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.

AJ Landscaping & Grading, LLC a/k/a A J Landscaping & Grading, LLC; 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-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., a/k/a Caryl Mechanicals, Inc.; Cannaday Siding & 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: Get Floored, LLC; GBS Building Supply; US LBM, LLC, f/k/a GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc., a/k/a Green Pastures of Aiken, LLC; IBS Asset, LLC d/b/a Blue Ridge Building Products; Installed

Building Products, LLC, a/k/a Installed Building Products II LLC; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danlar, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC, a/k/a M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC: Poinsett Homes, LLC; P&T Construction, Inc., a/k/a P & T Construction, Inc.; P & L Enterprises, LLC; Probuild Company, LLC a/k/a Probuild Holdings, Inc.; Rite Rug Company, Inc., a/k/a, Rite Rug Co.; Rodney Howard Grading Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractors Service; Tucker Materials, Inc, a/k/a Gypsum; Silver Line Building Products Corp.; Dupree Plumbing Co., Inc.; UTM Enterprises, Inc; and 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. The trial judge erroneously applied a standard of "clear and unequivocal" to the parties' contractual provisions requiring the Respondent to defend the Appellant against claims concerning the Respondent's work and provide insurance to protect the Appellant against those claims.

2. The trial judge erred in finding that the Respondent's duties to provide the Appellant a defense and insurance to protect it against claims concerning Respondent's work were not "clear and unequivocal" in the parties' contract.

3. The trial judge erroneously concluded that the Appellant was not damaged by the Respondent's breach of contract and refusal to defend the Appellant or pay its defense fees and expenses or have its insurance company do likewise.

4. The trial judge erroneously ruled that the duties to defend and provide insurance in the parties' contract were not severable from the remainder of the contract and enforceable.

STATEMENT OF THE CASE

On September 25, 2019, Plaintiff Natalie Zitek filed a Complaint against Appellant D.R. Horton, Inc. as the developer of the Rose Hill subdivision in Anderson County. Plaintiff's counsel served it in 2020. The Complaint alleged vague construction defects and was open-ended to allege more. The Plaintiff included unnamed Jane and John Does as sub-contractor co-defendants and asked the Court to certify a class of all owners of the houses in Rose Hill. (ROA pp. 55-69) Judge Cordell Maddox certified the class. (ROA pp. 1-14) Judge Sprouse later modified the class certification to include two subgroups: (1) original owners who purchased from D.R. Horton, and (2) those who purchased their homes from prior owners – "downstream purchasers." The class ultimately included approximately 220 homes.

Subsequently, the Plaintiff sent the Appellant a Notice and Opportunity to Cure dated December 11, 2019, which implicated certain of the Respondent's work. The Appellant moved to compel arbitration. On January 27, 2021 Judge Maddox denied that motion. Meanwhile, Covid 19 intervened. On February 23, 2022, the Appellant sued the Respondent and dozens of other sub-contractors as third-party defendants. It sought recompense from them for their acts or failures to act, contractual and equitable duties to indemnify, contractual duties to defend, and contractual duties to obtain insurance for the Appellant and name the Appellant as an additional insured.[1]

That is how the Respondent in this appeal was added to the case. The Respondent is Defendant Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II.

The case involved numerous sub-contractor parties, many discovery disputes in which the Appellant repeatedly attempted to obtain the discovery necessary to clearly understand what work was and was not being included for trial, (ROA pp. 70-96; 97-123; 20-21; 956-973; 987 line 1 – 990 line 22; 1056-1058; 980 line 21 – 984 line 18; 1001 line 12- line 1003 line 20), and motions by sub-contractors *to also gain clarity* as to what work was and was not being included for trial. (ROA pp. 951 line 10- 954 line 18) The Plaintiff did not remove any claims from the case until July 20, 2023, six weeks before trial, when it filed a Stipulation that, among other things, released claims concerning the Respondent's work. The Stipulation was filed at the direction of the Court and consistent with statements by the Plaintiff at a hearing on April 21,

[1] The Appellant asserted third-party claims against its sub-contractors, including contractual and equitable indemnification, duty to defend, breach of contract, breach of warranties, contribution, and negligence. (ROA pp. 70-96; 97-123)

2023, (ROA pp. 470-472; 984 lines 14-18), but the Plaintiff did not file a stipulation with regards to the work performed by the Respondent with specifics until July 2023. (ROA pp. 470-472)

