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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.

AJ Landscaping & Grading LLC, A/K/A AJ Landscaping &
Grading, Inc; Allpro Textures, LCC; Alpha Omega
Construction Group, Inc.; American Concrete and Precast,
Inc., A/K/A ACP Concrete, Inc.; A&J Framing, Inc; Alpha
E.M.C; A-Z, Inc.; Atlanta Floor Designs Center; A Grade
Above Others, LLC; Brand-Vaughan Lumber Co., Inc.;
BKF Builders, Inc; Builders Designhouse, LLC; BMC East,
LLC D/B/A Coleman Floor, LLC; Builders Firstsource
Southeast Group, LLC,A/K/A Builders Firstsource, Inc;
Bravo Carpenters, Inc.; Caryl Mechanics II, Inc.; Caryl
Mechanics, 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 Building 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.

AMENDED RECORD ON APPEAL
VOLUME III

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d/b/a Blue Ridge Building Products, LLC***

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STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
Natalie Zitek, individually, and on behalf)
of all others similarly situated,)
))
Plaintiff)
vs)
D.R. Horton, Inc., Jane Doe #1-10; and,)
John Doe #1-50,)
Defendant)
))

D.R. HORTON, INC.)
Third-Party Plaintiff)
vs)
AJ LANDSCAPING & GRADING,)
LLC, A/K/A AJ LANDSCAPING &)
GRADING, LLC; ALLPRO)
TEXTURES, LLC; ALPHA OMEGA)
CONSTRUCTION GROUP, INC.;)
AMERICAN CONCRETE AND)
PRECAST, INC.; A/K/A ACP)
CONCRETE, INC.; A&J FRAMING,)
INC; ALPHA E.M.C.; A-Z, INC.;)
ATLANTA FLOOR DESIGNS)
CENTER; A GRADE ABOVE)
OTHERS, LLC; BRAND-VAUGHAN)
LUMBER CO, INC.; BKF BUILDERS,)
INC.;BUILDERS DESIGNHOUSE,)
LLC; BMC EAST LLC D/B/A)
COLEMAN FLOOR, LLC; BUILDERS)
FIRSTSOURCE SOUTHEAST GROUP,)
LLC, A/K/A BUILDERS)
FIRSTSOURCE, INC; BRAVO)
CARPENTERS, INC.; CARYL)
MECHANICS II, INC., A/K/A CARYL)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

C.A. No. 2019-CP-04-1942

**DEFENDANT D.R. HORTON, INC.'S
SUPPLEMENTAL MEMORANDUM IN
OPPOSITION TO THIRD-PARTY
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT**

MECHANICALS, INC.; CANNADAY)
 SIDING & GUTTER, INC.; CORTES)
 PAINTING, LLC; CBU ENTERPRISES,)
 INC.; CPI SECURITY SYSTEMS, INC.;)
 DOM GROUP, LLC; FERGUSON)
 ENTERPRISES, INC.; FIVE STAR)
 CONSTRUCTION INC.; FIVE STAR)
 FOUNDATIONS, LLC; GALLOWAY-)
 BELL, INC. A/K/A GALLOWAY-)
 BELL, INC. II; GET FLOORED, LLC;)
 GBS BUILDING SUPPLY – US LBM,)
 LLC, F/K/A GBS BUILDING SUPPLY,)
 INC.; GENERAL SHALE BRICK INC.;)
 GREENER PASTURES, INC. A/K/A)
 GREENER PASTURES OF AIKEN,)
 LLC; IBP ASSET, LLC D/B/A BLUE)
 RIDGE BUILDING PRODUCTS; JLS)
 MASONRY, INC.; KINGS)
 LANDSCAPING, LLC;)
 LANDSHAPERS, LLC; LADE-)
 DANLAR, INC.; LANSING BUILDING)
 PRODUCTS, INC.; LONG HEATING &)
 AIR CONDITIONING, INC.; L&M)
 ELECTRIC, INC; MANALE)
 LANDSCAPING, LLC; MJ COWBOYS,)
 LLC; M&L GENERAL)
 CONSTRUCTION, LLC, A/K/A M&L)
 GENERAL CONSTRUCTION, INC.;)
 M&L REYNA CONSTRUCTION, LLC;)
 M&M FOUNDATIONS, LLC;)
 NAZARETH BUILDERS, LLC; NB)
 CONTRACTORS, LLC; POINSETT)
 DEVELOPMENT, LLC; POINSETT)
 HOMES, LLC; P&T CONSTRUCTION,)
 INC., A/K/A P&T CONSTRUCTION,)
 INC.; P&L ENTERPRISES, LLC;)
 PROBUILD COMPANY, LLC A/K/A)
 PROBUILD HOLDINGS, INC.; RITE)
 RUG CO.; RODNEY HOWARD)
 GRADING, INC. A/K/A RODNEY)
 HOWARD GRADING CO.;)
 SANDLAPPER CONCRETE, LLC;)
 SODFATHER INC., LANDSCAPE)
 CONTRACTORS; STOCK BUILDING)
 SUPPLY, LLC; TOPBUILD HOME)
 SERVICES, INC., A/K/A GALE)

CONTRACTORS SERVICE; TUCKER)
 MATERIALS, INC., A/K/A GYPSUM;)
 UTM ENTERPRISES, INC; DUPREE)
 PLUMBING COMPANY, INC. AND)
 WILLOW TREE LANDSCAPING, INC;)
 AND SILVER LINE BUILDING)
 PRODUCTS CORPORATION)
)

Third-Party

Defendants

TO: THIRD-PARTY DEFENDANTS M&M FOUNDATIONS, LLC, P&L ENTERPRISES, LLC, GALLOWAY-BELL, INC., II, PROBUILD COMPANY, LLC, BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC, BMC EAST, LLC, STOCK BUILDING SUPPLY, LLC, COLEMAN FLOOR, LLC, CANNADAY SIDING & GUTTER, INC., P&T CONSTRUCTION, INC., BKF BUILDERS, INC., IBP ASSET, LLC D/B/A BLUE RIDGE BUILDING PRODUCTS AND BUILDERS SERVICES GROUP, INC. D/B/A GALE CONTRACTOR SERVICES AND THEIR COUNSEL OF RECORD:

COMES NOW, Defendant D.R. Horton, Inc. (“D.R. Horton”) and hereby provides this Supplemental Memorandum in Opposition to Third-Party Defendants M&M Foundations, LLC, P&L Enterprise, LLC, Galloway-Bell, Inc. II, ProBuild Company, LLC, Builders FirstSource-Southeast Group, LLC, BMC East, LLC, Stock Building Supply, LLC, Coleman Floor, LLC, Cannady Siding & Gutter, Inc., P&T Construction, Inc., BKF Builders, Inc., IBP Asset, LLC d/b/a Blue Ridge Building Products, and Builders Services Group, Inc. d/b/a Gale Contractor Services Motions for Summary Judgment addressing arguments not specifically addressed in D.R. Horton’s initial opposition brief.

I. ARGUMENT

A. Statute of Limitations Does Not Bar D.R. Horton’s Claims Against Third-Party Defendants

M&M Foundations, LLC (“M&M”) and P&L Enterprise, LLC (“P&L”) contend that the statute of limitations bars claims against them because D.R. Horton brought its claims more than three years after these contractors last completed their work at Rose Hill or received their final

payment. This argument is misplaced. The statute of limitations does not begin to run until the injury is discovered by the Plaintiff.¹

On September 25, 2019, Plaintiff filed her claim against D.R. Horton, individually, and on behalf of all other similarly situated regarding alleged defects. D.R. Horton was first put on notice of this potential claim on December 11, 2019, when the Notice of a Right to Cure was provided to D.R. Horton by Plaintiff's counsel. On February 11, 2021, D.R. Horton filed its Answer. On March 11, 2021, D.R. Horton filed its Amended Answer and Third-Party Complaint against its subcontractors, including P&L Enterprises, LLC and M&M Foundations, LLC. P&L was served May 17, 2021, and M&M Foundations was served May 24, 2021. By applying South Carolina law and the "discovery rule", the Statute of Limitations regarding D.R. Horton's claims would not run until December 11, 2022, three years after D.R. Horton received notice regarding the potential claims. D.R. Horton's claims against these parties were brought well within the statute of limitations.

Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute was induced by the defendant's conduct.² Such inducement may consist either of an express representation that

¹ A number of Third-Party Defendants raised the statute of limitations in their motions as basis for granting summary judgment but provided no additional briefing on this grounds, including Galloway-Bell, Inc. II, Probuild Company, LLC, BMC East, LLC, Stock Building Supply, LLC and Coleman Floor, LLC. To the extent these parties are joining DRH's motion for summary judgment against Plaintiff on statute of limitations grounds, their motions should be similarly treated. Because none of these parties raised any specific grounds for the statute of limitations, DRH requests the ability to submit supplemental briefing should any of these parties be allowed to argue grounds for statute of limitations that were not raised in their briefing. *Skinner v. Skinner*, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972) ("One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor... Ordinarily, a court may not grant relief beyond the limits or scope of notice."). Additionally, BMC East, LLC, and Cannady Siding & Gutter, Inc. raised the issue of not having a contract with DRH in their motion but did not brief this issue. Because these parties did not specifically brief this issue, DRH requests the ability to submit supplemental briefing should BMC and Cannady be permitted to argue grounds for no contract that were not raised in its briefing.

² *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55 (1997).

the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary.³ Although the issue of whether a defendant is estopped from claiming the statute of limitations is ordinarily a question of fact, summary judgment is appropriate where there is no evidence of conduct on the defendant's part warranting estoppel.⁴ “Generally, a cause of action accrues under South Carolina law ‘the moment the defendant breaches a duty owed to the Plaintiff.’”⁵ There are multiple reasons why a cause of action may not begin to accrue on the day of the initial breach. In this instance, South Carolina has adopted the “discovery rule,” which tolls the three-year statute of limitations from running until discovery of the potential claim by the injured party. The South Carolina Supreme Court elaborated that:

Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against *another party* might exist. This standard as to when the limitations period begins to run is objective rather than subjective. Therefore, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.⁶

Essentially, the “exercise of reasonable diligence” means that “the injured party must act with some promptness” once on notice of a potential claim.⁷ The law is clear that a plaintiff, or in this case a Third-Party Plaintiff, must be on notice that a claim might exist and that a party exists against whom the claim can be made in order to trigger the discovery rule.

³ Id.

⁴ Id.

⁵ Barr v. City of Rock Hill, 330 S.C. 640, 644, 500 S.E.2d 157, 159-60 (Ct. App. 1998).

⁶ Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 787 S.E.2d 485 (2016) (emphasis added). “In other words...whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against *another party* might exist.” Young v. South Carolina Dept. of Soc. Servs., 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999) (emphasis added).

⁷ Dean v. Ruscon Corp., 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996).

In this instance, the earliest D.R. Horton was potentially put on notice of claims against these third-party defendants was after it received the notice of the right to cure in December 2019.

P&L Enterprise, LLC claims that under South Carolina law, the statute of limitations bars any claim from being brought after three years from the completion of its work on Rose Hill. P&L states that its last day of work for D.R. Horton regarding the Rose Hill Subdivision was September 30, 2015, and it was last paid for this work on July 26, 2018. In arguing that either of these dates starts the statute of limitations period, P&L ignores the discovery rule.

M&M Foundations, LLC takes the identical position as P&L Enterprises, LLC, stating that M&M Foundations, LLC last day of work on the Rose Hill Subdivision was on June 24, 2016, and therefore the statute of limitations had passed before D.R. Horton filed its Third-Party Complaint. M&M Foundation, LLC alternatively suggests that the Court use the Certificate of Occupancy date to establish the starting date for the statute of limitations. Both arguments ignore the discovery rule.

The statute of limitations for D.R. Horton's claims against M&M and P&L did not begin to run from their last date of work, the date of last payment, or the date the certificate of occupancy was issued. At the earliest, it began once D.R. Horton was put on notice of potential claims of latent defects after Plaintiff filed suit in September 2019. For these reasons, M&M and P&L's motions for summary judgment on statute of limitations ground should be denied.

B. The Statute of Repose is Not a Basis for Dismissal of D.R. Horton's Claims Against ProBuild and Builders FirstSource

ProBuild and Builders (collectively “ProBuild”) specifically raises the statute of repose as a basis for summary judgment. The statute of repose is not a basis for dismissal of D.R. Horton’s claims against ProBuild.⁸

D.R. Horton built the homes at issue in this matter between 2011 and 2017. ProBuild installed windows and exterior doors on nearly every home involved in this class action lawsuit. Plaintiff’s Complaint was filed on September 25, 2019. D.R. Horton filed its Amended Answer and Third-Party Complaint on March 11, 2021 (the “Third-Party Complaint”). ProBuild was among the Third-Party Defendants included in the Third-Party Complaint. D.R. Horton brought the following claims in the Third-Party Complaint: contractual and equitable indemnity, breach of contract, breach of express and implied warranties, and negligence/gross negligence/recklessness. *See generally*, D.R. Horton’s Amended Answer & Third-Party Complaint. ProBuild was served with the Third-Party Complaint on June 1, 2021. ProBuild contends that claims arising out of work performed by ProBuild prior to May 31, 2013 – eight years and one day before ProBuild was served with the Third-Party Complaint – are barred by the Statute of Repose. D.R. Horton has similarly moved for summary judgment on Statute of Repose grounds as to homes with certificates of occupancy more than eight years before Plaintiff’s Complaint.

Pursuant to the Section 15-3-640 (the “Statute of Repose”), “[n]o actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real

⁸ Numerous Third-Party Defendants have raised arguments in their Motions for Summary Judgment based on the Statute of Repose. However, several Third-Party Defendants did not include any argument or evidence in support of this argument in the briefs in support of their motions. Other Third-Party Defendants included a catch-all argument in their motions incorporating any potential applicable argument made by another Third-Party Defendant. To the extent any other Third-Party Defendants submit supplemental briefs and evidence in support of their arguments that D.R. Horton’s claims are barred by the Statute of Repose, D.R. Horton reserves the right to supplement and respond.

property may be brought more than eight years after substantial completion of the improvement.” The Statute of Repose applies to breach of contract, negligent construction or repair, actions in contract or in tort, contribution or indemnification for damages sustained on account of an action described in this section, among other causes of action. S.C. Code Ann. § 15-3-640(1), (2), (5) and (6). However, the Statute of Repose is not available as a defense to a person guilty of fraud, gross negligence, or recklessness. *See* S.C. Code Ann. § 15-3-670(A). While “the violation of a building code ... does not constitute *per se* fraud, gross negligence, or recklessness, ... this type of violation may be admissible as evidence of fraud, negligence, gross negligence, or recklessness.” S.C. Code Ann. § 15-3-670(B).

The latest date that the Statute of Repose begins to run is on the date that the Certificate of Occupancy is issued. *See Lawrence v. Gen. Panel Corp.*, 425 S.C. 398, 822 S.E.2d 800 (2019). “For any improvement to real property, a certificate of occupancy ... in the case of new construction ... shall constitute proof of substantial completion of the improvement[.]”). S.C. Code Ann. § 15-3-640. “Substantial Completion” is defined as that degree of a completion of a project, improvement, or a specified area or portion thereof ... upon attainment of which the owner can use the same for the purpose for which it was intended[.]” S.C. Code Ann. S.C. Code Ann. § 15-3-630.

D.R. Horton contends that the applicable date for measuring the end of the Statute of Repose should be the date Plaintiff’s filed its complaint and not the date of D.R. Horton’s Third-Party Complaint.⁹ Further, if the Court grants D.R. Horton’s motion for summary judgment on Statute of Repose grounds, then it follows that summary judgment as to claims against ProBuild apart from gross negligence/recklessness would be appropriate for these specific homes. However,

⁹ If the statute of repose begins at issuance of the certificate of occupancy, then approximately 40 homes would be excluded from the class on this basis.

D.R. Horton's indemnity claims would remain viable because ProBuild's obligations to defend was triggered by Plaintiff's claim.

Moreover, as noted above, the Statute of Repose is not available as a defense to a person guilty of fraud, gross negligence, or recklessness. *See* S.C. Code Ann. § 15-3-670(A). Therefore, any homes that the Court finds are barred, DRH's claims for gross negligence/recklessness would survive summary judgment. ProBuild argues that the record is devoid of any evidence that ProBuild acted with gross negligence or recklessness and, therefore, ProBuild is entitled to summary judgment on that claim as well.

Gross negligence has been defined as:

[T]he intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. It is the failure to exercise slight care. Gross negligence is ordinarily a mixed question of law and fact.

Jinks v. Richland Cty., 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003) (citations omitted). "Gross negligence is a relative term and means the absence of care that is necessary under the circumstances." Berberich v. Jack, 392 S.C. 278, 287 n.1, 709 S.E.2d 607, 612 (2011) (quoting Doe v. Greenville County Sch. Dist., 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007)). Recklessness is a "conscious failure to exercise due care" and "implies the doing of a negligent act knowingly[.]" Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting Yaun v. Baldrige, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964)).

Testimony from the Jeff Hawk, the 30(b)(6) deponent for Therma-Tru, LTD., the door manufacturer, and testimony from Curtis Harrelson, who testified he was hired by ProBuild to install doors, is some evidence that ProBuild may have been grossly negligent and/or reckless in its obligations to install and/or oversee the installation of the doors in Rose Hill. Jeff Hawk was deposed as the 30(b)(6) deponent for Therma-Tru, LTD., the manufacturer for the doors installed

in Rose Hill. Hawk testified that in some of the door photographs he noted missing corner sill pads and, according to Hawk, this can contribute to water damage to a door because the pads are an integral part of keeping water out. (Jeff Hawk Dep. 32:20-33:9, excerpts attached as **Exhibit A**). Curtis Harrelson, with Harrelson Painting, deposed in a similar matter in Rose Hill, testified that the corner sill pads were not always installed but given back to ProBuild. (Curtis Harrelson Dep. 133-136 (Apr. 12, 2022), excerpt attached as **Exhibit A**). Based on this testimony about the failure to install the corner sill pads, there is, at the very least, a question of material fact as to whether ProBuild acted grossly negligent and/or reckless. Therefore, D.R. Horton's claims for gross negligence/recklessness as to the work outside of the permitted time period under the Statute of Repose must survive summary judgment.

C. There Are Factual Disputes Concerning the Work Performed by Subcontractors

1. Galloway-Bell, Inc. a/k/a Galloway-Bell, Inc. II's

Galloway-Bell, Inc. contends that it should be granted summary judgment as against D.R. Horton because the Plaintiff concedes through answers to requests for admission and prior stipulations made before this Court, that batt and blown insulation are not at issue in this litigation. If such a stipulation is submitted on these issues, then it follows that summary judgment as to certain of D.R. Horton's claims against Galloway-Bell for batt and blown insulation would be appropriate. D.R. Horton's indemnity claims would remain viable because Galloway-Bell's obligation to defend was triggered by Plaintiff's claim.

If such a stipulation is not entered, because Plaintiff has changed its allegations throughout the course of this litigation, it would be premature and prejudicial to grant Galloway-Bell's motion if Plaintiff is later permitted to raise allegations about these construction items as these would be fact questions that must be resolved by a fact finder.

2. P&L Enterprises, LLC

P&L Enterprises, LLC (“P&L”) contends that it should be granted summary judgment on allegations of siding defects at the Homes it worked on in Rose Hill. D.R. Horton disputes Plaintiff’s allegations that siding is defective, and it believes that the evidence at trial will show as much. If the Court is willing to grant summary judgment on any of Plaintiff’s claims relating to siding on the specific Homes that P&L worked on, then it follows that summary judgment as to some of D.R. Horton’s claims against P&L would be appropriate. D.R. Horton’s indemnity claims would remain viable because P&L’s obligation to defend was triggered by Plaintiff’s claim.

It is the nature of class actions that only a representative sample of defects (not every individual defect) is analyzed to reach class-wide conclusions. Whitlock looked at one Home on which P&L worked, but not the other. (Whitlock Dep. 1562:9-12, excerpts attached as **Exhibit B**). Plaintiff identified siding defects in its Notice & Opportunity to Cure Letter. Unless Plaintiff has now dismissed all such claims, there remains factual issues for a jury to determine on this issue. Accordingly, there remain factual questions as to whether siding is defective in any Rose Hill Home and specifically as to the P&L Homes. As such, summary judgment should be denied.

3. Cannady Siding & Gutter, Inc.

Cannady Siding & Gutter, Inc. (“Cannady”) contends that it should be granted summary judgment on allegations of siding defects at the 35 Rose Hill Homes it worked on. D.R. Horton disputes Plaintiff’s allegations that siding is defective, and it believes that the evidence at trial will show as much. If the Court is willing to grant summary judgment on any of Plaintiff’s claims relating to siding on the specific Homes that Cannady worked on, then it follows that summary judgment as to some of D.R. Horton’s claims against Cannady would be appropriate. D.R.

Horton's indemnity claims would remain viable because Cannady's obligation to defend was triggered by Plaintiff's claim.

Whitlock testified regarding potential issues with cement siding. (Whitlock Dep. 1559:19-1560:9, **Exhibit B**). Plaintiff also identified siding defects in its Notice & Opportunity to Cure Letter and the Court did not specifically identify which alleged construction defects were included or excluded from class certification. Unless Plaintiff has now dismissed all such siding claims, there remain factual issues for a jury to determine on this issue. Accordingly, there remain factual questions as to whether siding is defective in any Rose Hill Home and specifically as to the Cannady Homes. As such, summary judgment should be denied.

4. P&T Construction, Inc.

P&T Construction, Inc. ("P&T") contends that it should be granted summary judgment on allegations of siding defects at the approximately 160 Rose Hill Homes it worked on. D.R. Horton disputes Plaintiff's allegations that siding is defective, and it believes that the evidence at trial will show as much. If the Court is willing to grant summary judgment on any of Plaintiff's claims relating to siding on the specific Homes that P&T worked on, then it follows that summary judgment as to some of D.R. Horton's claims against P&T would be appropriate. D.R. Horton's indemnity claims would remain viable because P&T's obligation to defend was triggered by Plaintiff's claim.

Whitlock testified regarding potential issues with siding even though it was not currently in his scope of repair estimate. (Whitlock Dep. 79:14-80:16, **Exhibit B**). Plaintiff identified siding defects in its Notice & Opportunity to Cure Letter and the Court did not specifically identify which alleged construction defects were included or excluded from class certification. Unless Plaintiff has now dismissed all such siding claims, there remain factual issues for a jury to determine on

this issue. Accordingly, until Plaintiff stipulates to a dismissal of siding claims, there remain factual questions as to whether siding is defective in any Rose Hill Home and specifically as to the P&T Homes. As such, summary judgment should be denied.

5. M&M Foundations, LLC

M&M Foundations, LLC (“M&M”) contends that it should be granted summary judgment on allegations of foundation defects at the approximately twelve Rose Hill Homes it worked on. D.R. Horton disputes Plaintiff’s allegations that foundations are defective, and it believes that the evidence at trial will show as much. If the Court is willing to grant summary judgment on any of Plaintiff’s claims relating to foundations on the specific Homes that M&M worked on, then it follows that summary judgment as to some of D.R. Horton’s claims against M&M would be appropriate. D.R. Horton’s indemnity claims would remain viable because M&M’s obligation to defend was triggered by Plaintiff’s claim.

Whitlock testified to potential issues with foundation and included foundation in his scope of repair estimate. (Whitlock Dep. 88:18-89:4, **Exhibit B**). Plaintiff identified foundation defects in its Notice & Opportunity to Cure Letter and the Court did not specifically identify which alleged construction defects were included or excluded from class certification. Unless Plaintiff has now dismissed all such foundation related claims, there remain factual issues for a jury to determine on this issue. Accordingly, until Plaintiff stipulates to a dismissal of foundation claims, there remain factual questions as to whether foundations are defective in any Rose Hill Home and specifically as to the M&M Homes. As such, summary judgment should be denied.

6. BKF Builders, Inc.

BKF Builders, Inc. (“BKF”) contends that it should be granted summary judgment on its drywall and painting work on approximately twelve Rose Hill Homes. There are genuine issues of

material fact as to whether the scope of work for drywall and painting contractors included installation or re-installation of the corner sill pads on the doors. Jeff Hawk was deposed as the 30(b)(6) deponent for Therma-Tru, LTD., the manufacturer for the doors installed in Rose Hill. Hawk testified that in some of the door photographs he noted missing corner sill pads and, according to Hawk, this can contribute to water damage to a door because the pads are an integral part of keeping water out. (Jeff Hawk Dep. 32:20-33:9, excerpts attached as **Exhibit A**). Hawk was unable to identify which contractor is responsible for installation of the pads, but he was not able to rule out that they should be installed after the jams are painted. (Hawk Dep. 184:18-185:6, **Exhibit A**). Curtis Harrelson, with Harrelson Painting, deposed in a similar matter in Rose Hill, testified that the corner sill pads were not always installed but given back to ProBuild. (Curtis Harrelson Dep. 133-136 (Apr. 12, 2022), excerpt attached as **Exhibit C**). Whether BKF or another contractor was responsible for this issue is a genuine issue of material fact.

Because BKF's scope of work could have contributed to door deterioration, it would be inappropriate to grant BKF summary judgment. There remain factual questions as to whether BKF's work contributed to door deterioration in any Rose Hill Home. As such, summary judgment should be denied.

7. IBP Asset, LLC d/b/a Blue Ridge Building Products

IBP Asset, LLC d/b/a Blue Ridge Building Products ("Blue Ridge") contends that it should be granted summary judgment as against D.R. Horton because the Plaintiff conceded at a previous hearing that installation of gutters and attic insulation were not part of the class claims. However, Plaintiff has never stipulated to this fact and instead raised the concern of potential water leak through doorknobs. (Blue Ridge Mem. Supp. 2). If Plaintiff is willing to stipulate that Blue Ridge's work is not at issue, then it follows that summary judgment as to certain of D.R. Horton's claims

against Blue Ridge would be appropriate. D.R. Horton's indemnity claims would remain viable because Blue Ridge's obligation to defend was triggered by Plaintiff's claim.

If such a stipulation is not entered, because Plaintiff has changed its allegations throughout the course of this litigation, it would be premature and prejudicial to grant Blue Ridge's motion if Plaintiff is later permitted to raise allegations about these construction items as these would be fact questions that must be resolved by a fact finder.

8. Builders Services Group, Inc. d/b/a Gale Contractor Services

Builders Service Group, Inc. d/b/a Gale Contractor Services ("Gale") installed garage doors, gutters, downspouts, and batt and blown insulation. Gale contends that it should be granted summary judgment as against D.R. Horton because the Plaintiff confirmed at a previous status conference that gutters, downspouts, and insulation were not part of the class claims. If such a stipulation is submitted on these issues, then it follows that summary judgment as to certain of D.R. Horton's claims against Gale may be appropriate. D.R. Horton's indemnity claims would remain viable because Gale's obligation to defend was triggered by Plaintiff's claim.

If such a stipulation is not entered, because Plaintiff has changed its allegations throughout the course of this litigation, it would be premature and prejudicial to grant Gale's motion if Plaintiff is later permitted to raise allegations about these construction items as these would be fact questions that must be resolved by a fact finder. In fact, Gale itself points to a factual dispute with Plaintiff over potential damages connected with these construction conditions. (Gale Mem. 14). Accordingly, summary judgment should be denied.

D. Alleged Defective Plans Not Grounds for Summary Judgment

Third-Party Defendants Galloway, P&L, and M&M, each argue that summary judgment should be granted because they are not responsible for consequences of defects in plans and

specifications. These parties have not presented evidence that their scope of work in the plans were improper. D.R. Horton's expert, Moore, testified that there is no information that the plans and specifications for Rose Hill were not adequate. (Moore Dep. 288:9-18, excerpt attached as **Exhibit D**). Additionally, Moore concluded that even if the plans were not adequate, the subcontractor has a duty to follow up with the builder for any specific questions. (Moore Dep. 288:24-289:1, **Exhibit D**).

D.R. Horton's expert, Moore, testified that DRH, as a general contractor, has some duty to inspect the work of its subcontractors during construction which can be met by a walk through. (Moore Dep. 498:24-499:11, **Exhibit D**). Moore further stated that the subcontractors must perform their scope of work in accordance with building codes and their Independent Contractor Agreements. Subcontractors cannot blame DRH for failing to look at the work and catch it. (Moore Dep. 660:1-13, **Exhibit D**). The ICA's provide that these subcontractors were responsible for reviewing the plans and specifications and complying with applicable building codes. To the extent any plans or specifications deviated from building codes, these contractors were responsible for bringing any such discrepancy to D.R. Horton's attention.

6. PERFORMANCE STANDARDS.

6.1 Applicable Standards. Contractor shall perform all Work in a good and workmanlike manner in accordance with the plans and specifications of Owner, according to industry standard practices, and warrants that the Work will meet or exceed FHA minimum property standards, VA requirements, all laws (statutory or common) and regulations, and any applicable building code requirements.

(Version 1 of ICA, attached as Ex. 1 to Mem. Opp'n Third-Party Defendants' Mot. Summary Judgment).

Because there are questions of fact as to whether any such plans or specifications were defective, whether these contractors failed to follow applicable building codes, and whether any

such alleged defects or deviations from building codes caused damages, summary judgment should be denied.

E. The Economic Loss Rule Does Not Apply

1. M&M Foundations, LLC

M&M argues that the economic loss rule applies to “some or all of D.R. Horton’s damages and as such the negligence cause of action should be dismissed.” M&M’s Memo in Support of its Motion for Summary Judgment as to D.R. Horton states that “[t]he economic loss rule prohibits any liability for damages when the damage is to the product itself and no economic loss result (sic) from it.” This argument is a misstatement of how the economic loss rule works under South Carolina law. M&M cites Beachwalk Villas Condominium Ass’n v. Martin, 305 S.C. 144, 406 S.E.2d 372 (1991) as the authority for its argument. The economic loss rule has evolved since 1991 and is not stated as M&M suggests in the later cases.

The Court made it clear in Sapp v. Ford Motor Company, 386 S.C. 143, 687 S.E.2d 47 (2009), that purely "economic loss" may be recoverable under a variety of tort theories. The question is not whether the damages are physical or economic; rather, the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed. A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty arising independently of any contractual duties between the parties, however, may support a tort action. State Ports Auth. v. Booz-Allen, 289 S.C. 373, 346 S.E.2d 324 (1986). Those duties include complying with applicable building codes and industry standards in residential building. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335. Ultimately, the

Sapp Court reaffirmed the holding in *Kennedy*, recognizing an exception to the economic loss rule in the residential real estate construction context. *Sapp*, 386 S.C. 150, 687 S.E.2d at 51.

In the present case, M&M provided basement wall foundation work to the project. In the Plaintiff's Notice to Cure, attached hereto as **Exhibit E**, the Plaintiff alleged defects in that work. Accordingly, D.R. Horton alleged claims for contractual indemnity, equitable indemnity, breach of contract, breach of express warranties, and negligence/gross negligence/recklessness against M&M. M&M has a duty to perform its work in a good and workmanlike manner, and in compliance with applicable codes and industry standards. *Terlinde v Neely*, 275 S.C. 395, 397, 271 S.E.2d 768, 769 (1980) Therefore, the economic loss doctrine does not bar D.R. Horton's claims.

2. **P&L Enterprises, LLC**

P&L argues that the economic loss rule applies to "some or all of D.R. Horton's damages and as such the negligence cause of action should be dismissed." P&L's Memo in Support of its Motion for Summary Judgment as to D.R. Horton states that "[t]he economic loss rule prohibits any liability for damages when the damage is to the product itself and no economic loss result (sic) from it." This argument is a misstatement of how the economic loss rule works under South Carolina law. Plaintiff cites *Beachwalk Villas Condominium Ass'n v. Martin*, 305 S.C. 144, 406 S.E.2d 372 (1991) as the authority for its argument. The economic loss rule has evolved since 1991 and is not stated as P&L suggests in the later cases.

The Court made it clear in *Sapp v. Ford Motor Company*, 386 S.C. 143, 687 S.E.2d 47 (2009), the purely "economic loss" may be recoverable under a variety of tort theories. The question is not whether the damages are physical or economic. Rather, the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the

source of the duty plaintiff claims the defendant owed. A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of a duty arising independently of any contractual duties between the parties, however, may support a tort action. State Ports Auth. v. Booz-Allen, 289 S.C. 373, 346 S.E.2d 324 (1986). Those duties include complying with applicable building codes and industry standards in residential building. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335. Ultimately, the *Sapp* Court reaffirmed the holding in *Kennedy*, recognizing an exception to the economic loss rule in the residential real estate construction context. *Sapp*, 386 S.C. 150, 687 S.E.2d at 51.

In the present case, P&L provided siding to the project. In the Plaintiff's Notice to Cure, attached hereto as **Exhibit E**, the Plaintiff alleged defects in siding. Accordingly, D.R. Horton alleged claims for contractual indemnity, equitable indemnity, breach of contract, breach of express warranties, and negligence/gross negligence/recklessness against P&L. P&L has a duty to perform its work in a good and workmanlike manner, and in compliance with applicable codes and industry standards. Terlinde v. Neely, 275 S.C. 395, 397, 271 S.E.2d 768, 769 (1980). Therefore, the economic loss doctrine does not bar D.R. Horton's claims.¹⁰

F. BKF Has a Contract With DRH

BKF Builders, Inc. argues that it should be granted summary judgment on DRH's claims because there is no written contract between DRH and BKF. This is incorrect. Brian Fowler, owner of BKF signed an independent contractor agreement on or about March 2014, and added DRH as an additional insured on its insurance policies. BKF ICA, attached as **Exhibit F**).

¹⁰ Galloway-Bell, Inc. II raise the economic loss rule in its motion but did not brief this issue. Because Galloway-Bell did not specifically brief this issue as it relates to its work at Rose Hill, DRH requests the ability to submit supplemental briefing should Galloway be permitted to argue grounds for economic loss rule that were not raised in its briefing.

Accordingly, BKF has the same contractual obligations to DRH as the other third-party defendants and BKF's motion for summary judgment on these grounds should be denied.

CONCLUSION

Based on the foregoing, the Third-Party Defendants have not met their burden of proof, and therefore, their motions for summary judgment as to D.R. Horton's Crossclaims must be denied.

WHEREFORE, Defendant D.R. Horton shall, and hereby does, move the Court for an Order denying these Third-Party Defendants' Motions for Summary Judgment on D.R. Horton's Crossclaims.

Respectfully submitted,

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

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Counsel for Defendant D.R. Horton, Inc.

July 19, 2023
Greenville, South Carolina

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 ANDERSON COUNTY

4 DEPOSITION OF JEFF HAWK
5 30(b)(6) THERMA-TRU, LTD.
6 MAY 30, 2023

7 NATALIE ZITEK, Individually and on behalf of all
8 others similarly situated,

9 Plaintiff,

10 vs. CASE NO. 2019-CP-04-01942

11 D.R. HORTON, INC.,

12 Defendant.

13 D.R. HORTON, INC.,

14 Third-Party Plaintiff,

15 vs.

