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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2019-CP-04-01942
Appellate Case No. 2023-001401

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

v.

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

D.R. Horton, Inc., Appellant,

v.

AJ Landscaping & Grading LLC, A/K/A AJ Landscaping & Grading, Inc; Allpro Textures, LCC; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc., A/K/A ACP Concrete, Inc.; A&J Framing, Inc; Alpha E.M.C; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughan Lumber Co., Inc.; BKF Builders, Inc; Builders Designhouse, LLC; BMC East, LLC D/B/A Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC,A/K/A Builders Firstsource, Inc; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc.; Caryl Mechanicals, Inc.; Cannaday Siding and Gutter, Inc; Cortes Painting, LLC; CBU Enterprises, Inc.; CPI Security Systems, Inc.; Dom Group, LLC; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc.; A/K/A Galloway-Bell, Inc. II BGET Floored, LLC; GBS Building Supply-Us LBM, LLC, A/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danler, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC. A/K/A M&L General Construction, Inc.; M&Lreyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC, NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, LLC; P&L Enterprises, LLC; Probuild Company, A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc, A/K/A Gale Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc., Dupree Plumbing Company, Inc.; Willow Tree Landscaping, Inc., Third-Party Defendants,

of which Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractors Services) and IBP Assets, LLC d/b/a Blue Ridge Building Products, are the Respondents.

INITIAL BRIEF OF RESPONDENT
IBP ASSETS, LLC d/b/a BLUE RIDGE BUILDING PRODUCTS

April 10, 2024

MURPHY & GRANTLAND, P.A.
Everett A. Kendall, II (SC Bar No. 8450)
Timothy J. Newton, (SC Bar No. 71640)
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Respondent
IBP Assets, LLC d/b/a
Blue Ridge Building Products

TABLE OF CONTENTS

Page Number

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

Page Number

SECONDARY AUTHORITIES

RELATED PENDING SUITS

STATEMENT OF ISSUES ON APPEAL

1. The trial court ruling that Blue Ridge's work was not involved in this suit is not contested on appeal.

2. D.R. Horton knew or should have known that Blue Ridge's work was not at issue before D.R. Horton sued Blue Ridge.

3. The trial court correctly found that the "clear and unequivocal" standard applies.

4. D.R. Horton improperly seeks indemnification for its sole negligence or the sole negligence of its other subcontractors.

5. Blue Ridge's subcontract did not clearly and unequivocally impose a duty to defend D.R. Horton regardless of fault.

6. The trial court correctly found that the Zitek Plaintiffs' claims do not support D.R. Horton's alleged entitlement to an immediate defense from Blue Ridge.

7. D.R. Horton failed to prove damages.

8. The trial court properly granted summary judgment in favor of Blue Ridge as to all of D.R. Horton's causes of action.

9. The trial court did not err in declining to sever defense and insurance provisions.

10. The remaining orders on appeal do not impact the outcome of this appeal.

STATEMENT OF THE CASE

This class action, which alleged defective construction of residences in the Rose Hill subdivision, was filed on September 25, 2019. (ROA pp. (Complaint).) The only defendant named in the suit is Appellant D.R. Horton, Inc. (hereinafter "DR Horton").

The Plaintiff and DR Horton consented to a plan allowing compliance with the South Carolina Notice and Opportunity to Cure Construction Dwelling Act, S.C. Code Ann. §§ 40-59-810, *et seq.* (ROA pp. (transcript of Dec. 9, 2020 hearing, p. 5).) After that was completed, DR Horton re-filed its Motion to Compel Arbitration and Plaintiff re-filed her Motion for Class Certification. (Id. at p. 6.) By Order filed January 27, 2021, the trial court certified the class and denied DR Horton's motion to compel arbitration. (ROA pp. (Order).)

DR Horton filed its Answer on February 11, 2021 and thereafter filed its Amended Answer and Third Party Complaint on March 11, 2021. (ROA pp. (Answer); (Third-Party Complaint).) Among the third-party defendants were "Blue Ridge Building Products, LLC" and "Installed Building Products, LLC a/k/a Installed Building Products II, LLC."

The referenced third-party defendants appeared and filed a Motion to Make a More Definite Statement on July 21, 2021. (ROA pp. (Motion).) This Motion sought clarification as to, among other things, the particular entities and scope of work involved in the suit. The trial court heard that motion and granted it on September 22, 2021. (ROA pp. (transcript at p. 8).) However, a formal order did not dispose of the motion until later.

DR Horton filed its Second Amended Answer and Third-Party Complaint on February 23, 2022. (ROA pp. (Amended Third-Party Complaint).) Respondent IBP Asset, LLC d/b/a Blue Ridge Building Products (hereinafter "Blue Ridge") was first named as a third-party defendant in that pleading. The plaintiff class did not assert direct claims against Blue Ridge.

Blue Ridge filed its Answer on March 1, 2022. (ROA pp. (Answer).) On July 26, 2022, Blue Ridge filed a Motion for Summary Judgment as to DR Horton's Third-Party Complaint. (ROA pp. (Motion).) Blue Ridge re-filed its Motion on August 1, 2022. (ROA pp. (Motion).) Blue Ridge argued that it performed no work on Class Representative Natalie Zitek's residence, and that none of the claims certified in the class action concerned Blue Ridge's work.

The trial court heard Blue Ridge's motions along with other matters on September 8, 2022. (ROA pp. (transcript).) On November 3, 2022, the trial court issued an Order disposing of many motions. (ROA pp. (Order).) However, that Order did not address Blue Ridge's motion.

At a hearing held February 8, 2023, counsel for Blue Ridge reminded the trial court about Blue Ridge's pending motion. (ROA pp. (transcript pp. 71-73).) The trial court issued an order filed February 15, 2023 that granted Blue Ridge's Motion to Make a More Definite Statement.[1] (ROA pp. (Order).) That order did not mention Blue Ridge's Motion for Summary Judgment.

Blue Ridge filed a Motion to Reconsider on February 22, 2023. (ROA pp. (Motion).) In that motion, Blue Ridge explained that its Motion to Make a More Definite Statement was mooted by DR Horton's Amended Third-Party Complaint. (Id. at pp. 2-3.) Blue Ridge again requested a ruling on its Motion for Summary Judgment. (Id.)

Blue Ridge filed a Supplemental Memorandum in support of its Motion for Summary Judgment on April 19, 2023. (ROA pp. (Memorandum).) Blue Ridge contended therein that no witness had yet testified to any defect in Blue Ridge's work.

At the hearing on April 21, 2023, Plaintiff's counsel stipulated on the record that gutters and insulation were not within the class claims. (ROA pp. (transcript, pp. 52-54).) However,

[1] This Order was vacated by a subsequent Order on May 8, 2023 due to the misunderstanding as to which motion was pending. (ROA pp. (Order).)

certain new issues were raised concerning leaking doorknobs. (Id. at 52-53.) Blue Ridge withdrew its motion with leave to re-file once those new issues were investigated. (Id. at 53.)

Blue Ridge filed a Supplemental Motion for Summary Judgment on May 1, 2023. (ROA pp. (Motion).) In that motion, Blue Ridge contended that the new issues did not concern work performed by Blue Ridge. (Id.) Blue Ridge filed a supporting Memorandum on July 11, 2023. (ROA pp. (Memorandum).)

D.R. Horton filed a Memorandum in Opposition to All Third-Party Defendants' Motions for Summary Judgment on July 11, 2023. (ROA pp. (Memorandum).) That Memorandum incorporates a prior Memorandum DR Horton filed on September 7, 2022 in anticipation of a prior hearing. (ROA pp. (Memorandum).) DR Horton addressed Blue Ridge's scope-of-work argument in its Supplemental Memorandum filed July 19, 2023. (ROA pp. (Supplemental Memorandum).)

Plaintiffs filed a Stipulation as to Limitation of Claims on July 20, 2023. (ROA pp. (Stipulation).) This formally excluded Blue Ridge's scope of work from the class claims.

