THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Bentley Price, Circuit Court Judge

Case No. 2019CP0702629
Appellant Case No. 2022-000469

Margaret A. Eberly and Barbara J. Pavelik; ..... Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC; Archer Exteriors, Inc.; Crossroads Enterprises, LLC; D.R. Horton, Inc.; East Coast Construction Cleanup Corp.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc. Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; and Valim Construction, LLC, ... Defendants

Of which D.R. Horton, Inc., is the ..... Appellant,

And

Hutton's Landscapes, Inc., Lather Construction SC, Inc., and Lather Construction, Inc. are the ..... Respondents.

INITIAL BRIEF OF APPELLANT D.R. HORTON, INC.

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3. Without evidence or showing, did Judge Price improperly presume that the Appellant was at fault when he granted summary judgment against the Appellant on its equitable indemnification cause of action against the Respondents?

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6. Did Judge Price improperly grant summary judgment as to Appellant's breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness claims?

STATEMENT OF THE CASE

The underlying lawsuit was commenced on November 25, 2019, by the plaintiff purchasers of a new home in a newly developed subdivision who were dissatisfied with the property. It was amended on December 19, 2019. (ROA) [Amended Complaint] Suit was against the subdivision developer Appellant D.R. Horton, Inc. and various subcontractors, including Respondent subcontractors Hutton's Landscapes, Inc., Lather Construction, Inc. and Lather Construction SC, Inc.

On November 9, 2020, D. R. Horton crossclaimed against all defendant subcontractors for (a) contractual indemnification, (b) equitable indemnification, (c) breach of contract, (d)

breach of express warranties, (e) breach of implied warranties, and (f) negligence/gross negligence/recklessness. (ROA) [Defendant D. R. Horton, Inc.'s Answer to Plaintiffs' Amended Complaint and Further Asserting Its Crossclaims Against Co-Defendants]

On December 9, 2021, Respondent Hutton's moved for summary judgment "on the contractual and equitable indemnity cross-claims asserted against it by Defendant D. R. Horton". (ROA)[Hutton's Landscape's, Inc.'s Motion for Summary Judgment on the Cross-Claims of D. R. Horton, Inc.] On January 3, 2022, Lather and Lather SC moved for summary judgment, stating that they "hereby joins in totality and hereby adopts by reference as allowed by South Carolina Rules of Civil Procedure 10(c), Hutton's Landscapes, Inc. ('Hutton's Landscapes')'s Motion for Summary Judgment on the Cross-Claims of D. R. Horton, Inc., filed on or about December 9, 2021. (ROA.) [Defendant Lather Construction, Inc. and Lather Construction, SC, Inc.'s Joinder in Hutton's Landscapes, Inc.'s Motion for Summary Judgment]

A hearing on the motions was held on March 3, 2022 before the Hon. Bentley D. Price. On March 11, 2022, Judge Price granted the motions for summary judgment for Hutton's and Lather. Lather SC was not mentioned in his order. (ROA) [Form 4 Order] By motion on March 18, 2022, Appellant D. R. Horton sought clarification and explanation of the judge's order. (ROA) [Defendant D. R. Horton, Inc.'s Motion to Alter and Amend Judgment] A week later, on March 24, 2022, Judge Price denied the motion. (ROA) [Order Denying Defendant D. R. Horton, Inc.'s Motion to Alter or Amend Judgment]

D. R. Horton's counsel filed and served a Notice of Appeal with Orders on April 11, 2022, and followed that on April 28, 2022 by serving and filing an Amended Notice of Appeal with Orders. (ROA)

On May 11, 2022, Respondent Hutton's Landscapes, Inc filed a Motion to Dismiss Appeal. On May 12, 2022, Respondents Lather Construction, Inc. and Lather Construction, SC, Inc. filed a Motion to Dismiss Appeal. On July 21, 2022, the Court of Appeals dismissed the appeal. On April 24, 2024, the South Carolina Supreme Court reinstated the appeal, reversing dismissal and remanding the case to the Court of Appeals.

STANDARD OF REVIEW

This is an appeal from the grant of motions for summary judgment. 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). "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).

SUMMARY OF FACTS

The order of Judge Price granting summary judgment against D. R. Horton and in favor of Hutton's and Lather in this case had its origin in the order of the Hon. H. Steven DeBerry, IV refusing to grant summary judgment in favor of Hutton's, Lather and Lather SC against D. R. Horton on exactly the same grounds and Judge Price's improper reversal of Judge DeBerry in a companion case, *Richard W. and Rebecca A. Dreier, et al v. Advanced Flooring & Design et al including D. R. Horton, Inc.*, 2018-CP-07-00911, now on appeal in the Court of Appeals as App. Case No. 2022-000016. (ROA) [Order of Hon. H. Steven DeBerry, IV in *Dreier, id.* filed

November 12, 2021; Hutton's Landscapes, Inc.'s Motion for Summary Judgment on the Cross-Claims of D. R. Horton, Inc. in *Dreier, id.*, filed October 19, 2021; Defendants Lather Construction, Inc. and Lather Construction SC, Inc.'s Motion for Summary Judgment as To Claims of D. R. Horton, Inc. in *Dreier, id.*, filed October 8, 2021] [1]

D. R. Horton was the owner and developer of a subdivision in Beaufort County by the name Tidewater Creek. It contracted with Hutton's and Lather to perform site work there. Lather was also the general contractor for the site work. (ROA) [Trial testimony of Ronald Brunner November 18, 2021, in *Dreier, id.*, Transcript Vol. IV, p. 414, line 13 -p. 415, line 16] Lather's "Work generally consists of clearing, grading and constructing the water, sewer, drainage, and roads for the proposed residential subdivision." (ROA) [Article I – WORK 1.01, Document 00505 Standard Form of Agreement Between Owner and Contractor.] Hutton's contract work included "rough grade, final grade, landscape turnkey, landscaping, sod/seed, trees, backfill foundations/crawl spaces, flatwork labor turnkey, forming, pouring, stripping forms, slab backfill, and house slab turnkey (monolithic)." (ROA) [Hutton's Landscapes, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment on the Cross-Claims of

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[1] Hutton's attorney repeatedly referenced the *Dreier* case during the summary judgment hearing in this case from the first page of the hearing transcript, et. seq., and the judge referred to the case as well, so the *Dreier* trial material was squarely before the court. (ROA) [MSJ Hearing, March 3, 2022.] Rather than preparing a memorandum to support the motion for summary judgment in this case, Hutton's attorney stated that "we are going to incorporate our briefing that we filed in support of our motion for summary judgment on this issue in the *Dreier* lawsuit as well as our oral argument that we made on our motion to bifurcate D.R. Horton's cross-claims during the Shafi trial" and she then proceeded to hand Judge Price those pleadings. (ROA) [MSJ Hearing, March 3, 2022,TR. p. 4 lines 7-19.] There had been a deadline to file memorandum, which had already passed, and Hutton's attorney had filed no memorandum, so this maneuver was sprung on D.R. Horton's new attorneys. Judge Price allowed it even though he knew that the D.R. Horton attorneys before him were not a part of the Shafi trial.

D. R. Horton, Inc. in *Dreier, id.* (Pp. 1-4 and Ex. A. Contract] Both Lather and Hutton's were sophisticated companies. (ROA) [MSJ Hearing, March 3, 2022,TR. p. 19 lines 9 - 22]

The contracts at issue in this appeal are the same as those involved in *Dreier, id.* (ROA) [MSJ Hearing, March 3, 2022, Counsel for Hutton's, p. 3, ll. 21 – 25 and Counsel for Lather, p. 8, lines 4 - 14] They not only require Hutton's and Lather to indemnify D. R. Horton and to defend it, they also require Hutton's and Lather to provide insurance for their indemnity and defense obligations and to name D. R. Horton as an "additional insured." (ROA) [Contracts] Insurance is more than a theoretical part of these indemnification and duty to defend obligations. It is critical in this case because Respondents Lather and Hutton's are, and were at the time of trial in *Dreier, id.*, out of business. (ROA) [Defendant Lather Construction SC, Inc.'s Motion for Summary Judgment As To Claims of Plaintiffs and D. R. Horton, Inc. in *Dreier, id.*, including Exhibits D and F; Trial Proceedings in *Dreier, id.* on November 15, 2021, p. 33, line 23 – p. 35, line 10; Lather Notice of Bankruptcy Stay]

The First Amended Complaint included allegations concerning deficient site work. (ROA) [First Amended Complaint, especially Paragraphs 7, 8(d) & (e), 21, 25] Before the March 3, 2022, hearing on their motions for summary judgment, the case against Hutton's, Lather and Lather SC was settled with the plaintiffs. (ROA) All that remained were D. R. Horton's cross-claims against them. (ROA) [Hearing, March 3, 2021, p. 6, line 21 – p. 7, line 1 & p. 7, lines 20 – 21]

On March 11, 2021, Judge Price granted the motions of Hutton's and Lather in a Form 4 order that gave no basis for his decision. (ROA) [Form 4 Order, filed March 11, 2021] It did not mention Lather SC; nor did it specify which cross-claims it addressed. There was only a single Motion for Summary Judgment before the Court and that was filed by Hutton's. Lather

and Lather, SC joined the motion. That motion only asked for summary judgment as to D.R. Horton's contractual and equitable indemnity claims. Nothing else was properly before the court. There had been no motion as to D.R. Horton's cross-claims for (i) breach of contract, (ii) breach of express warranties, (iii) breach of implied warranties, and (iv) negligence/gross negligence/recklessness. When D. R. Horton sought an explanation for the basis and clarification about what was granted and what was not granted, Judge Price summarily denied its motion. (ROA) [Order Denying Defendant D. R. Horton's Motion to Alter or Amend Judgment]

ARGUMENTS

1. WAS JUDGE PRICE UNFAIRLY BIASED AGAINST THE APPELLANT?

Circuit Judge Bentley Price was unfairly biased against the Appellant D. R. Horton because Appellant had not acceded to the plaintiff's settlement demand during trial several months earlier in the *Dreier* case and thereby required him to try that case through the end of the week instead of going home early as he wished. He wanted to force settlement also to avoid having to try 15 future related cases, including this one. In *Dreier*, Judge Price even threatened Appellant Horton with the threat of additur *during the second day of trial*, after *only* two witnesses appeared, and during the plaintiffs' case – *none* of the defendants had yet put on their respective cases. When that did not give him what he wanted, he improperly turned a third-party defendant's motion for bifurcation into a motion for summary judgment against Appellant D.R. Horton, granted summary judgment and in doing so reversed another circuit judge who had

denied the same motion only two business days earlier.[2] D.R. Horton brought this to the Court's attention in its appeal in *Dreier*:

> THE COURT: All right. Who wants to start?
>
> MS. LUCEY: Your Honor, I am happy to try to update the Court on the status of settlement talks, if you want to jump right into that.
>
> THE COURT: Where are we on settlement talks?
>
> MS. LUCEY: The parties have been talking, and Hutton's and Lather have communicated or are working on putting money on the table to settle the plaintiffs' claims. I don't believe that Horton has contributed any money towards the settlement a global settlement. Dreier R.p. 698:16 – 25 (ROA)

Along the way, the Respondents reminded Judge Price about the other 15 related trials for the homes that he faced in the future, as well as a trial on the Respondents' contractual indemnity and defense obligations.