16 AJ LANDSCAPING & GRADING, LLC a/k/a A J
17 LANDSCAPING & GRADING, LLC, et al.,

18 Third-Party Defendants,

19 PROBUILD COMPANY, LLC, et al.,

20 Fourth-Party Plaintiffs,

21 vs.

22 HARRELSON PAINTING, LLC, et al.,

23 Fourth-Party Defendants,

24 NICHOLAS SOTA a/k/a NICOLAS SOTO, Individually
25 and d/b/a SOTA HVAC,

 Fifth-Party Plaintiff,

 vs.

TORIBIO ISLAS AND ALEJANDRO SOTO,

 Fifth-Party Defendants.

1 Q. You said you've seen some pictures of
2 the doors at Rose Hill; is that right?

3 A. Yes, sir.

4 Q. I'll pull one up. After your review of
5 those pictures -- well, let me ask you this. How
6 many did you see?

7 A. I didn't keep count. I don't know. I
8 saw a few.

9 Q. But fewer than 10?

10 A. I would say maybe around 10.

11 Q. Okay. And what did you see as the main
12 issue with the doors?

13 MR. JONES: Object to the form.
14 You can answer.

15 A. So what I saw was there was rot on the
16 frame, that there were corner sill pads missing.
17 I didn't necessarily see anything that failed as
18 it relates to a Therma-Tru component in that
19 door.

20 Q. Do you know why the frames are rotting?

21 A. It appeared that it was due to
22 maintenance and incomplete installation.

23 Q. What was the incomplete installation?

24 A. It was missing the corner sill pads.

25 Q. What are the corner sill pads for?

1 A. Corner sill pads are basically designed
2 to connect your weatherstripping to your sill
3 cap. So your sill cap is in one plane. Your
4 weatherstripping is in another plane. They're
5 not married up in parallel. They're offset. The
6 corner sill pad basically connects the
7 weatherstripping over to the sill cap so it
8 completes the sill. It's very much an integral
9 part of the door system to keep water out.

10 Q. If those -- you called it sill caps, I
11 think. If those sill caps are missing, is the
12 door more prone to leak and rot?

13 A. Sill pad. There's a sill cap and
14 there's a sill pad. The sill pad, P-A-D, is the
15 component that I saw that was missing. The sill
16 cap would be the part that would go from one jamb
17 to the other across the top of the sill or
18 threshold.

19 What was the question, please?

20 Q. Give me one minute. So what I meant to
21 ask was what does the sill pad do?

22 A. That was what I was explaining a minute
23 ago. I can re-explain it.

24 Q. Yeah. Please do. I'm having trouble
25 following you.

1 Q. Okay. Turning a minute to the pads,
2 have you ever run into the situation where the
3 pads aren't put on until after the frames are
4 painted or the jamb is painted to keep the
5 painter from either painting over the pad or
6 pulling it off to paint?

7 A. Yes, sir.

8 Q. Do you know what happened in this
9 particular case to result in pads not being
10 present in some of the doors you looked at?

11 A. Only through -- only through what has
12 been shared with me.

13 Q. And who shared that with you? If you or
14 your lawyer talked about it, I don't want to know
15 about it, but if you have it from any other
16 source, please tell us what was shared with you.

17 A. Not from any other source.

18 Q. You don't have any personal knowledge of
19 why the pads aren't there, I take it.

20 A. No, sir, because as of two weeks ago, I
21 was unaware that there was even an issue here in
22 the subdivision.

23 Q. Got it. Do you know -- assuming that
24 the pads were to go on after the jambs were
25 painted, do you know who was responsible for

1 making sure they got put on at that point?

2 A. No. I can only speculate whoever's
3 involved with the punchlist, you know, walking
4 the home making sure screens are in the windows
5 and, you know, corner sill pads are placed on the
6 door.

7 Q. So it sounds like you think that should
8 be one of the punchlist items to make sure it got
9 done.

10 A. It could be. Again, it varies. I've
11 seen a variety of ways people do it, and all
12 builders do it differently, and they have their
13 own standard operating procedures. So I don't
14 know what this in particular builder's SOPs are
15 as it relates to that.

16 MR. DUBOSE: Okay. Very good.
17 Thank you. I don't have anything further.

18 THE WITNESS: Thank you, sir.

19 EXAMINATION

20 BY MR. PRITCHARD:

21 Q. Hey, Mr. Hawk. My name is Thomas
22 Pritchard, and I represent Huttig. How are you
23 today, sir?

24 A. I'm okay, sir. How are you?

25 Q. Fine. I don't have too many questions

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 ANDERSON COUNTY

4 DEPOSITION OF A. RHETT WHITLOCK, PhD, PE
5 VOLUME 1, NOVEMBER 17, 2022

6 NATALIE ZITEK, Individually and on behalf of all
7 others similarly situated,

8 Plaintiff,

9 vs. CASE NO. 2019-CP-04-01942

10 D.R. HORTON, INC.,

11 Defendant.

12

D.R. HORTON, INC.,

13 Third-Party Plaintiff,

14 vs.

15 AJ LANDSCAPING & GRADING, LLC a/k/a A J
16 LANDSCAPING & GRADING, LLC, et al.,

17 Third-Party Defendants,

18

PROBUILD COMPANY, LLC, et al.,

19 Fourth-Party Plaintiffs,

20 vs.

21 HARRELSON PAINTING, LLC, et al.,

22 Fourth-Party Defendants,

23

NICHOLAS SOTA a/k/a NICOLAS SOTO, Individually
24 and d/b/a SOTA HVAC,

25 Fifth-Party Plaintiff,

 vs.

TORIBIO ISLAS AND ALEJANDRO SOTO,

Fifth-Party Defendants.

1 surfaces, glass windows.

2 Q. In your opinion, is it a defective
3 product or is it just something that happens
4 sometimes?

5 A. Well, it does happen sometimes. I don't
6 know if there's a vinyl that can withstand it or
7 not. There may be a vinyl formulation that
8 doesn't have that problem. I don't know.

9 Q. Well, let me ask you this. For this
10 case have you developed an opinion that there is
11 either a design or manufacturing defect with the
12 vinyl exterior cladding in Rose Hill?

13 A. Not with the material, no.

14 Q. Do you have any criticisms of the vinyl,
15 either installation or product, that you're
16 prepared to testify about in this case?

17 A. Well, as I said, the air barrier and
18 associated flashings and tape that's missing, I
19 have criticisms of that. If it were installed by
20 the vinyl siding person, then that would be an
21 installation issue related to the vinyl
22 installation.

23 Q. Are you calling for a declad of the
24 vinyl houses?

25 A. No.

1 Q. Why not?

2 A. I don't think that the cost of putting
3 on new vinyl is justified by the defect in the
4 air barrier behind it.

5 Q. Again, I don't mean to beat a dead
6 horse, but let me go back. I understand some of
7 it is warping, the vinyl. But is that -- is that
8 something you intend to testify about in this
9 case and/or ask the jury to award damages to
10 remove and replace it?

11 A. I have no anticipation that I will be
12 doing that. If you ask me questions during
13 trial, I'll answer them.

14 Q. Yeah. But it's not in your report or
15 your scope of repair or your pricing, is it?

16 A. No.

17 Q. No. All right. So this next photograph
18 is 1102. This shows the berm behind 158
19 Haverhill; is that right?

20 A. Yes.

21 Q. Dr. Whitlock, this berm and the issue
22 around it, I believe, is Andy Sherard's area of
23 expertise and testimony, I think. Do you have
24 testimony about the exterior grading and exterior
25 water issues in this case?

1 people's feet? What's the issue here? Cracks in
2 the concrete?

3 A. Cracked concrete.

4 Q. Do you have an opinion about why the
5 concrete cracked at 3 Chatham in the garage?

6 A. I believe that's a combination of normal
7 concrete shrinkage, drying shrinkage and slab
8 movement, settlement.

9 Q. Is it -- well, let me ask you this. Are
10 you going to testify about a construction defect
11 that created that crack in the slab and the
12 garage at 3 Chatham?

13 A. At this point, I don't think I am. I do
14 know that some recent information came in -- or
15 relatively recent -- about the construction of
16 the fill areas of this project that cast some
17 doubt on it being installed properly.

18 Q. Yeah. We'll probably talk about that
19 later. As you sit here today, have you developed
20 an opinion -- can you say to a reasonable degree
21 of engineering certainty that there is
22 differential or unaccepted settling at any of the
23 homes causing foundation or slab cracking?

24 A. I have seen that on some homes. There
25 are homes that have some fairly large cracks, and

1 they correlate to areas of significant fill.

2 Q. In the slab or in the driveway or where
3 did you see those cracks?

4 A. Slabs and driveways and foundations.

5 Q. Do you have a list of those homes for
6 us?

7 A. I've got photographs, but I didn't do a
8 list of homes that have large cracks.

9 Q. Are you prepared to testify about which
10 homes have settling, compaction, concrete
11 foundation slab issues?

12 A. I can do that, but I haven't done that.

13 Q. Well, let me ask you this. Are you
14 finished with your inspections and developing
15 your opinions?

16 A. As far as I know, I am.

17 Q. And when you say as far as you know you
18 are, is that because you haven't been asked to do
19 more or there's nothing else you can do?

20 A. I have not been asked to do more in this
21 regard.

22 Q. Can you testify to a reasonable degree
23 of engineering certainty that there are
24 foundation, slab, fill issues at Rose Hill?

25 A. Yes.

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 ANDERSON COUNTY

4 DEPOSITION OF RHETT WHITLOCK, PhD, PE
5 VOLUME 6, APRIL 11, 2023

6 NATALIE ZITEK, Individually and on behalf of all
7 others similarly situated,

8 Plaintiff,

9 vs. CASE NO. 2019-CP-04-01942

10 D.R. HORTON, INC.,

11 Defendant.

12 _____
13 D.R. HORTON, INC.,

14 Third-Party Plaintiff,

15 vs.

16 AJ LANDSCAPING & GRADING, LLC a/k/a A J
17 LANDSCAPING & GRADING, LLC, et al.,

18 Third-Party Defendants,

19 _____
20 PROBUILD COMPANY, LLC, et al.,

21 Fourth-Party Plaintiffs,

22 vs.

23 HARRELSON PAINTING, LLC, et al.,

24 Fourth-Party Defendants,

25 _____
26 NICHOLAS SOTA a/k/a NICOLAS SOTO, Individually
27 and d/b/a SOTA HVAC,

28 Fifth-Party Plaintiff,

29 vs.

30 TORIBIO ISLAS AND ALEJANDRO SOTO,

31 Fifth-Party Defendants.

1 MR. LUCEY: Anybody else? Last
2 chance on insulation before we move to siding.
3 Once, twice. Insulation is completed 9:14.
4 Emily, who's taking the lead on siding.

5 MS. SHEETS: You have me all day,
6 Justin.

7 EXAMINATION

8 BY MS. SHEETS:

9 Q. Dr. Whitlock, we are going to move on to
10 siding. The good news is my client, P&L, only
11 did a couple of houses, and you only looked at
12 one. But this is a big neighborhood, so I
13 imagine that I will be pretty brief here, but
14 there will be others after that.

15 So on the siding, have you discussed any
16 siding issues with Natalie Zitek?

17 A. I don't remember discussing siding with
18 her.

19 Q. Have you discussed any siding issues
20 with plaintiffs' counsel?

21 A. I have.

22 Q. What are those discussions?

23 A. When I first visited the site, I noticed
24 that there were areas where the siding appeared
25 to be loose. There was siding that looked like

1 it was fried by the sun, vinyl siding. There was
2 cement -- fiber cement siding that wasn't
3 flashed.

4 Q. Okay.

5 A. There was poor or no caulking at the
6 terminations of the siding at trim. Issues like
7 that I saw here and there. I didn't see those
8 issues everywhere, but I saw them in quite a few
9 homes.

10 Q. Looking at Exhibit Number 34, and
11 particularly the properties that you performed
12 testing on, which are circled with a blue circle,
13 did you look at siding on each of those homes if
14 it existed?

15 A. I looked at the siding, and I
16 photographed the siding, but I didn't test the
17 siding.

18 Q. You didn't remove it to see what was
19 underneath?

20 A. I didn't remove the siding to see how
21 the siding was installed.

22 Q. Did you observe anyone else do that?

23 A. ABS did some of that in their most
24 recent destructive testing.

25 Q. Did any of ABS's testing change any of

1 anything in my repair scope for siding, except to
2 remove siding to get to windows, for example.

3 Q. Do you recall in your observations
4 either with your own team or following ABS's team
5 around, whether you had any criticisms of any
6 trimwork installed around garage door frames?

7 A. I don't recall having any criticisms of
8 that.

9 Q. Can you tell me if you have visually
10 observed 119 Sturbridge as it relates to siding.

11 A. I don't recall specifically looking at
12 the siding there. I might have.

13 Q. I'll represent to you that after
14 scouring all 24 of these boxes that are sitting
15 here behind me in this room today, that I have
16 not found any photographic evidence that you
17 looked at siding on 119 Sturbridge Court. As you
18 sit here today, do you have any information that
19 tells me that I'm wrong about that?

20 A. Not from my memory, and the only way I
21 could confirm that is to go through my
22 photographs.

23 Q. Dr. Whitlock, I'm going to hand you a
24 large binder. For the record, these are your
25 photographs, which were originally Bates labeled

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 CHARLESTON COUNTY

4 30(b)(6)DEPOSITION OF HARRELSON PAINTING
5 CURTIS HARRELSON (BY VIDEOCONFERENCE)
6 APRIL 18, 2022

7 MADELINE JEAN SMITH, DR HORTON, INC.; A GRADE
8 ABOVE OTHERS, LLC; ANDRADE'S CLEAN UP, INC.; AJ
9 LANDSCAPING & GRADING, LLC a/k/a A J LANDSCAPING
10 & GRADING, LLC; BRAVO CARPENTERS, INC.; BMC EAST,
11 LLC f/k/a STOCK BUILDING SUPPLY, LLC; BUILDER
12 SERVICES GROUP, INC. f/k/a MASCO CONTRACTOR
13 SERVICES CENTRAL INC. f/k/a GALE INDUSTRIES, INC.
14 d/b/a GALE CONTRACTOR SERVICES; BUILDERS
15 FIRSTSOURCE SOUTHEAST GROUP, LLC; CARYL
16 MECHANICALS II, INC.; GENERAL SHALE BRICK, INC.
17 a/k/a GENERAL SHALE BRICK or GENERAL SHALE; JLS
18 MASONRY, INC.; LONG HEATING & AIR CONDITIONING,
19 INC.; MANALE LANDSCAPING, LLC; MJ COWBOYS, LLC
20 AND ITS SUCCESSORS MAURICIO REYNA AND/OR JOSE
21 SANCHEZ; OLD CFC, LLC f/k/a COLEMAN FLOOR
22 COMPANY; P & T CONSTRUCTION, INC. a/k/a P&T
23 CONSTRUCTION, INC; PROBUILD COMPANY, LLC a/k/a
24 PROBUILD HOLDINGS, INC.; SANDLAPPER CONCRETE,
25 LLC; TOPBUILD HOME SERVICES, INC. f/k/a MASCO
 HOME SERVICES, INC; and JOHN DOE #19-25,
 Plaintiffs,

vs.

CASE NO. 2019-CP-04-01486

DR HORTON, INC.; A GRADE ABOVE OTHERS, LLC;
ANDRADE'S CLEAN UP, INC.; AJ LANDSCAPING &
GRADING, LLC a/k/a A J LANDSCAPING & GRADING,
LLC; BRAVO CARPENTERS, INC.; BMC EAST, LLC f/k/a
STOCK BUILDING SUPPLY, LLC; BUILDER SERVICES
GROUP, INC. f/k/a MASCO CONTRACTOR SERVICES
CENTRAL INC. f/k/a GALE INDUSTRIES, INC. d/b/a
GALE CONTRACTOR SERVICES; BUILDERS FIRSTSOURCE
SOUTHEAST GROUP, LLC; CARYL MECHANICALS II, INC.;
GENERAL SHALE BRICK, INC. a/k/a GENERAL SHALE
BRICK or GENERAL SHALE; JLS MASONRY, INC.; LONG
HEATING & AIR CONDITIONING, INC.; MANALE
LANDSCAPING, LLC; MJ COWBOYS, LLC and its
successors MAURICIO REYNA and/or JOSE SANCHEZ;

(Caption continued on following page)

1 about half an inch, correct?

2 A. Correct.

3 Q. And you cut it at each end, correct?

4 A. Cut it at the corner, yeah.

5 Q. Because when the tape gets to the jamb,
6 it can't -- it can no longer wrap into the
7 opening, it goes up the jamb, correct?

8 A. That's correct.

9 Q. Is any effort made to splice or bridge
10 the gap between the two pieces of tape at the end
11 where it's cut?

12 A. No.

13 Q. Were any of these Therma-Tru doors, if
14 they were Therma-Tru, supplied with some sort of
15 water-resistant pads of some kind to be installed
16 at the lower portions of the jambs, where the
17 jambs meet the thresholds, to assist with water
18 resistance?

19 A. There -- sometimes they did come with
20 bumper pads. Typically that was done -- the
21 installer did not do it because we typically did
22 it -- we typically installed the doors where it
23 didn't need it. But during the course of that
24 build, things may shift, whatever, they would use
25 those bumper pads to put in behind there in order

1 to make that seal even tighter.

2 Q. And who would put those in behind you?

3 A. Again, this is -- this is all off of
4 memory. And what I remember is they would have a
5 service guy go out. He would install screens, at
6 that point right when the house was closing. He
7 would make sure -- and you would have to find out
8 from them what their process was because I don't
9 know -- remember what exactly the process,
10 because I didn't do that process.

11 I just know that they had -- service
12 guys went out and screened the house out, checked
13 the doors and did a couple other things. And one
14 of them might have been, you know, adjust
15 thresholds that needed it or put the bumper pads
16 on there, because I would have -- sometimes I
17 would have to give them some bumper pads that I
18 would get off the door.

19 Q. And do you happen to recall the name of
20 any of these DR Horton service guys that would
21 close out the --

22 A. They were ProBuild service guys.

23 Q. Okay.

24 A. ProBuild did the -- I'm sorry.

25 Q. Do you recall any of their names?

1 A. No. They were two Russian or Ukrainian
2 guys.

3 Q. And I take it if they're sending service
4 guys out to close out the house, that they're
5 providing turnkey services to DR Horton?

6 A. I don't know. I mean I don't know their
7 process. You know, what do you mean by turnkey?
8 I don't get that.

9 Q. You don't know if your portion of the
10 install was part of a larger scope of work that
11 ProBuild was providing to DR Horton?

12 A. Right. I have no idea. Like I said, I
13 think I said earlier, I don't know what their
14 contract with ProBuild and DR Horton was. I just
15 know what my job was.

16 Q. Assuming that you didn't think you
17 needed the pads when you did your first install,
18 what was your practice? Was it -- was it to
19 leave the pads taped to the inside of the door,
20 leave the pads on the kitchen counter, to hand
21 the pads back to ProBuild when you got done with
22 the job? What did you do?

23 A. No. They typically came stapled to the
24 area in which you have to install -- where you
25 would have to install doors. So you had to

1 remove them.

2 So I would take them off. And normally
3 they would come with like two security screws
4 which went in the hinge to secure the door which
5 were two long, 3-inch screws, and the bumper
6 pads. And we would typically put the bumper pads
7 on the truck. And at one point we had a bucket
8 full of them, and we gave them back to ProBuild
9 so that they could do what they needed to do with
10 it. Or we would use a couple here and there if
11 we came across a door that needed it. So
12 that's -- yeah, that's --

13 Q. And tell us in simple terms if you
14 would, please, what final adjustments that you
15 believe you were making to the doors that would
16 make it so that the pads, the bumper pads were no
17 longer needed.

18 A. Well, during -- during our installation
19 we tried to make our doors -- well, first of
20 all -- tight up against the wall, secured, and
21 then make sure the reveals are good all the way
22 around.

23 Q. Okay. Sir, I'm going -- I've got two
24 more small areas to ask you about and then we're
25 going to check in and see if Silver Line's

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
ANDERSON COUNTY

DEPOSITION OF L. STEVEN MOORE, PE
VOLUME 1 MAY 9, 2023

NATALIE ZITEK, Individually and on behalf of all
others similarly situated,

Plaintiff,

vs. CASE NO. 2019-CP-04-01942

D.R. HORTON, INC.,

Defendant.

D.R. HORTON, INC.,

Third-Party Plaintiff,

vs.

AJ LANDSCAPING & GRADING, LLC a/k/a A J
LANDSCAPING & GRADING, LLC, et al.,

Third-Party Defendants,

PROBUILD COMPANY, LLC, et al.,

Fourth-Party Plaintiffs,

vs.

HARRELSON PAINTING, LLC, et al.,

Fourth-Party Defendants,

NICHOLAS SOTA a/k/a NICOLAS SOTO, Individually
and d/b/a SOTA HVAC,

Fifth-Party Plaintiff,

vs.

TORIBIO ISLAS AND ALEJANDRO SOTO,

Fifth-Party Defendants.

1 If there's questions about it, then they should
2 ask for it.

3 Q. The owner provides the drawings,
4 correct?

5 A. Correct.

6 Q. And in this case the owner and the
7 general contractor are the same entity, correct?

8 A. Correct.

9 Q. So in this case in the first instance it
10 was the owner/general contractor's responsibility
11 to make sure that the plans and specifications
12 for the buildout of Rose Hill had adequate
13 information and details for the buildout to occur
14 properly, correct?

15 MR. IMHOFF: Object to the form.

16 A. Correct. And we have no information
17 that they weren't adequate. We just don't have
18 copies of them.

19 Q. We just don't have copies of the
20 allegedly adequate specifications and details.
21 Is that what you're telling me, sir?

22 MR. IMHOFF: Object to the form.

23 Q. Is that what I heard?

24 A. Yes. If there was not adequate, then
25 the subcontractor should have followed up with

1 the builder for any questions.

2 MR. LUCEY: Mark the record for
3 production of the Fillmore drawings that the
4 witness has that has engineering in it and marked
5 for South Carolina.

6 (This page contains Requested
7 Information.)

8 Q. Sir, when we started talking about
9 engineered -- two-story brick veneer, we were
10 actually about halfway or more through Laura's
11 list, 127.23. And her list seems to be missing
12 the code provision requiring the separation of
13 foundation -- the code requirement requiring the
14 separation of foundation-supported brick veneer
15 and wood-supported brick veneer in her list. Do
16 you see that?

17 A. Yes.

18 Q. So let's add that for her. What section
19 of the code would we go to to get that separation
20 requirement?

21 A. We're going to do what to this list now?

22 Q. Add the code requirement that
23 brick-supported -- excuse me --
24 foundation-supported brick facade be separated
25 from wood-supported brick facade.

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 ANDERSON COUNTY

4 DEPOSITION OF L. STEVEN MOORE, PE
5 VOLUME 2, MAY 10, 2023

6 NATALIE ZITEK, Individually and on behalf of all
7 others similarly situated,

8 Plaintiff,

9 vs. CASE NO. 2019-CP-04-01942

10 D.R. HORTON, INC.,

11 Defendant.

12 _____
13 D.R. HORTON, INC.,

14 Third-Party Plaintiff,

15 vs.

16 AJ LANDSCAPING & GRADING, LLC a/k/a A J
17 LANDSCAPING & GRADING, LLC, et al.,

18 Third-Party Defendants,

19 _____
20 PROBUILD COMPANY, LLC, et al.,

21 Fourth-Party Plaintiffs,

22 vs.

23 HARRELSON PAINTING, LLC, et al.,

24 Fourth-Party Defendants,

25 _____
26 NICHOLAS SOTA a/k/a NICOLAS SOTO, Individually
27 and d/b/a SOTA HVAC,

28 Fifth-Party Plaintiff,

29 vs.

30 TORIBIO ISLAS AND ALEJANDRO SOTO,

31 Fifth-Party Defendants.

1 work goes on. You agree with that?

2 MR. IMHOFF: Object to the form.

3 A. Absolutely not. They never supervise
4 the work of the subcontractors. That was your --
5 that never happens.

6 Q. Would you agree that they have a duty to
7 inspect the work of their subcontractors to a
8 certain level during construction?

9 MR. IMHOFF: Object to the form.

10 A. Have a duty and an opportunity but not a
11 total requirement.

12 Q. But DR Horton does have a duty to
13 inspect the work of its subcontractors at certain
14 increments during construction to make sure it
15 complies with the building code at some level.
16 You'd agree with that?

17 A. They have the right to inspect it as
18 they wish at some levels.

19 Q. They don't have any duty to inspect.

20 A. I think the requirements state some
21 duty. It's defined a specific point, and I don't
22 know that we have any specific points that DR
23 Horton has to absolutely go look at that house.

24 Q. But you'd agree with me that DR Horton
25 has a duty at some level to inspect the work of

1 its subcontractors during construction to ensure
2 it complies with the building code?

3 MR. IMHOFF: Object to the form.

4 A. They have a -- they have some duty they
5 can walk through. The level of inspection
6 varies.

7 Q. But they have some duty to do it. You'd
8 agree with that.

9 A. At certain times, sure. They have the
10 opportunity to walk through. It doesn't relieve
11 the subcontractors from performing their work.

12 Q. Do you have any opinions pertaining to
13 the Rhett Whitlock repairs estimate?

14 MR. LUCEY: Objection.

15 A. No. I mean I've looked at it. It's--
16 the last one I saw was some \$37.9 million. You
17 know, it seems like that they're going to
18 basically rebuild every house out there.

19 Q. Do you the Dr. Whitlock repairs estimate
20 is reasonable?

21 A. No.

22 MR. LUCEY: Objection.

23 A. No.

24 Q. Do you think it's excessively inflated?

25 MR. LUCEY: Objection.

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 ANDERSON COUNTY

4 DEPOSITION OF L. STEVEN MOORE, PE
5 VOLUME 3, MAY 11, 2023

6 NATALIE ZITEK, Individually and on behalf of all
7 others similarly situated,

8 Plaintiff,

9 vs. CASE NO. 2019-CP-04-01942

10 D.R. HORTON, INC.,

11 Defendant.

12

D.R. HORTON, INC.,

13 Third-Party Plaintiff,

14 vs.

15 AJ LANDSCAPING & GRADING, LLC a/k/a A J
16 LANDSCAPING & GRADING, LLC, et al.,

17 Third-Party Defendants,

18

PROBUILD COMPANY, LLC, et al.,

19 Fourth-Party Plaintiffs,

20 vs.

21 HARRELSON PAINTING, LLC, et al.,

22 Fourth-Party Defendants,

23

NICHOLAS SOTA a/k/a NICOLAS SOTO, Individually
24 and d/b/a SOTA HVAC,

25 Fifth-Party Plaintiff,

 vs.

TORIBIO ISLAS AND ALEJANDRO SOTO,

Fifth-Party Defendants.

1 Q. Okay. Regardless of whether D.R. Horton
2 was able to inspect the work of all
3 subcontractors at D.R. Horton, do you agree that
4 they share responsibility for the work performed
5 by those subcontractors?

6 A. They are the general contractor. They
7 are ultimately responsible for the entire job,
8 but that does not relieve the subcontractors from
9 performing their scope of work in accordance with
10 the building code and their ICAs. You can't lay
11 it off on Horton if you did your job wrong. You
12 can't blame Horton for failing to go look at it
13 and catch it.

14 Q. Okay. And you've testified a couple
15 times about different subcontractors' scopes of
16 work. Are you going to offer any opinions about
17 what each subcontractor's specific scope of work
18 included?

19 A. No.

20 Q. Okay.

21 A. I'm talking in general terms.

22 Q. Yesterday you also testified about
23 subcontractors having a duty at Rose Hill. Do
24 you recall that line of testimony?

25 A. I would suspect it's the same time I was

JUSTIN O'TOOLE LUCEY, PA

Attorneys at Law

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Anna S. McCann
Lauren M. Milton
Sohayla R. Townes
Collin H. Fuller

December 11, 2019

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

D.R. Horton, Inc.
c/o C T Corporation System
2 Office Park Court Suite 103
Columbia, South Carolina 29223

RE: *Rose Hill Subdivision in Anderson County, South Carolina*
Notice and Opportunity to Cure Improper Construction Conditions and Resulting Damages

To Whom It May Concern:

This letter is to notify D.R. Horton, Inc. that Natalie and Paul Zitek as well as other owners of D.R. Horton homes within the Rose Hill subdivision in Anderson County, South Carolina ("Rose Hill") intend to proceed with litigation should D.R. Horton, Inc. fail to cure the following improper construction conditions and resulting damages existing at their homes within thirty (30) days from the date of this letter:

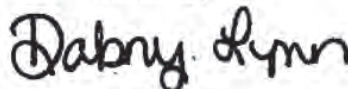
1. Brick: Insufficient/improperly installed brick veneer and resulting cracking, separation, water damage, efflorescence, and cost to repair;
2. Stone: Insufficient/improperly installed stone veneer and resulting loose embedment, cracking, separation, water damage and cost to repair;
3. Doors: Insufficient/improperly installed front and patio doors, deteriorating trim, resulting water damage/leakage, and cost to repair;
4. Floors: Insufficient/improperly installed flooring and resulting buckling, cracking, separation, bumpiness, water damage, and cost to repair;
5. General Wall: Insufficient/improperly installed framing, missing/inadequate insulation at exterior walls, drywall cracking, increased utility bills, and cost to repair;
6. Roof: Insufficient/improperly installed roofs, deteriorating sheathing and roof decking, resulting water damage/leakage, blow-offs, and cost to repair;
7. Windows: Insufficient/improperly installed windows, resulting water damage/leakage, cracking, separation, and cost to repair;

Notice and Opportunity to Cure
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8. Vinyl Siding: Insufficient/improperly installed vinyl siding, resulting waviness, water damage, and cost to repair;
9. Hardi Siding: Insufficient/improperly installed Hardi siding, resulting cracking, water damage, efflorescence, and cost to repair;
10. Concrete/Soil: Insufficiently supported concrete/inadequate soil, resulting cracking, water damage, and cost to repair;
11. Grading/Drainage: Insufficient/improperly installed grading and/or drainage, resulting water damage, ponding, unevenness, landscaping difficulties, and cost to repair;
12. MEP: Inadequate free air space, improper duct work, insufficient insulation in attics, plumbing/HVAC leaks, insufficient PEX piping, non-galvanized piping, holes in roof sheathing at plumbing penetrations, inadequate outlets, insufficient amperage, power surges, and resulting cracking, water damage/leakage, cost to repair, and increased utility bills; and
13. Poor Work: Sloppy workmanship throughout Rose Hill homes and resulting cost to repair.

Time is of the essence and extensions will not be granted. Thereafter, the Rose Hill homeowners will proceed with serving litigation. Please contact us directly if you have any questions or concerns regarding this Notice and Opportunity to Cure.

Sincerely,



Dabny Lynn
Sohayla Townes

DL/dl



SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR BKF Builders ("Contractor")
☒ Sole Proprietorship ☐ Partnership ☐ Corporation ☐ L.L.C. ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 57-1103379
 Name of Owner(s)/Officer(s): Brian Fowler
 Division Name: _____ Area Name: _____ Assigned Vendor No.: _____
 Address for All Notices: 9800 Boulevard Road Suite 3
 City: Greer State: SC Zip Code: 29615
 Telephone: (Cell) 297-7220 Fax: (BA) 281-6665 E-Mail Address: brian@bkfbuilder.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 28th day of February, 2014, between
DR Horton INC. ("Owner") and Contractor.

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, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 29-6-30 AND 29-6-50 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR AGREES THAT OWNER DOES AND WILL NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 6th day of MARCH, 2014.

Owner:	Contractor:
By: <u>MARCEY MARTIN</u>	By: <u>BKF Builders</u>
Name: <u>MARCEY MARTIN</u>	Name: <u>Brian Fowler</u>
Title: <u>CEO</u>	Title: <u>Owner</u>

INITIALS: OWNER AM, CONTRACTOR BF

4.2 Contractor Payments. No payment shall be due under this Agreement until Contractor's invoice (or Purchase Order, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("Purchase Order"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Subcontractor shall immediately notify Contractor in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractors' Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

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, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended, the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "Requirements"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, **INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS** from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, verdicts, causes of action, citations or work stoppages, 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, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("Inspector") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such

INITIALS: OWNER CONTRACTOR

rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("Waste"), caused by its operations and shall remove all of Contractor's materials at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Laws"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substances" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers; (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home; and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon

INITIALS: OWNER M, CONTRACTOR JK

receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claim Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such lien, affidavit, stop payment notice, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavits, stop payment notices, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge that lien, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the lien, affidavit, stop payment notice, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS, AGENTS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF AND ATTORNEYS' FEES), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE, RELATED IN ANY WAY TO THE WORK, EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY PROXIMATELY CAUSED BY OR RESULTING FROM 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 CONTRACTOR'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 SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S 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.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnities to the same extent that Contractor is required to indemnify Indemnities in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnities to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnities from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or

INITIALS: OWNER AM CONTRACTOR 3/6

modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (s, c, u) exposures. The CGL Policy shall not exclude from coverage the type of, or nature of, the Work or limit the type of structure on which the Work is to be performed. The CGL policy shall not contain a deductible or self-insured retention of more than \$25,000.00. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (c) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person for bodily injury and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner as a named, Additional Insured, specifically identifying Owner, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 1185 or, if unavailable, both forms CG 2010 1004 and CG 2037 1001). Coverage obtained by Contractor with Owner as an additional insured shall be primary, with any insurance of Owner being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, nonrenewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Owner as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any Indemnities, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise; (b) did not pay the insurance premium directly or indirectly; and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location or as a result of Contractor's acts or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

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 so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations,

INITIALS: OWNER  CONTRACTOR 

rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' 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.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose, except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days after the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the persons executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement, but shall supplement its terms. In the event of a conflict, to the extent permitted by

INITIALS: OWNER CONTRACTOR

law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. 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.

SOUTH CAROLINA VERSION (REV. 12 APRIL 2013)

Sheetrock
paint

INITIALS: OWNER m , CONTRACTOR ZC

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2019-CP-04-01942
	)	
Natalie Zitek, individually and on behalf of all	)	
others similarly situated,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
D.R. Horton, Inc., et al.,	)	
	)	
Defendants.	)	
	)	PLAINTIFF'S STIPULATION AS TO
	)	LIMITATION ON CLAIMS
D.R. Horton, Inc.,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
AJ Landscaping & Grading, LLC a/k/a A J	)	
Landscaping & Grading, LLC, et al.	)	
	)	
Third-Party Defendants.	)	
	)	
	)	
ProBuild Company, LLC; et al.,	)	
	)	
Fourth-Party Plaintiffs,	)	
	)	
v.	)	
	)	
Harrelson Painting, LLC, et al.,	)	
	)	
Fourth-Party Defendants.	)	
	)	
	)	
Nicholas Soto a/k/a Nicolas Soto, Individually	)	
and d/b/a Soto HVAC,	)	
	)	
Fifth-Party Plaintiffs,	)	
	)	
v.	)	
	)	
Toribio Islas and Alejandro Soto,	)	
	)	
Fifth-Party Defendants.	)	
	)	

Plaintiff Natalie Zitek, by and through her undersigned counsel, hereby stipulate that she and the Class are not making defective construction claims for the below components in this case:

1. Batt and blown insulation;
2. Gutters and downspouts, garage doors, and garage door openers;
3. Improperly installed front doors and front door hardware;
4. Improperly installed roofs, except as to the intersections with other components;
5. Improperly installed hardi and vinyl siding, except as to the failure to check or repair the substrate, including WRB, prior to installation;
6. Improperly installed wall framing, except as it relates to truss lift, window/doors, and squeaky floors; and,
7. MEP issues (which are settled);

Provided, however, work relating to the foregoing may be required because of defective work by other parties. Nothing herein shall in any way limit the type or content of evidence put on by Plaintiff.

