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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

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

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

v.

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

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

v.

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

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

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

APPELLANT'S MOTION TO STRIKE PORTIONS OF THE BRIEFS OF RESPONDENTS IBP ASSETS, LLC D/B/A BLUE RIDGE BUILDING PRODUCTS AND GALE INDUSTRIES, INC.

Appellant D.R. Horton moves to strike those portions of Respondents IBP Assets, LLC D/B/A Blue Ridge Building Products' and Gale Industries, Inc.'s Briefs that include statements, references, or events that occurred after the date of the Orders on Appeal (August 23, 2023) or

include references to pleadings not provided to the trial court.[1] Such items are not properly includable in Respondents' Briefs and are highly prejudicial. This is especially true of Respondents' inclusion of a jury verdict *that occurred more than three weeks* after the Orders on Appeal.[2] In support of this Motion to Strike, Appellant states as follows.

The Court of Appeals set August 23, 2023 as the date of the Order on Appeal and limited the Record on Appeal to materials filed with the trial court on or before that date. Order dated October 21, 2024. The Court also ordered Appellant to strike from its Reply Brief anything that referenced material that occurred after August 23, 2023.[3] Referencing Rule 210(c), SCACR, the Order states that, "Appellant's May 13 reply brief is stricken to the extent it references any of the stricken items." The stricken items included references to the jury verdict that Appellant discussed in its Reply Brief in response to the allegations about the jury trial and verdict made by Respondents.[4] Appellant does not complain that it was ordered to strike its discussion about the jury trial or the verdict. Appellant simply asks the Court to order Respondents to strike all such statements from their Briefs, as well. Otherwise, the briefing is lopsided with Respondents' Briefs discussing a jury trial, verdict, and related finding of negligence while Appellant's Brief has been ordered silent on these issues.

The Court may wonder how did we get here? It started when IBP discussed the jury verdict at length and repeatedly in its Brief and designated it for the Record on Appeal. Gale did, too. It was improper to include the jury verdict and the related negligence discussion about it in

[1] This is Appellant's first motion on this issue.
[2] The Court of Appeals struck the jury verdict from the Record on Appeal and the discussion in Appellant's Reply brief. October 21, 2024.
[3] The Court also ordered Appellant to strike such material from its Supplemental Designation of Record and from the Record on Appeal as to all parties. The October 21, 2024 Order amended an earlier August 23, 2024 Order.
[4] Additionally, "[a]ny items included in Respondents' designations of matter that were not presented to the lower court shall also be excluded from the record on appeal, including the jury verdict and any portions of the trial transcript recorded after August 23, 2023." Order, October 21, 2023, fn 2.

their Briefs. The tactic of including the jury verdict and negligence discussion violated the rules and left Appellant with a catch 22 dilemma. Ignore the flagrant violations and do nothing; or respond. Appellant had to respond because the jury verdict is highly prejudicial and was rendered after the Order on Appeal and after Appellant had already settled with the Plaintiff. Because the rules require Appellant to include in the Record on Appeal everything every party designates to be included, Appellant could not avoid the prejudice created by Respondents when they designated the post-Order on Appeal material. Therefore, Appellant did its best to explain in its Reply Brief why the jury verdict should not be considered against it. But as it stands now, Appellant was ordered to strike its explanation from its Brief, while Respondents' Briefs include the same statements they made initially, which started everyone on this path. It is ironic that Respondents wrongly included the jury verdict and discussed it extensively in their Briefs and then filed a motion to strike Appellant's Brief when Appellant defended against their tactic. The Briefs are now unbalanced because Respondents' Briefs include post-Order on Appeal material while it has all been struck from Appellant's Brief.