On the eve of trial, on September 1, 2023, the Court granted summary judgment to the Respondent on the Appellant's Third-Party Complaint against it. (ROA pp. 1021 line 25 – 1023 line 11) The Appellant moved the Court to reconsider on September 11, 2023, (ROA pp. 473-659), which the Court effectively denied when it issued its expanded order on September 27, 2023. (ROA pp. 37-42) The Appellant then served its notice of appeal on October 25, 2023. (ROA pp. 918-937) Those summary judgment orders, FORM 4 and the expanded orders, are the summary judgment orders in the Notice of Appeal.[2]

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 Judgement, (ROA pp. 141-145; 146-149), except for the Plaintiff's July 20, 2023 Stipulation that renounced claims against the Respondent. The Court denied those motions by Order dated November 3, 2022. (ROA pp. 15-22) Judge Sprouse determined that "there are genuine issues of material fact in the claims

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[2] The Orders in the Notice of Appeal included the following, with copies of the Orders included with the Notice of Appeal. D.R. Horton, Inc. appeals the following Orders of the Honorable R. Scott Sprouse:

> Form 4 Order dated and filed September 27, 2023, granting Defendant Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II's Motion for Summary Judgment filed May 2, 2023, and the expanded Order dated and filed September 27, 2023, granting the same motion titled Order Granting Galloway-Bell, Inc. A/K/A Galloway-Bell, Inc II's Motion for Summary Judgment as To All Claims Asserted by Third-Party Plaintiff D.R. Horton, Inc., as well as the verbal Order on September 1, 2023, to which D.R. Horton, Inc. filed its Motion to Reconsider and/or Alter or Amend the Order Granting Third-Party Defendant Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II's Motion for Summary Judgment as to D.R. Horton, Inc.'s Third-Party Complaint dated and filed September 11, 2023. Counsel for the Appellant received written notice of entry of the Order effectively denying its Motion for Reconsideration by virtue of the Court's Orders referenced herein on September 27, 2023.

between the Defendant and Third-Party Defendants," precluding summary judgment and did not find that the provisions in those contracts were not "clear and unequivocal."

The Plaintiff and the Appellant settled during trial. The only matter on this appeal is the Court's grant of summary judgment to Respondent Galloway-Bell.

STANDARD OF REVIEW

The appellate court reviews the grant of a summary judgment motion *de novo* as to matters of law. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRP." *Savannah Bank, N.A. v. Stalliard,* 400 S.C. 246, 250, 734 S.E.2d 161, 163 (S.C. 2012) (quoting *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (S.C. 2002)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.'" *Id.* (quoting *Hancock v. Mid-South Mgmt. Co., Ins.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (S.C. 2009).

SUMMARY OF FACTS

Because the Plaintiff and the Appellant settled, no homeowner is involved in this appeal. The case is between the Appellant as a residential real estate developer and the Respondent as one of its sub-contractors whose work was brought into question. This appeal is not a consumer protection case and does not involve any home purchasers or consumer contracts.

This appeal is between sophisticated businesses. It involves the ruling of Judge Sprouse granting summary judgment to the Respondent and denying the Appellant its contracted-for and paid-for claims for defense or defense fees and expenses, and protection as an additional insured.

Fundamentally, this is an allocation of risk case between sophisticated businesses. The Appellant and the Respondent entered into contracts in which the Respondent agreed to perform certain construction services, agreed to defend the Appellant against claims concerning the Respondent's work or pay the Appellant's defense fees and expenses, and agreed to provide insurance to the Appellant via additional insured policy provisions *in exchange for* the Appellant paying compensation for all of these obligations. No one forced the Respondent to sign the contract and it has not repaid the Appellant one dime of what the Appellant paid the Respondent. This case is about businesses that determined how risk would be allocated among themselves and who would be responsible to defend against and cover claims.

The contract at issue involves indemnification, duty to defend, warranties, and additional insured provisions. The Respondent Galloway's obligations are contained in a printed form agreement titled "South Carolina Independent Contractor Agreement ('ICA')." Section 10 concerns the Respondent's indemnification and duty to defend obligations. Section 11 requires it to provide insurance for those obligations and to name the Appellant D. R. Horton as an additional insured. (ROA. pp.479-480; 1049-1054) Galloway admitted that it had performed work at the development and that the work it performed was included in the Plaintiff's July 2023 stipulation. (ROA pp. 360) (Galloway Memo in Support of Summary Judgment filed 7/11/2023, p. 13). Galloway's work was also included in the Plaintiff's December 11, 2019 Notice and Opportunity to Cure.

