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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Benton Price, Circuit Court Judge

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

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

v.

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

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

And

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

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

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## STATEMENT OF THE CASE

Hutton's counterstatement of the case confirms that its motion for summary judgment *only* included Appellant's contractual and equitable indemnification claims. Lather Construction's statement of the case makes *no claim at all* that it made any motion for summary judgment as to any issue other than joining Hutton's Motion for Summary Judgment. Neither Hutton's nor Lather Construction or Lather SC filed a Motion for Summary Judgment as to Appellant's breach of contract, breach of express warranties, breach of implied warranties, and

negligence/gross negligence/recklessness claims.[1] The two motions are short 3 pages and never mention breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness claims. (ROA)

## ARGUMENTS

1. WAS JUDGE PRICE UNFAIRLY BIASED AGAINST THE APPELLANT?

Respondents try to avoid the obvious judicial bias in both *Dreier* and *Eberly* by arguing these are different cases, the references to the record were cited out of order, and the issue of judicial bias was not preserved. None of these defeat Appellant's appeal on this issue. First, the Court can review the record citations to verify that Appellant's representations of the Judge's inappropriate settlement pressure, scheduling concerns for personal reasons, attempted invasion of the attorney-client privilege, threats of additur, and the litany of concerns raised in this and the *Dreier* case to fully understand the environment Appellant found itself in. (ROA) Judge Price told Mr. Nail what to write to his client and then demanded a copy of it and threatened Appellant with additur. (ROA) Judges are not permitted to threaten litigants or coerce settlement. In *Ledford v. Dep't of Pub. Safety*, 428 S.C. 387 (S.C. 2019). Attorneys and litigants in civil cases are not supposed to experience fear in the courtroom from the judge.[2]

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[1] Hutton's counterstatement confirms that the only mention of Appellant's other claims was made by Lather Construction in its memorandum of law in support of summary judgment, *but no motion was made as to those issues by any party.* Lather Construction's memorandum of law was filed at 4:52 p.m. on February 28, only two business days before the hearing. That is not due process. Moreover, a memorandum of law is *not* a motion, does not cure the deficiency of a lack of motion, and does not provide the due process required of a motion. Lather Construction cannot remedy its failure to make a motion as to the breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness claims by including a very short paragraph with only conclusory statements, one citation, and no application of facts at the end of its memorandum of law.

[2] Appellant felt repeated pressure and coercion to settle to accommodate the trial judge's social calendar during typical court hours and the Judge's increasing anger at Appellant. Appellant was provided only one day to present a defense, while Plaintiffs had four days. Respondent Lather Construction asserts that Appellant could have had more time, however, they cited to nothing in the record to suggest that. Appellant was facing the threat of additur already.

Second, yes, these are different cases with different case numbers, involving different houses within the development; however, Respondents did everything possible to have Judge Price treat the summary judgment motion regarding contractual and equitable indemnification in this case exactly as he did in *Dreier.* Hutton's handed up its pleadings in *Dreier* and stated that "we are going to incorporate our briefing that we filed in support of our motion for summary judgment on this issue in the *Dreier* lawsuit as well as our oral argument that we made on our motion to bifurcate D.R. Horton's cross-claims during the Dreier trial" and she then proceeded to hand Judge Price those pleadings. (ROA ) [MSJ Hearing, March 3, 2022,TR. p. 4 lines 7-19.] The bias pervaded both cases as fully briefed in both cases, and because Respondents expressly implored and beseeched the judge to remember, rely upon, apply, and do again what he did in *Dreier* in this case, Respondents cannot now legitimately say the bias in *Dreier* had nothing to do with this case. "A trial judge must act with absolute impartiality in the performance of judicial duties." *State v. Davis*, No. 2006-UP-316, 2006 S.C. App. Unpub. Lexis 299 (S.C. Ct. App. Aug. 4, 2006). For Respondents to now argue the cases have little to do with each other is disingenuous.

Third, not only did Judge Price threaten Appellant in *Dreier,* he repeated that threat in *Eberly*, implying to Appellant's new lawyers that they were also subject to whatever threats he would choose to use with them.

> THE COURT: But they (*meaning Appellant D. R. Horton*) absolutely do not get what I, what I have, what I say. I did threaten Neal (*meaning Horton's trial counsel*) that they fly from Texas (*where D. R. Horton is located*) last time to come here and tell me to my face …. (ROA ) [Hearing, March 3, 2022, TR. p. 9 lines 10-13] (Italics supplied)

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

> THE COURT: … but then I backed down. (ROA ) [Hearing, March 3, 2022, TR. p. 9 lines 13]

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

What he did do, however, was to set the stage for intimidation and another veiled threat. And just a few minutes earlier, (three transcript pages earlier) he announced that he had already made up his mind how he would decide the hearing.