For consistency, fairness, and to avoid prejudice to Appellant, Appellant moves to strike those portions of Respondents' Briefs that include any references to the jury trial, jury verdict, or inferences, conclusions, assertions, or allegations that Appellant was found negligent or solely negligent that either Respondent's Brief alleges. Leaving in the sentences about a jury verdict or a negligence judgment that occurred after the Order on Appeal and after D.R. Horton had already settled with the Plaintiffs is only designed to prejudice D.R. Horton to the appellate panel. Additionally, any references to anything that occurred after August 23, 2023 or any pleadings not before the trial court should also be stricken from the Respondents' Briefs as such items were stricken from Appellant's Brief and from the Record on Appeal pursuant to the Court of Appeals

Order. Order October 21, 2024. For example, no pleadings were provided to the trial court regarding declaratory judgment actions that Gale and IBP allege were filed in Greenville County, South Carolina. The trial court did not have such pleadings when the Orders on Appeal were issued. Additionally, Gale made references to discovery responses in its Brief that were not provided to the trial court and those should also be stricken. Attachment A includes the pages with strikethroughs for each of IBP's and Gale's Briefs with the relevant sentences that should be stricken. The use of the inappropriate material is extensive in IBP's brief – something that might not be readily apparent until one examines the strikethrough analysis in Attachment A.

CONCLUSION

Appellant D.R. Horton asks this Court to order Respondents to strike the sentences from their Briefs as marked in Attachment A. Appellant has requested only necessary changes to the Briefs.

October 29, 2024

Respectfully,

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ATTACHMENT A

Strikethrough Pages of Respondents' Briefs

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THE STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2019-CP-04-01942
Appellate 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 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 Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danler, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC. A/K/A M&L General Construction, Inc.; M&Lreyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC, NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, LLC; P&L Enterprises, LLC; Probuild Company, A/K/A Probuild

Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc, A/K/A Gale Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc., Dupree Plumbing Company, Inc.; Willow Tree Landscaping, Inc., ...Third-Party Defendants,

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

FINAL BRIEF OF RESPONDENT IBP ASSETS, LLC d/b/a BLUE RIDGE BUILDING PRODUCTS

July 2, 2024

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Blue Ridge Building Products

SECONDARY AUTHORITIES

~~RELATED PENDING SUITS~~

77 and n.1.) The court further found that DR Horton's third-party claims therefore collapsed into indemnity, and the subcontract was not clear and unequivocal. (R. pp. 73-77.)

The trial court's formal Order found that Blue Ridge did not work on the class representative's home. (R. p. 72, ¶ 4.) Plaintiff stipulated that gutters and insulation are not included in the class claims. (Id., ¶ 5.) The court further found that leaky doorknobs were not a class defect and, in any event, Blue Ridge did not install the one doorknob that leaked. (Id. at ¶ 6.) The trial court ruled that, because Blue Ridge's subcontract (ICA) lacked a defined scope of work, DR Horton could not prove the allegations in this case were subject to the indemnity agreement. (R. p. 72 at ¶ 1, p. 77.) Furthermore, the trial court ruled that DR Horton failed to present evidence of damages. (R. pp. 74-75.) This appeal followed.

~~Judge Sprouse's subsequent rulings on directed verdict motions were not to the contrary. Plaintiffs (who had assumed DR Horton's indemnity claims due to a settlement) argued the remaining subcontractors' dispositive motions should be denied because they had derivative liability. (R. p. 1509, lines 9-17.) Plaintiffs' counsel distinguished Respondents' dismissal because they "had no derivative liability as conceded by DR Horton." (Id., lines 15-16.) In the paragraph above the one quoted in DR Horton's brief on page 14, the trial court confirmed that Respondents' motions were granted because there was no evidence Respondents were negligent. (R. p. 1514, lines 12-22.)~~

~~After Blue Ridge's scope of work was formally excluded from the class claims, DR Horton proceeded to trial. The jury found in favor of Plaintiffs and awarded them $15,000,000 on their Negligence claim against DR Horton. (R. p. 90.)~~

STANDARD OF REVIEW

Appellate courts apply the same standard as the trial court when reviewing rulings on motions for summary judgment. USAA Prop. and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661

Finally, DR Horton, as the general contractor, was in a position to know which subcontractors' scopes of work were implicated. DR Horton's "Vendor Spend" spreadsheet was used throughout the litigation for this purpose. (R. p. 391-437; p. 1314, lines 2-12; see also DRH Init. Br., p. 12.) Blue Ridge's dispositive motion simply forced DR Horton to admit what it knew all along—DR Horton had no evidence that Blue Ridge's work was implicated.

