THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Bentley D. Price, Circuit Court Judge

Case No.: 2019-CP-07-02629
Appellate Case No.: 2022-000469

Margaret A. Eberly and Barbara J. Pavelik,

Plaintiffs,

v.

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

Defendants,

And

D. R. Horton, Inc.,

Appellant,

v.

Hutton's Landscapes, Inc. and Lather Construction, Inc.,

Respondents.

INITIAL BRIEF OF RESPONDENTS LATHER CONSTRUCTION SC, INC. AND LATHER CONSTRUCTION, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. APPELLANT'S RESERVATIONS REGARDING JUDGE PRICE'S BEHAVIOR WERE NOT PRESERVED FOR REVIEW, AND EVEN IF IT WAS PRESERVED FOR REVIEW JUDGE PRICE WAS PROPER IN GRANTING HIS MOTION FOR SUMMARY JUDGMENT.

II. JUDGE PRICE APPROPRIATELY EXERCISED HIS DISCRETION IN DECIDING THE MOTION FOR SUMMARY JUDGMENT, AS WELL AS THE MOTION TO ALTER OR AMEND JUDGMENT, VIA FORM 4 ORDER AS PERMITTED BY THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

III. APPELLANT'S RESERVATIONS REGARDING JUDGE PRICE'S PRESUMPTIONS OF FAULT WERE NOT PRESERVED FOR REVIEW, AND EVEN IF IT WAS PRESERVED FOR REVIEW JUDGE PRICE WAS PROPER IN GRANTING HIS MOTION FOR SUMMARY JUDGMENT.

IV. THE CONSTRUCTION CONTRACT BETWEEN RESPONDENT AND APPELLANT IS UNLAWFUL.

V. APPELLANTS'S CROSS-CLAIMS FOR BREACH OF CONTRACT, BREACH OF EXPRESS WARRANTIES, BREACH OF IMPLIED WARRANTIES, AND NEGLIGENCE/GROSS NEGLIGENCE WERE PROPERLY BEFORE THE COURT AND JUDGE PRICE PROPERLY DISMISSED THEM.

STATEMENT OF THE CASE

This is an appeal from the Court of Common Pleas for the Fourteenth Judicial Circuit's grant of summary judgment. When on March 11, 2022, Hon. Bentley D. Price (hereinafter "Judge Price") granted Hutton's Landscapes, Inc. (hereinafter "Hutton"), Lather Construction, Inc., and Lather Construction SC, Inc.'s[1] (hereinafter jointly referred to as "Lather" or "Respondent") Motion for Summary Judgment to dismiss D.R. Horton's (hereinafter "D.R. Horton" or "Appellant") cross-claims against them.

[1] Respondents believe the court made a harmless error omitting Lather Construction SC, Inc. from the Form 4 Order. This issue is addressed herein. As a practical matter, Lather Construction SC, Inc. should have been dismissed from the case as they did not perform any work on the project. In *Drier*, Lather Construction SC, Inc. was dismissed prior to trial for the same reasonings.

The Plaintiffs, purchasers of a new home in a newly developed Tidewater Creek Neighborhood (hereinafter "the Development"), commenced the underlying lawsuit on November 25, 2019, because the Plaintiffs were dissatisfied with the property. The suit targeted the subdivision developer Appellant D.R. Horton, and various subcontractors, including Respondent subcontractors Hutton and Lather.

On November 9, 2020, D.R. Horton brought cross-claims against all defendant subcontractors for (a) contractual indemnification, (b) equitable indemnification, (c) breach of contract, (d) breach of express warranties, (e) breach of implied warranties, and (f) negligence/gross negligence/recklessness.

On December 9, 2021, Respondent Hutton moved for summary judgment on the cross-claims asserted against it by Defendant D.R. Horton. On January 3, 2022, Lather moved for summary judgment, stating that they "hereby join in totality and hereby adopt by reference as allowed by South Carolina Rules of Civil Procedure 10(c), Hutton's Landscapes, Inc.'s Motion for Summary Judgment on the cross-claims of D.R. Horton, Inc., filed on or about December 9, 2021."

Judge Price held a hearing on the motions on March 3, 2022. On March 11, 2022, Judge Price granted the motions for summary judgment in favor of Hutton's Landscapes, Inc and Lather Construction, Inc. He did not mention Lather Construction, SC, Inc. in his order. On March 18, 2022, Appellant D.R. Horton sought clarification and explanation of Judge Price's order by motion. A week later, on March 24, 2022, Judge Price denied the Motion.

