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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

Case No. 2019CP041942
Appellant 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.

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., ... 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.

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 Respondents to defend the Appellant against claims concerning the Respondents' work and provide insurance to protect the Appellant against those claims.

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

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

4. The trial judge erroneously ruled that the duties to defend and provide insurance in the parties' contracts were not severable from the remainder of the contracts 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. 94 Paragraph 8; 95 Paragraph 16; 97-98 Paragraphs 35 & 36; 834. 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 both Respondents' 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 Respondents 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]

The Respondents are Defendant Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractor Services, improperly named as TopBuild Home Services, Inc., a/k/a Gale Contractors Service) and Defendant IBP Assets, LLC d/b/a Blue Ridge Building Products. The Respondents are referred to as Gale and IBP, respectively.

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. 1423 line 21-1425 line 11; 1431 line 23-1439 line 22; 1461 line 17-1462 line 21; 1462 line 25 – 1463 line 5; 1371 line 22-1388 line 3, and motions by sub-contractors *to also gain clarity* as to what work was and was not being

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[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. 298-324; 263-289.

included for trial. ROA pp. 25; 1311 line 15-1313 line 16; 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 Respondents' work. The Stipulation was filed at the direction of the Court and consistent with statements by the Plaintiff at a hearing on April 21, 2023, ROA p. 1425 line 16-1427 line 18, but the Plaintiff did not file a stipulation with regard to the work performed by the Respondents with specifics until July 2023. ROA pp. 969-971; 926-927.

On the eve of trial, August 7 and 23, 2023, the Court granted summary judgment to the Respondents on the Appellant's Third-Party Complaint against them. ROA pp. 42-52; 70-79. The Appellant moved the Court to reconsider the Orders on August 7, 2023 and August 8, 2023, ROA pp. 972-989; 990-1011, the Court denied the motions. ROA pp. 66-69. The Appellant then served its Notice of Appeal on September 6, 2023. ROA pp. 1012-1124. Those summary judgment orders, FORM 4 and the two expanded orders, are the summary judgment orders in the Notice of Appeal.[2]

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[2] The Orders in the Notice of Appeal, included the following, which copies of the Orders are included with the Notice of Appeal. Appellant is moving forward on appeal with the Orders in numbers 1, 2, and 7 below.

D.R. Horton, Inc. appealed the following Orders of the Honorable R. Scott Sprouse:

1. Form 4 Order granting Defendant Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractor Services, improperly named as TopBuild Home Services, Inc., a/k/a Gale Contractors Service) Motion for Summary Judgment dated and filed July 28, 2023 and the expanded Order granting the same motion titled Proposed Order Granting Builders Services Group, Inc. d/b/a Gale Contractor Services' Motion for Summary Judgment dated and filed August 7, 2023, as well as the Order denying D.R. Horton, Inc.'s Motion to Reconsider and/or Alter or Amend the Order Granting Third-Party Defendant Builders Services Group, Inc. d/b/a Gale Contractor Services' Motion for Summary Judgment as to D.R. Horton, Inc.'s Third-Party Complaint dated and filed August, 18, 2023. Counsel for the Appellant received written notice of entry of the Order denying reconsideration on August 18, 2023.

2. Form 4 Order granting Defendant IBP Assets, LLC d/b/a Blue Ridge Building Products Motion for Summary Judgment dated and filed July 26, 2023 and the expanded Order Granting Motion for Summary Judgment dated and filed August 23, 2023 granting the same relief, as well as the Order denying D.R. Horton, Inc.'s Motion to Reconsider and/or Alter or Amend the Order Granting Third-Party Defendant IBP Asset, LLC

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, ROA pp. 368-372; 373-374, except for the Plaintiff's July 20, 2023 Stipulation that renounced claims against the Respondents. The Court denied those motions by Order dated November 3, 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 did not find that the provisions in those contracts were not "clear and unequivocal." ROA pp. 15-22.

The Plaintiff and the Appellant settled during trial. The only matters on this appeal are the Court's grant of summary judgment to the two Respondents Gale and IBP.

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d/b/a Blue Ridge Building Products' Motion for Summary Judgment as to D.R. Horton, Inc.'s Third-Party Complaint dated and filed August, 18, 2023. Counsel for the Appellant received written notice of entry of the Order denying reconsideration on August 18, 2023. On August 31, 2023, Appellant served and filed a Motion for Reconsideration of the Expanded Order Granting Motion for Summary Judgment filed August 23, 2023.

3. Order denying Defendant D.R. Horton, Inc.'s Motion to Decertify dated and filed July 19, 2023, as well as the Order denying Defendant D.R. Horton, Inc.'s Motion to Alter or Amend Order Denying Motion for Decertification dated and filed August 18, 2023. Counsel for the Appellant received written notice of entry of the Order denying reconsideration on August 18, 2023.