This Court could affirm on the basis of Blue Ridge's first two arguments alone. The arguments DR Horton made in this appeal do not get around that.

III. DR Horton cannot avoid the "clear and unequivocal" standard.

~~DR Horton's argument that it had no sole or concurrent negligence is disingenuous.~~ The argument goes that due to the Plaintiffs' Stipulation, neither DR Horton nor Blue Ridge were found to be negligent. (DRH Init. Br. at p. 15.)

DR Horton's argument produces an absurd result. Under DR Horton's theory, DR Horton has enhanced ability to enforce indemnity agreements against subcontractors whose work is not alleged to be defective because the "clear and unequivocal" standard would not apply.

In Concord and Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), this Court held that the "clear and unequivocal" standard applies when an indemnitee seeks indemnity for his own negligence. Id. at 649, 819 S.E.2d at 172. By statute, DR Horton cannot recover indemnity for its own sole negligence. S.C. Code Ann. § 32-2-10. The rule of strict construction (or "negligence rule") requires DR Horton to satisfy the "clear and unequivocal" standard to recover indemnity for its own concurrent negligence under Concord and Cumberland.

As DR Horton acknowledged, the Stipulation confirmed that Plaintiff was not claiming Blue Ridge's work is defective. (R. p. 970; p. 1463, lines 16-19.) DR Horton does not contest the

dismissal of Blue Ridge in this appeal. Nor does DR Horton seek indemnity for a judgment or settlement against it due to Blue Ridge's negligence.

The claims against which DR Horton is seeking a defense in this appeal are those brought by the Zitek plaintiffs. The Plaintiffs alleged DR Horton was negligent in their Complaint. (R. pp. 93-94, 103-04.) In fact, Plaintiffs did not sue anyone else. "The Appellant spent considerable money on attorney's fees and expenses during four years of complex and difficult class-action litigation . . . ." (Resp't. Init. Br., p. 11.) ~~Nevertheless, the jury found DR Horton negligent as to those claims. (R. p. 90.)~~ DR Horton's argument is merely smoke and mirrors.

Thus, DR Horton's third-party claim seeks indemnification ~~for its own negligence. The "clear and unequivocal" standard applies because DR Horton was alleged and proved to be solely or concurrently negligent.~~ See 57A Am. Jur. 2d Negligence § 497 (May 2024 Update) (defining "concurrent negligence" as a single injury caused by the negligence of two or more defendants).

IV. DR Horton's position violates Section 32-2-10.

DR Horton's argument also runs afoul of South Carolina's anti-indemnity statute. DR Horton's claim is barred by statute because it seeks indemnification for the sole negligence of DR Horton and its other subcontractors.

South Carolina's anti-indemnity statute provides that indemnity agreements in the building construction context that require indemnification for the sole negligence of either the indemnitee or its independent contractors are unenforceable and against public policy. S.C. Code Ann. § 32-2-10. Due to the anti-indemnity statute, indemnity claims are predicated upon a finding of negligence. To the extent DR Horton seeks indemnification for its own sole negligence or the sole negligence of any of DR Horton's other subcontractors on this project, DR Horton's indemnity agreement is unenforceable because it violates Section 32-2-10.

DR Horton knows this. In D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, the trial court made the following conclusion of law:

> 24. Applicable law does not permit BFS to indemnify DRH for judgments based on defects in the work of others. See S.C. Code Ann. § 32-2-10 (prohibiting agreements whereby subcontractor agrees to indemnify general contractor for general contractor's sole negligence or the negligence of its "independent contractors.").

No. 2010-CP-10-10355, 2014 WL 12783398 at *4 (Charleston County Comm. Pl. Sept. 5, 2014). This Court affirmed that ruling:

> However, we agree that the indemnification clause is void as against public policy to the extent it purports to require BFS to indemnify D.R. Horton for damages caused by its negligence or the negligence of its subcontractors.

D.R. Horton, Inc. v. Builders FirstSource-SE Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018).