> MS. LUCEY: I think the only reasonable way to do it is for Hutton's to settle all of the claims with all of the homes with plaintiffs' counsel. I don't know that I am in a position to try to negotiate one house settlement; because that simply kicks the can down the road, and we will be here in three months.
>
> THE COURT: Right. You will be right back in front of me in February.
>
> MS. LUCEY: Right. Dreier R.p. 679:9 – 14 (ROA)

The stoking worked. Tuesday morning, Judge Price became exasperated.

> THE COURT: Well, it's a huge mess. Dreier R.p. 685:6 (ROA)

The Court saw Appellant's desire to enforce the contracts regarding work they had already paid Respondents for as the biggest problem in the case.

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[2] The full details of the additur threat, including Judge Price's own words, are set forth in D. R. Horton's Final Brief and Reply Brief of Appellant in the *Dreier* case. (ROA) [Appellant's Final Brief and Appellant's Final Reply Brief]

> THE COURT: The biggest issue continues to be the cross-claims. That is the biggest snag. Because without that being resolved, then it's never going to settle or be resolved. It will always be - - there will always be this, you know, this case out there with you-all, and it's just never going to end. Dreier R.p. 688:15 – 19 (ROA)

At the end of Tuesday, after securing more confidential settlement information, Judge Price's exasperation led him to squeeze the Appellant in a manner that crossed the line.

> THE COURT: Earlier when I got the update from the settlement conference that you all went into, why did D. R. Horton not throw anything in the pot? They had previously.
>
> MR. NAIL: (representing D.R. Horton) I don't have an answer. It was two years ago.
>
> THE COURT: I am talking about today.
>
> MR. NAIL: Today?
>
> THE COURT: Yes. Dreier R.p. 733:11 – 18 (ROA)

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> THE COURT: I am getting really concerned about the time and what is going to happen Thursday at 3:00.
> All right. Tell D. R. Horton they are being absolutely ridiculous. I want you to email them, and I want you to bring me the email and tell them I said that, all right? Ask them if they know what an additur is, all right? Bring it to me tomorrow. Dreier R.p. 734:19 – 25 (ROA)

At the end of Thursday, the trial was still underway. Judge Price left town for the evening.

> THE COURT: I need to be out of town. I told you that I thought this case would finish on Thursday. I am going to travel out of town tonight, but I will be back in the morning, but I am going to be late. I should be here by 11:15. I would ask all of you to be here around 11:00. Dreier R.pp. 828:25 – 829:4 (ROA)

The trial concluded at 8:10 p.m. on Friday. Judge Price then went to his daughter's birthday party.

> THE COURT: . . . Today's my daughter's ninth birthday, so they're waiting on me to get home to do the cake, so imagine how many texts I've gotten today. . . . I

have a birthday party waiting on me. Dreier R.p. 878:5 – 7; Dreier R.p. 878:22 (ROA)

It is one thing for a judge to encourage settlement. It is another thing for a judge to browbeat and threaten a party toward settlement. What is particularly troubling about Judge Price's conduct is his invasion of the attorney/client privilege and the threat of an additur before the witnesses had all testified and before the jury rendered a judgment. He told Mr. Nail what to write to his client and then demanded a copy of it and threatened Appellant with additur. Judges are not permitted to threaten litigants or coerce settlement. In *Ledford v. Dep't of Pub. Safety*, 428 S.C. 387 (S.C. 2019), the Court admonished,

> We are deeply concerned by Commissioner Braden's conduct in this matter. We first address her comments during the phone conference, especially those regarding a "duty" to report Ledford for criminal prosecution. Commissioner Braden's remarks essentially left Ledford with two equally undesirable options: (1) move forward with his claim and risk being referred for criminal prosecution; or (2) settle the case and forfeit his right to have his claim adjudicated, and concomitantly Commissioner would ignore her purported "duty" to report Ledford for criminal prosecution. Even if Commissioner Braden's statements were not intended as bona fide threats, there were undisputedly coercive. Commentary to Section 3(B)(8), Code of Judicial Conduct (CJC), Rule 501, SCACR ("A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts"). *Id.* at 391-92.

In *Dreier*, the threat of additur occurred *during the second day of trial*, after *only* two witnesses appeared, and during the plaintiffs' case – *none* of the defendants had yet put on their respective cases. When Appellant did not settle and declined to forego well over a million dollars (as of day two of the trial) in additional insured coverage because Respondents' insurance carriers failed to provide coverage for the claims and failed to defend Appellant despite Appellant's tender of the claim to Respondents' carriers, the Court took it upon itself to grant summary judgment against Appellant as to its indemnity and duty to defend cross-claims. "A trial judge must act with absolute impartiality in the performance of judicial duties." *State v. Davis*, No. 2006-UP-316,

2006 S.C. App. Unpub. Lexis 299 (S.C. Ct. App. Aug. 4, 2006).[3] In *Cabrera v. Esso Std. Oil Co. P.R.*, held that the court "abused its discretion by factoring the plaintiff's refusal to settle into its decision to dismiss the case." 723 F.3d 82, 88 (1st Cir. 2013). The court admonished the trial court when it "permitted the information gleaned through its involvement with the settlement talks to exert influence over its disposition of Appellant's motion." *Id.* at 89. The court also cautioned the court that it had been too involved in settlement discussions when it obtained information about the parties' positions that unduly influenced its ruling. *Id.* at 90 (the Eight Circuit similarly had concerns in *United States v. Pfizer*, 560 F.2d 319 (8th Cir. 1977) in situations where the decision-maker is too involved in settlement). In this case Judge Price was the decision-maker as to the cross-claims when he removed them from the jury's purview by granting Respondents' summary judgment motion.

If anything, the judge should have stayed out of any settlement discussions because he was being called upon to decide a dispositive motion concerning the very heart of the case. Instead, he plunged right into those discussions, even entertaining confidential aspects of the discussions which, moreover, were intended to and had the effect of poisoning him against the Appellant. His conduct concerning settlement and his desire to get through the trial in time for his Thursday at 3:00 p.m. trip and his daughter's birthday show a clear bias which led him to rule against the Appellant contrary to the law and without facts, and he overruled another circuit judge, Judge DeBerry, who just two business days earlier had denied the very same summary

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[3] Additionally, a Judge's family and social life are not supposed to bear upon any litigant's trial and a judge is supposed to perform the duties of office impartially and diligently. S.C. Rule 501, Code of Judicial Conduct. Appellant felt repeated pressure and coercion to settle to accommodate the trial judge's social calendar during typical court hours. Appellant was provided only one day to present a defense, while Plaintiffs had four days.

judgment motions. The Court deprived Appellant of its day in court as to its cross-claims without due notice or a meaningful opportunity to be heard when a procedurally ill-timed motion to bifurcate was allowed to proceed as a repeat motion for summary judgment.

Judge Price should not have overruled Judge DeBerry and he should not have extended that error to *Eberly*. It is settled law in South Carolina that one trial judge may not overrule another trial judge because doing so is reserved to the appellate courts. "It is axiomatic . . . a Circuit Judge does not have the power to reverse the ruling of another Circuit Judge." *Tisdale v. Am. Life Ins. Co.*, 216 S.C. 10, 13, 56 S.E.2d 580, 581 (S.C. 1949). "The rule is well settled that the prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge, except in cases when the right to do so has been reserved to the succeeding Judge, when it is allowed by rule of Court or statute or when the subsequent order does not alter or substantially affect the ruling or decision represented by the previous order." *Dinkins v. Robbins,* 203 S.C. 199, 202, 26 S.E.2d 689, 690 (S.C. 1943) (citing *Mut. Bldg. Loan Ass'n of Sumter v. Hewson,* 196 S.C. 181, 12 S.E.2d 715 (S.C. 1940)); *see also Charleston Co. Dep't Soc. Serv. v. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (S.C. 1995) (citing *Tisdale*, 216 S.C. at 13 and *Dinkins*, 203 S.C. at 202), ("There is a long-standing rule in this State that one judge of the same court cannot overrule another. . . . Accordingly, we hold a successor judge may not substitute his own judgment for that of the trial judge.").

The question in *Dinkins* was: "Does a Circuit Judge have jurisdiction and power to grant a compulsory order of reference as to certain equitable issues raised by the pleadings when a former Circuit Judge has refused a general order of reference, from which there has been no appeal?" 203 S.C. at 202. The *Dinkins* Court decided that the prior judge's decision to not refer

any issues on a general order of reference embraced all matters that could have been referred. *Id.* Thus, a subsequent circuit judge could not parse out equitable issues for referral.

