THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Trial Court Case No. 2019CP041942
Appellant Case No. 2023-001681

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

v.

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

AND

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

v.

A&J Landscaping & Grading LLC, A/K/A AJ Landscaping & Grading, Inc; Allpro Textures, LLC; 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-Vaughn Lumber Co., Inc.; BFK Builders, Inc; Builders Designhouse, LLC; BMC EAST, LLC D/B/A Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC, A/K/A Builders Firstsourse 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 Buildings 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., and Silver Line Building Products Corporation, ... Third-Party Defendants,

of which Galloway-Bell, Inc.; a/k/a Galloway-Bell, Inc. II is the ……. Respondent

AND

D.R. Horton, Inc. is the …….. Appellant

INITIAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from a summary judgment order against contractual obligations for defense costs and additional insured provisions. That is the only issue; and it is a simple case. It is a case by D. R. Horton against Galloway-Bell for attorneys' fees, expenses and costs. It is based on a Contract between the parties. That is the basis of D. R. Horton's claim. All the pages in the Respondent's brief about everything else are completely irrelevant.

At bottom, the challenge is not by Galloway-Bell, but instead by its insurance company, using the Respondent as subterfuge. In bad faith, Galloway-Bell's insurance company refused to defend D. R. Horton as its own named Additional Insured. Of course, fault on the part of the Respondent's insurance company does not relieve the Respondent of its contractual obligation to stand good for D. R. Horton's defense, attorneys' fees and expenses.

One might fairly ask why Galloway-Bell as the Contractor has agreed in the Contract to defend D.R. Horton as the Owner. The answer is twofold. The first is that it has insurance for this, which the Contract requires. The second is that every other Contractor is in exactly the same position, which means that the Contractors involved in a lawsuit will divide the responsibility for defense among themselves. It is a simple allocation of risk amongst the parties. That is the way that it should be because D. R. Horton does not perform any of the work itself. It contracts for everything. (ROA ___, July 20-21, 2023 TR p. 170, lines 3-7)

ARGUMENT

First, this is an appeal from summary judgment. It is not an appeal from a trial, although much of the Respondent's brief reads otherwise. The standard for summary judgment is "reasonable inference" concerning a "genuine issue as to any material fact." Rule 56(c), SCRCP; *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023). There is a

"reasonable inference" concerning a "genuine issue as to any material fact" in this case. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *Murray v. Holnam, Inc.*, 344 S.C. 129, 137, 542 S.E.2d 743, 747 (Ct. App. 2001). The Respondent has lost sight of the fact that this is an appeal on a summary judgment order.

There is ample evidence that the Appellant incurred defense costs and attorneys' fees. These include everything relating to the Respondent's work at the development from the time that the Plaintiff submitted warranty work requests, her Notice to Cure, her Complaint, and all hearings, motions, pleadings, discovery and inspections at the development. This is substantially more than the law requires. The Appellant spent considerable money on attorneys' fees and expenses during four years of complex and difficult class-action litigation defending against the claims relating to over 200 houses, and requiring the Plaintiff to provide discovery and evidence of the class claims – including those regarding the Respondent's work. The court was well aware of the many hearings and motions regarding discovery disputes, depositions, on-site inspections, motions to compel discovery, motions for more definite statements and other activities in which the Appellant engaged to defend against the claims the Plaintiff identified in her Notice to Cure and Complaint. (ROA ___)

There is evidence that the Appellant suffered reputational harm, as well. The court records are public records and any prospective home purchaser is free to look up the case prior to purchasing a home. In doing so, such a homeowner would see the Plaintiff's Notice to Cure and

her Complaint of defects. Issues with basic things like gutters and insulation is not a good look for a home developer.

Second, this is an appeal about the right to enforce a contractual duty to defend and a contractual obligation to provide insurance defense to an additional insured. It is not about indemnification for liability as the Respondent would have this Court believe. Ultimately, there was no liability assessed against the Appellant or the Respondent as to the work performed by the Respondent. There is no indemnity claimed. It is not about any limitation on indemnification for sole or concurrent liability – there was no sole or concurrent liability imposed against either the Appellant or the Respondent. The anti-indemnification statute and the cases about sole and concurrent negligence simply do not apply. Moreover, the court made it clear that there was nothing wrong with the duty to indemnify in the Appellant's Contract with the Respondent when it enforced the duty to defend provision against JLS Masonry and refused to grant JLS Masonry's motion for judgment notwithstanding the verdict and motion for reconsideration on section 10 of the contract's contractual obligations to defend and indemnify D.R. Horton even though JLS Masonry told the Court that they were the same as those of Galloway in paragraph 4, page 4, of JLS Masonry's Motion for Judgment Not Withstanding the Verdict. (ROA ___) On the same contractual provision, the same judge ruled two different ways. (ROA ___, JLS Motion for Judgment Notwithstanding, filed September 22, 2023; JLS Motion for Reconsideration filed November 20, 2023; Form Order 4, filed November 8, 2023 denying JLS Motion for Judgment Notwithstanding, and Form 4 Order Denying Third-Party Defendant JLS Masonry, Inc. Motion For Reconsideration, filed December 12, 2023; TR. September 15, 2023, p. 868, 933-934) The Court affirmed the validity of section 10 of the parties' contract when that provision remained in the trial, when it sent the issue to the jury, and when during jury