Dated this 20th day of July, 2023.

WE SO STIPULATE

JUSTIN O'TOOLE LUCEY, P.A.

s/ Justin Lucey

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Attorneys for Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
	)	C.A. No. 2019-CP-04-1942
Natalie Zitek, individually, and on behalf of	)	
all others similarly situated,	)	
	)	
	)	
	)	DEFENDANT D.R. HORTON, INC.'S
	)	MOTION TO RECONSIDER AND/OR
Plaintiff	)	ALTER OR AMEND THE ORDER
vs	)	GRANTING THIRD-PARTY
	)	DEFENDANT BUILDERS SERVICES
D.R. Horton, Inc., Jane Doe #1-10; and,	)	GROUP, INC. d/b/a GALE
John Doe #1-50,	)	CONTRACTOR SERVICES' MOTION
	)	FOR SUMMARY JUDGMENT AS TO
Defendant	)	D.R. HORTON, INC'S THIRD-PARTY
	)	COMPLAINT
D.R. HORTON, INC.	)	
	)	
Third-Party Plaintiff	)	
vs	)	
	)	
AJ LANDSCAPING & GRADING, LLC,	)	
A/K/A AJ LANDSCAPING & GRADING,	)	
LLC; ALLPRO TEXTURES, LLC; ALPHA	)	
OMEGA CONSTRUCTION GROUP,	)	
INC.; AMERICAN CONCRETE AND	)	
PRECAST, INC.; A/K/A ACP	)	
CONCRETE, INC.; A&J FRAMING, INC;	)	
ALPHA E.M.C.; A-Z, INC.; ATLANTA	)	
FLOOR DESIGNS CENTER; A GRADE	)	
ABOVE OTHERS, LLC; BRAND-	)	
VAUGHAN LUMBER CO, INC.; BKF	)	
BUILDERS, INC.;BUILDERS	)	
DESIGNHOUSE, LLC; BMC EAST LLC	)	
D/B/A COLEMAN FLOOR, LLC;	)	
BUILDERS FIRSTSOURCE SOUTHEAST	)	
GROUP, LLC, A/K/A BUILDERS	)	
FIRSTSOURCE, INC; BRAVO	)	
CARPENTERS, INC.; CARYL	)	
MECHANICS II, INC., A/K/A CARYL	)	
MECHANICALS, INC.; CANNADAY	)	
SIDING & GUTTER, INC.; CORTES	)	
PAINTING, LLC; CBU ENTERPRISES,	)	
INC.; CPI SECURITY SYSTEMS, INC.;	)	

DOM GROUP, LLC; FERGUSON)
 ENTERPRISES, INC.; FIVE STAR)
 CONSTRUCTION INC.; FIVE STAR)
 FOUNDATIONS, LLC; GALLOWAY-)
 BELL, INC. A/K/A GALLOWAY-BELL,)
 INC. II; GET FLOORED, LLC; GBS)
 BUILDING SUPPLY – US LBM, LLC,)
 F/K/A GBS BUILDING SUPPLY, INC.;)
 GENERAL SHALE BRICK INC.;)
 GREENER PASTURES, INC. A/K/A)
 GREENER PASTURES OF AIKEN, LLC;)
 IBP ASSET, LLC D/B/A BLUE RIDGE)
 BUILDING PRODUCTS; JLS MASONRY,)
 INC.; KINGS LANDSCAPING, LLC;)
 LANDSHAPERS, LLC; LADE-DANLAR,)
 INC.; LANSING BUILDING PRODUCTS,)
 INC.; LONG HEATING & AIR)
 CONDITIONING, INC.; L&M ELECTRIC,)
 INC; MANALE LANDSCAPING, LLC;)
 MJ COWBOYS, LLC; M&L GENERAL)
 CONSTRUCTION, LLC, A/K/A M&L)
 GENERAL CONSTRUCTION, INC.; M&L)
 REYNA CONSTRUCTION, LLC; M&M)
 FOUNDATIONS, LLC; NAZARETH)
 BUILDERS, LLC; NB CONTRACTORS,)
 LLC; POINSETT DEVELOPMENT, LLC;)
 POINSETT HOMES, LLC; P&T)
 CONSTRUCTION, INC., A/K/A P&T)
 CONSTRUCTION, INC.; P&L)
 ENTERPRISES, LLC; PROBUILD)
 COMPANY, LLC A/K/A PROBUILD)
 HOLDINGS, INC.; RITE RUG CO.;)
 RODNEY HOWARD GRADING, INC.)
 A/K/A RODNEY HOWARD GRADING)
 CO.; SANDLAPPER CONCRETE, LLC;)
 SODFATHER INC., LANDSCAPE)
 CONTRACTORS; STOCK BUILDING)
 SUPPLY, LLC; TOPBUILD HOME)
 SERVICES, INC., A/K/A GALE)
 CONTRACTORS SERVICE; TUCKER)
 MATERIALS, INC., A/K/A GYPSUM;)
 UTM ENTERPRISES, INC; DUPREE)
 PLUMBING COMPANY, INC. AND)
 WILLOW TREE LANDSCAPING, INC;)
)
)

Third-Party Defendants

Defendant, D.R. Horton, Inc. (“D.R. Horton”) moves pursuant to Rule 59(e), SCRCP, and the Court’s inherent authority, for the Court to reconsider its Order Granting Third-Party Defendant Builders Services Group, Inc. d/b/a Gale Contractor Services’ (“TopBuild”) Motion for Summary Judgment (the “Order”).¹ (This Motion is made in an abundance of caution as the final proposed Order has not been signed or filed.)

The Court received motions, briefs, and heard oral arguments on TopBuild’s Motion for Summary Judgment. The Court Ordered as follows:

The Court considered the filings of the parties, arguments of counsel and the applicable law. The Court considered the evidence in a light most favorable to the non-moving party and finds that no genuine issue of material fact exists. With the Plaintiff’s stipulations, there are no allegations of defective work by Topbuild in the record. The Court finds that the contractual indemnity cause of action is not supported by a clear and unequivocal contract and that it should be dismissed. Accordingly, the Motion for Summary Judgment by 3rd Party Defendant Topbuild Home Services, Inc. is GRANTED.

The grounds for this Motion include, but are not limited to:

1. Whether the last minute, self-serving, tardy stipulation by Plaintiff should have been considered by the Court and whether there were facts in the record prior to the execution of that document to create a genuine issue of material fact preventing summary judgment;
2. Whether there were facts in the record at any time such that any indemnity requirement would be triggered at any time prior to and during the litigation precluding summary judgment;

¹ D.R. Horton fully incorporates herein its Brief in Opposition to Motion for Summary Judgment filed July 11, 2023, and Supplemental Brief in Opposition to Motion for Summary Judgment filed July 19, 2023, as **Exhibits 1 and 2**.

3. Whether D.R. Horton's entire Independent Contractor Agreement is unenforceable;

4. Whether any section of D.R. Horton's Independent Contractor Agreement is enforceable;

5. Whether the review of D.R. Horton's Independent Contractor Agreement was made in the light most favorable to D.R. Horton ;

6. Whether clear and unequivocal is the correct standard to review D.R. Horton's entire Independent Contractor Agreement and the basis for the Court's finding;

7. Whether any causes of action remain and were not dismissed by the Court against this Defendant and any Third-Party Defendants;

8. The basis for the Court's dismissal of D.R. Horton's claims for equitable indemnity, breach of contract, breach of express warranties, and breach of implied warranties;

9. The Court found that D.R. Horton's contractual indemnity indemnification cause of action is not supported by a clear and unequivocal contract; however, that decision is not supported by the law or facts. The contract complies with South Carolina law and the parties to contract should have the benefit of bargain that they agreed to when they executed the contract; and

10. While the Plaintiff volunteered that it does not have any evidence to present that the work performed by TopBuild was defective, such a declaration against interest by the Plaintiff cannot serve to foreclose D.R. Horton's contractual rights to seek redress from any subcontractor for deficient work product that results in a cost to or judgment against D.R. Horton. To the extent Plaintiff alleges any defect in workmanship as to the body of work for which TopBuild was wholly or partly responsible, TopBuild would be liable to D.R. Horton pursuant to and consistent

with the indemnity obligations and the duty to defend obligations contained in the parties' contract. D.R. Horton should have an opportunity to present its case at trial.

I. INTRODUCTION

On January 27, 2021, the Court conditionally certified this class action for 234 homes in the Rose Hill subdivision in Easley, South Carolina, and the class is currently 221 homes (collectively, the "Rose Hill Homes," or the "Homes", or, individually, "Home"). Builders Service Group, Inc. d/b/a Gale Contractor Services ("TopBuild" and "Gale") installed garage doors, gutters, downspouts, and batt and blown insulation. Plaintiff brought the following claims against Defendants: negligence and gross negligence, breach of implied warranties, and unfair trade practices. However, D.R. Horton did not self-perform any of the work in the construction of the Subject Properties.

After filing the subject lawsuit, Plaintiff provided a Notice and Opportunity to Cure to D.R. Horton listing 13 categories of issues that were alleged to have been experienced by Plaintiff and similarly situated individuals. Only those subcontractors whose work was implicated by that notice have been named in the lawsuit. D.R. Horton brought claims against the entities and individuals with whom it contracted with to provide labor and/or supply materials for the construction of the Subject Properties including the Third-Party Defendants. D.R. Horton brought the following claims against the Third-Party Defendants: contractual indemnification, equitable indemnification, breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness.

D.R. Horton entered into agreements with subcontractors, including the Third-Party Defendants, to perform the work (collectively hereinafter referred to as the "ICAs").² Each of the

² D.R. Horton fully incorporates its Memorandum in Opposition to Third-Party Motions for Summary Judgments

ICAs included indemnity provisions (collectively hereinafter referred to as the “Indemnity Provisions”). Throughout the years D.R. Horton constructed homes in Rose Hill with various subcontractors, it had six slight variations of the ICA. (ICA’s attached as **Exhibits 3-8; Exhibit 9** (listing of ICA’s for each subcontractor). Generally, these all incorporate the following applicable provisions:

Subcontractor Standards:

2. Independent Contractor Status. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, methods and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform the assigned tasks and have all necessary licenses.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers’ or suppliers’ standards or specifications for use and installation, and all laws (statutory and common), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements).

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor’s own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any work, or Contractor shall be deemed to have accepted all other contractors’ work for inclusion into Contractor’s Work.

Subcontractor Indemnity and Insurance Requirements:

10.1 GENERALLY. To the fullest extent permitted by law, contractor hereby agrees to hold harmless, indemnify, protect and

(Sep. 7, 2022) and all exhibits of representative ICAs attached thereto as **Exhibit 10**.

defend owner, its parent corporation, subsidiaries, affiliates, successors and assigns, and each of the aforementioned entities' respective officers, directors, partners, employees, agents and insurers (individually or collectively hereinafter, "indemnatee") from and against any and all demands, claims, actions, causes of action, proceedings, lawsuits, settlements, judgments, fines, penalties, losses, attorneys fees, litigation costs, interest, and expenses of any kind (individually or collectively hereinafter, "losses") for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm, arising out of, or resulting from, or related in any way to the work performed and/ or the materials supplied under this contract, regardless of whether or not caused in part by indemnatee. Such losses specifically include, but are in no way limited to losses arising out of or attributable to: (1) a breach of any warranties, representations, covenants or obligations of contractor set forth herein; (2) the work performed or to be performed or materially supplied by contractor, contractor's agents or employees, suppliers or subcontractors and their respective agents and employees, and/or all other entities over whom the contractor may exercise control (individually or collectively hereinafter, "contractor's agents"); (3) any negligent, grossly negligent, and/or intentional act and/or omission of contractor and/or contractor's agents; or (4) any negligent, grossly negligent, and/or intentional act and/or omission of the indemnatee related in any way to the work. Notwithstanding the foregoing, nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnatee. The losses described herein shall include, but are not limited to, demands, claims, or actions asserted by (1) any present or future owner of the house incorporating the work; and (2) any owner, contractor or any third party (including, but not limited to, personnel furnished by contractor and/or contractor's agents). The indemnification obligation under this contract shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for contractor under workers' compensation acts, disability benefit acts or other employee benefit acts. The indemnity provisions contained herein are intended to be as broad and inclusive as permitted by law.

10.4 Subcontractor's and Supplier's Indemnity Obligations.

....For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the actions of any subcontractor engaged by Contractor whether in written agreement or otherwise or who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed to be the obligation of the subcontractors to Owner, for which

Contractor shall be fully responsible to Owner.

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner as an Additional Insured on the CGL Policy or policies required above covering both on-going operations and completed operations (equivalent to form CG20101185 or form CG2037). Coverage obtained by Contractor naming Owner as an Additional Insured shall be primary with any insurance of Owner being excess coverage. The insurance coverage will be carried continuously during the term of this Agreement and thereafter is requested by this Agreement with insurance companies acceptable to Owner in its sole and absolute discretion.

II. ARGUMENT

A. The Indemnity Provisions are not Illegal and Unenforceable

The Third-Party Defendants rely heavily on *DRH, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 148, 810 S.E.2d 41, 45 (Ct. App. 2018) and contend that the Indemnity Provisions included in the ICAs are illegal and unenforceable because they are barred by S.C. Code § 32-2-10, *et. seq.* (the “Anti-Indemnity Statute”).

This perfunctory analysis is insufficient, as the South Carolina Court of Appeal’s decision in *Builders* made specific reference to the concealment and unreasonable award of damages, which impacted D.R. Horton’s ability to recover under the indemnification agreement.³ In *Builders*, Patricia Clark (hereinafter “Clark”) filed a suit against D.R. Horton for negligence, breach of contract, multiple breaches of warranty and a violation of the South Carolina Unfair Trade Practice Act. *Id.* at 148. The lawsuit alleged various defects in the Clark home, including but not limited to, the work performed by Builders FirstSource. Clark and D.R. Horton participated in arbitration, where Clark was awarded \$150,000.00. *Id.* However, the arbitration

³ *Id.* at 153. “D.R. Horton cannot ask the arbitrator to conceal its reasons for an award, which may have included damages caused by its own negligence, then ask the circuit court to award it damages that would be barred by the statute.”

award did not indicate what damages the arbitrator found compensable. *Id.* Further, the arbitrator noted that “(c)ounsel for the parties have requested an order containing a monetary award only.” *Id.*

Following the arbitration award, D.R. Horton filed a complaint seeking contractual indemnification and contribution from Builders FirstSource for recovery of the arbitration award and attorney’s fees that D.R. Horton incurred as a result of the Clark suit. *Id.* Subsequently, Builders FirstSource filed a motion for summary judgement alleging D.R. Horton’s claim for contractual indemnification failed as the agreement required D.R. Horton to be indemnified from its own negligence. *Id.* at 148-49. Upon the request via multiple motions, the trial court granted Builders FirstSource’s motion for Summary Judgment. *Id.* at 149. D.R. Horton then appealed the trial court’s decision, asserting that the trial court erred by reading additional terms into the agreement and failed to require Builders FirstSource to pay the entire arbitration award and attorney’s fees. *Id.* at 150.

The Indemnity Provisions in this matter specifically exclude losses caused by the sole negligence of D.R. Horton.

The Anti-Indemnity Statute provides, in pertinent part, as follows:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building ... 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.

(*Emphasis added*).

In D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, the South Carolina Court of Appeals found that a prior version of D.R. Horton's ICA violated S.C. Code § 32-2-10. The former ICA required the indemnitee to indemnify D.R. Horton for claims "related in any way to the work, even when the loss is caused by the fault or negligence of the indemnitee." 422 S.C. 144, 148, 810 S.E.2d 41, 45 (Ct. App. 2018). As explained by the Court,

[The Anti-Indemnity Statute] allows D.R. Horton and [the Third-Party Defendants] to agree that [the Third-Party Defendants] will indemnify D.R. Horton for damages caused by [Third-Party Defendants] or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree. However, we agree that the indemnification clause is void as against public policy to the extent it purports to require [Third-Party Defendants] to indemnify D.R. Horton for damage caused by [D.R. Horton's] negligence or the negligence of its subcontractors.

Id. The Court held that the contract at issue "purport[ed] to require [subcontractor] to indemnify D.R. Horton for its own negligence in violation of section 32-3-10." Id.

In the present case, the Indemnity Provisions specifically exclude claims arising out of the sole negligence of D.R. Horton by providing:

- "10.1 GENERALLY. ...nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnitee [DRH]" (See Exhibit 3);
- "10.1 GENERALLY. ...nothing herein shall require contractor to indemnify indemnitee against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of indemnitee [DRH]" (See Exhibits 4, 5, 6, 7);
- "10.1 GENERALLY. ...It is the express intent of the parties in agreeing to this Section 10 that Contractor shall indemnify Indemnitee for the negligence of Contractor, its subcontractors, employees and anyone over whom Contractor exercises control as well as for Owner's and/or indemnitee's concurrent or joint

negligence arising from a failure to properly supervise Contractor.” (See Exhibit 8).

Because the ICAs with the Third-Party Defendants exclude claims arising out of D.R. Horton’s sole negligence, the Indemnity Provisions do not violate Section 32-3-10 and are distinguishable from the agreement in *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*. (See Exhibits 3-8, the ICAs and Exhibit 9, listing of ICA’s for each subcontractor).

B. The Indemnity Provisions Comply with The Requirements Set Forth in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC

The Third-Party Defendants contend that the Indemnity Provisions do not comply with the requirements laid out in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) and are therefore unenforceable. The Court in *Concord* held that when a party seeks indemnification for its own concurrent negligence, the clear and unequivocal standard applies. *Id.* at 649, 172. Additionally, “when an indemnity clause purports ‘to relieve an indemnitee from the consequences of its own negligence,’ [South Carolina] case law requires strict construction of the clause.” *Id.* at 650, 172 (quoting *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111 S.E.2d 375, 378-379 (2003)).

There were two indemnity agreements entered at issue in *Concord*. For the first agreement, the court found that the phrase “to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of the [Muhler]” specifically limited Muhler’s obligation to indemnify to damages and losses caused by the negligence of the Muhler and its subcontractors.⁴ *Id.* at 654, 174. Additionally, the phrase “regardless of whether it is caused in

⁴ The first indemnity agreement in *Concord* stated, in relevant part, as follows:

part by a party indemnified hereunder” did not alter the limiting language. *Id.* Therefore, the general contractor was not entitled to indemnification from the subcontractor, Muhler, for the general contractor’s concurrent negligence pursuant to the first agreement.

With regard to the second agreement, the court found that although the language was broader and excluded the limiting “to the extent caused” language from the first agreement, it still failed to include any reference to indemnification for the general contractor’s concurrent negligence.⁵ *Id.* at 656-657, 176. While “there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in an indemnity clause that clearly shows the parties’ intent to absolve the indemnitee of the consequences of its own concurrent negligence.” *Id.* at 657, 176 (citation omitted). Further, the Court indicated that the following language may be sufficient to meet the clear and unequivocal standard: “[subcontractor] agrees to indemnify for all damages, regardless of whether the damages are caused in part by a party indemnified hereunder[.]” *Id.* at 656-657, 176.

the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor ... and other contractors and subcontractors ... from and against all claims, damages, loss and expenses, including but not limited to attorney’s fees, arising out of or resulting from the performance of the Subcontractor’s Work ...

- (a) ... to the extent cause or alleged to be caused in whole or in part by any negligent act or omission of the Subcontractor ... regardless of whether it is caused in part by a party indemnified hereunder.

Id. at 643, 168-169.

⁵ The second indemnity provision provided, in pertinent part,

In the event either Superior or Concord and Cumberland, LLC are sued hereafter ... alleging that one or more of the windows and/or doors do not comply with the original or amended contract documents, or are defectively installed, Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC ... and will pay all damages ... incurred by either or both[.]

Id. at 644, 169.

The indemnity provision in Version 1 of the ICA provides in relevant part (See Exhibit

3):

10.1 GENERALLY. ...[Subcontractor] hereby agrees to hold harmless, indemnify, protect and defend [DRH]...from and against any and all demands, claims, actions, causes of action, proceedings, lawsuits...and expenses of any kind... for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm, arising out of, or resulting from, or related in any way to the work performed and/ or the materials supplied under this contract, **regardless of whether or not caused in part by indemnitee [DRH].**" (*Emphasis added*).

The indemnity provision in Versions 2, 3, and 4 of the ICA provides in relevant part (See Exhibits 4, 5, and 6):

"10.1 Generally. ... [Subcontractor] shall protect, defend, indemnify, and hold [DRH].... harmless from and against any and all claims, demands, lawsuits or other litigation...including all costs thereof, attorneys' fees and interest... on account of bodily or personal injury, death, or damage to or loss of tangible or intangible property... arising out of, or in connection with: (1) a breach of any warranties, representations, covenants, or other obligations of [subcontractor] set forth in this Agreement; (2) the work...performed or material supplied by [subcontractor]...(3) any negligent or intentional act or omission...of [subcontractor]...**regardless of whether caused in part by [DRH]; or (4) any negligent or intentional act or omission... of [DRH] related in any way to the work.**" (*Emphasis added*).

The indemnity provision in Version 5 of the ICA provides in relevant part (See Exhibit 7):

10.1 GENERALLY....[Subcontractor] shall protect, defend, indemnify, and hold [DRH]....harmless from and against any and all claims, demands, lawsuits or other litigation... including all costs thereof, reasonable settlement amounts, attorneys' fees and interest... on account of bodily or personal injury, death, or damage to or loss of tangible or intangible property...arising out of, or in connection with: (a) a breach of any warranties, representations, covenants, or other obligations of [subcontractor] set forth in this agreement; (b) the work...performed or material supplied by

[subcontractor]... (c) any negligent or intentional act or omission of [subcontractor] **regardless of whether caused in part by [DRH]; or (d) any negligent or intentional act or omission... of [DRH] related in any way to the work...**” (*Emphasis added*).

The indemnity provision in Version 6 of the ICA provides in relevant part (See Exhibit 8):

“10.1 GENERALLY. ...[Subcontractor] shall hold harmless, indemnify [DRH]... against all demands, claims, actions, causes of action, proceedings, lawsuits...or expenses (including attorneys’ fees and interest), for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm.... arising out of, or resulting from, or related to the work performed and/ or the materials supplied under this Agreement, **including losses founded partially upon the negligent acts or omissions of [DRH] in failing to supervise contractor, attributable in whole or in part to:** (1) a breach of any warranties, representations, covenants or other obligations of contractor set forth in this Agreement; (2) the work performed.... or materials supplied by [subcontractor]...; or (3) any negligent or intentional act and/or omission of [Subcontractor] related in any way to the work...” (*Emphasis added*).

The Indemnity Provisions between D.R. Horton and the Third-Party Defendants closely track the language suggested by the court in Concord and provide that third-party defendants will indemnify DRH for certain losses regardless of whether or not the losses caused in part by D.R. Horton. The Indemnity Provisions clearly and unequivocally show that the parties intended to absolve D.R. Horton of the consequences of its own concurrent negligence. Therefore, the Indemnity Provisions meet the standard set forth in Concord and are enforceable. See Exhibits 3-8, the ICAs.

C. The Entire Contract is not Unenforceable

The entire ICA is not unenforceable if the indemnity provision is void. D.R. Horton and third parties entered into an agreement for work in exchange for payment. The contract was between sophisticated parties done at arm’s length. No argument was made or supported that the

contract was somehow “forced” onto the sub-contractors such that they could not walk away, ask for explanations, negotiate, or request revisions.

Further, the contract requires the subcontractor to perform its work correctly, safely, and in compliance with certain state, building, and industry standards. No part of that requirement is unfair, onerous, or against public policy. In fact, those parts of the ICA mirror South Carolina’s requirements for construction and thus cannot be void as against public policy.

The ICA also requires the subcontractor to obtain insurance for itself and for D.R. Horton. 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...” 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 obligation as they are written and were agreed to by the parties.

If either the indemnity or duty to defend obligations is determined to be unenforceable 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. If the entire ICA is not void, D.R. Horton requests reconsideration or clarification of the Court’s Order on the unenforceability of the ICA.

D. The Court Did Not Set Out A Basis For Dismissing D.R. Horton’s Other Causes Of Action

The Court did not specifically set out whether it dismissed D.R. Horton’s causes of action for equitable indemnity, breach of contract, breach of implied warranties, or breach of express warranties. The Order does not address D.R. Horton’s arguments on these issues.

D.R. Horton brought breach of contract causes of action for third parties’ breach of its ICA with D.R. Horton. In that contract the subcontractor agreed to perform its work in accordance with the code, installation instructions, and other requirements. Separately, D.R Horton brought suit for damages arising from third parties’ work as alleged by Plaintiff. Plaintiff sued D.R. Horton for the work performed by the third party as set forth in its complaint and Notice and Opportunity letters. No evidence or arguments have been made that D.R. Horton either contributed to TopBuild’s alleged failures or that D.R. Horton’s ICA was invalid in requiring third parties to perform their work in accordance with these certain requirements.

Further, there has been no argument that requiring a sub-contractor to comply with code, installation instructions, or provide express warranties for their work is unfair, invalid, against public policy, or otherwise unenforceable.

D.R. Horton requests reconsideration or clarification of the court's Order related to its causes of action for breach of contract, express warranties, implied warranties, and equitable indemnity.

E. The Court Did Not Consider the Facts and Chronology of The Allegations And Evidence

The Court should consider all of the evidence in the record and the timing of Plaintiff's stipulation when considering Summary Judgment on each of D.R. Horton's causes of action. Plaintiff's late, arbitrary self-serving stipulation should not be the only piece of evidence considered when evaluating motions for summary judgment on multiple causes of action.

Specifically, Plaintiffs maintained causes of action and evidence throughout four years of this case on each area of potential defects. In fact, these same motions for summary judgment were made years ago in this case and denied because Plaintiff would not dismiss them or stipulate they did not exist. The filing of a stipulation the day before or the day of 100 motions were to be heard should not preclude D.R. Horton from continuing causes of action on all of its causes of action.

To the extent Plaintiff alleges any defect in workmanship as to the body of work for which TopBuild was wholly or partly responsible, TopBuild would be liable to D.R. Horton pursuant to and consistent with the indemnity obligations and the duty to defend obligations contained in the parties' contract. D.R. Horton should have an opportunity to present its case at trial.

IV. CONCLUSION

For the reasons set forth above, D.R. Horton requests the Court reconsider its Order granting Summary Judgment.

Respectfully submitted,

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

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Attorneys for Defendant D.R. Horton, Inc.

August 7, 2023
Greenville, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) FOR THE TENTH JUDICIAL CIRCUIT
Natalie Zitek, individually, and on behalf of) C.A. No. 2019-CP-04-1942
all others similarly situated,)
)
)
)
) **DEFENDANT D.R. HORTON, INC.'S**
) **MOTION TO RECONSIDER AND/OR**
) **ALTER OR AMEND THE ORDER**
) **GRANTING THIRD-PARTY**
) **DEFENDANT IBP ASSET, LLC d/b/a**
) **BLUE RIDGE BUILDING**
) **PRODUCTS' MOTION FOR**
) **SUMMARY JUDGMENT AS TO D.R.**
) **HORTON, INC'S THIRD-PARTY**
) **COMPLAINT**
)
Plaintiff)
vs)
D.R. Horton, Inc., Jane Doe #1-10; and,)
John Doe #1-50,)
Defendant)

D.R. HORTON, INC.)
Third-Party Plaintiff)
vs)
AJ LANDSCAPING & GRADING, LLC,)
A/K/A AJ LANDSCAPING & GRADING,)
LLC; ALLPRO TEXTURES, LLC; ALPHA)
OMEGA CONSTRUCTION GROUP,)
INC.; AMERICAN CONCRETE AND)
PRECAST, INC.; A/K/A ACP)
CONCRETE, INC.; A&J FRAMING, INC;)
ALPHA E.M.C.; A-Z, INC.; ATLANTA)
FLOOR DESIGNS CENTER; A GRADE)
ABOVE OTHERS, LLC; BRAND-)
VAUGHAN LUMBER CO, INC.; BKF)
BUILDERS, INC.;BUILDERS)
DESIGNHOUSE, LLC; BMC EAST LLC)
D/B/A COLEMAN FLOOR, LLC;)
BUILDERS FIRSTSOURCE SOUTHEAST)
GROUP, LLC, A/K/A BUILDERS)
FIRSTSOURCE, INC; BRAVO)
CARPENTERS, INC.; CARYL)
MECHANICS II, INC., A/K/A CARYL)
MECHANICALS, INC.; CANNADAY)
SIDING & GUTTER, INC.; CORTES)
PAINTING, LLC; CBU ENTERPRISES,)
INC.; CPI SECURITY SYSTEMS, INC.;)

DOM GROUP, LLC; FERGUSON)
 ENTERPRISES, INC.; FIVE STAR)
 CONSTRUCTION INC.; FIVE STAR)
 FOUNDATIONS, LLC; GALLOWAY-)
 BELL, INC. A/K/A GALLOWAY-BELL,)
 INC. II; GET FLOORED, LLC; GBS)
 BUILDING SUPPLY – US LBM, LLC,)
 F/K/A GBS BUILDING SUPPLY, INC.;)
 GENERAL SHALE BRICK INC.;)
 GREENER PASTURES, INC. A/K/A)
 GREENER PASTURES OF AIKEN, LLC;)
 IBP ASSET, LLC D/B/A BLUE RIDGE)
 BUILDING PRODUCTS; JLS MASONRY,)
 INC.; KINGS LANDSCAPING, LLC;)
 LANDSHAPERS, LLC; LADE-DANLAR,)
 INC.; LANSING BUILDING PRODUCTS,)
 INC.; LONG HEATING & AIR)
 CONDITIONING, INC.; L&M ELECTRIC,)
 INC; MANALE LANDSCAPING, LLC;)
 MJ COWBOYS, LLC; M&L GENERAL)
 CONSTRUCTION, LLC, A/K/A M&L)
 GENERAL CONSTRUCTION, INC.; M&L)
 REYNA CONSTRUCTION, LLC; M&M)
 FOUNDATIONS, LLC; NAZARETH)
 BUILDERS, LLC; NB CONTRACTORS,)
 LLC; POINSETT DEVELOPMENT, LLC;)
 POINSETT HOMES, LLC; P&T)
 CONSTRUCTION, INC., A/K/A P&T)
 CONSTRUCTION, INC.; P&L)
 ENTERPRISES, LLC; PROBUILD)
 COMPANY, LLC A/K/A PROBUILD)
 HOLDINGS, INC.; RITE RUG CO.;)
 RODNEY HOWARD GRADING, INC.)
 A/K/A RODNEY HOWARD GRADING)
 CO.; SANDLAPPER CONCRETE, LLC;)
 SODFATHER INC., LANDSCAPE)
 CONTRACTORS; STOCK BUILDING)
 SUPPLY, LLC; TOPBUILD HOME)
 SERVICES, INC., A/K/A GALE)
 CONTRACTORS SERVICE; TUCKER)
 MATERIALS, INC., A/K/A GYPSUM;)
 UTM ENTERPRISES, INC; DUPREE)
 PLUMBING COMPANY, INC. AND)
 WILLOW TREE LANDSCAPING, INC;)
)
)

Third-Party Defendants

Defendant, D.R. Horton, Inc. (“D.R. Horton”) moves pursuant to Rule 59(e), SCRCPP, and the Court’s inherent authority, for the Court to reconsider its Order Granting Third-Party Defendant IBP Asset, LLC d/b/a Blue Ridge Building Products’ (“IBP”) Motion for Summary Judgment (the “Order”) including:¹

1. Whether the last minute, self-serving, tardy stipulation by Plaintiff should have been considered by the Court and whether there were facts in the record prior to the execution of that document to create a genuine issue of material fact preventing summary judgment;
2. Whether there were facts in the record at any time such that any indemnity requirement would be triggered at any time prior to and during the litigation precluding summary judgment;
3. Whether D.R. Horton’s entire Independent Contractor Agreement is unenforceable;
4. Whether any section of D.R. Horton’s Independent Contractor Agreement is enforceable;
5. Whether the review of D.R. Horton’s Independent Contractor Agreement was made in the light most favorable to D.R. Horton ;
6. Whether clear and unequivocal is the correct standard to review D.R. Horton’s entire Independent Contractor Agreement and the basis for the Court’s finding;
7. Whether any causes of action remain and were not dismissed by the Court against this Defendant and any Third-Party Defendants;

¹ D.R. Horton fully incorporates herein its Brief in Opposition to Motion for Summary Judgment filed July 11, 2023, and Supplemental Brief in Opposition to Motion for Summary Judgment filed July 19, 2023, attached hereto as **Exhibits 1 and 2.**

8. The basis for the Court's dismissal of D.R. Horton's claims for equitable indemnity, breach of contract, breach of express warranties, and breach of implied warranties;

9. The Court found that D.R. Horton's contractual indemnity indemnification cause of action is not supported by a clear and unequivocal contract; however, that decision is not supported by the law or facts. The contract complies with South Carolina law and the parties to contract should have the benefit of bargain that they agreed to when they executed the contract;

10. While the Plaintiff volunteered that it does not have any evidence to present that the work performed by IBP was defective, such a declaration against interest by the Plaintiff cannot serve to foreclose D.R. Horton's contractual rights to seek redress from any subcontractor for deficient work product that results in a cost to or judgment against D.R. Horton. To the extent Plaintiff alleges any defect in workmanship as to the body of work for which IBP was wholly or partly responsible, IBP would be liable to D.R. Horton pursuant to and consistent with the indemnity obligations and the duty to defend obligations contained in the parties' contract. D.R. Horton should have an opportunity to present its case at trial; and

11. The Court decided that there was no evidence in the to support the negligence, express warranty and implied warranty causes of action against IBP and that all such causes of action therefore collapse into indemnity. The Court then held that the parties' agreed to contractual indemnification provision is not clear and unequivocal. D.R. Horton's contractual rights to seek redress from any subcontractor for deficient work product that results in a cost to or judgment against D.R. Horton is a contractual provision agreed to by the parties. To the extent Plaintiff alleges any defect in workmanship as to the body of work for which IBP was wholly or partly responsible, IBP would be liable to D.R. Horton pursuant to and consistent with the

indemnity obligations and the duty to defend obligations contained in the parties' contract. D.R. Horton should have an opportunity to present its case at trial.