D.R. Horton's counsel filed and served a Notice of Appeal with Orders on April 11, 2022, and followed that on April 28, 2022, by serving and filing an Amended Notice of Appeal with Orders. On May 11, 2022, Respondent Hutton's Landscapes, Inc. filed a Motion to Dismiss

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

STANDARD OF REVIEW

When reviewing an order granting summary judgment, the appellate court applies the same standard as that used by the trial court pursuant to Rule 56(c), SCRCP. *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *Turner*, 392 S.C. at 122, 708 S.E.2d at 769. "In determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn from the evidence must be viewed in the light most favorable to the non-moving party." *Koester v. Carolina Rental Center Inc*., 313 S.C. 490, 493, 443 S.e.2d 392, 394 (1994).

Recently, the South Carolina Supreme Court rejected the "mere scintilla" standard in *Kitchen Planners, LLC v. Friedman*, No. 2020-001669, 2023 WL 5420401, at 3 (Opinion No. 28173, Aug. 23, 2023). The Court held that proper standard is the "genuine issue of material fact" standard delineated in Rule 56(c) SCRCP. *Kitchen Planners, LLC*, No. 2020-001669, 2023 WL 540401 at 3 (Opinion No. 28173, Aug. 23, 2023). It is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine. *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

ARGUMENTS

I. APPELLANT'S RESERVATIONS REGARDING JUDGE PRICE'S BEHAVIOR WERE NOT PRESERVED FOR REVIEW, AND EVEN IF IT WAS PRESERVED FOR REVIEW JUDGE PRICE WAS PROPER IN GRANTING THE MOTION FOR SUMMARY JUDGMENT.

A. The Appellant's reservations regarding Judge Price's behavior were not preserved for review.

Appellant argues that Judge Price was biased against them and presumed their fault. Neither of these arguments were appropriately preserved for appeal. "To successfully preserve an issue for appellate review, the issue must be: (1) raised and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity." (*quoting* Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002).

First, Appellant asserts in the *Dreier*[2] case Judge Price was unfairly biased against the Appellant because Appellant had not acceded to the Plaintiff's settlement demand during trial several months earlier in the *Dreier* case. Ap. at 6. Appellant claimed "He [Judge Price] wanted to force settlement also to avoid having to try 15 future related cases, including this one." Ap. Br. at 6. Appellant further claims they were "browbeat" and "threatened" by Judge Price to make them settle. Ap. Br. at 9. Appellant also claims Judge Price dismissed D.R. Horton's crossclaims because of its refusal to settle. Ap. Br. at 9. Appellant failed to preserve these arguments. *See Humbert v. State*, 345 S.C. 332, 337–38, 548 S.E.2d 862, 865–66 (2001) (holding when an issue is presented to the trial court but not ruled upon, the issue must be

[2] *Richard W. and Rebecca A. Dreier, et al v. Advanced Flooring & Design et al including D. R. Horton, Inc.,* 2018-CP-07-00911, now on appeal in the Court of Appeals as App. Case No. 2022-000016. The *Drier* case involves the same parties litigating similar issues in the same development. The Eberly's chose to bring their claims separately in this suit.

raised in an appropriate post-trial motion to be preserved for appeal); *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an issue must be raised to and ruled on by the trial court to be properly preserved for appellate review); *see* also *Gaddy v. Douglass*, 359 S.C. 329, 349–50, 597 S.E.2d 12, 23 (Ct. App. 2004) (noting the appellants never took issue with Judge Hughston's involvement in or handling of the case at the trial level, and holding it unpreserved for review on appeal); *Abba Equip., Inc., v. Thomason*, 335 S.C. 477, 486, 517 S.E.2d 235, 240 (Ct. App. 1999) ("The same grounds argued on appeal must have been argued to the trial [court]."). In *Dreier* Appellant never raised any issue with Judge Price's partiality or involvement in settlement discussions at trial. See *Humbert*, 345 S.C. at 337–38, 548 S.E.2d at 865–66; *I'On*, 338 S.C. at 422, 526 S.E.2d at 724; *Gaddy*, 359 S.C. at 349–50, 597 S.E.2d at 23; *Abba*, 335 S.C. at 486, 517 S.E.2d at 240. Appellant improperly attempts to question Judge Price's partiality and involvement in the case for the first time in Appellant's appeal of *Dreier* and again attempts to carry over the argument to the present case without the issue ever being addressed at the circuit court level in either case. *See Humbert*, 345 S.C. at 337–38, 548 S.E.2d at 865–66; *I'On*, 338 S.C. at 422, 526 S.E.2d at 724; Gaddy, 359 S.C. at 349–50, 597 S.E.2d at 23; *Abba*, 335 S.C. at 486, 517 S.E.2d at 240.