deliberations the court answered the jury's question about indemnity. (ROA ____, TR. September 15, 2023, pp. 933-934) The Section 10 provisions in the JLS contract were exactly the same as those in the Galloway contract as stated in the motions for JNOV and reconsideration that JLS Masonry filed. The JLS Masonry and the Respondent's contractual indemnification provision below are identical. (ROA ___, JLS Contract and Galloway Contract) Galloway's contract provides:

> **10.1 GENERALLY**. To the fullest extent permitted by law, [Subcontractor] . . .hereby agrees to hold harmless, indemnify, protect and **defend** [DRH]…from and against any and all **demands**, **claims**, actions, causes of action, proceedings, lawsuits, settlements, judgments, fines, penalties, losses, attorney's fees, litigation costs, interest, and expenses of any kind … for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm, arising out of, or resulting from, or related in any way to the work performed and/ or the materials supplied under this contract, regardless of whether or not caused in part by indemnitee [DRH]." (emphasis added).

Long before trial, some of the other Third-Party Defendants moved for summary judgment in the fall of 2022 on the same basis as the Respondent's Motions for Summary Judgment and with substantially similar if not identical contractual provisions, (ROA ___, Defendant AJ Landscaping Grading's Notice of Motion and Motion for Summary Judgment filed, August 29, 2022; Third-Party Defendant Rite Rug Company, Inc. A/K/A Rite Rug Co.'s Motion for Partial Summary Judgment, filed August 26, 2022), but those were all denied. The only defendants whose summary judgment motions were granted were those whose entire body of work was within the Plaintiff's July 20, 2023 Stipulation that renounced claims against the Respondent and two other defendants. In November 2022, Judge Sprouse determined that "there are genuine issues of material fact in the claims between the Defendant and Third-Party Defendants," precluding summary judgment, and Judge Sprouse did not find that the provisions

in those contracts were not "clear and unequivocal." (ROA ___, Order, filed November 3, 2022) At the trial in September 2023, Judge Spouse denied the Defendant JLS Masonry's attempts to evade the contract between it and the Appellant. JLS Masonry made substantially the same arguments as did the Respondent for summary judgment –JLS Masonry even argued to the court that its contract is identical to the contract with the Respondent as to the contractual provisions of indemnification, duty to defend, and insurance at issue here. (ROA ___, JLS Motion for Judgment Notwithstanding, filed September 22, 2023; JLS Motion for Reconsideration filed November 20, 2023; Form Order 4, filed November 8, 2023 denying JLS Motion for Judgment Notwithstanding, and Form 4 Order Denying Third-Party Defendant JLS Masonry, Inc. Motion For Reconsideration, filed December 12, 2023; TR. September 15, 2023, p. 868, 933-934) *Judge Sprouse denied JLS Masonry's motion for judgment notwithstanding and motion for reconsideration* and distinguished the prior grants of summary judgment to the Respondent and two other defendants solely on the basis whether the work at issue was stipulated to not have any defects. That, however, is not a condition for defense under the Contracts. (ROA ___, Galloway Contract) JLS filed Motions arguing the same issues that the Respondent argued in its brief, and Judge Sprouse denied the JLS Masonry motions. (ROA ___, JLS Motion for Judgment Notwithstanding, filed September 22, 2023; JLS Motion for Reconsideration filed November 20, 2023; Form Order 4, filed November 8, 2023 denying JLS Motion for Judgment Notwithstanding, and Form 4 Order Denying Third-Party Defendant JLS Masonry, Inc. Motion For Reconsideration, filed December 12, 2023; TR. September 15, 2023, p. 868, 933-934) There are some things litigants should be able to expect and rely upon and that is that they will be treated similarly under similar circumstances. That did not happen here. The very same indemnity provision went to the jury after Judge Sprouse denied JLS Masonry's motion to

exclude it. This shows that how D.R. Horton was treated in regards to section 10 of the Contract in the order granting Galloway's motion for summary judgment was unjust. It proves there was no basis to deny D.R. Horton enforcement of its right to defense costs. (ROA ___, Tr. September 15, 2023, pp. 868, 933-934) The court's summary judgment order as to Respondent is so inconsistent with its other summary judgment orders that it renders most of the order dicta, at best. The court's order harms the Appellant as to its contractual rights beyond the denial of its defense costs. It undermines the Appellant's business model, which is based on hiring subcontractors to do all the work and holding them responsible for that work.