In *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546 (S.C. 1986), the court confirmed that "[O]ne Circuit Court Judge does not have the authority to set aside the order of another (citing Circuit Court Rule 60 and *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (S.C. 1979)). "The effect of Judge Pyle's order was to reverse the earlier substantive order, clearly an impermissible act." *Id.* Respondents erred under the rules of civil procedure when they repeatedly asked the court to revisit Judge DeBerry's decision. Rule 41(l), SCRCP prohibits repeat motions on the same facts. "If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in the action." *Id.*

Judges DeBerry and Price are both Circuit Judges. Judge DeBerry had before him the entirety of the summary judgment motions, including the additional insured (AI) issue – both as to matters of law and issues of fact. He declined to find for the Respondents on any issue. To consider the factual issues, he first would have decided that the contract was enforceable as a matter of law. If it were not enforceable as a matter of law, he would have had no reason to then consider factual issues. This was specifically brought to Judge Price's attention by Appellant's counsel.

> MS. PETERSON: (representing D.R. Horton). . . A judge has already decided as a matter of law that it's not unenforceable. Dreier R.p. 680:5 – 6 (ROA)

Judge Price apparently recognized this and acknowledged earlier that he did not have the power to rule on the matter that Judge DeBerry had already ruled on. Dreier R.pp. 676:23 – 677:6 (ROA)

MS. PETERSON: If this case is to go forward with the trial and the jury deciding, then we believe it's wholly improper for the summary judgment to be re-heard.

THE COURT: I agree with that. I don't think I can do that. So I'm agreeing with you 100% on that. That is what we talked about. I don't think that is something I can do. You don't get to just bring it back up again, because a prior circuit judge has already ruled on that. So I am with you on that. Dreier R.p. 676:23 – 677:6 (ROA)

Respondents' counsel then proceeded to re-argue their summary judgment motions under the guise of a motion to bifurcate. Dreier R.p. 678:12 – 723:6 (ROA) In doing so, they put front and center exactly the same matter that Judge DeBerry had decided on the motions for summary judgment, namely the enforceability of the contractual indemnity and duty to defend.[4]

MS. LUCEY: A lot of uncertainty for us in terms of trying to resolve the claim. . . . Another alternative, Your Honor, is for Hutton's and likely Lather to raise a motion -- in an effort to expedite the trial, raise a motion to bifurcate the cross-claims.
But I think the threshold issue and whether we can bifurcate the claims is to determine whether or not the contractual indemnity provision would remain enforceable. If they are enforceable – if they are not enforceable, which is our position, then there is no reason to bifurcate them, and they can be dismissed. And that's already been decided then, Your Honor. Dreier R.p. 678:9 – 22 (ROA)

Appellant's counsel objected because the matter had already been heard and decided by Judge DeBerry. Dreier R.p. 680:5 – 6 (ROA) Nonetheless, Judge Price allowed a motion to

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[4] At the pretrial summary judgment hearing before Judge DeBerry, Respondents argued that as a matter of law the indemnity and duty to defend provisions violated public policy and were therefore unenforceable as to S.C. Code Ann. § 32-2-10 and under the "clear and unequivocal" standard when an indemnitee will be indemnified for its concurrent negligence. Dreier R.p. 574:10 – 579:14 (contractual indemnity and duty to defend) and Dreier R.p. 564:8 – 565:3 ("clear and unequivocal"). (ROA) Judge DeBerry declined to find for Respondents. It is not surprising that Judge DeBerry did not find for Respondents because neither the indemnity provision nor the duty to defend provision violate public policy, as discussed in this brief. Additionally, the indemnity language is clear and unequivocal and follows the language the court suggested in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 658 n. 6, 819 S.E.2d 166, 176 n. 6 (S.C. App. 2018). The same arguments based on the same legal theories were then raised before Judge Price two business days after Judge DeBerry's ruling.

bifurcate after the trial had already commenced and then turned it into a rehearing of the summary judgment motions.

> MS. LUCEY: At this time, may I make a motion to bifurcate the contractual and equitable indemnity claims that D.R. Horton has asserted against Hutton's?
>
> THE COURT: Sure.
>
> MR. ROSS: [Lather] would like to join, Your Honor.
>
> MR. CLOUD: East Coast would join in that as well.
>
> MS. PETERSON: For the record, I think any arguments that go to the enforceability of contracts and which contracts apply have already been dealt with on the summary judgment motion. They made the same arguments, and the Court did not rule in their favor. Dreier R.p. 702:24 – 703:10 (ROA)

Over counsel's objection and against what Judge Price himself had correctly recognized earlier as settled law precluding him from overruling another Circuit Judge, Dreier R.p. 677:1 – 6 (ROA), Judge Price then proceeded to rule on exactly the same issue that Judge DeBerry had previously decided.

Without subject matter jurisdiction or authority, Judge Price reversed Judge DeBerry. Dreier R.p. 722:17 – 18 (ROA) and he did so via a procedurally improper bifurcation motion he turned into a motion for summary judgment.

Judge Price heard the "bifurcation motion" that turned into a new summary judgment hearing *after* the trial had started, after the jury was seated, after opening statements, and after the direct examination of one witness had begun. That was procedurally improper. The court then compounded its error when it also reached substantive issues. A motion to bifurcate is a motion on how to *procedurally* resolve a claim. Adjudicating the *merits* of the case is not appropriate on a motion to bifurcate. First the court is supposed to bifurcate if appropriate and only thereafter schedule a hearing or trial to consider the merits related to the bifurcated portion of the case. In *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019), the court

bifurcated an equitable division case to consider whether the couple was common law married – but the court did not reach the merits during the bifurcation hearing. The bifurcation hearing in *Stone* was held to decide *whether* to schedule a separate merits hearing – not to hold the merits hearing as part of the bifurcation hearing. In this case, Judge Price turned a bifurcation hearing into a substantive hearing on the merits without proper notice and without an opportunity to prepare. He then made factual findings as to adhesion contracts and bargaining power without first allowing any testimony, or having any facts, as to either issue.

Moreover, bifurcating the contractual and indemnification issues from the fault issues would never be proper in this case because the indemnification and fault issues overlap. "Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate." *Creighton v. Coligny Plaza Ltd. P'ship,* 334 S.C. 96, 108, 512 516 S.E.2d 510, 516 (1998) (citing *Fortune v. Gibson,* 304 S.C. 279, 403 S.E.2d 674 (Ct. App. 1991)). The bifurcation motion had no support in the law or facts of this case, and was simply a ruse to then present the summary judgment motion – which had been denied – to a new judge. This was not proper. Whether the merits hearing was a rehearing of the same summary judgment motion or a directed verdict motion that no party had requested or properly noticed, it was procedurally improper and Judge Price's improper ruling prejudiced Appellant in the jury's eyes. When all the cross-defendants, which were in court at the outset of the trial, were relieved by him of their indemnification obligations and disappeared, Appellant was painted as the sole wrongdoer in *Dreier.*

What occurred in the *Dreier* case directly impacts this *Eberly* case because it shows bias, because it shows the court intended to and did apply *Dreier* to *Eberly* with no testimony or facts, because Judge Price acknowledged that he had threatened Horton during the *Dreier* case, and

because Judge Price then applied *Dreier* to the *Eberly* case during the summary judgment hearing, which is clear from the transcript.

> THE COURT: But they (*meaning Appellant D. R. Horton*) absolutely do not get what I, what I have, what I say. I did threaten Neal (*meaning Horton's trial counsel*) that they fly from Texas (*where D. R. Horton is located*) last time to come here and tell me to my face .... (ROA) [Hearing, March 3, 2021, TR. p. 9 lines 10-13] (Italics supplied)

Apparently realizing what he had said, Judge Price then tried to backtrack:

> THE COURT: ... but then I backed down. (ROA) [Hearing, March 3, 2021, TR. p. 9 lines 13]

Nothing could be further from the truth. He did not back down.

In fact, only minutes earlier, at the outset of the hearing in the present case and before counsel for D. R. Horton had said a word, he ruled against Appellant on the motions for summary judgment now on appeal here.

> MS. WHITE: -- in this lawsuit. We're just – the only thing that we have outstanding on behalf of Hutton's is the D. R. Horton's cross-claims.
>
> THE COURT: Didn't we already deal with that in the last trial?
>
> MS. WHITE: We did. Which it, it should make this motion, straightforward in –
>
> THE COURT: Well, it is.
>
> MS. WHITE: -- my opinion. But –
>
> THE COURT: It's gonna make it very straightforward because I've already made a ruling on it. (ROA) [Hearing, March 3, 2021, TR. p. 6 line 24 – p. 7 line 9]

The "hearing" and allowing Appellant's attorney to speak was a mere pretext because the decision had been made at the outset of the hearing. Judge Price made a mockery of the judicial process. The mockery in *Dreier* carried over to *Eberly*, and there it increased. That is something

that absolutely cannot be tolerated in a nation that is governed by the rule of law. That alone requires reversal.

2. DID JUDGE PRICE IMPROPERLY REFUSE TO EXPLAIN HIS GRANT OF SUMMARY JUDGMENT AGAINST THE APPELLANT, BOTH IN HIS ORIGINAL ORDER GRANTING SUMMARY JUDGMENT AND THEN IN HIS ORDER DENYING THE APPELLANT'S MOTION TO ALTER AND AMEND JUDGMENT?