Plaintiffs sued a single defendant for all damages claimed in this action. (R. pp. 93-94, 103-04.) ~~The jury found in favor of Plaintiffs and awarded them $15,000,000 on their Negligence claim. (R. p. 90.) DR Horton's negligence was responsible for all of the injuries the Plaintiffs claimed at trial.~~

The trial judge granted summary judgment to Blue Ridge upon a finding that none of Plaintiffs' allegations concerned Blue Ridge's work. (R. pp. 72, 77.) DR Horton did not challenge that finding in this appeal. ~~Thus, none of the damages awarded were the result of Blue Ridge's negligence.~~

The defense costs DR Horton seeks to recover from Blue Ridge were incurred in defending DR Horton against claims arising from the sole negligence of DR Horton and its other independent contractors. Thus, DR Horton's indemnity claim against Blue Ridge is unenforceable. D.R. Horton, 422 S.C. at 152, 810 S.E.2d at 45.

it incurred in defending Plaintiffs' claims against DR Horton due to Blue Ridge's (purported) alleged negligence. DR Horton did not identify a single court filing or any evidence that DR Horton defended Blue Ridge and its scope of work.

DR Horton cites no record evidence that it ever tendered its defense to Blue Ridge. The first notice to Blue Ridge was the service of DR Horton's third-party claim.

Under the American rule, the costs DR Horton incurred in prosecuting its third-party claims against Blue Ridge are not Blue Ridge's responsibility. DR Horton's litigation to enforce the indemnity agreement was at DR Horton's own expense.

Furthermore, DR Horton's mischaracterization that, merely because Blue Ridge did not defend, DR Horton was forced to shoulder the defense burden alone, lacks evidentiary support. There were numerous other defendants in the case. (See R. p. 1322, lines 5-16.) ~~DR Horton obtained a four-million jury verdict against another third-party defendant. (R. p. 90.) Surely those culpable subcontractors owed DR Horton a defense.~~

DR Horton never presented evidence of reputational harm. It is difficult to discern how DR Horton's reputation could be harmed by work not at issue in the class claims.

VIII. The trial court properly granted summary judgment as to all causes of action.

DR Horton's causes of action against Blue Ridge for equitable indemnity, breach of contract, breach of express warranties, breach of implied warranties, and negligence were properly dismissed. (R. p. 1322, lines 2-16.) The uncontested finding that Blue Ridge's work was not at issue in the class claims disposes of all causes of action except contractual indemnity. DR Horton cannot prove a breach of contract, warranty, or legal duty.

Furthermore, case law bars this type of claim. DR Horton alleged that "to the extent that Plaintiff proves that the work was not performed correctly," Blue Ridge breached its subcontract. (R. p. 321, ¶ 115.) This Court has held that a contingent cause of action based solely on liability

to a third party is a disguised indemnity claim. Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 622, 776 S.E.2d 426, 430 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 637, 776 S.E.2d 434, 438 (Ct. App. 2015). DR Horton's third-party claim for Breach of Contract is based on contingent allegations that are substantially similar to those in Stoneledge. See 413 S.C. at 635-36, 776 S.E.2d at 437.

All theories under which DR Horton demanded an immediate defense are subsumed under its indemnity claims. As this Court has explained, a right of indemnity arises when the wrongful act of the indemnity defendant has involved the indemnity plaintiff in litigation with others, making it necessary for the indemnity plaintiff to incur legal expenses to protect its interest. Stoneledge. See 413 S.C. at 625, 776 S.E.2d at 431. Without the Zitek plaintiffs' class action against DR Horton, DR Horton would have no cause for demanding a defense from Blue Ridge. As a matter of law, DR Horton has no standalone breach of contract claim based on an alleged duty to defend. Unless suit is filed against DR Horton, there is nothing to defend.

DR Horton has no claim for equitable indemnity. To recover under an equitable indemnity theory, DR must prove three elements: (1) Blue Ridge was at fault in causing the Zitek plaintiffs' damages; (2) DR Horton was not at fault for those damages; and (3) DR Horton incurred expenses that were necessary to protect its interest in defending against the Zitek plaintiffs' claim. Stoneledge. See 413 S.C. at 625, 776 S.E.2d at 432.