The trial court filed a Form 4 Order on July 26, 2023 finding that Blue Ridge's Motion for Summary Judgment should be granted. (ROA pp. (Order).) The court requested a draft order. (Id.)

DR Horton filed a Motion to Reconsider on August 8, 2023. (ROA pp. (Motion).) This Motion incorporated DR Horton's prior supporting memoranda. The trial court denied all of DR Horton's motions to reconsider on August 18, 2023. (ROA pp. (Order).)

The trial court filed its formal Order granting Blue Ridge's Motion for Summary Judgment on August 23, 2023. (ROA pp. (Order).) Among the findings in that Order were that Blue Ridge did not work on the Class Representative's house and that the class claims did not concern Blue Ridge's work. (Id.)

D.R. Horton filed its Notice of Appeal on September 8, 2023. (ROA pp. (NOA).) The orders concerning Blue Ridge that DR Horton challenged in this appeal include:

- the July 26, 2023 informal order and the August 23, 2023 formal order granting Blue Ridge's motion for summary judgment;
- the Amended Scheduling Order filed February 15, 2023 granting Blue Ridge's Motion to Make a More Definite Statement (this Order was later vacated);
- the Order dated May 8, 2023 vacating the ruling on the motion for more definite statement and holding a ruling on Blue Ridge's dispositive motion in abeyance; and
- the Form 4 Order filed August 18, 2023 denying all DR Horton motions for reconsideration.

OBJECTIONS TO APPELLANT'S STATEMENT OF FACTS

Blue Ridge objects to numerous self-serving and argumentative comments in its statement of the facts. In particular, Blue Ridge objects to the following:

- DR Horton characterized Blue Ridge as a sophisticated business. (DRH Init. Br., pp. 10, 12.) No evidence in the record was cited to support that characterization. Nothing in the record supports DR Horton's statement that "No one forced the Respondents to sign these contracts and they have not repaid the Appellant one dime of what the Appellant paid the Respondents." (Id.)
- Blue Ridge never admitted that its work was "included in the Plaintiff's July 2023 Stipulation." (See DRH Init. Br. pp. 10-11.) As discussed below, the Stipulation supported Blue Ridge's position that its scope of work was not included in the Plaintiffs' class claims. DR Horton's self-serving attempt to take credit for the trial court's ruling in Blue Ridge's favor finds no support in the record. (Id. at p. 11.)
- No record evidence supports DR Horton's claim of reputational harm. (See id. at p. 11.)

COUNTER-STATEMENT OF FACTS

The following is provided by way of counter-statement:

Plaintiff's Complaint alleged that DR Horton developed, built, and sold the relevant residences in Rose Hill. (ROA pp. (Complaint, ¶ 7).) As alleged, latent and undisclosed defects existed at the time the certificates of occupancy were issued that caused water intrusion. (Id. at ¶ 24.) The alleged defects included structural and exterior cladding issues. (Id. at ¶ 27.) Plaintiff alleged, among other things, that DR Horton failed to properly supervise and coordinate the work of subcontractors. (Id. at ¶ 67.)

At that time, the only plaintiff in the case was Natalie Zitek. (ROA pp. (Complaint, p. 1).) Blue Ridge did not perform work on Zitek's residence. (ROA pp. (Order filed Aug. 23, 2023, p. 3, ¶ 4).)

DR Horton filed a Motion to Stay on February 28, 2020. (ROA pp. (Motion).) DR Horton argued that Zitek's Notice and Opportunity to Cure (NOC) letter was too general for DR Horton to be able to assess the repairs that were needed. (Id. at p. 2.) DR Horton sought a stay until Plaintiff's concerns were sufficiently identified to comply with the NOC Act. (Id. at p. 3.)

In contesting the re-filed motion for class certification, DR Horton again argued that Plaintiff's allegations were too vague to support the commonality requirement for class certification. (ROA pp. (DRH Memo in Opp. Filed Nov. 23, 2020, pp. 13-17).) DR Horton's characterized Plaintiff's claims as "a laundry list of defects," quoting the NOC letter. (Id. at p. 5.)

Plaintiff pounced on that statement. Under a heading entitled "Horton Misstates Multiple Facts," Plaintiff pointed out that the Right to Cure letters were merely "a general description of all defects and damages known to the homeowner." (ROA p. (Pl's. Reply Mem. filed Dec. 8, 2020, p. 3).) Plaintiff specified that the common defects upon which certification was sought were those identified in Whitlock's affidavits. (Id.) Specifically, the common defect was identified as "failing

building envelopes." (Id. at p. 5.) "Building envelope" was defined to mean "fenestrations (windows and doors) and cladding (siding and masonry)." (Id. at p. 10.)

Plaintiff's Motion for Class Certification was supported by three affidavits by Plaintiff's expert, Dr. A. Rhett Whitlock. (ROA pp. (transcript of Dec. 9, 2020 hearing, p. 48; Affidavit; Reply Affidavit; and Supplemental Affidavit filed Nov. 23, 2020).) In support of class commonality, Plaintiff's counsel identified the "singular" problem as "defective exterior building envelope." (ROA p. (transcript of Dec. 9, 2020 hearing, p. 49; Whitlock Reply Aff. p. 1, ¶ 4).) The building envelope issues were subclassified into fenestrations and cladding. (Id.) Fenestrations refers to windows and doors. (Id.) Cladding includes siding and masonry. (ROA pp. (transcript of Dec. 9, 2020 hearing, pp. 49-50; Whitlock Reply Aff. pp. 1-2, ¶ 4).) Whitlock's Supplemental Affidavit detailed problems with the windows and doors, exterior brick and stone, and patio doors. (ROA p. (Whitlock Suppl. Aff., ¶ 4).) Plaintiff's counsel clarified that it was the rear patio doors that were leaking. (ROA p. (transcript of Dec. 9, 2020 hearing, p. 56).)

The Order granting class certification limited Plaintiffs' claims. The trial court found the "common and typical defect at issue" to be "failing exterior envelopes (consisting of failed siding systems and failing fenestrations)." (ROA pp. (Order filed Jan. 27, 2021, pp. 2, 7.)

DR Horton's Third-Party Complaint does not specify the scope of work Blue Ridge performed. (ROA pp. (Third-Party Complaint).) DR Horton's claims are based on the NOC letter. (Id. at ¶¶ 88-89, 98, 107.) DR Horton claimed that "[i]f subcontractors' work was defective," DR Horton is entitled to indemnity. (Id. at ¶¶ 87, 101, 110, 115, 119, 123, 127.) DR Horton did not assert a right to an immediate defense from its subcontractors, regardless of their lack of fault.

Plaintiff filed motions to sever DR Horton's third-party claims and to bifurcate discovery on those claims. (ROA pp. (Motions filed December 22, 2021; Feb. 3, 2022.) Those motions were heard along with Blue Ridge's Motion for Summary Judgment on September 8, 2022.

In support of their motions to sever and bifurcate discovery, Plaintiffs' counsel argued Zitek filed a simple complaint against a single defendant—DR Horton, yet Plaintiffs now found themselves in litigation with around 150 other parties. (ROA pp. (transcript dated Sept. 8, 2022, p. 6).) As part of the class certification, Plaintiffs stipulated that they would not file direct claims against DR Horton's third-party defendant subcontractors. (Id. at p. 5).) Plaintiffs' counsel argued, among other things, that their case against DR Horton was complicated by anticipated subcontractor defenses that DR Horton's claimed damages were the result of DR Horton's own trial strategy. (Id. at p. 14.) Plaintiffs forecasted additional extraneous complexities due to subcontractor arguments that DR Horton's attempt "to make the duty to defend global, universal, and unconditional" is unenforceable under South Carolina's anti-indemnity statute. (Id. at p. 16.)

