct, incidental, consequential, special damages and attorneys' fees including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects and repair deficiencies and they have or will have to spend substantial sums of money in order to renovate, correct, repair, remediate, and restore their Residence to make it safe and habitable. Each year since completion, new areas of damage occurred separate and apart from any damage already in the process of occurring. All of which has or will require the Plaintiffs to suffer the loss, use and enjoyment of the property, as well as loss of valuation and depreciation by virtue of the defects and damages aforesaid.

35. That at all times material hereto, the Defendants, Artis Construction, LLC and Oceanaire, LLC, by and through their agents, servants, and/or employees undertook and were under a duty to build, construct and/or repair the subject residence and to provide materials and services in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards.

36. That Defendant Artis Construction, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly installing the cementitious siding and related flashings;
- h. in improperly installing the trim;
- i. in improperly installing the windows, doors, and flashing;
- j. in improperly installing the plumbing and related components;
- k. in improper installation the heating and air conditioning system including duct lines and related components;
- l. in improperly grading the property;
- m. in improperly installing the framing;
- n. in failing to properly integrate the secondary weather barrier and flashings;
- o. in installing a home exterior and ductwork which fails to provide a sufficient barrier against the intrusion of water into the wall system and adequate avenue for exit of water that gets into the wall system, slab, flooring and other building components;
- p. in improperly installing and/or failing to install the sealants and caulks;
- q. in failing to properly install the exterior paint, sealants, and all related components;
- r. in improperly installing the deck, related components, and the scuppers;
- s. in improperly installing flooring;
- t. in improperly installing the plumbing and related components;
- u. in improperly installing the fireplace, related flashings, and related components;
- v. in improperly installing the gas system and related components;
- w. in improperly installing the concrete slabs;
- x. in improperly installing the concrete footings;
- y. in improperly installing the stucco and stucco related flashings;
- z. in improperly installing the roof, related accessories, and related flashings;
- aa. in improperly applying the liquid applied membrane on the deck;
- bb. in improperly installing the gutters and related components;
- cc. **in installing the insulation and related components in violation of applicable building codes, standard building practices, relevant**

product specifications, and accepted construction industry standards and practices; and

dd. other deficiencies or failures will be proven at trial.

37. That Defendant Oceanaire, LLC was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in improper installation the heating and air conditioning system including duct lines and related components; and
- g. other deficiencies or failures will be proven at trial.

38. That Defendant Hero Heating And Air, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to

construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in improper installation the heating and air conditioning system including duct lines and related components; and
- g. other deficiencies or failures will be proven at trial.

39. That Defendant Custom Climate Heating & Aire, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in improper installation the heating and air conditioning system including duct lines and related components; and
- g. other deficiencies or failures will be proven at trial.

40. That Defendant P.J. Sanchez Masonry, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;

- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly grading the property;
- h. in improperly installing the concrete slabs;
- i. in improperly installing the concrete footings; and
- j. other deficiencies or failures will be proven at trial.

41. That Defendant Donnix Construction, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly installing the framing;
- h. in failing to properly integrate the secondary weather barrier and flashings;
- i. in improperly installing the windows, doors, and flashing;

- j. in improperly installing the deck, related components, and the scuppers;
- k. in improperly installing the roof, related accessories, and related flashings;
- l. in improperly applying the liquid applied membrane on the deck; and
- m. other deficiencies or failures will be proven at trial.

42. That Defendant Guillen Carpentry, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly installing the cementitious siding and related flashings;
- h. in improperly installing the trim;
- i. in improperly installing the framing;
- j. in failing to properly integrate the secondary weather barrier and flashings;
- k. in improperly installing the windows, doors, and flashing;
- l. in improperly installing the deck, related components, and the scuppers;

- m. in improperly installing flooring; and
- n. other deficiencies or failures will be proven at trial.

43. That Defendant Charleston Exteriors, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly installing the gutters and related components; and
- h. other deficiencies or failures will be proven at trial.

44. That Defendant Ashley Oak Contracting, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes

and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly installing the roof, related accessories, and related flashings; and
- h. other deficiencies or failures will be proven at trial.

45. That Defendant La Roca Masonry, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies

in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly installing the stucco and stucco related flashings;
- h. in improperly installing the fireplace, related flashings, and related components; and
- i. other deficiencies or failures will be proven at trial.

46. That Defendant Apex Contractors, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly installing flooring; and
- h. other deficiencies or failures will be proven at trial.

47. That Defendant South Point Hardwood Floor, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;

- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly installing flooring; and
- h. other deficiencies or failures will be proven at trial.

48. That Defendant Bluetape Solutions, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly installing the windows, window flashings, and related components; and
- h. other deficiencies or failures will be proven at trial.

49. That Defendant Carolina Climate Control, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in improperly installing the heating and air conditioning system; and
- g. other deficiencies or failures will be proven at trial.

50. That Defendant Movar, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of

which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, and other building components;
- g. in improperly installing and/or failing to install the sealants and caulks;
- h. in failing to properly install the exterior paint, sealants, and all related components; and
- i. other deficiencies or failures will be proven at trial.

51. That Defendant ECL Design, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;
- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, flooring and other building components; including damages to the HVAC system and related components;
- g. in improperly performing grading and site work services; and
- h. other deficiencies or failures will be proven at trial.

52. That Defendant Affordable Spray Foam Insulation of the Carolina's, LLC f/k/a Affordable Sprayfoam Insulation of the Carolinas, LLC, was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, supervising, and inspecting the work on the subject residence which was not built in accordance with the applicable building codes and not in conformance with accepted construction and industry standards, and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused damage to the Plaintiffs. The defects and deficiencies in and to the residence will need to be corrected, repaired, remediated and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness includes, but is not limited to, the following particulars, to wit:

- a. in failing to use due care in construction and/or repair of the subject residence;
- b. in failing to adequately supervise the construction, repair, and building of the subject residence;

- c. in failing to hire competent subcontractors or specialty contractors or employees;
- d. in failing to adequately and competently supervise and/or train said subcontractors or specialty contractors or employees;
- e. in building, constructing and repairing the subject residence in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices;
- f. in constructing a home which allowed water to intrude into the residence allowing deterioration of framing, sheathing, flooring and other building components; including damages to the HVAC system and related components;
- g. in installing the insulation and related components in violation of applicable building codes, standard building practices, relevant product specifications, and accepted construction industry standards and practices; and
- h. other deficiencies or failures will be proven at trial.

53. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness and wantonness of the Defendants, 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; H2O 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** the Plaintiffs have suffered actual, direct, incidental, consequential, and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects of the building and construction set forth above and they have or will have to spend substantial sums of money in order to renovate, correct, repair, remediate and restore their residence to make it safe and habitable. These deficiencies as set forth above have caused damage to various building components. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded and continues to intrude into

their Residence resulting in damage to finish and structural elements of the Plaintiffs' Residence, including mechanical systems. Each year since completion, new areas of damage occurred separate and apart from any damage already in the process of occurring. All of which has or will require the Plaintiffs to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of their property, as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A SECOND CAUSE OF ACTION

**(Breach of Warranty of Habitability, Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness for a Particular Purpose, Breach of Warranty of Merchantability and Serviceability, and Breach of Warranty against Latent Defects)
(AS TO DEFENDANT SELLERS; 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; H2O 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)**

54. The Plaintiffs re-allege the allegations contained in Paragraphs 1 through 53 of this Complaint and incorporated the same herein as if repeated verbatim.

55. The Defendant Sellers; 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; H2O 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** implicitly and/or expressly warranted that subject Residence and its components would be habitable and fit for its intended use as a single family

residence and home, and that said Residence and its components would be constructed and/or repaired in a fit, serviceable, good and workmanlike fashion in accordance with the applicable building codes, accepted construction industry standards applicable thereto and that the subject Residence would be merchantable, free from latent defects, and for the particular purpose for which work was performed.

56. The Defendant Sellers; 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; H2O 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** breached said warranties by building, constructing and/or repairing subject Residence in such a manner as to be in violation of applicable building codes, standard building practices, and accepted construction industry standards and practices.

57. As a direct and proximate result of Defendant Sellers; 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; H2O 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's** breach of these warranties, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including, but not limited to, the expenses associated with having to hire experts to

investigate the causes of the defects and deficiencies set forth above, and in their having to spend substantial sums of money in order to renovate, correct, repair, remediate and restore their Residence to make it safe and habitable. These deficiencies as set forth above have caused damage to various building components. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded and continues to intrude into their Residence resulting in damage to finish and structural elements of the Plaintiffs' Residence, including mechanical systems. Each year since completion, new areas of damage occurred separate and apart from any damage already in the process of occurring. All of which have and will require the Plaintiffs to expend great amounts of money to correct and repair their Residence as well as to suffer the loss, use and enjoyment of their property, as well as loss of valuation and depreciation by virtue of the defects and damages aforesaid.

FOR A THIRD CAUSE OF ACTION
(Constructive Fraud)

(AS TO DEFENDANTS SELLERS AND DEFENDANTS SELLERS' AGENT)

58. Each and every allegation contained in Paragraphs 1 through 57 above are incorporated herein by express reference as though fully set forth.

59. The Defendant Sellers and Defendant Sellers' Agent had a duty to see that truthful and accurate information was communicated to the Plaintiffs.

60. The Defendant Sellers and Defendant Sellers' Agent breached their duty of care to the Plaintiffs by failing to exercise due care.

61. Plaintiffs were ignorant of the true facts.

62. Plaintiffs reasonably relied upon Defendant Sellers and Defendant Sellers' Agent's representations.

63. As a direct and proximate result of Defendant Sellers and Defendant Sellers' Agent's acts and omissions, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects and deficiencies set forth above, and in their having to spend substantial sums of money in order to renovate, correct, repair, remediate and restore their Residence to make it safe and habitable. These deficiencies as set forth above have caused damage to various building components. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded and continues to intrude into their Residence resulting in damage to finish and structural elements of the Plaintiffs' Residence, including mechanical systems. Each year since completion, new areas of damage occurred separate and apart from any damage already in the process of occurring. All of which have and will require the Plaintiffs to expend great amounts of money to correct and repair their Residence as well as to suffer the loss, use and enjoyment of their property, as well as loss of valuation and depreciation by virtue of the defects and damages aforesaid.

FOR AN FOURTH CAUSE OF ACTION
(Fraud and Misrepresentation)
(AS TO DEFENDANTS SELLER AND DEFENDANTS SELLERS' AGENT)

64. Each and every allegation contained in Paragraphs 1 through 63 above are incorporated herein by express reference as though fully set forth.

65. Defendant Sellers and Defendant Sellers' Agent impliedly and/or expressly represented or misrepresented, to the Plaintiffs that the Residence was free from defects and that they had no knowledge of the defects associated with the Residence, and that none of the Residence's defects or damages resulting therefrom had been concealed.

66. Said misrepresentations were false in that certain repairs had not been made to the Residence, that the Residence was not free from defects, Defendant Sellers and Defendant Sellers' Agent had knowledge of the history of defects associated with the Residence, and that the Residence's defects, and damages resulting therefor, had been concealed.

67. Defendant Sellers and Defendant Sellers' Agent knew or should have known the falsity of the representations.

68. Said representations were material in that the representations induced Plaintiffs to pay monies to them in order to purchase the Residence.

69. Defendant Sellers and Defendant Sellers' Agent intended that the false representations be acted upon by the Plaintiffs.

70. The Plaintiffs were reasonably ignorant of the falsity of the representations.

71. The Plaintiffs reasonably relied on the representations and had a right to rely on the representations.

72. As a direct and proximate result of Defendant Sellers and Defendant Sellers' Agent false and misleading representations, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects and deficiencies set forth above, and in their having to spend substantial sums of money in order to renovate, correct, repair, remediate and restore their Residence to make it safe and habitable. These deficiencies as set forth above have caused damage to the building components. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded and continues to intrude into their Residence resulting in damage to finish and structural elements of the Plaintiffs' Residence, including mechanical systems. Each year since completion,

new areas of damage occurred separate and apart from any damage already in the process of occurring. All of which have and will require the Plaintiffs to expend great amounts of money to correct and repair their Residence as well as to suffer the loss, use and enjoyment of their property, as well as loss of valuation and depreciation by virtue of the defects and damages aforesaid.

FOR A FIFTH CAUSE OF ACTION
(Residential Property Condition Disclosure Act)
(AS TO DEFENDANTS SELLER AND DEFENDANTS SELLERS' AGENT)

73. Each and every allegation contained in Paragraphs 1 through 72 above are incorporated herein by express reference as though fully set forth.

74. Defendant Sellers and Defendant Sellers' Agent executed a disclosure statement pursuant to the South Carolina Residential Property Condition Disclosure Act §27-50-40.

75. The Defendant Sellers and Defendant Sellers' Agent failed to disclose material information on the disclosure statement.

76. As a direct and proximate result of Defendant Sellers and Defendant Sellers' Agent's failure to disclose material information required pursuant to the South Carolina Residential Property Condition Disclosure Act §27-50-40, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects and deficiencies set forth above, and in their having to spend substantial sums of money in order to renovate, correct, repair, remediate and restore their Residence to make it safe and habitable. These deficiencies as set forth above have caused damage to the building components. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded and continues to intrude into their Residence resulting in damage to finish and structural elements of the Plaintiffs' Residence, including mechanical systems. Each year since

completion, new areas of damage occurred separate and apart from any damage already in the process of occurring. All of which have and will require the Plaintiffs to expend great amounts of money to correct and repair their Residence as well as to suffer the loss, use and enjoyment of their property, as well as loss of valuation and depreciation by virtue of the defects and damages aforesaid.

FOR A SIXTH CAUSE OF ACTION

(Unfair Trade Practices)

(AS TO ALL DEFENDANT SELLERS; DEFENDANTS SELLERS' AGENT; 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; H2O 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)

77. The Plaintiffs re-allege the allegations contained in Paragraphs 1 through 76 of this Complaint and incorporate the same herein as if repeated verbatim.

78. The Defendant Sellers; Defendant Sellers' Agent; 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; H2O 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** are "persons" within the meaning of South Carolina Code §39-5-10(a) and by their actions in constructing, remodeling, repairing and selling are engaged in commerce within the meaning of South Carolina Code §39-5-10(b).

79. The Defendant Sellers; Defendant Sellers' Agent; 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; H2O 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**, by their action(s) described herein above, constitute unfair and deceptive practice within the meaning of South Carolina Code §39-5-20(a) and such action(s) are capable of repetition and upon information and belief have been repeated.

80. That the conduct of the Defendant Sellers; Defendant Sellers' Agent; 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; H2O 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** affects the public interest of the people in South Carolina and the Defendant Sellers and Defendant Sellers' Agent knew or should have known that their conduct violated the South Carolina Unfair Trade Practices Act.

81. As a direct foreseeable and proximate result of the Defendant Sellers; Defendant Sellers' Agent; 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; H2O 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's** unfair and deceptive practices, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects and deficiencies set forth above, and in their having to spend substantial sums of money in order to renovate, correct, repair, remediate and restore their Residence to make it safe and habitable. These deficiencies as set forth above have caused damage to the building components. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded and continues to intrude into their Residence resulting in damage to finish and structural elements of the Plaintiffs' Residence, including mechanical systems. Each year since completion, new areas of damage occurred separate and apart from any damage already in the process of occurring. All of which have and will require the Plaintiffs to expend great amounts of money to correct and repair their Residence as well as to suffer the loss, use and enjoyment of their property, as well as loss of valuation and depreciation by virtue of the defects and damages aforesaid.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Contract)
(AS TO DEFENDANT SELLERS)

82. The Plaintiffs re-allege the allegations contained in Paragraphs 1 through 81 of this Complaint and incorporate the same herein as if repeated verbatim.

83. The Plaintiffs contracted with the Defendant Sellers for the purchase of their Residence located at 5 Palmetto Drive, Charleston, South Carolina and the Defendant Sellers had an obligation and duty to disclose all latent defects and hidden conditions.

84. The Defendant Sellers breached the contract by failing to sell a Residence in which they knew or should have known had latent defects and hidden conditions.

85. The Defendant Sellers breached its contract with the Plaintiffs. Such breach includes but is not limited to the following particulars, to wit:

- a. In concealing defects and damages that existed at the Residence;
- b. In failing to disclose defective conditions that were known or should have been known; and
- c. Other deficiencies or failures will be proved at trial.

86. That as a direct and proximate result of the Defendant Sellers' breach, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects and deficiencies set forth above, and in their having to spend substantial sums of money in order to renovate, correct, repair, remediate and restore their Residence to make it safe and habitable. These deficiencies as set forth above have caused damage to the building components. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded and continues to intrude into their Residence resulting in damage to finish and structural elements of the Plaintiffs' Residence, including mechanical systems. Each year since completion, new areas of damage occurred separate and apart from any damage already in the process of occurring. All of which have and will require the Plaintiffs to expend great amounts of money to correct and repair their Residence as well as to suffer the loss, use and enjoyment of their property, as well as loss of valuation and depreciation by virtue of the defects and damages aforesaid.

FOR AN EIGHTH CAUSE OF ACTION
(Negligent Misrepresentation)
(AS TO DEFENDANTS SELLER AND DEFENDANTS SELLERS' AGENT)

87. Each and every allegation contained in Paragraphs 1 through 86 above are incorporated herein by express reference as though fully set forth.

88. The Defendant Sellers and Defendant Sellers' Agent made false representations and concealed defects at the Residence and failed to disclose defective conditions that were known or should have been known and induced the Plaintiffs to purchase the Residence by concealing and/or failing to disclose latent defects and damages that were not apparent to a reasonable person and Defendants had a pecuniary interest in making the false representations and nondisclosures.

89. The Defendant Sellers and Defendant Sellers' Agent owed a duty to truthfully and accurately convey information to the Plaintiffs and truthfully and accurately represent and disclose the condition of the Residence, including latent defects and hidden damage.

90. The Defendant Sellers and Defendant Sellers' Agent breached their duty by failing to exercise reasonable care in the truthfulness of information communicated and in failing to accurately disclose the condition of the Residence, including the concealed latent and hidden damages.

91. The Plaintiffs justifiably relied to their detriment on these representations, misrepresentations, concealment of damages, and nondisclosures made by the Defendant Sellers and Defendant Sellers' Agent and as a proximate result of their reliance upon these representations, misrepresentations, concealment of damages, and nondisclosures, the Plaintiffs were induced to purchase the Residence and were damaged.

92. The falsities, nondisclosures and/ or reckless disregard for the truth conveyed to the Plaintiffs by the Defendant Sellers and Defendant Sellers' Agent and/or their agents or employees was outrageous and reckless conduct.