> MS. WHITE: -- in this lawsuit. We're just – the only thing that we have outstanding on behalf of Hutton's is the D. R. Horton's cross-claims.
>
> THE COURT: Didn't we already deal with that in the last trial?
>
> MS. WHITE: We did. Which it, it should make this motion, straightforward in –
>
> THE COURT: Well, it is.
>
> MS. WHITE: -- my opinion. But –
>
> THE COURT: It's gonna make it very straightforward because I've already made a ruling on it. (ROA ) [Hearing, March 3, 2022, TR. p. 6 line 24 – p. 7 line 9]

Amazingly, Respondents blame Appellant for the outcome by suggesting that Appellant should have known *before* the hearing occurred that Judge Price would start the hearing by announcing that he had already decided the matter and should have filed a recusal motion in advance.[3] Appellant's counsel could not have predicted Judge Price's action. No litigant expects any Judge to announce a predetermined decision at the beginning of a hearing.

Respondent also argues that summary judgment in *Dreier* was granted before the additur threat, therefore, the bias was not relevant to the grant of summary judgment. The bias and the Judge's desire to pressure settlement pervaded the entire trial period, which was discussed in the

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[3] Respondents also state that Appellant refused to file a post-trial motion in *Dreier*. Lather Construction Brief at 7. Appellant has no idea what Respondent is talking about and Respondent provided no record support for that assertion.

*Dreier* briefs and Appellant's Initial Brief. (ROA) Whether the threat of additur came before, during, or after the bifurcation hearing that turned into a summary judgment hearing that violated all due process for Appellant or after, is irrelevant. A simple review of the record cites Appellant provides of Judge Price's actions in this case will provide clarity to the Court of what Appellant was up against in its atttempt to have a fair and impartial judicial process. (ROA)

Appellant seeks remand for a fair and impartial trial on its claims.

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

Judge Price granted summary judgment in a Form 4 Order. (ROA ) It gave no reasons. It did not apply to Lather Construction, SC, Inc., which was also a defendant and a moving party.[4] It did not even specify which of Appellant D. R. Horton's causes of action were removed from the case by his grant of summary judgment. (ROA ) [Form 4 Order] "[I]t is better practice—and in most cases common practice—as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment." *Woodson v. DLI Props., LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014) Otherwise, an appellate court—never mind the public—cannot "ascertain the basis for the circuit court's ruling ..." *Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007); *See also Easterling v. Burger King Corp*., 416 S.C. 437, 786 S.E.2d 443 (Ct. App. 2016).

[4] Lather Construction attempts to cure the omission of Lather Construction SC by calling it an error; however, it did not file a motion to alter or amend the order with the trial court.

Appellant and Respondents have briefed this appeal without clarity as to which issues were decided in the Order and the reasoning for the decision. This uncertainty was unnecessary.

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

It is also not clear if the Court granted summary judgment pursuant to Rule 56(c), SCRCP on Appellant's equitable indemnification claims because the Order is silent. If the Court did grant summary judgment on the equitable indemnification claims, doing so would be premature because there had not been any finding of fault as to Appellant on the Eberly's claims. Respondents argue that Appellant is not entitled to equitable indemnification because Appellant has unclean hands, but no such finding had been made. There had been no trial. Respondents also try to get around this fact by bringing in joint tortfeasor law, *which was never raised to Judge Price,* but the result is the same. There was no evidence presented in this case of any fault regarding the Eberly property. The Respondents provided no evidence and made no showing that D. R. Horton was at fault in causing any damage to the house or yard belonging to the Plaintiffs Margaret A. Eberly and Barbara J. Pavelik in this case.

Respondent Lather Construction tries to bolster their assertions by including citations to a deposition that does not appear to have been provided to Judge Price in this case or in *Dreier*. Appellant has found no record evidence that Mr. Osako's deposition to which Respondent refers and to which Respondent provides a designation for the record on appeal was ever admitted into the record in either case and Appellant therefore objects to its use in this case. Mr. Osako's trial testimony in *Dreier* supports Appellant, not Respondents. (ROA) Moreover, the testimony to which Respondent refers does not establish any fault on Appellant in this case because no fault at

all has been established in this case as to anyone. Additionally, Appellant was the owner, but not the general contractor on the land development phase of the development. Appellant hires experts and those experts have the right and the obligation to hire, manage, and project manage the work. They are responsible for their work. No fault was established. At a minimum, a finding of fault was premature. At worst, it was simply wrong.