DR Horton revealed its litigation strategy in response. DR Horton chose to sue every subcontractor potentially implicated in the 2019 NOC letter, even though Plaintiffs' claims had already been pared down by the Class Certification Order. (ROA pp. (transcript dated Sept. 8, 2022, p. 23).) DR Horton took the position that the only way its third-party claims could be released was if Plaintiffs' counsel would agree a particular third-party defendant did not belong in the case. (Id. at p. 24.)

When the court subsequently took up subcontractor motions, one subcontractor argued that DR Horton's third-party claims were based on the NOC letter, but no evidence yet produced in the case related to that subcontractor's scope of work—roofing. (ROA pp. (transcript dated Sept. 8,

2022, p. 36).) DR Horton agreed with that subcontractor's position but asked Plaintiff's counsel to specify whether the class claims included roofing defects. (Id. at pp. 36-37.)

Plaintiff's counsel described DR Horton's stance as "a complete mischaracterization." (ROA pp. (transcript dated Sept. 8, 2022, p. 37).) He argued that the NOC letters merely set forth the homeowners' perception of the problems. (Id.) He explicitly stated that the class claims were based upon the expert reports. (Id.) Counsel reiterated that direct claims were not asserted against the subcontractors and the third-party claims were the result of DR Horton's choice. (Id.) In response to a question from the court, Plaintiff's counsel stated that his expert was finished with his analysis. (Id. at 37-38.) Plaintiff's position could not be clearer:

THE COURT: If it's not in your report, you're not alleging.

MR. LUCEY: That's correct.

(Id. at p. 39.)

Nevertheless, DR Horton continued to press Plaintiffs' counsel to stipulate to limitations in Plaintiffs' claims. Plaintiffs' counsel admitted their expert reports did not address roofing. (ROA pp. (transcript dated Sept. 8, 2022, p. 44).) However, a code violation involving an intersection between roofing and stone cladding was cited in the report. (Id.)

Next up was Blue Ridge's motion. (ROA pp. (transcript dated Sept. 8, 2022, p. 46).) Blue Ridge argued that Plaintiff's claims were limited to what their experts identified. (Id. at p. 47.) Blue Ridge's scope of work only included certain things such as installation of gutters, and doorknobs and deadbolts. (Id.) Blue Ridge contended that the rules of civil procedure only allow third-party practice when a third-party defendant's work exposed a third-party plaintiff to liability. (Id.) Again, DR Horton responded with "We have tried to narrow this case down [but Plaintiffs]

won't help us." (Id. at 48.) Blue Ridge maintained that DR Horton had all the information it needed to decide whether it had *bona fide* third-party claims. (Id. at 48-49.)

Plaintiffs' counsel then stated that the class claims include grading issues that prevent water draining through downspouts from flowing away from houses. (transcript dated Sept. 8, 2022, p. 49).) He continued:

> The Plaintiff is not blaming the down spout or gutter contractor for that. D.R. Horton may blame the[m] . . . . I have no control of that. We have not brought a claim of defective gutters or defective downspouts.

(Id.)

Blue Ridge's counsel pressed the issue, pointing out that Plaintiff's expert reports do not identify defective gutters, but rather defective grading below the gutters. (ROA pp. (transcript dated Sept. 8, 2022, p. 49-50).) DR Horton recognized that "the class was certified . . . based on affidavits from Plaintiffs, and if it isn't in there, it's not in the class." (Id. at 50.) However, "we can't get Plaintiff to tell us that this down spout . . . isn't included in the case." (Id.)

Plaintiffs' counsel responded as follows:

> Your honor, I couldn't have been more clear with the Court. We don't allege defective downspouts. We don't allege defective gutters. Are the downspouts and gutters causing and contributing to the water that's sitting in the backyard and not draining away? Yes they are. Did D.R. Horton try to go back and do some nickel dime repairs by putting downspout extenders . . . ? It appears they did. . . . . Is that viable evidence to be discussed at trial as part of the res gestae, or the source of the water, or a filed interim fix? Yes, it is. Does that mean we're going to raise defective downspout or defective gutter claim? No, we're not. We're not. We never have and we never will.

(ROA pp. (transcript dated Sept. 8, 2022, p. 51).)

Blue Ridge argued Plaintiff's claim includes defective grading, not defective gutters. (ROA pp. (transcript dated Sept. 8, 2022, p. 51-52).) Nevertheless, DR Horton refused to dismiss Blue Ridge, claiming that DR Horton had not been allowed to inspect the houses since suit was filed. (Id. at 52.)

This was incorrect. DR Horton injected the question of gutter defects into the case in their NOC responses.[2] (ROA pp. (Pl's. Suppl. Designation of Record, Exh. 3, pp. 74 and 77 of 142).) After inspection by DR Horton and its expert, DR Horton offered to install a downspout extender to stop mulch washout at 4 Dartford Court. (ROA pp. (Pl's. Suppl. Designation of Record, Exh. 3, pp. 73-74 of 142).) DR Horton offered to reattach an isolated portion of a gutter that had come loose at 102 Yount Court. (Id. at pp. 76-77.) Based on DR Horton's own evidence, Blue Ridge did not install gutters at either location. (ROA pp. (Blue Ridge Mem. filed Sept. 2, 2022, Exh. 1 (DRH Vendor Spend spreadsheet).)

The trial court did not deny Blue Ridge's motion for summary judgment. The ruling was postponed due to confusion over which motion was pending. (ROA pp. (Mot. to Reconsider).)

At the April 21, 2023 hearing, Blue Ridge again argued there was no evidence its work was implicated in the class claims. (ROA pp. (transcript, pp. 47-50).) In response, DR Horton argued as follows:

> Mr. Kendall is right. Mr. Lucey doesn't have reports and he does not have experts criticizing the work of IBP [i.e., Blue Ridge]. But, he did send a notice and opportunity to cure, which did implicate the work of IBP, which is the basis of how we brought the third-party subcontractors in.
>
> And Mr. Lucey filed a very, very, very general pleading, and he did not set forth exactly what he was complaining about. . . . . We're not exactly sure who Mr. Lucey is suing or what about. But Mr. Kendall is right that there is no expert testimony at this time about his work.

(Id. at 51.) DR Horton then requested a stipulation from Plaintiffs' counsel that insulation and gutter issues (among others) are not included in the class claims. (Id. at 52.)

[2] The Subject line of both relevant DR Horton NOC responses states: "Inadmissible Evidence Pursuant to Rule 408, SCRE." (Pl's. Suppl. Designation of Record, Exh. 3, pp. 73 and 76 of 142).)

Plaintiffs' counsel agreed that Blue Ridge's work was not implicated, except for one issue. (ROA pp. (transcript, p. 52).) He pointed out that patio doors leaked through the door handles, hardware, and locks. (Id. at pp. 52-53.)

Blue Ridge accepted Plaintiffs' stipulation on the record that gutters and insulation were not included in the class claims. (ROA pp. (transcript, p. 53).) Blue Ridge withdrew its motion for summary judgment to investigate the door hardware issue. (Id.) The trial court asked Plaintiff to file a formal stipulation. (Id. at 54.)

Blue filed its Supplemental Motion for Summary Judgment on July 11, 2023. (ROA pp. (Motion).) Blue Ridge argued that Plaintiff's expert tested two patio doors, and only one leaked. (Id. at p. 4.) Plaintiff did not identify leaky doorknobs as a class-wide defect. (Id. at p. 5.) Furthermore, Blue Ridge did not install the one doorknob that leaked. (Id.)

DR Horton's response memorandum pointed out that Plaintiff had not yet filed a formal stipulation that gutters and attic insulation were not included in the class claims. (Mem. in Opp'n filed July 19, 2023, p. 14.) DR Horton did not respond to Blue Ridge's argument that the leaky doorknob issue did not implicate Blue Ridge's work. Instead, DR Horton argued that Blue Ridge owes an independent duty to defend, regardless of fault. (Id. at pp. 14-15.)