93. As a direct and proximate result of the Defendant Sellers and Defendant Sellers' Agent's misrepresentations, the Plaintiffs have suffered actual, direct, incidental, consequential and special damages, including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects and deficiencies set forth above, and in their having to spend substantial sums of money in order to renovate, correct, repair, remediate and restore their Residence to make it safe and habitable. These deficiencies as set forth above have caused damage to the building components. Additionally, Plaintiffs have been injured and otherwise damaged in that there has been a continuous exposure to moisture and water that has intruded and continues to intrude into their Residence resulting in damage to finish and structural elements of the Plaintiffs' Residence, including mechanical systems. Each year since completion, new areas of damage occurred separate and apart from any damage already in the process of occurring. All of which have and will require the Plaintiffs to expend great amounts of money to correct and repair their Residence as well as to suffer the loss, use and enjoyment of their property, as well as loss of valuation and depreciation by virtue of the defects and damages aforesaid.

FOR A NINTH CAUSE OF ACTION
(Breach of Fiduciary Duty)
(AS TO DEFENDANTS SELLERS)

94. Each and every allegation contained in Paragraphs 1 through 93 above are incorporated herein by express reference as though fully set forth.

95. The Defendant Sellers in their capacity as developers and sellers of the Residence located at 5 Palmetto Road, Charleston, South Carolina, owed fiduciary and fiduciary-like duties to the Plaintiffs.

96. The Defendant Sellers were bound to act honestly and in good faith and with full disclosure with regards to all matters relating to the development and sale of the Residence located at 5 Palmetto Road, Charleston, South Carolina.

97. Given the existence of the Fiduciary and Fiduciary-like duties, the burden is on the Defendants to prove the appropriateness of their actions with and to the Plaintiffs.

98. The Defendant Sellers breached their fiduciary duty owed to the Plaintiffs by the following:

- a. In failing to act in good faith and with due regard to the interests of the Plaintiffs;
- b. In failing to ensure that the Residence from which they profited complied with the applicable building code, industry standards, and state law;
- c. In failing to disclose that the Residence from which they profited was not constructed in compliance with the applicable building code, industry standards, and state law;
- d. In making decisions for the Plaintiffs that benefited their interests at the expense of the Plaintiffs; and
- e. In such other acts which will be shown through the course of discovery and trial.

99. Plaintiffs are informed and believe they are entitled to a judgment against Defendants for actual, consequential, incidental and punitive damages and the costs of this action in an amount to be determined by the trier of fact.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs pray for a judgment against 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; H2O 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** of actual, punitive, and treble damages to be determined by a jury; for attorneys' fees and the costs of this action; for pre-judgment or post-judgment interest on the Plaintiffs' damages; and for such other and further relief as this Court may deem just and proper.

BLUNDY LAW FIRM, LLC

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Charleston, South Carolina
November 16, 2022

EXHIBIT “B”

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Jared S. O'Connell and Harmon 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 & Air;
Custom Climate Heating & Air, Inc.;
P.J. Sanchez Masonry, LLC;
Donnix Construction, LLC;
Guillen Carpentry, LLC;
Charleston Exteriors, LLC
Ashley Oak Contracting, LLC;
H2O 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
Carolinas, LLC f/k/a Affordable Sprayfoam
Insulation of the Carolinas, LLC

Defendants.

Artis Construction, LLC

Third-Party Plaintiff,

Vs.

Brian R. Wells, PE, LLC;
Perryman Engineering, LLC;
PJ Sanchez Masonry, LLC;
Donnix Construction, LLC;

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2021-CP-10-03090

**ARTIS CONSTRUCTION, LLC'S
ANSWER TO PLAINTIFF'S FIFTH
AMENDED COMPLAINT, CROSS-
CLAIMS, AND THIRD-PARTY
COMPLAINT**

(Jury Trial Demanded)

Guillen Carpentry, LLC;
 Charleston Exteriors, LLC;
 Ashley Oak Contracting, LLC;
 H2O Pro, LLC;
 La Roca Masonry, LLC;
 Apex Contractors, LLC;
 South Point Hardwood Floor, LLC; and

Third-Party Defendants.

House Therapy Holdings, LLC, Amanda F.
 Dempsey, William T. Phillips, and Matthew
 B. Swain,

Third-Party Plaintiffs,

Vs.

Carolina Climate Control, LLC and Bluetape
 Solutions, LLC

Third-Party Defendants.

TO: PLAINTIFFS AND THEIR COUNSEL, AMANDA BLUNDY, ESQ:

Reserving all rights to amend this pleading within thirty (30) days pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure, and reserving all rights to include in the Pleading any defenses and/or objections under Rule 12 of the South Carolina Rules of Civil Procedure, and reserving all rights to make any Motions Under Rule 12 of the South Carolina Rules of Civil Procedure, Artis Construction, LLC, (hereinafter “Artis” or this “Defendant”) by and through their undersigned counsel, does hereby amend its Answer to Plaintiff’s Fifth Amended Complaint, and asserts by way of Cross-Claims and a Third-Party Complaint, the following:

FOR A FIRST DEFENSE

1. This Defendant lacks knowledge and information sufficient to either admit or deny the allegations in Paragraph 1 of the pleading.

2. The allegations in Paragraphs 2 through 7 of the pleading are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

3. In answering the allegations in Paragraph 8 of the pleading, this Defendant admits so much thereof as it alleges that Artis is a limited liability company organized in the State of South Carolina, conducts business in Charleston County, State of South Carolina, and performed construction services to Plaintiff's residence located at 5 Palmetto Road, Charleston, South Carolina pursuant to a written contract with Plaintiff. This Defendant denies the remaining allegations of the paragraph and any allegations inconsistent with the terms of the contract.

4. The allegations in Paragraphs 9 through 25 of the pleading are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

5. The allegations in Paragraph 26 of the pleading contain conclusions of law which this Defendant is required to neither admit nor deny.

6. This Defendant lacks knowledge and information sufficient to either admit or deny the allegations in Paragraph 27 of the pleading. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

7. The allegations in Paragraph 28 of the pleading are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

8. This Defendant denies the allegations in Paragraphs 29 and 30 of the pleading.

9. In answering the allegations in Paragraph 31 of the pleading, this Defendant repeats and re-alleges its responses in the above paragraphs.

10. The allegations in Paragraphs 32 through 34 of the pleading, including sub-parts, are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

11. The allegations in Paragraph 35 of the pleading contain conclusions of law which this Defendant is required to neither admit nor deny.

12. This Defendant denies the allegations in Paragraph 36 of the pleading, including sub-parts.

13. The allegations in Paragraphs 37 through 52 of the pleading, including sub-parts, are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

14. This Defendant denies the allegations in Paragraph 53 of the pleading.

15. In answering the allegations in Paragraph 54 of the pleading, this Defendant repeats and re-alleges its responses in the above paragraphs.

16. The allegations in Paragraph 55 of the pleading contain conclusions of law which this Defendant is required to neither admit nor deny. To the extent a response is required, this Defendant denies the allegations in Paragraph 53 of the pleading.

17. This Defendant denies the allegations in Paragraphs 56 and 57 of the pleading.

18. In answering the allegations in Paragraph 58 of the pleading, this Defendant repeats and re-alleges its responses in the above paragraphs.

19. The allegations in Paragraphs 59 through 63 of the pleading, including sub-parts, are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

20. In answering the allegations in Paragraph 64 of the pleading, this Defendant repeats and re-alleges its responses in the above paragraphs.

21. The allegations in Paragraphs 65 through 72 of the pleading, including sub-parts, are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

22. In answering the allegations in Paragraph 73 of the pleading, this Defendant repeats and re-alleges its responses in the above paragraphs.

23. The allegations in Paragraphs 74 through 76 of the pleading, including sub-parts, are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

24. In answering the allegations in Paragraph 77 of the pleading, this Defendant repeats and re-alleges its responses in the above paragraphs.

25. The allegations in Paragraph 78 of the pleading contain conclusions of law which this Defendant is required to neither admit nor deny. To the extent a response is required, this Defendant denies the allegations in Paragraph 78 of the pleading.

26. This Defendant denies the allegations in Paragraphs 79 through 81 of the pleading.

27. In answering the allegations in Paragraph 82 of the pleading, this Defendant repeats and re-alleges its responses in the above paragraphs.

28. The allegations in Paragraphs 83 through 86 of the pleading, including sub-parts, are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

29. In answering the allegations in Paragraph 87 of the pleading, this Defendant repeats and re-alleges its responses in the above paragraphs.

30. The allegations in Paragraphs 88 through 93 of the pleading, including sub-parts, are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

31. In answering the allegations in Paragraph 94 of the pleading, this Defendant repeats and re-alleges its responses in the above paragraphs.

32. The allegations in Paragraphs 95 through 99 of the pleading, including sub-parts, are not directed at this Defendant therefore a response is not required. To the extent the allegations can be interpreted as making a claim against this Defendant they are hereby denied.

33. To the extent that a response is required to the Prayer for Relief of Plaintiffs' Fifth Amended Complaint, this Defendant denies the same and demands strict proof thereof.

34. This Defendant denies each and every allegation of the pleading not hereinabove specifically admitted.

FOR A SECOND DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO

35. The Complaint does not properly allege the elements of fraud and therefore that Cause of Action should be dismissed.

FOR A THIRD DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Failure to State a Claim)

36. Plaintiffs have failed to state facts sufficient to constitute a cause of action against this Defendant pursuant to Rule 12(b)(6), SCRCPP, and Plaintiffs' claims should be dismissed.

FOR A FOURTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Failure to Mitigate)

37. Plaintiffs have failed to mitigate their damages as required by law.

FOR A FIFTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Waiver, Estoppel, Laches)

38. Plaintiffs' claims may be barred by the doctrines of waiver, estoppel and/or laches.

FOR A SIXTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Statute of Frauds)

39. Plaintiffs' claims are barred by the statute of frauds.

FOR A SEVENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Statute of Limitations)

40. This Defendant asserts that some or all of the claims against it are barred by applicable statute of limitations or statute of repose.

FOR AN EIGHTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Notice to Plaintiffs)

41. Plaintiffs' claims are barred to the extent that they discovered or should have discovered and were aware of any defects and nevertheless unreasonably proceeded to purchase or make use of the product.

FOR A NINTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Intervening Acts of Third-Parties)

42. Plaintiffs' damages, if any, are the direct and proximate result of intervening and superseding acts of third parties not affiliated with these Defendants and not under its domain or control.

FOR A TENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Failure to Join a Necessary Party)

43. Plaintiffs have failed to join a party necessary to this litigation as required by Rule 19, SCRCP, and Plaintiffs' Pleadings should be dismissed pursuant to Rule 12(b)(7), SCRCP.

FOR AN ELEVENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Contributory/Comparative Negligence)

44. Any damage suffered by Plaintiffs is the direct and proximate result of their comparative and contributory negligence; and Plaintiffs' recovery should be barred or, alternatively, reduced proportionately to Plaintiffs' comparative negligence.

FOR A TWELTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Open and Obvious)

45. Plaintiffs either knew or should have known of any alleged deficiencies in the allegedly purchased materials and accepted the same with such knowledge. As a result, Plaintiffs' recovery should be barred.

FOR A THIRTEENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Unclean Hands)

46. Plaintiffs have unclean hands and may not recover in indemnity.

FOR A FOURTEENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(NOTICE AND OPPORTUNITY TO CURE)

47. Plaintiffs have failed to comply with the SC Notice and Opportunity to Cure Construction Dwelling Defects Statute, S.C. Code Ann. § 40-59-810 through 860, and therefore the pleading must be dismissed.

FOR A FIFTEENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Punitive Damages Cap and Bifurcation)

48. Pursuant to S.C. Code Ann. § 15-32-520, Defendant hereby requests trial bifurcation on the issues of actual damages and punitive damages. To the extent the Court submits the question of punitive damages to the jury, the award of punitive damages, if any, is subject to the caps and limitations set forth in S.C. Code Ann. § 15-32-530, and this Defendant

pleads and incorporates all defenses, limitations on damages, and other privileges contained in S.C. Code Ann. §§ 15-32-520 and 15-32-530 as if fully stated herein verbatim.

**FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND BY
WAY OF A CROSS-CLAIM AGAINST OCEANAIRE, LLC AND AFFORDABLE
SPRAY FOAM INSULATION OF THE CAROLINA'S, LLC F/K/A AFFORDABLE
SPRAYFOAM INSULATION OF THE CAROLINAS, LLC
(Negligence)**

49. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

50. Oceanaire, LLC ("Oceanaire") is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

51. Affordable Spray Foam Insulation of the Carolinas, LLC f/k/a Affordable Sprayfoam Insulation of the Carolinas, LLC ("Affordable Spray Foam") is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

52. Artis entered into a contractual agreement with Oceanaire and Affordable Spray Foam, wherein Oceanaire and Affordable Spray Foam agreed to provide services and/or perform specific work on the property in question, which is the subject of this litigation.

53. Oceanaire and Affordable Spray Foam agreed to furnish labor, materials, equipment, tools and all else necessary to perform work pursuant to the contract.

54. Oceanaire and Affordable Spray Foam had a duty to properly, adequately perform its scope of work at the subject property in compliance with the, plans and specifications, and in compliance with the industry standards, manufacturers specifications and building codes.

55. Plaintiffs have brought claims against Artis alleging defects and deficiencies in the work performed by Oceanaire and Affordable Spray Foam. Artis has denied the claims; however,

these claims have or will cause Artis damages in addressing the claims, defending the claims and subjecting it to potential judgment.

56. If Plaintiffs' claims are proven true, then Oceanaire and/or Affordable Spray Foam breached its duties and was negligent, grossly negligent, wanton, reckless and willful in failing to perform its scope of work at the subject property according to the plans and specifications and in compliance with the applicable industry standards and building codes, among other alleged deficiencies.

57. As a direct and proximate result of Oceanaire and Affordable Spray Foam's alleged negligence, Artis has suffered and/or will continue to suffer substantial damages in defending the claims (including but not limited to attorney's fees and expert costs), for not receiving the services and/or materials for which it paid and lost time in addressing the claims.

**FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND BY
WAY OF A CROSS-CLAIM AGAINST OCEANAIRE, LLC AND AFFORDABLE
SPRAY FOAM INSULATION OF THE CAROLINA'S, LLC F/K/A AFFORDABLE
SPRAYFOAM INSULATION OF THE CAROLINAS, LLC
(Indemnity)**

58. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

59. Plaintiffs have brought claims against Artis involving work performed by Oceanaire and Affordable Spray Foam. Artis has denied the claims; however, these claims have or will cause Artis damages in addressing these claims, defending these claims, and subjecting it to potential judgment.

60. A special relationship was created and exists between Artis and Oceanaire.

61. A special relationship was created and exists between Artis and Affordable Spray Foam.

62. To the extent the Plaintiffs are entitled to damages from Artis, which Artis denies, said damages were due solely to the actions of Oceanaire and/or Affordable Spray Foam, or their employees, agents, representatives and were not cause by any act or omission of Artis.

63. Accordingly, Artis asserts the right of indemnity exists in its favor against Oceanaire and Affordable Spray Foam in equity and contract because Artis is exposed to liability as a result of this action resulting from the primary wrongful acts or omissions of Oceanaire and/or Affordable Spray Foam in which Artis did not join; that to the extent the Plaintiffs recover against Artis, Artis alleges that Oceanaire and Affordable Spray Foam are liable to Artis for all damages recovered against Artis; and that Oceanaire and Affordable Spray Foam must indemnify Artis for any judgments obtained by Plaintiffs, and for all attorney's fees and costs incurred in defending the claims.

**FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND
BY WAY OF A CROSS-CLAIM AGAINST OCEANAIRE, LLC AND AFFORDABLE
SPRAY FOAM INSULATION OF THE CAROLINA'S, LLC F/K/A AFFORDABLE
SPRAYFOAM INSULATION OF THE CAROLINAS, LLC
(Breach of Contract)**

64. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

65. Artis entered into contract with Oceanaire and Affordable Spray Foam whereby Oceanaire and Affordable Spray Foam agreed to furnish labor, materials, installation, supplies, equipment, tools and all other resources and facilities necessary to perform their scopes of work at the subject property, and Oceanaire and Affordable Spray Foam did participate in the construction of the subject property.

66. If Plaintiffs' claims are proven true, then Oceanaire and/or Affordable Spray Foam breached their contracts in that they failed to perform their scopes of work at the subject property, and failed to provide Artis with the services and/or materials for which it contracted.

67. As a direct and proximate result of Oceanaire and Affordable Spray Foam's breach, Artis has suffered and/or will continue to suffer substantial damages in defending Plaintiffs' claims (including but not limited to attorney's fees and expert costs), for not receiving the services and/or materials for which it paid and lost time in defending this matter.

**FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND BY
WAY OF A CROSS-CLAIM AGAINST OCEANAIRE, LLC AND AFFORDABLE
SPRAY FOAM INSULATION OF THE CAROLINA'S, LLC F/K/A AFFORDABLE
SPRAYFOAM INSULATION OF THE CAROLINAS, LLC
(Breach of Expressed or Implied Warranties)**

68. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

69. Oceanaire and Affordable Spray Foam made expressed and implied warranties that they would perform their work according to the plans and specifications, industry standards, applicable building codes, manufacturers recommendations, and that their work or product would be fit for its intended purpose, would be of good workmanship and quality, would be suitable for the project, would be adequate for the intended use, would be merchantable, would be free of defects, and would be adequate to prevent water penetration and damage to the subject project.

70. If Plaintiffs' claims are proven true, then Oceanaire and/or Affordable Spray Foam breached these warranties.

71. As a direct and proximate result of Oceanaire and Affordable Spray Foam's breach, Artis has suffered and/or will continue to suffer substantial damages in defending Plaintiffs' claims (including but not limited to attorney's fees and expert costs), for not recovering the services and receiving the services and/or materials for which it paid and lost time in defending this matter.

**FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND BY
WAY OF A CROSS-CLAIM AGAINST HOUSE THERAPY HOLDINGS, LLC,
AMANDA F. DEMPSEY, WILLIAM T. PHILLIPS, AND MATTHEW B. SWAIN
(Indemnity)**

72. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

73. Upon information and belief, Defendant House Therapy Holdings, LLC is a limited liability company organized and existing pursuant to the laws of the State of Texas and did business at all times relevant hereto in Charleston County, South Carolina.

74. Upon information and belief, Defendant Amanda F. Dempsey, is a citizen and resident of the State of Texas and did business at all times relevant hereto in Charleston County, South Carolina.