Appellant's only objection to any mention of settlement discussions occurred in *Dreier* when Respondent, Hutton, stated Appellant was seeking $1,000,000 in attorneys' fees. However, there are two problems with this objection. First, Appellant failed to object when Hutton told Judge Price approximately two hours prior to the above that Appellant's attorneys' fees were over $500,000 and it was on the hook for $750,000. *See State v.*

Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) (holding a contemporaneous objection must be made to preserve an issue regarding the admissibility of evidence and a failure to object when evidence is offered constitutes waiver of the right to have the issue considered on appeal). Second, Judge Price never actually ruled on Appellant's objection and Appellant failed to raise the issue in an appropriate post-trial motion. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 (holding an issue must be raised to and ruled on by the trial court to be properly preserved for appellate review).

Therefore, Appellant's arguments were not preserved for review and this Court cannot properly address the arguments. *See Humbert*, 345 S.C. at 337–38, 548 S.E.2d at 865–66; *I'On*, 338 S.C. at 422, 526 S.E.2d at 724; *Gaddy*, 359 S.C. at 349–50, 597 S.E.2d at 23; *Wannamaker*, 346 S.C at 499, 552 S.E.2d at 286.

B. Judge Price was proper in granting Respondent's motion for summary judgment.

Even if this Court holds Appellant's arguments are preserved, Appellant's arguments are without merit. It appears Appellant is attempting to appeal the *Drier* case in this matter. However, that is not how our legal system functions, Plaintiffs chose to bring this case separately and Appellant must argue on the merits of this case. To the extent that the Court allows *Drier* to be discussed, Appellant presents the *Drier* record in a confusing manner—by jumping out of order, Appellant presents statements without context in an attempt to twist the record to suit their narrative. Ap. Br. at 6–10. In *Drier*, Judge Price did need to go out of town on Thursday, his daughter's birthday was Friday, and the trial was one out of many more relating to the community at issue, Appellant did not present *any evidence* that these factors had any bearing on Judge Price's decisions. Appellant now asks this Court, without properly

preserving their arguments and without presenting *any evidence*, to rule that Judge Price violated a Judicial Canon. Furthermore, Respondents are unaware of any rule or procedure that allows a party to appeal a ruling not made in the confines of the current case.

Appellant's inflammatory remarks that Judge Price's actions in *Drier* amount to judicial bias are not only offensive accusations but also remarkably inconsistent. If Appellant truly believed that Judge Price's "mind was made up before he ever set foot in the courtroom", they would have sought his recusal upon notice of the hearing. Ap. Br. at 18. Appellant refused to file a post-trial motion in *Drier* and declined to request Judge Price's recusal in this case. They are aware that Judge Price's rulings were not prejudicial. This accusation represents a desperate attempt to distract this Court from the issue at hand, namely that their appeal is completely unsupported by the lower court record and the law of this jurisdiction. The law unequivocally supports the ruling of the lower Court, and Appellant simply has no grounds for this appeal.

Furthermore, Judge Price's colloquy in *Drier* at the end of day two (and Appellant's reliance on *Ledford v. Dep't of Pub. Safety*[3]) are wholly unrelated to the reasoning behind his rulings. The only discussion related to any appealed issue *must have taken place prior to Judge Price's applicable ruling on Appellant's contractual indemnity claim*. In *Drier*, Judge Price granted the motion to bifurcate and motion for a directed verdict early on day two. Therefore, the exchange taking place at the end of day two in *Dreier,* referencing an email

[3] *Ledford v. Dep't of Pub. Safety*, 428 S.C. 387, 835 S.E.2d 509, 511 (2019). In *Ledford*, the Supreme Court of South Carolina examined Commissioner Barden's remarks regarding a "duty" to report Ledford for criminal prosecution, holding "even if Commission Barden's statements were not intended as bona fide threats, they were indisputably coercive," citing the commentary to Rule 3B(8), CJC, Rule 501, SCACR.

from D.R. Horton's counsel to D.R. Horton is wholly unrelated as to why Judge Price ruled the provisions were unlawful.

Thus, the only exchanges that this Court could properly consider occurred prior to Judge Price's rulings in *Drier*. Appellant's attorney/client privilege was never "invaded," and Appellant was never "browbeat" or "threatened" by Judge Price. Consistently throughout trial, Judge Price stated he did not believe the provisions were enforceable. Appellant never claimed to feel coerced at the *Dreier* trial and never asked Judge Price to take a step back. Indeed, in its brief, Appellant only claims it felt "pressure" or "coercion" to settle due to constrictions with Judge Price's "social calendar." It is difficult to believe that a party would feel "pressure" or "coercion" to settle because a judge brought up his scheduling obligations. Working around schedules of both other parties and the Court is a common issue within trial practice. The parties had multiple options available to them to accommodate Judge Price's schedule—the trial could have been continued to Monday, and Appellant was not forced to rest its case when it chose to.

Here, Judge Price properly ruled on the Motion for Summary Judgment by granting the motion in full and dismissing all cross-claims of Appellant. Judge Price's order states: "Defendant Hutton's Landscapes, Inc.'s Motion for Summary Judgment on the cross-claims of D.R. Horton and Defendant Lather Construction, Inc.'s Joinder in Hutton's Motion for Summary Judgment are granted." Judge Price does rule in part of the Motion for Summary Judgment, he grants the Motion in full, thereby dismissing all of Appellant's cross-claims.