Respondents spend a lot of pages arguing that Appellant did not preserve its right to appeal that Judge Price wrongly presumed Appellant's was at fault, but of course that makes no sense. Appellant filed a Motion to Alter or Amend and asked the Court to clarify its ruling. (ROA) Appellant appealed the grant of the Order, including the grant of equitable indemnification – if equitable indemnification was in fact granted in the Order. (ROA) There was no trial. There were no facts presented of fault as to Eberly's property. Therefore, if Respondents were granted summary judgment as to Appellant's equitable indemnification cross claim because the Court decided Appellant had unclean hands, then the Court would necessarily have to have presumed Appellant was at fault. Appellant did preserve the issue, asked the trial court to review its Order, and appealed the Order. And yes, the Court had to have presumed Appellant was at fault, showing bias against Appellant without any trial showing fault in this case as to Eberly's property. *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) (finding "the circuit court erred in granting summary judgment on the merits of Marick's equitable indemnity cross-claim because Marick presented a question of fact").

Also, as discussed in detail in Appellant's Initial Brief, under the South Carolina law of equitable indemnification, inquiry about the fault, if any, on the part of the party seeking indemnification (i.e. the indemnitee) is to be to be limited to the damages incurred by the

plaintiff. When talking about the fault of the party seeking to be indemnified, the question is whether the party is at fault as to the *plaintiff's* claims. It is not a question of whether there is fault for anything else. This has been stated time and time again by South Carolina appellate courts. "To recover damages on its equitable indemnity claim, Marick must prove the following: (1) Clear View was at fault in causing Stoneledge's water intrusion damages; (2) Marick has *no fault for those damages*; and (3) Marick has incurred expenses that were necessary to protect its interest in defending against Stoneledge's claim." [Emphasis supplied] *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC,* 413 S.C. 615, 625, 776 S.E.2d 426 (Ct. App. 2015)

Respondents' attempt to turn this into a joint tortfeasor case in which they are entitled to summary judgment before any trial, or any fault has been determined or allocated is misplaced. Until fault is determined, summary judgment is premature.

Finally, Respondents dismiss without much comment Appellant's request that the Court review South Carolina's current law on equitable indemnification considering recent changes to the law and consider whether inconsistencies should be addressed. Appellant reiterates its concerns and those of other commentators on this issue. *See* John J. Cheap, Jr., Comment, *Contribution and Indemnity Collide with Comparative Negligence – The New Doctrine of Equitable Indemnity*, 18 Santa Clara L. Rev. 779 (1978). South Carolina has not yet updated its equitable indemnity law to conform to and reflect its limited comparative negligence law.

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

Respondents both make substantially similar arguments regarding the enforceability of the parties' contracts regarding indemnification, duty to defend, and obligation to provide additional insured coverage for the benefit of Appellant. Appellant provided the Court with its

argument regarding these issues in both its *Dreier* briefing and its Initial Brief. In addition to those arguments, Appellant responds with these additional thoughts.

First, Respondents' entire defense against enforcement of the provisions relies upon their sense of entitlement that the Court should rescue one sophisticated, multi-million company from another in a multi-year, multi-house development in which insurance coverage was required and obtained to manage every party's risk in the transaction. Rescuing one multi-million-dollar business or insurance company at the expense of another is not how business should work in South Carolina. Nor will it encourage business in the State. Respondents wanted to enter into the contracts and did so. Now their insurance companies do not like the bargain their customers made and are trying to back out of the deal after Respondents allegedly performed sub-standard work and were fully paid for the work. The Court should not condone this. And certainly not at the summary judgment stage.

Second, Respondents argue that the Court should not rewrite any part of the contract if one part is found unenforceable, but their entire argument imploring the Court to not enforce the contracts they signed relies on the Court rewriting the contract to ignore the specific language that provides a separate and distinct duty to defend provision. Respondents ask the Court to ignore or rewrite the clear language of the contract to subsume the separate duty to defend provision into the duty to indemnify provision, but that is not how the parties' contracts are written. There is a duty to indemnify and a separate duty to defend.

Section 10.1 of the parties' identical contracts, which describes the Respondents' indemnity and defense obligations to the Appellant, specifically states that these obligations are separate, distinct, and independent. The contracts specifically state that the "[c]ontractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify…"

Dreier R.p. 944; Dreier R.pp. 398 – 399. (ROA) Respondents' Briefs confirm this language. For emphasis, the entire section is in all capital letters, bold, and font larger than the remainder of the contract. The indemnity obligation in Section 10.1 is enforceable and the duty to defend obligation in Section 10.1 is enforceable. There is no law in South Carolina that limits or prohibits enforcement of either of the obligations as they are written and were agreed to by the parties.