4. Amended Scheduling Order dated and filed February 15, 2023. Counsel for the Appellant received written notice of entry of the Order on February 15, 2023.

5. Order (untitled but addressing several issues) dated and filed May 8, 2023. Counsel for the Appellant received written notice of entry of the Order on May 8, 2023.

6. Trial Plan Order dated and filed August 17, 2023. Counsel for the Appellant received written notice of entry of the Order on August 17, 2023. Appellant's Motion for Reconsideration was filed August 28, 2023, and supplemented on August 31, 2023, by Defendant D.R. Horton, Inc.'s Brief in Support of Motion to Reconsider Trial Plan Order.

7. Form 4 Order dated and filed August 18, 2023, denying all pending Motions to Reconsider by all parties. Counsel for the Appellant received written notice of entry of the Order denying reconsiderations on August 18, 2023.

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 Respondents as two 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 Respondents 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 Respondents entered into contracts in which the Respondents agreed to perform certain construction services, agreed to defend the Appellant against claims concerning the Respondents' 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 Respondents to sign these contracts and they have not repaid the Appellant one dime of what the Appellant paid the Respondents. 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 contracts at issue involve indemnification, duty to defend, warranty, and additional insured provisions. The Respondent IBP's obligations are contained in a printed form agreement titled "South Carolina Independent Contractor Agreement ('ICA')." Section 10 concerns its indemnification and duty to defend obligations. Section 11 requires IBP to provide insurance for those obligations and to name the Appellant D. R. Horton as an additional insured. ROA. pp. 909-910. Respondent Gale's contractual provisions are contained in an Addenda that also includes indemnification, duty to defend, and additional insured provisions. ROA pp. 1530-1552. Both Respondents admitted that they had performed work at Rose Hill and that the work they performed was included in the Plaintiff's July 2023 Stipulation. ROA pp. 632-697; 604-631; 42-52; 358; 72 Both of the Respondents' 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 Respondents to fend off all the Plaintiff's claims by itself after the Respondents and their respective insurance companies 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 Respondents' 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 Respondents' work that the Plaintiff finally stipulated the Respondents out of the case, and yet the Respondents have failed and refused to live up to their contractual obligations to provide that defense for the Appellant or have their insurance companies provide it.

Respondent IBP's work consisted of gutters, attic insulation, and door hardware. ROA pp. 358; 72 (Court's Order, 8/23/20223). IBP is a sophisticated contractor. IBP knew what its obligations were, including its obligations to indemnify, defend, and insure.

According to the Appellant's vendor spend reports and the Respondent Gale's admissions, Respondent Gale's work included "installing of garage doors, gutters, downspouts, and batt and blown insulation." Gale's scope of work is derived from Gale's work tickets and purchase orders, which identifies all of the work that Gales (sic) performed at Rose Hill, the dates the work was performed, how much Gale was paid for the work, etc." ROA pp. 632-697; Gale Memo in Support of Summary Judgment 7/10/2023 and Court's Order, 8/7/2023). ROA pp.

604-631; 42-52. Gale is also a sophisticated contractor. Gale knew what its obligations were, including its obligations to indemnify, defend, and insure.[3]

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. ROA pp. 960-961. Neither IBP nor Gale nor their respective insurance companies provided D.R. Horton a defense. Instead, the Respondents filed motions for summary judgment to evade their obligations and their insurance company's obligations under the duty to indemnify and duty to defend provisions of their contracts. ROA pp. 356 – 361; 362-367; 377-390; 600-603; 604-631. Each Respondent received the full benefit of the contract which they entered into – they were provided the work, they were paid for the work, and they were 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. Each 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. 451; 831-837;

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[3] Gale attempts to avoid liability by alleging there is no contract between the parties. However, the Addenda show there was a contract and that the contract was negotiated. Additionally, the Appellant fully performed its side of the contract when it allowed Gale to perform the contracted for work and fully paid Gale for its work and its duties to defend, indemnify, and insure the Appellant. The Addenda include the indemnity, duty to defend, and insurance provisions for which Gale is liable.

838-898; 913-968; 1447 lines 5-24; 1452 lines 7-16; 1453 lines 1-17; 1480 lines 3-19; 974-988; 992-1010. The Respondents breached their agreements by failing to comply with the terms of the agreements.

After the Plaintiff finally filed a Stipulation on July 20, 2023 that she was not proceeding with claims for the Respondents' work, the Court granted the Respondents 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 Respondents' breach are clear.