Appellant claims that there is confusion regarding which cross-claims were dismissed and that the motion only asked for summary judgment as to the contractual and

equitable indemnity claims. Appellants appear to have not reviewed Lather's memorandum in support of its Motion for Summary Judgment, that supported Judge Price's ruling. The memorandum clarifies cross-claims for (i) breach of contract, (ii) breach of express warranties, (iii) breach of implied warranties, and (iv) negligence/gross negligence/recklessness are disguised equitable indemnity claims under *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp*., 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015). (finding circuit court properly granted subcontractor's summary judgment on the general contractor's breach of contract and breach of warranty claims because they were not independent causes of action from the general contractor's equitable indemnity claim)[4]. Appellant's claims for express warranties, breach of implied warranties, and negligence/gross negligence are not independent from the equitable indemnity claim. Therefore, even if Judge Price did not specifically address these claims in the order, there is no prejudice or adverse ruling resulting from this omission. The claims in question amount to nothing more than an equitable indemnity claim, which Appellant themselves acknowledge was included in Respondent's motion.

II. JUDGE PRICE APPROPRIATELY EXERCISED HIS DISCRETION IN DECIDING THE MOTION FOR SUMMARY JUDGMENT, AS WELL AS THE MOTION TO ALTER OR AMEND JUDGMENT, VIA FORM 4 ORDER AS PERMITTED BY THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Judge Price did not err in granting summary judgment via Form 4 order. At the outset, the Court should decline to address this issue because it is without merit. *See* Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly

[4] This issue is further discussed in Lather's Issue V argument section.

without merit."). Even on the merits, the Court should find Judge Price appropriately exercised his discretion in issuing a Form 4 order pursuant to the South Carolina Rules of Civil Procedure and the decisions of this Court.

Appellant cites *Woodson v. DLI Props., LLC,* 406 S.C. 517, 753 S.E.2d 428 (2014), claiming it is better practice for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment. What Appellant fails to mention is the ensuing sentence that states "[h]owever, Rule 52, SCRCP, provides that "[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56...." *Id.* Thus, such findings and conclusions are not required as the parties provided requisite evidentiary material in their briefs for the trial court to make a proper decision. Here, Respondents filed a motion for summary judgment pursuant to Rule 56(c), and the rules expressly allowed the circuit court to rule upon this motion via Form 4 order without making specific findings of fact and conclusions of law. See Rule 52(a), SCRCP.

The circuit court's use of the Form 4 order was perfectly acceptable, and no further explanation was required because the parties fully briefed the issues below and created an ample record for this Court to conduct meaningful appellate review in this case. *See*, e.g., *Easterling v. Burger King Corp*., 416 S.C. 437, 453, 786 S.E.2d 443, 452 (Ct. App. 2016) (finding "[t]he circuit court acted within its discretion in issuing a Form 4 order" and stating "the parties provided an ample record for the court to conduct meaningful appellate review of the circuit court's grant of summary judgment and rule upon the merits of the case"); *Woodson v. DLI Props*., LLC, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014) (noting appellate courts apply the same standard as the circuit court under Rule 56(c), SCRCP, and

finding the court of appeals had "a sufficient record before it to permit meaningful appellate review and make a decision on the merits"); *Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) (stating "not all situations require a detailed order, and the [circuit] court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal").

This Court has already addressed Appellant's argument in the cases cited above, and this Court should decline Appellant's invitation to depart from the holdings in those cases. The record is complete in this matter and speaks for itself, and this Court has an ample record from which to conduct meaningful appellate review. See *Easterling*, 416 S.C. at 453, 786 S.E.2d at 452; *Woodson*, 406 S.C. at 527, 753 S.E.2d at 433; Porter, 372 S.C. at 568, 643 S.E.2d at 100; see also Rule 220(c), SCACR (asserting an "appellate court may affirm any ruling, order, decision [,] or judgment upon any ground(s) appearing in the Record on Appeal"). Accordingly, if the Court reaches the merits of this issue, it should affirm because the circuit court properly used Form 4 orders in granting summary judgment and denying Appellant's Rule 59(e) motion.

Regarding Lather Construction SC, Inc., the omission of its name from the Form 4 letter constitutes, at most, a harmless error. Lather Construction SC, Inc. was included in the motion and memorandum in support. Dismissing the cross-claims against Lather Construction, Inc. while excluding Lather Construction SC, Inc. given that both entities are represented by the same counsel and were listed in the motion and memorandum would result in an inconsistent decision.