The Court Ordered as follows:

After considering the filings of the parties, arguments of counsel and the applicable law, the Court finds, after considering the evidence in a light most favorable to the Defendant DR Horton, that there is no evidence to support the negligence, express warranty and implied warranty causes of action. Furthermore, in the absence of any such evidence on the part of Installed Building Products, DR Horton's claims collapse into indemnity. The Defendant also alleges contractual indemnity. The Court finds that the indemnity provisions in the contract between the parties are not clear and unequivocal. Accordingly, the motion for summary judgment is GRANTED.

I. INTRODUCTION

On January 27, 2021, the Court conditionally certified this class action for 234 homes in the Rose Hill subdivision in Easley, South Carolina, and the class is currently 221 homes (collectively, the "Rose Hill Homes," or the "Homes", or, individually, "Home").

After filing the subject lawsuit, Plaintiff provided a Notice and Opportunity to Cure to D.R. Horton listing 13 categories of issues that were alleged to have been experienced by Plaintiff and similarly situated individuals. Only those subcontractors whose work was implicated by that notice have been named in the lawsuit. D.R. Horton brought claims against the entities and individuals with whom it contracted with to provide labor and/or supply materials for the construction of the Subject Properties including the Third-Party Defendants. D.R. Horton brought the following claims against the Third-Party Defendants: contractual indemnification, equitable indemnification, breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness.

D.R. Horton entered into agreements with subcontractors, including the Third-Party

Defendants, to perform the work (collectively hereinafter referred to as the “ICAs”).² Each of the ICAs included indemnity provisions (collectively hereinafter referred to as the “Indemnity Provisions”). Throughout the years D.R. Horton constructed homes in Rose Hill with various subcontractors, it had six slight variations of the ICA. (ICA’s attached as **Exhibits 3-8; Exhibit 9** (listing of ICA’s for each subcontractor). Generally, these all incorporate the following applicable provisions:

Subcontractor Standards:

2. Independent Contractor Status. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, methods and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform the assigned tasks and have all necessary licenses.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers’ or suppliers’ standards or specifications for use and installation, and all laws (statutory and common), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements).

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor’s own Work in any way, and shall report in writing to Owner any defects in the work of any other contractor prior to commencement of any work, or Contractor shall be deemed to have accepted all other contractors’ work for inclusion into Contractor’s Work.

² D.R. Horton fully incorporates its Memorandum in Opposition to Third-Party Motions for Summary Judgments (Sep. 7, 2022) and all exhibits of representative ICAs attached thereto as **Exhibit 10**.

Subcontractor Indemnity and Insurance Requirements:

10.1 GENERALLY. To the fullest extent permitted by law, contractor hereby agrees to hold harmless, indemnify, protect and defend owner, its parent corporation, subsidiaries, affiliates, successors and assigns, and each of the aforementioned entities' respective officers, directors, partners, employees, agents and insurers (individually or collectively hereinafter, "indemnatee") from and against any and all demands, claims, actions, causes of action, proceedings, lawsuits, settlements, judgments, fines, penalties, losses, attorneys fees, litigation costs, interest, and expenses of any kind (individually or collectively hereinafter, "losses") for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm, arising out of, or resulting from, or related in any way to the work performed and/ or the materials supplied under this contract, regardless of whether or not caused in part by indemnatee. Such losses specifically include, but are in no way limited to losses arising out of or attributable to: (1) a breach of any warranties, representations, covenants or obligations of contractor set forth herein; (2) the work performed or to be performed or materially supplied by contractor, contractor's agents or employees, suppliers or subcontractors and their respective agents and employees, and/or all other entities over whom the contractor may exercise control (individually or collectively hereinafter, "contractor's agents"); (3) any negligent, grossly negligent, and/or intentional act and/or omission of contractor and/or contractor's agents; or (4) any negligent, grossly negligent, and/or intentional act and/or omission of the indemnatee related in any way to the work. Notwithstanding the foregoing, nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnatee. The losses described herein shall include, but are not limited to, demands, claims, or actions asserted by (1) any present or future owner of the house incorporating the work; and (2) any owner, contractor or any third party (including, but not limited to, personnel furnished by contractor and/or contractor's agents). The indemnification obligation under this contract shall not be limited by any limitation on the amount of damages, compensation or benefits payable by or for contractor under workers' compensation acts, disability benefit acts or other employee benefit acts. The indemnity provisions contained herein are intended to be as broad and inclusive as permitted by law.

10.4 Subcontractor's and Supplier's Indemnity Obligations. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the actions of any

subcontractor engaged by Contractor whether in written agreement or otherwise or who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed to be the obligation of the subcontractors to Owner, for which Contractor shall be fully responsible to Owner.

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner as an Additional Insured on the CGL Policy or policies required above covering both ongoing operations and completed operations (equivalent to form CG20101185 or form CG2037). Coverage obtained by Contractor naming Owner as an Additional Insured shall be primary with any insurance of Owner being excess coverage. The insurance coverage will be carried continuously during the term of this Agreement and thereafter is requested by this Agreement with insurance companies acceptable to Owner in its sole and absolute discretion.

II. ARGUMENT

A. The Indemnity Provisions are not Illegal and Unenforceable

The Third-Party Defendants rely heavily on *DRH, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 148, 810 S.E.2d 41, 45 (Ct. App. 2018) contend that the Indemnity Provisions included in the ICAs are illegal and unenforceable because they are barred by S.C. Code § 32-2-10, *et. seq.* (the “Anti-Indemnity Statute”).

This perfunctory analysis is insufficient, as the South Carolina Court of Appeal’s decision in *Builders* made specific reference to the concealment and unreasonable award of damages, which impacted D.R. Horton’s ability to recover under the indemnification agreement.³ In *Builders*, Patricia Clark (hereinafter “Clark”) filed a suit against D.R. Horton for negligence, breach of contract, multiple breaches of warranty and a violation of the South Carolina Unfair Trade Practice Act. *Id.* at 148. The lawsuit alleged various defects in the Clark home, including

³ *Id.* at 153. “D.R. Horton cannot ask the arbitrator to conceal its reasons for an award, which may have included damages caused by its own negligence, then ask the circuit court to award it damages that would be barred by the statute.”

but not limited to, the work performed by Builders FirstSource. Clark and D.R. Horton participated in arbitration, where Clark was awarded \$150,000. *Id.* However, the arbitration award did not indicate what damages the arbitrator found compensable. *Id.* Further, the arbitrator noted that “(c)ounsel for the parties have requested an order containing a monetary award only.” *Id.*

Following the arbitration award, D.R. Horton filed a complaint seeking contractual indemnification and contribution from Builders FirstSource for recovery of the arbitration award and attorney’s fees that D.R. Horton incurred as a result of the Clark suit. *Id.* Subsequently, Builders FirstSource filed a motion for summary judgement alleging D.R. Horton’s claim for contractual indemnification failed as the agreement required D.R. Horton to be indemnified from its own negligence. *Id.* at 148-49. Upon the request via multiple motions, the trial court granted Builders FirstSource’s motion for Summary Judgment. *Id.* at 149. D.R. Horton then appealed the trial court’s decision, asserting that the trial court erred by reading additional terms into the agreement and failed to require Builders FirstSource to pay the entire arbitration award and attorney’s fees. *Id.* at 150.

The Indemnity Provisions in this matter specifically exclude losses caused by the sole negligence of D.R. Horton.

The Anti-Indemnity Statute provides, in pertinent part, as follows:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building ... 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.

(*Emphasis added*).

In D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, the South Carolina Court of Appeals found that a prior version of D.R. Horton's ICA violated S.C. Code § 32-2-10. The former ICA required the indemnitee to indemnify D.R. Horton for claims "related in any way to the work, even when the loss is caused by the fault or negligence of the indemnitee." 422 S.C. 144, 148, 810 S.E.2d 41, 45 (Ct. App. 2018). As explained by the court,

[The Anti-Indemnity Statute] allows D.R. Horton and [the Third-Party Defendants] to agree that [the Third-Party Defendants] will indemnify D.R. Horton for damages caused by [Third-Party Defendants] or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree. However, we agree that the indemnification clause is void as against public policy to the extent it purports to require [Third-Party Defendants] to indemnify D.R. Horton for damage caused by [D.R. Horton's] negligence or the negligence of its subcontractors.

Id. The court held that the contract at issue "purport[ed] to require [subcontractor] to indemnify D.R. Horton for its own negligence in violation of section 32-3-10." Id.

In the present case, the Indemnity Provisions specifically exclude claims arising out of the sole negligence of D.R. Horton by providing:

- "10.1 GENERALLY. ...nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnitee [DRH]" (See Exhibit 3);
- "10.1 GENERALLY. ...nothing herein shall require contractor to indemnify indemnitee against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of indemnitee [DRH]" (See Exhibits 4, 5, 6, 7);

- “**10.1 GENERALLY.** ...It is the express intent of the parties in agreeing to this Section 10 that Contractor shall indemnify Indemnitee for the negligence of Contractor, its subcontractors, employees and anyone over whom Contractor exercises control as well as for Owner’s and/or indemnitee’s concurrent or joint negligence arising from a failure to properly supervise Contractor.” (See Exhibit 8)

Because the ICAs with the Third-Party Defendants exclude claims arising out of D.R. Horton’s sole negligence, the Indemnity Provisions do not violate Section 32-3-10 and are distinguishable from the agreement in *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*. (See Exhibits 3-8, the ICAs and Exhibit 9, listing of ICA’s for each subcontractor).

B. The Indemnity Provisions Comply with The Requirements Set Forth in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC

The Third-Party Defendants contend that the Indemnity Provisions do not comply with the requirements laid out in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) and are therefore unenforceable. The court in *Concord* held that when a party seeks indemnification for its own concurrent negligence, the clear and unequivocal standard applies. *Id.* at 649, 172. Additionally, “when an indemnity clause purports ‘to relieve an indemnitee from the consequences of its own negligence,’ [South Carolina] case law requires strict construction of the clause.” *Id.* at 650, 172 (quoting *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111 S.E.2d 375, 378-379 (2003)).

There were two indemnity agreements entered at issue in *Concord*. For the first agreement, the court found that the phrase “to the extent caused or alleged to be caused in whole or in part by any negligent act or omission of the [Muhler]” specifically limited Muhler’s obligation to indemnify to damages and losses caused by the negligence of the Muhler and its

subcontractors.⁴ *Id.* at 654, 174. Additionally, the phrase “regardless of whether it is caused in part by a party indemnified hereunder” did not alter the limiting language. *Id.* Therefore, the general contractor was not entitled to indemnification from the subcontractor, Muhler, for the general contractor’s concurrent negligence pursuant to the first agreement.

With regard to the second agreement, the court found that although the language was broader and excluded the limiting “to the extent caused” language from the first agreement, it still failed to include any reference to indemnification for the general contractor’s concurrent negligence.⁵ *Id.* at 656-657, 176. While “there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in an indemnity clause that clearly shows the parties’ intent to absolve the indemnitee of the consequences of its own concurrent negligence.” *Id.* at 657, 176 (citation omitted). Further, the court indicated that the following language may be sufficient to meet the clear and unequivocal standard:

⁴ The first indemnity agreement in *Concord* stated, in relevant part, as follows:

the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor ... and other contractors and subcontractors ... from and against all claims, damages, loss and expenses, including but not limited to attorney’s fees, arising out of or resulting from the performance of the Subcontractor’s Work ...

- (a) ... to the extent cause or alleged to be caused in whole or in part by any negligent act or omission of the Subcontractor ... regardless of whether it is caused in part by a party indemnified hereunder.

Id. at 643, 168-169.

⁵ The second indemnity provision provided, in pertinent part,

In the event either Superior or Concord and Cumberland, LLC are sued hereafter ... alleging that one or more of the windows and/or doors do not comply with the original or amended contract documents, or are defectively installed, Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC ... and will pay all damages ... incurred by either or both[.]

Id. at 644, 169.

“[subcontractor] agrees to indemnify for all damages, regardless of whether the damages are caused in part by a party indemnified hereunder[.]” *Id.* at 656-657, 176.

The indemnity provision in Version 1 of the ICA provides in relevant part (See Exhibit 3):

10.1 GENERALLY. ...[Subcontractor] hereby agrees to hold harmless, indemnify, protect and defend [DRH]...from and against any and all demands, claims, actions, causes of action, proceedings, lawsuits...and expenses of any kind... for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm, arising out of, or resulting from, or related in any way to the work performed and/ or the materials supplied under this contract, **regardless of whether or not caused in part by indemnitee [DRH].**” (*Emphasis added*).

The indemnity provision in Versions 2, 3, and 4 of the ICA provides in relevant part (See Exhibits 4, 5, and 6):

“10.1 Generally. ... [Subcontractor] shall protect, defend, indemnify, and hold [DRH].... harmless from and against any and all claims, demands, lawsuits or other litigation...including all costs thereof, attorneys’ fees and interest... on account of bodily or personal injury, death, or damage to or loss of tangible or intangible property... arising out of, or in connection with: (1) a breach of any warranties, representations, covenants, or other obligations of [subcontractor] set forth in this Agreement; (2) the work...performed or material supplied by [subcontractor]...(3) any negligent or intentional act or omission...of [subcontractor]...**regardless of whether caused in part by [DRH]; or (4) any negligent or intentional act or omission... of [DRH] related in any way to the work.**” (*Emphasis added*).

The indemnity provision in Version 5 of the ICA provides in relevant part (See Exhibit 7):

10.1 GENERALLY....[Subcontractor] shall protect, defend, indemnify, and hold [DRH]....harmless from and against any and all claims, demands, lawsuits or other litigation... including all costs thereof, reasonable settlement amounts, attorneys’ fees and interest... on account of bodily or personal injury, death, or damage

to or loss of tangible or intangible property...arising out of, or in connection with: (a) a breach of any warranties, representations, covenants, or other obligations of [subcontractor] set forth in this agreement; (b) the work...performed or material supplied by [subcontractor]... (c) any negligent or intentional act or omission of [subcontractor] **regardless of whether caused in part by [DRH]; or (d) any negligent or intentional act or omission... of [DRH] related in any way to the work...**” (*Emphasis added*).

The indemnity provision in Version 6 of the ICA provides in relevant part (See Exhibit 8):

“10.1 GENERALLY. ...[Subcontractor] shall hold harmless, indemnify [DRH]... against all demands, claims, actions, causes of action, proceedings, lawsuits...or expenses (including attorneys’ fees and interest), for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm.... arising out of, or resulting from, or related to the work performed and/ or the materials supplied under this Agreement, **including losses founded partially upon the negligent acts or omissions of [DRH] in failing to supervise contractor, attributable in whole or in part to:** (1) a breach of any warranties, representations, covenants or other obligations of contractor set forth in this Agreement; (2) the work performed.... or materials supplied by [subcontractor]...; or (3) any negligent or intentional act and/or omission of [Subcontractor] related in any way to the work...” (*Emphasis added*).

The Indemnity Provisions between D.R. Horton and the Third-Party Defendants closely track the language suggested by the court in Concord and provide that third-party defendants will indemnify D.R. Horton for certain losses regardless of whether or not the losses caused in part by D.R. Horton. The Indemnity Provisions clearly and unequivocally show that the parties intended to absolve D.R. Horton of the consequences of its own concurrent negligence. Therefore, the Indemnity Provisions meet the standard set forth in Concord and are enforceable. See Exhibits 3-8, the ICAs.

C. The Entire Contract is not Unenforceable

The entire ICA is not unenforceable if the indemnity provision is void. D.R. Horton and third parties entered into an agreement for work in exchange for payment. The contract was between sophisticated parties done at arm's length. No argument was made or supported that the contract was somehow "forced" onto the sub-contractors such that they could not walk away, ask for explanations, negotiate, or request revisions.

Further, the contract requires the subcontractor to perform its work correctly, safely, and in compliance with certain state, building, and industry standards. No part of that requirement is unfair, onerous, or against public policy. In fact, those parts of the ICA mirror the state's requirements for construction in South Carolina and thus can not be void as against public policy.

If the entire ICA is not void, D.R. Horton request reconsideration or clarification of the court's Order on the unenforceability of the ICA.

D. The Court Did Not Set Out A Basis For Dismissing D.R. Horton's Other Causes Of Action

The Court did not specifically set out whether it dismissed D.R. Horton's causes of action for equitable indemnity, breach of contract, breach of implied warranties, or breach of express warranties. The Order does not address D.R. Horton's arguments on these issues. D.R. Horton brought suit against the Third-Party Defendants for, among other causes, breach of contract, equitable indemnity, and breach of express warranties which were not addressed in the court's order.

D.R. Horton brought breach of contract causes of action for third parties' breach of its ICA with D.R. Horton. In that contract the subcontractor agreed to perform its work in accordance with the code, installation instructions, and other requirements. Separately, D.R. Horton brought suit for damages arising from third parties' work as alleged by Plaintiff. Plaintiff sued D.R.

Horton for the work performed by the third party as set forth in its complaint and Notice and Opportunity letters. No evidence or arguments have been made that D.R. Horton either contributed to IBP's alleged failures or that D.R. Horton's ICA was invalid in requiring third parties to perform their work in accordance with these certain requirements.

Further, there has been no argument that requiring a sub-contractor to comply with code, installation instructions, or provide express warranties for their work is unfair, invalid, against public policy, or otherwise unenforceable.

D.R. Horton requests reconsideration or clarification of the Court's Order related to its causes of action for breach of contract, express warranties, and equitable indemnity.

E. D.R. Horton's Claims for Negligence, Breach of Warranties, And Breach Of Contract Are Independently Viable

D.R. Horton could sue and recover damages against the Third-Party Defendants under theories of negligence, gross negligence, recklessness, breach of contract, and breach of warranties, related to construction deficiencies, regardless of whether Plaintiff ever filed a lawsuit. Therefore, D.R. Horton's causes of action are not "disguised" equitable indemnity claims derivative of Plaintiff's lawsuit. D.R. Horton's rights to pursue these claims do not evaporate simply because D.R. Horton was not the first to discover the Third-Party Defendants' failures and a lawsuit was instituted by Plaintiff after the structure was sold. The Third-Party Defendants' reliance upon Stoneledge v. Clear View, LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015) (hereinafter referred to as "Stoneledge I") and Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) (hereinafter referred to as "Stoneledge II") (collectively referred to as "Stoneledge") is misplaced. Moreover, the Third-Party Defendants' interpretation of the Stoneledge decisions is overbroad.

Instead, a more reasonable interpretation of the Stoneledge decisions is that if the general

contractor alleges and proves damages that arise separately from having to defend itself in the purchasers' lawsuit, the general contractor's claims for breach of warranty and negligence are independent from the equitable indemnity claim. Indeed, a careful reading of *Stoneledge* reveals that the court did not make a blanket bright line rule, but rather did an analysis, mostly of the allegations in the third-party complaint, to determine if the general contractor had plead, alleged, or proved a factual issue of the existence of damages not arising from the plaintiffs' lawsuit.

As the court explained in *Stoneledge II*, "[t]he issue [the general contractor] raises – whether the circuit court properly interpreted its claims for breach of contract and breach of warranty as one claim for equitable indemnity – requires us to construe its cross-complaint, and thus presents a question of law." *Stoneledge II* at 634. In determining that the general contractor's claims for breach of warranty and breach of contract were equitable indemnity claims, the court explained that "[the general contractor's] injuries arose exclusively from having to defend itself in [plaintiff's] lawsuit." *Id.* at 636.

In reviewing the general contractor's allegations, the court held that the

allegations demonstrate [the general contractor] did not sustain its own damages as a result of any breach of contract or breach of warranty by the respondents. Rather, the allegations show [plaintiff] is the party that suffered damages, and [the general contractor's] injuries ***arose exclusively from having to defend itself in [plaintiff's] lawsuit.*** Consequently, the damages [the general contractor] seeks to recover resulted only from its potential liability to [plaintiff] and from the expenses [the general contractor] incurred defending itself.

Id. at 634. (Emphasis added). The court then highlighted this point further:

[u]nder [the general contractor's] own allegations, its cross-claims arose only when it faced potential liability for [plaintiff's] damages and incurred fees and costs defending against [plaintiff's] lawsuit.

Id. at 637.

The Stoneledge court looked to two federal court cases in making this decision: South Carolina National Bank v. Stone, 749 F. Supp. 1419 (D.S.C. 1990) and United States Fidelity & Guaranty Co. v. Patriot's Point Development Authority, 788 F. Supp. 880 (D.S.C. 1992) (“USF&G”). As explained by the Stoneledge court,

In Stone, the defendants asserted cross-claims for breach of contract, negligence, and fraud against co-defendants that settled with the plaintiffs. The district court barred the non-settling defendants from asserting these cross-claims against the settling defendants because it found they were not independent causes of action. The court explained the cross-claims arose only if the non-settling defendants were liable to the plaintiffs, and these purported causes of action are nothing more than claims for ... indemnification with a slight change in wording.

Similarly, in USF&G, the defendants argued they had “independent claims” against a co-defendant in addition to their claim for indemnification. The district court barred the defendants from bringing these claims, finding *“without plaintiffs suing the ... defendants[,] the ‘independent claims’ ... would not exist,”* and thus “these claims are really nothing more than claims for indemnity.” Id. We agree with Stone and USF&G and find the reasoning in those decisions applies to this case. Under [the general contractor’s] own allegations, its cross-claims arose only when it faced potential liability for [plaintiff’s] damages and incurred fees and costs defending against [plaintiff’s] lawsuit.

Stoneledge II at 636-637 (emphasis added).

Here, Plaintiff’s lawsuit did not give rise to D.R. Horton’s legal rights against the Third-Party Defendants. D.R. Horton can bring claims of breach of contract, implied warranties negligence/gross negligence/recklessness against the Third-Party Defendants. See Kennedy v. Columbia Lumber and Mfg. Co., Inc., 384 S.E.2d 730, 299 S.C. 335 (S.C. 1988). Those rights existed before the lawsuit was initiated by Plaintiff, which only provided notice of those issues to D.R. Horton. Thus, these claims, which existed but were latent, are not disguised indemnity claims derivative of the Plaintiff’s lawsuit – they are preexisting claims which are separate and

distinct from D.R. Horton's claim for equitable indemnity. Moreover, in addition to the damages D.R. Horton is incurring related to defending this lawsuit, D.R. Horton seeks to recover for extra workload, repairs or repair costs of the defective work, costs of investigation, and damage and harm to reputation. (D.R. Horton's Amended Answer to Plaintiff's Complaint and Crossclaims, ¶¶ 87, 96, and 112).

These separate damages are explained by the court in Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971). In Addy, the defendant owner of a building was sued by its tenant when the building caught fire. The building owner then sued the contractor whose negligent work caused the fire. The owner's recovery of fees and costs from the negligent contractor was upheld by the South Carolina Supreme Court, reasoning that "the weight of authority sustains [the building owner's] right of recovery, either on the theory of an implied contract to indemnify, or because they were put to the necessity of defending themselves against the claim by the tortious conduct of the contractor, or by his breach of contract." Addy at 33. As explained by the Stoneledge court, "[u]nlike in this case, the Addy appellants did suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit." Stoneledge II at 639 (*Emphasis added*).

The facts in Addy are aligned with the facts of this case. Like the building owner in Addy, D.R. Horton is forced to defend itself from the Plaintiff's claims arising from the Third-Party Defendants' tortious conduct (negligent performance of work) and breach of warranties (failure to perform work in a workmanlike manner). Moreover, D.R. Horton seeks not only damages related to defending this lawsuit, but also for costs to investigate and repair the deficient or defective work, attorneys' fees and costs, and damage to reputation. These facts distinguish this case from Stoneledge I and Stoneledge II. D.R. Horton's damages are thus recoverable under the

separate causes of action it has pled, and those claims must remain in this action.

F. D.R. Horton Does Not Have Unclean Hands and Can Recover in Equity

Various Third-Party Defendants contend that D.R. Horton cannot recover under its equitable indemnity claim because D.R. Horton is not without fault. However, they cannot meet their burden of proof to obtain judgment as a matter of law on D.R. Horton's equitable indemnity claim by arguing that the jury *might* find D.R. Horton liable to Plaintiff. Because there is a question of fact as to whether D.R. Horton is at fault for the alleged construction defects, the third-party defendants' motions for summary judgment as to D.R. Horton's claim for equitable indemnity should be denied.

South Carolina courts have consistently found that equitable indemnity claims may be brought against a negligent co-defendant during the initial action. *See, e.g., Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 622, 776 S.E.2d 426, 430 (Ct. App. 2015) (stating that "[w]e agree *Addy* controls this case to the extent it shows Marick may assert a claim for equitable indemnity against a negligent co-defendant"). Additionally, *Stoneledge* held that the lower court erred in granting summary judgment on the merits of the general contractor's equitable indemnity crossclaim because the general contractor presented a question of fact as to whether it was at fault for the alleged construction defect.

"[T]he doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010) (citation omitted). The third-party defendants bear the burden of proof in seeking summary judgment on such an affirmative defense. However, they have failed to come forward with any evidence that DRH has unclean hands as a matter of law.

It is well settled that where a party is exposed to liability to a third party due to the conduct of another, through no fault of its own, that party may recover in equitable indemnity against the second party. See *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990). Moreover, a general contractor is not automatically responsible for the negligence of a subcontractor. See *Fields v. J. Haynes Waters Builders*, 376 S.C. 545, 658 S.E.2d 80 (S.C. 2008).

It is clear that there is a factual issue whether or not D.R. Horton appropriately supervised and oversaw the project. D.R. Horton did not self-perform any of the construction on the project, and therefore, relied on the subcontractors for their knowledge, expertise, experience and installation. Because there is a question of fact as to whether D.R. Horton had fault, the Third-Party Defendants' unclean hands defense does not preclude D.R. Horton's claim for equitable indemnity at this time.

In fact, here, Plaintiff has complained of subcontractors' work for four years and sued D.R. Horton for it. Now, on the eve of trial, Plaintiff admits she cannot prove her case against D.R. Horton on certain issues and filed a stipulation admitting as much. That tardy self-serving admission also expressly and impliedly absolves D.R. Horton from any wrongdoing for those issues – thus erasing any argument about unclean hands. Therefore, in this case, IBP has not proven that D.R. Horton has unclean hands and thus equitable indemnity should not be dismissed. Conversely, D.R. Horton can show that it faced liability and damages due to IBP's work and that cause of action should remain.

IV. CONCLUSION

For the reasons set forth above, D.R. Horton requests the Court reconsider its Order granting summary judgment.

Respectfully submitted,

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August 7, 2023
Greenville, South Carolina

RECEIVED

Sep 06 2023

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. 2019-CP-04-01942

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

v.

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

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

vs

A&J Framing, Inc.;
A-Z, Inc.;
AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;
Allpro Textures, LLC;
Alpha E.M.C.;
Alpha Omega Construction Group, Inc.;
American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.;
Atlanta Floor Designs Center;
A Grade Above Others, LLC;
BFK Builders, Inc.;
BMC East LLC D/B/A Coleman Floor, LLC;
Brand-Vaughn Lumber Co, Inc.;
Bravo Carpenters, Inc.;
Builders Designhouse, LLC;
Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;
Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A Gale Contractor Services;
Cannaday Siding & Gutter, Inc.;
Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;
CBU Enterprises, Inc.;
Cortes Painting, LLC;

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

and

Aaron D. Peris;
 Harrelson Painting, LLC;

Huttig Building Products; et al Fourth and Fifth-Party
Defendants and Plaintiffs

D.R. HORTON, INC.....Appellant

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

Jane Doe #1-10; and John Doe #1-50;

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A-Z, Inc.;
AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;
Allpro Textures, LLC;
Alpha E.M.C.;
Alpha Omega Construction Group, Inc.;
American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.;
Atlanta Floor Designs Center;
A Grade Above Others, LLC;
BFK Builders, Inc.;
BMC East LLC D/B/A Coleman Floor, LLC;
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Bravo Carpenters, Inc.;
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Cannaday Siding & Gutter, Inc.;
Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;
CBU Enterprises, Inc.;
Cortes Painting, LLC;
CPI Security Systems, Inc.;
Dom Group, LLC;
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Toribio Islas; and
Alejandro Soto.....Respondents

NOTICE OF APPEAL

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

1. Form 4 Order granting Defendant Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractor Services, improperly named as TopBuild Home Services, Inc., a/k/a Gale Contractors Service) Motion for Summary Judgment dated and filed July 28, 2023 and the expanded Order granting the same motion titled Proposed Order Granting Builders Services Group, Inc. d/b/a Gale Contractor Services' Motion for Summary Judgment dated and filed August 7, 2023, as well as the Order denying D.R. Horton, Inc.'s Motion to Reconsider and/or Alter or Amend the Order Granting Third-Party Defendant Builders Services Group, Inc. d/b/a Gale Contractor Services' Motion for Summary Judgment as to D.R. Horton, Inc.'s Third-Party Complaint dated and filed August, 18, 2023. Counsel for the Appellant received written notice of entry of the Order denying reconsideration on August 18, 2023.
2. Form 4 Order granting Defendant IBP Assets, LLC d/b/a Blue Ridge Building Products Motion for Summary Judgment dated and filed July 26, 2023 and the expanded Order Granting Motion for Summary Judgment dated and filed August 23, 2023 granting the same relief, as well as the Order denying D.R. Horton, Inc.'s Motion to Reconsider and/or Alter or Amend the Order Granting Third-Party Defendant IBP Asset, LLC d/b/a Blue Ridge Building Products' Motion for Summary Judgment as to D.R. Horton, Inc.'s Third-Party Complaint dated and filed August, 18, 2023. Counsel for the Appellant received written notice of entry of the Order denying reconsideration on August 18, 2023. On August 31, 2023,

Appellant served and filed a Motion for Reconsideration of the Expanded Order Granting Motion for Summary Judgment filed August 23, 2023.

3. Order denying Defendant D.R. Horton, Inc.'s Motion to Decertify dated and filed July 19, 2023, as well as the Order denying Defendant D.R. Horton, Inc.'s Motion to Alter or Amend Order Denying Motion for Decertification dated and filed August 18, 2023. Counsel for the Appellant received written notice of entry of the Order denying reconsideration on August 18, 2023.
4. Amended Scheduling Order dated and filed February 15, 2023. Counsel for the Appellant received written notice of entry of the Order on February 15, 2023.
5. Order (untitled but addressing several issues) dated and filed May 8, 2023. Counsel for the Appellant received written notice of entry of the Order on May 8, 2023.
6. Trial Plan Order dated and filed August 17, 2023. Counsel for the Appellant received written notice of entry of the Order on August 17, 2023. Appellant's Motion for Reconsideration was filed August 28, 2023, and supplemented on August 31, 2023 by Defendant D.R. Horton, Inc.'s Brief in Support of Motion to Reconsider Trial Plan Order.
7. Form 4 Order dated and filed August 18, 2023, denying all pending Motions to Reconsider by all parties. Counsel for the Appellant received written notice of entry of the Order denying reconsiderations on August 18, 2023.

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Sep 06 2023

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. 2019-CP-04-01942

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

v.

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

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

vs

A&J Framing, Inc.;
A-Z, Inc.;
AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;
Allpro Textures, LLC;
Alpha E.M.C.;
Alpha Omega Construction Group, Inc.;
American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.;
Atlanta Floor Designs Center;
A Grade Above Others, LLC;
BFK Builders, Inc.;
BMC East LLC D/B/A Coleman Floor, LLC;
Brand-Vaughn Lumber Co, Inc.;
Bravo Carpenters, Inc.;
Builders Designhouse, LLC;
Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;
Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale
Industries, Inc. D/B/A Gale Contractor Services;
Cannaday Siding & Gutter, Inc.;
Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;
CBU Enterprises, Inc.;
Cortes Painting, LLC;
CPI Security Systems, Inc.;
Dom Group, LLC;

Dupree Plumbing Company, Inc.;
 Ferguson Enterprises, Inc.;
 Five Star Construction Inc.;
 Five Star Foundations, LLC;
 Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II;
 GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.;
 General Shale Brick Inc.;
 Get Floored, LLC;
 Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;
 Installed Building Products, LLC A/K/A Installed Building Products II, LLC;
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 JLS Masonry, Inc.;
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 Stock Building Supply, LLC;
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 Tucker Materials, Inc., A/K/A Gypsum;
 UTM Enterprises, Inc;
 and
 Willow Tree Landscaping, Inc Third-Party Defendants

and

Aaron D. Peris;
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 Defendants and Plaintiffs

D.R. HORTON, INC.....Appellant

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

Jane Doe #1-10; and John Doe #1-50;

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PROOF OF SERVICE

The undersigned does hereby certify that on September 1st, 2023 a copy of the Notice of Appeal as served by email on all counsel of record as follows and filed with the Clerk of Court for Anderson County Court of Common Pleas via electronic filing. A copy of the sent email is enclosed as Exhibit 1 with this Proof of Service.

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Subject: RE: Zitek v. D.R. Horton, Inc., et al.
Attachments: Notice of Appeal Revised.pdf

Your Honor and Counsel,

Please find attached an updated Notice of Appeal, which we are filing this morning, on behalf of DR Horton, Inc. related to the following Orders:

- Certification and Decertification of the Class;
- Orders limiting discovery;
- Trial Order;
- Bifurcation; and
- Order Granting IBP and Gale's Motion for Summary Judgment.

With kindest regards,



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Paralegal

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From: Stephanie Simpson <simpson@conlaw.com>

Sent: Thursday, August 31, 2023 3:03 PM

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Subject: Zitek v. D.R. Horton, Inc., et al.

Importance: High

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

CIVIL ACTION NO: 2019-CP-04-01942

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

Plaintiff,

v.

D.R. Horton, Inc., et al.,

Defendants.

D.R. Horton, Inc.

Third-Party Plaintiff,

v.

AJ Landscaping & Grading, LLC a/k/a A J
Landscaping & Grading, LLC, et al.

Third-Party Defendants.

ProBuild Company, LLC; et al.,
Fourth-Party Plaintiffs,

v.

Harrelson Painting, LLC, et al.,
Fourth-Party Defendants.

Nicholas Soto a/k/a Nicolas Soto, Individually
and d/b/a Soto HVAC,
Fifth-Party Plaintiffs,

v.

Toribio Islas and Alejandro Soto,
Fifth-Party Defendants.

**PROPOSED ORDER GRANTING BUILDERS
SERVICES GROUP, INC. D/B/A GALE
CONTRACTOR SERVICES' MOTION FOR
SUMMARY JUDGMENT**

This matter came before the Court on July 21, 2023, on Defendant Builder Services Group, Inc. D/B/A Gale Contractor Services' (hereinafter "Defendant" or "Gale") Motion for Summary Judgment pursuant to Rule 56(C) of the South Carolina Rules of Civil Procedures ("SCRCP").

Gale argued that the record reflects there is no genuine issue as to any material fact as it relates to D.R. Horton's Third-Party Complaint against Gale and Gale is entitled to a judgment as a matter of law.