Judge Price granted summary judgment in a Form 4 Order. (ROA) It gave no reasons. It did not apply to Lather Construction, SC, Inc., which was also a defendant and a moving party. It did not even specify which of Appellant D. R. Horton's causes of action were removed from the case by his grant of summary judgment. (ROA) [Form 4 Order]

On cross-claims, D. R. Horton sued Hutton's and both Lather defendants for contractual indemnification, equitable indemnification, breach of contract, breach of express warranties, breach of implied warranties and negligence/gross negligence/recklessness. (ROA) [Defendant D. R. Horton Inc.'s Answer to Plaintiff's Amended Complaint and Further Asserting Its Crossclaims Against Co-Defendants] *Only the first two of these causes of action were addressed in the motions for summary judgment filed by Hutton's.* "Hutton's Landscapes now seeks summary judgment on the contractual and equitable indemnity claims ..." (ROA) [Hutton's Landscapes, Inc.'s Motion for Summary Judgment on the Cross-Claims of D. R. Horton, Inc.] The Lather defendants coat-tailed Hutton's in their motion for summary judgment, which they filed the following month. "Defendants, Lather Construction, Inc. and Lather Construction SC, Inc. (hereinafter collectively referred to as 'Defendant' or 'Lather Construction' unless specifically noted otherwise) hereby joins in totality and hereby adopts by reference as allowed by South Carolina Rules of Civil Procedure 10(c), Hutton's Landscapes, Inc. ('Hutton's Landscapes')'s Motion for Summary Judgment on the Cross-Claims of D.R. Horton filed on or

about December 09, 2021." (ROA) It is only those two causes of action that were argued by Hutton's and D.R. Horton at the hearing and in D.R. Horton's bench memo. (ROA)

After receiving the Form 4 order, D. R. Horton asked Judge Price to specify which causes of action were subject to his grant of summary judgment and to provide the basis of his order. (ROA) [Defendant D. R. Horton, Inc.'s Motion to Alter and Amend Judgment] He did neither. Instead, in what appears to be a "canned" 1 ½ page order lifted from another case, he denied D. R. Horton's motion. His stated reasons had nothing to do with the nature of D. R. Horton's request. (ROA) [Order Denying Defendant D. R. Horton, Inc.'s Motion to Alter or Amend Judgment]

It is bad enough to have one's causes of action summarily rejected. It is worse to have them rejected without being told the basis for rejection. What is almost beyond belief is to have them rejected without being told *what is rejected.* This was done not once but twice.

None of this should be a surprise, however, because Judge Price had neither the facts nor the law on his side. He wanted to rule against D. R. Horton and was going to do it regardless. His mind was made up before he ever set foot in the courtroom. Not only was the hearing itself a mockery. Both of Judge Price's orders afterward were likewise a mockery. "[I]t is better practice—and in most cases common practice—as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment." *Woodson v. DLI Props., LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014) Otherwise, an appellate court—never mind the public—cannot "ascertain the basis for the circuit court's ruling ..." *Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007); *See also Easterling v. Burger King Corp.*, 416 S.C. 437, 786 S.E.2d 443 (Ct. App. 2016).

Just as an appellate court cannot "ascertain the basis for the circuit court's ruling," neither can the Appellant D. R. Horton. That makes it impossible to select and focus the relevant arguments on appeal.

Because Hutton's raised the matter of "ripeness" at the end of its Motion for Summary Judgment, and Lather adopted Hutton's motion, Appellant feels constrained to point out that its claims against Hutton's and Lather were "ripe" for consideration. This is clear from *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC,* 413 S.C. 615, 624, 776 S.E.2d 426 (Ct. App. 2015) in which "the circuit court erred in granting summary judgment on the merits of Marick's equitable indemnity cross-claim because Marick presented a question of fact." Justice Few, then Chief Judge of the Court of Appeals, noted that, "[a]n equitable indemnity claim may arise when a third party (Stoneledge) makes a claim against the indemnity plaintiff (Marick) for damages the third party sustained as a result of another party's tortious conduct." *Stoneledge, id.* It is not necessary for the indemnity plaintiff (D. R. Hoton) to wait until it has paid damages before it can file suit for indemnification. In *Stoneledge* the third-party claim for indemnification was included in the plaintiff's main action. That was exactly what happened in *Town of Winnsboro v. Wiedmeman-Singleton, Inc.*, 307 S.C. 128, 414 S.E.2d 118 (1992), a leading South Carolina case on equitable indemnification. This is the logical approach because the trial judge, who will make a determination about equitable indemnification at the end of a case, has already seen the witnesses and heard the arguments. Duplicative trials are avoided. D. R. Horton's indemnification claims were "ripe".

The fact that Judge Price did not make "ripeness" the basis of his ruling suggests strongly that he did not think that it was a valid basis. Likewise, the fact that he offered no other basis for his ruling strongly suggests that knew that he had none.

3. WITHOUT EVIDENCE OR SHOWING, DID JUDGE PRICE IMPROPERLY PRESUME THAT THE APPELLANT WAS AT FAULT WHEN HE GRANTED SUMMARY JUDGMENT AGAINST THE APPELLANT ON ITS EQUITABLE INDEMNIFICATION CAUSE OF ACTION AGAINST THE RESPONDENTS?

"Under Rule 56 (c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 315 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002). Hutton's and Lather did not fulfill that responsibility. They presented no evidence and made no showing that there was no genuine issue of material fact about the elements of equitable indemnity. For that reason, their motions failed. *Id.*

Under the South Carolina law of equitable indemnification, inquiry about the fault, if any, on the part of the party seeking indemnification (i.e. the indemnitee) is to be to be limited to the damages incurred by the plaintiff. When talking about the fault of the party seeking to be indemnified, the question is whether the party is at fault as to the *plaintiff's* claims. It is not a question of whether there is fault for anything else. This has been stated time and time again by South Carolina appellate courts. "To recover damages on its equitable indemnity claim, Marick must prove the following: (1) Clear View was at fault in causing Stoneledge's water intrusion damages; (2) Marick has *no fault for those damages*; and (3) Marick has incurred expenses that were necessary to protect its interest in defending against Stoneledge's claim." [Emphasis supplied] *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC*, 413 S.C. 615, 625, 776 S.E.2d 426 (Ct. App. 2015) citing *Inglese v. Beal*, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct. App. 2013) (stating the elements of equitable indemnity); *Walterboro Cmty. Hosp. v. Meacher*, 392 S.C. 479, 485, 709 S.E.2d 71, 74 (Ct. App. 2011) (same); *Addy v. Bolton*, 257

S.C. 28, 33, 183 S.E.2d 708, 709-710 (1971) (describing the requirements for proving equitable indemnity).

The Respondents provided no evidence and made no showing that D. R. Horton was at fault in causing any damage to the house or yard belonging to the Plaintiffs Margaret A. Eberly and Barbara J. Pavelik in this case. Their chief argument was that Judge Price should grant summary judgment to them in this case because he had granted summary judgment to them in in the *Dreier* case In the *Dreier* case, D. R. Horton was not defending against claims concerning the Eberly/Pavelik house. It was defending against claims concerning a house belonging to the plaintiffs Sarmed and Jessica M. Shafi. The verdict against D. R. Horton in the *Dreier* case concerning the Shafi house does not establish *as a matter of law* that there is no genuine issue of material fact concerning the Eberly/Pavelik house in this case. That is especially true because the *Dreier* case involving the Shafi house is on appeal, and was on appeal when Judge Price ruled against D. R. Horton concerning the Eberly/Pavelik house in this case. And Judge Price was well aware of this entire situation because he was the judge in both cases, he discussed both cases at the summary judgment hearing, and he made a quick decision based on the connections between the two cases. (ROA) [Hearing, March 3, 2021, TR. p. 7 lines 2 - 9].

At the hearing, Lather's counsel attempted to buttress its argument by stating that the Eberly/Pavelik house is on the same street in the same subdivision as the Shafi house. That is no showing of fault. Plaintiffs' counsel was the same in both cases and yet elected to bring them separately. That alone creates a reasonable inference that they involve separate facts. Beyond that, the record reflects that D. R. Horton performed no work on the Eberly/Pavelik property. It contracted for everything. (ROA) [Hearing, March 3, 2021, Tr. p. 22, lines 11 – 15] The record also reflects that the subcontractors included Hutton's, which was paid "close to a million

dollars" by D. R. Horton for its work, and Lather, which was likewise paid "two and a half million dollars" by D. R. Horton for its work. (ROA) [Hearing, March 3, 2021,Tr. p. 18, line 17 – p.19, line 23] Hutton's and Lather were subcontractors on the project, (ROA) [Hutton's contract and Lather contract], and Lather was the general contractor for the land sitework. (ROA) [Trial testimony of Ronald Brunner November 18, 2021, in *Dreier, id.*, Transcript Vol. IV, p. 414, l. 13 -p. 415, l.16] The Plaintiffs have sued Respondents for the work. (ROA) [Amended Complaint] If there is fault with the work, it lies with Hutton's and Lather—not D. R. Horton.

In South Carolina, a general contractor is not "automatically liable" for the fault of its subcontractor. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 560, 658 S.E.2d 80, 88 (2008).

D. R. Horton's involvement was less than that of a general contractor. It was the owner. D. R. Horton's contracts with the Respondents refer to it as the "owner"—not the general contractor. (ROA) Lather was the general contractor on the site work as well as a contractor performing certain of that work. (ROA) [Trial testimony of Ronald Brunner November 18, 2021 in *Dreier, id.*, Transcript Vol. IV, p. 414, l. 13 -p. 415, l.16] The quality of the Respondents' work was overseen not by D. R. Horton, but instead by Lather and an independent engineering firm, Carolina Engineering Consultants, Inc. (ROA) [Deposition of Ronald Brunner, p. 12, l. 3 – l. 13 and p. 178, l. 2 – p. 179, l. 9]

The Respondents have thus failed to meet their "initial responsibility of demonstrating the absence of a genuine issue of material fact." *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 470, 570 S.E.2d 197, 202 (Ct. App. 2002). For that reason, D. R. Horton was not required to go forward with anything in opposition to the Respondents' motions for summary judgment. Even so, the record reflects affirmatively that a

genuine issue of material fact does exist, and did exist in front of Judge Price when he ruled against D. R. Horton on the summary judgment motions.

In its order reversing Judge Price and remanding the case, the Court of Appeals should also correct what has become a flaw in the South Carolina law of equitable indemnity. That law was created when South Carolina law was based on contributory negligence. The law of contributory negligence provides that even a scintilla of negligence on the part of a plaintiff defeats recovery. That law was changed by the South Carolina Supreme Court in the case *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991), which provides for limited comparative negligence. Other states have likewise departed from contributory negligence and adopted various forms of comparative negligence; and, in doing so, have revised their respective laws of equitable indemnity to incorporate the concept of comparative fault. A scintilla of fault will no longer defeat recovery by an indemnitee. John J. Cheap, Jr., Comment, *Contribution and Indemnity Collide with Comparative Negligence – The New Doctrine of Equitable Indemnity*, 18 Santa Clara L. Rev. 779 (1978). South Carolina has not yet updated its equitable indemnity law to conform to and reflect its limited comparative negligence law.