III. APPELLANT'S RESERVATIONS REGARDING JUDGE PRICE'S PRESUMPTIONS OF FAULT WERE NOT PRESERVED FOR REVIEW, AND EVEN IF IT WAS PRESERVED FOR REVIEW JUDGE PRICE WAS PROPER IN GRANTING HIS MOTION FOR SUMMARY JUDGMENT.

A. The Appellant's reservations regarding Judge Price's presumptions of fault were not preserved for review.

Appellant argues that Judge Price improperly presumed that Appellant was at fault when Judge Price granted summary judgment in favor of the Respondents. However, the Appellant attempts to raise this argument for the first time on appeal and thus this argument was not preserved for appeal.

It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). While "a party is not required to use the exact name of a legal doctrine in order to preserve the issue," *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011), the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error, *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). If the party is not reasonably clear in his objection to the perceived error, he waives his right to challenge the erroneous ruling on appeal. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007). "To successfully preserve an issue for appellate review, the issue must be: (1) raised and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity." (*See* Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002).

In the present case the Appellant failed to present any evidence on the record regarding

Judge Price's alleged improper presumption of fault. Thus, this issue was not properly preserved for review by the Appellant.

B. Even if the Appellant's reservations regarding Judge Price's presumptions were preserved for review, Judge Price properly granted Respondents Hutton's and Lather's Motion for Summary Judgment.

A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record. *State v. Cheatham*, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct. App. 2002). "Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." *Id*. "It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias." *Id.* "Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature." *Id.* The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge. The Appellant Court's role is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, this Court must determine whether the trial court judge's behavior was so prejudicial that it denied the party a fair, as opposed to a perfect, trial. *United States v. Robinson*, 635 F.2d 981, 984 (2d Cir.1980), *cert. denied*, 451 U.S. 992, 101 S.Ct. 2333, 68 L.Ed.2d 852 (1981).

Appellant has not presented any evidence in the present case that Judge Price's presumed D.R. Horton was at fault in this case. Instead, the Appellant's argument wholly rests on the idea that Judge Price's ruling in *Dreier* was improper and so Judge Price's ruling in the present case must also be improper. *See Reading v. Ball,* 291 S.C. 492, 354 S.E.2d 397 (Ct. App. 1987). "The fact a judge rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his ruling." *Id.* The fact that Judge Price ruled against D.R. Horton

in the *Dreier* case makes no indication that Judge Price presumed D.R. Horton was at fault in the present case. Therefore, this argument by the Appellant is without merit.

C. Summary judgment is proper as to D.R. Horton's cross-claim for equitable indemnification against Lather because D.R. Horton has unclean hands.

Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. *Town of Winnsboro v. Wiedeman–Singleton, Inc*. (*Winnsboro I*), 303 S.C. 52, 398 S.E.2d 500 (Ct.App.1990), aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992) (*Winnsboro II*). If the second party is also at fault, he comes to court without clean hands and has no right to indemnity. *Id*. The doctrine of unclean hands bars a party from recovering in equity if they acted unfairly in the matter that is the subject of litigation. *Inglese v. Beal*, 403 S.C. 290, 742 S.E.2d 687 (S.C. Ct. App. 2013). The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault. *See Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971); *Winnsboro I, supra*.

A party opposing a summary judgment motion on an indemnification claim, even though the motion is based primarily upon the complaint, has the two-fold burden of demonstrating a genuine issue of material fact regarding the opposing party's lack of liability and a genuine issue of material fact regarding the moving party's liability. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 64-65, 518 S.E.2d 307 (S.C. Ct. App. 1999).

In *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.* the court held that a manufacturer and distributor of a woodchipper were joint tortfeasors, thus the distributor could not meet its two-fold burden meaning summary judgment in favor of the manufacturer was proper. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). In this case, Wood/Chuck Chipper Corporation (hereinafter "Wood/Chuck")

manufactured a woodchipper known as a Model Series V Heavy Duty Chipper (hereinafter "Woodchipper"). *Id*. at 57-58, 518 S.E.2d at 304. The Woodchipper ended up in the possession of a distributor Vermeer Carolina's, Inc., (hereinafter "Vermeer") who sold a used version of the Woodchipper to Elbert Causey. *Id*. Subsequently Mr. Causey's right hand was amputated by the Woodchipper, and he brought suit against Vermeer. *Id*. Vermeer settled with Mr. Causey and sought to recover from Wood/Chuck through equitable indemnification. *Id*. Wood/Chuck filed motion for summary judgment regarding the cross claims and claimed that the parties were joint tortfeasors. *Id*. This motion was granted by the trial court and upheld by the appellate court. *Id*. at 68-69, 518 S.E.2d at 309-310.