75. Upon information and belief, Defendant Amanda F. Dempsey was/is a principal of Defendant House Therapy Holdings, LLC and at all time relevant hereto managed, supervised, and participated in the development, supervision, construction, and/or repair and sale of the property at issue in this litigation located at 5 Palmetto Road, Charleston, South Carolina (the "Property").

76. Upon information and belief, Defendant William T. Phillips, is a citizen and resident of the State of South Carolina and did business at all times relevant hereto in Charleston County, South Carolina.

77. Upon information and belief, Defendant William T. Phillips was/is a principal of Defendant House Therapy Holdings, LLC and at all time relevant hereto managed, supervised, and participated in the development, supervision, construction, and/or repair and sale of the Property.

78. Upon information and belief, Defendant Matthew B. Swain, is a citizen and resident of the State of South Carolina and did business at all times relevant hereto in Charleston County, South Carolina.

79. Upon information and belief, Defendant Matthew B. Swain was/is a principal of Defendant House Therapy Holdings, LLC and at all time relevant hereto managed, supervised, and participated in the development, supervision, construction, and/or repair and sale of the Property.

80. The Defendants, House Therapy Holdings, LLC, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain are the agents and/or alter egos of each other, and the corporate interests of these Defendants were amalgamated so that they in effect operated as one and the same entity. Hereinafter, these parties shall be collectively referred to as the “HTH Defendants.”

81. Artis entered into a contractual agreement with the HTH Defendants, wherein Artis agreed to provide construction services on the property in question, located at 5 Palmetto Road, Charleston, South Carolina (the “Property”), which is the subject of this litigation.

82. A dispute arose between Artis and the HTH Defendants which resulted in a Settlement Agreement signed by representatives of both Artis and the HTH Defendants.

83. By way of the Settlement Agreement, the HTH Defendants, on behalf of themselves and subsequent purchasers of the Property, agreed to release Artis of all damages whatsoever related to Artis’ alleged defective and deficient construction of the Property, among other things. Further, HTH Defendants agreed in the Settlement Agreement to indemnify Artis against any and all claims later brought against Artis by subsequent purchasers of the Property, among others, arising out of or relating to the construction or installation of materials at the Property.

84. Plaintiffs have brought claims against Artis relating to the construction or installation of materials at the Property. Artis has denied the claims; however, these claims have

or will cause Artis damages in addressing these claims, defending these claims, and subjecting it to potential judgment.

85. A special and contractual relationship was created and exists between Artis and the HTH Defendants.

86. Accordingly, pursuant to the Settlement Agreement, Artis asserts that the right of indemnity exists in its favor against the HTH Defendants in equity and contract because Artis is exposed to liability as a result of this action; that to the extent the Plaintiffs recover against Artis, Artis alleges that the HTH Defendants are liable to Artis for all damages recovered against Artis; and that the HTH Defendants must indemnify Artis for any judgments obtained by Plaintiffs, and for all attorney's fees and costs incurred in defending the claims.

**FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND
BY WAY OF A CROSS-CLAIM AGAINST HOUSE THERAPY HOLDINGS, LLC,
AMANDA F. DEMPSEY, WILLIAM T. PHILLIPS, AND MATTHEW B. SWAIN
(Breach of Contract)**

87. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

88. Artis and the HTH Defendants entered a Settlement Agreement resolving claims by and between them related to construction of the Property.

89. By way of the Settlement Agreement, the HTH Defendants, on behalf of themselves and subsequent purchasers of the Property, agreed to release Artis of all damages whatsoever related to Artis' alleged defective and deficient construction of the Property, among other things. Further, HTH Defendants agreed in the Settlement Agreement to indemnify Artis against any and all claims later brought against Artis by subsequent purchasers of the Property, among others, arising out of or relating to the construction or installation of materials at the Property.

90. Plaintiffs, who are subsequent purchasers of the Property, have brought claims against Artis relating to the construction or installation of materials at the Property. Artis has denied the claims; however, these claims have or will cause Artis damages in addressing these claims, defending these claims, and subjecting it to potential judgment.

91. Pursuant to the release and indemnity provisions of the Settlement Agreement signed by Artis and the HTH Defendants, Artis timely tendered its defense to the HTH Defendants, requesting that the HTH Defendants fulfill its contractual obligations to indemnify and hold Artis harmless in this matter.

92. The HTH Defendants have since denied the tender and refused to indemnify and hold Artis harmless in this matter in direct breach of its obligations pursuant to the Settlement Agreement signed by representatives of both Artis and the HTH Defendants.

93. As a direct and proximate result of the HTH Defendants' breach, Artis has suffered and/or will continue to suffer substantial damages in defending against Plaintiffs' claims, including but not limited to attorney's fees, court fees, and expert costs.

**FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND BY
WAY OF A CROSS-CLAIM AGAINST HOUSE THERAPY HOLDINGS, LLC,
AMANDA F. DEMPSEY, WILLIAM T. PHILLIPS, AND MATTHEW B. SWAIN
(Fraud)**

94. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

95. The HTH Defendants sold and conveyed ownership of the Property to Plaintiffs on November 6, 2020.

96. The HTH Defendants executed the Settlement Agreement between Artis and the HTH Defendants on December 4, 2020 affirmatively and falsely representing that they were the "owner[s] of real property and improvements consisting of a 'Garage' and 'Residence' located at 5 Palmetto Road, Charleston, South Carolina, 29407", the very same Property at issue in this litigation.

97. Such representations were made with the intent to induce Artis to enter into the Settlement Agreement and was made with knowledge of its falsity and/or reckless disregard for the truth.

98. Artis was ignorant of the falsity of the HTH Defendants' representations, and rightfully relied on said representations to its detriment. But for the HTH Defendants' representations, Artis would not have entered into the Settlement Agreement with the HTH Defendants on the terms of the written Settlement Agreement.

99. As a direct and proximate result of the HTH Defendants' fraudulent representations, Artis has suffered, and will continue to suffer, damages in such sums as shall be established at a trial on this matter.

FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND
BY WAY OF A THIRD-PARTY COMPLAINT AGAINST THIRD-PARTY
DEFENDANTS
(Negligence)

100. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

101. Upon information and belief, Third-Party Defendant Brian R. Wells, PE LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

102. Upon information and belief, Third-Party Defendant Perryman Engineering, LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

103. Upon information and belief, Third-Party Defendant PJ Sanchez Masonry, LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South

Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

104. Upon information and belief, Third-Party Defendant Donnix Construction, LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

105. Upon information and belief, Third-Party Defendant Guillen Carpentry, LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

106. Upon information and belief, Third-Party Defendant Charleston Exteriors, LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

107. Upon information and belief, Third-Party Defendant Ashley Oak Contracting, LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

108. Upon information and belief, Third-Party Defendant H2O Pro, LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

109. Upon information and belief, Third-Party Defendant La Roca Masonry LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South

Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

110. Upon information and belief, Third-Party Defendant Apex Contractors LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

111. Upon information and belief, Third-Party Defendant South Point Hardwood Floor LLC is a is a limited liability company organized and existing pursuant to the laws of the State of South Carolina and did business at all times relevant to matters herein in Charleston County, South Carolina.

112. Artis entered into a contractual agreement with Third-Party Defendants Brian R. Wells, PE LLC; Perryman Engineering, LLC; PJ Sanchez Masonry, LLC; Donnix Construction, LLC; Guillen Carpentry, LLC; Charleston Exteriors, LLC; Ashley Oak Contracting, LLC; H2O Pro, LLC; La Roca Masonry LLC; Apex Contractors LLC; and South Point Hardwood Floor LLC (hereinafter the “Subcontractor Defendants”) wherein the Subcontractor Defendants agreed to provide services and/or perform specific work on the property in question, which is the subject of this litigation.

113. Subcontractor Defendants agreed to furnish labor, materials, equipment, tools and all else necessary to perform work pursuant to the contract.

114. Subcontractor Defendants had a duty to properly, adequately perform its scope of work at the subject property in compliance with the, plans and specifications, and in compliance with the industry standards, manufacturers specifications and building codes.

115. Plaintiffs have brought claims against Artis alleging defects and deficiencies in the work performed by the Subcontractor Defendants. Artis has denied the claims; however, these

claims have or will cause Artis damages in addressing the claims, defending the claims and subjecting it to potential judgment.

116. If Plaintiffs' claims are proven true, then Subcontractor Defendants breached their duties and was negligent, grossly negligent, wanton, reckless and willful in failing to perform their scopes of work at the subject property according to the plans and specifications and in compliance with the applicable industry standards and building codes, among other alleged deficiencies.

117. As a direct and proximate result of Subcontractor Defendants' alleged negligence, Artis has suffered and/or will continue to suffer substantial damages in defending the claims (including but not limited to attorney's fees and expert costs), for not receiving the services and/or materials for which it paid and lost time in addressing the claims.

**FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND
BY WAY OF A THIRD-PARTY COMPLAINT AGAINST THIRD-PARTY
DEFENDANTS
(Indemnity)**

118. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

119. Plaintiffs have brought claims against Artis involving work performed by Subcontractor Defendants. Artis has denied the claims; however, these claims have or will cause Artis damages in addressing these claims, defending these claims, and subjecting it to potential judgment.

120. A special relationship was created and exists between Artis and Subcontractor Defendants.

121. To the extent the Plaintiffs are entitled to damages from Artis, which Artis denies, said damages were due solely to the actions of Subcontractor Defendants, or their employees, agents, representatives and were not cause by any act or omission of Artis.

122. Accordingly, Artis asserts the right of indemnity exists in its favor against Subcontractor Defendants in equity and contract because Artis is exposed to liability as a result of this action resulting from the primary wrongful acts or omissions of Subcontractor Defendants in which Artis did not join; that to the extent the Plaintiffs recover against Artis, Artis alleges that Subcontractor Defendants are liable to Artis for all damages recovered against Artis; and that Subcontractor Defendants must indemnify Artis for any judgments obtained by Plaintiffs, and for all attorney's fees and costs incurred in defending the claims.

**FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND
BY WAY OF A THIRD-PARTY COMPLAINT AGAINST THIRD-PARTY
DEFENDANTS
(Breach of Contract)**

123. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

124. Artis and the Subcontractor Defendants entered into contract whereby Subcontractor Defendants agreed to furnish labor, materials, installation, supplies, equipment, tools and all other resources and facilities necessary to perform their scopes of work at the subject property, and Subcontractor Defendants did participate in the construction of the subject property.

125. If Plaintiffs' claims are proven true, then Subcontractor Defendants breached their contracts in that they failed to perform their scopes of work at the subject property, and failed to provide Artis with the services and/or materials for which it contracted.

126. As a direct and proximate result of Subcontractor Defendants' breach, Artis has suffered and/or will continue to suffer substantial damages in defending Plaintiffs' claims (including but not limited to attorney's fees and expert costs), for not receiving the services and/or materials for which it paid and lost time in defending this matter.

FURTHER ANSWERING PLAINTIFF'S FIFTH AMENDED COMPLAINT AND
BY WAY OF A THIRD-PARTY COMPLAINT AGAINST THIRD-PARTY
DEFENDANTS
(Breach of Expressed or Implied Warranties)

127. Artis hereby repeats and reasserts the allegations in the above paragraphs as if more fully set forth herein verbatim.

128. Subcontractor Defendants made expressed and implied warranties that they would perform their work according to the plans and specifications, industry standards, applicable building codes, manufacturers recommendations, and that their work or product would be fit for its intended purpose, would be of good workmanship and quality, would be suitable for the project, would be adequate for the intended use, would be merchantable, would be free of defects, and would be adequate to prevent water penetration and damage to the subject project.

129. If Plaintiffs' claims are proven true, then Subcontractor Defendants breached these warranties.

130. As a direct and proximate result of Subcontractor Defendants' breach, Artis has suffered and/or will continue to suffer substantial damages in defending Plaintiffs' claims (including but not limited to attorney's fees and expert costs), for not recovering the services and receiving the services and/or materials for which it paid and lost time in defending this matter.

WHEREFORE, having fully answered the Third Amended Complaint of Jared S. O'Connell and Harmon A. O'Connell, this Defendant pray that the same be dismissed with the cost of this action and for such other and further relief as this Honorable Court may deem just and proper.

WHEREFORE, Artis Construction, LLC requests judgment against House Therapy Holdings, LLC, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain for actual damages, together with punitive damages, for the costs of this action, and for such other and further relief as this Court deems just and proper.

WHEREFORE, Artis Construction, LLC requests judgment against Oceanaire, LLC, Brian R. Wells, PE LLC; PJ Sanchez Masonry, LLC; Donnix Construction, LLC; Guillen Carpentry; LLC; Charleston Exteriors, LLC; Ashley Oak Contracting, LLC; H2O Pro, LLC; La Roca Masonry LLC; Apex Contractors LLC; South Point Hardwood Floor LLC; and Affordable Spray Foam Insulation of the Carolinas, LLC for actual damages, together with punitive damages, for the costs of this action, and for such other and further relief as this Court deems just and proper.

RICHARDSON PLOWDEN & ROBINSON, P.A.

s/James H. Elliott, Jr.

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November 21, 2022
Mount Pleasant, South Carolina

EXHIBIT “C”

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Jared S. O'Connell and Harmon 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 & Air;
Custom Climate Heating & Air, Inc.;
P.J. Sanchez Masonry, LLC;
Donnix Construction, LLC;
Guillen Carpentry, LLC;
Charleston Exteriors, LLC
Ashley Oak Contracting, LLC;
H2O Pro, LLC;
La Roca Masonry, LLC;
Apex Contractors, LLC;
South Point Hardwood Floor, LLC;
Bluetape Solutions, LLC;
Carolina Climate Control, LLC;
Movar, LLC; and
ECL Design, LLC

Defendants.

Artis Construction, LLC

Third-Party Plaintiff,

Vs.

Brian R. Wells, PE, LLC;
Perryman Engineering, LLC;
PJ Sanchez Masonry, LLC;

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2021-CP-10-03090

**AMENDED NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT
AS TO ARTIS CONSTRUCTION, LLC'S
CROSS-CLAIMS AGAINST HOUSE
THERAPY HOLDINGS, LLC, AMANDA F.
DEMPSEY, WILLIAM T. PHILLIPS, AND
MATTHEW B. SWAIN.**

Donnix Construction, LLC;
 Guillen Carpentry, LLC;
 Charleston Exteriors, LLC;
 Ashley Oak Contracting, LLC;
 H2O Pro, LLC;
 La Roca Masonry, LLC;
 Apex Contractors, LLC; and
 South Point Hardwood Floor, LLC;

Third-Party Defendants.

House Therapy Holdings, LLC, Amanda F.
 Dempsey, William T. Phillips, and Matthew
 B. Swain,

Third-Party Plaintiffs,

Vs.

Carolina Climate Control, LLC and Bluetape
 Solutions, LLC

Third-Party Defendants.

Comes Now, Artis Construction, LLC, by and through its undersigned counsel and moves before this Honorable Court within ten days of the date of this Motion or as soon thereafter as can be heard for an Order Granting Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. The basis for this Motion is that substantial discovery has been completed and no genuine issue of material fact exists as to Artis Construction, LLC's ("Artis") Indemnity, Breach of Contract, and Fraud claims against House Therapy Holdings, LLC ("HTH"), Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain (the "HTH Defendants").

In support of this Motion, the following uncontradicted facts are offered:

Comes Now, Artis Construction, LLC, by and through its undersigned counsel and moves before this Honorable Court within ten days of the date of this Motion or as soon thereafter as can be heard for an Order Granting Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. The basis for this Motion is that substantial discovery has been completed and no genuine issue of material fact exists as to Artis Construction, LLC's ("Artis") Indemnity, Breach of Contract, and Fraud claims against House Therapy Holdings, LLC ("HTH"), Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain (the "HTH Defendants").

In support of this Motion, the following uncontradicted facts are offered:

1. Defendant House Therapy Holdings, LLC ("HTH") was the previous owner of the property located at 5 Palmetto Road, Charleston, SC (the "Property") which is at issue in this litigation.
2. The three members of HTH are Latitude Design Group, LLC, Low Tide Holdings, LLC, and Matthew B. Swain Real Estate, LLC. **Ex. 1, HTH Company Agreement.**
3. Defendant William T. Phillips is the sole member of Latitude Design Group. **Ex. 2, William T. Phillips' January 18, 2023 Deposition Transcript, p. 19:6-13.**
4. Defendant Amanda F. Dempsey and her husband are the sole members of Low Tide Holdings, LLC. **Ex. 3, HTH's August 19, 2022 30(b)(6) Deposition Transcript, pp. 46:20-48:1.**
5. Defendant Matthew B. Swain is the sole member of Matthew B. Swain Real Estate, LLC. **Ex. 4, Matthew B. Swain's January 25, 2023 Deposition Transcript, p. 14:8-12.**
6. In 2018, the HTH Defendants hired Artis to perform renovations at the property located at 5 Palmetto Road, Charleston, SC (the "Property") which is the same property at issue in this litigation. **Ex. 5, Cost-Plus Construction Agreement.**

7. Prior to completion, a dispute arose between Artis and the HTH Defendants over the HTH Defendants' refusal to pay Artis' invoices. As a result, Artis filed a Mechanic's Lien on or around January 22, 2020 for the unpaid amount of \$283,968.00 with the RMC Office of the County of Charleston. **Ex. 6, Artis Construction's Amended Mechanic's Lien.**
8. Artis also filed suit against the House Therapy Holdings, LLC on or around July 6, 2020 in the Charleston County Court of Common Pleas for Breach of Contract and Foreclosure of Bond asserting damages related to the Mechanic's Lien. *See*, Artis' Summons and Complaint in Civil Action No. 2020CP1002859 and the Mechanic's Lien attached as Exhibit C.
9. On or about August 31, 2020, House Therapy Holdings, LLC filed counterclaims against Artis claiming, *inter alia*, damages arising from alleged defects in Artis' construction. *See*, House Therapy Holdings, LLC's August 31, 2020 Answer and Counterclaims in Civil Action No. 2020CP1002859.
10. In order to avoid the expense, uncertainty, and distraction of continuing the litigation, Artis and House Therapy Holdings, LLC entered into a settlement agreement (the "Settlement Agreement")

...to settle and dispose of all claims that were asserted or that could have been asserted in the Litigation and *all possible claims, known or unknown*, which have been asserted or *that could have been asserted* against one another with regard to the Contracts, Property, the Liens, and/or that *arise in any other way from the design, construction, manufacture or installation of materials as the Property*.