Plaintiffs filed their Stipulation the next day. (ROA pp. (Stipulation).) The Stipulation confirmed that gutters and downspouts, insulation, and front door hardware were not included in the class claims. (Id. at p. 2.)

At the hearing, DR Horton agreed that Blue Ridge should be dismissed. (ROA (transcript of July 20, 2023 hearing, pp. 116-18).) DR Horton opposed Blue Ridge's motion only on the ground that DR Horton sought indemnity for its defense costs based on Plaintiffs' allegations. (Id.)

The trial court granted Blue Ridge's motion for summary judgment. (ROA pp. (Order filed July 26, 2023).) The court found no evidence to support DR Horton's negligence and warranty causes of action. (Id.) The court further found that DR Horton's third-party claims therefore collapsed into indemnity, and the subcontract was not clear and unequivocal. (Id.)

The trial court's formal Order found that Blue Ridge did not work on the class representative's home. (Order, p. 3, ¶ 4.) Plaintiff stipulated that gutters and insulation are not included in the class claims. (Id., ¶ 5.) The court further found that leaky doorknobs were not a class defect and, in any event, Blue Ridge did not install the one doorknob that leaked. (Id. at ¶ 6.) The trial court ruled that, because Blue Ridge's subcontract (ICA) lacked a defined scope of work, DR Horton could not prove the allegations in this case were subject to the indemnity agreement. (Id. at pp. 3 at ¶ 1, 8.) Furthermore, the trial court ruled that DR Horton failed to present evidence of damages. (Id. at pp. 5-6.) This appeal followed.

Judge Sprouse's subsequent rulings on directed verdict motions were not to the contrary. Plaintiffs (who had assumed DR Horton's indemnity claims due to a settlement) argued the remaining subcontractors' dispositive motions should be denied because they had derivative liability. (ROA (trial transcript (Sept. 15, 2023), p. 716).) Plaintiffs' counsel distinguished Respondents' dismissal because they "had no derivative liability as conceded by DR Horton." (Id.) In the paragraph above the one quoted in DR Horton's brief on page 14, the trial court confirmed that Respondents' motions were granted because there was no evidence Respondents were negligent. (Id. at p. 721.)

After Blue Ridge's scope of work was formally excluded from the class claims, DR Horton proceeded to trial. The jury found in favor of Plaintiffs and awarded them $15,000,000 on their Negligence claim against DR Horton. (ROA pp. (Verdict).)

STANDARD OF REVIEW

Appellate courts apply the same standard as the trial court when reviewing rulings on motions for summary judgment. USAA Prop. and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). "Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Ex parte United Servs. Auto. Ass'n, 365 S.C. 50, 53, 614 S.E.2d 652, 653 (Ct. App. 2005). Evidence must be viewed in the light most favorable to the non-moving party. Id.

Summary judgment is appropriate when a properly supported motion sets forth facts that are undisputed or are contested in a deficient manner. Lanier Constr. Co., Inc. v. Bailey & Yobs, Inc., 384 S.C. 275, 278, 681 S.E.2d 909, 911 (Ct. App. 2009). A party opposing summary judgment may not rely on allegations in the pleadings, but must "set forth specific facts showing there is a genuine issue for trial." SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). Mere scintillas, unreasonable inferences, and issues of fact that are not genuine will not suffice to withstand summary judgment. Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 463-64, 892 S.E.2d 297, 301 (2023).[3] A party may not avoid summary judgment by asserting that the trier of fact may disbelieve uncontradicted evidence. Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010).

This Court exercises *de novo* review of questions of law. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

ARGUMENT

All of DR Horton's arguments in this appeal have a common theme. DR Horton contends that Blue Ridge must defend DR Horton even though Blue Ridge was not responsible for any of

[3] Kitchen Planners overruled the "mere scintilla" rule. (See DRH Init. Br., p. 9 (citing Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009)).

Plaintiffs' alleged defective construction. (DRH Init. Br., pp. 21-22.) DR Horton contends that, even though Blue Ridge was exonerated, DR Horton still incurred costs in defending itself from the allegations of Blue Ridge's defective work. That is a mischaracterization.

This is not a typical indemnification case in which a plaintiff alleges defective construction, and the general contractor and the subcontractor responsible for the allegedly defective construction work together to show the plaintiff's allegations are incorrect. In that situation, the contractors' interests are aligned in the effort to show that the construction was not defective. The conflict of interest only arises in the after-the-fact indemnity dispute over who picks up the tab for the defense costs.

This situation is different. The Zitek Plaintiffs never alleged Blue Ridge's work was defective. Blue Ridge's opponent throughout this case has been DR Horton. The question was never whether Plaintiffs' allegations regarding Blue Ridge's work could be defeated, but whether Blue Ridge's work was included in the suit at all. Blue Ridge prevailed in showing it is not.

DR Horton characterizes the Complaint as "vague" and "open-ended." This is a notice pleading state. That does not entitle DR Horton to arbitrarily demand indemnification from every subcontractor that touched the project if a construction defect suit is filed.

In this appeal, DR Horton seeks to justify its "shoot first, aim later" strategy. It was in DR Horton's interest to construe the Plaintiffs' claims as broadly as possible so as to seek indemnification from as many subcontractors as it could. However, an indemnity claim cannot be merely spoken into existence. DR Horton's third-party claims call for Blue Ridge to indemnify DR Horton for Blue Ridge's negligent work under the subcontract. Blue Ridge did not contract to pay DR Horton's attorney's fees for prosecuting claims against Blue Ridge.

DR Horton's contentions that Blue Ridge failed to honor its contract, left DR Horton to fend for itself, and inflicted reputational harm are empty talking points. Plaintiffs did not sue Blue Ridge, and their counsel repeatedly stated in open court that they were not blaming the class claims on Blue Ridge. The tangential issues Plaintiffs raised did not involve Blue Ridge's work.

Furthermore, DR Horton's argument that it was responsible for Blue Ridge's "win" is baseless. It was DR Horton that sued Blue Ridge. DR Horton never filed a single brief supporting Blue Ridge's position. Blue Ridge's only opponent in this suit is DR Horton. A court ruling was necessary to secure Blue Ridge's dismissal.

The law does not support DR Horton's position. This Court should affirm.

I. The trial court's ruling that Blue Ridge's work was not involved in this suit is not contested in this appeal.

The trial court granted Blue Ridge's motion for summary judgment because:

> there is no evidence that [DR] Horton has sustained 'losses . . . arising out of, or resulting from, or related in any way to the work performed and/or the materials supplied under this contract.' . . . . Plaintiff is not pursuing a claim for work within the scope that Blue Ridge performed. Thus, there are no losses within the defined scope of the indemnity agreement.

(ROA p. (Order Granting Blue Ridge MSJ, p. 4).) DR Horton does not contest this ruling in its Statement of Issues on Appeal. See Rule 208(b)(1)(B), SCACR.

The indemnity agreement in Blue Ridge's subcontract only required Blue Ridge to indemnify and defend DR Horton with respect to claims "arising out of, or resulting from, or related in any way to the work performed . . . under this Contract." (Id.) This represents a condition precedent to Blue Ridge's owing *any* duty under the indemnification agreement, whether a defense, indemnity, or anything else listed in the agreement. The uncontested trial court ruling that the Plaintiff's claims did not arise out of, result from, or relate in any way to Blue Ridge's work is fatal to DR Horton's claim for a defense under the indemnity agreement.

II. DR Horton knew or should have known that Blue Ridge's work was never at issue in this suit.

DR Horton's argument—that prior to the formal Stipulation, Blue Ridge owed a duty to defend based on the *possibility* that its work might become involved in this suit—presupposes the existence of an independent duty to defend in the indemnity agreement. DR Horton has not identified any such provision in Blue Ridge's subcontract.