DR Horton's equitable indemnity claim fails for two reasons. ~~First, DR Horton has unclean hands because it was found negligent for all damages claimed at trial. (R. p. 90.)~~ Stoneledge, 413 S.C. at 625-26, 776 S.E.2d at 432. Second, Blue Ridge was not at fault ~~for any of those damages~~,

~~Moreover, DR Horton's dispute with Blue Ridge's insurance carrier is the subject of a separate pending suit. D.R. Horton v. American Guar. and Liab. Ins. Co., *et al.*, No. 2023-CP-23-01810 (Greenville County Comm. Pl.).~~

Moreover, DR Horton's attempt to impose an immediate duty to defend may run afoul of insurance regulation. Insurance is regulated by the South Carolina Department of Insurance. See S.C. Code ¶ 38-5-10. By statute, "insurance" is defined as "a contract where one undertakes to indemnify another or pay a specified amount upon determinable contingencies." S.C. Code Ann. § 38-1-20(25). Liability insurers undertake two primary duties: the duty to defend and the duty to indemnify. Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977). Insurers owe a separate and distinct duty to defend, regardless of whether the insurer is obligated to pay for damages. Id.

DR Horton cites insurance law against Blue Ridge. (DRH Init. Br., pp. 22-23.) It contended that the summary judgment for Blue Ridge was "a windfall" because "forfeitures of insurance contracts are not favored." (Id. at p. 23.) Blue Ridge is not an insurance company. This attempt to impose a "duty to defend" in the absence of any liability exposure caused by Blue Ridge's work falls within the definition of insurance and improperly seeks to render Blue Ridge DR Horton's liability insurer.

The only remedy DR Horton seeks in this appeal is defense costs. Yet this is precisely what DR Horton cannot obtain under applicable law and the circumstances of this case. Severance of the offending provision would not improve DR Horton's position.

X. The remaining orders on appeal do not impact the outcome.

DR Horton did not raise issues concerning the other trial court orders referenced in the Notice of Appeal. Any arguments relating to those motions are waived. Stoneledge. 413 S.C. at

642, 776 S.E.2d at 441. The trial court's July 26, 2023 informal order and its order denying DR Horton's motions for reconsideration have been addressed above.

The trial court's Amended Scheduling Order filed February 15, 2023 was vacated by the Order dated May 8, 2023. These orders concerned Blue Ridge's Motion to Make a More Definite Statement, which was mooted by DR Horton's Second Amended Answer and Third-Party Claim.

CONCLUSION

The trial court ruling that the Zitek Plaintiffs' claims did not arise out of, result from, or relate to Blue Ridge's work is not contested in this appeal. The indemnity agreement in Blue Ridge's subcontract does not clearly and unequivocally require Blue Ridge to defend DR Horton against claims that do not arise from, result from, or relate to Blue Ridge's work. If it did, the indemnity agreement violates South Carolina's anti-indemnity statute by potentially requiring Blue Ridge to indemnify DR Horton for the negligence of DR Horton or its other subcontractors. Even if the indemnity agreement is enforceable, it should not be enforced under the circumstances of this case because DR Horton knew before it sued Blue Ridge that Blue Ridge's scope of work was not included in the class claims, which by then had been limited to those issues raised in the Plaintiffs' expert reports.

South Carolina law does not allow indemnification against the sole negligence of the indemnitee or other subcontractors. Amounts expended in defending claims arising from the indemnitor's negligence can only be ascertained after liability is established. ~~DR Horton's negligence was responsible for all of Plaintiffs' damages and Blue Ridge was found not negligent.~~ Therefore, Blue Ridge does not owe a duty to defend under the indemnity agreement even if it is enforceable. Accordingly, the trial court ruling in favor of Blue Ridge should be affirmed.