BACKGROUND

This litigation arises out of the development and construction of the Rose Hill subdivision in Anderson County, South Carolina. The Rose Hill subdivision consists of approximately 270 single-family homes. D.R. Horton served as the developer and builder for the Rose Hill subdivision, taking over the project from Poinsett Development, LLC and Poinsett Homes, LLC. Gale served as a subcontractor to D.R. Horton, providing labor and materials for 91 of the homes in the Rose Hill subdivision. Gale's scope of work at the Rose Hill subdivision consisted of installing the garage doors, gutters, downspouts, and batt and blown insulation.

On September 25, 2019, Plaintiff Natalie Zitek ("Plaintiff Zitek") brought a class action lawsuit on behalf of herself and a proposed class of other similar situated Rose Hill homeowners (collectively the "Class") against D.R. Horton, Inc. and Jane and John Does. On February 23, 2022, D.R. Horton filed a Second Amended Answer and Third-Party Complaint, naming Gale as a Third-Party Defendant. In its Third-Party Complaint, D.R. Horton demanded that Gale defend D.R. Horton in this lawsuit and indemnify D.R. Horton for the damages it has and will sustain as a result of Gale's work in the Rose Hill subdivision. However, during a status conference before the Court on April 21, 2023, counsel for Plaintiff Zitek confirmed that the gutters, downspouts, and insulation were not defects for which Plaintiff Zitek would be seeking damages. Counsel for Plaintiff then filed the said stipulation with the Court on July 20, 2023 (the "Stipulation"). Upon entry of the Stipulation, D.R. Horton agreed to dismissal of its' breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness

claims against Gale. Only D.R. Horton's claim for indemnification remained at issue during summary judgment arguments.

The universe of documents upon which D.R. Horton relied for its indemnity claims consists of 1) The "First Amendment to Master Addendum to Independent Contractor Agreement" executed March 8, 2006; 2) the "Master Addendum to Independent Contractor Agreement" executed October 23, 2015 respectively, (the foregoing collectively referred to herein as the "Addendum Contracts")¹ and 3) Plaintiff Zitek's Notice and Opportunity to Cure Improper Construction Conditions and Resulting Damages correspondence served December 11, 2019 (the "NOC Letter"). D.R. Horton contends the indemnity provision cited in its Indemnification and Additional Insured Tender (the "Tender")² creates Gale's duty to defend and indemnify D.R. Horton and reimburse them for attorney's fees relating to litigation for the case. However, the Independent Contracting Agreement where the indemnification clause was cited was never produced to Gale. The only Independent Contractor Agreement pertaining to Gale produced by D.R. Horton is a compilation of the Addendum Contracts, identified above. Notably, in the Addendum Contracts the indemnification clause states in pertinent part:

Indemnity and Insurance. Any defense, indemnification hold harmless or similar obligation (collectively "Indemnification") imposed on Contractor under the Standard Agreement shall be limited to any claims, demands, damages, defense expenses (including attorneys fees and litigation costs) or liabilities (collectively "Loss") covered by the terms of the Indemnification in the Standard Agreement that are caused by Contractor's negligence or the negligence of its subcontractors or its Work (including any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's Work).

¹The Addendum Contracts, Bates Stamped KDC13229-13251, were attached as Exhibit 25 to Gales' Mem. in Supp. of Mot. for Sum. J.

² D.R. Horton's Indemnification and AI Tender were attached as Exhibit 27 25 to Gales' Mem. in Supp. of Mot. for Sum.J.

LEGAL STANDARD

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” See *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). “In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment.” *Id.*; *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). Furthermore, the “construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment.” *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995).

CONCLUSIONS OF LAW

I. D.R. Horton’s Third-Party Complaint against Gale must be dismissed because the defects common to the class do not implicate the work of Gale.

As reflected in the Stipulation, Plaintiff Zitek is not alleging a common defect that implicates Gale’s work. Specifically, there are no allegations of common defects in Plaintiff Zitek's pleadings, the deposition testimony, or expert reports as to gutters, downspouts, batt and blown insulation, or garage doors. Accordingly, because D.R. Horton has not incurred, nor will it incur, any damages in this lawsuit resulting from Gale’s work, Gale cannot be compelled to defend and

indemnify D.R. Horton in this lawsuit. The Court finds in the absence of any derivative claim, the entire Third-Party Complaint by D.R. Horton against Gale warrants dismissal.

II. D.R. Horton Cannot prove the Addendum Contracts apply to the construction of Rose Hill and Cannot prove that Gale is bound by the Indemnification Clause Referenced in its Tender.

A breach of contract claim is a failure to perform a contractual promise without legal excuse. The action is one at law, predicated on the existence of a contract. *See Sterling Development Co. v. Collins*, 309 S.C. 237, 421 S.E.2d 402, 404 (1992); *Cain v. United States Insurance, Co.*, 232 S.C. 397, 102 S.E.2d 360 (1958). A binding, valid contract must exist for there to be a cause of action for breach of contract. *Id.* The party asserting such a claim must, therefore, allege and prove each material element of the contract sued on. *Rabon v. State Financial Corp.*, 203 S.C. 183, 26 S.E.2d 501 (1943). A contract only arises when there is actual agreement by parties in which they demonstrate mutual intent to be bound. *Electro-Lab of Aiken, Inc. v. Sharp Construction Co. of Sumter, Inc.*, 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004).

First, the Addendum Contracts entered into between D.R. Horton and Gale do not encompass terms governing the construction of Rose Hill. Without the underlying Independent Contractor Agreement, the Addendum Contracts do not define the scope of work Gale was hired to perform. There was no “meeting of the minds” in the Addendum Contracts for the installation of insulation, gutters, downspouts and garage doors at Rose Hill. The terms of a contract speak for themselves; however, without the underlying Independent Contractor Agreement, the terms to which the Addendum Contracts apply cannot be known.

In addition, the lack of the Independent Contractor Agreement, to which the Addendum Contracts refer, inherently creates an issue of ambiguity as to the terms governing the relationship between Gale and D.R. Horton as it applies to Rose Hill and the conditions of any indemnity

obligations imposed on Gale. Any such ambiguity must be construed against the drafter, D.R. Horton. A court will construe any doubts and ambiguities in an agreement against the drafter of the agreement. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 499–500, 649 S.E.2d 494, 502 (Ct.App.2007). (“Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.” (quoting *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (internal quotation marks omitted))).

Read as a whole, the Addendum Contracts are ambiguous as to what scopes of work they contemplate. “A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause.” *McGill v. Moore*, 381 S.C. 179 at 185, 672 S.E.2d 571 at 574 (citation omitted). Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975) (citation omitted). Nowhere in the Addendum Contracts is the scope of work Gale was hired to perform at Rose Hill even discussed nor is the Rose Hill subdivision identified. Accordingly, the Addendum Contracts do not apply to the insulation, gutters, downspouts and garage doors Gale installed at Rose Hill.

Second, D.R. Horton failed to produce any contract with Gale containing the Indemnification clause cited in its Tender. D.R. Horton cannot reasonably assert Gale is bound by an indemnification clause in a contract which has never been produced and to which D.R. Horton cannot prove Gale agreed. Again, there was no “meeting of the minds” between D.R. Horton and Gale with respect to the indemnification clause cited in the Tender. Therefore, the Third-Party

Claims based on the indemnification clause cited in the Tender fail and any Third-Party Claims that are based on the Addendum Contracts are not enforceable as a matter of law.

III. D.R. Horton's claims for contractual indemnity fail as a matter of law and public policy.

As a matter of law, D.R. Horton's claim for indemnity for its own negligence fails if the language contained in the indemnity clause does not clearly and unequivocally provide indemnity for D.R. Horton's own negligence. *See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018). Our Supreme Court has ruled that "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Id.* *Concord* held a general contractor must "meet the very high standard of eliminating any possibility that the contract language on which [it] rel[ies] can be read to limit indemnification to the [general contractor's] own negligence" and "if any other interpretation of the contract language is reasonably possible, [the general contractor] cannot prevail on their contract claims as a matter of law." *Id.*

First, the trigger point for the indemnification provision in the Addendum Contracts is damage "caused by Contractor's [Gale's] negligence or the negligence of its subcontractors or its Work (including any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's Work). With the Plaintiff's stipulation there are no allegations of defective work by Gale in the record.

Second, the Court finds the indemnity provisions contained in the Addendum Contracts fall directly in line with the *Concord* decision and are unenforceable as a matter of law. The Addendum Contracts' Indemnification provision does not clearly and unequivocally state what Gale's indemnification responsibilities are as they relate to the sole or concurrent negligence of

D.R. Horton. Although recognizing that “there is no verbatim phrase that must be used to meet the clear and unequivocal standard,” *Concord*, 424 S.C. at 657, 819 S.E.2d at 176, the Court notes that there is no reference to the sole negligence of D.R. Horton in the indemnity provision. There is also a lack of clarity between the inclusion of liability for Builder for its supervision of the Contractor but the exclusion of work, negligence or misconduct of Builder, which by definition includes supervision of the subcontractors. The language contained in the Addendum Contracts appears to require indemnity for concurrent acts and omissions of D.R. Horton, as it states Gale must indemnify D.R. Horton for “any liability of Builder for its supervision of Contractor”. Further, “supervision” is broad and undefined. The Court finds this clearly creates ambiguity as to whether D.R. Horton is seeking indemnification for its own concurrent negligence and must be construed against D.R. Horton. Accordingly, the Court finds the indemnification agreement is unenforceable because it is vague, ambiguous, and implies D.R. Horton is to be indemnified for its own negligence contrary to the clear and unequivocal standard in *Concord*.

Third, the indemnity provision in the Addendum Contracts also states, “Contractor shall then have the duty to reimburse Builder *only for the proportion of Builder's defense expenses that are attributable to Loss caused by Contractor*”. (Emphasis added). The Court finds D.R. Horton cannot attribute any loss Gale caused since Plaintiff Zitek is not seeking damages for the scope of work Gale performed. Without damages or a loss caused by Gale, D.R. Horton has no claim. D.R. Horton has provided no evidence of what it has spent defending claims against it related to Gale’s scope of work. Moreover, a demand for attorney’s fees is not ripe until entry of a judgment. See *Bayles v. Marsh Realty & Assocs., LLC*, Civil Action No. DKC 20-3322, 2021 U.S. Dist. LEXIS 61066, at *9 (D. Md. Mar. 30, 2021). Since there will be no judgment attributable to damages from Gale’s work pursuant to Plaintiff Zitek’s Stipulation, the Court finds it is inequitable for D.R.

Horton to demand that Gale defend and indemnify it. As a result, D.R. Horton's claim for contractual indemnification against Gale fails as a matter of law.

IV. D.R. Horton's Unclean Hands Preclude it from Recovering under a Theory of Equitable Indemnification.

In general, there is no right to indemnity between joint tortfeasors. *Atl. Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 70, 132 S.E.2d 172, 176 (1963). Equitable indemnity arises in scenarios where "the first party is at fault, but the second party is not." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); *see also Fowler v. Hunter*, 697 S.E.2d 531, 388 S.C. 355 (S.C. 2010). "If the second party is also at fault, he comes to court without equity and has no right to indemnity." *Id.* For a party to recover under the theory of equitable indemnity, it must satisfy the following three elements: (1) the party from whom indemnity is sought is liable for causing the plaintiff's damages; (2) the party seeking indemnity is exonerated from any liability for those damages; and (3) the party seeking indemnity incurred damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor. *Id.* However, South Carolina law is clear that "[t]he most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault." *Id.*

Pursuant to the Stipulation, Plaintiff Zitek is not seeking any damages related to Gale's scope of work because there are no defects in Gale's work. Thus, D.R. Horton cannot prove it has incurred damages as a result of defending against Plaintiff Zitek's claims that are the fault of Gale. Further, by virtue of the Stipulation, D.R. Horton has been exonerated from liability relating to any defects in Gales' work. Therefore, is no genuine issue of material fact for a jury to consider with respect to D.R. Horton's equitable indemnity claim against Gale.

CONCLUSION

This Court finds there is no genuine issue as to any material fact as to DR Horton's Third-Party Complaint against Gale, and that the moving party is entitled to judgment as a matter of law, pursuant to Rule 56(c). SCRCP. Therefore, it is hereby **ORDERED** that Gale's Motion for Summary Judgment as to all of D.R. Horton's third-party claims is **GRANTED** and D.R. Horton's Third-Party Complaint against Gale is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED, this _____ day of _____ 2023.

The Honorable Judge Sprouse



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al
Case Number: 2019CP0401942
Type: Order/Summary Judgment

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-08-07 15:19:17 page 11 of 11

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019-CP-04-01942

Natalie Zitek, et al

PLAINTIFF(S)

DR Horton, et al

DEFENDANT(S)

Submitted By: Address:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Motions to Reconsider:

All of DR Horton's motions

BKF Builders, Inc.

Nazareth Builders

Jesus Robles Montes

Bravo Carpenters

MJ Cowboys

ML Reyna

JLS Masonry

Jesus Jiminez

Therma-Tru

Rite-Rug

Cannaday

Builder's First Source

NM Alex Carpet

Harrelson Painting

RECEIVED
Sep 06 2023
SC Court of Appeals

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the parties' Motions to Reconsider, pursuant to Rule 59, SCRCP*, are DENIED.

*The Court decides these Motions to Reconsider based upon the briefs filed by the parties and without oral argument.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

R. SCOTT SPROUSE
Circuit Court Judge

2752
Judge Code

8/18/2023
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al
Case Number: 2019CP0401942
Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-08-18 15:53:51 page 4 of 4

FORM4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019-CP-04-01942

Natalie Zitek, et al

PLAINTIFF(S)

DR Horton, et al

DEFENDANT(S)

Submitted By:
Address:

Attorney for : Plaintiff Defendant or
Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40U), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends ☒ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order.		

The Judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court for judgment details.

R. SCOTT SPROUSE

2752

8/17/2023

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____, to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

CourtReporter:-----

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

SCRCP Form 4C (03/2013) S2001045/JVS/W004EFL

Page 2 of 2

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT
CASE NO: 2019-CP-04-1942

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

PLAINTIFF

vs

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

DEFENDANTS

TRIAL PLAN ORDER

DR Horton, Inc.,

THIRD-PARTY PLAINTIFF

VS

AJ Landscaping & Grading, LLC a/k/a
AJ Landscaping & Grading, Inc;
AllPro Textures, LCC; Alpha Omega
Construction Group, Inc; American
Concrete And Precast, Inc., a/k/a ACP
Concrete, Inc.; A&J Framing, Inc;
Alpha EMC; A-Z, Inc; Atlanta Floor
Designs Center; A Grade Above Others,
LLC; Brand-Vaughan Lumber Co.,
Inc. BKF Builders, Inc.; Builders
Designhouse, LLC; BMC East,
LLC D/B/A Coleman Floor, LLC;
Builders Firstsource
Southeast Group, LLC, a/k/a Builders
Firstsource, Inc;
Bravo Carpenters, Inc.; Caryl
Mechanics II, Inc.; Caryl
Mechanicals, Inc.; Cannaday
Siding and Gutter, Inc.; Cores 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
Building 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;
Landscapers, 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&L Reyna
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 Contractors Service;
Tucker Materials, Inc., a/k/a Gypsum
UTM Enterprises, Inc.; Dupree Plumbing
Company, Inc.; Willow Tree
Landscaping, Inc.

THIRD-PARTY DEFENDANTS

This case involves complex issues and presents a significant challenge to the Court to ensure that the issues are presented to the jury in an organized and understandable manner. The Court heard from the parties at the July 21, 2023 hearing regarding a trial plan. Opportunity for the submission of additional trial plans was given to the parties. The following parties moved for bifurcation and/or submitted/joined in the submission of trial plans:

The Plaintiff Natalie Zitek, et al

The Defendant D.R. Horton

Third Party Defendants P&L Enterprises
 M&L Reyna Construction LLC
 Aaron D. Peris
 Installed Building Products LLC
 JLS Masonry Inc.
 Topbuild Home Services, Inc.

The Court received correspondence from the parties requesting that the Court not issue a final trial plan order until August 17, 2023, given that the parties were actively involved in settlement negotiations. The Court granted that request.

I. Trial Bifurcation

The Court finds that the most judicially economical method of presenting this case will be by bifurcating the trial. The Court previously denied the Plaintiffs motion to bifurcate the entire case, in that a complete bifurcation would require a new jury and new trial. The Court finds that the same jury should hear all of the issues in this case. However, the claims of the Defendant against the Third-Party Defendants (and the claims against the Fourth-Party/Fifth-Party Defendants that flow from those) are affected by any liability attributed to the Defendant by the jury. Accordingly, Phase I of the trial shall be that of liability of the Defendant to the Plaintiff. The issue of punitive damages shall be heard by the jury immediately after Phase I should the jury have found the Defendant liable to the Plaintiff and if the Defendant has elected bifurcation of that issue. The jury shall render a verdict on the issues of liability and punitive damages. Should the jury find for the Plaintiff on any issue of liability and/or punitive damages, Phase II of the trial shall consist of the Defendant proceeding with its claims against the Third-Party Defendants (and any Fourth/Fifth Party claims).

II. Pretrial Submissions

The parties shall make the following pre-trial submissions by the end of business on **Friday, August 25, 2023:**

- A. Witness lists.
- B. Proposed deposition designations under S.C.R.C.P Rule 32.

The parties shall make the following pre-trial submissions by the end of business on **Monday, August 28, 2023:**

- A. Notice by the Defendant of election of punitive damages bifurcation. Should the Defendant file no notice in this regard, punitive damages will not be bifurcated.
- B. Proposed voir dire questions.
- C. Exhibit lists.
- D. Motions in limine.
- E. Proposed verdict forms.

- F. Counter designations and objections to any deposition designations. Counter designations must clearly specify which designations are supplemental to the portions designated to be published to the jury (and need to be incorporated by original designating party) and which portions are simply counter-publications (to be published by the counter party at the conclusion of the original publication in the nature of rebuttal information). The parties are encouraged to make an earnest effort to reach an agreement on publication of deposition summaries in lieu of verbatim reading given the limited amount of time for the trial.

The parties shall file any objections to witness or exhibit lists by the end of business on **Tuesday, August 29, 2023.**

Service of any of these materials shall be by electronic transmission.

The parties shall confer before submissions of the above-listed items and determine where disagreements exist. The Court will hear arguments surrounding any of these items at the Pre-Trial Hearing.

III. Pre-Trial Hearing

The attorneys in the case shall appear at an in-person Pre-Trial Hearing on Friday, September 1, 2023 at 9:30 AM. The Court will rule on any disputes regarding the Pre-Trial submissions and announce the voir dire questions that will be used. The attorneys shall bring hard copies of any documents in dispute to the hearing, unless excused from this requirement by the Court. The parties are expected to have their exhibits ready to be marked by the Court reporter. All exhibits shall be marked. The parties shall be prepared to enter any stipulated exhibits and inform the Court which exhibits will require foundation testimony and a ruling on admissibility. No attorney shall exit the courthouse until all of his or her exhibits have been marked. The parties also should be prepared to notify the Court of whether or not they would be willing to accept a verdict of fewer than twelve jurors should issues arise where it is impossible for a full jury to finish the case. This will not be an option if any party objects.

The parties also shall bring any multimedia presentations and/or demonstrative exhibits requiring use of the courtroom's electrical system/outlets with them to this hearing. The courtroom shall be available to the parties after the hearing. Should a party plan on using a technician to operate their presentation, that person shall attend the Pre-Trial Hearing so that all of that party's technological equipment can be tested in the courtroom.

IV. Jury Selection

Due to the nature of the case, the Court has directed the Clerk of Court to summon a very large jury pool, making the facilities at the Anderson County Courthouse insufficient to house all of the persons in attendance. Therefore, the Court has directed jury qualification and selection to take place at the Anderson Civic Center, which is located at 3027 Martin Luther King, Jr. Blvd. Anderson, SC 29625, on Tuesday, September 5, 2023 at 9:30 AM.

The Plaintiff and Defendant shall have the customary four (4) strikes. The Third-Party Defendants shall be grouped according to trade, not to exceed five (5). The Third-Party Defendants shall submit proposed groups to the Court by the end of business on Monday, August 28, 2023 along with the other items in Paragraph II above. The Court will make a final decision on which group each party is assigned to at the Pre-Trial Hearing. Each group shall have four (4) strikes. The group shall elect one attorney to announce that group's strikes.

Due to the anticipated length of the trial, it is the Court's intention for four (4) alternates to be selected, departing from normal procedure. In the event a party has an objection to this unusual number of alternates, it must file that objection with the other materials set forth in Paragraph II above.

The Court's intention is that the jury be selected and sworn before lunch, with the trial to begin at 2 PM on the same day.

V. Trial Commencement and Opening Statements.

The Plaintiff and Defendant shall make opening statements at the commencement of Phase I of the trial. Then, one attorney from each trade group (to be elected by the group) shall be allowed to make an opening statement. Should the group be unable to agree on an attorney to make an opening statement, the Court will select one from the group randomly. The Plaintiff should be prepared to call the first witness at the conclusion of the opening statements on September 5, as time permits.

VI. Trial Procedure.

Court shall commence each day at 9 AM, unless the Court instructs otherwise. The attorneys should anticipate, and communicate to their witnesses, that the trial will extend past 5 PM on some days in order for a witness' testimony to be concluded. The time allotted to this case is limited given the large number of parties. Requests have been made for the Court to either set specific days for each party or to limit examination/cross-examination of witnesses by hours. The Court hesitates to set arbitrary time limits for each witness given the highly technical nature of this case and the need for counsel to make tactical decisions regarding witnesses in the prosecution and defense of this case. However, the Court recognizes the potential of the case bogging down in minutiae and the need for guidelines. The guidelines will be followed and counsel should prepare to complete their portion of the case inside the days allotted. Accordingly, the following schedule shall govern the trial:

September

5	Tuesday	Jury Selection, Opening Statements, First Witness (if time permits).
6	Wednesday	Plaintiffs Case.
7	Thursday	Plaintiffs Case.
8	Friday	Plaintiffs Case.

11	Monday		Plaintiff's Case.
12	Tuesday	AM	Plaintiff's Case.
		PM	Defendant's Case.
13	Wednesday		Defendant's Case.
14	Thursday		Defendant's Case.
15	Friday		Defendant's Case.
18	Monday		Defendant's Case.
19	Tuesday	AM	Plaintiffs Reply.
		PM	(Time available for site visit should the Court order such).
20	Wednesday		Closing Arguments/Jury Verdict on Phase I.
21	Thursday		Punitive Damages Phase (should the Defendant elect bifurcation).
22	Friday		Phase II Opening Statements/ Defendant/Third-Party Plaintiffs Case.
25	Monday		Defendant/Third-Party Plaintiffs Case.
26	Tuesday	AM	Defendant/Third-Party Plaintiffs Case.
		PM	Third-Party Defendants' Case.
27	Wednesday	AM	Third-Party Defendants' Case.
		PM	Fourth/Fifth-Party Defendants' Case.
28	Thursday		Defendant/Third-Party Plaintiff Reply.
			Third-Party Defendants/Fourth-Party Plaintiff Reply.
29	Friday		Phase II Closing Arguments/Submission to Jury

While the Court does not put specific hourly limits on any examination, the Court reserves the right to terminate the questioning of a particular witness by any attorney if the questions being asked are repetitive, unduly argumentative or merely for the purpose of slowing the pace of the trial. In Phase I, the Plaintiff and Defendant shall be allowed to fully examine each witness. One attorney representing each group shall be allowed to cross examine any witness regarding matters not covered in the direct or cross examination by the Plaintiff or Defendant. The attorney representing a party may participate in full if their client or expert is called as a witness by the Plaintiff or Defendant. In that case, that particular attorney will represent his client's group.

Should a part of the trial finish early, the next part of the trial will proceed at that time. For instance, should the Plaintiff rest a day early, the Defendant should be prepared to immediately move forward with its case.

VII. Post-Trial Motions

The parties shall have ten (10) days from the conclusion of the trial in which to file any post-trial motions.

The Court reserves the right to modify this plan. The parties should notify the Court immediately should any settlements be reached which removes parties and simplifies the case.

AND IT IS SO ORDERED!

This 17th day of August, 2023

Walhalla, South Carolina

R. Scott Sprouse, Judge

Tenth Judicial Circuit



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al
Case Number: 2019CP0401942
Type: Order/Jury Trial

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-08-17 14:27:11 page 10 of 10

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

CIVIL ACTION NO: 2019-CP-04-01942

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

Plaintiff,

v.

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

Defendants.

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

D.R. Horton, Inc.

Third-Party Plaintiff

v.

IBP Asset, LLC d/b/a Blue Ridge Building
Products, et al.

This matter is before the Court upon the Motion of IBP Assets, LLC d/b/a Blue Ridge Building Products (“Blue Ridge”) seeking an Order granting Summary Judgment in its favor on the claims by D.R. Horton, Inc. set forth in the Second Amended Answer and Third-Party Complaint. For the reasons set forth herein, the Motion is GRANTED.

Procedural History

On September 25, 2019, Plaintiff Natalie Zitek (“Plaintiff Zitek”) brought a class action lawsuit on behalf of herself and a proposed class of other similar situated Rose Hill homeowners (collectively the “Class”) against D.R. Horton, Inc. and Jane and John Does. In her Complaint, Plaintiff Zitek alleged that the prerequisites of South Carolina Rule of Civil Procedure (SCRCP) 23(a) had been satisfied and that class certification is appropriate. Pertinent to the present

Motion, Plaintiff Zitek alleged in her Complaint that her claims are “typical of the class” and that “questions of law and fact common to the Class predominate over questions affecting only individual members.”

On October 20, 2020, Plaintiff Zitek moved for an Order certifying the Class under SCRCR Rule 23, wherein she re-alleged that her claims are “typical of the Class members’ claims.” Plaintiff Zitek filed an affidavit contemporaneously with the motion for class certification, identifying the defects common to the Class.

On January 27, 2021, this Court certified the Class, finding, *inter alia*, that Plaintiff Zitek’s claims are typical of the Class.

On March 11, 2021, Horton filed an Amended Answer and Third-Party Complaint, naming Blue Ridge as a Third-Party Defendant. On February 23, 2022, Horton filed a Second Amended Answer and Third-Party Complaint. In its Third-Party Complaint, Horton demands that Blue Ridge defend Horton in this lawsuit and indemnify Horton for the damages it has and will sustain as a result of Blue Ridge’s work in the Rose Hill subdivision.

Blue Ridge first filed a Motion for Summary Judgment on August 1, 2022, which was argued September 8, 2022. However, due to administrative oversight, no ruling was issued based on the initial arguments and the Court heard the Motion again on April 21, 2023. At that time, the factual issues concerning the underlying allegations of defect that had been asserted against Blue Ridge were largely conceded as not being included in the class claims. However, Zitek’s counsel suggested that there could be a class issue related to doors that had been tested and found to leak through or around the doorknob. Blue Ridge’s counsel requested additional opportunity to investigate that suggested concern.

A hearing was held again on July 21, 2023. All parties to this motion were present and participated in the presentation to the Court. Multiple briefings have been submitted by all parties and considered by the Court.

Finding of Fact

Based upon the evidence submitted to the Court, the Stipulation of the Plaintiff and the statements of counsel on the record, I find that the following material facts are not in dispute:

1. Blue Ridge and Horton entered a “South Carolina Independent Contractor Agreement” (hereinafter “Subcontract”) on or about January 12, 2010. In the paragraph entitled “Scope of Work,” reference is made to Exhibit A for a list of “construction-related” activities that Blue Ridge was contracted to undertake. However, Exhibit A is not attached to the Subcontract and no party has produced the document. The Court finds that Exhibit A does not exist.
2. The Subcontract also references a “Pricing Schedule” at Paragraph 3.1. No Pricing Schedule has been submitted in evidence.
3. According to excerpt from a “Vendor Spend” spreadsheet produced by Horton, Blue Ridge installed a number of different products on various homes in the Rose Hill subdivision between 2012 and 2017. Relevant to the allegations and motions before the Court is the installation of gutters, attic insulation and door hardware. Blue Ridge did not work on every house in Rose Hill and did not perform the same work on each of the houses where it did work.
4. Blue Ridge did not work on the home of the Class Representative, Natalie Zitek.
5. Plaintiff has stipulated that batt and blown insulation and gutters are not included in the class claims.
6. Plaintiff has submitted evidence that water may have infiltrated the patio door at 8 Duxbury Lane through a doorknob when tested by Plaintiff’s Expert, Dr. Rhett Whitlock. Blue Ridge did not perform any work at this residence. There is no evidence that Blue Ridge installed door hardware on any patio door. Furthermore, Dr. Whitlock testified that he did not know why the doorknob leaked and did not testify that this is a systemic issue throughout the neighborhood. Thus, there is no evidence that Blue Ridge contributed to the water infiltration on any residence in the Class.

Conclusions of Law

I. Summary Judgment Standard

Summary judgment is appropriate when the movant demonstrates that the material facts of the case are undisputed, and the moving party is entitled to judgment as a matter of law. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); Rule 56(c), SCRCP. If the moving party meets its initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party cannot simply rest on mere allegations or denials contained in the pleadings. *Singleton v. Sherer*, 377 S.C. 185, 197–98, 659 S.E.2d 196, 203 (Ct. App. 2008). Instead, the nonmoving party must come forward with specific evidentiary support showing there is a genuine dispute for trial. *Rife v. Hitachi Const. Mach. Co.*, 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005).

“[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). Here, there is no dispute regarding any material fact.

II. Summary Judgment Should be Granted on all Causes of Action Against Blue Ridge

Blue Ridge seeks Summary Judgment on all causes of action brought by Horton in the Second Amended Answer and Third-Party Complaint (“Third-Party Complaint”).

In its First Cause of Action of the Third-Party Complaint, Horton claims that Blue Ridge is liable under a theory of Contractual Indemnification and demands that Blue Ridge indemnify Horton for the damages it has and will incur as a result of Blue Ridge's work in the Rose Hill subdivision. The specific contract provision is not cited in the Third-Party Complaint, nor attached as an exhibit. The Subcontract has been submitted to the Court in conjunction with this Motion.

Horton demands contractual indemnification under Section 10 of the contract between itself and Blue Ridge. The contractual indemnity provision demands that Blue Ridge “hold harmless, indemnify, protect and defend” Horton from and against all “losses . . . arising out of, or resulting from, or related in any way to the work performed and/or the materials supplied under this contract” The full text is as follows:

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO HOLD HARMLESS, INDEMNIFY, PROTECT AND DEFEND OWNER, ITS PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THE AFOREMENTIONED ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "INDEMNITEE"), FROM AND AGAINST ANY AND ALL DEMANDS, CLAIMS, ACTIONS, CAUSES OF ACTION, PROCEEDINGS, LAWSUITS, SETTLEMENTS, JUDGMENTS, FINES, PENALTIES, LOSSES, ATTORNEYS FEES, LITIGATION COSTS, INTEREST, AND EXPENSES OF ANY KIND (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "LOSSES") FOR DAMAGES FROM BODILY OR PERSONAL INJURY, DEATH, THE DESTRUCTION OR LOSS OF PROPERTY (INCLUDING LOSS OF USE), OR ANY OTHER KIND OF DAMAGES OR HARM, ARISING OUT OF, OR RESULTING FROM, OR RELATED IN ANY WAY TO THE WORK PERFORMED AND/OR THE MATERIALS SUPPLIED UNDER THIS CONTRACT, REGARDLESS OF WHETHER OR NOT CAUSED IN PART BY INDEMNITEE. SUCH LOSSES SPECIFICALLY INCLUDE, BUT ARE IN NO WAY LIMITED TO LOSSES ARISING OUT OF OR ATTRIBUTABLE TO: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS OR OBLIGATIONS OF CONTRACTOR SET FORTH HEREIN; (2) THE WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR, CONTRACTOR'S AGENTS OR EMPLOYEES, SUPPLIERS OR SUBCONTRACTORS AND THEIR RESPECTIVE AGENTS AND EMPLOYEES, AND/OR ALL OTHER ENTITIES OVER WHOM THE CONTRACTOR MAY EXERCISE CONTROL (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "CONTRACTOR'S AGENTS"); (3) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF CONTRACTOR AND/OR CONTRACTOR'S AGENTS; OR (4) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK, NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE INDEMNITY FOR LOSSES CAUSED SOLELY BY FAULT OR NEGLIGENCE OF THE INDEMNITEE. THE LOSSES DESCRIBED HEREIN SHALL INCLUDE, BUT ARE NOT LIMITED TO, DEMANDS, CLAIMS, OR ACTIONS ASSERTED BY (1) ANY PRESENT OR FUTURE OWNER OF THE HOUSE INCORPORATING THE WORK; AND (2) ANY OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR AND/OR CONTRACTOR'S AGENTS). THE INDEMNIFICATION OBLIGATION UNDER THIS CONTRACT SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. THE INDEMNITY PROVISIONS CONTAINED HEREIN ARE INTENDED TO BE AS BROAD AND INCLUSIVE AS PERMITTED BY LAW.

For the reasons set forth below, Summary Judgment is Granted as to the First Cause of Action.

First, Summary Judgment is appropriate because there is no evidence that Horton has sustained “losses . . . arising out of, or resulting from, or related in any way to the work performed and/or the materials supplied under this contract” As set forth above, Plaintiff is not pursuing a claim for work within the scope that Blue Ridge performed. Thus, there are no losses within the defined scope of the indemnity agreement.

Horton contends that it is entitled to recovery for losses incurred prior after the Notice of Claim was received and prior to the Stipulation being filed. However, there is no evidence in the

record that any such losses were incurred or what they might have been. However, irrespective of any proof of losses, Horton is not entitled to recover from Blue Ridge because the indemnity agreement is unenforceable as a matter of law.

In South Carolina, contracts purporting to relieve an indemnitee from the consequences of its own negligence must be stated in “clear and unequivocal terms.” *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018) (citing, *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)) (“Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.”). The Court of Appeals in *Federal Pacific Electric v. Carolina Prod. Enterprises* addressed the issue of contracts attempting to seek indemnification of damages arising from the indemnitee’s concurrent negligence:

A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. Because it is somewhat unusual for an indemnitor to indemnify the indemnitee for losses resulting from the indemnitee’s own negligence, a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed.

Fed. Pac. Elec., 298 S.C. at 26 (internal citations omitted). “[B]road, comprehensive, and general terms” are inadequate to show the parties intended the indemnitor to indemnify the indemnitee for the indemnitee’s own concurrent negligence. See, *Concord & Cumberland*, 424 S.C. at 656–57, 819 S.E.2d at 176. The Court of Appeals in *Concord & Cumberland* explains that in *Federal Pacific*, the same Court found the use of general terms such as ‘indemnify . . . against any damage suffered or liability incurred . . . or any loss or damage of any kind in connection with the leased premises during the term of the lease’ did not disclose an intention to indemnify for consequences arising from the indemnitee’s own negligence.” *Id.* at 651, 819 S.E.2d at 173 (citing, *Fed. Pac.*

Elec. 298 S.C. at 29, 378 S.E.2d at 58-59) (brackets removed). “Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in the indemnity clause that **clearly shows** the parties intent to absolve the indemnitee of the consequences of its own concurrent negligent.” *Concord & Cumberland*, 424 S.C. at 657, 819 S.E.2d at 176 (emphasis added). Our Court of Appeals noted the challenges that this standard presents to attorneys as quoted by the Texas Supreme Court:

As the Texas Supreme Court has observed, this strict construction test has caused drafters of indemnity provisions to write them in a way that can be read as indemnifying the indemnitee for its own negligence, “yet be just ambiguous enough to conceal that intent from the indemnitor.” *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 707-08 (Tex. S. Ct. 1987). What results are law suits that burden courts with deciding whether the parties’ intent was camouflaged or “clear and unequivocal.”

