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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2019CP041942
Appellant Case No. 2023-001401

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

v.

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

D.R. Horton, Inc., ... Appellant,

v.

A&J Landscaping & Grading LLC, A/K/A AJ Landscaping & Grading, Inc; Allpro Textures, LLC; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc., A/K/A ACP Concrete, Inc.; A&J Framing, Inc; Alpha E.M.C; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughn Lumber Co., Inc.; BFK Builders, Inc; Builders Designhouse, LLC; BMC EAST, LLC D/B/A Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC, A/K/A Builders Firstsourse Inc.; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc.; Caryl Mechanicals, Inc.; Cannaday Siding and Gutter, Inc; Cortes Painting, LLC; CBU Enterprises, Inc.; CPI Security Systems, Inc.; Dom Group, LLC; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC;

Galloway-Bell, Inc.; A/K/A Galloway-Bell, Inc. II BGET Floored, LLC; GBS Buildings Supply-Us LBM, LLC, A/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danler, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC. A/K/A M&L General Construction, Inc.; M&Lreyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC, NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, LLC; P&L Enterprises, LLC; Probuild Company, A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc.; Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc, A/K/A Gale Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc.; Dupree Plumbing Company, Inc.; Willow Tree Landscaping, Inc., ... Third-Party Defendants,

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

INITIAL REVISED REPLY BRIEF
OF APPELLANT REPLYING TO IBP

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INTRODUCTION

The brief filed by Respondent IBP Assets, LLC (d/b/a Blue Ridge Building Products) is unnecessarily long and complicated for two reasons. First, it argues many issues that are not raised on this appeal. Second, it argues them as though this is an appeal from a non-jury trial. It is not. It is an appeal from the grant of a motion 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). There is a "reasonable inference" concerning a "genuine issue as to any material fact" in this case.

This is a simple case. It is a case by D. R. Horton against IBP for attorneys' fees, expenses and costs. That is the only issue. It is based on a contract between the parties. That is the basis of D. R. Horton's claim. All the pages in the IBP's brief about everything else are completely irrelevant.[1]

ARGUMENT

In its Answer to D. R. Horton's Third-Party Complaint, "Defendant IBP admits that it contracted with D.R. Horton for work in the Rose Hill subdivision and craves reference to said contract for its specific terms and conditions." (Record p. 348, IBP Answer, Paragraph 4 of First Defense) IBP then included the contract as an exhibit to IBP's Memorandum in Support of Its

[1] D.R. Horton incorporates herein its briefs filed in this appeal regarding Respondent Gale.

Motion for Summary Judgment, filed September 2, 2022. (Record pp. 440-447) The contract is seven pages long. Of the hundreds of pages put into the Record on Appeal by IBP, these seven pages are the most important. (Record pp. 440-447, IBP/D. R. Horton Contract)

With D. R. Horton as the "Owner", IBP as the "Contractor" and bold typeface and capitalization in the original, the relevant portions of the Contract are as follows:

> **1. SCOPE OF WORK.** This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner … (the "Work").
>
> **6.4 Government Requirements.** Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work … (the "Requirements") … In addition to its obligations under Section 10 of this Agreement, Contractor shall … **DEFEND**, and **HOLD OWNER HARMLESS** from and against any and all claims, demands .. or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, … or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor …
>
> **10. CONTRACTOR'S INDEMNITY.**
>
> **10.1 GENERALLY. … CONTRACTOR SHALL … DEFEND … AND HOLD OWNER … FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION … (INCLUDING ALL COSTS THEREOF AND ATTORNEYS' FEES) … IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH … (2) THE WORK AS DEFINED IN SECTION 1 … EXCEPTING ONLY … THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRCTOR'S ULTIMATE**

LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY ... THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ... INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

11. INSURANCE

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance ... protecting against ... broad form property damage ... claims arising from ... (ii) products-completed operations ... ; (iv) contractual liability risk covering the indemnity obligation set forth in this Agreement; ...