Insurance and duties to defend are more than theoretical in this case. They are critical because the Appellant was left by the Respondent to fend off all the Plaintiff's claims by itself after the Respondent and its insurance company failed to provide the Appellant a defense. The claims included the claims in the Notice to Cure and the Plaintiff's Complaint, which was

deliberately open-ended to expand the universe of claims. 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 220 houses, and requiring the Plaintiff to provide discovery and evidence of its 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.

The Appellant suffered reputational harm, as well.

It is a supreme irony—and injustice—that it was through the Appellant's shouldering of the defense of the Respondent's work that the Plaintiff finally stipulated the Respondent out of the case, and yet the Respondent has failed and refused to live up to its contractual obligation to provide that defense for the Appellant or have its insurance company provide it.

Respondent Galloway's work consisted of attic insulation. (ROA pp. 360) (Galloway Memo in Support of Summary Judgment filed 7/11/2023, p. 13). Galloway is a sophisticated contractor that knew what its obligations were, including its obligations to indemnify, defend, and insure.

After the Plaintiff sued the Appellant and provided it with a Notice to Cure deficiency, the Appellant tendered the claims to the various sub-contractor respondents to defend. Neither Galloway-Bell nor its insurance company provided D.R. Horton a defense. Instead, the Respondent filed a motion for summary judgment to evade its obligations and its insurance company's obligations under the duty to indemnify and duty to defend provisions of its contract. (ROA pp. 276-299) The Respondent received the full benefit of the contract which it entered into

– it was provided the work, it was paid for the work, and it was paid for the duty to indemnify, duty to defend, and duty to provide insurance as part of the total compensation package for the contractual obligations and performance of the work.

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 Appellant relied upon these contractual provisions. (ROA pp. 1049-1055; 1000 lines 14-17; 1005 line 20 – 1006 line 19) The Respondent breached its agreement by failing to comply with the terms of the agreement.

After the Plaintiff finally filed a Stipulation on July 20, 2023 that she was not proceeding with claims for the Respondent's work, the Court granted the Respondent full summary judgment over the Appellant's objection. This included the Appellant's claim for the attorneys' fees and expenses that it incurred in defense. The Plaintiff's eve of trial Stipulation did not make all the years of fees and expenses disappear; nor did it repair the reputational harm that the Appellant suffered as a result of the claims having been brought and litigated for years. The parties' contracts and the Appellant's resulting damage from the Respondent's breach are clear.

In granting summary judgment, the Court went far beyond the Plaintiff's July 20, 2023 Stipulation dropping claims against the Respondent. Even though the Stipulation removed only negligence from the case, Judge Sprouse nevertheless wrongly applied the "clear and unequivocal" standard applicable only to concurrent or sole negligence to eliminate the

Respondent's defense and insurance obligations. Those were completely different. They did not depend upon negligence. They arose under contract. Making the matter worse, Judge Sprouse's grant of summary judgment to the Respondent was directly contrary to his own earlier rulings **denying summary judgment** to other third-party defendant sub-contractors that had filed for summary judgment earlier. (ROA pp. 15-22; 1033 lines 12-1034 line 5 T.R. (9/15/2023) p. 20-21 (Note: pagination changed when transcript from 9/11/2023 – 9/15/2023 is used). Their contracts were similar to those of the Respondent in all material respects. Judge Sprouse commented about what appears to be an inconsistency in granting summary judgment to some third-party defendants and not others.

> The other claims were made at summary judgment, those motions for summary judgment were denied, because there was some allegation that those third parties had committed negligence of some sort. Again, I have to consider this in a light most favorable to the non-moving party, and I'm going to find that there is some evidence in the record that a reasonable jury could base its decision in favor of the claim, so I'm going to deny the motion for a directed verdict.

(ROA pp. 15-22; 1033 lines 12-1034 line 5 TR. 9/15/2023 pp. 20-21)

In contrast to his written Order granting summary judgment (likely drafted by counsel for the Respondent) Judge Sprouse said that he granted summary judgment due to there being no negligence based on Plaintiff's Stipulation -- *not* because the contract at issue was not "clear and unequivocal."