Resting as it does on the concept of equity, the doctrine of equitable indemnity should not totally foreclose recovery by an indemnitee who bears only a scintilla of fault, or even a lesser degree of fault than the indemnitor. One might even argue that recovery should be based on a system of "pure" comparative fault.

That was the holding of the United States Supreme Court in *United States v. Seckinger*, 397 U.S. 203, 90 S. Ct. 880, 25 L.Ed.2d 224 (1970), a case in which the Government sought indemnification from one of its contractors. "A synthesis of all the foregoing considerations leads to the conclusion that the most reasonable construction of the clause is the alternative

suggestion of the Government, that is, that liability be premised on the basis of comparative negligence." *Id.* at 215. In so holding, the Supreme Court noted, "[a] number of courts have reached comparable results." *Id.* It provided multiple accompanying citations of authority, as well. *Id.* at n. 20. *Seckinger* involved a contractual indemnity, but the Supreme Court's reasoning was based in large part on principles of equity. In a case involving equitable indemnification, such as this one, the argument "that liability be premised on the basis of comparative negligence" applies with even greater force.

Because South Carolina is a "limited" rather than "pure" comparative negligence state, its law of equitable indemnification should likewise be based on a "limited" comparative negligence system. The "pure" comparative negligence system adopted by the United States Supreme Court in *Seckinger* was noted by the Court to be based on federal law, *id.* at 309, thus, "pure" comparative negligence is not required to be a part of equitable indemnity in South Carolina leaving South Carolina free to apply its "limited" comparative negligence system to equitable indemnification.

This change in the law of equitable indemnity to conform it to the changed law of negligence is not required for D. R. Horton to prevail in this case. Even under the law as it exists today, Judge Price should be reversed.

4. IS THE CONSTRUCTION CONTRACT BETWEEN THE APPELLANT AND RESPONDENT LATHER UNLAWFUL?

The United States District Court for the District of South Carolina has already considered a case such as this and ruled in favor of the party seeking indemnification, as is D. R. Horton here. The case is *Midland Ins. Co. v. Delta Lines, Inc.*, 530 F. Supp. 190 (D.S.C. 1982). Because the case is almost on "all fours" with this one, a copy is attached, highlighted for the Court's convenience. In brief, all the arguments of Respondents fall by the wayside because the contract

is clear enough, and by including a requirement for insurance in their contract the parties have consciously decided how to allocate risk and made the indemnification arrangement one for insurance. The parties' inclusion of insurance in their contract eliminates all arguments that the contract is against public policy. Indeed, to the contrary, it enhances public policy by not only respecting the parties' agreement but by also providing outside resources in the form of insurance to protect both of them. Moreover, the statute the Respondents rely upon in their attempt to overcome the indemnification provision in their contracts, specifically excludes voiding insurance contracts. S.C. Code. Ann. § 32-2-10 ("The provisions of this section shall not affect any insurance contact . . ..") But that is what Judge Price did when he granted summary judgment – to the extent anything is clear about what Judge Price ruled. If he granted summary judgment as to the parties' indemnity contractual provisions that were secured by the insurance provisions, then he effectively voided the insurance provisions to the full extent of his ruling. That violates the statute. The contracts do not.

To the extent that Judge Price erroneously lumped together the duty to indemnify, the duty to defend, and the insurance provisions as just an "indemnification provision," then such an approach also violates the statute because it likewise voids the insurance contracts. It also ignores the fact that South Carolina has repeatedly recognized that a duty to defend is separate from a duty to indemnify, as D.R. Horton has briefed in the *Dreier* case.

One might fairly ask why Lather, Lather SC, and Hutton's have agreed in the Contract to defend an entire lawsuit, even claims not subject to indemnity. The answer is twofold. The first is that it has insurance for this, which the Contract requires. The second is that every other Contractor/Subcontractor is in exactly the same position, which means that the Contractors/Subcontractors will divide the responsibility for defense among themselves. That is

the way that it should be because D. R. Horton does not perform any of the work itself. It contracts for everything.

If any additional legal argument is needed to support the contract between D. R. Horton and Respondent Lather, it can be found in the pages of D. R. Horton's appellate briefs in *Richard W. and Rebecca A. Dreier, et al v. Advanced Flooring & Design et al including D. R. Horton, Inc.*, 2018-CP-07-00911, now on appeal in the Court of Appeals as App. Case No. 2022-000016. (ROA) [Final Brief of Appellant and Final Reply Brief of Appellant, both in *Dreier*] In its briefs in *Dreier*, and here, Appellant argues that its contracts are enforceable as to its duty to indemnify, duty to defend, and its additional insured obligations, that such duties are separate and distinct, and are severable.

The heart of the Respondents' argument is that their contractual duty to defend the Appellant violates S.C. Code Ann. § 32-2-10. In *Dreier*, which Hutton's incorporated into its *Eberly* argument at summary judgment, Hutton's counsel argued,

> MS. LUCEY: At the heart of the matter is – in the contract is the indemnity provision. It's quite lengthy. I believe Your Honor has a copy of the contract, and the language is included also in Hutton's motion for summary judgment.
>
> The issue is - Hutton's is arguing that the indemnity provision is void and unenforceable under South Carolina's anti-indemnity statute, which is South Carolina Code Section 32-2-10, which at its heart prevents one party from requiring another to indemnify it for its own negligence; namely, Horton cannot require Hutton's to indemnify and defend, is our position for its own negligence. The indemnity clause in the contract does purport to exclude indemnity liability for Horton's sole negligence, but within that same provision, there is a broad and expansive duty to defend that Hutton's is required to undertake.
>
> So the indemnity clause requires Hutton's Landscape to defend D.R. Horton against all of the plaintiffs' claims, including those that may be based on Horton's sole negligence. It's our position that that violates the anti-indemnity statute. Dreier R.pp. 704:19 – 705:14 (ROA)

Hutton's is mistaken, because that statute does not contain a word about a duty to defend. It reads as follows:

> SECTION 32-2-10. Hold harmless clauses in certain construction contracts. Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

S.C. Code Ann. § 32-2-10.

South Carolina law is clear, "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Eagle Container Co., LLC v. City of Newberry,* 379 S.C. 564, 570-71, 666 S.E.2d 892, 896 (S.C. 2008) (quoting *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (S.C. 1994)). The absence of any mention in the statute of a duty to defend means that it does not exist there.

The South Carolina Legislature considered and *declined* to add a duty to defend to the very statute at issue, S.C. Code Ann. § 32-2-10, when it considered an amendment to that statute. S. 422, 124th Sess. (2021) (included in the designations on the Record on Appeal). Dreier R.pp. 1023 – 1025 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 *such as this very contract*. *See* Paragraph (B), S. 422, 124th Sess. (2021). Dreier R.p. 1024 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. [5]

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) (discussed and quoted in Appellant's initial brief); 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). Dreier R.pp. 1026 – 1028; Dreier R.pp. 1030 – 1032; Dreier R.pp. 1034 – 1037

When the General Assembly wants to address duty to defend in a statute, it uses the words "duty to defend', "defend" and "defense". That is clear from "2021-2022 Bill 4048: Duty to defend and indemnify" passed by the General Assembly on May 12, 2022 and signed by the Governor on May 13, 2022. It reads, in relevant part, as follows:

> AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 1-11- 445 SO AS TO PROVIDE THAT THE STATE OF SOUTH CAROLINA MUST PROVIDE A LEGAL **DEFENSE** FOR AND **INDEMNIFICATION** TO . . . AND TO PROVIDE A SIMILAR **DEFENSE** AND **INDEMNIFICATION** TO . . . TO REPEAL SECTION 1-11-440 RELATING TO LEGAL **DEFENSES** AND **INDEMNIFICATIONS** PROVIDED TO . . . AND TO REPEAL SECTION 12-4-325 RELATING TO LEGAL **DEFENSES** AND **INDEMNIFICATION** PROVIDED TO . . . .

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[5]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). Dreier R.p. 1036

Defense and indemnification of state agencies
SECTION 1. Article 1, Chapter 11, Title 1 of the 1976 Code is amended by adding:

Section 1-11-445. (A) The State of South Carolina, by and through its agencies, departments, and instrumentalities, must **defend** ... and must **indemnify**.... The State also must **defend** . . . . The State shall **indemnify** . . . . This commitment to **defend** and **indemnify** . . . .

H. 4048, 2022, 124th Sess. (S.C. effective date May 13, 2022) (emphasis added) Dreier R.p. 1026

2021-2022 Bill 4048 is not unique in this respect. The statutes repealed by it likewise used the words "defend" and "defense" and were crystal clear about a duty to defend. *See* S.C. Code Ann. § 1-11-440 (repealed May 13, 2022), and S.C. Code Ann. § 12-4-325 (repealed May 13, 2022). Dreier R.p. 1030; Dreier R.p. 1034 "Indemnity" and "defense" were made separate and distinct from each other by the General Assembly in all three statutes. In contrast, the General Assembly said not a word about "defense", "defend" or "duty to defend" in Section 32-2-10. *See* S.C. Code Ann. § 32-2-10. Neither a duty to defend nor the prohibition of a duty to defend is to be read into the term "indemnity" in a South Carolina statute.

S.C. Code Ann. § 32-2-10 reflects a policy decision the General Assembly made. The South Carolina Supreme Court has recognized that such a decision is for the legislature. *Smith v. Tiffany*, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (S.C. 2008); *Machin v. Carus Corp.*, 419 S.C. 527, 576, 799 S.E.2d 468, 478 (S.C. 2008). "But the policy decision belongs to the legislature, and the legislature has crafted the provisions of the Act as it sees fit. We are a court, not a legislative body. That a court may disagree with a legislative body's policy decisions or believe a perceived 'more fair' outcome exists is of no moment." *Smith*, 419 S.C. at 559. Judge Price

incorrectly read a limitation on a duty to defend into S.C. Code Ann. § 32-2-10 that does not exist.