In granting summary judgment, the Court went far beyond the Plaintiff's July 20, 2023 Stipulation dropping claims against the Respondents. 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 Respondents' 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 Respondents 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. 368-372; 373-376; 15-22; 33-35; 36-38; 39-41; 42-52. Their contracts were similar to those of the Respondents 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. 1514-1515. TR. 9/15/2023 pp. 20-21 (Note: pagination changed due to a multi-day transcript being used instead of just September 15, 2023).

In contrast to his written Orders granting summary judgment (likely drafted by counsel for the Respondents), Judge Sprouse said that he granted summary judgment due to there being no negligence based on Plaintiff's Stipulation -- not because the contracts were not "clear and unequivocal."

ARGUMENTS

1. THE TRIAL JUDGE ERRONEOUSLY APPLIED A STANDARD OF "CLEAR AND UNEQUIVOCAL" TO THE PARTIES' CONTRACTUAL PROVISIONS REQUIRING THE RESPONDENTS TO DEFEND THE APPELLANT AGAINST CLAIMS CONCERNING THE RESPONDENTS' 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 Respondents' work would not be an issue at trial, which meant that the Appellant's work and claims related to the Respondents' work would also not be an issue at trial. The Stipulation was filed in July, 2023 and the Court's summary judgment rulings for the Respondents were filed in August, 2023. Nonetheless, based on the Orders the Respondents 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.[4] 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 concerning the Respondents' work, nor are the Respondents being asked to provide relief for any such concurrent or sole negligence of 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 from their own wrongdoing or their duties to insure or defend an indemnitee for an indemnitor's own wrongdoing or wrongdoing an indemnitor is claimed to have done, such as when a claim is made that may later be rescinded by a plaintiff or potential plaintiff. *Concord* did not address duty to defend or provide insurance. This appeal is focused on the Respondents' duties to indemnify and defend the Appellant from claims alleged about *Respondents'* respective work. Once the Plaintiff stipulated she was not planning to pursue claims related to the Respondents' work at trial, there was no allegation of concurrent or sole negligence by the Appellant regarding the Respondents' work. Thus, *Concord* is not relevant

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

to this appeal.

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

If the Court determines that *Concord* applies, the indemnity provision between the Appellant and IBP closely tracks the language suggested by the Court in *Concord* and provides that IBP 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 IBP ICA provides that Respondent IBP shall provide the defense in the event any demands, claims, actions, causes of action . . . are made regarding Respondent IBP's work. The Plaintiff sent the Appellant a Notice to Cure defects that implicated IBP's work and filed a Complaint against the Appellant for defects at the subdivision. Together, they clearly implicated IBP's work. IBP's contract with the Appellant provides that IBP will provide defense costs and defend the Appellant. When IBP failed to do so, the Appellant provided the defense and should now be reimbursed. IBP'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).

Respondent Gale argues that the Appellant cannot recover for its defense costs from Gale because no ICA was produced regarding Gale. That argument fails for many reasons. First, allowing Gale to avoid its defense cost obligations provides a windfall to Gale and imposes upon the Appellant the costs associated with having to defend Gale's work in this litigation. Second, Gale has admitted that it performed work at Rose Hill that included "installing of garage doors, gutters, downspouts, and batt and blown insulation. Gale's scope of work is derived from Gale's work tickets and purchase orders, which identifies all of the work that Gales (sic) performed at Rose Hill, the dates the work was performed, how much Gale was paid for the work, etc." ROA pp. 604-830 (Gale Memo in Support of Summary Judgment 7/10/2023). Despite all of that detailed information that Gale kept, Gale surprisingly—even unbelievably—says that it cannot find the contract between the parties. ROA pp. 618-620. Third, while Gale did not produce the contract, Gale has not asserted that it did not have an ICA with the Appellant for its work at Rose Hill; nor has it asserted that the Addenda included in the record did not apply to that work. ROA pp. 618-620; 747-769; 1476 lines 2-23.

Fourth, and in contrast, the Appellant produced the Addenda in the record, the insurance contract that Gale provided to the Appellant as required under the contract, and provided the Court with every ICA that the Appellant used at Rose Hill. ROA pp. 831-853; 854-898; 1530-1554. Fifth, the Appellant requires *every* contractor and sub-contractor that it hires to execute an ICA and provide the Appellant with insurance coverage as an additional insured before being allowed to work in the Appellant's developments. Sixth, the Appellant prices its contracts with the trades that perform the work at its developments to include compensation to the contractors and sub-contractors for their obligations to indemnify, defend and insure. It is a pure allocation of risk and decision among the parties for which they contract and for which Gale was

compensated. Gale now attempts to escape even its basic obligation to defend the Appellant and provide the contract for insurance by saying that it cannot find its contract; yet it could find the details of the work it performed. Seventh, even the most sub-contractor favorable ICA used at Rose Hill would require Gale to provide the Appellant indemnification, a defense, and insurance. Gale should not be allowed to escape its obligations and obtain a windfall from the Appellant in the form of attorneys' fees and expenses of litigation that the Appellant expended to defend Gale's work.