***See*, Settlement Agreement attached as Ex. 7, p. 2 (emphasis added).**

11. In exchange for paying Artis \$56,087 less than the amounts owed to Artis, the HTH Defendants agreed to

...remise, release, and discharge Artis...its subcontractors..., and all persons who might be claimed to be liable for, of, and from *any and all*

claims, liens, suits, actions, demands, damages, costs, causes of action, warranties, guaranties, suits at law or equity, claims for breach of express or implied warranty, judgments, costs and expenses of attorneys, costs and expenses of experts, executions, liabilities, debts and all other claims of whatever nature or kind, known or unknown, past, present, or future, whether in contract or in tort, both legal and equitable, in any matter arising out of or related to the Parties, the Property, the contracts, the Liens, the Bond or which in any other way arise from the design, construction, or installation of the materials at the Property. Id., p.3 (emphasis added).

12. The HTH Defendants agreed to the release provision cited above “on behalf of subsequent purchasers” of the Property. *Id.*

13. The HTH Defendants further agreed 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, attorney’s fees, and costs, that Artis may incur as a result of a breach by HTH of any representation or agreement contained in the Settlement Agreement, or in connection with any act or omission of HTH in connection with the provisions of this Settlement Agreement. Id. p. 4-5 (emphasis added).

14. The Settlement Agreement stipulates that it is effective on the date “the settlement agreement as fully executed by all parties, [is] circulated to all counsel of record to the parties.” *Id. p. 6.*

15. The Settlement Agreement was executed on December 4, 2020. **Ex. 8, p. 2, December 4, 2020 Email from James Floyd Providing Fully Executed Copy of Settlement Agreement.**

16. Despite representing that HTH was the real owner of the Property located at 5 Palmetto Road (**Ex. 7, pg. 1**) and that they were “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” (*Id., p. 3*), the HTH Defendants had already sold the

Property to the Plaintiffs in this matter when they executed the Settlement Agreement. *See*, **Ex. 9, Contract to Buy and Sell Real Estate and Ex. 3, HTH's August 19, 2022 30(b)(6) Deposition Transcript, p. 238:1-21.**

17. The HTH Defendants therefore committed fraud by agreeing to facts and representations that they knew were not true and induced Artis to sign the Settlement Agreement who relied on the HTH Defendants' fraudulent misrepresentations.
18. Each member of HTH had the opportunity to consult with their attorney before Amanda Dempsey signed the Settlement Agreement on behalf of HTH, agreeing to the terms therein. *See*, **Ex. 3, HTH's August 19, 2022 30(b)(6) Deposition Transcript, pp. 236:17 – 237:11; Ex. 4, Matthew B. Swain's January 25, 2023 Deposition Transcript, p. 214:6-12; and Ex. 2, William T. Phillips' January 18, 2023 Deposition Transcript, p. 171:2-6.**
19. Deposition testimony and records produced in this litigation show that the HTH Defendants were aware of alleged construction defects at the Property prior to signing the Settlement Agreement. *See*, **Ex. 3; HTH's August 19, 2022 30(b)(6) Deposition Transcript, pp. 160:21 – 166:15 and Exs. 10, 11, and 12 for the invoices discussed in the previously cited deposition transcript excerpt.**
20. The HTH Defendants undertook repairs to those installations by contracting directly with third-party contractors. *Id.*
21. The HTH Defendants directly attributed the alleged construction defects to Artis' scope of work as soon as they were discovered. **Ex. 4, Matthew B. Swain's January 25, 2023 Deposition Transcript, p. 230:1-23.**

22. Plaintiffs, who are “subsequent purchasers” of the Property, have filed suit against Artis claiming damages related to alleged construction defects at the Property.

23. Artis tendered its defense to the HTH Defendants on or about February 28, 2022 requesting that the HTH Defendants fulfill their contractual obligations as set forth in the Settlement Agreement to indemnify and hold Artis harmless in the instant matter. **Ex. 13, Richardson Plowden and Robinson’s January 10, 2022 Tender Letter to Matthew B. Swain.**

24. On or about April 1, 2022, The HTH Defendants denied Artis’ tender in breach of the Settlement Agreement. **Ex. 14, Wall Templeton’s April 1, 2022 Letter Denying Tender.**

25. Therefore, the HTH Defendants have breached their contractual obligations to defend and indemnify Artis for alleged construction defects at the Property both known and unknown at the time HTH signed the Settlement Agreement, including the alleged defects HTH was aware of and took steps to remediate.

26. But for the fact that the HTH Defendants did not actually own the property when they entered into the Settlement Agreement with Artis, Artis would have a full and complete defense to Plaintiffs’ claims in the instant matter because HTH would have released those claims on behalf of all future parties in their chain of title. Therefore, HTH must indemnify, defend, and hold Artis harmless against Plaintiffs’ claims in this case.

For the above stated reasons, Artis Construction, LLC is entitled to Summary Judgment on its claims for Indemnity, Breach of Contract, and Fraud against House Therapy Holdings, LLC, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain.

[Signature Block on Following Page]

RICHARDSON PLOWDEN & ROBINSON, P.A.

s/James H. Elliott, Jr.

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Attorneys for Artis Construction, LLC

May 5, 2023
Mount Pleasant, South Carolina

EXHIBIT “D”

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Jared S. O'Connell and Harmon 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 & Air;
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;
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.

Artis Construction, LLC

Third-Party Plaintiff,

Vs.

Brian R. Wells, PE, LLC;
Perryman Engineering, LLC;
PJ Sanchez Masonry, LLC;

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2021-CP-10-03090

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT AS TO
PLAINTIFFS' CLAIMS AGAINST ARTIS
CONSTRUCTION, LLC FOR UNFAIR
TRADE PRACTICES**

Donnix Construction, LLC;
 Guillen Carpentry, LLC;
 Charleston Exteriors, LLC;
 Ashley Oak Contracting, LLC;
 H2O Pro, LLC;
 La Roca Masonry, LLC; and
 Apex Contractors, LLC;

Third-Party Defendants.

House Therapy Holdings, LLC, Amanda F.
 Dempsey, William T. Phillips, and Matthew
 B. Swain,

Third-Party Plaintiffs,

Vs.

Carolina Climate Control, LLC and Bluetape
 Solutions, LLC

Third-Party Defendants.

Comes Now, Artis Construction, LLC, by and through its undersigned counsel and moves before this Honorable Court within ten days of the date of this Motion or as soon thereafter as can be heard for an Order Granting Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. The basis for this Motion is that substantial discovery has been completed and no genuine issue of material fact exists as to Plaintiffs' claim for Unfair Trade Practices against Artis Construction, LLC ("Artis").

In support of this Motion, the following uncontradicted facts are offered:

1. In 2018, the Defendant House Therapy Holdings, LLC ("HTH") hired Artis to perform renovations at the property located at 5 Palmetto Road, Charleston, SC (the "Property") which is the same property at issue in this litigation.

2. After the renovation project was complete, the HTH Defendants sold the Property to the Plaintiffs in this matter in late 2020.
3. Plaintiffs negotiated the purchase of the Property through its agents and the agents for the HTH defendants.
4. Plaintiffs did not communicate in any way with Artis prior to the initiation of this lawsuit.
5. Plaintiffs has never had any contractual relationship with Artis whether in relation to the Property or otherwise.
6. To recover in an action for unfair trade practices, the Plaintiffs must show that Artis employed unfair or deceptive acts or practices during the construction project at issue. *See*, S.C. Code Ann. §§ 39-5-20.
7. Additionally, Plaintiffs must also allege and prove that Artis' actions adversely affected the public interest. *See, Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 (2004).
8. When asked at their respective depositions whether Plaintiffs can identify any act or omission by Artis that they would constitute as "unfair or deceptive", Plaintiffs' responded as follows:
 - a. Jared O'Connell: "I think it's an irrelevant question because we never – before we closed on the house, we never had an interaction with Artis...I have never had a communication in any form, I do not believe, with anyone at Artis." **Ex. 1, February 14, 2023 Deposition of Jared O'Connell, p. 183:10 – 184:8.**
 - b. Harmony O'Connell: "Since we've never had any contact, no, I don't think that there's anything they've done to me personally." **Ex. 2, April 17, 2023 Deposition of Harmony O'Connell, p. 207:2 – 208:6.**

9. Therefore, Plaintiffs' claim for Unfair Trade Practices against Artis must fail as Plaintiffs do not have any evidence to support a finding that Artis engaged in any unfair or deceptive acts or practices which adversely affected the public interest as required to succeed on a claim for Unfair Trade Practices.

For the above stated reasons, Artis Construction, LLC is entitled to Summary Judgment dismissing Plaintiffs claim for Unfair Trade Practices against Artis Construction, LLC, with prejudice.

RICHARDSON PLOWDEN & ROBINSON, P.A.

s/Cameron D. Berthelsen

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Attorneys for Artis Construction, LLC

June 23, 2023
Mount Pleasant, South Carolina

EXHIBIT “E”

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF GENERAL SESSIONS
TENTH JUDICIAL CIRCUIT
2021-CP-10-03090

Jared O'Connell, et al.,)
)
 Plaintiffs,)
)
vs.)
)
Amanda F. Dempsey, et al.,)
)
 Defendants.)
-----)

TRANSCRIPT OF HEARING

August 15, 2023
Charleston, South Carolina

B E F O R E:

The Honorable Bentley Price, Judge Presiding

A P P E A R A N C E S:

For the Plaintiffs -
Amanda Morgan Blundy, Esquire
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843-867-6050

For the Defendant -
William "Trey" Watkins, Esquire
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Official Circuit Court Reporter
Post Office Box 4604
Beaufort, South Carolina 29903

P R O C E E D I N G S

* * * * *

THE COURT: Jared O'Connell vs. Amanda Dempsey.

MR. WATKINS: Your Honor, there may be a few motions in front of you. Is there one in particular that you want to hear?

THE COURT: Well, if there's any motion to compel, I'm just dying to see - hear those. Let me see if there are. Oh, goody, there are. So we've got one, two, three, four, five, six, seven, eight motions. Three motions to compel discovery, and one motion to quash, a motion for amended, motion for summary judgment, a motion for summary judgment, a partial summary judgment, and more motions to compel.

MR. WATKINS: Your Honor, Trey Watkins, on behalf of ---

THE COURT: Start where you want.

MR. WATKINS: -- House Therapy Holdings. Our of our -- we have resolved all of our motions to compel, I've withdrawn those.

THE COURT: All right. Hold on.

MR. WATKINS: I believe it's been updated or marked complete, but anything on behalf of House

1 Therapy Holdings on the motions to compel are
2 completed.

3 THE COURT: All right, so they don't --
4 they don't indicate -- it doesn't matter.

5 MR. WATKINS: I can pull it up the ---

6 THE COURT: Well, it -- it's just the only
7 way we would know -- we would know by the first
8 filing was May 24th, then June 27th, and then
9 January 11th.

10 MS. BLUNDY: Your Honor.

11 THE COURT: Yes, ma'am.

12 MS. BLUNDY: Amanda Blundy on behalf of the
13 Plaintiff. So just going in order, the first one,
14 that says motion to compel discovery, that's been
15 resolved, the May 24, 2023.

16 THE COURT: All right.

17 MS. BLUNDY: The second one, motion to
18 compel discovery responses, that one has been
19 resolved by a consent order. The consent order just
20 has not been filed.

21 THE COURT: All right.

22 MS. BLUNDY: Then the next one would be a
23 motion to compel. It's your motion to compel, HTH
24 vs. ---

25 MR. WATKINS: I showed my roster of

1 MR. WATKINS: They haven't done
2 topographic, one like we have, but they can measure
3 it. If she wants to do a topographic, she can go
4 spend the money to go hire someone to go do that,
5 produce it, and call him as an expert. But these
6 are my consultants that I get the right to rely on.
7 I don't have all the expertise, and I need to be
8 able to consult with them in order to understand the
9 facts of the case.

10 THE COURT: I agree. I think that she can
11 hire whomever she'd like as long as she has now been
12 advised as to what the experts are giving you or
13 opining you on, and so I will ---

14 MR. WATKINS: That was the motion to quash.

15 THE COURT: Yeah, so I'll get back now.
16 I'll recommend the motion to defend -- or the
17 defendant's motion to quash as I find there are no
18 real exceptional circumstances.

19 MR. WATKINS: Thank you, Your Honor.

20 THE COURT: All right, what's next?

21 MS. BLUNDY: Thank you, Your Honor.

22 THE COURT: Okay. An amended motion for
23 summary judgment filed 5/5/23.

24 MR. BERTHELSON: Yeah, I believe that's
25 mine, Your Honor.

1 THE COURT: All right.

2 Yes, sir, your name for the record?

3 MR. BERTHELSEN: My name is Cameron
4 Berthelsen.

5 THE COURT: Spell your last name?

6 MR. BERTHELSEN: My last name is B-E-R-T-H-
7 E-L-S-E-N, I'm an attorney.

8 THE COURT: And you represent whom?

9 MR. BERTHELSEN: I represent Artist
10 Construction, LLC, Your Honor.

11 THE COURT: All right, yes, sir, I'm happy
12 to hear from you.

13 MR. BERTHELSEN: All right, thank you, Your
14 Honor.

15 I'm here today to argue in favor of
16 Artist's motion for summary judgment against House
17 Therapy Holdings, LLC, who for the remainder of this
18 argument I will refer to as HTH, if that's all right
19 with the Court, and the individual members of HTH,
20 who are Amanda Dempsey, Williams Phillips, and
21 Matthew B. -- Matthew B. Swain. And the claims that
22 Artist has against HTH for a breach of contract
23 indemnity and fraud. Now as just a way of a brief
24 background on this matter, Your Honor, HTH purchased
25 the property that's at issue in this litigation, the

1 same property owned by the Plaintiffs in this
2 litigation, and represented by Ms. Blundy. They
3 hired, excuse me, they purchased the property with
4 the intent to renovate and sell this property at a
5 profit. They hired my client, Artist Construction,
6 to perform those renovations. Before the
7 renovations were complete, a dispute arose over
8 payment and construction deficiencies. My client
9 filed suit, HTH filed counterclaims for construction
10 deficiencies. My client's claims were lack of
11 payment. But again, there was counterclaims from
12 HTH for construction defects. And around the same
13 time it's come out in this case that HTH began
14 discovering the exact same construction defect
15 issues that are pled and alleged by Plaintiffs in
16 the incident matter. After litigation ensued, they
17 settled the negotiate -- excuse me, they negotiated
18 the settlement through counsel where Artist agreed
19 to receive \$120,000 less than what they were owed
20 and exchanged for the settlement agreement. I do
21 want to take this moment to correct a quick typo on
22 my motion for summary judgment. This would be on
23 paragraph 11. I allege that they took around 50,000
24 less than what they were owed, that's not the true
25 number. The true number is just over \$120,000 less

1 than what they were owed. So I believe the payment
2 was 163, the amount owed on the contract is about
3 283. And, Your Honor, if I may approach, I have the
4 settlement agreement that was negotiated through
5 counsel and agreed to. Your Honor, may I approach?

6 THE COURT: Absolutely.

7 MR. BERTHELSEN: All right, if you notice
8 what I've handed to you is actually -- if you take
9 off the paperclip, you'll see that there's actually
10 a packet of two different documents, the first of
11 which is Exhibit 7 to my motion, which is the
12 settlement agreement we're here to discuss. The
13 second page of the -- excuse me, the second packet
14 of documents is what I typed up personally. It's
15 simply retypes the highlighted sections that you
16 view side-by-side, but the quality of the contract
17 -- the quality of this document is just not great,
18 so I gave it to you just to be able to read it a
19 little better. No change in the language. Sorry,
20 Your Honor. There you go. All right, so first
21 thing, I'm going to go ahead and point out to Your
22 Honor is, if you jump to the first half on there is
23 the release. If you look at the release paragraph,
24 this is going to be Section 5. It's going to be on
25 page -- I believe it's page three of the settlement

1 agreement. And if you look at the contract, Your
2 Honor, it says, "The HTH parties," which of course
3 represent House Therapy Holdings, LLC, and the
4 individual members, "on behalf of themselves, their
5 heirs, executors, successors," it keeps going to
6 say, "and subsequent purchasers of the property
7 hereby irrevocably and unconditionally remise,
8 release and discharge Artist," and it goes on. If
9 you look at the main section of this release, the
10 main phrase of this release that I am going to
11 stress about today, Your Honor, is on behalf of
12 subsequent purchasers. Pursuant to this paragraph,
13 HTH released all liability from this for any
14 aspects, or any claims of defects with that -- with
15 that property on behalf of subsequent purchasers, on
16 behalf of the Plaintiffs in this case, who purchased
17 the property from HTH. Now if we go down to the
18 second tab on what I handed to you, known or
19 unknown, I will point out that in the second rest --
20 recital, the whereas paragraph, I just want to point
21 out that the parties agreed to settle and dispose of
22 all claims that were asserted, could have been
23 asserted, known or unknown, all the language you've
24 seen before, Your Honor. The last section I would
25 point out to you is the indemnity section. It's

1 going to be on page four at the very bottom, I've
2 got it highlighted that HTH, at their own expense,
3 agrees to indemnify Defendant, and hold Artist
4 harmless. And if you read on, excuse me, "holding
5 parties for any cost that Artist may occur as a
6 result of a breach by HTH of any representation or
7 agreement contained in this settlement agreement."
8 Now when this settlement agreement was signed, and
9 if you go to the first red tab that's on this, it's
10 going to be on the first page of this document.
11 When this agreement was signed, HTH represented that
12 they owned this property. They represented that
13 they owned every claim associated with this
14 property, and they were the sole owners of the
15 claims associated with this property. And you can
16 see that section on the red number two tab, which I
17 believe it is page three. Those representations,
18 Your Honor, were false. In fact, HTH had sold this
19 property before signing this settlement agreement,
20 never notified my clients, never notified my
21 clients' counsel either. My client, Artist
22 Construction, would not have signed the settlement
23 agreement had they known that another party had
24 already purchased this property, and already owned
25 claims to the ongoing damage, or alleged ongoing

1 construction defects at the property. These were
2 material statements that were not true that my
3 client relied on and relied on in signing this
4 agreement, relying on these representations.

5 THE COURT: Because the new homeowner,
6 obviously, didn't have to honor that agreement.

7 MR. BERTHELSEN: The new homeowner is
8 claiming that they do not need to hold to that
9 agreement. The new homeowner was unaware of the
10 agreement at the time. The new homeowner was not
11 aware of the litigation that ensued, that my client
12 had filed a lien, none of it. The new owner --
13 homeowner was completely unaware of this situation
14 altogether, it just ---

15 THE COURT: I'm sorry. Did the new
16 homeowner pay cash then? Well, I mean they didn't
17 do any type of title searches to find out that there
18 was liens or anything along those lines? How would
19 that have gone through?