Concord & Cumberland, 424 S.C. at 658 n.6, 819 S.E.2d at 176 (Ct. App. 2018).

I find that the indemnification provisions of the Subcontract between Horton and Blue Ridge are not clear and unequivocal for the following reasons:

First, nowhere does the provision expressly state that Blue Ridge is responsible to indemnify Horton for its concurrent liability to a homeowner. Rather, it uses exception clauses to avoid the broad form indemnity that is statutorily prohibited. The Subcontract requires indemnity for losses “regardless of whether or not caused in part by [Horton].” But, then inserts a vague exception for “losses caused solely by fault of negligence of [Horton].” This structure is not unequivocal.

This confusion is amplified by the extremely complicated grammatical structure of the provision itself. The indemnification requirement is described within a single sentence containing 260 words, 48 commas and 34 conjunctions/disjunctions. The sentence includes multiple serial

lists, definitions, sub-parts, sub-ordinate clauses, parenthetical notes and prepositional phrases. As a result, the indemnity provision of this contract is manifestly unclear.

Finally, the Subcontract itself does not clearly set forth the material term of the “scope of work” that triggers the obligations for indemnity. The contract must be “clear and unequivocal” to the parties at the time of its acceptance. Otherwise, a subcontractor cannot fairly appreciate the risks that it might be accepting through an indemnity provision. Because there is nothing in this contract that established the work to be performed, it cannot be said that the work that was performed was part of the bargain at the time the indemnification provision was offered.

In its Second Cause of Action, Horton demands equitable indemnification based on the “special relationship” existing between Horton and Blue Ridge and because Horton has and will incur damages as a result of Blue Ridge’s work in the Rose Hill subdivision. As stated above, there is no evidence of wrongdoing by Blue Ridge for which Horton is exposed to liability from the Plaintiff Class. Therefore, there is no basis for equitable indemnity.

Finally, Horton also brings causes of action against Blue Ridge for breach of contract (Third Cause of Action), breach of express warranties (Fourth Cause of Action), breach of implied warranties (Fifth Cause of Action), and negligence, gross negligence, and recklessness (Sixth Cause of Action). Again, as stated above, there is no evidence that Plaintiff is asserting any claim on behalf of the class arising out of work performed by Blue Ridge, thus there is no basis for a derivative claim. Likewise, Horton has produced no evidence of negligence, breach of contract or breach of warranty for which Horton has sustained independent damages for which it is entitled to recovery.¹ Whether Blue Ridge procured insurance as may have been required

¹ Blue Ridge contends that, because these causes of action are dependent solely on the potential liability that may arise from Plaintiff Zitek’s claims against Horton and because Horton’s damages arise exclusively from having to defend itself from Plaintiff Zitek’s lawsuit, these causes of action are in reality claims for equitable indemnification and should be dismissed in accordance with the South Carolina Court of Appeals’ ruling in *Stoneledge at Lake*

under the Subcontract was not pled in the Third-Party Complaint and is therefore not before this Court.

Conclusion

For the reasons stated above, Summary Judgment is GRANTED to Blue Ridge on all causes of action against in the Second Amended Answer and Third-Party Complaint of D.R. Horton.

IT IS SO ORDERED.

Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 635, 776 S.E.2d 434, 437 (Ct. App. 2015). See also, *Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc.*, 2018 WL 3475472, at *1-2 (D.S.C. July 19, 2018). Because the Court has found that there is no evidence of any wrong-doing or breach on the part of Blue Ridge, this question is rendered moot and is not addressed in this Order.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al
Case Number: 2019CP0401942
Type: Order/Summary Judgment

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-08-23 15:49:31 page 10 of 10

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

C.A. No. 2019-CP-04-1942

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

Plaintiff,

vs.

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

Defendant,

D.R HORTON, INC.,

Third-Party Plaintiff,

vs.

AJ LANDSCAPING & GRADING LLC,
A/K/A AJ LANDSCAPNG & GRADING,
INC; ALLPRO TEXTURES, LCC; ALPHA
OMEGA CONSTRUCTION GROUP, INC.;
AMERICAN CONCRETE AND PRECAST, INC.,
A/K/A ACP CONCRETE, INC.; A&J FRAMING,
INC; ALPHA E.M.C; A-Z, INC.; ATLANTA
FLOOR DESIGNS CENTER; A GRADE ABOVE
OTHERS, LLC; BRAND-VAUGHAN LUMBER
CO., INC.; BKF BUILDERS, INC; BUILDERS
DESIGNHOUSE, LLC; BMC EAST, LLC D/B/A
COLEMAN FLOOR, LLC; BUILDERS
FIRSTSOURCE SOUTHEAST GROUP, LLC,
A/K/A BUILDERS FIRSTSOURCE, INC;
BRAVO CARPENTERS, INC.; CARYL
MECHANICS II, INC.; 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 BUILDING
SUPPLY-US LBM, LLC, A/K/A GBS

**AMENDED
SCHEDULING ORDER**

The Defendant's Motion for a Protective Order

This motion surrounds a controversy that arose during the depositions of Jeremy Young and Brian Waddell, two former employees of the Defendant. These individuals apparently retained Mr. Imhoff at some point prior to their depositions. Plaintiff's Counsel attempted to question the witnesses about the details surrounding their retainment of Mr. Imhoff. Mr. Imhoff objected to the questioning on the grounds that it violates attorney-client privilege. Should this issue remain unresolved, each witness shall submit an affidavit to the Court for *in camera* review. The Court will then rule on this motion.

The Plaintiff's Motion to Compel

The Plaintiff filed several motions to compel, all of which were resolved prior to the hearing except one. The Plaintiff served interrogatories and requests for production on Alpha E.M.C. in August of 2021 and has received no response. Accordingly, the Plaintiff's Motion to Compel is GRANTED. Third-Party Defendant Alpha E.M.C. shall provide complete discovery responses within **fifteen (15)** days from the date of this Order. Another motion was filed pertaining to Third-Party Defendant Five Star Foundations. No discovery responses were filed by this Third-Party Defendant due to the Court being informed at the September hearing that they would be dismissed from the suit. The formal Order has not been executed at this point, so Five Star Foundations is technically still a party to the suit. The Court declines to require Five Star Foundations to answer any discovery requests at this point. The Order dismissing them shall be submitted promptly. This issue may be revisited if Five Star Foundations ultimately is not dismissed.

Installed Building Products, LLC

Installed Building Products, LLC previously filed a Motion to Make A More Definite Statement, alleging that it cannot identify by reading the Third-Party Complaint the specific claims against it. This motion was before the Court at the September hearing, but was inadvertently left out of the November Order. Accordingly, the Court orders the Defendant/Third-Party Plaintiff to provide the following information to Installed Building Products, LLC a/k/a Installed Building Products II, LLC:

1. The products, services, or brands that were allegedly involved in the construction of the Plaintiff's residence.
2. Each particular contract(s) on which its claims are based.
3. The span of time during which the contract(s) was made, the work was performed, or the materials were provided.

The remaining motions have common elements, many being virtually identical. Therefore, the Court will address the contents of these motions by topic.

Inspections

The Court allowed inspections in its previous Order. Over 100 houses have been visibly inspected. There has been some destructive testing conducted, although this did not occur until the week of the hearing, with there being sharp disagreement over the source of the delay. The Court extended the deadline for inspections to February 28, 2023 by way of a Consent Order. The parties did reach an agreement as to the various aspects of destructive testing, although there was initial disagreement as to the terms.

Ultimately, the parties executed a written document entitled “Destructive Testing Agreement” on February 7, 2023. The Court notes that there is a provision in that agreement that allows the parties to submit any disputes regarding the agreement to the Court. The Plaintiff moves for a Protective Order addressing the inspections. The Plaintiff moves that further inspections be curtailed since approximately half of the houses in the subdivision have been inspected.

Multiple Third-Party Defendants raised the issue of inspections as they pertain to their work. Not all of the Third-Party Defendants performed work and/or provided services to each home, with some having a very limited involvement in the project. Counsel for these parties are concerned that their clients will not have the ability to conduct inspections on homes that were subject to their work.

Accordingly, the Court amends its previous Order as follows:

1. The Defendant shall be allowed to continue inspections as scheduled.
2. Further inspections, not to exceed **fifteen (15)** additional homes in the class shall be allowed.
3. The protocol, as executed by the parties in the prior testing shall be adopted by the Court, with any disputes regarding the destructive testing being referred to the Court.
4. Any Third-Party Defendant with fewer than **five (5)** houses on which they performed work and/or provided materials shall specify those houses by the end of business on **Tuesday, February 21, 2023**. The houses specified by the Third-Party Defendant shall be included in the larger inspection group if possible, provided that they have not been inspected previously.
5. If a Third-Party Defendant specifies houses that have not been included in the larger inspection group or previously inspected, that party shall be allowed to inspect **one (1)** of the non-included houses. If destructive testing is sought, then the protocol executed between the Plaintiff and Defendant as noted above shall be followed.
6. No house shall be subject to a second inspection.
7. The inspection deadline shall be extended to **Monday, March 6, 2023**.

Survey

The Defendant seeks court permission to send out a survey to homeowners in order to better frame the issues with each house and streamline the discovery process. A sample survey was presented, along with arguments from Counsel. The Plaintiff opposes the motion.

While the Court understands the reasoning behind the survey proposal, the discovery schedule is “tight,” as pointed out by Counsel at the hearing. Even with the Court’s modifications outlined below, adding a new element of discovery into the case at this stage is not warranted. Accordingly, the Defendant’s request to be allowed to send a survey to individual homeowners is **DENIED**. This does not prohibit the parties from sending a survey with consent. In that event, a Consent Order may be submitted modifying this provision.

Absent Class Member Depositions

The Defendant seeks an Order setting forth the number of absent class member depositions that may be taken. After considering the arguments of Counsel, the Court allows additional absent class depositions not to exceed **ten (10)**.

Deposition of Dr. Whitlock

The Plaintiff's expert has been deposed by Defense Counsel for five (5) days. The deposition has been recessed, with a new date being set for Third-Party Defendants to have the opportunity to depose him. There is much disagreement between Counsel as to what caused the lengthy deposition. The Plaintiff alleges that Defense Counsel asked repetitive questions, had no exhibits copied and ready to present to the witness for identification, and was generally unprepared to use digital exhibits. The Defendant alleges that the witness ignored a subpoena to bring his file to the deposition, would not answer questions without referring to a collection of over 1000 photographs and was generally disorganized. The Court makes no finding as to fault, but is concerned that this deposition has taken a week of time and still is not finished.

The parties shall resume the deposition of Dr. Whitlock, not to exceed **three (3) days**. The Defendant may continue to depose Dr. Whitlock inside this time period only after the scheduled Third-Party Defendants have concluded their questioning. To expedite the process, Dr. Whitlock shall bring his file to the deposition. To allow for efficient reference and review, any attorney planning to depose Dr. Whitlock shall bring physical copies of exhibits in their possession that they plan on using for questioning.

Discovery Timeline

The Court recognizes that a significant amount of work remains in order for this case to be ready for trial. While five months (the time between the November ruling and the April 1 deadline) normally would be ample time to complete discovery in a case that was over three years old at the time of the ruling, this case does have unique and complicated issues that will require some extra time. Accordingly, the Court extends the date in which discovery should be completed to **Monday, May 8, 2023**. The Court is mindful that the mediator is requesting that the parties' exhibits and other presentation information be submitted in advance.

Status Conference

The Court will hold a status conference during the April 17 term of Common Pleas in Anderson to address any lingering discovery issues. This hearing shall be held virtually.

Previous Order

Unless specifically modified in this Order, all provisions in the previous Order of this Court shall remain in full force and effect. Once the term information is obtained from Court Administration, the Court will schedule an **in-person** pre-trial hearing in which pre-trial motions may be heard, voir dire requests considered, and the Court's structural plan for the trial discussed.

AND IT IS SO ORDERED!

February 15, 2023

R. Scott Sprouse
Judge, Tenth Judicial Circuit



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al
Case Number: 2019CP0401942
Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-02-15 16:06:09 page 6 of 6

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019-CP-04-01942

Natalie Zitek, et al
PLAINTIFF(S)DR Horton, et al
DEFENDANT(S)Submitted By: the Court
Address:Attorney for : ☐ Plaintiff ☐ Defendant
or ☐ Self-Represented Litigant

RECEIVED

Sep 06 2023

SC Court of Appeals

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Court took the Motions to Decertify under advisement after hearing arguments from counsel on Monday, July 17, 2023. The Court considered the arguments of counsel, the thorough briefing of the matter, the exhibits and the applicable law.

This Court previously has certified the class. Significant discovery has taken place since the issuance of the Honorable Cordell Maddox's order on January 27, 2021. The Defendant, along with several other parties, have moved that the class be decertified due to new evidence that they allege shows that the Plaintiff's home is distinct from the other members of the class and that the conditions necessary for classification under Rule 23 of the SC Rules of Civil Procedure are not present.

Extensive analysis of the various homes was presented to the Court both in the presentations and the various briefs filed. While the Court notes that there are many variances between the homes in the subdivisions, there are some common issues. Aside from the issues expressed at the hearing regarding whether a decertification in this case would in essence be in violation of the long-established rule that one circuit judge cannot overrule another, I find that there is sufficient commonality and typicality present in the case for a class action under Rule 23 to be appropriate. I find that the issues are sufficiently similar that the class action as ordered is a more efficient means of trying the case. Extensive evidence showing commonality in brickwork, stonework, landscaping, windows, doors and other areas was presented. The Court notes that there is evidence of commonality even in the evidence from some defense experts. There also is sufficient evidence of the typicality of the Plaintiff's home to maintain the class. The long-established law is that every issue need not be identical with each class member. The individual differences in the homes, along with the sufficiency and accuracy of expert opinions are factual questions for trial.

Accordingly, the Defendant and Third/Fourth Party Defendants' Motions to Decertify are DENIED.

ORDER INFORMATIONThis order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

Circuit Court Judge2752

Judge Code_____
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al
Case Number: 2019CP0401942
Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-07-19 15:47:52 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Anderson
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0401942

Natalie Zitek et al
PLAINTIFF(S)

D R Horton Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCp; ☐ Rule 41(a), SCRCp (Vol. Nonsuit); ☐ Rule 43(k), SCRCp (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCp; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Motion for Summary Judgment by 3rd Party Defendants Topbuild Home Services Inc. against Defendant D.R. Horton:

The Court considered the filings of the parties, arguments of counsel and the applicable law. The Court considered the evidence in a light most favorable to the non-moving party and finds that no genuine issue of material fact exists. With the Plaintiff's stipulations, there are no allegations of defective work by Topbuild in the record. The Court finds that the contractual indemnity cause of action is not supported by a clear and unequivocal contract and that it should be dismissed. Accordingly, the Motion for Summary Judgment by 3rd Party Defendant Topbuild Home Services, Inc. is GRANTED.

Mr. Emge is directed to prepare a formal order within ten (10) days, setting forth full findings of fact and the applicable law, copying Mr. Imhoff with the same prior to submission to the Court.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/28/2023 .

M&L General Construction Inc.
M&L General Construction LLC
Lansing Building Products Inc.
A-Z Inc.
Kings Landscaping LLC
A&J Framing Inc.
Allpro Textures LLC
AJ Landscaping & Grading LLC
Dupree Plumbing Company, Inc.
Blue Ridge Building Products
IBP Asset LLC
Greener Pastures Of Aiken LLC
Greener Pastures Inc.
GBS Building Supply - US LBM LLC
Get Floored LLC
Five Star Construction Inc.
Ferguson Enterprises Inc.
DOM Group LLC
Caryl Mechanicals Inc.
Latinos Roofing LLC
Edwin Edgardo Barahona
Edwin Barahona
GSF Renovations LLC
Jose Aristides Hernandez
Jose Hernandez
JJS Commercial Construction Inc.
Brothers Contractors Inc.
Brothers Contractors LLC
The App Phase Group
Alexander G. Koenig
Luis Solis Machado
J. Rene Padilla
Pavilla Flooring LLC

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

RECEIVED
Sep 06 2023
SC Court of Appeals

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al
Case Number: 2019CP0401942
Type: Order/Electronic Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-07-28 15:10:19 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Anderson
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0401942

Natalie Zitek et al
PLAINTIFF(S)

D R Horton Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Motion for summary judgment filed by 3rd Party Defendant Installed Building Products against Defendant DR Horton.

After considering the filings of the parties, arguments of counsel and the applicable law, the Court finds, after considering the evidence in a light most favorable to the Defendant DR Horton, that there is no evidence to support the negligence, express warranty and implied warranty causes of action. Furthermore, in the absence of any such evidence on the part of Installed Building Products, DR Horton's claims collapse into indemnity. The Defendant also alleges contractual indemnity. The Court finds that the indemnity provisions in the contract between the parties are not clear and unequivocal. Accordingly, the motion for summary judgment is GRANTED.

Mr. Kendall is directed to prepare a formal order within ten (10) days, setting forth full findings of fact and applicable law, copying Mr. Imhoff with same prior to submission to the Court.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/26/2023 .

M&L General Construction Inc.
M&L General Construction LLC
Lansing Building Products Inc.
A-Z Inc
Kings Landscaping LLC
A&J Framing Inc.
Allpro Textures LLC
AJ Landscaping & Grading LLC
Dupree Plumbing Company, Inc.
Blue Ridge Building Products
IBP Asset LLC
Greener Pastures Of Aiken LLC
Greener Pastures Inc.
GBS Building Supply - US LBM LLC
Get Floored LLC
Five Star Construction Inc.
Ferguson Enterprises Inc.
DOM Group LLC
Caryl Mechanicals Inc.
Latinos Roofing LLC
Edwin Edgardo Barahona
Edwin Barahona
GSF Renovations LLC
Jose Aristides Hernandez
Jose Hernandez
JJS Commercial Construction Inc.
Brothers Contractors Inc.
Brothers Contractors LLC
The App Phase Group
Alexander G. Koenig
Luis Solis Machado
J. Rene Padilla
Eavilla Flooring LLC

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

RECEIVED
Sep 06 2023
SC Court of Appeals

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al
Case Number: 2019CP0401942
Type: Order/Electronic Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-07-26 16:25:44 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

C.A. No. 2019-CP-04-1942

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

Plaintiff,

vs.

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

Defendant,

D.R HORTON, INC.,

ORDER

Third-Party Plaintiff,

vs.

AJ LANDSCAPING & GRADING LLC,
A/K/A AJ LANDSCAPNG & GRADING,
INC; ALLPRO TEXTURES, LCC; ALPHA
OMEGA CONSTRUCTION GROUP, INC.;
AMERICAN CONCRETE AND PRECAST, INC.,
A/K/A ACP CONCRETE, INC.; A&J FRAMING,
INC; ALPHA E.M.C; A-Z, INC.; ATLANTA
FLOOR DESIGNS CENTER; A GRADE ABOVE
OTHERS, LLC; BRAND-VAUGHAN LUMBER
CO., INC.; BKF BUILDERS, INC; BUILDERS
DESIGNHOUSE, LLC; BMC EAST, LLC D/B/A
COLEMAN FLOOR, LLC; BUILDERS
FIRSTSOURCE SOUTHEAST GROUP, LLC,
A/K/A BUILDERS FIRSTSOURCE, INC;
BRAVO CARPENTERS, INC.; CARYL
MECHANICS II, INC.; 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 BUILDING)
SUPPLY-US LBM, LLC, A/K/A GBS)

- 3) The Motions deadline shall be extended to Friday, June 23, 2023.
- 4) The Defendant shall be allowed to reconvene the deposition of Nick Dalton, not to exceed three additional hours.
- 5) The Defendant shall be allowed to ask the witness about any community newsletters providing information about the lawsuit. However, any communications directly from legal counsel shall be deemed privileged. The witness may be questioned regarding the date on which legal counsel was retained.
- 6) The Defendant's request for further testing of the Zitek home is denied.
- 7) The Plaintiff's Motion to Quash as to other matters is granted.
- 8) The Court vacates its prior ruling on the IBP Asset, LLC d/b/a Blue Ridge Building Products' Motion for Summary Judgment as the Motion was already moot at the time of the Order. IBP Asset, LLC d/b/a Blue Ridge Building Products' active Motion for Summary Judgment shall be held in abeyance to allow responses to issues of material fact raised by the Plaintiff at the April 21, 2023 hearing.
- 9) The Defendant(s) shall not be allowed to issue surveys to Class Members.
- 10) Unless expressly modified by this Order, all previous orders remain in full force and effect.

AND IT IS SO ORDERED!

May 1, 2023

R. Scott Sprouse
Judge, Tenth Judicial Circuit



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al
Case Number: 2019CP0401942
Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-05-08 10:48:52 page 4 of 4

Records Deleted Per Order of the Court

Pages 1125-1293

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF ANDERSON) 2019-CP-04-01942
)
)
)
NATALIE ZITEK, ET AL)
) PLAINTIFFS)
) vs.) TRANSCRIPT OF RECORD
)
D.R. HORTON, ET AL)
) DEFENDANTS)

December 9, 2020
Anderson, South Carolina

B E F O R E:

THE HONORABLE CORDELL MADDOX, Judge.

A P P E A R A N C E S:

JUSTIN LUCEY, ESQ.
Attorney for the Plaintiffs

BRIAN AUTRY, ESQ.
THOMAS DUDLEY, ESQ.
Attorneys for the Defendants

APRIL HERRON
Official Court Reporter

There were no witnesses.

There were no exhibits.

» > ○ < «

Certificate of Reporter 83

1 (WHEREUPON, the following proceedings were held
2 via WebEx.)

3 COURT REPORTER'S NOTE: Due to remote platform
4 interruption and video/audio interference/distortion
5 throughout the hearing, those instances are denoted with
6 [audio distortion] in the transcript.

7 THE COURT: Okay, y'all, let's get started here.
8 I have read all this. I haven't read all of it but I
9 have looked through it, taken some notes. And if I'm
10 too loud let me know because this -- I was told that
11 I was too loud the other day in front of the senate
12 commission. Somebody just give me a quick run down
13 so that I'm sure that I'm on the right page with
14 everybody.

15 MR. DUDLEY: Your Honor, it's a motion to compel
16 arbitration. And then Justin has a motion for class
17 certification. We, obviously, think the motion to
18 compel arbitration could go first. We think you
19 ought to listen to those arguments and rule on that
20 before you even entertain the parts of that class
21 certification. I mean, that's the logical sense,
22 Judge.

23 THE COURT: Yeah but can somebody give me just a
24 five minute overstory so I know what I'm doing.

25 MR. LUCEY: Yes, Your Honor, this is a class

1 action, a defective construction, punitive class
2 action concerning the Rose Hill neighborhood in
3 Anderson, South Carolina. It's a few miles from
4 Powdersville, Your Honor. It's about 30 minutes
5 north of Anderson.

6 Your Honor, this case was filed late last year,
7 the Defendant moved to stay for a right to cure.
8 Plaintiffs responded, we already cured. We had
9 already given you the notice of right to cure. And
10 we move for class certification. The parties started
11 briefing that material and two days before our
12 original hearing in this matter, which was to occur
13 on May 29th, the Defendant at that time first moved
14 to compel arbitration. The Defendant filed that
15 motion the same day that it filed its responses to
16 the [audio distortion] pleadings by the Plaintiff.

17 At Your Honor's encouragement, what we -- we
18 actually did have a hearing on May the 29th, we
19 addressed the right to cure for the absent class
20 members. The representative right to cure under the
21 Grazia decision and we addressed the various other
22 class points by the Plaintiff. And we argued about
23 whether or not Zitek itself had already satisfied the
24 right to cure. The Court suggested that the parties
25 could probably reach a compromise quicker than the

1 Court could issue an order, that we had to do that.
2 And compromise was negotiated as to how to handle the
3 representative right to cure.

4 In other words -- and that both parties would
5 withdraw their pending motions until that right to
6 cure was completed. And basically, Your Honor, the
7 class is 234 potential class. It's 234 houses or
8 owners of the houses, in their Rose Hill
9 neighborhood. All houses were built by D.R. Horton.
10 There was a prior [audio distortion] none of those
11 houses are in the class, none of those houses are in
12 the 234 [audio distortion].

13 So we devised a system whereby -- and at the
14 time we started -- at that time we had about 30 odd
15 clients. We devised a system where they would
16 inspect maybe half of our clients houses, inspect
17 another 20 or so of the action-class members. And we
18 started doing that in the summer. We agreed mutually
19 to delay our procedure because the COVID numbers were
20 increasing so fast in the middle of summer, so we
21 postponed it a little bit. We actually filed our
22 compromise agreement on representative inspections,
23 right to cure inspections, with the Court and the
24 Court signed an order enrolling that compromise
25 agreement in the court record.

1 We proceeded to do the inspections. The
2 Defendant issued approximately 48 offers to cure.
3 None of our clients accepted them. At least five, by
4 the end of the process, all but five of those
5 offerees were clients of ours. We don't know if any
6 of the five -- if any of the five non-clients
7 accepted an offer but none of our clients did accept
8 an offer. And then, as soon as this thing ended, the
9 Defendant refiled its motion to compel arbitration.
10 The Plaintiff refiled its motion for class
11 certification. The Defendant has now inspected,
12 roughly, 48 homes. The Plaintiff's engineer has
13 inspected, roughly, 76 homes. Which is one-third of
14 the class.

15 We believe that the Defendant waived its right
16 to object to the class certification motion going
17 first when they waited until May 27th to file their
18 motion to compel arbitration--

19 MR. DUDLEY: -- argue my motion before I get--

20 THE COURT: Yeah, just -- yeah, I'm trying to
21 figure out. So we got 234 houses. The houses were
22 all built by D.R. Horton. Y'all agree, and I
23 appreciate you doing that, I thought it was the right
24 thing to do that you had a plan for a right to cure.
25 That process started. And I assume failed. At least

1 All right, let's move on to the certification.
2 Obviously, I'm not going to hurry it up, I'd rather
3 go ahead and finish the whole thing today and I'll
4 rule on both of them.

5 MR. DUDLEY: Thank you, sir.

6 THE COURT: Thank you.

7 Tom, I think you're still muted.

8 Okay.

9 MR. LUCEY: I'm not muted now?

10 THE COURT: You are.

11 MR. LUCEY: Okay, can you hear me?

12 THE COURT: Yeah, go ahead.

13 MR. LUCEY: Okay, Judge, just to the class
14 certification, Your Honor, the class [audio
15 distortion] eight persons who were entities [audio
16 distortion] home developed by D.R. Horton within the
17 Rose Hill neighborhood in Easley, South Carolina.
18 D.R. Horton, in fact, developed and built all 234
19 homes, a number of homes that's agreed to. We
20 excluded in the class a possible conflict. I'm not
21 going to lose time on that. Plaintiffs have
22 satisfied all Rule 23 requirements and we're going to
23 talk about those.

24 The Horton claims opposing certification are
25 groundless. The Court may recall, we actually sent

1 the Court a chart before the May 29th hearing called
2 quote, Debunking groundless class cert opposition by
3 Horton. And we gave them a list of 50 items, that
4 D.R. Horton list 50 items, that were red herrings in
5 their opposition. To date they've had that chart in
6 their hands for six months, they have not solved any
7 of the items that we will show the Court that. We're
8 going to show the Court that this class is easily
9 manageable and we have a trial plan and damage plan.
10 And that the -- it's not unusual for a court to
11 certify [audio distortion] which seems to be one of
12 the Defendants primary oppositions.

13 This chart here compares some of what has been
14 seen in the memos. I pointed out to the Court one of
15 the important points, which is the debunking chart,
16 has never been addressed by D.R. Horton. Another
17 aspect, Your Honor, is we're going to show the Court
18 that their right to cure letters -- they want, in
19 their brief, they want to say there's no common
20 issues. Their right to cure letters indicate
21 otherwise. We have filed with the court the original
22 letters for that purpose. Ninety-sixth percent of
23 the letters indicated repair was necessary at the
24 homes. You can't get any closer to a universal issue
25 than 96 percent.

1 Fifty-two percent of the right to cure letters
2 indicated that the patio door at these 49 or 50 homes
3 needed repair. While these right to cure letters may
4 not be admissible for purposes of the jury verdict,
5 they are admissible for any other purpose, such as
6 what we have here, which is that there is a common --
7 they're several common issues, even conceded by the
8 Defendant in this matter.

9 The -- on the screen, Your Honor, is three other
10 more important quotes from the Defendants expert,
11 Dr. Whitlock. The Plaintiffs filed Dr. Whitlock's
12 original affidavit in support of their motion, with
13 their motion or shortly thereafter. The Defendants
14 back this -- in the spring then filed an opposing
15 affidavit by a gentleman named Kruglewicz, and I know
16 I'm pronouncing it wrong. And so we filed a reply
17 affidavit from Dr. Whitlock addressing everyone of
18 Mr. Kruglewicz's points. Since that time when we
19 refiled this motion, since Dr. Whitlock has examined
20 another 30 odd homes, we filed a supplemental
21 affidavit. A third affidavit, a third expert
22 affidavit. Unheard of in class certification
23 motions. A third expert affidavit.

24 And he opined under oath that his prior
25 observations and opinions as to the first 38 houses

1 apply equally to the remaining house now. And so
2 those observations, those common observations, apply
3 to one-third of the class. That is unheard of,
4 statistical review by an expert for certification,
5 one-third of the class that he has looked in detail.
6 His affidavit also explains that he has actually
7 looked at all 234 houses and in [audio distortion]
8 all 234, he's only done detail inspections of
9 one-third of the class, 76 homes.

10 He [audio distortion] have standard components
11 and they have common and typical defects. He
12 explained in his reply affidavit, Horton had come out
13 and said, well, you know, you can build this
14 particular home, floor plan, in 20 different ways.
15 You can build it with brick or with stone. So
16 there's all these issues and therefore you can't have
17 commonality.

18 Dr. Whitlock replied to that in his reply
19 affidavit filed before the May hearing that the
20 singular defect in these houses is a defective
21 exterior building envelope. And our envelopes in
22 Rose Hill only have two components. Fenestrations on
23 the one hand and cladding on the other.
24 Fenestrations are where there's, essentially, a hole
25 in the cladding. And that's windows and doors. And

1 we have defective fenestrations with both windows and
2 doors. Cladding, there's both masonry cladding and
3 siding. So there's two types of cladding. Each type
4 of cladding there's two more types. There's
5 HardiPlank and there's vinyl. There's masonry, there
6 is brick and there's stone.

7 But, essentially, he explained how these houses
8 are actually very similar and that their problems
9 were occurring mostly -- most a -- lot of the
10 problems occur at the intersections of these
11 materials. But that, for instance, that brick is and
12 masonry stone are failing many times for the same or
13 similar reasons. He went on to reply early on that
14 the windows appeared to be same or identical
15 throughout the subdivision. And here we are eight
16 months later and D.R. Horton has not rebutted that
17 observation by Dr. Whitlock that all the windows and
18 doors are the same.

19 I showed the Court a few common window problems
20 in the May 29th hearing. We actually picked up a few
21 more of the houses that were inspected for this
22 exhibit. And this exhibit follows Dr. Whitlock's
23 observation that the same window product were in all
24 sample homes and that they're failing in all sample
25 homes in the same or similar manner. This particular

1 of the building. 10 Duxbury, the same. 14 Duxbury
2 there's a stone laying on the ground. 107 Berwick is
3 all cracked up. 110 Sturbridge, the stone has fallen
4 from above the garage door. And here at 112
5 Sturbridge -- and the one we just saw was one stone
6 fell. And now we can see at this location, three or
7 four stones have fallen off of the face of the
8 building.

9 And again, not to belabor the point, we move on
10 to common patio doors. Refresh the court's memory,
11 approximately 56 percent of the right to cure letters
12 had a patio door offer, repair offer. And the
13 Defendants new expert, which we'll talk about in a
14 second, has opined that, perhaps, as many as 50
15 percent of the patio doors would be an issue but they
16 don't consider that common for class action purposes.
17 Plaintiffs, obviously, disagree. The patio doors
18 were called out by Dr. Whitlock in his original
19 affidavit. And it's here in Paragraph 8 regarding
20 the damage -- the water intrusion and damage at the
21 patios doors. The causation is common, insufficient
22 water resistance. The damage is common, resulting
23 damage to adjacent finishes and components.

24 This is what a typical patio door looks like,
25 you might call them the rear door. It's a double

1 door and usually the left slab is fixed, the right
2 slab is operable for people to come and go. We're
3 going to focus on the operable slab. The court can
4 see 1 Chatham on the screen. The lower left of the
5 jam [audio distortion] attached to the structure and
6 the lower left of the door slab as opened, are both
7 water damaged. And you can see some water damage
8 also on the wood trim threshold.

9 Next picture, 8 Duxbury, same condition on the
10 lower jam and on the lower slab. 17 Kettering, you
11 can actually see the door jam, the front of the door
12 jam just disintegrating out there next to where it
13 adjoins the HardiPlank siding. Going to 110 Yount,
14 this problem with the door jam disintegrating is now
15 being shown midway up the door. It's just a matter
16 of untreated wood. Going to 112 Sturbridge, this is
17 the water intrusion is progressed more in some of the
18 other doors and you can see there's actually a void
19 in the exterior jam of the door. And there's water
20 damage on the interior of the jam of the door. All
21 common conditions.

22 158 Haverhill, the pin is in the door frame
23 trim. Or some people call that casing. To show that
24 it's rotten away, there's nothing left to that
25 particular component. 203 Marshfield, same lower

State of South Carolina

Court of Common Pleas

County of Anderson

Natalie Zitek	)	
	)	
Plaintiff,	)	Transcript of Record
v.	)	2019-CP-04-01942
	)	
D.R. Horton, et al	)	
	)	
<u>Defendant.</u>	)	

September 22, 2021
Anderson, South Carolina

B E F O R E:

The Honorable R. Scott Sprouse, Judge.

A P P E A R A N C E S:

Justin Lucey, Esquire
Attorney for the Plaintiff

Jason Imhoff, Esquire
Attorney for the Defendant

Everett Kendall, Esquire
Attorney for the Defendant

Lisa Scott
Circuit Court Reporter

I N D E XWITNESSPAGE

No Witnesses.

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
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No Exhibits.

P R O C E E D I N G S

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THE COURT: All right. Well, this is *Natalie Zitek v. Jane Doe, et al.* Why don't we do this, let me have each attorney stand for the court reporter, give your name, and tell whom you represent.

MR. IMHOFF: Your Honor, Jason Imhoff with Kenison, Dudley & Crawford on behalf of D.R. Horton.

THE COURT: Okay.