Here, Lather and D.R. Horton are joint tortfeasors and D.R. Horton has unclean hands in this matter. D.R. Horton selected the site location for the Development, including the property at issue in the present case. (O'Sako Dep. 46). This location was allegedly riddled with garbage and other loose products which are alleged to have caused the damage at issue in this case. Further, D.R. Horton hired all of the contractors for the Development, oversaw all of the work performed at the Development, and had employees on site weekly. Specifically, Jared O'sako Appellant's land development project manager for the Development, testified to being on site regularly. (O'Sako Dep. 47). Additionally, the Appellant admitted to failing to supervise its hired contractors during the grading process of the Development. (O'Sako Dep. 12). Thus D.R. Horton comes to the table with unclean hands and at minimum in this case becomes a joint tortfeasor.

Here D.R. Horton has failed to meet either of its burdens. D.R. Horton has not shown a genuine issue of material fact exist regarding their lack of liability, nor has D.R. Horton provided any evidence supporting Lather's liability in the present case. D.R. Horton is not without fault

and has unclean hands, thus they cannot state their claim for equitable indemnity against Lather and Judge Price's grant of summary judgment should be affirmed.

IV. THE CONSTRUCTION CONTRACT BETWEEN RESPONDENT AND APPELLANT IS UNLAWFUL.

A. S.C. Code Ann. § 32-2-10 contemplates the duty to defend.

S.C. Code Ann. § 32-2-10 sets forth:

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

Contrary to Appellant's belief that damages resulting from the duty to defend are separate by statute, Courts within South Carolina have specifically held that the damages resulting from a duty to defend are encompassed by indemnity. *See Addy v. Bolton*, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971) (holding that in actions brought where the duty to indemnify arises under contract, reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses); *see also Columbia/CSA-HS Greater Columbia Healthcare Sys., LP, v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n.*, 411 S.C. 557, 568, 769 S.E.2d 847, 852 (2015) (holding the innocent party's right to *sue for indemnification*

accrues when it sustains damages, either by paying an injured party on behalf of the tortfeasor or by *incurring attorneys' fees from defending itself in the underlying tort suit*).

Section 32-2-10 specifically excludes insurance contracts and the applicability of any insurance-related caselaw is therefore dubious at best.[5] Therefore, Section 32-2-10 *must* contemplate the duty to defend within the term "indemnify." *See* S.C. Code Ann. § 32-2-10; *Addy*, 257 S.C. at 34, 183 S.E.2d at 710; *see also Greater Columbia Healthcare*, 411 S.C. at 568, 768 S.E.2d at 852.

B. Section 10 of the Contract was unenforceable under S.C. Code Ann. § 32-2-10 and *Concord & Cumberland*.

Section 32-2-10 prohibits indemnification of the indemnitee's own negligence. In *Concord & Cumberland*, this Court held the contractual language did not show a "clear and unequivocal" intent for Munoz to indemnify Superior for Superior's own negligence and was therefore unenforceable. *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. Where contractual language purports to make one party indemnify another for the negligence of the indemnified party, these terms must be set forth in terms under a heightened standard of "clear and unequivocal." *Id.* at 648–49, 819 S.E.2d at 171 (holding deterrence is the policy basis for the heightened standard of clear and unequivocal standard); *see also id.* at 658 n.6, 176 n.6 (holding no precedent has upheld indemnity provisions that can meet the "clear and unequivocal" test).

The South Carolina Independent Contractor Agreement between Lather and Horton

[5] However, even in insurance law, this Court has made statements such as "[a]n insurer that breaches its duty to defend and indemnify the insured may be held liable for the expenses the insured incurs in providing for his own defense." *Unisun Ins. Co. v. Hertz Rental Corp.*, 312 S.C. 549, 436 S.E.2d 182, 186 (Ct. App. 1993). Thus showing that even an in insurance context, this Court has still blurred the lines (if not outright conflated the two) between indemnity and the duty to defend.

(hereinafter “the Contract”) set forth the following provisions:

> 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 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 TIIE 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 OK 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 CONTRATOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

(Contract p.4 §§ 10.1–10.2). (emphasis added). D.R. Horton's Contract with Lather does exactly what Section 32-2-10 and *Concord & Cumberland* prohibit. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. The language in the Contract is *not* the exception to the experience of this Court—every reviewed provision has failed *Concord & Cumberland's* test, and so does this one. *See Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. While the contract purports to exclude liability for D.R. Horton's sole negligence, the provisions contain a broad requirement of indemnification and a duty to defend D.R. Horton no matter whether Lather was ultimately liable. *See* S.C. Code Ann. § 32-2-10; *Concord &*

Cumberland, 424 S.C. at 658, 819 S.E.2d at 176. Furthermore, even if § 10.1 limits this in any way, § 10.2 grants D.R. Horton the right to choose, *in its own absolute discretion*, whether to defend *any claim* that may be asserted, requiring "reimbursement" from Lather for "all expenditures" that Horton may incur in doing so. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. This language necessarily includes defending claims resulting from D.R. Horton's sole negligence, in violation of Section 32-2-10 and *Concord and Cumberland*. *See* S.C. Code Ann. 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176.