11.3 General Requirements Applicable to all Required Insurance. Contractor shall add Owner as a named, Additional Insured ... Coverage obtained by Contractor with Owner as an additional insured shall be primary, ...

12. REMEDIES.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative ...

12.4 Right to Attorney's Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

> **16.2 Severability.** The provisions of this Agreement shall be deemed independent and severable, ...
>
> **19. MISCELLANEOUS.** All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

The provisions are clear and enforceable.

At bottom, the challenge to them is not by IBP, but instead by its insurance company, using IBP as subterfuge. If there is any bad faith in this case, as IBP has asserted, it is on the part of IBP's insurance company against D. R. Horton as its own named Additional Insured. Of course, fault on the part of IBP's insurance company does not relieve IBP of its contractual obligation to stand good for D. R. Horton's defense, attorneys' fees and expenses.

One might fairly ask why IBP as the Contractor has 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 is in exactly the same position, which means that the Contractors 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. (Record p. 1480 lines 3-7, July 20-21, 2023 TR p. 170, lines 3-7)

IBP is not entirely candid in characterizing the Complaint filed by the Plaintiff Natalie Zitek as being only against D. R. Horton. IBP states that it was not sued by Plaintiff and was only sued by D.R. Horton. That is not correct. The Complaint includes 60 other Defendants, 10 Jane Does and 50 John Does. The Jane Doe Defendants are alleged to have been involved in the construction of the homes. (Record p. 94, Complaint, Paragraph 8) The John Doe Defendants are alleged to include "contractors, subcontractors, manufacturers, material suppliers,

consultants, architects, engineers, real estate agents, managers, marketers, laborers, or otherwise." (Record p. 95, Complaint, Paragraph 16) Everyone who had a hand in building the homes was a target and was named in the lawsuit – some of them by name like D.R. Horton and some of them as John and Jane Does until such time as their names were ascertained. That is typical in these subdivision development construction defect cases. The Complaint is not against D. R. Horton alone. In page after page, allegations are made against the "Defendants", who include all the Jane Does and John Does. IBP knows very well that it was sued by the Plaintiff as a Jane/John Doe.

Some of the allegations in the Plaintiff's Complaint are specific, such as "water intrusion" as an element of damages. (Record pp. 96-97, Complaint, Paragraphs 24, 27 & 34) Others are more general, such as negligence on the part of all Defendants "[i]n failing to develop the Residences in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices; ... and [o]ther deficiencies or failures as will be proven at trial." (Record pp. 103-104, Complaint, Paragraph 67) These are broad and sweeping allegations.

The Complaint was filed as a class action on behalf of "All persons and entities that own a single family house developed by Defendants within the Rose Hill subdivision in the City of Easley, Anderson County, South Carolina." That is the way that it was certified as a class action by the court. (Record pp. 1-14, Order Granting Plaintiff's Motion for Class Certification and Denying Defendant's Motion to Compel Arbitration, filed January 27, 2021) "The class concerns approximately two hundred and fifty (250) properties." (Record pp. 97-98, Complaint, Paragraphs 35 & 36) It was not limited to specific problems or subcontractors.

The obligation of IBP to defend D. R. Horton was triggered by the filing and service of the Complaint. This is what their Contract provided. IBP breached its contract with D.R. Horton when it failed and refused to provide a defense and provide insurance coverage.[2]