20 MR. BERTHELSEN: I can't answer that
21 question for you, Your Honor.

22 THE COURT: Okay. I'm sorry.

23 MR. BERTHELSEN: No, that's all right. So,
24 essentially, what I'm arguing here today is the
25 enforcement of the settlement agreement. There was

1 misrepresentations that my client relied on. But
2 for those misrepresentations, my client would have a
3 full defense to the claims brought by Plaintiffs,
4 because they would have been released on behalf of
5 HTH.

6 THE COURT: Who owns the house now?

7 MR. BERTHELSEN: The Plaintiffs do. They
8 purchased it from HTH.

9 THE COURT: Your clients?

10 MS. BLUNDY: Yes, Your Honor.

11 MR. BERTHELSEN: Yes.

12 THE COURT: Is it still for sale? Are they
13 selling it?

14 MS. BLUNDY: No, Your Honor.

15 THE COURT: All right.

16 MS. BLUNDY: That's the house we're here --
17 that's the construction defect action.

18 THE COURT: Right. Oh, I know, I'm just
19 looking on Zillow, but I didn't know they were
20 selling that. I'll give you 300 for it tomorrow,
21 but ---

22 MR. BERTHELSEN: It's ---

23 MS. BLUNDY: Also, we can make a deal, if
24 you're interested.

25 THE COURT: 3.34 million dollars. I

1 don't ---

2 MR. BERTHELSEN: That's not what it sold
3 for, but ---

4 THE COURT: No, no, no, that's the -- it
5 sold for 2.2, but Zillow says, or whatever they call
6 it, I don't know.

7 MS. BLUNDY: Zestimate.

8 THE COURT: Zestimate. I couldn't think of
9 it. Thank you. All right, what else?

10 MR. BERTHELSEN: So, basically, what we're
11 arguing today is that my client has litigated these
12 issues before. It's the exact same construction
13 defect claims that they'd settled and negotiated
14 through counsel, and memorialized in the settlement
15 agreement ---

16 THE COURT: All right.

17 MR. BERTHELSEN: -- that they're facing
18 today. So I'm just seeking enforcement of the
19 indemnity provisions of the settlement agreement.

20 THE COURT: All right.

21 MR. BERTHELSEN: Thank you, Your Honor.

22 THE COURT: Who is representing HTH?

23 MR. WATKINS: your Honor, Trey Watkins here
24 on behalf of HTH. If I understand Mr. Berthelsen, I
25 guess he's abandoning his fraud claim; is that -- is

1 that true? Are you arguing again for fraud? Are
2 you moving for fraud as well or not?

3 MR. BERTHELSEN: Absolutely.

4 MR. WATKINS: Okay, all right.

5 THE COURT: So you just want a partial
6 summary judgment?

7 MR. WATKINS: It sounds like he's moving
8 for a full summary judgment against fraud, breach of
9 contract indemnity as he's drafted in his memo; is
10 that right?

11 MR. BERTHELSEN: Essentially, yes.

12 MR. WATKINS: All right.

13 MR. BERTHELSEN: Let's talk to the, you
14 know, it's already talking about the facts in the
15 settlement agreement, that were fraudulently alleged
16 and induced my client to sign this.

17 THE COURT: I understand that. All right.

18 MR. WATKINS: All right, Your Honor, Trey
19 Watkins on behalf of House Therapy Holdings, LLC,
20 and the three individuals, Amanda Dempsey, Matthew
21 Swain and William T. Phillips. I'm going to address
22 the individuals at the end. The arguments would
23 apply regardless, but importantly here, there's one
24 entity, House Therapy Holdings, LLC, that's who
25 hired Artist, that's who the lawsuit was, it was

1 between the LLC and Artist. That's the settlement
2 agreement. There's only two parties in the
3 settlement agreement, so those are the two entities.
4 The members have other LLCs that are members of
5 House Therapy Holdings, and then there are members
6 of those LLCs, and we'll talk about that at the end.
7 There shouldn't be individual liability here at all,
8 but let's get to the heart of the matter. So my
9 folks are the former owners of the house. You heard
10 that there was a dispute. There was essentially a
11 payment dispute at the end of construction, and
12 liens were filed against the house. And my clients
13 ended up paying Artist \$163,000 to release that
14 suit. That was settled in a mediated settlement
15 agreement. Both sides had counsel. They drafted a
16 settlement agreement that's at issue here. And then
17 during the pendency of getting those signed, there's
18 an effected date on the settlement agreement, and
19 that effected date was on the last day that it's
20 signed, circulated to counsel; but when all that
21 happened, the house got sold during that process.
22 And when they mediated the case, the case was filed
23 with the Court as settled, but the actual lease
24 doesn't get -- it doesn't become effective till
25 after the house is sold. Somewhat of a nonissue,

1 just letting you know what the -- what the -- what
2 the -- what's going on. What -- what you've got
3 inside here is that settlement agreement, it's
4 Exhibit 7, you've got it right there, is -- it has
5 an indemnity agreement, okay? And so the first
6 issue for you to decide is whether or not any
7 indemnity agreement -- what Artist is asking us to
8 do, my client to do, is to indemnify him for their
9 own negligence. They built the house, they're now
10 being sued for construction defects that they
11 created. It's their sole negligence. My clients
12 were the owners, they didn't have anything to do
13 with the construction. And so they are trying to
14 say that a breach of the settlement agreement
15 entitles them to indemnity. And it doesn't -- the
16 -- the indemnity agreement at issue talks nothing
17 about indemnifying Artist for their sole negligence.
18 And that's against public policy in South Carolina.
19 There's the Statute, South Carolina Code 32-210, and
20 it covers construction agreements, and says, "It's
21 completely against public policy for one party to
22 indemnify another for their sole negligence." So
23 the indemnity clause is invalid and should not be
24 enforced. South Carolina law is also very clear on
25 this. I cited a number of cases to exempt a party

1 from liability or his own negligence, there must be,
2 "Explicit language clearly indicating that such was
3 the intent of the parties." That's *McCune v. Myrtle*
4 *Beach Indoor Shooting Range*, 364 S.E. 242, the Court
5 of Appeals, 2005. There's also -- I'm sure Your
6 Honor's heard of the *Concord and Cumberland* case in
7 the construction defect cases, that stands for the
8 same issue. The -- an indemnity agreement
9 purporting to indemnify someone else for their sole
10 negligence, and in that course, even for their
11 concurrent -- or concurrent negligence must be clear
12 and unequivocal. This indemnity agreement doesn't
13 even talk about doing that, so in no way it's clear
14 and unequivocal, and also completely violates
15 public policy, and is not enforceable, but I
16 wouldn't ---

17 THE COURT: One second. I don't have the
18 complete case statute, so I don't know who all the
19 parties are, but, Ms. Blundy, are you -- are you
20 still going after Artist Construction as well?

21 MS. BLUNDY: Yes, Your Honor. This --
22 these -- just to clarify, which is why I got up
23 arguing, there are no motions against -- these
24 motions are not against any of the Plaintiffs'
25 claims.

1 THE COURT: I understand.

2 MS. BLUNDY: Okay.

3 THE COURT: All right.

4 MS. BLUNDY: Yes, we still have other ---

5 THE COURT: Well, I think what Mr. Watkins
6 is arguing is that if I grant their motion, then
7 your claims against them would be out.

8 MR. WATKINS: Yeah, he's trying to -- he's
9 trying to pass all -- he's trying to say that we've
10 got to stand in their shoes for their negligence.
11 They built the house, they've got construction
12 defects alleged, and they're trying to pass it onto
13 my ---

14 THE COURT: I understand.

15 MR. WATKINS: -- clients.

16 THE COURT: All right.

17 MR. WATKINS: So ---

18 THE COURT: What I'm going -- what I'm
19 going to do is I'm going to deny the motion, and,
20 obviously, he's entitled to a setoff at any point in
21 time if there is a verdict rendered against him. So
22 that's -- I mean that's the way I would see it
23 happen at this point in time, not the
24 indemnification portion of it.

25 MR. WATKINS: All right.

1 MR. BERTHELSEN: Your Honor, will I be able
2 to address any of those before you make your
3 judgment?

4 THE COURT: If you want to for the record,
5 I've got no problem with that.

6 MR. BERTHELSEN: All right. I'm just
7 saying that the sources that are cited by Mr.
8 Watkins here apply specifically to construction
9 contracts. The 32-2-10 actually in its title
10 specifically means -- or let's see, develop
11 provisions, hold harmless clauses in certain
12 construction contracts. This is a construction
13 contract. This policy was put into effect because
14 construction contracts are prospect to change. When
15 they sign the contract about what they're going to
16 do, they want to try and get people away from
17 signing away their liability before it even occurs.
18 A settlement agreement is not a construction
19 contract. It's not after-the-fact. There's not a
20 single case out there where 32-2-10 is applied to
21 settlement agreements. And the cases cited by Mr.
22 Watkins, McCune and -- well, first of all Concord
23 and Cumberland is a construction defect case, a full
24 stop construction contract, nothing to do with the
25 settlement agreement. McCune vs. Myrtle Beach,

1 while it does stand for the proposition and citation
 2 that he cited, actually upheld the language, when --
 3 and it's much more broad, and the evidence actually
 4 suggests that Plaintiff hadn't even read the
 5 agreement. At this point, these claims have been
 6 litigated. These claims have been negotiated, and
 7 these claims have been settled. And my client took
 8 106 -- or \$120,000 haircut to settle these, and now
 9 we're back in Court with the same things again. I
 10 mean it's -- in order to read this settlement
 11 agreement in the way that Mr. Watkins is suggesting,
 12 we use these indemnity provisions all the time, with
 13 these construction defect cases. To read it in this
 14 way, to apply 32-2-10 to a settlement agreement
 15 would blow up all of the settlement agreements we've
 16 cited.

17 THE COURT: I didn't say I was applying it
 18 to that in that manner.

19 MR. BERTHELSEN: Yeah.

20 THE COURT: I just said that I felt like it
 21 -- the best way to handle this would be a setoff at
 22 the end of the case for your clients, if there is,
 23 in fact, actually a verdict in excess of 160 minus
 24 the 120.

25 MR. BERTHELSEN: All right, yes, Your

1 Honor.

2 THE COURT: So the next one would be motion
3 for summary judgement as to Plaintiff's claims.

4 MR. WATKINS: That's mine as well.

5 THE COURT: All right, yes, sir.

6 MR. WATKINS: And, Your Honor, just so the
7 records clear, you're denying that motion as it
8 relates to indemnity and fraud to the entities, the
9 individuals and a breach of contract, correct? That
10 was his full motion.

11 THE COURT: Yes.

12 MR. WATKINS: I just want to make sure of
13 that.

14 THE COURT: Okay, thank you, Your Honor.

15 MR. BERTHELSEN: But we added the Order
16 will have setoff 120,000 at the end of this.

17 THE COURT: That's for the trial judge to
18 make that determination of that, but that's the way
19 I see it at this point in time.

20 MR. WATKINS: All right. Your Honor, he's
21 making that finding that there's that --

22 THE COURT: I think it would be the
23 appropriate way of handling it because then he would
24 get something for the \$120,000 that he's already
25 paid or taken.

1 MR. WATKINS: Well, on that -- on that
2 amount, I'd say there's a factual dispute as to that
3 amount. He's made that -- he's made that
4 determination, he's represented that. That's not
5 what the settlement agreement said. The only comp
6 -- the only compensation paid under the settlement
7 agreement is my client's paying them \$163,000.

8 THE COURT: But ---

9 MR. WATKINS: It wasn't the full value of
10 what their claim was.

11 THE COURT: I think that was backwards, I
12 think.

13 MR. BERTHELSEN: Okay, there was a lien
14 filed with a counter affidavit.

15 THE COURT: Yeah, the trial judge made that
16 determination.

17 MR. BERTHELSEN: Yeah.

18 THE COURT: And that's what I'm -- that's
19 why I'm denying the motion. I'm going to let the
20 trial judge make that determination.

21 MR. WATKINS: Thank you, Your Honor.

22 THE COURT: All right. There was a case
23 that I handled that came back on appeal, it was a --
24 I don't know if y'all -- you construction junkies
25 read them all. What was the one that was with -- it

1 just came back. Mr. Butler, you probably -- I don't
2 know if you were involved in that one or not, it was
3 in the Fourteenth Circuit, it was a D. R. Horton
4 case saying if you settle, you're out. I'd read
5 that one. It was just upheld. Meaning you can make
6 that argument and cite that case later. All right,
7 what's next.

8 MR. BERTHELSEN: All right, Your Honor,
9 this is a quick one. Again, Cameron Berthelsen on
10 behalf of Artist Construction, LLC. I filed a
11 motion for summary judgment asking for an order
12 denying or dismissing Plaintiffs' complaints for
13 unfair trade practices against Artist Construction.
14 As you know, unfair trade practices require unfair
15 and deceptive -- or deceptive acts. They require
16 that it's capable -- I'm sorry, that it's against
17 public policy or public in general. I think we show
18 that by way of capable of being repeated. In this
19 case I asked both Plaintiffs can you point to
20 anything unfair and deceptive that my client did.
21 Jared O'Connell responded that, "That's an
22 irrelevant question, I've never even spoken to your
23 client," and Harmony O'Connell said, "I can't think
24 of anything that they've done," I mean all -- and
25 that's me paraphrasing, the citations are in my

1 motion. Yep, Your Honor, that's it.

2 THE COURT: All right.

3 MS. BLUNDY: Your Honor, Amanda Blundy on
4 behalf of the Plaintiffs. Your Honor, we submitted
5 a brief if you would like a copy?

6 THE COURT: I've got it.

7 MS. BLUNDY: Okay. Your Honor, the section
8 does not require that the Plaintiffs state unfair
9 acts. There was no requirement of communication,
10 it's just that unfair methods of competition, unfair
11 and deceptive acts or practices, and the conduct in
12 any trade or commerce. There's that -- there's no
13 privity requirements. Several cases that I talk to
14 that are in my brief just to -- for time purposes.
15 So being that there's no requirement, Your Honor,
16 this is PVC ductwork that was placed in a slab. It
17 fills up with water. We asked Artist during their
18 deposition how many times have they done that? They
19 said five or six times. They are still operating in
20 South Carolina. They are still building. It is,
21 you know, it can be repeated conduct. This is E.
22 coli that's swelling through the ductwork.
23 Coliform. They've had to move out. The entire
24 family's sick. This is -- and so the fact that my
25 clients, who did not directly contract with Artist,

1 and didn't talk to them, I mean, obviously, you've
2 just heard the arguments that HTH contracted with
3 Artist. That is not a requirement under South
4 Carolina law, so that is irrelevant to the argument,
5 Your Honor. So we would just ask that you deny this
6 motion.

7 THE COURT: All right.

8 MR. BERTHELSEN: May I speak to that real
9 quick?

10 THE COURT: Absolutely.

11 MR. BERTHELSEN: All right, so, again,
12 there is no evidence that there was any unfair,
13 deceptive acts. There's no evidence that my client
14 even knew there were defects in the ductwork until
15 right before this litigation was filed. Certainly,
16 not before the house was sold to the Plaintiffs.
17 Just because they have installed HVAC systems in the
18 past, there's no evidence that there's anything
19 wrong with those underground HVAC systems
20 whatsoever. Along that line of thinking any
21 contractor would be liable for unfair trade
22 practices if they had a defect in their work simply
23 because they're a framer, or even if there is
24 defective framing and they're a framer, then it's
25 capable of being repeated. It needs more in order

1 for it to be an unfair trade practice. It needs
2 deception, it needs unfairness, and it needs moral
3 issues here, and there's no evidence suggesting
4 that's true.

5 THE COURT: All right.

6 MS. BLUNDY: Your Honor, may I add one
7 thing?

8 THE COURT: Yes.

9 MS. BLUNDY: On that note we see that there
10 was litigation about the home before it was sold to
11 my clients. That is very -- we are bringing claims
12 for negligence and misrepresentation, fraud as well.
13 This house was litigated as a result of the issue
14 before it was sold to my client. One of my exhibits
15 to the brief is phone calls to SERVPRO pumping 180
16 gallons of water out of the ductwork before it was
17 sold to my clients. The ductwork problems were very
18 aware between Artist and HTH. My clients didn't
19 know about that. If I can't -- and this is not a
20 typical construction defect house where there's some
21 leaking windows. It is -- there was recorded phone
22 calls we have in evidence of the owners calling. I
23 mean my clients knew nothing of water pumping
24 through their floors that's filled with E. coli.

25 THE COURT: All right. All right, I'll

1 deny the motion. Just do a short order.

2 MS. BLUNDY: Thank you, Your Honor.

3 (Whereupon, the hearing was concluded at
4 2:52 p.m.)

5 - - -END OF TRANSCRIPT- - -

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CERTIFICATE OF REPORTER

I, Cathy L. Young, CVR-M, for the
Fourteenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a
true, accurate and complete Transcript of Record of
the proceedings had and evidence introduced in the
hearing of the captioned case, relative to appear,
in the Circuit Court for Beaufort County, South
Carolina, on the 6th day of September, 2023.

I do further certify that I am neither of
kin, counsel nor interest to any party herein.

A handwritten signature in black ink that reads "Cathy L. Young". The signature is written in a cursive, flowing style. Below the signature is a horizontal dashed line.

Cathy L. Young, CVR-M

Court Reporter and Notary

Public in and for South Carolina

My Commission expires: 3-28-2029

EXHIBIT “F”

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2021-CP-10-3090

JARED S. O'CONNELL AND
HARMONY A. O'CONNELL,

Plaintiffs,

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

**ORDER DENYING MOTION FOR
SUMMARY JUDGMENT**

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.E.2d 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 is 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

EXHIBIT “G”

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jared S. O'Connell and Harmon 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 & Air;
Custom Climate Heating & Air, Inc.;
P.J. Sanchez Masonry, LLC;
Donnix Construction, LLC;
Guillen Carpentry, LLC;
Charleston Exteriors, LLC
Ashley Oak Contracting, LLC;
H2O Pro, LLC;
La Roca Masonry, LLC;
Apex Contractors, LLC;
South Point Hardwood Floor, LLC;
Bluetape Solutions, LLC;
Carolina Climate Control, LLC;
Movar, LLC; and
ECL Design, LLC

Defendants.

Artis Construction, LLC

Third-Party Plaintiff,

Vs.

Brian R. Wells, PE, LLC;
Perryman Engineering, LLC;
PJ Sanchez Masonry, LLC;

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2021-CP-10-03090

**ORDER DENYING ARTIS
CONSTRUCTION, LLC'S MOTION
FOR SUMMARY JUDGMENT AS TO
PLAINTIFFS**

Donnix Construction, LLC;
 Guillen Carpentry, LLC;
 Charleston Exteriors, LLC;
 Ashley Oak Contracting, LLC;
 H2O Pro, LLC;
 La Roca Masonry, LLC;
 Apex Contractors, LLC; and
 South Point Hardwood Floor, LLC;

Third-Party Defendants.