ARGUMENTS

1. THE TRIAL JUDGE ERRONEOUSLY APPLIED A STANDARD OF "CLEAR AND UNEQUIVOCAL" TO THE PARTIES' CONTRACTUAL PROVISIONS REQUIRING THE RESPONDENT TO DEFEND THE APPELLANT AGAINST CLAIMS CONCERNING THE RESPONDENT'S WORK AND PROVIDE INSURANCE TO PROTECT THE APPELLANT AGAINST THOSE CLAIMS.

There was no need for the Court to decide whether the parties' indemnity provision was "clear and unequivocal" because there was no concurrent or sole negligence of indemnitee at

issue when the Court issued its ruling. The Plaintiff stipulated the Respondent's work would not be an issue at trial, which meant that the Appellant's work related to the Respondent's work would also not be an issue at trial. The Stipulation was filed in July 2023 and the Court's summary judgment ruling for the Respondent was filed in September 2023. Nonetheless, based on the Order Respondent prepared in the case, the Court ruled that the indemnity provisions did not comply with the requirements set forth in *Concord & Cumberland Horizontal Prop. Regime v. Concord Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) and were therefore unenforceable.[3] This portion of the Court's order is either dicta or moot because the case's posture is not similar to *Concord.* This case sits differently from the typical construction case in which *Concord* might be applied. After the Stipulation in this case, there was no concurrent or sole negligence by the indemnitee, nor the Respondent's work, nor is the Respondent being asked to provide relief for any concurrent or sole negligence by indemnitee. The lynchpin of *Concord* stems from an indemnitee's concurrent or sole negligence. The court in *Concord* held that when a party seeks indemnification for its own concurrent negligence, the "clear and unequivocal" standard applies. *Id.* at 649, 172. Additionally, "when an indemnity clause purports 'to relieve an indemnitee from the consequences of its own negligence,' [South Carolina] case law requires strict construction of the clause." *Id.* at 650, 172 (quoting *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 378-379 (2003)).

However, *Concord* does not relieve indemnitors of their own wrongdoing or their duties to insure or defend an indemnitee for an indemnitor's own wrongdoing or wrongdoing an

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[3] The duty to indemnify, duty to defend, and duty to insure are set forth in the ICA included in the ROA.

indemnitor is claimed to have done, such as when a claim is made that may later be rescinded by a plaintiff or potential plaintiff. This appeal is focused on the Respondent's duties to indemnify and defend the Appellant from claims alleged about the *Respondent's* work. Once the Plaintiff stipulated she was not planning to pursue claims related to the Respondent's work at trial, there was no allegation of concurrent or sole negligence by Appellant regarding the Respondent's work. Thus *Concord* is not relevant to this appeal.

2. THE TRIAL JUDGE ERRED IN FINDING THAT THE RESPONDENT'S DUTIES TO PROVIDE THE APPELLANT A DEFENSE AND INSURANCE TO PROTECT IT AGAINST CLAIMS CONCERNING RESPONDENT'S WORK WERE NOT "CLEAR AND UNEQUIVOCAL" IN THE PARTIES' CONTRACT.

If the Court determines that *Concord* applies, the indemnity provisions between the Appellant and Galloway closely track the language suggested by the court in *Concord* and provide that Galloway will indemnify the Appellant for certain losses regardless of whether or not the losses were caused in part by the Appellant. The indemnity provision "clearly and unequivocally" shows that the parties intended to absolve the Appellant of the consequences of its own concurrent negligence. Therefore, the indemnity provision meets the standard set forth in *Concord* and is enforceable.

The Respondent's ICA provides that the Respondent shall provide the defense in the event any demands, claims, actions, causes of action . . . are made regarding the Respondent's work. The Plaintiff sent the Appellant a Notice to Cure defects that implicated Galloway's work and filed a Complaint against the Appellant for defects at the subdivision. Together they clearly implicated the Respondent's work. The Respondent's contract with the Appellant provides that the Respondent will provide defense costs and defend the Appellant. When the Respondent failed to do so, the Appellant provided the defense and should now be reimbursed. 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).

The Respondent agreed to defend the Appellant. 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 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.