Appellants cite *Midland Ins. Co. v. Delta Lines, Inc.*, 530 F. Supp. 190 (D.S.C. 1982), claiming the contract cannot violate public policy because of "the parties' inclusion of insurance in their contract". Ap. Br. at 25. Here, although the Contract does include the requirement for insurance, an insurance provision does not prevent a contract from violating public policy. *See Fed. Pac. Elec. v. Carolina Prod. Enters*., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)[6] (South Carolina Court of Appeals chose to not follow *Midland Ins. Co. v. Delta Lines, Inc.*, where both parties included an insurance provision in their contract). The contract violates public policy because Appellant does not clearly and unequivocally express the intention to be indemnified for its own concurrent negligence. *See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC,* 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).

[6] *Fed. Pac. Elec. v. Carolina Prod. Enters*., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). In this case, the court declined to follow *Midland Ins. Co. v. Delta Lines, Inc.*, 530 F. Supp. 190 (D.S.C. 1982) and instead applied the standard of *Murray v. The Texas Co*., 172 S.C. 399, 402, 174 S.E. 231, 232 (1934), that held "[A] provision [in] a contract relieving one of the parties thereto from liability for ... its own negligence should be clear and explicit."

Thus, reading Section 10 of the Contract as a whole, it fails the "clear and unequivocal" standard required by this Court, along with every other provision that has come before this Court. *See Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. Therefore, the provision is unenforceable as a matter of law, and this Court should affirm the ruling of the trial court.

C. Section 10 of the Contract was an unenforceable contract of adhesion.

Adhesion contracts are standard form contracts offered on a take-it or leave-it basis with terms that are not negotiable. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 362 (2001). These contracts are not per se unconscionable under state law; however, where there is an absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive no reasonable person would make them, and no fair and honest person would accept them, adhesion contracts are unenforceable as against public policy. *Id.*

The provisions at issue between Respondents and D.R. Horton are unconscionable and unenforceable as a matter of public policy. *See Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (setting forth the elements of an unenforceable adhesion contract). The evidence in the record shows Lather had no meaningful choice—the contract was "take-it or leave-it." *See Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (holding there must be an absence of meaningful choice on the part of one party due to one-sided contractual provisions). D.R. Horton is an extremely large homebuilder who builds homes throughout not only South Carolina, but the entire country, and Respondent Lather was a small, local contractor who is no longer even in business. Respondent Lather had no real bargaining power with D.R. Horton.

Furthermore, the terms required by D.R. Horton are so one-sided and oppressive that no reasonable person would make them, and no fair and honest person would accept them. *See Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (holding that the terms of the contract must be so oppressive and unreasonable that no person would make them, and no fair and honest person would accept them). The contractual provisions violated Section 32-2-10 and *Concord & Cumberland*. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. No reasonable person would propose contractual provisions in direct violation of South Carolina law, and no fair or honest person would accept them. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. It stands in direct contention with being reasonable, fair, and honest that one would require indemnity for their sole negligence in violation of South Carolina law. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. Therefore, the provisions were unconscionable and unenforceable, and this Court should affirm the ruling of the trial court.

V. APPELLANT'S CROSS-CLAIMS FOR BREACH OF CONTRACT, BREACH OF EXPRESS WARRANTIES, BREACH OF IMPLIED WARRANTIES, AND NEGLIGENCE/GROSS NEGLIGENCE WERE PROPERLY BEFORE THE COURT WHEN JUDGE PRICE DISMISSED THEM.

A. Appellant's claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/ gross negligence were properly before the Court when Judge Price dismissed them.

Appellant argues that their claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/ gross negligence were not properly before the court. It is accurate that in Hutton's original Motion for Summary Judgment (ROA) [Hutton's Landscapes, Inc.'s Motion for Summary Judgment, filed December 9, 2021] the only claims addressed were

those for contractual and equitable indemnity. However, in Lather's Motion to join in Hutton's Motion for Summary Judgment, counsel for Lather used the language of "Cross-Claims of D.R. Horton" and "claims asserted by D.R. Horton against Lather" (ROA) [Lather's Joinder in Hutton's Landscapes, Inc.'s Motion for Summary Judgment, filed on January 3, 2022]. This was a reference to all of DR Horton's cross claims against Lather.

In Lather's memorandum in support of their Motion for Summary Judgment, Lather requested judgment as a matter of law to "all causes of action asserted by D.R. Horton". (ROA) [Lather's Memorandum in Support of Its Motion for Summary Judgment]. Lather then included an argument section in the memorandum specifically addressing the dismissal of Appellant's claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/ gross negligence under the holding of *Stoneledge*. *See Stoneledge at Lake Keowee Owners ' Ass'n, Inc. v. Clear View Constr., LLC,* 413 S.C. 615, 624, 776 S.E.2d 426 (Ct. App. 2015) (holding that claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/ gross negligence are merely disguised indemnity claims).