The Respondent agreed to defend the Appellant and that agreement includes demands or claims such as warranty claims, notices to cure, and litigation. The Appellant seeks those defense costs and asks the Court to remand the case for factual findings on those costs. The Respondent's attempt to avoid its obligation simply because the Plaintiff stipulated in late July 2023 for a September 2023 trial that it would not proceed on those claims at trial ignores the reality that sometimes defendants win, but defense costs are still incurred. That is this case. The Respondent seeks to punish D.R. Horton for winning as to the Respondent's work by denying it defense costs. That is illogical and against both commercial practice and the law.

This case is not about contractual indemnification for liability, contrary to the Respondent's assertions. It is about defense costs and additional insured rights. A duty to defend and an obligation regarding additional insured status are not the same thing as indemnification; and the Respondent is wrong to assert they are the same thing.[1] The construction litigation bar is

[1] D.R. Horton should prevail whether its attorneys' fees and defense costs fall under a duty to indemnify or a duty to defend because the trial court found no flaw with the same duty to indemnify provision it sent to the jury at trial.

small in South Carolina and every experienced attorney who practices in that area knows that a duty to defend is not the same as a duty to indemnify. The State of South Carolina knows it, too.

The two concepts are distinct, as the South Carolina General Assembly has repeatedly recognized and shown in its statutes. For example, the Legislature considered and *declined* to add a duty to defend to the anti-indemnity statute, S.C. Code Ann. § 32-2-10, when it considered an amendment to that statute. S. 422, 124th Sess. (2021). (ROA ____) The proposed amendment, in paragraph (D) would have expressly prohibited a duty to defend in construction contracts that include design professional services. Additionally, the proposed amendment *would not* have prohibited a duty to defend in construction contracts that did not include design professional services. *See* Paragraph (B), S. 422, 124th Sess. (2021). (ROA ___) The Legislature chose not to amend S.C. Code Ann. § 32-2-10 and the proposed amendment clearly shows the Legislature knows how to include a duty to defend when it wants to – *and it decided it does not want to*. The Legislature has clearly spoken on this issue and made clear that a duty to defend is not the same as a duty to indemnify. [2]

The Legislature has shown in other legislation, as well, that it knows how to draft a statute that includes separately both a duty to indemnify and a duty to defend. See e.g., H. 4048, 2022, 124th Sess. (S.C. effective date May 13, 2022); S.C. Code Ann. § 1-11-440 (repealed May 13, 2022); S.C. Code Ann. § 12-4-325 (repealed May 13, 2022) (passing legislation providing a duty to indemnify and a duty to defend). (ROA ____)

[2]Other state legislatures have separated duty to indemnify and duty to defend, as well. For example, the North Carolina Legislature amended its Chapter 22B, to prohibit a duty to defend in design professional contracts. N.C. §22-B-1(c). (ROA ____)

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Town of Winnsboro v. Wiedman*, 303 S.C. 52, 56, 398 S.E.2d 500 (Ct. App. 1990), *affd.* 307 S.C. 128, 414 S.E.2d 118 (1992). That is different from an obligation to defend. Indemnity involves payment to a third party. The obligation to defend is a direct obligation to the second party; there is no payment for defense to the third party. As a matter law, IBP's assertion that the duty to defend is the same as the obligation to indemnify, is wrong.

Third, in a thinly veiled attempt to smear D. R. Horton, the Respondent injects matters that occurred at trial—**after** the summary judgment motion had been granted and, therefore, could not possibly have affected it—but leaves out key facts that completely change its narrative. The trial began on September 5, 2023, six weeks after the Plaintiff's July 20, 2023 stipulation that the Respondent's work would no longer be included in the class claims. During trial D. R. Horton settled with the Plaintiff and, thus protected, it left the courtroom. Because of the settlement, the $15,000,000 verdict nominally against D. R. Horton is not a judgment that it will have to pay. The reason that it is against D. R. Horton in name only is that under the terms of the settlement the Plaintiff did not dismiss the case against D. R. Horton but instead agreed to exonerate D. R. Horton fully in exchange for D. R. Horton's contract rights against JLS Masonry, a third-party defendant masonry subcontractor. Those contract rights, like D. R. Horton's rights in its contract with Galloway-Bell, required JLS to defend and indemnify D. R. Horton. JLS refused to defend. The result was the substantial verdict. Clearly, the Plaintiff would not have settled on this basis if D.R. Horton's contract rights were not enforceable. They are now the foundation of Plaintiff's $15,000,000 judgment. In addition to these important facts, which were omitted by the Respondent in its brief, there is one more fact of importance: the trial judge