Several months after filing the Complaint, counsel for the Plaintiff sent D. R. Horton a letter providing some more specifics about their claim. (Record pp. 111-116, Notice and Opportunity to Cure Letter dated December 11, 2019, filed February 28, 2020, at 10:02 a.m.) The letter notes "missing/inadequate insulation at exterior walls" ... "Insufficient/improperly installed grading/drainage, resulting water damage" ... "insufficient insulation in attics" ... and "Sloppy workmanship throughout Rose Hill." Almost three years after the Plaintiff noted these problems, IBP filed successive Motions for Summary Judgment against D. R. Horton and in both motions stated that its "scope of work at the Rose Hill subdivision consisted of the provision and installation of the following items: -Gutters; - Attic, wall, and crawl space insulation; - Shower doors ... ." (Record pp. 358, 364, IBP Motions for Summary Judgment, filed July 26, 2022 and August 1, 2022) Improperly installed gutters are a "drainage" problem. Improperly installed shower doors, like improperly installed gutters, frequently lead to "water intrusion." The insulation problem even more clearly lies at IBP's doorstep. IBP admitted it. All are examples of "sloppy workmanship."

It was not until July 20, 2023 that the Plaintiff filed a written stipulation concerning these claims, which provided the basis for D. R. Horton to *reduce* its case against IBP.[3] (Record pp. 969-971, Plaintiff's Stipulation As To Limitation of Claims filed July 20, 2023) This written stipulation was demanded by the trial judge. He would accept nothing less. Because he would

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[2] The court then gutted D.R. Horton's ability to recover its defense costs when it granted summary judgment.

[3] Reduce rather than dismiss because IBP still has contractual obligations for defense costs and insurance for the years D.R. Horton defended against the claims.

accept nothing less, neither should D. R. Horton be required to accept something less.[4] But even though the claims against IBP would not then be included in the trial, certain aspects of the case between D.R. Horton and IBP remained. In fact, both IBP and the court were made aware of the continued liability of IBP to D.R. Horton at the hearing on July 20-21, 2023. Attorney Imhoff, representing D.R. Horton, told the court:

> [T]here is a contract out there. Again, presumably between sophisticated, at arms' length entities, whereby IBP, Mr. Kendall's clients, signed a document that says if you get sued for our work, we'll fix it, defend you, we'll get insurance for you, ... But, because we had to go out there and take depositions and hire experts and file motions and that type of thing, DR Horton has incurred damages for allegations of wrongdoing or defective work from all of these subcontractor's work.
> (Record p. 1462 lines9-21, July 20-21, 2023 TR p 116, lines 9-21)
>
> ... but the fact is, that it hasn't been narrowed down until a month before trial. And if IBP had followed the contract, they would have stepped in and indemnified. They would have gotten their insurance carrier to step in and indemnify DR Horton and defend it. But they didn't.
> (Record pp. 1462 line 25 – 117 line 5, July 20-21, 2023 TR p 116 line 25 - p. 117 line 5)

The Respondent also attempts to conflate a duty to indemnify and a duty to defend. The two concepts are distinct, as the South Carolina General Assembly has repeatedly recognized and shown in its statutes.[5] For example, the South Carolina Legislature considered and *declined* to

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[4] At the July 20, 2023 hearing, the Appellant's attorney again discussed the lack of clarity in Plaintiff's complaint.

> [W]e have asked this Court multiple times – we stood in front of you, Your Honor, and said will you require Plaintiffs to identify the specific defects that they have that they are going to support so that we can narrow this case down.
>
> And you and I turned and looked at Mr. Lucey, and he didn't. He didn't until maybe an hour before this hearing start [July 20, 2023] finally stipulating that certain things are not part of this lawsuit. And so, DR Horton would say in response to that is, if we can't get clarification what's in this, and it takes us eight days to suck the testimony out of Rhett Whitlock, and we don't get the stipulation of things they're no longer going to ask to until an hour before this hearing a month before trial, that we could not possibly have known that Mr. Kendall's clients were -- or anybody else's clients were -- ... not going to be part of this lawsuit.
> (Record pp. 1461 line 17 – 1462 line 8, TR p 115, line 17 – p. 116, line 8)

add a duty to defend to the anti-indemnity statute, S.C. Code Ann. § 32-2-10, when it considered an amendment to that statute. S. 422, 124th Sess. (2021). (Record pp. 1648-1652) 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). (Record p. 1651) 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.[6]