What the Court did in its order granting summary judgment was to relieve the Respondent of its duty to defend the Appellant from claims alleged by the Plaintiff as to the Respondent's work and foisted the sole cost and expense of the defense on the Appellant. The contract specifically provides that the Respondent is responsible to provide the defense, to pay the costs of the defense and to insure the Appellant. The parties allocated the risk for the cost of defense and insurance to the Respondent for any claims about the Respondent's work, but the Court's order improperly changes that allocation. The Court rewrote the parties' contract, which is something that it is not allowed to do. It is well-settled law in South Carolina that courts must enforce an unambiguous contract according to its terms regardless of whether the court thinks a party failed to carefully protect its rights. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). Additionally, the court's primary objective in interpreting a contract is to determine and make operative the intentions of the parties. *Ecclesiastes Prod. Ministries,* 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App.

2007); *S. Atl. Fin. Servs.*, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct. App. 2002); *accord D.A. Davis Constr. Co. Inc. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984); *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976); *RentCo., a Div. of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct. App. 1984). "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958).

The Appellant paid for the work to be performed and for the allocation of risk set forth in the contract. Just as an insurance company must pay the defense costs for its insured driver in an accident even if that driver is later found to be not at fault or if the case against it is dropped, so too must the Respondent pay to defend against the Plaintiff's claims in this case. "Winning" does not extinguish the Appellant's right to be defended or the Respondent's obligation to defend.

But again, the question concerning "clear and unequivocal" in this case is dicta or moot because no concurrent or sole negligence is at issue. (See ROA 470-472; 1049-1055, Galloway ICA).

3. THE TRIAL JUDGE ERRONEOUSLY CONCLUDED THAT THE APPELLANT WAS NOT DAMAGED BY THE RESPONDENT'S BREACH OF CONTRACT AND REFUSAL TO DEFEND THE APPELLANT OR PAY ITS DEFENSE FEES AND EXPENSES OR HAVE ITS INSURANCE COMPANY DO LIKEWISE.

The Court's Order finding that the Appellant had not provided any evidence that it had incurred any costs regarding the Respondent's work is baffling. It is an incontrovertible fact that from the time that the Plaintiff filed her Complaint and issued her Notice to Cure defect to the Appellant, defense attorneys' fees and expenses began to be incurred by the Appellant. The Appellant tendered the defense to the Respondent for the Respondent to provide a defense pursuant to the terms of the contract. When the Respondent failed to provide the defense, either

directly or through its insurance company, the Appellant was forced to do so itself. As discussed previously and as evidenced by the numerous court filings pertaining to the claims against Galloway, it is readily apparent that the Appellant incurred significant attorney's fees and costs defending against the Plaintiff's claims. The Appellant rightly believes that its defense was instrumental in getting the Plaintiff to stipulate that the claims against the Respondent would not be pursued, and that the Appellant should be reimbursed for those defense fees and expenses. The Appellant also incurred expenses inspecting the homes and suffered reputational harm resulting from the Plaintiff's claims against the Respondent and its work. The Appellant should have been allowed its day in court to prove the amounts it was entitled to after the Respondent failed to provide the required defense.

The Court was aware of the existence of attorneys' fees and costs because the Court held the hearings, received the motions, and issued orders regarding the motions. While the amount of the attorneys' fees and costs was not yet presented to the court because doing so was premature at the pretrial phase, the fact of their existence was obvious.

4. THE TRIAL JUDGE ERRONEOUSLY RULED THAT THE DUTIES TO DEFEND AND PROVIDE INSURANCE IN THE PARTIES' CONTRACT WERE NOT SEVERABLE FROM THE REMAINDER OF THE CONTRACT AND ENFORCEABLE.

Section 10.1 of Respondent's contract, which describes Respondent's indemnity and defense obligations to the Appellant, lists the duties separately, - sub-contractor agrees to "hold harmless, indemnify, protect and defend" Appellant. (ROA pp. 1052) For emphasis, the entire section is in all capital letters, bold, and font larger than the remainder of the contract. The indemnity obligation in Section 10.1 is enforceable and the duty to defend obligation in Section 10.1 is enforceable. There is no law in South Carolina that limits or prohibits enforcement of either of the obligations as they are written and were agreed to by the parties.

If either of the indemnity or duty to defend obligations is determined to be unenforceable, which Appellant thinks neither should be, then the unenforceable obligation is severable as a separate, distinct, and independent obligation from the other obligation. The South Carolina Supreme Court has long allowed the severability of contracts.

> In *Packard Field v. Byrd*, 73 S.C. 1, 51 S.E. 678 (1905), our Court previously articulated the general rule with regard to the severability of contracts: . . . 'A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention.'