"There exists in every contract an implied covenant of good faith and fair dealing." Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). It was one thing for DR

Horton to keep Blue Ridge in the case until Plaintiffs formally stipulated that Blue Ridge's work was not implicated in the class claims and the trial court granted Blue Ridge's motion for summary judgment. It is another for DR Horton to demand that Blue Ridge pay for DR Horton's prosecution of its third-party claims against it. Once Plaintiffs made it clear they were not proceeding upon all the defects alleged in their NOC letter and that the class claims did not involve Blue Ridge's work, DR Horton had no basis for continuing to insist upon indemnification from Blue Ridge. DR Horton was on notice that Blue Ridge's scope of work was not implicated in this suit before DR Horton sued Blue Ridge. DR Horton's continued prosecution against Blue Ridge is in bad faith.

Respectfully submitted,

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Columbia, South Carolina
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BRIEF OF RESPONDENT BUILDER SERVICES GROUP, INC. D/B/A GALE CONTRACTOR SERVICES

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., ……..…….Appellant,

vs

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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 Contractor Services; 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 Contractor Services)[1]; and IBP Asset, LLC d/b/a Blue Ridge Building Products; ……Respondents

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[1] This is in improper name identification the entity should be listed as *Builder Services Group, Inc d/b/a Gale Contractors Services*.

Hill, the dates the work was performed, and how much Gale was paid for the work. (Ex. 1 to Gale MIS of MSJ) (sampling work tickets and purchase orders). Gale did not work on every home in Rose Hill. (Ex. 1 to Gale's MIS of MSJ). Nor did Gale install garage doors and gutters, downspouts, and batt and blown insulation in each home because its scope of work varied. (Id.).

~~On April 14, 2023, Appellant filed its Amended Complaint for Declaratory Judgment action against several of the insurers involved in this matter including, Gale's insurer, Old Republic Insurance Company alleging several of these same issues with respect to the duty to defend. (DJ Action Am. Compl 04/14/2023)~~

On April 21, 2023, during a hearing before the Honorable R. Scott Sprouse, Plaintiff's counsel admitted that Plaintiff was making no claims regarding Gale's scope of work at Rose Hill. (Hearing Transcript, April 21, 2023: P. 52:ln. 16--24).

On May 1, 2023, Respondent filed its Motion for Summary Judgment (the "Motion") and a corresponding memorandum in support on July 10, 2023, requesting the Trial Court grant summary judgment as to all of D.R. Horton's crossclaims as it was clear from the Plaintiff that Gale's scope of work was not implicated in her damages. (Gale's MSJ 05/01/2023) and (Gale's MIS of MSJ 07/10/2023). On July 20, 2023, Plaintiff filed a written stipulation memorializing her counsel's admission that Plaintiff was making no claims related to Gale's scope of work at the April 21, 2023, hearing. (Plts' Stip 07/20/2023)

On July 21, 2023, the trial court heard arguments on the motions for summary judgment filed by various third-party defendants, including Gale's Motion. (Hearing Transcript, July 20-21, 2023: P. 157-173). The trial court dismissed D.R. Horton's negligence and breach of warranty claims against Gale during oral arguments and took Gale's Motion with respect to the parties' contractual dispute under advisement. (Hearing Transcript, July 20-21, 2023: P. 157-173).

The trial court issued a Form 4 Order granting summary judgment to Gale on July 28, 2023 (the "Form 4 Order"). (Form 4 Order 07/28/2023) The Form 4 Order did not explain why Respondent's Motion was granted; it only noted that the Motion was granted. (Id.)

On August 7, 2023, the trial court issued an Order granting summary judgment to Gale (the "Full Order"). (Order Granting Gale SJ 08/07/2023). The Full Order provides the reasoning for granting Gale's Motion, which included the following: Plaintiff stipulated that there were no allegations regarding Gale's work at Rose Hill; Appellant presented no evidence of a "standard agreement" with Gale that is referenced in the Addendum Contract; Appellant presented no evidence that the Addendum Contracts encompass the construction at Rose Hill; Appellant presented no evidence that it incurred any damages resulting from Respondent's work; Appellant presented no evidence that Gale was bound by the Indemnification Clause referenced in its Tender; and Appellant's claim for contractual indemnity failed pursuant to Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (2018) and violated public policy. (Id.) Appellant moved the Court to reconsider its August 7, 2023, Order and the Court denied the Motion to Reconsider. (Form 4 Order 08/18/2023) D.R. has never produced an Independent Contractor Agreement with Gale with respect to Rose Hill during the entirety of this litigation.