Moreover, DR Horton cannot demonstrate that the Zitek Plaintiffs' claims against DR Horton ever arose from, resulted from, or related to Blue Ridge's work. As recounted in the counter-statement of facts above, DR Horton knew, before it filed its third-party claims against Blue Ridge, that Plaintiffs' claims did not include all issues related to the NOC letter. DR Horton's insistence on resurrecting NOC issues had already been lampooned as misstatements in Plaintiffs' briefing. (ROA p. (Pl's. Reply Mem. filed Dec. 8, 2020, p. 3).)

The tangential matters raised at the hearings never amounted to anything. At the first hearing, Plaintiffs' counsel stated in open court they were not alleging defective gutters. (ROA pp. (transcript of hearing dated Sept. 8, 2022, p. 51).) Plaintiff's counsel also admitted that issues not raised in expert reports were not included in the class claims. (Id. at p. 39.) After that, DR Horton had no basis for continuing to raise NOC issues against subcontractors.

At the second hearing, Plaintiffs' counsel brought up leaking patio doors. (ROA pp. (transcript of hearing dated April 21, 2023, pp. 52-53.) This was nothing new. Plaintiff's counsel had previously clarified that it was the rear patio doors that were leaking. (ROA p. (transcript of Dec. 9, 2020 hearing, p. 56).) Blue Ridge did not install door hardware on any patio door. (ROA p. (Order Granting Blue Ridge MSJ, p. 3).)

During the second hearing, the trial court asked Plaintiff's counsel to file a formal stipulation that insulation and gutter issues (among others) are not included in the class claims.

(ROA pp. (transcript of hearing dated April 21, 2023, pp. 54).) The formal Stipulation did not change anything. The Stipulation states that plaintiffs "are not making . . . claims" based on the listed building components. (Id.) It was not a release—it merely confirmed what had previously been made clear in open court. (See (ROA pp. (Stipulation as to Limitation of Claims).)

Finally, DR Horton, as the general contractor, was in a position to know which subcontractors' scopes of work were implicated. DR Horton's "Vendor Spend" spreadsheet was used throughout the litigation for this purpose. (ROA p. (transcript of Sept. 22, 2021 hearing, p. 8); see also DRH Init. Br., p. 12.) Blue Ridge's dispositive motion simply forced DR Horton to admit what it knew all along—DR Horton had no evidence that Blue Ridge's work was implicated.

This Court could affirm on the basis of Blue Ridge's first two arguments alone. The arguments DR Horton made in this appeal do not get around that.

III. DR Horton cannot avoid the "clear and unequivocal" standard.

DR Horton's argument that it had no sole or concurrent negligence is disingenuous. The argument goes that due to the Plaintiffs' Stipulation, neither DR Horton nor Blue Ridge were found to be negligent. (DRH Init. Br. at p. 15.)

DR Horton's argument produces an absurd result. Under DR Horton's theory, DR Horton has enhanced ability to enforce indemnity agreements against subcontractors whose work is not alleged to be defective because the "clear and unequivocal" standard would not apply.

In Concord and Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), this Court held that the "clear and unequivocal" standard applies when an indemnitee seeks indemnity for his own negligence. Id. at 649, 819 S.E.2d at 172. By statute, DR Horton cannot recover indemnity for its own sole negligence. S.C. Code Ann. § 32-2-10. The rule of strict construction (or "negligence rule") requires DR Horton

to satisfy the "clear and unequivocal" standard to recover indemnity for its own concurrent negligence under Concord and Cumberland.

As DR Horton acknowledged, the Stipulation confirmed that Plaintiff was not claiming Blue Ridge's work is defective. (ROA pp. (transcript of July 20, 2023 hearing, pp. 116-17).) DR Horton does not contest the dismissal of Blue Ridge in this appeal. Nor does DR Horton seek indemnity for a judgment or settlement against it due to Blue Ridge's negligence.

The claims against which DR Horton is seeking a defense in this appeal are those brought by the Zitek plaintiffs. The Plaintiffs alleged DR Horton was negligent in their Complaint. (ROA pp. (Complaint).) In fact, Plaintiffs did not sue anyone else. "The Appellant spent considerable money on attorney's fees and expenses during four years of complex and difficult class-action litigation . . . ." (Resp't. Init. Br., p. 11.) Nevertheless, the jury found DR Horton negligent as to those claims. (ROA pp. (Verdict).) DR Horton's argument is merely smoke and mirrors.

Thus, DR Horton's third-party claim seeks indemnification for its own negligence. The "clear and unequivocal" standard applies because DR Horton was alleged and proved to be solely or concurrently negligent. See 57A Am. Jur. 2d Negligence § 497 (Feb. 2024 Update) (defining "concurrent negligence" as a single injury caused by the negligence of two or more defendants).

IV. DR Horton's position violates Section 32-2-10.

DR Horton's argument also runs afoul of South Carolina's anti-indemnity statute. DR Horton's claim is barred by statute because it seeks indemnification for the sole negligence of DR Horton and its other subcontractors.

South Carolina's anti-indemnity statute provides that indemnity agreements in the building construction context that require indemnification for the sole negligence of either the indemnitee or its independent contractors are unenforceable and against public policy. S.C. Code Ann. § 32-2-10. Due to the anti-indemnity statute, indemnity claims are predicated upon a finding of

negligence. To the extent DR Horton seeks indemnification for its own sole negligence or the sole negligence of any of DR Horton's other subcontractors on this project, DR Horton's indemnity agreement is unenforceable because it violates Section 32-2-10.

DR Horton knows this. In D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, the trial court made the following conclusion of law:

> 24. Applicable law does not permit BFS to indemnify DRH for judgments based on defects in the work of others. See S.C. Code Ann. § 32-2-10 (prohibiting agreements whereby subcontractor agrees to indemnify general contractor for general contractor's sole negligence or the negligence of its "independent contractors.").

No. 2010-CP-10-10355, 2014 WL 12783398 at *4 (Charleston County Comm. Pl. Sept. 5, 2014). This Court affirmed that ruling:

> However, we agree that the indemnification clause is void as against public policy to the extent it purports to require BFS to indemnify D.R. Horton for damages caused by its negligence or the negligence of its subcontractors.

D.R. Horton, Inc. v. Builders FirstSource-SE Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018).

Plaintiffs sued a single defendant for all damages claimed in this action. (ROA pp. (Complaint).) The jury found in favor of Plaintiffs and awarded them $15,000,000 on their Negligence claim. (ROA pp. (Verdict).) DR Horton's negligence was responsible for all of the injuries the Plaintiffs claimed at trial.

The trial judge granted summary judgment to Blue Ridge upon a finding that none of Plaintiffs' allegations concerned Blue Ridge's work. (ROA pp. (Order).) DR Horton did not challenge that finding in this appeal. Thus, none of the damages awarded were the result of Blue Ridge's negligence.

The defense costs DR Horton seeks to recover from Blue Ridge were incurred in defending DR Horton against claims arising from the sole negligence of DR Horton and its other independent

contractors. Thus, DR Horton's indemnity claim against Blue Ridge is unenforceable. D.R. Horton, 422 S.C. at 152, 810 S.E.2d at 45.

Courts in other jurisdictions have held that anti-indemnity statutes restrict the ability of upstream contractors to demand an immediate defense from subcontractors. Arthur v. State Dep't of Hawaiian Home Lands, 138 Hawai'i 85, 97, 377 P.3d 26, 38 (2016); 3 Bruner & O'Connor Constr. Law § 10:65 (Aug. 2023 Update). Requiring an immediate defense may require an indemnitor to defend in cases in which liability is ultimately attributed solely to the indemnitee, thus violating the statute. Arthur, 138 Hawai'i at 97, 377 P.3d at 38.

DR Horton's requested relief contravenes Section 32-2-10. Blue Ridge's work was not at issue. DR Horton is statutorily barred from demanding indemnity or a defense against claims based upon the sole negligence of itself or its other subcontractors.