For the reasons discussed above regarding IBP's ICA being "clear and unequivocal" as to the claims regarding IBP's work, so too is the Gale ICA "clear and unequivocal" as to Gale's work. Gale is not being asked to indemnify, defend, or insure the Appellant for the Appellant's sole negligence because there was none related to Gale's work. Gale also is not being asked to indemnify, defend, or insure the Appellant for the Appellant's concurrent negligence because there was none related to Gale's work. For there to be concurrent negligence by the Appellant, there first would have had to have been negligence by Gale regarding the work, but the Plaintiff's eve of trial Stipulation that she was not proceeding with any such claims against Gale, also meant that she was not proceeding with any such claims against the Appellant.

But still, a defense had to be mounted and money spent to do so. Gale refused to provide the defense, so the Appellant was forced to. Had the Appellant simply ignored the Complaint and Notice to Cure defects, the Plaintiff would have had an easy path to prevailing, which would have made Gale liable for damages. Instead, the Appellant challenged the Plaintiff's evidence and required the Plaintiff to substantiate her claims, which ultimately led to Gale's work being excluded from the suit. That did not just happen without effort or expense.

Appellant should have been provided its day in court to provide evidence of the amount it spent defending Gale's work and IBP's work. Win or lose in litigation, defense costs exist.

The Respondents agreed to defend the Appellant. The Appellant seeks those defense fees and expenses and asks the Court to remand the case for factual findings on those costs. The Respondents' attempt to avoid their obligations 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 both Respondents of their duties to defend the Appellant from claims alleged by the Plaintiff as to the Respondents' work and foisted the sole cost and expense of the defense on the Appellant. The contracts specifically provide that the Respondents are 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 Respondents for any claims about the Respondents' 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 contracts. 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 Respondents pay to defend against the Plaintiff's claims in this case. "Winning" does not extinguish the Appellant's right to be defended or the Respondents' obligation to defend.

But again, the question concerning "clear and convincing" in this case is dicta or moot because no concurrent or sole negligence is at issue. See ROA pp. 969-971; 906-912, IBP ICAs.

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

The Court's Orders finding that the Appellant had not provided any evidence that it had incurred any costs regarding IBP's and Gale'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 defects to the Appellant, defense attorneys' fees and expenses began to be incurred by the Appellant. The Appellant tendered the defense to the Respondents for each of them to provide a defense pursuant to the terms of the contracts. When neither provided the defense, either directly or through their insurance companies, the Appellant was forced to do so itself. As discussed previously and as evidenced by the numerous court filings pertaining to the claims against IBP and Gale, it is readily apparent that the Appellant incurred significant attorneys' fees and expenses defending against the Plaintiff's claims. Gale acknowledges this in its Memo in

Support of Summary Judgment, ROA pp. 604-631, in which it details hearings, deposition testimony, and other litigation activities that the Appellant engaged in regarding Gale's work. The record is filled with similar activities related to IBP's work. The Appellant rightly believes its defense was instrumental in getting the Plaintiff to stipulate that the claims against the Respondents 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 it arising through the Respondents and their work. The Appellant should have been allowed its day in court to prove the amounts it was entitled to after both Respondents 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 pre-trial 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' CONTRACTS WERE NOT SEVERABLE FROM THE REMAINDER OF THE CONTRACTS AND ENFORCEABLE.

Section 10.1 of Respondent IBP's contract, which describes the Respondents' indemnity and defense obligations to the Appellant, list the duties separately, -- sub-contractor agrees to "hold harmless, indemnify, protect and defend" Appellant. ROA p. 909. 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. The language is the typical ICA language used at the development, which would include Gale, as well. 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 the 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 the Respondents and the Appellant in this case is clear from their contracts. They have expressly agreed to an obligation to indemnify and a duty to defend. Both Respondents even agreed to provide insurance to cover those obligations. ROA pp. 1530-1552; 906-912.

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 Respondents may attempt to argue insurance as a limiting factor; however, the parties' contracts undermine that argument completely. Section 11.1 of the contracts require the Respondents to provide insurance for the work and Section 11.3 then requires the Respondents 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 Respondents was a forfeiture of the insurance provisions in the contracts and a windfall to the Respondents' insurance companies. That is against the law.

CONCLUSION

The Appellant requests that the Court reverse Judge Sprouse's summary judgment orders in favor of the Respondents and remand the case for trial on D.R. Horton's third-party-claims

against the Respondents. 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 respective contracts 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 2, 2024

Respectfully,

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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

Case No. 2019CP041942
Appellant 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.

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., ... 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.

CERTIFICATE OF COUNSEL

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

July 2, 2023

Respectfully,

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