~~Plaintiff and Appellant settled during the trial of the underlying lawsuit; however, a jury rendered a verdict against Appellant and in favor of Plaintiff for the sum of $15,000,000.00 on Plaintiff's negligence cause of action. (Negligence Verdict 09/19/2023). Appellant's Declaratory Judgment action is still pending.~~

Again, the Appellant failed to cite anything in the record to support this statement. Additionally, there is no evidence in the record that supports DR Horton's claim of reputational harm. (Id. at p. 11.) Appellant asserts multiple facts and arguments related to insurance and the duty to defend that do not belong in this case ~~and are currently being plead in the Appellant's Declaratory Judgment Action. (DJ Action Am. Compl 04/14/2023)~~

There is no Independent Contractor Agreement or Standard Agreement executed by Gale included in the record for this matter because it has not been produced by the Appellant. (Record on Appeal) Despite, Appellant's assertions in its summary of facts Gale does not know its duties and obligations under any agreement with respect to Rose Hill because no enforceable contract has ever been provided by the Appellant. (Appellant's Brief, Footnote 3 makes it clear the Standard Agreement was not provided only Addendum Contracts) It is clear that there has been no Independent Contractor Agreement or Standard Agreement with respect to Rose Hill ever produced in this case.

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO RESPONDENT BECAUSE APPELLANT CAN PRODUCE NO UNDERLYING INDEPENDENT CONTRACTOR AGREEMENT BETWEEN THE PARTIES AND IS SEEKING INDEMNIFICATION FROM RESPONDENT BASED ON UNENFORCEABLE ADDENDUM CONTRACTS.

A. Appellant cannot produce an enforceable Independent Contractor Agreement between Appellant and Respondent.

1. South Carolina law requires a party to prove the existence of a contract before breach of the same is even considered.

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

(1992); Cain v. United States Insurance, Co., 232 S.C. 397, 102 S.E.2d 360 (1958).

2. There is no Independent Contractor Agreement between D.R. Horton and Gale concerning Rose Hill.

The universe of documents upon which Appellant relies for its claims against Gale are: 1) The "First Amendment to Master Addendum to Independent Contractor Agreement," executed on March 8, 2006 (Ex. 25 to Gale's MIS); 2) the "Master Addendum to Independent Contractor Agreement," executed on October 23, 2015 (Ex. 25 to Gale's MIS) (the foregoing two documents are collectively referred to herein as the "Addendum Contracts"); and 3) Plaintiff's Notice and Opportunity to Cure Improper Construction Conditions and Resulting Damages correspondence served December 11, 2019 (Ex. 26 to Gale's MIS) (the "NOC Letter").

Appellant contends that an indemnity provision in a purported Independent Contractor Agreement with Gale creates Gale's duty to defend and indemnify D.R. Horton and reimburse it for defense costs related to the litigation of this case, but it has never produced that agreement. (~~DRH resp. to Gale's discovery 03/29/2021~~; Appellant's Initial brief 02/08/2024; DRH MIO of MSJs 07/11/2023). In D.R. Horton's March 17, 2023 "Indemnification and Additional Insured Tender"(Ex. 27 to Gale's MIS) (the "Tender Letter to Gale 3/17/2023"), D.R. Horton asserts that Gale entered into an Independent Contractor Agreement with the following **irrelevant** indemnification clause:

> To the fullest extent remitted 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, … on account of damage to or loss of tangible or intangible property. 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. The defense duty is triggered by allegations in a lawsuit or other similar action, regardless of whether they are groundless, false or fraudulent, or alternatively by any facts (extrinsic to the allegations) not plead, or not pled with specificity, by the claimant. 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.

Ex. 27 to Gale's MIS, Tender Letter to Gale 3/17/2023.