Section 10.1 of the parties' identical contracts, which describes the Respondents' indemnity and defense obligations to the Appellant, specifically states that these obligations are separate, distinct, and independent. The contracts specifically state that the "[c]ontractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify..." Dreier R.p. 944; Dreier R.pp. 398 – 399. (ROA) 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 the Respondents and Appellant in this case is clear from their contracts. They have expressly agreed the obligation to indemnify and the duty to defend are separate,

distinct, and independent obligations, therefore, they have agreed upon severability. That is sufficient to allow it. The Judge agreed with Appellant's counsel that the duty to defend and the duty to indemnify are separate.

> MS. PETERSON: (representing D.R. Horton) I still think there is a difference between a duty to defend and a duty to indemnify.
>
> THE COURT: I agree with that. I see your point on that. Dreier R.p. 717:9 – 12 (ROA)

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). Dreier R.pp. 1026 – 1029; Dreier R.pp. 1030 – 1033; Dreier R.pp. 1034 – 1035 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 "(iv) commercial liability risk covering the indemnity obligations set forth in this Agreement." The indemnity obligations are those of the Respondents to indemnify the Appellant set forth in Section 10. 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. Moreover, insurance is all that is left because both Lather and Hutton's are no longer in business. The cross-claims and additional insured claims are simply issues between D.R. Horton and Respondents' insurance companies.

The role of insurance in the parties' relationship has another very important effect – it makes Section 32-2-10 inapplicable. S.C. Code Ann. § 32-2-10. That statute states that it "shall not affect any insurance contract." *Id.* The Appellant is a "named, Additional Insured" in its contracts with the Respondents. Exhibit B (Contract §11) Dreier R.p. 894; Dreier R.pp. 944 – 945 (ROA) Insurance coverage exists in favor of the Appellant for the Respondents' indemnity obligations. That is the "AI demand that Horton has made" identified by counsel for Respondent Hutton's at Dreier R.p. 700:17 – 18 (ROA) Counsel for Respondent Lather also acknowledged the existence of insurance for the indemnity in his argument to Judge Price. "We have got a demand from the plaintiffs and the contractual indemnity and AI clause is blocking it." Dreier R.p. 702:22 – 23 (ROA) This was a theme throughout the Respondents' arguments to Judge Price. It was their effort to paint the Appellant as stubborn and an impediment to settlement. Dreier R.pp. 681:1 – 688:10 and Dreier R.p. 734:3 – 10[6] (ROA) In doing so, however, they

[6] The Court saw Appellant's desire to enforce its rights under the contracts with Respondents as the biggest problem in the case.

removed themselves from Section 32-2-10 because their argument "affected an insurance contract." *See* S.C. Code Ann. § 32-2-10. By ruling for the Respondents, Judge Price purports to release the Respondents' insurance companies from their obligations to the Appellant as a "named, Additional Insured." There can be no greater way to "affect an insurance contract" than by totally releasing the insurance company from its obligations to its "named, Additional Insured." Such a release goes against South Carolina law.

"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 insurance provision relieves the Respondents of financial risk and places it on insurance companies, so the real parties in interest here are the insurance companies. Appellant tendered the defense to each Respondent and their insurance companies consistent with the duty to defend and insurance provisions.

The contractual indemnity and defense obligations of the Respondents are separate, distinct, and independent. Neither Section 32-2-10, nor any other law, nor logic provide otherwise.

If any additional factual argument is needed, it can be found in the contract documents themselves. Lather argues that the controlling document is entitled "Contract Documents and Specifications for Tidewater Creek" and dated August 1, 2014. (ROA) This document, in its

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THE COURT: The biggest issue continues to be the cross-claims. That is the biggest snag. Because without that being resolved, then it's never going to settle or be resolved. It will always be - - there will always be this, you know, this case out there with you-all, and it's just never going to end." Dreier R.p. 688:15 – 19 (ROA)

Table of Contents and in ARTICLE 9 – CONTRACT DOCUMENTS incorporates "General Conditions – EJCDC". Lather acknowledges this in its memorandum in support of its motion for summary judgment. (ROA) [Defendants Lather Construction, Inc. and Lather Construction SC, Inc.'s Memorandum in Support of Its Motion for Summary Judgment as to Claims of D. R. Horton, Inc., p. 3] However, Lather apparently never read the General Conditions because those require Lather to indemnify D. R. Horton and procure insurance for that obligation, listing D. R. Horton as an "additional insured." The contract also specifies that the indemnity includes "all fees and charges of ... attorneys ... and all court or arbitration or other dispute resolution costs." (ROA) [Complete "Contract Documents and Specifications for Tidewater Creek" dated August 1, 2014, including but not limited to General Conditions] These appear in Sections 5.04 *CONTRACTOR's Liability Insurance*, 6.19 *CONTRACTOR's General Warranty and Guarantee* and 6.20 *Indemnification.*

D. R. Horton contends that the controlling document is entitled "South Carolina Independent Contractor Agreement" and dated December 2, 2013. (ROA) It, too, requires Lather to indemnify D. R. Horton and procure insurance for that obligation, listing D. R. Horton as an "additional insured." These appear in Section 10 *CONTRACTOR'S INDEMNITY* and Section 11 INSURANCE. (ROA) [South Carolina Independent Contractor Agreement dated December 2, 2013] Attorneys' fees and costs are specifically included within the indemnity. Separately, Lather is required to defend D. R. Horton. Of course, that obligation falls on Lather's insurance company through the "additional insured" provision; and it is no different than any other defense obligation required of an insurer under its liability policies. Thus, three obligations: duty to indemnify, duty to defend, and requirement to provide insurance as an additional insured.

Regardless of which contract controls, or if they both control because they are to be read together, Lather and its insurance company are required to indemnify D. R. Horton and stand good for its defense costs. (ROA) [Hearing, March 3, 2021, Tr. p. 6, line 17 – p. 18, line 1] Because the Plaintiffs Eberly and Pavelik have settled, the obligation to continue to defend is moot and D. R. Horton's sole remedy is monetary.

If the court finds any of the duties or obligations unenforceable, it could sever them. The parties agreed each of those provisions is separate and distinct, which allows the Court to sever the provision(s). South Carolina courts enforce the valid provisions of a contract in accordance with the parties' intent at the time the contrct was executed. *See Beach Co. v. Twillman, Ltd.,* 351 S.C. 56, 59-60, 566 S.E.2d 863, 866-67 (S.C. Ct. App. 2002). If the court finds a provision unenforceable, "the next question becomes whether, under any appropriate circumstances, the . . . agreement can be reformed, or the identified illegal provisions . . . severed, thus preserving . . . [the] agreement between the parties." *Hooters of Am., Inc. v. Phillips,* 39 F. Supp. 2d 582, 624 (D.S.C. 1998), *aff'd* 173 F.3d 933 (4th Circ. 1999). A provsion may be severed when it is susceptible to division, has two or more parts, is not dependent on other parts of the contract, and is not intended by the parties to be an interdependent clause. *Id.; see also Columbia Architectural Grp., Inc. v. Barker,* 274 S.C. 639, 641, 266 S.E.2d 428, 429 (S.C. 1980).

Respondents' arguments that the duty to defend provision is not severable from the duty to indemnify ignores all reasonable basis for interpreting a statute and contract provisions. The parties' contract *specifically* shows the parties' understanding and intent when it states that the "Contractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify . . ." ICA §10. Dreier R.p. 882 (ROA) Section 10.2 is its own provision, which is also

severable. It could not be clearer that the parties intended the provisions to be separate, distinct, and independent. Such clauses are severable.

Respondents also attempt to merge all the provisions together to attempt to argue the provisions violate S.C. Code Ann. § 32-2-10 because they require Respondents to indemnify Appellant for intentional wrongful acts. However, their merger argument is defeated by the contractual provision prohibiting indemnification for Appellant's sole fault. Under the "general" provision of the indemnity the contract provides, "Notwithstanding the foregoing, nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnitee." Section 10.1 ICA. Sole negligence is expressly excluded. Also, as discussed above, a duty to defend is not the same as a duty to indemnify. Likewise a provision allowing Appellant to defend itself and to seek reimbursement is also not an indemnity provision. It is merely the mechanism by which Appellant may have the benefit of its duty to defend. As a practical matter, it is common in all types of commercial and insurance contracts that one party agrees to provide the entire defense should things go awry. It make sense to have one party in charge of the litigation and to see it through all its stages. It is also why the additional insured provision is included in the contracts to expressly allocate the risk and to decide in advance which insurance company would handle the defense against a third-party claim. More importantly, the parties agreed how any necessary defense would be undertaken and the State of South Carolina honors businesses' contracts on such matters.

The Lather contracts at hand are entirely lawful. Judge Price's order granting summary judgment should be reversed.

5. IS THE CONSTRUCTION CONTRACT BETWEEN THE APPELLANT AND RESPONDENT HUTTON'S UNLAWFUL?

The South Carolina Independent Contractor Agreement between D. R. Horton and Hutton's is exactly the same as the one between D. R. Horton and Lather, excepting only price and scope of work. The provisions concerning indemnification, duty to defend and insurance are identical. (ROA) [South Carolina Independent Contractor Agreement between D. R. Horton and Hutton's dated May 16, 2016, pp. 1-7] D. R. Horton's review of the law and facts concerning its South Carolina Independent Contractor Agreement with Lather applies equally to its contract with Hutton's. The facts and law have been set out previously; there is no need to repeat them here. They require reversal of Judge Price's order granting summary judgment.

6. DID JUDGE PRICE IMPROPERLY GRANT SUMMARY JUDGMENT AS TO APPELLANT'S BREACH OF CONTRACT, BREACH OF EXPRESS WARRANTIES, BREACH OF IMPLIED WARRANTIES, AND NEGLIGENCE/GROSS NEGLIGENCE/RECKLESSNESS CLAIMS?