House Therapy Holdings, LLC, Amanda F.
 Dempsey, William T. Phillips, and Matthew
 B. Swain,

Third-Party Plaintiffs,

Vs.

Carolina Climate Control, LLC and Bluetape
 Solutions, LLC

Third-Party Defendants.

This matter came before the Court upon Artis Construction, LLC's Motion for Summary Judgment on its claims against Defendants House Therapy Holdings, LLC; (hereinafter "HTH"), Amanda F Dempsey; William T Phillips; and Matthew B. Swain. 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 William W. Watkins, Jr. was present on behalf of HTH, Amanda F. Dempsey, William T. Phillips, and Matthew B. Swain. After hearing the arguments and reviewing the memorandum submitted by the parties, Artis Construction, LLC's Motion for Summary Judgment is hereby 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/Other

IT IS SO ORDERED!

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

EXHIBIT “H”

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	2021-CP-10-03090
	)	
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	)	ORDER DENYING ARTIS
INTERNATIONAL REALTY, ARTIS	)	CONSTRUCTION, LLC'S MOTION FOR
CONSTRUCTION, LLC; OCEANAIRE, LLC;	)	SUMMARY JUDGMENT AS TO
HERO HEATING AND AIR, LLC; CUSTOM	)	PLAINTIFFS
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.	)	

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), SCRCF. 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), SCRCF. 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

EXHIBIT “I”

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jared S. O'Connell and Harmon 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 & Air;
Custom Climate Heating & Air, Inc.;
P.J. Sanchez Masonry, LLC;
Donnix Construction, LLC;
Guillen Carpentry, LLC;
Charleston Exteriors, LLC
Ashley Oak Contracting, LLC;
H2O Pro, LLC;
La Roca Masonry, LLC;
Apex Contractors, LLC;
South Point Hardwood Floor, LLC;
Bluetape Solutions, LLC;
Carolina Climate Control, LLC;
Movar, LLC; and
ECL Design, LLC

Defendants.

Artis Construction, LLC

Third-Party Plaintiff,

Vs.

Brian R. Wells, PE, LLC;
Perryman Engineering, LLC;
PJ Sanchez Masonry, LLC;

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2021-CP-10-03090

**ORDER DENYING ARTIS
CONSTRUCTION, LLC'S MOTION
FOR SUMMARY JUDGMENT AS TO
PLAINTIFFS**

Donnix Construction, LLC;
 Guillen Carpentry, LLC;
 Charleston Exteriors, LLC;
 Ashley Oak Contracting, LLC;
 H2O Pro, LLC;
 La Roca Masonry, LLC;
 Apex Contractors, LLC; and
 South Point Hardwood Floor, LLC;

Third-Party Defendants.

House Therapy Holdings, LLC, Amanda F.
 Dempsey, William T. Phillips, and Matthew
 B. Swain,

Third-Party Plaintiffs,

Vs.

Carolina Climate Control, LLC and Bluetape
 Solutions, LLC

Third-Party Defendants.

This matter came before the Court upon Artis Construction, LLC's Motion for Summary Judgment against Jared S. O'Connell and Harmony A. O'Connell's 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 submitted by both parties, Artis Construction, LLC's Motion for Summary Judgment is hereby 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/Other

IT IS SO ORDERED!

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

EXHIBIT “J”

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), 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
- ☐ **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

EXHIBIT “K”

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), 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
- ☐ **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:

The following three orders were signed and filed due to clerical errors and are therefore vacated:
•ORDER DENYING ARTIS CONSTRUCTION, LLC'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS Filed 9/1/23 at 11:00am
•ORDER DENYING ARTIS CONSTRUCTION, LLC'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS Filed 9/1/23 at 11:02am
•Form 4 Order vacating 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" Filed 9/19/23 at 4:00pm.

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 09/27/2023 .

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

EXHIBIT “L”

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 & Air;
Custom Climate Heating & Air, Inc.;
P.J. Sanchez Masonry, LLC;
Donnix Construction, LLC;
Guillen Carpentry, LLC;
Charleston Exteriors, LLC
Ashley Oak Contracting, LLC;
H2O Pro, LLC;
La Roca Masonry, LLC;
Apex Contractors, LLC;
South Point Hardwood Floor, LLC;
Bluetape Solutions, LLC;
Carolina Climate Control, LLC;
Movar, LLC; and
ECL Design, LLC

Defendants.

Artis Construction, LLC

Third-Party Plaintiff,

Vs.

Brian R. Wells, PE, LLC;
Perryman Engineering, LLC;
PJ Sanchez Masonry, LLC;

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2021-CP-10-03090

**ARTIS CONSTRUCTION, LLC'S
MOTION TO RECONSIDER, ALTER,
AND/OR AMEND AND
MEMORANDUM IN SUPPORT**

Donnix Construction, LLC;
 Guillen Carpentry, LLC;
 Charleston Exteriors, LLC;
 Ashley Oak Contracting, LLC;
 H2O Pro, LLC;
 La Roca Masonry, LLC;
 Apex Contractors, LLC; and
 South Point Hardwood Floor, LLC;

Third-Party Defendants.

House Therapy Holdings, LLC, Amanda F.
 Dempsey, William T. Phillips, and Matthew
 B. Swain,

Third-Party Plaintiffs,

Vs.

Carolina Climate Control, LLC and Bluetape
 Solutions, LLC

Third-Party Defendants.

PLEASE TAKE NOTICE that Defendant Artis Construction, LLC (“Artis”), by and through its undersigned attorneys, ten (10) days hence, or as soon thereafter as counsel may be heard, will move before this Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an Order granting Artis’ Motion to Reconsider, Alter, and/or Amend the Order entitled “Order Denying Motion for Summary Judgment”, filed into the Court’s record on September 1, 2023 at 10:54 AM, denying Artis’ Motion for Summary Judgment as to Artis’ claims against Defendants House Therapy Holdings, LLC (“HTH”), Amanda F. Dempsey, Matthew B. Swain, and William T. Phillips (collectively the “HTH Defendants”) in the above captioned matter (hereinafter referred to as the “Order”).

As the Court will recall, this matter arises out of alleged construction defects in Plaintiffs' residence. Plaintiffs purchased the property from Defendant House Therapy Holdings, LLC ("HTH"). Prior to their purchase, HTH contracted with Artis to renovate the property. Prior to completion of the renovation, a dispute arose between Artis and the HTH Defendants over the HTH Defendants' refusal to pay Artis' final invoice. As a result, Artis filed a Mechanic's Lien on or around January 22, 2020 for the unpaid amount of \$283,968.00 and filed suit against HTH on or around July 6, 2020. HTH filed counterclaims against Artis alleging, *inter alia*, the exact same construction defect claims alleged by Plaintiffs in this case. Artis and HTH settled their claims in late 2020, and entered into the Settlement Agreement on December 4, 2020.

The very first recital of the Settlement Agreement states "HTH is the owner of real property and improvements consisting of a 'Garage' and 'Residence' located at 5 Palmetto Road, Charleston, South Carolina, 29407." **Ex. 7 to Artis' Motion, the Settlement Agreement, p. 1.** Unbeknownst to Artis at the time of execution, this statement, and other representations that HTH was the "sole owner" of the claims related to construction defects at the property, were not true. The HTH Defendants had sold the property to Plaintiffs a month before signing the Settlement Agreement attesting to the truth of the statements contained therein. This was around the same time the HTH Defendants failed to disclose the ongoing litigation between Artis and HTH to Plaintiffs prior to the sale. Relying on these misrepresentations without any knowledge to their falsity, Artis agreed to accept a single payment of \$163,000, thereby giving up their legal claims for the remaining \$120,968.00 they were owed under the contract with the HTH Defendants. Artis did so in exchange for a release of all claims related to construction defects and for defense and indemnity from the HTH Defendants should Artis be sued for any claims related to the construction of the property by subsequent purchasers of the property. ***Id.*, p. 3.** Plaintiffs, subsequent

purchasers of the property, have now brought suit against Artis for the same construction defect claims that were litigated and settled between Artis and the HTH Defendants.

On May 5, 2023, Artis filed a Motion for Summary Judgment on its claims against the HTH Defendants for indemnity, fraud, and breach of contract (the “Motion”). The HTH Defendants filed their opposition to Artis’ Motion on August 14, 2023, the day before the hearing, despite the Court’s order that all memoranda be filed 48 hours in advance (the “Opposition”). The Motion was heard before the Court on August 15, 2023. The HTH Defendants **did not** file a Cross-Motion for Summary Judgment. The full transcript of the hearing is attached as **Exhibit “A”** and the hearing at issue is from 13:22 through 31:6.

The Court denied the Motion from the bench after limited arguments stating multiple times that the issues of indemnification and set-off would be left for the trial judge to determine. The hearing concluded with the Court asking counsel to submit a proposed order. Counsel for the HTH Defendants filed a proposed order, without circulating to the parties beforehand, that included broad conclusions of law and findings of fact that the Court did not make, some of which were never raised at the hearing at all.

Counsel for Artis notified the Court of these discrepancies on August 25, 2023 and submitted a competing Proposed Order that accurately depicted the Court’s findings by simply denying Artis’ Motion. Because the HTH Defendants submitted an order granting the HTH Defendants affirmative relief, for which they had not moved, Artis was forced to submit its own order more accurately reflecting the Court’s ruling. The Court signed both the orders submitted by counsel for the HTH Defendants and the one submitted by counsel for Artis. On September 27, 2023, the Court notified the parties that it would be withdrawing the signed Order proposed by Artis and would keep the signed Order proposed by the HTH Defendants, thereby rendering its

final order on Artis' Motion. This motion is therefore timely as it is filed within the 10-day deadline prescribed by Rule 59(e) from the Court's final order on September 27, 2023, accounting for weekends.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

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 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). 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. *See, 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"). Further, summary judgment should not be granted even when there is no dispute of evidentiary facts if there is a dispute as to the conclusion to be drawn from those facts. *See, Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 684 S.E.2d 756 (2009).

The Court's Order denying Artis' Motion goes beyond a mere denial and provides findings of facts and conclusions of law in favor of the non-moving party who did not submit a Motion for Summary Judgment on the issues decided in the Order. The Order effectively grants Summary

Judgment *sua sponte* for the HTH Defendants when no evidence supporting these findings were submitted at the hearing. As outlined above, it is improper for the Court to decide factual issues on summary judgment, and it is equally improper to draw conclusions of law from these facts, even if they are not in dispute. The sole purpose of the Court was to determine if genuine issues of material facts existed and if so, allow the jury to decide those facts. The Order goes well beyond this mandate to essentially strip Artis of its claims against the HTH Defendants in this matter before discovery is closed and before the jury hears a single piece of evidence. The Order violates established Supreme Court precedent and the express language of the SC Rules of Civil Procedure and must be withdrawn. Artis is unable to proceed in this matter with this Order as the law of this case.

GROUND FOR RECONSIDERATION

A. Artis' Claim for Indemnity Against the HTH Defendants.

The Court improperly concluded that the indemnity provision at issue, which is the foundation of Artis' claim against the HTH Defendants for indemnity, is unenforceable, despite never making such a finding during the hearing and expressly saying that this issue would be for the trial court to decide. As evidenced by the transcript attached hereto, the only argument presented by counsel for the HTH Defendants at the hearing was that the indemnity provision is against public policy pursuant to S.C. Code § 32-2-10. The Court denied the Motion from the bench shortly after this argument.

The Order, on the other hand, does not contain a single reference to §32-2-10 and instead decides that the indemnity provision at issue is unenforceable because (a) it is overly broad; (b) the language does not show the necessary intent for the HTH Defendants to defend and indemnify Artis; and (c) that Artis did not pay "separate consideration" for the indemnity. None of these

arguments were presented to the Court and therefore have no place in the Order. Additionally, many, if not all, of the Order's citations do not include findings or arguments that they have been proffered to show. Each argument, including the HTH Defendants' arguments regarding §32-2-10 which were completely left out of this Order, are addressed in turn below.

1. The Order's Overbroad Argument Was Never Presented to the Court and Relies on Precedent Whose Conclusion is Directly Contrary to What the Case is Offered to Prove in the Order.

The Order concludes that the indemnity provision at issue is overbroad because the indemnity provision identifies potential unknown indemnitees and relies on *Keith River v. River Consulting, Inc.*, 365 S.C. 500, 508, 618 S.E.2d 302, 306 (Ct.App. 2005) as justification for this conclusion. *Keith* does not contain any language that correlates to this conclusion.

In *Keith*, the contract at issue was an *oral* construction contract between a construction company and a concrete company. This case did not in any way concern indemnity provisions in a settlement agreement like the instant case. Additionally, the oral contract included an indemnity obligation that was evidenced by language on the back of the job ticket. The indemnity provision required the construction company to indemnify the concrete company for any third-party injuries while using the equipment leased from the concrete company. The court found, that while this provision is wide in scope, it was not overly broad as to render the clause void against public policy. *Id.* at 509. Therefore, not only was the contract at issue in *Keith* dissimilar to the Settlement Agreement at issue in this case, the Court in *Keith* actually upheld the language of the indemnity provision, refusing to conclude that it was overly broad. The Order states the opposite conclusion.

The Order also briefly relies on *Fisher v. Stevens*, 355 S.C. 290, 297, 584 S.E.2d 149, 153 (Ct.App. 2003) for the same conclusion. In *Fisher*, which again deals with a construction contract, not a settlement agreement, the court concluded that an exculpatory clause was automatically against public policy once determined that it is overly broad. However, in *Fisher* the exculpatory

clause relieved “any persons in any restricted area” from all liability. *Id.* at 296. Because the clause relieved all potential defendants from any and all liability, no matter the circumstances giving rise to the injury, the court concluded the clause was overly broad as a matter of law. *Id.* at 297. The clause did not identify who the injured party may be, nor did it prescribe the conduct that would be subject to the exculpatory clause. The Settlement Agreement at issue here is the exact opposite.

In the present case, the indemnity provision merely calls for indemnification of a potential defendant by another potential defendant for liability arising out of the design, construction, manufacture or installation of materials at Plaintiffs’ property. The indemnity provision at issue clearly identifies Artis as the indemnitee and HTH as the indemnitor. The indemnity provision is similarly narrow in scope as it relates only to the design, construction, manufacture, or installation of materials at Plaintiffs’ property, and agreed to by HTH in exchange for HTH not being required to pay the full price of the construction. Therefore, the Court’s conclusion that the indemnity provision is overbroad is incorrect, and its reliance on *Fisher* and *Keith* are misplaced. If Artis knew HTH had lied about ownership of the property and that they never intended to indemnify Defend Artis, Artis would not have settled its payments claims against HTH.

2. The Order Misuses the Findings of *Concord & Cumberland* to Incorrectly Conclude That the Indemnity Provision Does Not Include the Required Intent.

The Order relies on *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) for the conclusion that any indemnification provision purported to indemnify the indemnitee for their sole or concurrent negligence must adhere to the heightened clear and unequivocal standard. While this is generally true, the rule in *Concord & Cumberland* specifically applies to construction contracts and is inapplicable to settlement agreements.

In its opinion the court in *Concord & Cumberland* clearly outlines the policy reason for the heightened standard when evaluating construction contracts:

The policy basis for the negligence rule is simple – barring indemnification when the indemnitee is at fault for damages serves to deter negligent conduct *in the future*, for the indemnitee will know the indemnification agreement will not save it from liability if it fails to act with due care.

Id. at 649 (citing *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 490–91, 763 S.E.2d 19, 21 (2014) (emphasis added).

This policy reasoning is not present in the instant matter. Construction contracts are agreements between two parties for obligations that will arise *in the future* after the contract is signed. They are prospective in nature. Negligence has not been determined at that point as the work has yet to begin. The policy reason applies in order to deter either party from acting negligently in the performance of their contract.

The instant case deals with a settlement agreement which is a contract memorializing agreements over *past* actions. It is retrospective in nature. Artis sued HTH for past due invoices and HTH counter-sued Artis for construction defects at the property allegedly resulting from Artis' negligence. The issue of negligence was litigated and settled between the two parties as memorialized by the Settlement Agreement. The policy reasoning for deterring future action is simply not applicable here as the agreement resolves *past* actions by both parties. By way of the settlement agreement, HTH has resolved all claims of negligence against Artis and agreed to indemnify Artis from claims of subsequent purchasers (i.e. the Plaintiffs) in exchange for a \$120,000 reduction in the amount owed to Artis under the contract. HTH has agreed to indemnify Artis *regardless* of Artis' alleged negligence.

Furthermore, even if the policy reasoning of *Concord & Cumberland* does apply, which is vigorously contested, the indemnity agreement sufficiently identifies the parties' intent for HTH

to indemnify Artis. Artis is the only party to the Settlement Agreement that performed any construction activities on the building at issue. There would be no other party to this settlement agreement that could be negligent for the design, construction, manufacture, or installation of materials in Plaintiffs' residence. Therefore, the parties were acutely aware of the intent to have HTH indemnify Artis for future claims related to this property in exchange for a \$120,000 reduction of the amount owed to Artis under the contract. Upon execution and payment of the settlement funds, HTH then gained full possession and control of the property at issue, along with any alleged construction defects or deficiencies. It is for this reason that Artis is due indemnification, having already paid for the alleged construction defects at issue in this litigation.

3. The Order Creates New Law by Concluding "Separate Consideration" is Required for Indemnity Provisions to Be Enforceable.

The Order begins this section with the following Finding of Fact: "Artis did not offer any separate consideration in exchange for a promise from House Therapy Holdings to indemnify Artis from anything." **Order, p. 6.** This statement was never presented to the Court at the hearing and the HTH Defendants did not provide any documentation or evidence to justify this finding. Moreover, this finding is disputed as Artis agreed to forgive \$120,000 of the amount owed under the contract and release the lien on the property. It is not the Court's role to decide factual issues at summary judgment and the Order does just that and must be withdrawn.

The Order continues on to conclude that "[a] contractual agreement to indemnify a party requires separate and valuable consideration to be enforceable." *Id.* The Order relies on *Rock Hill Tel. Co. v. Globe Commc'ns, Inc.*, 345 S.C. 378, 548 S.E.2d 208 (2001) as justification for this conclusion, which is also not applicable to a settlement agreement. The *Rock Hill* opinion does not include any reference whatsoever to the need for "separate and valuable" consideration in order for an indemnity provision to be enforceable. *Rock Hill* simply states that a "[c]ontractual

indemnity involves a transfer of risk for consideration...” *Id.* at 389. There is not a single mention of “separate” consideration. As such, the conclusion that separate consideration is needed to enforce an indemnity provision is a novel concept introduced by this Order which has no basis in South Carolina law. These statements cannot stand as the law of the case in this matter and must be withdrawn to ensure that the jury is instructed on actual South Carolina law and not confused by these statements.