MR. LUCEY: Justin Lucey and Dabny Lynn, Your Honor. I represent the plaintiff, Zitek. This is a certified class.

THE COURT: All right. Okay. Listed on my docket is a motion to make a more -- make a more definite statement and a motion to alter and amend.

MR. KENDALL: Your Honor, I'm Everett Kendall. I -- as to the first motion, the same thing, we're definitely here for the motion that I filed. I just wasn't certain the order you were calling the motions in, so I was deferring to -- these guys look like they have something important to talk about.

THE COURT: Okay. And I'm asking about this because one's contingent on the other. I'm just reading them in the order that they're listed on the docket.

1 MR. KENDALL: And I'm not -- I'm not interested
2 in inserting -- setting an agenda. I'll get to them
3 whenever we're called. I represent Install Building
4 Products.

5 THE COURT: Okay. Well, that's listed first.
6 Let's go ahead and hear that first, and then we'll
7 go to the motion to alter or amend.

8 MR. KENDALL: May it please the Court?

9 THE COURT: Yes, sir.

10 MR. KENDALL: Your Honor, again, I'm Everett
11 Kendall on behalf of Install Building Products.
12 It's a third-party complaint where listed -- my
13 client is listed as Install Building Products, LLC,
14 aka, Install Building Products II.

15 We filed a motion to make more definite and
16 certain because in the allegations that are
17 contained in the third-party complaint, we are
18 unable to determine what it is that we are alleged
19 to have done and, in fact, who the party is that
20 the -- that D.R. Horton intends to sue.

21 And the reason we -- that -- for that, Your
22 Honor, is set forth in our motion is that Install
23 Building Products is a company with hundreds of
24 operating units across the country. Many operating
25 units have -- have a contractual relationship with

1 D.R. Horton. Typically, those are controlled and
2 operated entirely out of jurisdictions.

3 From the allegations that are contained in the
4 complaint, we are unable to determine which business
5 unit it is that is engaged or should be involved in
6 this case. In fact, we -- in the research we have
7 done to try to clarify that for ourselves, we
8 noticed in the caption there's also a company called
9 Blue Ridge Building Products, LLC.

10 One of our business entities is IPE Assets, DBA
11 Building -- Blue Ridge Building Products. It's
12 possible that is the entity that the -- that D.R.
13 Horton intends to pursue, but they have not been
14 named in the case. The company that has been sued,
15 the Blue Ridge Building Products, LLC, is, in fact,
16 a dissolved company and it dissolved many years
17 before this project went underway, so that's not --
18 that's not who it is.

19 The company that we most suspect, IBP Assets,
20 LLC, DBA Blue Ridge, is not named in the case. And
21 so we have asked D.R. Horton about this motion to,
22 number one, clarify for Install Building Products
23 who it is that you're actually seeking to sue and
24 tell us what it is we were alleged to have done.

25 The client that -- that I represent, these

1 operating units operate all manner of businesses
2 from gutters to doorknobs to mirrors and even
3 mini-blinds. So lots of different business units
4 that we intend to discover in many ways simply by
5 holding companies that we're overseeing, so we
6 sought that clarification.

7 Your Honor, it would be helpful further -- and
8 we have, again, put this in -- indicated this, but
9 the allegations of the complaint simply are us --
10 us -- our -- my client, along with every other
11 third-party defendant, had a contract and it didn't
12 work it. And that's essentially as specific as it
13 gets. And we don't know how to respond to that
14 allegation. So we have -- we have -- we're just
15 asking for clarification so that we can properly
16 answer. Thank you, Your Honor.

17 THE COURT: Okay. Mr. Imhoff.

18 MR. IMHOFF: Your Honor, Jason Imhoff on behalf
19 of D.R. Horton. We don't oppose that -- that
20 motion. Mr. Kendall and I talked yesterday, and
21 we're happy to amend and clarify our third-party
22 complaint as best we can.

23 And this would sort of start getting into
24 Mr. Lucey's motion, but this is a 234-home
25 neighborhood construction somewhere between 2010 and

1 2014.

2 Now, what we have done is, we've put together
3 what's called a "vendor spend spreadsheet." It's
4 thousands of pages that tells anyone who's
5 interested who worked on what house and what they
6 did, warranty claims, address, the person who
7 purchased it, subcontractors that worked on it that
8 day, started and closed, all of those things.

9 So the only thing that I would ask from the
10 Court is a little bit of time to work through with
11 Mr. Kendall who on that list could be potentially
12 his clients and also what they did. Mr. Kendall did
13 not file an answer and did not send discovery. And
14 so when we talked yesterday, I sent him thousands of
15 pages of this excel spreadsheet that there's
16 absolutely no way he or I could go through before
17 this hearing, but it came up and we're happy to do
18 it. We just need a little bit of time.

19 THE COURT: Mr. Kendall.

20 MR. KENDALL: We're glad to accommodate the
21 time, 30 -- 30 days? Whatever the Court thinks is
22 reasonable.

23 THE COURT: All right. Well, I will -- I will
24 grant the relief Mr. Kendall is seeking and just put
25 in the order that. Now, Mr. Kendall, I'm going to

1 ask that you prepare the order that allows the
2 motion to be heard and give 30 days for you and
3 Mr. Imhoff to try to resolve any issues you may
4 have.

5 You've listed seven things in your motion that
6 you requested specifically, and Mr. Imhoff indicates
7 that he has a lot of these things already put
8 together so you may be able to resolve that.

9 MR. KENDALL: I believe we will. We just need
10 to -- we needed an opportunity to bring it to the
11 top of the pile. Thank you, Your Honor.

12 THE COURT: So your motion will be granted, and
13 just -- you have 30 days to resolve it.

14 MR. KENDALL: Thank you, Your Honor. Your
15 Honor, do you prefer the motions e-mailed to you or
16 just file with the clerk's office?

17 THE COURT: Just file it through system.

18 MR. KENDALL: Thank you, Your Honor.

19 THE COURT: That -- that saves a step in the
20 process and opposing counsel automatically gets a
21 copy of it then and we can go from there.

22 MR. KENDALL: And I'll confirm with Mr. Imhoff
23 before I send it.

24 THE COURT: Confirm with him prior. Yes, sir.
25 Okay. All right. That's one. Now, let's go

1 onto the next one. The next is a motion to alter
2 and/or amend filed by Long Heating and Air.

3 MR. STIRLING: Your Honor, Keith Stirling on
4 behalf of Long Heating and Air. That motion was
5 resolved by way of consent order.

6 THE COURT: Okay. So that -- that one can be
7 taken off.

8 Okay. Then we have the plaintiff's motion for
9 compliance, so Mr. Lucey.

10 MR. LUCEY: Yes, Your Honor. May I hand up a
11 copy for the Court?

12 THE COURT: Yes, sir.

13 MR. LUCEY: Your Honor, the plaintiff would
14 like to focus on -- on the index of this. The
15 documents supporting the index are in there, but the
16 index is a story that the plaintiff would like to
17 tell the Court.

18 This, as I said earlier, Your Honor, this is a
19 certified class action. It was filed back in late
20 1999. The parties engaged in a right to cure
21 process and house inspections for a while. And then
22 the parties renewed their various motions that were
23 originally filed on the first complaint, including
24 the defendant's motion to compel arbitration and the
25 plaintiff's motion to certify. Judge Maddox

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

NATALIE ZITEK,)
INDIVIDUALLY AND ON)
BEHALF OF ALL)
OTHERS SIMILARLY SITUATED)

2019-CP-04-01942

PLAINTIFFS,)

-VS-)

TRANSCRIPT OF RECORD

D.R. HORTON, ET AL,)
DEFENDANTS.)

SEPTEMBER 8, 2022
ANDERSON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE R. SCOTT SPROUSE, JUDGE

A P P E A R A N C E S:

ATTORNEY FOR THE PLAINTIFF: JUSTIN O'TOOLE LUCEY

ATTORNEY FOR THE DEFENDANT, D.R. HORTON: JOHN T. CRAWFORD, JR.

ATTORNEY FOR THE DEFENDANT, D.R. HORTON: JASON MICHAEL IMHOFF

ATTORNEY FOR THE DEFENDANT, L&M ELECTRIC: GEORGE JAMES

ATTORNEY FOR THE DEFENDANT ,ALPHA OMEGA: REED TEAGUE

ATTORNEY FOR THE DEFENDANT, BLUE RIDGE BUILDING PRODUCTS, LLC:
BRENT BOYD

ATTORNEY FOR THE DEFENDANT, : ROBERT LYLES

ATTORNEY FOR THE DEFENDANT, HARRELSON PAINTING: CHRISTIAN
GREENE

ATTORNEY FOR THE DEFENDANT, LONG HEATING AND AIR: HEATH STEWART

ATTORNEY FOR THE DEFENDANT, LADE-DANLAR: STEVE SMITH

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TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

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E X H I B I T S

(THERE WERE NO EXHIBITS INTRODUCED DURING THIS PROCEEDING)

1 CLERK OF COURT: This is the matter of *Natalie Zitek*,
2 *Plaintiff, et al v Jane Doe, Defendant, et al.*

3 THE COURT: The first motion that is listed on the
4 docket is a Motion to Bifurcate filed by the Plaintiff. Mr.
5 Lucey?

6 MR. LUCEY: Yes, Your Honor. Actually, if I may submit
7 to the Court that the first matter was filed a little bit
8 earlier, December 22, 2021. It's the Plaintiff's Notice of
9 Motion and Motion to Sever. Madam Court Reporter, I'm
10 sorry. My name is Justin Lucey from the Charleston, South
11 Carolina Bar. I am here with Dabny Lynn and Mande Funai,
12 both attorneys in my office. Your Honor, I have courtesy
13 copies of our motion if the Court does not. I'll hand a
14 courtesy copy of the Plaintiff's other two motions up that
15 are the oldest three motions on this roster. The second
16 motion is the Request to Transfer to Jury Trial and the
17 third one is the Motion to Bifurcate, Your Honor.

18 If it pleases the Court, I think I can save time by
19 addressing all three issues at one time.

20 THE COURT: Go ahead.

21 MR. LUCEY: I also presented to the Court, and served on
22 all parties, a background presentation, Your Honor, in this
23 matter. If I may hand it up to the Court. We had gone to
24 presentations back when we were all attending hearings by
25 Zoom, and we actually appeared for these matters once

1 previously last March, but they were not heard. Your Honor,
2 this has the background of this action which would relate to
3 all three pending Plaintiff's motions, but to the extent
4 that the Court is fully familiar with the action I can skip
5 over a lot of it if the Court would just tell me to move it
6 along, I'd be happy to.

7 This particular action, Your Honor, is three years old
8 this month. It will turn three in a week or two. This
9 action was filed in September of 2022. Your Honor, despite
10 the number of attorneys in this room, there is actually only
11 one Plaintiff and one Defendant. There's a certified class
12 of homeowners, approximately 220 homeowners, in a
13 neighborhood called Rose Hill and that class was certified
14 approximately two years ago. I'll get to that in a second.
15 So, there's one Plaintiff representing one class against one
16 Defendant, and that is the owner and general contractor on
17 all 220 homes, D.R. Horton, who is present here.

18 Plaintiff stipulated, as part of their class
19 certification motion with the Court, that should the Court
20 stipulate -- excuse me -- should the Court certify the class
21 that the Plaintiff would not file direct claims against the
22 rest of the subcontractors, and that's actually contained in
23 the class certification order, and so we have not filed
24 claims -- unlike most construction cases, we have not filed
25 direct claims against the subcontractor. Why does that

1 matter, Your Honor? Well, just to put it in context before
2 we discuss the case a little further, the Defendant, D.R.
3 Horton, has filed suit against approximately -- and I could
4 be off on my numbers because there are a lot of d/b/a's, but
5 they have filed suit against approximately 65 third-party
6 Defendants which are subcontractors and material suppliers.
7 Several of those third-party Defendants have, in turn, filed
8 suit against, what I understand to be, approximately 40 to
9 50 more fourth, fifth, and sixth-party defendants. So,
10 although Plaintiff, who owns the complaint, and owns -- she
11 chooses the form. She owns the complaint. She owns the
12 issues by the complaint. Although she brought a simple
13 lawsuit against one party with only two causes of action,
14 negligence and warranty -- she filed the simplest complaint
15 in the world. She now finds herself in litigation with
16 approximately 140 or 150 other parties.

17 Just briefly, Your Honor, on the fourth page of the
18 presentation we mention it's a certified class. It was
19 certified on January 27, 2021. I don't know if that's the
20 date the Court announced it or the date the order was
21 signed. I forget which. The defects of the class that the
22 homeowners are complaining about in this case -- and let me
23 mention to the Court the Plaintiff published her three
24 actual reports over six months ago. Our claims, our facts,
25 our evidence, our photographs, have all been out there since

1 this spring. And we've also published, late in the spring,
2 we published the class damage model. It was a damage model
3 created by a graduate doctor from Clemson University, an
4 engineer. So, all that has been long published in this
5 case. These defects that are documented in the complaint,
6 excuse me, in the damage model, are leaky windows, leaky
7 patio doors, insufficiently supported brick veneer,
8 improperly installed stone veneer, and problematic HVAC
9 installation, among other things. The experts have
10 documented over 20 building code defects, and the Court is
11 likely aware that, in this state, building code violation
12 is, in fact, a violation of state law.

13 The two causes of action asserted against the
14 Defendant, the single Defendant, are set forth on slide five
15 for negligence and breach of warranty. That's breach of
16 implied warranty. The case timeline is on the following
17 page. We completed our right to cure process, Your Honor. We
18 completed, I'm going to say, approximately three or four
19 dozen inspections, house inspections. So, in other words, we
20 brought the Defendant, D.R. Horton, in on a right to cure
21 notice and we ended up inspecting about twenty percent of
22 the class houses in the right to cure process. We completed
23 that in October 2020. Shortly after, the class was
24 certified. We went through some various discovery motions in
25 2021, and late in 2021 we, the Plaintiff, moved to transfer

1 the case to the jury trial roster as a matter of right under
2 the South Carolina Rules of Civil Procedure.

3 At that time, I believe at the same time or slightly in
4 advance to that, the Defendant moved to have this matter
5 certified is a complex case assigned to a single judge. That
6 actually occurred after a March hearing with Judge Maddox in
7 this matter. And, obviously, the Court knows that you were
8 assigned. We thereafter also filed our Motion to Sever the
9 third-party and other party claims, and a Motion to Transfer
10 to the jury trial roster which now, in light of the
11 certification of this case as a complex case, Plaintiff
12 would move to submit to simply be construed as a request for
13 a trial date from the Court. We are asking the Court to set
14 this matter for trial at the Court's convenience, but
15 hopefully sometime between mid January and mid March.

16 THE COURT: Mr. Lucey, Before you go further, along
17 that line, how long do you anticipate this trial taking?

18 MR. LUCEY: We anticipate the trial to take two weeks or
19 less, Your Honor, if it's a trial on the Plaintiff's claims.
20 If the third-party claims are not severed, we anticipate it
21 would take 3 and a half weeks. We believe the Defendant
22 would assert that, if there is no severance, that the trial
23 or the entire matter would take five weeks. In just a
24 moment, Your Honor, I'm going to cover the different issues
25 that would be presented in a trial that included the

1 third-party claims.

2 THE COURT: Go ahead.

3 MR. LUCEY: On the following page, Your Honor, I list
4 the three Plaintiff's motions. We then have three pages
5 listing the current Defendant's motions, and we also
6 submitted to the Court, via email this morning, a list of
7 those motions just so that everybody would be on the same
8 page. Then, Your Honor, we addressed Rule 42(b) on slide 13.
9 Your Honor, there's been a few briefs about the severance
10 and people talk about they have a right to bring a
11 third-party claim. They have a right to have third parties,
12 of course they do, but the same rule provides that, for good
13 cause shown, the Court has a right to sever them and try
14 them separately, and so that's what is at issue. What is at
15 issue is for me to show you why two severed trials are
16 better and for them to show you why they're not, or why they
17 would be prejudiced. Which, we submit, having reviewed the
18 written submissions, they cannot do.

19 As of the time we briefed this there were no
20 oppositions from the third-party Defendants from the one
21 hundred plus third-party Defendants to our Motion to Sever.
22 There is an opposition from D.R. Horton and after this was
23 created yesterday -- I believe two nights ago -- we received
24 one oppositions to the Motion to Sever from, what I'll call
25 collectively, as the third-party Defendants. So, we have the

1 burden of showing that severance makes sense to the Court,
2 it's judicially if efficient, it's smart, it takes the
3 confusion away from the jury. And they have the burden to
4 show prejudice, and we cited the Court to the Companion
5 Property case in our materials, for that proposition. It has
6 been noted, Your Honor, in the Companion Property case, and
7 in several treaties that we included in our materials, it
8 has been noted that it's very commonplace for a court to
9 sever third-party claims where the third-party claims are
10 completely contingent upon the success of the first-party
11 claim. Here, it's not completely contingent upon it, but
12 it's 95 percent contingent. If the Defendant, D.R. Horton,
13 prevails at trial there's no third-party claims for defect.
14 The only remaining third-party claim is whether or not D.R.
15 Horton is entitled to its fees and costs from the
16 subcontractors. So, 90 percent of the case goes out the
17 window if D.R. Horton wins.

18 On the flip side, it's the same answer. If the
19 Plaintiff wins, half of D.R. Horton's case goes out the
20 window, because if the Plaintiff wins, by definition, we've
21 shown that D.R. Horton has unclean hands and their equitable
22 indemnity claim is gone and all they're left with is a
23 contractual indemnity claim. Now, they've actually pled four
24 other claims in their complaint and the Court is scheduled
25 to hear some summary judgement motions on those four other

1 claims this afternoon, but we all know after Stoneledge, or
2 Stoneledge, we all know in this type of case there's two
3 types of claims that this Defendant has. They've got
4 contractual indemnity and they've got equitable indemnity.
5 So, the rest of the causes of action, they're going out and,
6 if we win, half of their case goes out. If they win, 90
7 percent of their case goes out. So, that's the kind of
8 economy that this Court will achieve if it has Plaintiff's
9 claim resolved first.

10 Our precedent is set forth in detail in our
11 presentation, Your Honor. I'm not going to read every word.
12 We did show the Court there are two principal claims. Our
13 first cause of action on slide 17, and our second cause of
14 action on slide 18. We go on to bring the Court's attention
15 to several treaties speaking about the efficiencies obtained
16 by severing contingent claims. What I just described to the
17 Court, those major efficiencies gained in a severance, is on
18 slide 23, the one I just described to the Court.

19 Going forward, Your Honor, I'd like to discuss the
20 complications that will occur in the trial of a third-party
21 claim in the context of a Plaintiff's complaint. Contractual
22 indemnity requires D.R. Horton to prove that it's many
23 versions of contractual indemnity. There's not one version
24 here. There is at least five, I think, six versions of
25 contractual indemnity. Many versions of contracts are

1 actually enforceable under Concord and Cumberland, which is
2 our famous indemnity case from five years ago, that severely
3 curtailed the enforceability of those agreements. Of course,
4 when I also refer to discussed in Concord and Cumberland the
5 illegal indemnity statute. The South Carolina statute makes
6 it illegal for indemnity to require indemnification for his
7 sole negligence. That's illegal in the state. What most
8 people don't know in dealing with that statute is that it
9 actually goes a step further. It makes it illegal for an
10 indemnity, an indemnified party, to cause somebody else to
11 be -- not only for his sole negligence, but also for the
12 sole negligence for any of his other agents or
13 subcontractors. The Court will see D.R. Horton's
14 indemnities, the indemnity provisions in these contracts,
15 all violate that second step in the South Carolina Illegal
16 Indemnity statute.

17 So, that's an issue they've got to try in their cases
18 that has nothing to do with the Plaintiffs. It has
19 absolutely nothing to do with us. They have to try to get
20 you, in their case not ours, they have to prove that none of
21 the issues resulted from their sole negligence or else they
22 can't get indemnity. Obviously, with the equitable
23 indemnity case they have to show that they have clean hands,
24 which is something that isn't relevant to Plaintiff's case.
25 Most importantly, probably, that since there's

1 no dominant subcontractor, and there's a hundred more
2 parties in their case, they would have to show how our
3 thirty-three million in damages should be allocated amongst
4 a hundred or so other parties. That's a Herculean task.
5 That's just not relevant to the Plaintiff's case.
6 Moreover, if, in fact, the Plaintiff's case has been tried,
7 then all damages are capped as to the construction defects
8 and the third-party. They can't get more than we got. They
9 may not be able to get what we've got, but they can't get
10 more than we got.

11 There is no longer a reason to argue what the repair
12 costs should be. They've been established in the first case.
13 That actually goes completely out the window. So, in trying
14 to allocate our thirty-three million of claim damages, if we
15 are successful with the jury amongst the hundred other
16 parties, they have to show to the jury the scope of work and
17 the deviations by those other hundred parties. The
18 Plaintiff, in their claim, only has to show the deviations
19 by one party. We don't have to show any scope of work,
20 because D.R. Horton designed and built it all. We don't have
21 to allocate anything. So, it's just a completely different
22 animal.

23 Going further than that, there's actually -- we've seen
24 in depositions here a claim by D.R. Horton that some of the
25 subcontractors violated their subcontract by not having D.R.

1 Horton named as a co-insured on the insurance policy. I have
2 the deposition extract to show that, if anybody challenges
3 that. Well, that's not an issue that is usually suitable for
4 a construction defect case. We're not litigating whether or
5 not the insurance endorsements are proper in front of a
6 jury, so it just gets to be a very complicated animal if
7 these cases were tried together. There is another huge issue
8 in their case, not ours, and this is a third-party defense
9 issue. They have an issue in their case against D.R. Horton
10 as to whether D.R. Horton's damages were the proximate cause
11 by them or by D.R. Horton's trial strategy, should we have
12 gotten that thirty-three million dollar verdict.

13 So, the numerous and overwhelming different issues are
14 something else, but going back to the contractual indemnity
15 for a second, which appears to be the probably -- we know
16 that's one of their two main claims. Slide 30 of this
17 presentation I've provided to the Court we have the General
18 Shale Brick indemnification. It's paragraph 10 of -- this is
19 important -- at the very top. It's paragraph 10 -- of the
20 standard North Carolina independent contract agreement. We
21 are in South Carolina. They're trying to enforce a North
22 Carolina contract here for North Carolina work, but what's
23 important -- so, first they've got to prove in our case, if
24 they keep their case in our case, they've got to prove to
25 the jury that the North Carolina contract is applicable to

1 the South Carolina work, which is just a complication that's
2 not present in our case. But going further, they're claiming
3 a concurrent causation indemnity right in almost every
4 contractual indemnity agreement they have against the 65
5 third-party defendants. General Shale does not have a
6 concurrent indemnity provisions, so how are they going to
7 explain to the jury in my defect defective construction case
8 the difference between concurrent indemnification,
9 concurrent causation indemnification, and non-concurrent
10 causation indemnification? I mean, that's beyond most
11 attorneys frankly, and they're going to put that to the jury
12 in our case. Your Honor, if you go on to the final page
13 slide 31, skip onto slide 32. Here's the Probuild Master
14 National Contract. So, this is again, a different contract
15 form, slide 32. Probuild is one of those other contracts
16 that has a concurrent causation indemnity requirement.
17 However, unlike all the other concurrent causation
18 requirements, Probuild only covers negligent supervision.
19 So, if the concurrent causation is caused by D.R. Horton's
20 design they don't get indemnity. So, now they're going to
21 go to the jury on a third type of concurrent causation in
22 our homeowner defective construction case.

23 Going on to the slide 34, we have yet another type of
24 indemnification notification, different language, in the
25 Alpha Omega contract on the South Carolina independent

1 contractor form. And then, going on to slide 36, we have an
2 indemnification provision in a contract that postdates the
3 construction of our subdivision. They're going to have to
4 prove to the jury that the contract after the houses were
5 built gets set indemnity on a preexisting work. I mean, what
6 they're going to try to show this jury in our homeowner
7 defective construction case gets more and more complicated.

8 Then we go on to slide 38. I'm skipping some of the
9 provisions. At a certain point in time, on slide 38, D.R.
10 Horton amended all of its independent contractor agreements
11 to separate out the duty to indemnify from the duty to
12 defend. They have now tried to make the duty to defend
13 global, universal, and unconditional. Which all of those
14 third-party defendants are going to argue to this court, and
15 to the jury if that's where we end up, is illegal under the
16 South Carolina illegal indemnity statute, because you can't
17 have -- you're asking us to indemnify us for your defense
18 costs. That's an indemnity. This is not insurance contract
19 law this is indemnity law. If you want us to indemnify you
20 for your defense costs it's illegal if it's solely your
21 negligence or solely the negligence of your other
22 subcontractors. So, it's getting awfully complicated as to
23 what is going to be sent to argue to the jury in this
24 third-party case within Plaintiff's defective construction
25 case.

1 Then we go to page 42, Your Honor. We find the Crown
2 subcontract with the subcontractor AJ landscaping. This is
3 apparently a company that D.R. Horton acquired just before
4 or when they started my neighborhood, Rose Hill. It's got
5 different indemnity. So, we're now to about a dozen
6 indemnity provisions that they are going to have to argue to
7 this jury in a third-party case if they are allowed to do it
8 within the homeowners' construction case. Going on to
9 several of the other issues, Your Honor, that we believe are
10 relevant to the issue of severing the third-party claims,
11 and addressing the motion to transfer, and essentially the
12 motion to set the case for trial at the same time.

13 Once we filed the motion to transfer, Your Honor,
14 according to the South Carolina rules of procedure, because
15 of the age of this case, there is only one response allowed
16 by any defendant. There is actually two. Yes, or here's our
17 proposed scheduling order. Nobody provided that proposed
18 scheduling order to this court within the timeframe allowed
19 by the Rules of Civil Procedure in this case, so we would
20 submit to the Court that any opposition to the motion to
21 transfer is, at this point, waived. By the way, nobody
22 timely provided a scheduling order. Only five parties timely
23 responded to our motion to transfer to the jury trial
24 roster.

25 Your Honor, relevant to the Court obviously the status

1 of the case, I probably have included too much information,
2 but since you are just got assigned as the specified judge
3 for the rest of this case and you're going to be with us for
4 a while I thought some background was appropriate. I've
5 probably give you more than I should have. To update the
6 Court on the status we have nearly completed D.R. Horton's
7 Rule 30(b)6 deposition through four days of deposition. We
8 presented our first expert for deposition yesterday,
9 Plaintiff's first expert. Our second expert is scheduled for
10 deposition in 2 and a half weeks and I think it is scheduled
11 for two or three days, and our main and third expert is
12 scheduled for, I believe it's about six weeks out, and his
13 deposition is scheduled for three or four days.

14 So, our expert's depositions are all on the books. We
15 have approximately a half dozen, maybe seven, fact witness
16 depositions on the books in the next nine or so weeks. Most
17 of those are current or ex-D.R. Horton employees that were
18 not presented as 30(b)6 witnesses. We do have two
19 subcontractor depositions on the books to take, and we do
20 intend to take a few more before trial, otherwise we would
21 ask for December date. We do want to take the depositions of
22 the principal subcontractors and we are going to do those in
23 November or December. We anticipate between now and trial
24 obviously there will be a couple of more discovery
25 conflicts. The court has heard them before. We still have

1 to mediate and we're all for that. We love mediation, but
2 there is a habit sometimes of these large developers just
3 coming to mediation with nothing but their indemnity claims
4 against the other parties. And no case settles that way. I
5 mean, it just doesn't. We've been through it with Callaham
6 (PHONETIC) and all those people. Sometimes that's their
7 modus operandi, but we welcome the opportunity to mediate if
8 there's going to be something besides third-party claims
9 there. And standard pretrial matters exhibit conference, or
10 whatever else.

11 With regard to D.R. Horton's inspections, the Court
12 should know ahead of time, except for the right to cure
13 inspections, they apparently having finished inspecting. We
14 have four times set up inspections for all the other
15 subcontractors who haven't seen the houses yet. All four
16 times D.R. Horton has requested those inspections be
17 cancelled. All four times. D.R. Horton requested the
18 inspections scheduled, I believe, starting in October for
19 themselves. They requested that back in May. We said we're
20 happy for you to come inspect all summer long. We're not
21 letting you start when we want a trial date. You've got to
22 come now. Come see them anytime you want, and by the way,
23 we need your testing protocol, or your inspection protocol.
24 What is it you want to do? We need to know that. We've
25 written for that three times at least and never received

1 that. No testing protocol and no inspection protocol. So,
2 any delay of the inspections is not because they haven't
3 been given an invitation all year long to come inspect. By
4 the way, they promised us that protocol in March. Here we
5 are in September and we don't have that protocol yet. In
6 theory, the same engineers who inspected in 2020 for the
7 right to cure, called ABS Engineers, they're writing up a
8 protocol to come back and visit again, but we've never seen
9 it.

10 So, we've got three motions. We want to trial date.
11 We'd like the Court to set a trial date. We'd like the third
12 party and further party claims severed from our case, and we
13 also filed a motion to bifurcate, to partially bifurcate
14 discovery. Let me close by speaking on that issue for just
15 two or three minutes, Your Honor. Early in this case, some
16 depositions got canceled, postponed, what have you because
17 of Covid and frankly we couldn't get them rescheduled. With
18 130 third, fourth, and fifth-party Defendants, everybody
19 blocked every day. Couldn't get them rescheduled. We file
20 this motion to partially bifurcate. Once all the other
21 parties saw that we were serious about this they have since
22 then cooperated, for the most part, in the scheduling of
23 discovery. They haven't blocked our depositions yet. We do
24 know it's going to happen again as we get ready for trial.
25 It always happens. You've got to finish your depositions.

1 You've got to get your depositions done. Incumbent upon
2 most law firms in this state in the construction bar, if you
3 take a big case you've got to staff it. You've got to get
4 to the depositions. Everybody has been doing a better job of
5 that now. We still ask for, as part of the severance, we
6 would like -- anybody is welcome to come and listen in and
7 audit any of our depositions, but we don't want any third,
8 fourth, or fifth party defendant blocking a deposition date
9 that has been agreed to by the Plaintiff and the Defendant.

10 Secondly, we've also currently devised a scheme to
11 shorten up the questioning. We have a list of all the third,
12 fourth, and fifth party defendants. We show that to the
13 witness and say do you have anything to say about any of
14 these entities who worked at Rose Hill? The witness
15 generally says no and there's a minimum amount of other
16 questioning. We would like to be able to come back on that
17 issue if the problem arises again. For now, we just don't
18 want any of the severed claims, or third-party claims, to
19 have a right to block a deposition date. We're happy for
20 you to come join us, but don't block us.

21 And that's the three motions. I'd be happy to address
22 any questions that the Court has.

23 THE COURT: How many more depositions do you anticipate
24 taking?

25 MR. LUCEY: Your Honor, I believe we have approximately

1 ten on the books, and we anticipate taking six more,
2 subcontractors.

3 THE COURT: Thank you Mr. Lucey. Your response?

4 MR. IMHOFF: Yes, Your Honor, thank you. If it please
5 the court. Jason Imhoff, John Crawford, and Cara Smith. Your
6 Honor, I think we can reset a little bit and we need to
7 address some of the misrepresentations that were made by Mr.
8 Lucey about this case, and the status of this case, and
9 where it is. May I approach, Your Honor?

10 THE COURT: Yes sir.

11 MR. IMHOFF: I want to point out -- so I'm going to
12 hand you several documents, Your Honor. I want to point out
13 that these two boxes, and all these motions, and some of
14 these briefs were coming in today. Over the last five days
15 all of this paper hit this firm, so we're going to try our
16 best to try to address those things and that's why that's
17 not in the brief, Your Honor. What I want to show you is the
18 detailed chronology that Mr. Lucey didn't go through in the
19 sort of tortured history of this case. Although he's right
20 that it was filed in 2019, he hadn't given D.R. Horton the
21 notice and opportunity to cure and there was a period of
22 negotiations where that was hammered out. Once service was
23 accepted and the lawsuit was accepted then motions were
24 filed by certification, Your Honor, and a motion to stay
25 from arbitration and as you see in this chronology those

1 were not resolved until January and February, 2021. Last
2 year, Your Honor. So all of these folks behind me didn't get
3 into this case until March, April, May, or later of 2021
4 which makes this \$43 million dollar class action with 220
5 homes about a year old. We think that's important, Your
6 Honor, that you see the actual chronology of when the case
7 really got going with all of these parties.

8 Under the third tab, Your Honor here's part of the
9 problem with Mr. Lucey's representations today. He has
10 created the monster he is now complaining about. This is his
11 notice and opportunity to cure letter which he sent in 2019.
12 which, as you can see, lists essentially everything in a
13 house: doors, floors, general wall, roof, windows, vinyl
14 siding, hardy siding, concrete, soil, grading, MIP, MEP,
15 free specs, poor work, sloppy workmanship. And these have
16 subparts, Your Honor. So, when we had to file our
17 third-party complaint, we had to rely on the Plaintiff's to
18 tell us what's wrong with all of these 220 homes. This is
19 what they've told us. Since then, Your Honor, at four, I
20 sent them an email and we said, "Some of these folks said
21 they didn't work on that house." or, "There's no evidence in
22 any of the expert reports that implicates anything we did."
23 Which is part of the motions for summary judgment today.
24 Some of these folks are going to get up and go, there's no
25 evidence we did anything, or that we were at this. So, you

1 see I sent an email in April of this year. I asked Mr. Lucey
2 if he would work with us to knock out some of those parties.
3 I don't know if it's 65. I don't know how many parties we
4 brought in or how many parties the third parties brought in,
5 but we know they don't all belong in this case. We never got
6 a response from Mr. Lucey, so there are parties in this case
7 that don't belong in this case.

8 He mentioned that we took their expert's first
9 deposition yesterday. Your Honor, we closed that deposition
10 yesterday because their expert is still doing testing on
11 site and doesn't have his opinions ready. So, Mr. Lucey says
12 D.R. Horton, we've given you opportunities. Get out there,
13 inspect and look at these homes. Except they have the burden
14 of proof of telling us what's wrong and presenting their
15 experts, whose deposition we set, to be ready to tell us
16 what's wrong so D.R. Horton and these folks implicated in
17 those scopes don't waste time going out there looking at the
18 houses, getting an expert opinion later, and having to go
19 back to the houses. That's what happened yesterday. So even
20 Plaintiff saying that their case is ready for trial, their
21 own expert isn't ready with his opinions yet. He still has a
22 three-month topographical survey that they are conducting
23 out there that he needs before he can give us his opinions.

24 As to the inspections that he was talking about that we
25 canceled. What those inspections were were, "Defendants, you

1 can come to this house, on this day, and do that." And I
2 said, "Justin and Dabny, we would like to pick the things
3 we're looking at and the houses we're looking at. We're not
4 going to be told how we conduct our inspections by
5 Plaintiff. I think there's folks in the gallery here who
6 will stand up and say that's exactly what happened. We were
7 not going to be constrained to do our investigation how
8 Plaintiffs wanted us to do it. I think that's resetting
9 this.