V. Blue Ridge's subcontract did not clearly and unequivocally impose a duty to defend regardless of fault.

In the alternative that DR Horton's indemnity claim for defense costs is not barred by statute, it fails under the "clear and unequivocal" standard. DR Horton cannot support its position from the contract language.

DR Horton relies on a general indemnity agreement that does not create a separate and independent duty to defend. (ROA pp. (ICA, ¶ 10.1).) The defense and indemnity requirements in the subcontract are both in the same series, all within the same section entitled "Contractor's Indemnity." (Id.).) All duties are conditioned upon a claim arising out of, resulting from, or relating to Blue Ridge's work. (Id.) The subcontract does not clearly and unequivocally require Blue Ridge to defend DR Horton merely because DR Horton asserts third-party claims against Blue Ridge. Moreover, it contains an exception to conform to Section 32-2-10: "Nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnitee." (Id.)

Until a determination of fault is made, the applicability of this exception is uncertain. Accordingly, the indemnity agreement does not clearly and unequivocally require Blue Ridge to begin defending DR Horton up front based solely on "vague" and "open-ended" allegations.

DR Horton's indemnity claim fails for several other reasons. In the first place, DR Horton did not plead entitlement to an immediate defense, regardless of whether a third-party defendant was without fault. The trial court therefore could not grant that relief. 61B Am. Jur. 2d Pleading § 814 (Feb. 2024 Update) (a trial court lacks jurisdiction to enter any judgment on an issue not raised by the pleadings); Wachovia Mortg. Corp. v. Posti, 166 So. 3d 944, 945-46 (Fla. Dist. Ct. App. 2015) (relief granted that was not requested in appropriate pleadings violates due process); Northway v. Allen, 291 Ga. 227, 229, 728 S.E.2d 624, 626 (2012) ("If material allegations are missing from a pleading, then the pleading fails.").

The trial court also found that confusion resulted from "the extremely complicated grammatical structure" of the indemnity provision. (ROA p. (Order p. 7).) DR Horton did not contest this finding in its initial brief:

> The indemnification agreement is described within a single sentence containing 260 words, 48 commas, and 34 conjunctions/disjunctions. The sentence includes multiple serial lists, definitions, sub-parts, sub-ordinate clauses, parenthetical notes and prepositional phrases. As a result, the indemnity provision of this contract is manifestly unclear.

(Id. at pp. 7-8.)

Finally, DR Horton's subcontract with Blue Ridge was flawed in that it lacked a specified scope of work. It failed to clearly and unequivocally identify the work that was subject to the indemnity agreement. DR Horton provided no authority to contest this ruling.

For all these reasons, the trial court properly found that DR Horton failed to clearly and unequivocally require Blue Ridge to indemnify for DR Horton's own negligence. DR Horton did

not clearly and unequivocally express intent to require Blue Ridge to defend DR Horton regardless of fault in either the subcontract or in its Third-Party Complaint.

VI. Plaintiffs' claims do not support entitlement to an immediate defense.

Even if the subcontract is found to have imposed an independent and immediate duty to defend DR Horton (which Blue Ridge denies), DR Horton cannot prove that Plaintiff's claims triggered a defense from Blue Ridge. Plaintiff's NOC letter did not expressly allege defects in Blue Ridge's work. It alleged improperly installed doors, "General Wall" issues, and grading issues. (ROA (Pl. Mem. Supporting Mot. for Certification, Exh. H).) Plaintiffs' Complaint did not allege any defect in Blue Ridge's work. It alleged failure of the exterior building envelope. (ROA (Complaint, ¶ 27).) It is undisputed that Blue Ridge did not perform any work on the class representative's residence. (ROA (Order, p. 3, ¶ 4).)

But even if these allegations could be read broadly to include Blue Ridge's work, the class claims had been narrowed by the Class Certification Order before DR Horton sued Blue Ridge. DR Horton knew that Plaintiff's class claims did not include every issue in the NOC letter. Plaintiffs' original motion for class certification referenced the NOC letter. (ROA p. (Mem filed May 27, 2020, p. 5 and Exh. H).) In that memorandum, Plaintiffs showed that DR Horton missed the statutory deadline for requesting clarification. (ROA p. (Id. at p. 5).) See S.C. Code Ann. § 40-59-840 (requiring contractors to request clarification of the claimed defects within 15 days).

DR Horton opposed the motion on the ground that the NOC letter was too general and vague to support class certification. (ROA pp. (Mem. in Opposition filed May 27, 2020, pp. 5-7).) DR Horton attempted to capitalize on its own dilatoriness.

Both parties subsequently withdrew their motions. (ROA p. (Class Certification Order, p. 3).) During that time, DR Horton inspected and offered to cure 48 homes. (Id.)

In its Offer to Cure letters, DR Horton gratuitously offered to repair a couple of minor gutter issues. DR Horton offered to extend a downspout away from a flower bed at 4 Dartford Court. (ROA (Pl. Suppl. Designation of Record, Exh. 3, p. 74 of 142).) DR Horton also offered to reattach an isolated portion of gutter that had become detached at 102 Yount Court. (Id. at 77.) It was DR Horton that injected gutter issues into the class action.

Plaintiffs' re-filed motion for certification did not reference the NOC letter. (See Pl. Mem. filed Nov. 23, 2020).) The defects upon which Plaintiffs sought certification were those identified in their expert affidavits. (Id. at p. 9.)

DR Horton argued in response that it was "undisputed" that it had not had an opportunity to inspect the homes at issue and to identify the scopes of work involved. (ROA p. (DRH Mem. filed Nov. 23, 2020, p. 3.) DR Horton rehashed its argument that the NOC letters were too general and vague. (Id. at pp. 5-7.)

Plaintiffs replied by confirming that their claims were not based on the NOC letter. (ROA p. (Pl's Reply Mem. filed Dec. 8, 2020, p. 3).) Plaintiffs characterized DR Horton's continued references to the NOC letter as misstatements. (ROA p. (Pl's Reply Mem. filed Dec. 8, 2020, p. 3).) Plaintiffs' "Debunking" chart, which was referenced at the hearing on their motion for certification, pointed to Whitlock's affidavit in response to questions as to which defects were included in the class claims. (ROA pp. (transcript of Dec. 9, 2020 hearing, p. 47; Pl's. Suppl. Designation of Record, Exh. 1, pp. 1 and 2).) Plaintiffs also showed that DR Horton in fact had been afforded the opportunity to inspect and identify the scopes of work at issue. (ROA p. (Pl's Reply Mem., p. 3).)

By the time the class was certified, Plaintiffs had narrowed their claim to defects identified in their expert affidavits. (ROA p. (Pl's. Reply Mem. filed Dec. 8, 2020, p. 3).) The Order granting

class certification limited the "common and typical defect at issue" to "failing exterior envelopes (consisting of failed siding systems and failing fenestrations)." (ROA pp. (Order filed Jan. 27, 2021, pp. 2, 7.)

At the hearing on Blue Ridge's first dispositive motion, the reason given for DR Horton's refusal to dismiss Blue Ridge was gutter issues. (ROA pp. (transcript of Sept. 8, 2022 hearing, pp. 49-52).) Plaintiffs did not allege gutter issues. (Id. at 49.) DR Horton raised gutter issues in its Offer to Cure letters, and then used that to oppose Blue Ridge's motion for summary judgment. (Compare ROA (Pl. Suppl. Designation of Record, Exh. 3, pp. 74 and 77 of 142).)

Importantly, DR Horton made these arguments after Plaintiffs' counsel's open-court admission that issues not raised in the expert reports are not included in the class claims. (ROA pp. (transcript of Sept. 8, 2022 hearing, pp. 49-52).) Counsel for DR Horton recognized the significance of Plaintiff's counsel's statement. (Id. at 44.) Blue Ridge argued that Plaintiff's expert reports did not implicate Blue Ridge's work. (Id. at 47.) Yet rather than consulting the expert reports itself, DR Horton tried to extract an admission from Plaintiffs. (Id. at 50.) DR Horton sought to manufacture grounds for indemnity from Blue Ridge.