The Legislature has shown in other legislation as well that it knows how to draft a statute that includes separately both a duty to indemnify and a duty to defend. See e.g., H. 4048, 2022, 124th Sess. (S.C. effective date May 13, 2022); S.C. Code Ann. § 1-11-440 (repealed May 13, 2022); S.C. Code Ann. § 12-4-325 (repealed May 13, 2022) (passing legislation providing a duty to indemnify and a duty to defend). (Record 1640-1644; 1645-1647)

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

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[5] D.R. Horton should prevail whether its attorneys' fees and defense costs fall under a duty to indemnify or a duty to defend.

[6] 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). (Record 1653)

IBP omitted many facts in its brief, including one of importance: the trial judge refused to grant JLS's Masonry's motion for summary judgment on its Section 10 contractual obligations even though they were the same contractual provisions as those of IBP. (R. pp. ___Order, July 28, 2023; JLS Masonry's Motion for Summary Judgment, filed May 1, 2023; JLS Masonry's Memo in Support of Motion for Summary Judgment with Exhibit A, filed July 11, 2023) On the same contract provisions to indemnify, to defend, and to additionally insure, the trial judge ruled two different ways. Other defendants sought summary judgment on the *very same issues* as Respondent IBP, but their motions were also denied. (R. pp. 368-376; 448-573, 831-853, 39-41; ___ ; Order, July 28, 2023; Order, July 28, 2023) JLS Masonry is but one such example of what occurred. When presented with motions to alter or amend in which the Court was alerted to what appeared to be inconsistent rulings on Section 10 of identical or substantially identical contracts, the Court denied those motions. R. pp. ___, 63-65; Order, August 18, 2023; JLS Masonry Motion to Alter or Amend, August 7, 2023). Others, such as MJ Cowboys, LLC and M&L Reyna Construction LLC, who were also denied summary judgment in the same order on July 28, 2023, were also denied relief on their motion to alter or amend. R. pp. ___, Order, August 18, 2023. The denial of those summary judgment motions was correct. The Court affirmed the legal validity of Section 10 of the parties' contracts when that provision was not declared void in the other contracts the Court ruled upon. IBP was the anomaly. IBP was the aberrant decision. IBP omitted these facts, too.

Litigants should be able to rely upon being treated similarly within the same case. That did not happen here. Judge Sprouse's inconsistent rulings concerning Section 10 of identical and substantially identical contracts is troubling. This shows how unjustly D.R. Horton was treated regarding Section 10 of the Contract, when the Court granted IBP's motion for summary

judgment. It proves there was no basis to deny D.R. Horton enforcement of its right to defense costs. The court's summary judgment order as to Respondent IBP is so inconsistent with its other summary judgment orders that it renders most of the IBP order dicta, at best. The court's order harms the Appellant D.R. Horton as to its contractual rights beyond the denial of its defense costs. It undermines the Appellant's business model, which is based on hiring subcontractors to do all the work and holding them responsible for that work.

CONCLUSION

The order under appeal is one granting a motion for summary judgment. Not only is there a "reasonable inference" concerning a "genuine issue as to any material fact", there is overwhelming evidence concerning the facts. Some of this is from the Plaintiff, some is from IBP and some is from the trial judge himself. The order granting summary judgment should be reversed and the case should be remanded to the trial judge for a trial on D. R. Horton's contractual rights to attorneys' fees and expenses, including those to enforce its rights under its contract with IBP.

September 6, 2024

Respectfully,

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

PROOF OF SERVICE

The undersigned does hereby certify that on September 6, 2024, a copy of Appellant D.R. Horton, Inc.'s Initial Revised Reply Brief of Appellant Replying To IBP was served by email on all counsel of record by copy of this email and filed by electronic mail with the Clerk of Court for the South Carolina Court of Appeals.

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