4. SC Code §32-2-10 Refers Specifically to Construction Contracts, Has Never Been Used to Evaluate a Settlement Agreement, and Would Create a Dangerous Precedent if Allowed to Remain.

At the hearing, the only argument presented by the HTH Defendants against enforcing the indemnity provision is that it violated public policy under S.C. Code §32-2-10. While this argument was strangely omitted from the Order itself, the argument is addressed here to emphasize the statute’s misapplication to this matter and the danger of creating this legal precedent.

S.C. Code §32-2-10, specifically entitled “Hold harmless clauses in certain *construction* contracts” (emphasis added), makes any provision purporting to indemnify the promisee for its sole negligence unenforceable. This provision has never been applied to settlement agreements. There is no jurisprudence characterizing a settlement agreement as a “construction contract” such that it would fall under the purview of this section. To do so here, would upend innumerable settlement agreements purporting to indemnify the released parties for liability relating to the property at issue. This is presumably why counsel for the HTH Defendants left this argument out of its proposed order, since all counsel of record in this suit frequently rely on similar provisions in settlement agreements to enforce and protect the rights of our clients.

As shown in the transcript, the Court denied Artis’ Motion after hearing counsel’s argument relying on §32-2-10, which was improper as this section has never been applied to

settlement agreements, but left the issues of enforceability and potential set-off for the jury and trial judge to determine. While denial on this basis was improper in and of itself, the Court had no basis or obligation to rule that the indemnity provision is unenforceable as a whole. With this conclusion, Artis has been stripped of its main claims and defenses in this matter, well before discovery is closed and before the issues are presented to the jury.

B. The Order Concludes that the HTH Defendants are Not Liable for Breach of Contract, Despite No Motion from the HTH Defendants to this Effect, and Makes Factual Determinations That Are False and Readily Disproven by Evidence Presented at Hearing.

As a preliminary matter, the Order provides the following Findings of Fact:

“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.” **Order, p. 7.**

“First, as noted above, the representation that HTH made in the Settlement Agreement was not that it owned the Property.” **Id. at p. 8.**

These findings are patently false and contrary to the very first recital of the Settlement Agreement on page one which states “HTH is the owner of real property and improvements...located at 5 Palmetto Road, Charleston, South Carolina, 29407.” **Ex. 7 to Artis’ Motion, the Settlement Agreement, p. 1.** The Settlement Agreement was attached to Artis’ Motion and presented to the Court during Artis’ arguments. The Order dismisses this recital in a footnote stating that this “Whereas” clause is “neither a representation nor part of the agreement. Instead, it is a recital that serves only to provide background and context in the Settlement Agreement.” **Order, p. 7, ft.nt. 1.** Regardless of this statement being included in the recital section of the Settlement Agreement, it is a material fact to the Settlement Agreement to which the HTH Defendants were the only party with knowledge of its falsity and who attested to the truth of this statement by affixing their signature on the document. At the very least, this fact is disputed and should be left to the jury to decide. It was improper for the Court to decide disputed issues of

fact as to the representations made by either party to this Settlement Agreement, create conclusions of law based on those disputed facts, and then grant affirmative relief for the non-moving party on the same issue.

The Order admits that the HTH Defendants represented that they were the sole owners of the claims being dismissed by the Settlement Agreement but improperly goes on to conclude this was immaterial as it had nothing to do with the sale of the property. The strained nature of this argument completely overlooks the fact that the HTH Defendants represented that they are the sole owners of their construction defect claims at the property, while they were no longer the owners of the property, and no longer had standing to bring claims for construction defects. Those rights rested solely with Plaintiffs in this matter who owned the property at the time of execution of the Settlement Agreement. Therefore, the argument in the Court's Order will serve no purpose other than to confuse the jury or trial judge as to the intent of the plain language of the Settlement Agreement and the HTH Defendants' material misrepresentations to same.

The Order also states that since the indemnity provision is unenforceable, the HTH Defendants are automatically not liable for breach of contract. Artis' arguments relating to the indemnity provision are provided in more detail above and are equally applicable here. Artis incorporates by reference those arguments in their entirety.

C. The Order's Denial of Artis' Fraud Claims Includes Factual Determinations That Are in Dispute and Not Supported by the Evidence Provided to the Court.

The section of the Order denying Artis' fraud claim due to genuine issues of material fact contains the following Finding of Fact:

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. **Order, p. 9.**

This statement is patently false, in dispute, and should be left to a jury to decide. Artis has suffered a \$120,000 loss in exchange for indemnification from HTH against Plaintiffs' claims for construction defects. Artis would not have agreed to a \$120,000 loss if it knew HTH was intentionally misrepresenting itself as the owner of the property. By breaching this agreement, the HTH Defendants have been unjustly enriched by a reduction in the amount owed to Artis under its contract and not fulfilling their obligation to defend and indemnify Artis in the instant matter.

D. Artis is Entitled to Summary Judgment on its Claim for Indemnity and Breach of Contract Against HTH.

In exchange for a \$120,968 reduction in the amount owed to Artis by HTH, HTH agreed to:

...remit, release, and discharge Artis...its subcontractors..., and all persons who might be claimed to be liable for, of, and from *any and all claims, liens, suits, actions, demands, damages, costs, causes of action, warranties, guaranties, suits at law or equity, claims for breach of express or implied warranty, judgments, costs and expenses of attorneys, costs and expenses of experts, executions, liabilities, debts and all other claims of whatever nature or kind, known or unknown, past, present, or future, whether in contract or in tort, both legal and equitable, in any matter arising out of or related to the Parties, the Property, the contracts, the Liens, the Bond or which in any other way arise from the design, construction, or installation of the materials at the Property. Ex. 7 to Artis' Motion, the Settlement Agreement, p.3* (emphasis added).

The HTH Defendants agreed to the release provision cited above "on behalf of subsequent purchasers" of the property (i.e. the Plaintiffs in the instant matter). *Id.* HTH further agreed 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, attorney's fees, and costs, that Artis may incur as a result of a breach by HTH of any representation or agreement contained in the Settlement Agreement, or in connection with any act or omission of HTH in connection with the provisions of this Settlement Agreement. Id. p. 4-5* (emphasis added).

Each of HTH Defendants had the opportunity to consult with their attorney before Amanda Dempsey signed the Settlement Agreement on behalf of HTH, agreeing to the terms cited above. ***See, Ex. 3 to Artis' Motion, pp. 236:17 – 237:11; Ex. 4 to Artis' Motion, p. 214:6-12; and Ex. 2 to Artis' Motion, p. 171:2-6.***

Plaintiffs, who are “subsequent purchasers” of the property, have filed suit against Artis claiming damages related to the same construction defects that were alleged by HTH and settled by way of the Settlement Agreement. Therefore, Artis is entitled to a full defense and indemnity from HTH by the express language of the Settlement Agreement. By refusing to defend and indemnify Artis in this matter, HTH has breached its contractual obligations to defend and indemnify Artis for alleged construction defects at the Property both known and unknown at the time HTH signed the Settlement Agreement, including the alleged defects HTH was aware of and took steps to remediate.

E. The HTH Defendants Have Committed Fraud in Falsely Representing Material Terms of the Settlement Agreement.

To succeed on a claim for fraud, a party must prove: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Armstrong v. Collins*, 366 S.C. 204, 218, 621 S.E.2d 368, 375 (Ct. App. 2005).

It is undisputed that HTH did not own the property at issue when they signed the Settlement Agreement attesting to the fact that they owned the property and were the sole owners of all rights related to construction defects at the property. These misrepresentations were material because Artis would not have agreed to these terms if they were aware that the HTH Defendants were no longer the sole owners of the claims they were settling. HTH intended for Artis to sign the

Settlement Agreement based on these representations and language contained in the Settlement Agreement.

It is also undisputed that those representations were indeed false as HTH had already sold the property to Plaintiffs by the time they executed the Settlement Agreement. It is similarly undisputed that Artis was unaware of the falsity of these statements and relied on them in executing the Settlement Agreement. Artis was justified in their reliance as the HTH Defendants were the only parties knowledgeable about these facts. And now, but for the fact that the HTH Defendants did not actually own the property when they entered into the Settlement Agreement with Artis, Artis would have a full and complete defense to Plaintiffs' claims in the instant matter because the HTH Defendants would have released those claims on behalf of all future parties in their chain of title. Therefore, Artis has satisfied all elements necessary to succeed on a claim of fraud against HTH and its members.

CONCLUSION

Based on the foregoing, the Court improperly reviewed the facts in the light most favorable to the HTH Defendants to affirmatively grant the HTH Defendants Summary Judgment when they did not make a motion or even present admissible evidence for consideration. Defendant Artis Construction, LLC respectfully requests that this Court withdraw and reconsider the Order entitled "Order Denying Motion for Summary Judgment", filed into the Court's record on September 1, 2023 at 10:54 AM, denying Artis' Motion for Summary Judgment as to Artis' claims against Defendants House Therapy Holdings, LLC, Amanda F. Dempsey, Matthew B. Swain, and William T. Phillips in the above captioned matter.

Respectfully submitted this 9th day of October, 2023.

RICHARDSON PLOWDEN & ROBINSON, P.A.

s/Cameron D. Berthelsen

James H. Elliott, Jr., SC Bar No. 13620

Cameron D. Berthelsen, SC Bar No. 104849

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Attorneys for Artis Construction, LLC

October 9, 2023

Mount Pleasant, South Carolina

EXHIBIT “M”

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 & Air;
Custom Climate Heating & Air, Inc.;
P.J. Sanchez Masonry, LLC;
Donnix Construction, LLC;
Guillen Carpentry, LLC;
Charleston Exteriors, LLC
Ashley Oak Contracting, LLC;
H2O Pro, LLC;
La Roca Masonry, LLC;
Apex Contractors, LLC;
South Point Hardwood Floor, LLC;
Bluetape Solutions, LLC;
Carolina Climate Control, LLC;
Movar, LLC; and
ECL Design, LLC

Defendants.

Artis Construction, LLC

Third-Party Plaintiff,

Vs.

Brian R. Wells, PE, LLC;
Perryman Engineering, LLC;
PJ Sanchez Masonry, LLC;

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL CASE NO.: 2021-CP-10-03090

**ARTIS CONSTRUCTION, LLC'S
MOTION TO RECONSIDER, ALTER,
AND/OR AMEND AND
MEMORANDUM IN SUPPORT**

Donnix Construction, LLC;
 Guillen Carpentry, LLC;
 Charleston Exteriors, LLC;
 Ashley Oak Contracting, LLC;
 H2O Pro, LLC;
 La Roca Masonry, LLC;
 Apex Contractors, LLC; and
 South Point Hardwood Floor, LLC;

Third-Party Defendants.

House Therapy Holdings, LLC, Amanda F.
 Dempsey, William T. Phillips, and Matthew
 B. Swain,

Third-Party Plaintiffs,

Vs.

Carolina Climate Control, LLC and Bluetape
 Solutions, LLC

Third-Party Defendants.

PLEASE TAKE NOTICE that Defendant Artis Construction, LLC (“Artis”), by and through its undersigned attorneys, ten (10) days hence, or as soon thereafter as counsel may be heard, will move before this Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for an Order granting Artis’ Motion to Reconsider, Alter, and/or Amend the Order entitled “Order Denying Artis Construction, LLC’s Motion for Summary Judgment as to Plaintiffs”, filed into the Court’s record on September 1, 2023 at 10:58 AM, denying Artis’ Motion for Summary Judgment as to Plaintiffs’ Claims Against Artis for Unfair Trade Practices in the above captioned matter (hereinafter referred to as the “Order”).

As the Court will recall, this matter arises out of alleged construction defects in Plaintiffs’ residence. Plaintiffs purchased the property from Defendant House Therapy Holdings, LLC

(“HTH”). Prior to their purchase, HTH contracted with Artis to renovate the property. During the renovation project, HTH requested the installation of a subterranean HVAC ductwork system on the first floor, which required PVC ducts to run within and beneath the concrete foundation. Plaintiffs bring this lawsuit because, among other things, water intrudes the HVAC ductwork during heavy rain events.

On June 23, 2023 Artis filed its Motion for Summary Judgment as to Plaintiffs’ Claims Against Artis for Unfair Trade Practices (the “Motion”). Plaintiffs filed their opposition on August 11, 2023 (the “Opposition”), and the Motion was heard before the Court on August 15, 2023. Plaintiffs **did not** file a Cross-Motion for Summary Judgment. The full transcript from this hearing is attached as **Exhibit “A”** to this motion. The hearing at issue can be found at 31:8 through 35:4.

As shown in the attached transcript, the Court denied the Motion from the bench after limited arguments and asked the parties to submit “a short order.” **Ex. A, p. 35:1**. Despite the Court’s direction, Plaintiffs filed a proposed order copying every argument provided in their Memorandum in Opposition, many of which had not been presented to the Court during the hearing. Additionally, the proposed order included various findings of fact and conclusions of law which, if signed by the Court, would amount to a summary judgment in Plaintiffs’ favor by dismissing Artis’ claims and defenses in this matter.

Counsel for Artis raised this issue with the Court on August 25, 2023 and submitted a competing Proposed Order that complied with the Court’s direction during the hearing, simply denying Artis’ Motion without any findings of facts or conclusions of law. Because Plaintiffs failed to follow the Court’s instructions, and submitted an order granting the Plaintiffs affirmative relief, for which they had not moved, Artis was forced to submit its own order more accurately reflecting the Court’s ruling. The Court signed both the orders submitted by counsel for Plaintiffs

and the one submitted by counsel for Artis. On September 27, 2023, the Court notified the parties that it would be withdrawing the signed Order proposed by Artis and would keep the signed Order proposed by Plaintiffs, thereby rendering its final order on Artis' Motion for Summary Judgment. This motion is therefore timely as it is filed within the 10-day deadline prescribed by Rule 59(e) from the Court's final order on September 27, 2023, accounting for weekends.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

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 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). 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. *See, 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"). Further, summary judgment should not be granted even when there is no dispute of evidentiary facts if there is a dispute as to the conclusion to be drawn from those facts. *See, Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 684 S.E.2d 756 (2009).

The Court's Order denying Artis' Motion for Summary Judgment goes beyond a mere denial and provides findings of facts and conclusions of law in favor of the non-moving party, effectively granting Plaintiffs summary judgment on their claims against Artis. The Order effectively grants Summary Judgment *sua sponte* for Plaintiffs when no evidence supporting Order were submitted at the hearing, and even finds in favor of the Plaintiffs on issues that were not before the Court.

As outlined above, it is improper for the Court to decide factual issues on summary judgment, and it is equally improper to draw conclusions of law from these facts, even if they are not in dispute. The sole purpose of the Court was to determine if genuine issues of material facts existed and if so, allow the jury to decide those facts. The Order goes well beyond this mandate to strip Artis of its main claims and defenses in this matter before discovery is closed and before the jury hears a single piece of evidence. The Order violates established Supreme Court precedent and the express language of the SC Rules of Civil Procedure and must be withdrawn. Artis is unable to proceed in this matter with this Order as the law of this case.

GROUND FOR RECONSIDERATION

A. The Court's Order Improperly Decides Contested Factual Issues

The Court's Order includes the following Findings of Fact over disputed issues that were either not before the Court at all during the hearing, or were never supported with any evidence. It is undisputed that neither party provided any evidence or witness testimony to the Court in support of their arguments on August 15, 2023.

1. **“Plaintiffs discovered the various construction deficiencies upon observations made by a licensed professional engineer, Russell T. Mease, P.E. on September 3, 2021.” (Order, pg. 2)**
2. **“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.” *Id.***
3. **“The improper installation of the underground ductwork has resulted in the PVC ductwork filling with water.” (Order, pg. 3).**
4. **“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.” *Id.***

The statements above assume the presence of construction deficiencies at the property without any presentation of evidence or testimony, or consideration of contradictory evidence from Artis that would have been presented if Plaintiffs had moved of Summary Judgment. These statements are vigorously contested by Artis, its counsel, and its experts as evidenced by its arguments at the hearing, the testimony of both Artis representatives at their respective depositions, and the expert opinions provided by Artis’ experts. By predetermining the existence of construction deficiencies before this case reaches a jury, the Court has effectively stripped Artis of its defenses against Plaintiffs’ claims of negligence, breach of warranties, etc. and violated Artis’ due process rights to have these issues presented to a jury for a decision.

These statements also cite to “a licensed professional engineer, Russell Mease, P.E.” whose licensure was never provided to the Court and who did not provide any testimony at the hearing as to his alleged “observations.” While Mr. Mease’s deposition has been taken in this matter, Plaintiffs did not attach any portion of that testimony to their Opposition, and therefore his observations and opinions were not before the Court in any fashion whatsoever. The report is hearsay, without foundational testimony, and no exception allowing its consideration.

Similarly, one statement cites to “Mr. Maddox’s Preliminary Report dated December 14, 2021”. Not only was this report never provided to the Court, attached to any memoranda, or discussed in detail at the hearing, the report itself would constitute hearsay by its very definition as an out of court statement offered to prove the truth of the matter asserted, i.e. the presence of construction deficiencies at the Property. Therefore, it would be in violation of the South Carolina Rules of Evidence for this report to be submitted into evidence at all, much less relied upon by the Court when deciding material facts in this matter at a summary judgment hearing.

Lastly, the findings conclude that Plaintiffs have “experience[ed] illness due to the quality of air blowing from the PVC ductwork”, suggesting that they have “had to move out” because of the air quality. Throughout the two-year discovery process leading up to this hearing, Plaintiffs have never produced any evidence, medical documentation or otherwise, showing that Plaintiffs have suffered any medical conditions or illnesses. In fact, during her deposition, Plaintiff Harmony O’Connell testified that no doctor has diagnosed her with any illnesses resulting from the alleged poor air quality at the property¹ and that she was not claiming any medical damages.² In addition to there being no evidence of any illness suffered by the Plaintiffs, there is similarly no evidence that Plaintiffs have moved out of their home *because* they have suffered such illnesses, as the statement above concludes.

All of the Findings of Fact above are disputed by readily available deposition testimony and documents exchanged through discovery. Due Process requires that these issues be presented to a jury for a decision after hearing all of the relevant evidence in this matter. It is procedurally improper to decide such crucial and disputed facts in a Denial of a Motion for Summary Judgment.