Columbia Architectural Grp. v. Barker, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (S.C. 1980) (quoting *Packard Field v. Byrd*, 73 S.C. 1, 6, 51 S.E. 678, 679 (S.C. 1905)).

The intent of Respondent and the Appellant in this case is clear from the contract. The Respondent expressly agreed to an obligation to indemnify and a duty to defend. It even agreed to provide insurance to cover those obligations.

Imposing the same standard on the duty to defend as the duty to indemnify ignores the established principle that the duty to defend is broader than the duty to indemnify.

If more is needed, there is ample evidence elsewhere. In multiple statutes, the General Assembly has treated indemnity and defense obligations separately. *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), and S.C. Code Ann. § 12-4-325 (repealed May 13, 2022). Indemnity and defense obligations are commonplace and likewise separately treated in many commercial transactions, including all or virtually all liability insurance contracts. For example, in *Sloan Const. Co. v. Cent. Nat'l Ins. of Omaha*, 269 S.C. 183, 236 S.E.2d 818 (S.C. 1977), the South Carolina Supreme Court held that duty to defend and indemnity obligations are separate and distinct.

> A liability insurance policy contains two insuring provisions of major significance: one, providing for the payment by the insurer of sums the insured shall become obligated to pay, the other providing, in substance, for the defense . . . . The duty to defend is separate and distinct from the obligation to pay a judgment. . . .

Id. at 186 (citing *Am. Cas. Co. v. Howard*, 187 F.2d 322, 327 (4th Cir. 1951)).

It is noteworthy that *Sloan* does not rest on the fact that the contract under consideration was one for insurance. *Id.* There is nothing in the law or logic that limits severability of indemnity and defense provisions to insurance policies.

The Respondent may attempt to argue insurance as a limiting factor; however, the parties' contract undermines that argument completely. Section 11.1 of the contract requires the Respondent to provide insurance for the work and Section 11.3 then requires the Respondent to add the Appellant as "a named, Additional Insured." Insurance was a part of the parties' overall contractual arrangement.

"It is well-established under South Carolina law that forfeitures of insurance contracts are not favored." *Johnson v. S. State Ins. Co.*, 288 S.C. 239, 241, 341 S.E.2d 793, 794 (S.C. 1986) (citing *Trakas v. Globe Rutgers Fire Ins.*, 141 S.C. 64, 68, 139 S.E. 176, 177 (S.C. 1927)) (holding that an insurance policy was severable). The grant of summary judgment to the Respondent was a forfeiture of the insurance provision in the contract and a windfall to the Respondent's insurance company. That is against the law.

CONCLUSION

The Appellant requests that the Court reverse Judge Sprouse's summary judgment order in favor of the Respondent and remand the case for trial on D.R. Horton's third-party-claim against the Respondent. If the Court reaches the merits on the contractual obligations, the Appellant requests that the Court determine that (1) the contractual indemnity and duty to defend

obligations are (a) enforceable, (b) separate and distinct obligations, (c) severable if any part of the contract is not enforceable, (2) the duty to defend was not extinguished due to the Plaintiff's eve of trial Stipulation, (3) that Judge Sprouse's reliance on "clear and unequivocal" as the standard of decision in this case was error, and (4) that the Appellant's defense expenses, including attorneys' fees, and reputational harm are proper elements of its claim for damages.

July 1, 2024

Respectfully,

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

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.

AJ Landscaping & Grading, LLC a/k/a A J Landscaping & Grading, LLC; 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-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., a/k/a Caryl Mechanicals, Inc.; Cannaday Siding & 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: Get Floored, LLC; GBS Building Supply; US LBM, LLC, f/k/a GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc., a/k/a Green Pastures of Aiken, LLC; IBS Asset, LLC d/b/a Blue Ridge Building Products; Installed

Building Products, LLC, a/k/a Installed Building Products II LLC; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danlar, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC, a/k/a M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC: Poinsett Homes, LLC; P&T Construction, Inc., a/k/a P & T Construction, Inc.; P & L Enterprises, LLC; Probuild Company, LLC a/k/a Probuild Holdings, Inc.; Rite Rug Company, Inc., a/k/a, Rite Rug Co.; Rodney Howard Grading Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractors Service; Tucker Materials, Inc, a/k/a Gypsum; Silver Line Building Products Corp.; Dupree Plumbing Co., Inc.; UTM Enterprises, Inc; and 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.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

July 1, 2023

Respectfully,

s/Carl F. Muller, SC Bar #4131
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