It is not clear from Judge Price's Order whether he did or did not grant summary judgment on Appellant's cross-claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness. (ROA) [Form 4 Order dated March 11, 2022]. The Order states:

> This matter came before the Court as Defendant Hutton's Landscapes, Inc.'s Motion for Summary Judgment on the Cross-claims of D.R. Horton and Defendant Lather Construction, Inc.'s Joinder in Hutton's Motion for Summary Judgment.
>
> Defendant Hutton's Landscapes, Inc., Motion for Summary Judgment on the Cross-Claims of D.R. Horton and Defendant Lather Construction, Inc.'s Joinder in Hutton's Motion for Summary Judgment are granted.

The problem with this Order is that it does not specify which cross-claims are included or the reasons for granting the motion for summary judgment as to any cross-claim. The summary

judgment motion before the Court *only* moved for summary judgment on the contractual indemnity and equitable indemnity cross-claims. (ROA) [Hutton's Motion for Summary Judgment] There was no motion before the court on D.R. Horton's other cross-claims nor was D.R. Horton provided notice and an opportunity to properly defend against such a motion because one was never filed, and a hearing was never set. Procedural due process was absent - *if* Judge Price's Order includes a grant of summary judgment as to those causes of action. We simply do not know because he did not tell us in his original Order, and he did not tell us when we asked for clarification. (ROA) [Order Denying Motion to Alter or Amend filed March 22, 2022]

At the summary judgment hearing, Lather's attorney threw in one line to attempt to expand the summary judgment motion into include the cross-claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness. (ROA) [Hearing, March 3, 2021, Tr. p. 33, lines 19-20.] His throwaway line was, "[a]nd then, of course, under the *Stoneledge*, the other four claims should be out as well." That was the totality of the argument, *and* there was no motion on these causes of action.

Lather did brief a very short vague paragraph in its memorandum on the issue, but that is not a motion. A party cannot expand or change another party's motion 48 hours before a hearing to include wholly new substantive issues on summary judgment. That violates due process. Furthermore, the brief paragraph did not explain the law, did not apply the law, did not apply the facts, and did not analyze the law and facts in this case. Like the one sentence at the hearing, the case name *Stoneledge* was simply tossed out into the wind to see if it landed. (ROA) [Lather Memorandum in Support of Hutton's Motion for Summary Judgment]

D.R. Horton's cross-claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness are not limited to mere indemnification damages. Unlike the pleading in *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015), there is nothing in the pleading of the cross-claims in this case that limits D.R. Horton's damages to only those recoverable under indemnity. (ROA) [D.R. Horton Answer and Cross Claims] For example, Respondents' defective work and their failure to take responsibility for that work and make things right for the homeowners has damaged D.R. Horton's reputation and its goodwill. It has harmed D.R. Horton's ability to have positive word of mouth in the area towards the sale of new developments. It has harmed D.R. Horton's reputation insofar as obtaining quality contractors. It has caused D.R. Horton to expend administrative overhead and divert employee attention to this case rather than pursuing other opportunities, among other harms – any and all of which D.R. Horton should have been able to prove at trial. *Stoneledge* does not defeat Appellant's breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness cross-claims and those causes of action were not in Hutton's motion for summary judgment. Lather and Lather SC did not file a motion for summary judgment. They merely joined Hutton's.

CONCLUSION

There is an adage that says, "Two wrongs don't make a right." That is especially true in this case, which has multiple wrongs instead of just two. It was wrong for Judge Price not to consider this case on its own, apart from his rulings in the *Dreier* case. It was wrong for him in *Dreier* to reverse another circuit judge. It was wrong for him in *Dreier* to convert a hearing on a

motion to bifurcate into one for a motion for summary judgment. It was wrong for him to muscle a settlement and invade the attorney-client relationship, and to let his personal affairs undermine his responsibilities as a judge. It was wrong for him to ignore the facts and the law. It was wrong for him to grant summary judgment against D. R. Horton without giving a basis for his order and without even saying what causes of action it covers; and, when asked to explain and clarify, stubbornly refusing again. It was wrong for him to expand a motion for summary judgment from two causes of action to six causes of action without procedural due process.

This appeal involves motions for summary judgment. The threshold to survive such a motion is extremely low. Hutton's and Lather have failed to meet their "initial responsibility of demonstrating the absence of a genuine issue of material fact." That alone is dispositive. D. R. Horton has gone beyond what it was required to show. It has shown affirmatively that such an issue does exist.

For these and the other reasons set forth in this brief, the Appellant D. R. Horton respectfully requests that the Order of the Hon. Bentley D. Price filed March 11, 2021, granting summary judgment against it be reversed and the case remanded for trial of its cross-claims against Hutton's and Lather.

July 23, 2024

Respectfully,

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Midland Ins. Co. v. Delta Lines, Inc.

United States District Court for the District of South Carolina, Charleston Division

January 19, 1982

Civ. A. No. 79-1950-1

Reporter
530 F. Supp. 190 *; 1982 U.S. Dist. LEXIS 9276 **; 1984 AMC 908

MIDLAND INSURANCE COMPANY, Intervening Plaintiff and Mildred Prioleau, Administratrix of the Estate of John Prioleau, Plaintiff, v. DELTA LINES, INC. and Strick Corporation, Defendants

Counsel: [**1] Grover C. Seaton, III, and Hans F. Paul, Charleston, S.C., for plaintiff.

John W. Minor, Hilton Head Island, S.C., and Edward T. Brennan, and Richard A. Rominger, Savannah, Ga., for intervening plaintiff.

Pledger M. Bishop, Jr., Charleston, S.C., for defendant Delta Lines, Inc.

Marvin D. Infinger, and Charles H. Gibbs, Charleston, S.C., for defendant Strick Corp.

Opinion by: HAWKINS

Opinion

[*191] ORDER

This action brought in this court's diversity jurisdiction is before the court on amended complaint filed November 3, 1980. The suit arises out of the death of plaintiff's intestate while participating in the shifting of a cargo container on the deck of the SS DELTA ECUADOR, a vessel owned by defendant Delta Lines, Inc. (Delta). At the time of his death, plaintiff's intestate was employed by Southeastern Maritime Company, the stevedore engaged to work the ship.

The amended complaint asserts claims sounding in strict tort liability and negligence against defendants, alleging that the container was defectively manufactured, designed and maintained. Delta answered and crossclaimed against Strick Corporation alleging that Strick, as manufacturer, was responsible for any damages [**2] resulting from the defective nature of the container. Strick counterclaimed to the cross claim, alleging a contractual indemnity agreement between it and Delta. The present motion is for summary judgment as to the cross claim and counterclaim. Strick seeks an order placing responsibility on Delta Lines for the defense of the suit and for payment of any judgment which might be rendered against Strick Corporation as a result of the action. For the reasons stated below the motion is granted.

As is evidenced by an equipment lease agreement dated September 17, 1976, Strick Corporation owned the container, # PLIU-203274-6, allegedly responsible for the [*192] death of plaintiff's intestate, and leased the same to Prudential Lines. It further appears that defendant Delta was the sublessee of Prudential Lines and assumed the terms and conditions under the lease agreement. Delta has admitted the authenticity of the lease and sublease agreements in response to requests for admission. [1]

[**3] Two provisions contained in the lease agreement, assumed by Delta, establish its indemnity obligation to Strick. Paragraph ten of that document reads in part as follows:

> (Lessee) hereby specifically indemnifies lessor, and agrees to hold lessor harmless, against all loss and damages lessor may sustain or suffer because of ... (c) the death of, injury to, and damages to the property of, any person as a result of, in whole or in part, the use or maintenance of the equipment of any thereof while in the custody, possession or control of lessee or anyone claiming by, through or under lessee.

Paragraph eleven contains in part the following language: "Lessee further agrees to procure, at lessee's sole cost and expense ... policies of insurance ...

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[1] # PLIU-203274-6 is described in the lease agreement which has been authenticated by requests for admission.

insuring the lessee against ... the hazards specified in (c) above (indemnity due to death or injury) ...."

The answer of Delta and the deposition testimony of Robert Stephen Marvin of the Charleston Masters, Mates & Pilots Association establish that plaintiff's intestate was killed as the result of the use of the equipment while in the custody, possession or control of Delta as described in paragraph ten of the lease.

Delta's answer **[**4]** admits the allegation of paragraph four of the amended complaint that the SS DELTA ECUADOR was owned by Delta and that the container in question was "owned and maintained" by Delta at the time of the accident.

Mr. Marvin's testimony indicates that he was present on the SS DELTA ECUADOR on the date of the accident which caused plaintiff's intestate death (Page 6, lines 21 through 25, Page 7, lines 1 through 5); and that the container which is the subject of the complaint was being moved or shifted from an outboard position inboard onto the hatch of the vessel to allow further loading of the vessel. (Page 14, lines 12 through 21).

It is therefore uncontroverted that the subject container was in use and under the "custody, possession, or control" of Delta at the time of the accident, being moved on the deck of its ship in order to allow further loading of the vessel.

Although there is a general reluctance by the courts to construe indemnity provisions so as to cover the fault of the indemnitee (Strick), the clear language used in paragraph ten and Delta's agreement to procure insurance to cover liability for the death or bodily injury described in paragraph ten compel the court to **[**5]** conclude as a matter of law that the defense of the action and payment of any judgment rendered against Strick Corporation is the responsibility of Delta.

First, the language in paragraph ten standing alone, supports this conclusion. In Southern Railway v. Springs Mills, Inc., 625 F.2d 496 (4th Cir. 1980), the Fourth Circuit Court of Appeals was called upon to construe the effect of an indemnity agreement in a personal injury context where the indemnitee's negligence was solely responsible for the injury to plaintiff. There the railway and Springs Mills had entered into an agreement for construction and maintenance of a private track servicing the Mills' plants. Springs Mills agreed to provide minimum clearance on either side of the track. The agreement was supplemented to include an indemnity agreement whereby Springs Mills undertook to "indemnify and save harmless the railway company from and against the consequences of any loss of life, personal injury, or property loss or damage which may be caused by, result **[*193]** from, or arise by reason of or in connection with, any limited or restricted clearances for said industrial track."