DR Horton knew how to ascertain whether a particular subcontractor's scope of work was implicated in the class claims. At the hearing on Blue Ridge's initial motion for a More Definite Statement, counsel for DR Horton represented to the Court that its decision as to which subcontractors to sue was based on a "Vendor Spend Spreadsheet." (ROA p. (transcript of Sept. 22, 2021 hearing, p. 8); see also DRH Init. Br., p. 12.)

Blue Ridge argued in its dispositive motions that the class defects did not involve Blue Ridge's scope of work. (ROA pp. (Blue Ridge Mem. filed Sep. 2, 2022, p. 3 and Exh. 1; Blue Ridge Mem. filed July 11, 2023, p. 5, n.14).) DR Horton never contested Blue Ridge's position

by identifying Blue Ridge work that was included in the class claims. After the gutter issue was raised at the hearing on September 8, 2022, DR Horton could have consulted its Vendor Spend spreadsheet as to whether Blue Ridge installed the gutters at 4 Dartford Court and 102 Yount Court. Had DR Horton done so, it would have found that Blue Ridge did not install those gutters. (ROA pp. (Blue Ridge Mem. filed Sept. 2, 2022, Exh. 1).) Instead, DR Horton kept Blue Ridge in the case. At the April 21, 2023 hearing, Plaintiffs' counsel pointed out that certain exterior doors were leaking. (ROA p. (transcript at p. 52).) Again, Blue Ridge showed that it did not install the one doorknob that leaked using DR Horton's "Vendor Spend" information. (Blue Ridge Mem. filed Jul 11, 2023, p. 5, n.14.).)

DR Horton sued Blue Ridge, not the Plaintiffs. DR Horton failed to request clarification under the NOC statute, injected the gutter issue into the case, and then used that evidence against Blue Ridge. When Blue Ridge showed the problems did not concern its work, DR Horton refused to consult its own Vendor Spend spreadsheet to confirm Blue Ridge was right.

DR Horton's willful ignorance and broad characterizations do not establish a possibility that Blue Ridge's negligence caused the Zitek Plaintiffs' damages. DR Horton knew or should have known that Blue Ridge's scope of work was not within the class claims. Furthermore, DR Horton's argument that the trial court "foisted the sole cost and expense of the defense on the Appellant" finds no support in the record. (DRH Init. Br., p. 19.) Blue Ridge was unnecessarily put to the expense of defending itself from DR Horton's third-party claims.

VII. DR Horton failed to prove damages.

The trial court found that DR Horton failed to present any evidence of damages resulting from Blue Ridge's alleged breach of the indemnity agreement. (ROA p. (Order pp. 5-6).) The record does not reflect that any argument challenging this ruling is preserved for appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue

cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") Furthermore, this argument lacks merit.

Blue Ridge recognizes that DR Horton incurred costs in defending itself from Plaintiffs' claims. However, Plaintiffs' claims had nothing to do with Blue Ridge's work.

Even in states that lack an anti-indemnity statute and therefore allow imposition of an immediate duty to defend, courts have held that subcontractors are only responsible for the portion of the indemnitee's defense costs that was incurred in defending that subcontractor's scope of work. Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc., 127 Nev. 331, 345, 255 P.3d 268, 278 (2011). DR Horton never presented evidence as to amounts of litigation costs it incurred in defending Plaintiffs' claims against DR Horton due to Blue Ridge's (purported) alleged negligence. DR Horton did not identify a single court filing or any evidence that DR Horton defended Blue Ridge and its scope of work.

DR Horton cites no record evidence that it ever tendered its defense to Blue Ridge. The first notice to Blue Ridge was the service of DR Horton's third-party claim.

Under the American rule, the costs DR Horton incurred in prosecuting its third-party claims against Blue Ridge are not Blue Ridge's responsibility. DR Horton's litigation to enforce the indemnity agreement was at DR Horton's own expense.

Furthermore, DR Horton's mischaracterization that, merely because Blue Ridge did not defend, DR Horton was forced to shoulder the defense burden alone, lacks evidentiary support. There were numerous other defendants in the case. (See ROA p. (transcript dated Sept. 8, 2022, p. 6).) DR Horton obtained a four-million jury verdict against another third-party defendant. (ROA pp. (Verdict).) Surely those culpable subcontractors owed DR Horton a defense.

DR Horton never presented evidence of reputational harm. It is difficult to discern how DR Horton's reputation could be harmed by work not at issue in the class claims.

VIII. The trial court properly granted summary judgment as to all causes of action.

DR Horton's causes of action against Blue Ridge for equitable indemnity, breach of contract, breach of express warranties, breach of implied warranties, and negligence were properly dismissed. (ROA p. (Amended Third-Party Complaint).) The uncontested finding that Blue Ridge's work was not at issue in the class claims disposes of all causes of action except contractual indemnity. DR Horton cannot prove a breach of contract, warranty, or legal duty.

Furthermore, case law bars this type of claim. DR Horton alleged that "to the extent that Plaintiff proves that the work was not performed correctly," Blue Ridge breached its subcontract. (Id. at ¶ 115.) This Court has held that a contingent cause of action based solely on liability to a third party is a disguised indemnity claim. Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 622, 776 S.E.2d 426, 430 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 637, 776 S.E.2d 434, 438 (Ct. App. 2015). DR Horton's third-party claim for Breach of Contract is based on contingent allegations that are substantially similar to those in Stoneledge. See 413 S.C. at 635-36, 776 S.E.2d at 437.

All theories under which DR Horton demanded an immediate defense are subsumed under its indemnity claims. As this Court has explained, a right of indemnity arises when the wrongful act of the indemnity defendant has involved the indemnity plaintiff in litigation with others, making it necessary for the indemnity plaintiff to incur legal expenses to protect its interest. Stoneledge. See 413 S.C. at 625, 776 S.E.2d at 431. Without the Zitek plaintiffs' class action against DR Horton, DR Horton would have no cause for demanding a defense from Blue Ridge.

As a matter of law, DR Horton has no standalone breach of contract claim based on an alleged duty to defend. Unless suit is filed against DR Horton, there is nothing to defend.

DR Horton has no claim for equitable indemnity. To recover under an equitable indemnity theory, DR must prove three elements: (1) Blue Ridge was at fault in causing the Zitek plaintiffs' damages; (2) DR Horton was not at fault for those damages; and (3) DR Horton incurred expenses that were necessary to protect its interest in defending against the Zitek plaintiffs' claim. Stoneledge. See 413 S.C. at 625, 776 S.E.2d at 432.

DR Horton's equitable indemnity claim fails for two reasons. First, DR Horton has unclean hands because it was found negligent for all damages claimed at trial. (ROA pp. (Verdict).) Stoneledge, 413 S.C. at 625-26, 776 S.E.2d at 432. Second, Blue Ridge was not at fault for any of those damages, as reflected in Plaintiffs' Stipulation and the trial court Order granting Blue Ridge's motion for summary judgment. (ROA pp. (Stipulation; Order).)

Furthermore, no authority supports DR Horton's claim that it has an independent negligence claim. The courts of this State created a tort cause of action *for homeowners* against building contractors for negligent construction. Kennedy v. Columbia Lumber and Mfg. Co., 299 S.C. 335, 345-47, 384 S.E.2d 730, 736-37 (1989). However, courts also made it clear this is a narrow, "consumer protection" exception to the general rule. Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47 (2009). DR Horton is a builder, not the homeowner. DR Horton's claims against Blue Ridge therefore fall under Sapp, not Kennedy.

IX. The trial court did not err in declining to sever the defense and insurance provisions.

DR Horton's final argument that the "duty to defend" and "duty to provide insurance" provisions in its subcontract are independent or severable does not support reversal. DR Horton's third-party complaint does not plead either of these. (ROA p. (Amended Third-Party Complaint, p. 24).) As discussed above, this alone is fatal to these claims.