10 So the case is about a year old. There's a bunch of
11 parties in here who don't belong in here. The Plaintiff can
12 cooperate and get rid of them. So that will narrow down the
13 number of parties in here. Third, and probably most
14 important thing is, the Plaintiff is not ready for trial.
15 The Plaintiff is not even ready to tell us what's wrong out
16 there. That's resetting it.

17 So, talking about the motion to sever, Your Honor. Mr.
18 Lucey mis-stated earlier. In fact, the burden is on the
19 Plaintiff, not the Defendant. It's right in the Rule of
20 Civil Procedure, to show that it's going to be economical,
21 efficient, and non-prejudicial and it's none of those
22 things. Is it complicated? Yes. Is it going to be hard?
23 Definitely. That's why we've got to narrow this thing down
24 and figure out exactly what we're litigating in this case.

25 So, let's just start with the first thing economical. The

1 Plaintiff is already scheduling and taking depositions of
2 these third parties of these subcontractors. They are
3 scheduling them. They are taking them. They are using them.
4 So all of these folks are already does participating in
5 discovery in this case. If you sever this case, and or
6 listen to Mr. Lucy's motion to bifurcate, that's going to
7 stop. The Plaintiff is already doing it. Here's the truth of
8 it. As a general contractor, the vast majority of general
9 contractors don't drive nails and don't twist wires. The
10 experts are sitting behind us. They know their scope of
11 work. They know their trade and some of them, like Mass
12 (PHONETIC) Graders have their own licenses that D.R. Horton
13 doesn't have. We can't even do the work they're doing. For
14 instance, yesterday we were talking about grading yesterday
15 with Plaintiff's experts. I generally have an idea of what
16 grading is. These folks were pulling statutes, and
17 requirements, and standards to ask Plaintiff's experts
18 specific questions about the Anderson County regulations for
19 grading. So, they know it and what he's asking you to do is
20 to stop their ability to ask those questions and use their
21 expertise.

22 Here's the other point if you sever. If we go to trial
23 they're all coming. Every one of them is going to have to
24 put up a witness at trial and every one of them is going to
25 bring their expert to trial because we're going to subpoena

1 them. We're a general contractor. We don't build HVAC
2 systems. Don't even have a license to do it. So somebody
3 has to come up and defend accusations and expert reports by
4 Plaintiff. That's what these folks back here. So it won't be
5 more economical at all, because will have to do that twice.
6 They're going to have to have discovery and a trial with
7 everyone here and then you're going to have to have
8 discovery and trial with everyone here, except for the
9 Plaintiffs. You're going to do it twice. Mr. Lucey's right,
10 it benefits the Plaintiff, but when you weigh it out,
11 there's 50 other folks here who it doesn't benefit. And is
12 prejudicial and is not economical, Your Honor.

13 I will say, there's an interesting case that you're
14 going to hear about all day today. It's called Miller's
15 First Source v D.R. Horton, and I'm not going to bore you
16 right now with all this indemnity contractual language but
17 essentially what happened in that case is that is this
18 happened. D.R. Horton went to trial with the Plaintiff and
19 there was a verdict against D.R. Horton. D.R. Horton turned
20 around and sued subcontractors and the Court said, no. We
21 don't know why those damages were given, under what cause of
22 action, or against what parties. And so, if this case goes
23 to trial, Plaintiff versus D.R. Horton, what we will have to
24 ask this court to do to comply with the law in the state of
25 South Carolina knowing that we are going to have to go try

1 this other case is we will have to submit evidence in the
2 first trial of who did what, on what house, what are the
3 damages on that house, what are the defects on that house.
4 And we're going to have to ask the jury to figure that out
5 so that when we turn around and these third-party Defendants
6 want to know what part of that verdict goes to them we can
7 show them. Otherwise, it won't work. There's already a case
8 in South Carolina that says you can't just get a verdict
9 against the general contractor, not break it down, and then
10 chase the subcontractors. So, we have to comply with the
11 law. To present that evidence and ask the jury to do those
12 things already, regardless, or the second case is dead.

13 Your Honor, let me say this -- and I should've started
14 with this. My original mentor is back here and if he taught
15 me one thing, that judges can hear arguments but they'd
16 rather hear solutions. And I agree with that. You don't have
17 to rule on the motion to sever today. You don't have to rule
18 on the motion to sever until discovery is done, mediation is
19 done, and we actually know what this case looks like heading
20 into trial. Both Lyles and I were involved in Stoneledge.
21 Justin Lucey knows that, as do most of these people, and we
22 had three Defendants by the end of this. Three Defendants,
23 after mediation and negotiation, that went to trial. As a
24 matter of fact, Judge, I think you came into the Stoneledge.
25 So, Your Honor the point being, that we are sort of in the

1 infancy enough \$43 million dollar class action with 220
2 homes and this decision doesn't have to be made today. The
3 analysis, in my opinion, would be much better when you see
4 who's left standing in the months before trial. And it could
5 be vastly different.

6 I don't know if you know this or not, but there is a
7 sister case. One of the Plaintiffs in the neighborhood
8 opted out of the class action. We zoomed through that. We've
9 taken all the depositions in the matter. We have had
10 mediation on Monday. We had mediation in the Smith case
11 against D.R. Horton, one house. I think there are four
12 parties left, five parties left, something along those
13 lines. People have settled out all over the place, so that's
14 what I would say. The solution to this is let's let this
15 work out. Let's see where we are after mediation and who's
16 left.

17 I would point one other thing out, Your Honor, on this
18 issue. I don't even know if you've ever seen this. With our
19 motion to designate this as complex we laid out a roadmap of
20 what has been done by other courts facing class-action
21 multi-party construction litigation, and we asked the Court
22 to look at these things and how to help us have a roadmap.
23 What happened was is the order got signed appointing to you.
24 I don't know if you consented or were appointed, Your Honor,
25 but you're our guy now. But, the actual substantive issues

1 never got addressed. I don't know if you want to take the
2 time to do that today or not, but we sure would like -- was
3 that a no? But we sure would like the Court's help, because
4 today the Plaintiff is taking the position that the only
5 discovery we can do, and the only depositions, and the only
6 investigation that we can do, in writing anyway, is the
7 class representative's house. And their expert said
8 yesterday that there are at least three different versions
9 of water issues on the lot, not including sub-parts. These
10 aren't iphones, Your Honor. They're all different houses on
11 different lots with different cladding, and frankly
12 different subcontractors. Some of these contractors only
13 worked on a couple of houses, if any. We need to know what's
14 out there. We need to know when these people bought these
15 houses, and what inspection they did. So, what they knew.
16 And what property disclosures they were given. If there were
17 water issues out there years ago and property disclosures.
18 What issues are with that particular house. Are they having
19 water issues? Is there stone falling off the front? Are
20 there windows leaking? We want to know those things and the
21 way the DeGrazia court did it -- can I hand this up to you?
22 Oh, it's in there behind one of the tabs, Your Honor. Under
23 tab number two, Your Honor. What the DeGrazia court did is
24 it did it piecemeal, and it said all right, I'm going to let
25 you take 20 homeowner depositions. Page 7 of tab two. This

1 was literally taken directly from the orders from those
2 other multi-party class-action cases. It broke it up. One of
3 the things that we agree with Mr. Lucey about is, we don't
4 need 40 to 50 lawyers at every deposition. There were maybe
5 six parties who did grading out there. The HVAC guy came to
6 the deposition. The window guy came to the deposition. The
7 window installer came to the deposition. Happy to have them.
8 Love to have them. They don't usually ask questions. They
9 don't care, frankly. They don't care about the grading if
10 they put the window in. So, we do agree with the bifurcation
11 part that you guys can certainly come to the deposition and
12 you can listen, but it doesn't have anything to do with your
13 work. You don't need to object to us having the deposition
14 because you've got an occasion if you're the grading guy
15 were talking about windows. So, we actually agree with that,
16 but we need your help to do some of this.

17 We ask you to let us do some actual inspections that we
18 pick, and we decide how they're done, and let us take some
19 homeowner depositions. And, even before that, get written
20 discovery from the homeowners. It's listed in here, Your
21 Honor. When did you buy your house? What did you know
22 about your house? Let me tell you one of the things expert
23 testified to yesterday, which is incredible to us, because
24 we had no access to any of these people. He's walking around
25 the neighborhood. Their expert is walking around the

1 neighborhood talking to these homeowners and they said, yeah
2 we have flooding. Well, show it to me. Well, there is a
3 drain put in here, and the homeowner says, yeah, we think
4 that drain was put in by D.R. Horton, but we don't know.
5 We're the third owners of the house. So, the expert
6 testifies, that drain was put in by D.R. Horton. The
7 Plaintiffs won't let us go take the deposition of that
8 homeowner to find out if that drain was, in fact, put in by
9 D.R. Horton. We've been blocked from doing discovery on
10 that, but their expert is out there talking to these people.

11 In fact, I don't know if you've seen this, Your Honor.
12 Plaintiffs are doing destructive testing. They're pulling
13 these houses apart. They're pulling brick off. They're
14 pulling roofs off. You know who didn't get notice of that?
15 Any of us. None of us. Which is typical in a construction
16 case. I mean, why do it multiple times. They say, we're
17 going to take this apart everybody come, have your cameras
18 ready, have your expert there. So, they are conducting
19 discovery and destructive testing on the houses out there,
20 not just the representative of the class, all the houses, to
21 develop their case and then turn around and telling us, you
22 can only talk about the class representative's house and
23 take the deposition of the class representative. That's why
24 we need your help.

25 Your Honor, he also has a motion after his motion to

1 sever. Your Honor, I can't wait to hear Mr. Lucey's
2 response to this. His expert is not right. His expert
3 yesterday -- I wish I had a transcript. His expert is not
4 ready to go to trial. This case is not ready to go to trial.
5 But, if you impose a scheduling order, and maybe a discovery
6 order, and give us the opportunity to do some things and
7 come back at certain dates and get it done certain times and
8 limit non-implicated parties objections to depositions and
9 that type of thing, then maybe we can get it moving forward.
10 But it is moving and I will say, some people may pipe up and
11 say we can't do this deposition that day and Justin is real
12 good at going, you don't need to be at this deposition and
13 you're in a 157 person firm. Get somebody to cover it. And
14 we've worked all of that out. We haven't been back in front
15 of you on a motion to compel or a motion for protective
16 order on depositions. It's actually moving really well and
17 I'll give Justin credit for that. He moves his cases
18 forward. But this case isn't ready to go to trial, Your
19 Honor.

20 THE COURT: Is there any input from any of the
21 third-party Defendants on the Plaintiff's motion? Any
22 third-party Defendant wish to be heard on the Plaintiff's
23 motion? There are no responses. Let's move on. As you
24 probably anticipate, I'm going to take some time to read
25 what's been submitted on these motions, so let's move on to

1 the next one.

2 MR. IMHOFF: Your Honor, the brief that we filed for
3 our motion to designate complex probably wasn't gotten to
4 you today, but it has been filed when we had a prior
5 hearing. Would you like us to send those to you
6 electronically, that book I just gave you?

7 THE COURT: That would be fine. I believe it was Judge
8 Maddox who designated it complex? Or class the
9 certification? He issued an order certifying the class.

10 MR. IMHOFF: Your Honor, actually that motion is in the
11 book I handed up to you today and is emailed to you prior.

12 THE COURT: The next motion on the list is a motion for
13 amended discovery disclosure of evidence filed by Topbuild
14 Home Services, Inc. Who represents Topbuild Home Services,
15 Inc.?

16 MR. IMHOFF: I want to know who Topbuild Home Services,
17 Inc. is.

18 THE COURT: That's the filing party. Madam Clerk, who
19 filed that motion?

20 CLERK: We actually got an email, and I copied your law
21 clerk on it, that they have a consent order to sign, so we
22 can mark that off.

23 THE COURT: Very good. The next one is a motion to
24 dismiss by L & M Electric, Inc. If y'all can come forward
25 to that microphone or use that podium.

1 MR. JAMES: It shouldn't be very long. Yes, Your Honor.
2 George James for L & M Electric. We have a consent motion
3 similar to the one which was entered into before we got
4 started. D.R. Horton has agreed to dismiss claims against L
5 & M Electric without prejudice. When we submitted the
6 stipulation of dismissal we needed the consent of all these
7 parties. We either did not get responses or we just didn't
8 have every body's response, so that's the reason we filed a
9 motion. We're just asking the Court to enter into a Form
10 Four granting our motion without prejudice.

11 THE COURT: Mr. Imhoff, is that correct?

12 MR. IMHOFF: Yes, Your Honor.

13 THE COURT: Thank you. I have a motion to dismiss
14 listed here, number 14, but I see no party file.

15 CLERK OF COURT: I think that was their motion as well.

16 THE COURT: Motion for summary judgment Alpha Omega
17 Construction Group, Inc. Summary judgment.

18 MR. IMHOFF: Your Honor, if I may? These motions are
19 essentially all the same. They are motions for summary
20 judgment on the contract. I don't know how you want to
21 handle that.

22 THE COURT: I have not had an opportunity yet to read
23 the briefs, but I have sort of scanned them. The motions all
24 seem to surround statutory indemnification provision. This
25 is what I'll do. We'll start with the first one and then if

1 the other lawyers have similar motion or if they have
2 something new to add we can go from there. If they just
3 want to support what's already been said, I'll give you that
4 option.

5 MR. TEAGUE: Your Honor, Reed Teague here for Alpha
6 Omega. I'm also here for Caryl Mechanical. It's the same
7 motion. I know quite a few other parties made the exact
8 same motion and they can add their take. I think Mr. Lucey
9 probably covered a lot of it in his presentation, but as it
10 relates to Alpha Omega, we are a roofer. I've yet to see
11 anything in the case that relates to roofing. However, we
12 are in the case. The only thing I've ever seen is that 2019
13 right to cure letter that Mr. Imhoff referenced and it's my
14 understanding that is why Alpha Omega's in the case. I'll
15 set that aside, because I'm not here to talk about the facts
16 of the case but just the contract.

17 MR. IMHOFF: Can we address that, because I addressed
18 it before. I don't want to set that aside. That is a problem
19 in this case is that we have a notice and opportunity to
20 cure that lists all these things and then three expert
21 reports. I took all three in the Smith case. Reed is right
22 and so are some of these other folks. There's no evidence
23 for some of the -- there is a concrete supplier in one of
24 these cases and there's no evidence against them. So, I kind
25 of want the Plaintiff to address that. If they're going to

1 produce evidence or when they're going to produce that
2 evidence, because otherwise we'll agree with Mr. Teague's
3 motion and he needs to get out of this case, but we need the
4 Plaintiff to tell us if he's ever going to produce evidence
5 are not

6 MR. LUCEY: Your Honor, that's a complete mis-
7 characterization. For starters, a right to cure letter is
8 often based substantially upon a homeowners' perception of
9 what problems they have in their house. That's why they call
10 the attorney, or engineer, or whatever it happens to be. We
11 have published our expert reports. They've been published
12 for months. We didn't sue any of these other parties. We
13 didn't decide what other parties to bring in. Nobody ever
14 asked me who or who should not be sued and tab four in the
15 book that was represented to you to the contrary talks about
16 service of process. It does not talk about who should or
17 should not be in this case. We have told every party that
18 asked us, we did not sue you. Take it up for with D.R.
19 Horton as to what issue they're suing you on. Our defects
20 are in the expert report. We have published those.

21 THE COURT: Let me ask you this. How do you respond - -
22 Mr. Teague, I'm going to get back to your motion.

23 MR. TEAGUE: Take your time.

24 THE COURT: How do you respond to Mr. Imhoff's assertion
25 that your expert is not finished with his analysis?

1 MR. LUCEY: Thank you, Your Honor. I wasn't permitted
2 to rebut, so I didn't address it. I'm happy to address it.
3 My expert is finished with his analysis. He is. He
4 published his analysis of the defective storm drainage in
5 the neighborhood and he published the estimate for the
6 repair contractor to include for the repair. His role was
7 done. I then said to him, part of your repair protocol is
8 that they need to do a topographical survey to get the
9 precise elevation each part must land. I said, just knowing
10 this will come up with Defendant's, go ahead and survey part
11 of this neighborhood, just so you can show the Defendants
12 how that will work in your repair estimate. They asked him
13 yesterday, is that topographical study going to change her
14 opinion. And he said -- told them, frankly, no. I've
15 already showed you ---

16 MR. IMHOFF: Mr. Lucey wasn't there and that is not what
17 he said.

18 MR. LUCEY: I just read the deposition on my way here.
19 I read the first 105 pages of the deposition on my way here
20 and they asked him, is this going to change her opinion, and
21 he said no. It was purely to show the defense how the damage
22 estimate would work. He is not even -- despite -- I don't
23 know if they asked him a direct question yesterday on this
24 or not. We're not surveying the whole neighborhood. I
25 said, go pick one block -- and maybe there's 30 blocks in

1 this place. I said, go pick one block to give the defense
2 and exemplar of how this would work. And that's all he's
3 doing. He's not even doing it. A topo is being done that's
4 just a survey or measuring elevations and it will be
5 presented and it's just to show them what he already wrote
6 in his report that he used a topo to set the exact
7 elevation. If the homeowner -- if some new issue comes up,
8 if they start doing testing and our expert see a new issue
9 they'll add it to their report. We are done with our
10 testing. We're done. We've been done.

11 THE COURT: If it's not in your report, you're not
12 alleging.

13 MR. LUCEY: That's correct.

14 THE COURT: Okay. All right. Go ahead, Mr. Teague.

15 MR. TEAGUE: Thank you, Your Honor. Before I address
16 the contractual indemnity portion, the third part of my
17 letter addresses the collapse of negligence, breach of
18 contract, breach of warranties. I think Your Honor likely
19 knows that issue of Stoneledge, that the case law in the
20 state is that what they've sued us for is for the damages
21 claimed by the Plaintiff, which are indemnity. So it's our
22 position that, pursuant to the Stoneledge case, that those
23 matters are collapsed into one claim for indemnity. The
24 other parts of the motion relate to contractual indemnity. I
25 did include in my motion equitable indemnity, but I'm not

1 going to -- I believe that's likely for another day, and I
2 won't move forward on the equitable part.

3 On the contractual there's two or three levels within
4 my client's contract, and I'm just going to argue for both
5 Alpha Omega and Caryl if that's okay. Caryl is a HVAC
6 contractor. The only difference between Caryl and Alpha is
7 that there are allegations -- they are one of the HVAC
8 contractors. There are allegations in the Plaintiff's
9 material related to HVAC. So, both Caryl and Alpha Omega
10 have the same written contract with D.R. Horton. It's got a
11 -- it is Exhibit 2 to my filing. It's got an addition date
12 of July 23, 2007 and it has multiple indemnity provisions.
13 The first being a 6.4 indemnity provision, which I block
14 quoted in the memo, but it talks to the nature to the
15 fullest extent allowed by law a contractor will agree to
16 indemnify, blah blah blah, and hold harmless D.R. Horton and
17 there's no limitations on the indemnity provided.

18 So, there were questions of the Rule 30 deposition
19 designee for D.R. Horton regarding which indemnity clause
20 applies, because you've got multiple ones within your
21 contracts, and the designee was not able to identify that.
22 And so, going on, it's our position that based upon this
23 language that it doesn't limit the indemnity requirements
24 and thus it would be, as Mr. Lucey, presented barred by the
25 South Carolina anti-indemnity statute. The next provision

1 is Provision 10, and that's the kind of the larger indemnity
2 provision within Alpha Omega and Caryl's contracts.

3 I do have co-counsel for Caryl. I just went into my
4 argument, but I think he agrees. There are provisions
5 within this indemnity clause number 10 that discuss the
6 language that would apply potentially to Concorde and
7 Cumberland arising out of, or resulting from, or relating in
8 any way, to the work performed and/or material supplied
9 regardless of whether or not caused, in part, by the
10 indemnity. And so, that's important as to Concorde and
11 Cumberland section which I will get to further down in my
12 argument.

13 Now, there are additional provisions within the
14 contract 10.2, indemnity pertaining to attorney fees and
15 10.4 for subcontractor and supplier indemnity obligations,
16 and so within -- if you read the contract you don't -- if
17 you read it all together like you're supposed to, it
18 basically finds that you know somebody like Alpha who -- I
19 have yet to determine why I'm in the case, yet I have all
20 the subcontractors that I'm having to try to serve by
21 publication. Is because I could potentially be subject to
22 exposure under this contract for all these other people's
23 work. For the attorneys' fees associated with those
24 people's work and that is why the contractual indemnity
25 claim should be first checked under the anti-indemnity

1 statute, because of all these different provisions and it
2 basically saying we are responsible for other people, the
3 soul nor negligence of D.R. Horton, the sole negligence of
4 some other party, and not the negligence of Alpha Omega.

5 Now, the second argument -- and some other folks will
6 probably have greater detail on that section -- but the
7 second argument relates to Concorde and Cumberland, which is
8 a case that relates discusses concurrent negligence, and
9 whether or not you can for indemnity provision that holds
10 you, a party like Alpha Omega, responsible to indemnify D.R.
11 Horton even though they've had some concurrent negligence.
12 And so what that case, in my abbreviated reading of that
13 case, which I can pass up if you'd like, is it basically
14 says if you want concurrent -- if you want to be indemnified
15 when you contributed to the negligence, then you've got to
16 write that out and it's got to be clear and unequivocal
17 terms. And when I cited to the terms earlier within the
18 contract as to where D.R. Horton is saying that they have --
19 are entitled to concurrent, it's not written out and for it
20 to be a clear and unequivocal term then D.R. Horton should
21 have to write out and know -- look, with this contract
22 you're agreeing to you're agreeing to indemnify us. If
23 you're solely negligent we are also agreeing to indemnify
24 us. If our negligence contributes to the damage, and it
25 doesn't write that out, and if you read in Concorde and

1 Cumberland, just a plain reading, that's clearly what it
2 obligates the drafter of that contract to if they want --
3 they can get indemnity for concurrent negligence, but they
4 have to make that in a clear and unequivocal terms. They
5 did not do.

6 So, basically there's citations to the Rule 30
7 deposition of D.R. Horton included in my memo wherein the
8 designee addresses the different sections, and that the
9 designee, which was the person sent forth to provide
10 testimony in this case as to whether or not the contract is
11 applicable, whether or not certain sections are applicable,
12 and as it relates to Alpha and as it relates to Caryl he
13 specifically indicated he did not know. When referencing
14 questions regarding the Manale contract, which is the same
15 exact version of the contract, that he doesn't know which
16 indemnity provision would apply. And that there's -- and
17 that as a result, you know, you have this merging together
18 which goes back to the anti-indemnity statute.

19 So, our position is -- some of these other folks may be
20 able to articulate it better than I can, but first, the
21 contractual indemnity claim should be kicked because it
22 violates the statute. If you don't think it violates the
23 statute then the contract doesn't meet the requirements of
24 Concord and Cumberland, and as a result the contractual
25 indemnity clause should be booted from the case and D.R.

1 Horton should be able to go forward on the equitable cases.

2 Thank you.

3 THE COURT: Mr. Imhoff, do you want to respond
4 individually or do you just want to wait until all arguments
5 have been made in the various motions and then respond at
6 one time?

7 MR. IMHOFF: On the indemnity part I'll leave it up to
8 the Court how you want to do that. I would ask, again, I
9 heard Mr. Teague say there's no evidence in this case. I
10 heard Mr. Lucey say, if it's not in our reports is not
11 included in the case. So we may be able to get Alpha Omega
12 and a bunch of other people out of this room right now if
13 Mr. Lucey will admit that there is no allegations in his
14 report, despite his notice of an opportunity to cure act,
15 against Alpha Omega's scope of work. And I think that's
16 fair today, and we've asked them. He's wrong about the
17 email. It does say in there will you get parties out of
18 this case. We've asked him multiple times to do that.

19 MR. LUCEY: No, they've never asked about roofing.
20 Never, and yes our report does address roofing. We have not
21 sued on the shingles. We have not sued on the felt paper,
22 but there is at least one improper roof condition on a lot
23 of these houses. They built the stone veneer for the second
24 floor façade right on the shingle of the first floor roof
25 and so is a code violation. It is the intersection of a

1 roof and the stone façade, and the problem for the roofer
2 is, I'm sorry, but we haven't taken that stone off to find
3 out if there's missing flashing. We know that the flashing
4 is not showing. If you don't flash -- today flashing
5 doesn't mean anything anyway. So, the missing flashing is
6 there. All we care about is D.R. Horton, the seller, and
7 the contractor built an improper condition. That's between
8 them and all their claims. They all can argue about whether
9 the roofer should've flashed under it, whether the stone
10 mason should've flashed under it, or somebody else should've
11 flashed under it. We don't care. The flashings not there
12 that is a roofing condition.

13 THE COURT: Is there an allegation in your expert's
14 report about improper work done in the scope of Mr. Teague's
15 clients involved?

16 MR. LUCEY: I did. Section of roofing and stone façade
17 Yes. Your Honor.

18 THE COURT: Okay. All right. I'm going to let you
19 respond to the indemnification generally, because again, I
20 think they're all arguing something similar on that, but if
21 you have anything specific factually to the work provided by
22 one of these third-party defendants, I'll let you respond.

23 MR. TEAGUE: Can I respond one second to Mr. Lucey? I
24 have reviewed the expert reports and "A", Alpha Omega's
25 never had any opportunity to go on the property and look at

1 this condition, only the photographs produced, and I know
2 Mr. Lucey has sued my client, but that's why I'm here. And,
3 his reports that he's referenced it specifically states that
4 the roofing repairs relate to the improper brick and stone
5 work repairs required to the home. There's not a reference
6 to improper roofing work, so I would want to make that
7 clarification on what I've reviewed from the materials.
8 Thank you.

9 THE COURT: Thank you. Mr. Teague, that was also for
10 Caryl Mechanics?

11 MR. TEAGUE: Yes, Your Honor.

12 THE COURT: Caryl doesn't have anything to add?

13 MR. TEAGUE: No, Your Honor. Caryl has the same
14 argument, the only difference is there are portions of the
15 Plaintiff's expert materials that implicate the HVAC, even
16 though they dispute those claims, there are implications.

17 THE COURT: All right. Blue Ridge Building Products,
18 LLC?

19 COURT REPORTER: Can we move the podium closer? They're
20 standing so far away. The microphones are not on.

21 THE COURT: Why don't we do that. The court reporter is
22 having a hard time hearing.

23 MR. BOYD: Thank you, Your Honor. My name is Brent
24 Boyd. I represent Blue Ridge Building Products. The motion
25 refers to them as Installed Building Products. Their full

1 formal name is IBP Asset, LLC, d/b/a Blue Ridge Building
2 Products. Your Honor, we filed a motion for summary
3 judgment today on the third-party claims by D.R. Horton
4 against my client. As Mr. Imhoff said, there are some
5 parties that shouldn't be here and I'm one of those parties.
6 And the reason for that is, as Mister Lucey said, his claims
7 and the defects are known by what his experts published.
8 And what his experts published was also the basis for which
9 the class was certified. They have to show common and
10 typical claims to establish a class-action, and that's what
11 has happened. And we know what those claims are. My
12 client, on the other hand, installed gutters, attic wall,
13 and crawlspace insulation, prefab fireplace and fireplace
14 mantels, doorknob and deadbolts, door numbers, closet
15 shelves, bathroom mirrors, and shower doors. Neither of the
16 class representative Zitek, nor the class in general through
17 the submission of their expert reports, have asserted any
18 defects in that scope of work, Your Honor. As Mr. Lucey has
19 already said D.R. Horton's liability is premised -- or their
20 exposure is premised on derivative liability under our
21 Supreme Court's cases in this state. Their liability is
22 premised on what Plaintiffs prove. Likewise, they can only
23 participate in third-party practice if one of the
24 third-party Defendant's work has exposed them to liability
25 from the Plaintiff. In this case, D.R. Horton has no

1 liability for any work conducted by my client, Blue Ridge
2 Building Products, and for that reason we are entitled to
3 summary judgment.

4 THE COURT: Thank you. Mr. Imhoff?

5 MR. IMHOFF: This is another one of those, Your Honor.
6 We have asked and Mr. Lucey says, I didn't say it. I never
7 said it. He never said it. (READING) We would also like to
8 talk to you with you about unnecessary parties and scopes of
9 work to narrow down the list of the parties and defects. Do
10 you have any interest in working with us on that? On April
11 20th. Mr. Lucey is not telling the truth. We have tried to
12 narrow this case down. They won't help us. They won't do
13 it. They want to complain about the size of this case, but
14 we agree there are no allegations against that party, and
15 until we can get the Plaintiffs to admit that they're not
16 going to do anything --

17 MR. BOYD: That's not necessary, Your Honor. The class
18 has already been certified based upon common issues and
19 typical issues, none of which involve my client. If they
20 want to suddenly say, hey, guess what, we now have common
21 issues of shower doors and bathroom mirrors which are
22 defective, and that's a common issue in this lawsuit, I
23 submit to you they have to seek an amendment of their
24 certification of the class. That's not going to happen.
25 These claims have been identified. They don't include Blue

1 Ridge Building Products. There's nothing more that needs to
2 be done to ferret that out. Those issues are not mentioned
3 in Mr. Lucey's expert reports.

4 THE COURT: Mr. Lucey, is this party mentioned in your
5 expert's report?

6 MR. LUCEY: The party is not, Your Honor. A substantial
7 part of our claim is improper storm drainage. We believe,
8 and we have alleged, that the storm drainage was not
9 properly designed or provided for by D.R. Horton. It
10 happens to be that their gutters, although they don't say
11 downspouts in their memo it is also the down spouts, they
12 are contributing to water to the backyard that's not
13 draining out. The Plaintiff is not blaming the down spout
14 or gutter contractor for that. D.R. Horton may blame the
15 down spout or gutter contractor for not providing the water
16 all the way past the fence. I have no control of that. We
17 have not brought a claim of defective gutters or defective
18 down spouts.

19 MR. BOYD: If I may respond, Your Honor. I have and we
20 filed a memo and multiple exhibits last week with the Court,
21 so all of those should be there on file at the Clerk's
22 office. We reviewed site consultants reports and their
23 estimated cost. There's nothing in their report indicating
24 that they find defective gutters, downspouts, as part of the
25 drainage burden. When you look at the report he's clearly

1 talking about the grading being the issue and also drainage
2 systems. It does not include the gutters. Also, D.R.
3 Horton's expert has been to at least 25 homes to look at
4 issues. That's Mr. Moore with ABS, and none of the homes --
5 or maybe he did it based upon the materials provided, since
6 you said you have not done inspections, but Mr. Moore did a
7 report and none of those reports did he identify defects in
8 my scope for a house that either my client worked on or, if
9 they did work on the house, that my client installed a
10 defective item that was identified by Mr. Moore.

11 MR. HOFFMAN: He makes a good point. I mean, not only
12 does the notice and opportunity to cure have these things,
13 but the class was certified back based on affidavits from
14 Plaintiffs, and if it isn't in there, it's not in the class.
15 So, I don't know if you want to dismiss them without
16 prejudice or Mr. Lucey can go back and get an expert to say
17 they did something wrong. We're not trying to keep people
18 in the case who don't have anything to do with issues out
19 there with this class action. And that's why we just said
20 and we've gotten calls and letters and emails from these
21 folks and we say we don't think prolonging the case either
22 we can't get Plaintiff to tell us that this down spout,
23 mirrors isn't included in the case. So, I'm happy to let
24 them go if Plaintiff will -- if you'll either say, Plaintiff
25 you're done. You're not bringing in any more issues in this

1 case, or that Plaintiffs haven't produced evidence against
2 that party. We're happy to let them go.

3 MR. LUCEY: Your Honor, I couldn't have been more clear
4 with the Court. We don't allege defective downspouts. We
5 don't allege defective gutters. Are the downspouts and
6 gutters causing and contributing to the water that's sitting
7 in the backyard and not draining away? Yes, they are. Did
8 D.R. Horton try to go back and do some nickel dime repairs
9 by putting downspout extenders on them from the bottom of
10 the downspout out to the rear fence or past the rear fence?
11 It appears they did. There a couple of dozen of those ugly
12 black extenders there. Is that viable evidence to be
13 discussed at trial as part of the res gestae, or the source
14 of the water, or a failed interim fix? Yes, it is. Does
15 that mean we're going to raise defective downspout or
16 defective gutter claim? No, we're not. We're not. We
17 never have and we never will.

18 But, we're also not asking for a gag order on the fact
19 that the spouts are putting the water in the backyard and
20 that D.R. Horton thought that by fixing the downspouts it
21 could somehow get the water out of the yards, which didn't
22 work.

23 MR. BOYD: And he can make that argument, and it
24 doesn't provide any liability either to me or to D.R. Horton
25 for what I did, because the gutter and the downspout is

1 doing exactly what it supposed to be doing. The only reason
2 that the water is standing there is because there are
3 allegations of improper grading and sloping. The gutter
4 does dump the water off of the roof out the end of the
5 spout. That's what it does. So there is no allegation, and
6 that's what our work was limited to. We had no contract or
7 scope of work to design drainage systems or move dirt.
8 That's somebody else. We put up gutters that's all we did.
9 To the extent that the water that comes off the roof through
10 a gutter is not draining off the yard it's because, as the
11 Plaintiff expert said, it had been improperly graded and
12 sloped.

13 MR. IMHOFF: That's potentially true, but I will put
14 this out here. We haven't been allowed to inspect the
15 houses since the suit was filed. Our expert has not produced
16 a report based on the house inspections and he hasn't given
17 his deposition testimony. So, while I would like to let them
18 go because I don't think it's an issue, I didn't really hear
19 that from Mr. Lucey. I would ask the Court to find the
20 motion for summary judgment premature and at least let us
21 have the inspections and do the deposition.

22 THE COURT: Is your claim against his client also based
23 on the same indemnification allegation?

24 MR. CRAWFORD: Do we have an indemnity agreement
25 contract with y'all?

1 MR. BOYD: I'm assuming so, but I have actually not
2 raised those arguments in this case because I don't think we
3 need to get there.

4 THE COURT: Thank you, Mr. Boyd. Okay, Long Heating and
5 Air Conditioning.

6 MR. STEWART: Your Honor, Heath Stewart for Long
7 Heating and Air. I can be pretty brief. My arguments are
8 greatly similar to that made by my colleague, Mr. Reed
9 Teague, on behalf of Caryl Mechanicals and Alpha Omega. We
10 have a independent contractor agreement with D.R. Horton
11 dated June 2009 that has the same three indemnity
12 provisions. We raise the same issues with those provisions.
13 They're conflicting. One part talks about only being
14 responsible for indemnifying our work. The next part talks
15 about indemnifying for D.R. Horton's work. Then, there's
16 the odd absolute duty to defend in the next section.
17 Because of all that, we would again emphasize that it's not
18 clear and unequivocal under Concorde and Cumberland and
19 therefore it shouldn't stand.

20 It's also in violation of the anti-indemnity statute
21 noted earlier. We would also argue that all the claims are
22 sub sued under Stoneledge. One thing that hasn't, I don't
23 think, really been fleshed out is that these are derivative
24 claims. They're pled in a derivative manner, if then, if
25 then, if then. They may artfully say that they have damages