A brakeman for the railway was injured **[**6]** when a gate allowing entry into the Springs Mills yard knocked him from the train, causing him to fall under it and crushing his foot. The cause of the injury was a failure on the part of another railway employee to secure the gate, absolving Mills from any direct responsibility. [2] It was argued that because no specific reference was made to indemnification against injury caused by the railway's own negligence, the indemnity provision should not inure to its benefit.

The court noted that the indemnity language referred to "any loss of life, personal injury ... which may be caused by, result from, or arise by reason of or in connection with, any limited or restricted clearances"; it was held that the language "obviously described a type of loss which could arise from the negligence of the railway as well as that of Springs Mills. Yet the parties agreed that Springs Mills **[**7]** would indemnify against any such loss ...." The lower court judgment of indemnity was affirmed.

The language contained in paragraph ten covering "all loss lessor (Strick) may sustain or suffer because of ... death ... as a result of, in whole or in part, the use ... of the equipment ... while in the custody, possession or control of lessee ...," is more specific and clearer than the language construed in Springs Mills. See also Bentley v. Palmer House Co., 332 F.2d 107 (7th Cir. 1964) and Jacksonville Terminal Co. v. Railway Express Agency, 296 F.2d 256 (5th Cir. 1961) (construing language similar to that in paragraph ten as creating an indemnity obligation for injury caused by the fault of the indemnitee).

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[2] There was a slight violation of clearance of the fence post on which the gate was attached, but it did not contribute to the injury.

Delta maintains that the indemnity clause here should be treated differently than the clause in Springs Mills because the claims triggering the indemnity provision are based on notions of products liability. [3] First, the issue before the court is one of contract construction. The theory triggering the indemnity contract has no effect on whether the language of that agreement is ambiguous or not. Second, the requirement of insurance procurement by Delta to cover indemnity arising **[**8]** out of death or injury described in paragraph ten effectively guts any policy argument which might be made where the underlying claim is based on products liability notions.

If one can create any doubt as to the effect of the language in paragraph ten, the requirement of insurance procurement by Delta as required by paragraph eleven conclusively establishes that it must indemnify Strick Corporation for death or injury resulting from any defect which might be established due to Strick's manufacture or design of the container in question.

Delta's position is that the indemnity agreement does not cover defects for which Strick could be held liable on theories of strict **[**9]** tort liability or negligence, but only for those delicts for which Delta could be held responsible, presumably alteration of the containers, lack of maintenance, etc., which caused the failure of the container. If such were the case, the provision providing for insurance would be superfluous for Strick cannot be held responsible for delicts such as alteration by Delta; [4] and Strick could have no conceivable interest in forcing Delta to insure itself against claims for which Strick could not be liable. The only conclusion which can be reached, as is borne out by the clear language of the indemnity and the procurement of insurance agreement, is that the indemnity agreement here is a conscious risk-shifting device by which **[*194]** the lessee (or here sublessee) assumed the cost of insurance procurement to guard against claims arising out of the use of the equipment.

Delta's argument that the policies giving rise to strict tort liability **[**10]** will be sacrificed by the court's construction of this agreement as imposing indemnity responsibility on it is misplaced. The policy behind strict tort as enunciated in Comment c to section 402A of the Second Restatement of Torts is to place the burden of accidental injuries on those who "market" the goods, the risk of which can be paid for by purchasing liability insurance. The agreement by Delta to procure liability insurance thus subserves the purpose of protecting the public from defective products by shifting the risk of payment to one better able to absorb it regardless of fault. [5]

[11]** Other courts dealing with a lease-indemnity agreement (although dealing with the lease of a fixed structure as opposed to a container) have held that the indemnitor's agreement to procure liability insurance conclusively established an indemnity in favor of an indemnitee whose fault arguably caused the injury complained of.

In Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d 153, 397 N.Y.S.2d 602, 366 N.E.2d 263 (1977) a lease was entered into containing an indemnity agreement which failed to explicitly mention the indemnitee's negligence. Included in the agreement, as here, was a provision obligating lessee to obtain public liability insurance inuring to the benefit of the lessor. An injury occurred and lessor was found proportionately at fault. It sought to enforce the indemnity agreement. Lessee indicated that without a clear specification, the

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[3] Cases cited by Delta are distinguishable in any event. See, e.g., Rourke v. Garza, 511 S.W.2d 331 (Tex.Civ.App.1974) and K & S Oil Well Serv., Inc. v. Cabot Corp., 491 S.W.2d 733 (Tex.Civ.App.1973) where the court's holding of no indemnity was based as much on the non-conspicuousness of the indemnity clause as any other rule of construction.

[4] See Restatement (Second) of Torts § 402A, Comment g (1965).

[5] The court, after the hearing on this motion, required Delta to inform it whether or not liability insurance had been procured pursuant to paragraph eleven. A policy naming Delta as primary insured and Strick as an additional insured issued by Transport Mutual Insurance Association was produced. The fact that that policy had a territorial exclusion, excluding the United States, and the fact that Delta has not informed the court of a policy covering the territorial United States is of no moment. First, insurance was procured pursuant to the agreement naming Strick as insured evidencing Delta's acknowledgment of responsibility for injuries arising from use of leased Strick equipment. Second, and more importantly, Delta's agreement to procure insurance placed it in the position of insurer regardless of whether or not a policy was procured. Tidewater Equip. v. Reliance Ins. Co., 650 F.2d 503, 506 (4th Cir. 1981).

indemnity agreement should not be construed to cover the indemnitee-lessor's negligence. The court noted that the intent of the parties, as garnered from the contract as a whole, should be determinative of the construction given the indemnity "rather than the semantic stereotypes with which an agreement may be phrased." Id. 397 N.Y.S.2d **[**12]** at 606, 366 N.E.2d at 266. The court observed that the parties involved were sophisticated business entities dealing at arm's length and indicated that the language was broad enough to include indemnification against lessor's negligence. Vital to the court's decision that lessor's negligence was covered by the indemnity was the insurance procured for its benefit. The court noted that lessor was not exempting itself from liability but rather that the parties were allocating risks between themselves through the employment of insurance.

Also instructive is Hastreiter v. Karau Buildings, Inc., 57 Wis.2d 746, 205 N.W.2d 162 (1973). There the indemnity provision provided a general hold harmless agreement as well as an agreement by lessee to carry and pay for public liability insurance. The court held that,

> The purpose of the public liability insurance clause can only be to protect the landlord from some liability which it sustains as the owner of the building. But, having contracted away the right to possession, it is liable only for structural defects or a failure to maintain or repair the building.
>
> The public liability insurance clause is intended to protect the landlord **[**13]** from the effects of his own negligence. The only issue is the scope of the protection accorded. To construe the indemnification provision as the appellant argues would be to **[*195]** make the hold harmless clause surplusage.

Id. 205 N.W.2d at 163-64, (citations omitted).

The same analysis applies here. If, as Delta urges, the hold harmless agreement indemnifies Strick only against the alteration or the failure to maintain the container after possession was ceded to Delta, the agreement would be nudum pactum; for Strick could have no liability for subsequent alteration of the container or failure to maintain it once it surrendered possession. [6] To adopt Delta's position, therefore, would be to force Delta to procure insurance for Strick's benefit, covering risks for which Strick could not be liable. Strick could have no conceivable interest in forcing that situation. The two clauses read together contemplate full indemnity accruing to Strick's benefit.

[14]** The South Carolina Supreme Court's acknowledgment of the prevalence of liability insurance as a factor in overruling longstanding common law immunities provides this Court with a compelling analogy. In overruling charitable immunity to a limited degree in Brown v. Anderson County Hospital Association, 268 S.C. 479, 234 S.E.2d 873 (1977), and in totally abrogating that immunity in Fitzer v. Greater Greenville South Carolina YMCA, 277 S.C. 1, 282 S.E.2d 230 (1981), the court noted that the general availability and procurement of liability insurance by charitable institutions to a large degree gutted the policy justifications for the immunity. The court in Fitzer noted that "the general availability of liability insurance ... underscores the unreasonableness of ... continued adherence to this archaic doctrine (of charitable immunity)." Id. at 231. (Citation omitted.) See also Elam v. Elam, 275 S.C. 132, 268 S.E.2d 109 (1980) (abolishing parent-child immunity, noting the prevalence of liability insurance as bearing on its abrogation of the immunity).

Certainly if the existence of liability insurance can alter deeply-rooted common law immunities, Delta's obligation to procure excuses **[**15]** this court from applying the rule of construction urged by it, viz., that without specific reference to the indemnitee's fault an indemnity agreement will not be construed to cover the same. After all, the general rule of construction which governs all others is that the intention of the parties controls, with every provision of the agreement being read to give each its proper effect so as not to render any provision superfluous. See generally Southern Railway v. Springs Mills, 625 F.2d at 498.

Finally, the term of the lease and the hefty consideration involved bolsters the conclusion here reached. The lease is for a term of eight years, divesting Strick of all

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[6] In addition section ten of the lease provides that lessee is responsible for maintenance and repair.

control and maintenance responsibilities for that period. (See paragraph ten.) Consideration for the lease was $ 2,234,064.00, payable in ninety-five (95) monthly installments of $ 23,271.50. These terms were assumed by Delta on its assumption of the lease.

The lengthy term of the lease, the hefty consideration, and the inability of Strick to control the units or maintain them all combine to bolster the clear language of the tenth paragraph and the requirement of the eleventh in placing responsibility on Delta (as sublessee) **[**16]** for "all loss and damage ... due to the death of ... any person as a result in whole or in part, the use or maintenance of the equipment ... while in the custody, possession and control of lessee." Properly structured economic risk-shifting in such a context is to be expected, especially in light of the recently evolved no-fault theories of liability against manufacturers of products.

Based on the above, Strick Corporation's motion for summary judgment of indemnity over against Delta is granted. Delta is therefore ordered to assume defense of the action against Strick Corporation and to pay any judgment rendered against Strick Corporation. The Clerk will enter judgment accordingly.

AND IT IS SO ORDERED.

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