Furthermore, at the March 3, 2022, hearing at which Respondents' Motion for Summary Judgment was heard, Respondent, Hutton's counsel referenced "Our motion for summary judgment as to D.R. Horton's cross-claims. Your Honor, D.R. Horton has asserted cross-claims against Hutton's Landscapes for contractual indemnity, equitable indemnity, and their remaining cross-claims that we believe are merely a disguised equitable indemnity *for breach of contract, breach of warranties and negligence*." (ROA) [Hearing, March 3, 2022, Tr. p. 3 lines 5-11.] Arguments regarding all of Appellant's cross-claims against the Respondents were presented by all three parties (D.R. Horton, Hutton, and Lather) and heard by Judge Price at this hearing.

D.R. Horton further argues that its due process was violated because D.R. Horton was not provided notice or opportunity to defend itself regarding Lather's argument to dismiss D.R. Horton's claims breach of contract, breach of express warranties, breach of implied warranties, and negligence/ gross negligence based on the holding of *Stoneledge*. *Id*. However, this argument is also without merit. D.R. Horton was provided with notice through Hutton's original Motion for Summary Judgment, Lather's Motion to join in Hutton's Motion for Summary Judgment, and Lather's memorandum in support of their Motion for Summary Judgment Lather. Further D.R. Horton had *actual notice* of this argument shown in D.R. Horton's Bench Brief filed on March 3, 2022, in response to Hutton and Lather's Motions for Summary Judgment. In this Bench Brief, D.R. Horton specifically addresses Lather's argument relating to *Stoneledge* stating, "*Stoneledge* also doesn't apply. That case was very fact specific and pleading specific. These were no indemnification clause for the Court to enforce in *Stoneledge* because none were produced at the time the work was done. That case only has to do with equitable indemnification. The opinion is not a bright line test for all contract indemnification or equitable indemnification it's a limited decision on specific facts." (ROA) [D.R. Horton's Bench Brief]. In responding and acknowledging Lather's argument to dismiss D.R. Horton's claims, D.R. Horton acknowledges that these claims were properly before the Court when Judge Price granted his Motion for Summary Judgment. D.R. Horton was provided with provided adequate notice or opportunity to defend itself regarding Lather's argument to dismiss D.R. Horton's claims breach of contract, breach of express warranties, breach of implied warranties, and negligence/ gross negligence, thus D.R. Horton's right to due process was not violated and these claims were properly dismissed.

Therefore, the Appellant's claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/ gross negligence were properly before the Court when Judge Price granted summary judgment in favor of Lather.

B. Judge Price properly dismissed Appellant's cross-claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence.

Appellant's claims for breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence were merely disguised equitable indemnity claims. Under *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015), these claims are merely disguised as equitable indemnity claims. *See id*. (finding circuit court properly granted subcontractor's summary judgment on the general contractor's breach of contract and breach of warranty claims because they were not independent causes of action from the general contractor's equitable indemnity claim). Therefore, Appellant's claims for express warranties, breach of implied warranties, and negligence/gross negligence were properly dismissed by Judge Price.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

(Signature page to follow)

Respectfully submitted,

ROSS & CRISTALDI, LLC

s/ *Scott H. Winograd*
Jeffrey A. Ross, Bar No.: 74254
Philip P. Cristaldi, Bar No.: 102219
Scott H. Winograd, Bar No.: 103483
765 Long Point Road, Suite 101
Mt. Pleasant, South Carolina 29464
Phone: (843) 329-4040
Email: jross@rclawsc.com
pcristaldi@rclawsc.com
swinograd@rclawsc.com
Attorneys for Respondent Lather Construction SC, Inc. and Lather Construction, Inc.

Mt. Pleasant, South Carolina
September 20, 2024

Other counsel of record:

Emily Lucey, Esq.
Carmen V. Ganjehsani, Esq.
Megan C. White, Esq.
Richardson, Plowden & Robinson, PA
235 MaGrath Darby Blvd Suite 100
Mt. Pleasant, SC 29464
egiffordlucey@richardsonplowden.com
cganjehsani@richardsonplowden.com
mwhite@richardsonplowden.com
Attorneys for Hutton's Landscapes. Inc.

John T. Crawford, Jr., Esq.
Jason Michael Imhoff, Esq.
Kenison Dudley & Crawford, LLC
704 E. Mcbee Ave.
Greenville, SC 29601
crawford@conlaw.com
jimhoff@conlaw.com
and
Carl F. Muller, Esq.
P.O. Box 1717
Greenville, SC 29602-1717
carl@carrlmullerlaw.com
Attorneys for D.R. Horton, Inc.