Again, **D.R. Horton failed to produce a copy of any Independent Contractor Agreement with Gale**, or any agreement whatsoever, that contains this indemnification clause. ~~(DRH resp. to Gale's discovery 09/8/2021)~~.

The only contract documents produced by D.R. Horton are the Addendum Contracts. (Exhibit 25 to Gale's MIS, KDC 008451-008473; KDC 013229-013251). In the Addendum Contracts the indemnification language 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). Other than as set forth above, Contractor's Indemnification shall not apply (based on indemnity, insurance, warranty, strict liability or otherwise) to the extent that the Loss arises out of the work, negligence or misconduct of Builder or any other indemnitee as defined in the Standard Agreement, third parties, or Builder's (or any other indemnitee's) activities related to supervision of third parties. Except as set forth above, Contractor shall not be responsible to the extent that the Loss arises out of (a) accident, misuse, abuse or neglect by someone other than Contractor or its agents; or (b) alteration, repair or attempted alteration or repair by anyone other than Contractor or its authorized agent.
>
> Where Builder or other indemnitee as defined under the Standard Agreement (collectively "Indemnitee") demands indemnification for Loss falling within the terms of this indemnity, Builder may retain counsel of Builder's own choosing that is reasonably acceptable to Contractor. **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** and not excluded from

IBP's ICA at ¶ 10.2.[4] (emphasis added).

Under a plain understanding of the word "indemnity"—Appellant is seeking just that. *See* Concord & Cumberland, 424 S.C. at 646-47, 819 S.E.2d at 170. Appellant demands compensation where Respondent would be liable to pay Appellant its attorney's fees and costs as a result of defending Plaintiff's lawsuit—a textbook definition of indemnity. *See id.* Appellant argues Paragraphs 10.1 and 10.2 should be read as totally and completely distinct from each other. However, those paragraphs fail to distinguish themselves from each other. For example, Paragraph 10.1 explicitly includes the obligation to defend within the obligation to indemnify. On the other hand, Paragraph 10.2 is nothing more than a thinly veiled attempt to circumvent this Court's rulings in the Stoneledge cases (holding a general contractor cannot bring claims that are merely "disguised indemnity" claims) and Concord & Cumberland (applying the negligence rule to the indemnification of a general contractor's own negligence, including both sole and concurrent negligence). *See* Concord & Cumberland, 424 S.C. at 646-47, 819 S.E.2d at 170; Stoneledge I, Stoneledge II.

Appellant also references the obligations of Respondent under the ICA to provide insurance and alleged that Respondent "failed to have its insurance company [provide a defense for Appellant or pay its fees and expenses]." *This is irrelevant to the appeal and improper*. Respondent's (and, by extension, its insurance carrier's) obligations under the additional insured provisions of the contract (the "AI provision") are not at issue in this lawsuit and never have been. ~~Any arguments related to insurer's obligations should be addressed in Appellant's Declaratory Judgment action.~~

[4] Respondent maintains that both Paragraphs 10.1 and 10.2 are unenforceable against Gale; however, these terms are part of a contract between Appellant and IBP, not Gale.

For the foregoing reasons, Respondent Gale was entitled to summary judgment on all of the crossclaims alleged by Appellant. Gale hereby requests that this Court AFFIRM the findings and Order Granting Summary Judgment to Builder Services Group, Inc. d/b/a Gale Contractor Services. Additionally, pursuant to Rule 208(b)(6), SCACR, Gale joins in the arguments contained in the briefs of the other Respondents to the extent they are applicable and incorporates those arguments herein.

Respectfully submitted,

Resnick & Louis, P.C.

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April 10, 2024
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

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

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

v.

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

D.R. Horton, Inc., ……. Appellant,

v.

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

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

PROOF OF SERVICE

The undersigned does hereby certify that on October 29, 2024, a copy of Appellant's Motion to Strike Portions of The Briefs of Respondent IBP Assets, LLC D/B/A Blue Ridge Building Products and Gale Industries, Inc. was served by email on all counsel of record by copy of this email and filed by electronic mail with the Clerk of Court for the South Carolina Court of Appeals.

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