refused to grant JLS's motions on its contractual obligations to defend and indemnify even though they were the same as those of Galloway-Bell. On the same contract provisions, the same judge ruled two different ways. (ROA ___, Galloway Contract; JLS Masonry Contract, JLS Motion for Judgment Notwithstanding, filed September 22, 2023; JLS Motion for Reconsideration filed November 20, 2023; Form Order 4, filed November 8, 2023 denying JLS Motion for Judgment Notwithstanding, and Form 4 Order Denying Third-Party Defendant JLS Masonry, Inc. Motion For Reconsideration, filed December 12, 2023; TR. September 15, 2023, p. 868, 933-934) The Respondent omitted this fact, also.

Fourth, the Respondent claims that it should not have to honor its contractual obligations because its work was not included in the trial. However, that is not how the contractual obligations that address the duty to defend or the additional insured provisions work. The Respondent's perspective is that the Appellant is not entitled to its defense costs and attorney fees because it won. That position is absurd. It finds no support in the law or commercial transactions and would lead to undesirable outcomes if duty to defend and additional insured obligations only benefit litigation losers.

The Complaint includes 60 other Defendants, 10 Jane Does and 50 John Does. The Jane Doe Defendants are alleged to have been involved in the construction of the homes. (ROA __, Complaint, Paragraph 8) The John Doe Defendants are alleged to include "contractors, subcontractors, manufacturers, material suppliers, consultants, architects, engineers, real estate agents, managers, marketers, laborers, or otherwise." (ROA ___, Complaint, Paragraph 16). Everyone who had a hand in building the homes was a target. The Complaint is not against D. R. Horton alone. In page after page, allegations are made against the "Defendants," who include all the Jane Does and John Does.

Some of the allegations are specific. Others are more general, such as "failure of various and sundry building components" and negligence on the part of all Defendants "[i]n failing to develop the Residences in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices … and [o]ther deficiencies or failures as will be proven at trial." (ROA __, Complaint, Paragraphs 27 and 67)

The Complaint was filed as a class action on behalf of "All persons and entities that own a single family house developed by Defendants within the Rose Hill subdivision in the City of Easley, Anderson County, South Carolina." That is the way that it was certified as a class action by the court. (ROA __, Order Granting Plaintiff's Motion for Class Certification and Denying Defendant's Motion to Compel Arbitration, filed January 27, 2021) "The class concerns approximately two hundred and fifty (250) properties." (ROA __, Complaint, Paragraphs 35 & 36) It was not limited to specific claims or subcontractors.

The obligation of the Respondent to defend D. R. Horton was triggered upon the filing and service of the Complaint. Several months after filing the Complaint, counsel for the Plaintiff sent D. R. Horton a letter providing some more specifics about their claim. Those specifics included claims for defective insulation work. (ROA __, Notice and Opportunity to Cure Letter dated December 11, 2019, filed August 29, 2023 at 1:15 PM). The Respondent's work as an insulation contractor was implicated and the Appellant defended against the claims. (ROA__; Galloway-Bell, Inc. a/k/a Galloway-Bell, Inc II's Memorandum in Support of Its Motion for Summary Judgment as to Claims Asserted by Third-Party Plaintiff D.R. Horton, Inc., p. 3)

It is typical in business contracts that the parties allocate risk as part of the contract. The party assuming the risk is compensated accordingly, and such contracts typically include additional insured provisions such that one party provides insurance for the benefit of both

parties to cover claims regarding the work. Otherwise, situations arise in which the parties work at cross-purposes or efforts are duplicated – which the parties contracted to avoid in this case. Respondent assumed the insurance obligation, as well as an indemnification obligation and a duty to defend. The Respondent breached its agreement by failing to comply with the terms of the agreement.

CONCLUSION

The order under appeal is one granting a motion for summary judgment. Not only is there a "reasonable inference" concerning a "genuine issue as to any material fact", there is overwhelming evidence concerning the facts. Some of this is from the Plaintiff, some is from Galloway-Bell, and some is from the trial judge himself. The order granting summary judgment should be reversed and the case should be remanded to the trial judge for a trial on D. R.

Horton's contractual rights to attorneys' fees and expenses, including those to enforce its rights under its contract with the Respondent.

May 13, 2024

Respectfully,

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