If this Court reaches the merits of the severability issue, the "duty to defend" provision is not severable. The indemnity agreement requires the subcontractor to "hold harmless, indemnity, protect and defend." (ROA p. (Subcontract, p. 4.) There is no separate and independent division, apportionment, or part addressing a "duty to defend." See Columbia Architectural Grp., Inc. v. Barker, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980). Severability is not allowed.

Furthermore, severability is unnecessary. DR Horton did not present any evidence of any alleged breach of contract by failing to provide insurance. Mere allegations are insufficient to avoid summary judgment. SSI Med. Servs., 301 S.C. at 497, 392 S.E.2d at 792.

Blue Ridge obtained liability insurance as per its subcontract with DR Horton. The argument that Blue Ridge failed to do so was never raised to or ruled upon by the trial court. Moreover, DR Horton's dispute with Blue Ridge's insurance carrier is the subject of a separate pending suit. D.R. Horton v. American Guar. and Liab. Ins. Co., *et al.*, No. 2023-CP-23-01810 (Greenville County Comm. Pl.).

Moreover, DR Horton's attempt to impose an immediate duty to defend may run afoul of insurance regulation. Insurance is regulated by the South Carolina Department of Insurance. See S.C. Code ¶ 38-5-10. By statute, "insurance" is defined as "a contract where one undertakes to indemnify another or pay a specified amount upon determinable contingencies." S.C. Code Ann. § 38-1-20(25). Liability insurers undertake two primary duties: the duty to defend and the duty to indemnify. Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977). Insurers owe a separate and distinct duty to defend, regardless of whether the insurer is obligated to pay for damages. Id.

DR Horton cites insurance law against Blue Ridge. (DRH Init. Br., pp. 22-23.) It contended that the summary judgment for Blue Ridge was "a windfall" because "forfeitures of

insurance contracts are not favored." (Id. at p. 23.) Blue Ridge is not an insurance company. This attempt to impose a "duty to defend" in the absence of any liability exposure caused by Blue Ridge's work falls within the definition of insurance and improperly seeks to render Blue Ridge DR Horton's liability insurer.

The only remedy DR Horton seeks in this appeal is defense costs. Yet this is precisely what DR Horton cannot obtain under applicable law and the circumstances of this case. Severance of the offending provision would not improve DR Horton's position.

X. The remaining orders on appeal do not impact the outcome.

DR Horton did not raise issues concerning the other trial court orders referenced in the Notice of Appeal. Any arguments relating to those motions are waived. Stoneledge. 413 S.C. at 642, 776 S.E.2d at 441. The trial court's July 26, 2023 informal order and its order denying DR Horton's motions for reconsideration have been addressed above.

The trial court's Amended Scheduling Order filed February 15, 2023 was vacated by the Order dated May 8, 2023. These orders concerned Blue Ridge's Motion to Make a More Definite Statement, which was mooted by DR Horton's Second Amended Answer and Third-Party Claim.

CONCLUSION

The trial court ruling that the Zitek Plaintiffs' claims did not arise out of, result from, or relate to Blue Ridge's work is not contested in this appeal. The indemnity agreement in Blue Ridge's subcontract does not clearly and unequivocally require Blue Ridge to defend DR Horton against claims that do not arise from, result from, or relate to Blue Ridge's work. If it did, the indemnity agreement violates South Carolina's anti-indemnity statute by potentially requiring Blue Ridge to indemnify DR Horton for the negligence of DR Horton or its other subcontractors. Even if the indemnity agreement is enforceable, it should not be enforced under the circumstances of this case because DR Horton knew before it sued Blue Ridge that Blue Ridge's scope of work

was not included in the class claims, which by then had been limited to those issues raised in the Plaintiffs' expert reports.

South Carolina law does not allow indemnification against the sole negligence of the indemnitee or other subcontractors. Amounts expended in defending claims arising from the indemnitor's negligence can only be ascertained after liability is established. DR Horton's negligence was responsible for all of Plaintiffs' damages and Blue Ridge was found not negligent. Therefore, Blue Ridge does not owe a duty to defend under the indemnity agreement even if it is enforceable. Accordingly, the trial court ruling in favor of Blue Ridge should be affirmed.

"There exists in every contract an implied covenant of good faith and fair dealing." Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). It was one thing for DR Horton to keep Blue Ridge in the case until Plaintiffs formally stipulated that Blue Ridge's work was not implicated in the class claims and the trial court granted Blue Ridge's motion for summary judgment. It is another for DR Horton to demand that Blue Ridge pay for DR Horton's prosecution of its third-party claims against it. Once Plaintiffs made it clear they were not proceeding upon all the defects alleged in their NOC letter and that the class claims did not involve Blue Ridge's work, DR Horton had no basis for continuing to insist upon indemnification from Blue Ridge. DR Horton was on notice that Blue Ridge's scope of work was not implicated in this suit before DR Horton sued Blue Ridge. DR Horton's continued prosecution against Blue Ridge is in bad faith.

[*Signature page follows*]

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/ Timothy J. Newton
Everett A. Kendall, II (SC Bar No. 8450)
Timothy J. Newton, (SC Bar No. 71640)
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Respondent
IBP Assets, LLC d/b/a
Blue Ridge Building Products

Columbia, South Carolina
April 10, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2019-CP-04-01942
Appellate Case No. 2023-001401

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

v.

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

D.R. Horton, Inc., Appellant,

v.

AJ Landscaping & Grading LLC, A/K/A AJ Landscaping & Grading, Inc; Allpro Textures, LCC; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc., A/K/A ACP Concrete, Inc.; A&J Framing, Inc; Alpha E.M.C; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughan Lumber Co., Inc.; BKF Builders, Inc; Builders Designhouse, LLC; BMC East, LLC D/B/A Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC,A/K/A Builders Firstsource, Inc; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc.; Caryl Mechanicals, Inc.; Cannaday Siding and Gutter, Inc; Cortes Painting, LLC; CBU Enterprises, Inc.; CPI Security Systems, Inc.; Dom Group, LLC; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc.; A/K/A Galloway-Bell, Inc. II BGET Floored, LLC; GBS Building Supply-Us LBM, LLC, A/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danler, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC. A/K/A M&L General Construction, Inc.; M&Lreyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC, NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, LLC; P&L Enterprises, LLC; Probuild Company, A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc, A/K/A Gale Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc., Dupree Plumbing Company, Inc.; Willow

Tree Landscaping, Inc., Third-Party Defendants,

of which Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractors Services) and IBP Assets, LLC d/b/a Blue Ridge Building Products, are the Respondents.

PROOF OF SERVICE

I certify that the ***Initial Brief of Respondent IBP Assets, LLC d/b/a Blue Ridge Building Products*** was served on counsel of record on April 10, 2024, via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/ Timothy J. Newton
Everett A. Kendall, II (SC Bar No. 8450)
Timothy J. Newton (SC Bar No. 71640)
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Respondent
IBP Assets, LLC d/b/a
Blue Ridge Building Products

Other counsel of record:

[*following page*]

Carl F. Muller, Attorney-at-Law, P.A.
P.O. Box 1717
Greenville, SC 29602-1717
Phone 864-991-8904
Fax 864-751-2831
carl@carlmullerlaw.com

John T. Crawford, Jr. (SC Bar No. 69355)
Kenison, Dudley & Crawford, LLC
704 McBee Ave.
Greenville, SC 29601
(864) 242 4899
(864) 242-4844 (fax)
crawford@conlaw.com
Attorneys for Appellant
D.R. Horton, Inc.

Alicia N. Bolyard
Resnick & Louis, P.C.
146 Fairchild St., Suite 130
Charleston, SC 29492
abolyard@rlattorneys.com
(843) 410-2534
Attorney for Respondent
Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractors Services)