¹ Ex. B, Harmony O’Connell’s April 17, 2023 deposition transcript, p. 213:20 through 214:7.

² *Id.* at 216:8-13.

5. **Plaintiffs had environmental testing performed of the water present in the PVC ductwork, which revealed that the ductwork contains 100 ML of Coliform and that E.Coli is also present.” (Order, Pg. 3)**
6. **“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.” (Order, pg. 5).**

While the environmental testing report was attached to Plaintiffs’ Opposition, it was never presented to the Court and therefore is improperly included in the Court’s Order. Additionally, this report would also constitute hearsay without any testimony authenticating the data or explaining the process used to arrive at the opinions contained in the report. These reports contain expert opinions that the South Carolina Rules of Civil Procedure requires opposing parties to have the opportunity to cross-examine and present expert testimony of their own. By summarily determining the truth and veracity of these tests, the Court has done away with procedural requirements and the ability of any defendant to challenge these findings through a Daubert Motion, their own environmental testing reports, or testifying experts, all while discovery is still ongoing in this matter.

Similarly, despite not presenting any evidence of defects or deficiencies in the construction of the property, Plaintiffs have similarly not provided any evidence that the alleged construction deficiencies have themselves *caused* the alleged presence of Coliform and E.Coli at the property. This far-reaching causal connection cannot be made during summary judgment, while discovery is ongoing, and especially not when the parties have requested a trial by jury.

7. **“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.” (pg. 5)**
8. **“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.” *Id.***

This Finding of Fact that Artis “suggested” the underground HVAC system is one of the most contested facts in this case, and had the Plaintiffs sought affirmative relief, Artis, would have

presented contrary evidence. Plaintiffs provided a single excerpt from the deposition of one of the members of House Therapy Holdings, LLC, William T. Phillips, who is known simply as “T”. Had Artis been given the opportunity to present any evidence to this issue, the following testimony from Artis’ Construction Manager Guyton Ash would have been presented:

Q. Let’s talk about – I’m interested in the conversations that took place that you-all decided to put the ductwork back into the slab rather than more traditional route.

A. There was a lot of back and forth. I spent a lot of time over there trying my best to get a conventional unit in there that didn’t go under the slab. Reasons being, budget.

Q. So if you can elaborate – I mean, you’re saying to get a conventional unit in there with the ductwork in the ceiling, you were constrained due to budget?

A. Yeah. Budget and aesthetics. Essentially, I had given I think two or three different options of ways to get the ductwork in the ceiling, but it was – it was not T’s vision.

Q. What did T say about this?

A. He said, it’s going in the slab.

Q. Did you – and so you personally had this conversation with T.

A. Yeah. T and Matthew. I walked them through the property and presented my two or three options.

Q. Okay. Was one of those options to put it in the slab though?

A. Not one of the two to three options, no.

Ex. C, October 27, 2022 30(b)(6) deposition of Artis’ representative Guyton Ash, pp 39:19 through 40:19.

As shown from the excerpt above, it was HTH’s decision to put the HVAC ductwork into the slab because it was a better fit for HTH and T’s “vision.” T agreed with Guyton’s testimony in the following excerpt ignored in Plaintiffs’ Opposition:

Q. So a minisplit was presented to HTH or you as an alternative or as an option for the HVAC system in the first floor of 5 Palmetto Road?

A. Yes. Right, because it would be the least structurally intrusive. It would just be the most visually intrusive.

...

Q. So that option was presented to HTH and it was decided either by you or by HTH that it was not aesthetically pleasing to have those minisplits in the first floor of 5 Palmetto, correct?

A. Correct.

Q. And instead we went – HTH wanted to go with the HVAC system in the slab because it was more aesthetically pleasing and it was more efficient than the minisplits?

A. It was high performance, yes. And we paid for it again.

Ex. D, January 18, 2023 deposition of William T. Phillips, pp. 183:25 through 184:22.

Therefore, not only is this Finding of Fact contested, it is patently false. As shown above, T went on to recant his own testimony that was excerpted in Plaintiffs' Opposition, which was presumably relied upon by the Court when issuing this Finding of Fact. Deciding this fact in contradiction to the evidence exchanged during discovery is improper.

9. 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. (Order, p. 5).

Plaintiffs did not present any evidence of the code requirements or Artis' alleged lack of knowledge about these code requirements. Based on the Plaintiffs' Opposition from which this statement was copied, Plaintiffs seem to imply that the fact that water has intruded the subterranean ductwork in the past, that this is somehow a violation of the building code. In making this argument, Plaintiffs ignore the very wording of the applicable residential code which states without exception that "[t]he code does **not** require that ducts be watertight." *See*, 2015 International Residential Code, M1601.1.2 (emphasis added). This is the very same code provision that

Plaintiffs' expert Warren Maddox relies on when he evaluated the underground ductwork system and gave his opinions. Therefore, at the very least, this fact is strongly contested by Artis, Artis' expert, and the provisions of the applicable building and residential codes themselves. As such, this Finding of Fact is improper.

10. "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." (Order, p.5)

This Finding is a combination of all of the disputed Findings listed above, and Artis' arguments in regards to those statements is equally applicable here. However, this Finding goes even further by raising the bar from "construction deficiencies" to a "fraudulent and deceptive act".

First, Plaintiffs have not alleged fraud against Artis, despite their representations to the Court otherwise. **Ex. A, Transcript pp. 34:11-18.** No party to this litigation has alleged fraud against Artis. Plaintiffs have only alleged fraud against HTH and its members. Plaintiffs have not presented any evidence that Artis engaged in any fraudulent act. The Standard of Review section copy and pasted from Plaintiffs' Opposition does not lay out any of the elements of fraud or even mention fraud once. Most importantly, the Motion before the Court was Summary Judgment on Plaintiffs' Unfair Trade Practices claim, where fraud is not a necessary element to prove a party committed Unfair Trade Practices. By finding that Artis committed a fraudulent act, the Court has unilaterally created a new cause of action for Plaintiffs, without Plaintiffs filing a pleading to that effect, and decided the issue without allowing Artis the opportunity to answer. This is improper on a multitude of grounds and must be removed from the Order.

Second, Plaintiffs have not presented any evidence that the PVC ductwork "could not work in the environment present at the Residence." In fact, Artis has installed a number of subterranean

PVC ductwork systems in the Charleston area which are fully operational to this day. This finding, which was also copy and pasted from Plaintiffs' Opposition, seems to imply that the simple fact that water is getting into the ductwork system means that the ductwork system "could not work in the environment". Had Artis been allowed the opportunity to present evidence to this issue, it would have provided photos of a gaping hole found in the ductwork that is clearly the source of water intrusion. **Ex. E, photos of hole in ductwork.** The hole was not present during installation and could have been caused by a number of different reasons, including negligent acts of the three to four contractors who worked on this system after Artis left the site and prior to the initiation of this lawsuit.

Lastly, Plaintiffs have not presented any evidence of water damage to their home at the hearing, and the Order does not discuss any areas in which water has "damaged" the physical structure of the residence. While it is undisputed that water has entered the ductwork system in the past, there is no uncontested evidence that this has caused any damage to the home itself. Plaintiffs' expert Russell Mease has testified that he did not find any sign of water damage inside or outside of the home, despite removing multiple pieces of siding and trim in various areas around the exterior of the building. Therefore, not only is this statement disputed, it is disputed by Plaintiffs' own expert, and has no place in the Court's Order.

B. Instead of Denying Artis' Motion for Summary Judgment, the Court's Opinion Provides Conclusions of Law that Find in Favor of Plaintiffs' Claim for Unfair Trade Practices Without a Motion Properly Before the Court.

The Court looked at the facts in the light most favorable to the Plaintiffs, but then by signing Plaintiffs' Order denying Artis' Summary Judgment, improperly made conclusions of fact. Based on those conclusions of fact (considered in the light most favorable to the Plaintiffs), the Court

then granted Plaintiffs affirmative relief on their cause of action. The Court's Order concludes with the following:

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. **Order, pg. 5.**

These three clauses mimic the three elements necessary to prove a claim under the South Carolina Unfair Trade Practices Act. *See, Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). So, while the Court's Order is titled as a *Denial* of Motion for Summary Judgment, these conclusions affirmatively state that Plaintiffs have satisfied all three elements of their claim for Unfair Trade Practices. All three clauses are premised on disputed facts and therefore, the Court improperly entered these findings as the law of the case.

The first clause of this excerpt, stating that "there is evidence that Artis engaged in an unfair or deceptive act" is a conclusion of law based on a disputed fact as outlined above. The Order cites only the act of "installing a PVC ductwork system that could not work in the environment present at the Residence" as the supposedly unfair or deceptive act.³ This Finding of Fact is disputed and involves the single-most important issue to Artis' defense in this matter. The South Carolina Supreme Court mandates that "no person will be deprived of a trial of the disputed factual issues" and that is exactly what the Court's Order has done to Artis in this matter by making this language the law of this case. There was no argument at the hearing as to how these acts are "deceptive" or "unfair". This finding is especially troublesome given that neither Plaintiff could testify to a single unfair or deceptive act or omission by Artis, and those excerpts from Plaintiffs' depositions were attached to our Motion for Summary Judgment and properly before the Court.

³ Although the Order specifically states "*fraudulent* and deceptive act" without ever alleging fraud as discussed in detail above.

The second clause stating the “unfair or deceptive act affected public interest” not only relies on the previous clause which was improper in and of itself, but seems to be based on the simple fact that “Artis is still in operation and still advertising their expertise to the public.” This statement is not contested. Artis is still in operation and they are experts in the field of construction. But the simple fact that they are still performing construction operations is not sufficient to conclude that their “unfair or deceptive act affected public interest.” By that logic, any contractor who violates a building code even once would be subject to triple damages under SCUTPA simply because they are still working in construction. Similarly here, Plaintiffs do not allege that Artis has installed defective or deficient ductwork in any other property other than their own, because that evidence does not exist. Therefore, it was improper for the Court to conclude that Artis’ unfair or deceptive act affected the public interest.

Lastly, the Court concludes that “Plaintiffs suffered monetary or property loss as a result of the defendant’s unfair or deceptive acts.” Plaintiffs did not present the court with any evidence of monetary or property loss at the hearing. Those damages are strictly for the jury’s decision and not to be made at summary judgment based on disputed facts such as these.

C. Plaintiffs’ Claims for Unfair Trade Practices Should be Dismissed as a Matter of Law

To recover in an action for unfair trade practices, the Plaintiffs must show that Artis employed unfair or deceptive acts or practices during the construction project at issue. *See*, S.C. Code Ann. § 39-5-20. Pursuant to the South Carolina Unfair Trade Practices Act (SCUTPA), an “unfair” trade practice is one that is offensive to public policy or which is immoral, unethical, or oppressive.” *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). A “deceptive” practice is one which has a tendency to deceive. *Id.* Plaintiffs have failed to provide even a scintilla of evidence that Artis performed any unfair or deceptive acts

whatsoever. Plaintiffs have also failed to allege in their Complaint any allegation that Artis' acts or omissions intended to deceive Plaintiffs or performed any action that was immoral, unethical, or oppressive. Plaintiffs simply allege construction deficiencies at their residence and therefore their claims should be dismissed based on the pleadings alone pursuant to SCRCP 12(b)(6).

Looking beyond the pleadings, the testimony given in this case further undermines Plaintiffs' claims under SCUTPA. It is uncontested from the testimony of all representatives of Artis and HTH that HTH was responsible for all site work at the Property, including grading and drainage. The site did not show any sign of having issues with drainage until HTH's landscaper re-graded the Property, according to Artis' construction manager, who was onsite more than any other fact witness in this matter. **Ex. C, 30(b)(6) deposition transcript of Artis' representative, Guyton Ash, pp. 34:14 through 36:24.** When Artis cut into the original slab, which is close to 70 years old, the ground underneath was completely dry with no sign of water intrusion into the concrete slab or the soil beneath the home. (*Id.*, pp. 40:24 through 43:21). Had they known that the site was not going to be graded properly, they never would have installed the ductwork in the slab. *Id.* It is the lack of proper grading at the Property that is causing water to enter the ductwork, not the installation of the ductwork itself. Plaintiffs' expert, Russell Mease agreed with this position in his deposition:

Well, the water has to be available so it can get in the ductwork. If we didn't have any water under the house, then we never collect water in the ductwork. So the nature of the site work and the nature of the configuration is this is helping introduce water into those areas where the ductwork is located and it gives it the opportunity to get into the ductwork.

Ex. F, Russel Mease's November 1, 2022 deposition transcript, 173:16 through 174:13.

While the cause of water infiltration into the ductwork is clearly contested, what is uncontested is that Artis did not employ any practices that were oppressive, immoral, unethical, or

intended in any way to deceive HTH or Plaintiffs in this matter. To the contrary, putting the ductwork in the slab was merely an option provided to HTH to choose from in order to fit their aesthetic vision, and Artis testified consistently that they would never have proceeded with the installation if they knew the site would not be properly graded. **Ex. C, 30(b)(6) deposition transcript of Artis’ representative, Guyton Ash, pp. 42:5 through 43:21.**

The undersigned counsel also asked each Plaintiff directly whether they could provide any evidence whatsoever that any act or omission of Artis was unfair or deceptive. The Plaintiffs responded as follows:

Jared O’Connell: “I think it’s an irrelevant question because we never – before we closed on the house, we never had an interaction with Artis...I have never had a communication in any form, I do not believe, with anyone at Artis.”

Ex. 1 to Artis’ Motion, pp. 183:10 through 184:8.

Harmony O’Connell: “Since we’ve never had any contact, no, I don’t think that there’s anything they’ve done to me personally.”

Ex. 2 to Artis’ Motion, pp. 207:2 through 208:6.

Plaintiffs’ counsel argued at the hearing that there is no communication requirement to SCUTPA. This argument misses the mark entirely. The excerpts above show that not only did Plaintiffs’ have never had any communication with Artis, they could not think of a single act or omission of Artis’ that could be unfair or deceptive. Therefore, Plaintiffs have failed to satisfy the first necessary element of a proper SCUTPA claim and Artis is entitled to summary judgment as a matter of law.

CONCLUSION

Based on the foregoing, the Court improperly reviewed the facts in the light most favorable to the Plaintiffs to affirmatively grant Plaintiffs’ Summary Judgment when they did not make a

motion or even present admissible evidence for consideration. Defendant Artis Construction respectfully requests that this Court withdraw and reconsider the Order entitled “Order Denying Artis Construction, LLC’s Motion for Summary Judgment as to Plaintiffs”, filed into the Court’s record on September 1, 2023 at 10:58 AM, denying Artis’ Motion for Summary Judgment as to Plaintiffs’ Claims Against Artis for Unfair Trade Practices, and dismiss Plaintiffs’ claims for Unfair Trade Practices against Artis Construction, LLC.

Respectfully submitted this 9th day of October, 2023.

RICHARDSON PLOWDEN & ROBINSON, P.A.

s/Cameron D. Berthelsen

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October 9, 2023

Mount Pleasant, South Carolina

EXHIBIT “N”

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 & Air;
Custom Climate Heating & Air, Inc.; P.J.
Sanchez Masonry, LLC; Donnix
Construction, LLC; Guillen Carpentry, LLC;
Charleston Exteriors, LLC Ashley Oak
Contracting, LLC; H2O Pro, LLC; La Roca
Masonry, LLC; Apex Contractors, LLC;
South Point Hardwood Floor, LLC; Bluetape
Solutions, LLC; Carolina Climate Control,
LLC; Movar, LLC; and ECL Design, LLC,

Defendants.

Artis Construction, LLC,

Third-Party Plaintiff,

Vs.

Brian R. Wells, PE, LLC; Perryman
Engineering, LLC; PJ Sanchez Masonry,
LLC; Donnix Construction, LLC; Guillen
Carpentry, LLC; Charleston Exteriors, LLC;
Ashley Oak Contracting, LLC; H2O Pro,
LLC; La Roca Masonry, LLC; Apex
Contractors, LLC; and South Point Hardwood
Floor, LLC;

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2021-CP-10-03090

**ORDER DENYING ARTIS
CONSTRUCTION, LLC'S MOTIONS TO
RECONSIDER, ALTER, AND/OR
AMEND**

House Therapy Holdings, LLC, Amanda F.
Dempsey, William T. Phillips, and Matthew
B. Swain,

Third-Party Plaintiffs,

Vs.

Carolina Climate Control, LLC and Bluetape
Solutions, LLC,

Third-Party Defendants.

Artis Construction, LLC, (“Artis”) filed a Motion to Reconsider, Alter, and/or Amend the Order entitled “Order Denying Artis Construction, LLC’s Motion for Summary Judgment as to Plaintiffs,” filed into the Court’s record on September 1, 2023 at 10:58 AM, denying Artis’ Motion for Summary Judgment as to Plaintiffs’ Claims Against Artis for Unfair Trade Practices. Additionally, Artis filed a Motion to Reconsider, Alter, and/or Amend the Order entitled “Order Denying Motion for Summary Judgment,” filed into the Court’s record on September 1, 2023 at 10:54 AM, denying Artis’ Motion for Summary Judgment as to Artis’ claims against Defendants House Therapy Holdings, LLC (“HTH”), Amanda F. Dempsey, Matthew B. Swain, and William T. Phillips (collectively the “HTH Defendants”).

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent “highly unusual circumstances.” U.S. ex rel. Becker v. Washington Savannah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court’s ruling will not support Rule 59(e) relief).¹ Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to

¹ Rule 59 is substantially the same as the Federal Rule. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) (“Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.”).

accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or “to raise argument or present evidence that could have been presented prior to the entry of judgment.” Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, “[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.” Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does “[a] party’s mere disagreement with the court’s ruling . . . warrant a Rule 59(e) motion.” In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat’l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Artis’ Motions, the Court hereby DENIES Artis’ Motion to Reconsider, Alter, and/or Amend as to Plaintiffs and the same as to HTH Defendants.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW



Charleston Common Pleas

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

IT IS SO ORDERED!

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

Dec 21 2023

SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant, Artis Construction, LLC, do hereby certify that I have this date served the foregoing Memorandum Regarding Appealability, dated December 21, 2023 pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022 on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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A copy of the sent email is enclosed with this Certificate of Service.

/s Carmen V. Ganjehsani
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Date: December 21, 2023.

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Date: Thursday, December 21, 2023 11:37:46 AM
Attachments: [2023-001853 O"Connell v. Artis \(Artis Memo. Re Appealability\) \(3153223\).pdf](#)

Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the Memorandum Regarding Appealability on behalf of Appellant Artis Construction, LLC which we will be filing with the Court of Appeals today.

Thank you,
Carmen Ganjehsani

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