If either of the indemnity or duty to defend obligations is determined to be unenforceable, which Appellant thinks neither should be, then the unenforceable obligation is severable as a separate, distinct, and independent obligation from the other obligation. The South Carolina Supreme Court has long allowed the severability of contracts.

Third, Respondents also attempt to confuse the Court when they argue that a duty to indemnify includes a duty to defend, therefore, the separate duty to defend is what …? They never really say, but what it seems they mean to say is that the duty to defend provision should be rendered meaningless or non-existent. That is not what the parties' contract states. Every provision should be given meaning.

Appellant has several rights under the contract to protect it from shoddy work by its general contractors and subcontractors. It has indemnification, which includes typical indemnification protections such as liability to third-parties for harms other than Appellant's sole negligence, attorneys' fees, and costs. It has a separate protection of a duty to defend if claims are made against it based on a general contractor's or subcontractor's alleged shoddy work. It also has a separate protection as an additional insured. And it has a separate protection to choose to handle the defense of an action itself and be reimbursed – a protection needed in the event a proper defense is not being provided. Why does the contract include all of these and why are

they not prohibited by the anti-indemnity statute? In addition to Appellant's briefing *Dreier* and its Initial Brief in this case explaining this, it is a simple allocation of business risk among business entities engaged in the development and construction of a multiple unit housing subdivision. Appellant does not do any of the building work itself. It relies upon the expertise of the multi-million-dollar sophisticated general contractors and subcontractors with which it contracts to perform the work. In this case, Appellant is merely seeking the benefit of the bargain it struck and for which it fully paid.

Appellants paid the Respondents as they completed the work. Under South Carolina law it had a right to withhold payment and utilize chargebacks for work that was underperformed until the final payment was made. Thereafter it had the protection of warranties, indemnities, duty to defend, additional insured provisions, and reimbursements provisions. This is all industry standard among commercial businesses.

When litigation occurs, it makes economic and strategic sense typically for there to be lead counsel for the defense side. Appellant's contract provides for this to happen through the duty to defend provision because every general contractor and subcontractor provides some form of a duty to defend provision that benefits the entire defense group if the insurance companies provide the defense they have been paid to provide via the insurance contracts. This works well if the insurance companies do not do what Respondents' insurance companies have done in this case. Had they stepped in and defended the case, we would not be here. They had an obligation to defend Appellant as an additional insured. Appellant has a right to be defended by each Respondent even if their respective insurance companies failed to comply. This duty is separate from the duty to indemnify, and the contract specifically states this.

Fourth, the reimbursement and duty to defend provisions do not provide Appellant the right to be indemnified for its sole negligence. Indemnity is when one party pays for the harm caused by another. No harm has been proven to have been caused by Appellant, either solely or concurrently. A duty to defend or to reimburse defense costs *does not include any amount payable for the harm caused to another.* Respondents try to conflate and confuse this issue, but in doing so they are attempting to rewrite the contract, something they strenuously object to the Court doing. A duty to defend is not an indemnity.

Furthermore, the indemnity provision excludes any indemnity protection for Appellant's sole negligence. Respondents attempt to merge all the provisions together to attempt to argue the provisions violate S.C. Code Ann. § 32-2-10 because they know and have admitted previoiusly that the provision excludes Appellant's sole negligence. However, their merger argument is defeated by the contractual provision that repeatedly excludes and prohibs indemnification for Appellant's sole fault. In *Dreier,* applying the same contract provisions, the same subcontractors agreed that the same indemnification provision in this case does not require the Respondents to indemnify Appellant for its sole negligence. Hutton's conceded at the hearing on the motion for summary judgment in *Dreier* that the duty to indemnify does not require Respondents to indemnify Appellant for its sole negligence. *Dreier* R.p. 705:5 – 7 (ROA) The other Respondents (including Respondent Lather Construction) joined Hutton's arguments to the court and each party joined the others' papers and arguments throughout the litigation. R.pp. 683:17 – 684:5 (ROA) Accordingly, the Respondents agreed that the ICA Section 10.1 duty to indemnify provision does not include a duty to indemnify Appellant for its sole negligence. *That is the only form of indemnification that S.C. Code Ann. § 32-2-10 prohibits and Respondents agreed that the duty to indemnify does not violate the statute.*

Fifth, Respondents argue that the South Carolina Legislature's attempt to amend the anti-indemnity by adding "duty to defend" language in that statute is irrelevant because it did not pass the legislature.[5] That misses the point. The fact that the amendment was drafted to include a "duty to defend" to be considered by the Legislature shows unequivocally that the South Carolina Legislature knows the statute in its current form does not include a prohibition on a duty to defend. It simply is not there. See Appellant's Initial Brief for a discussion of the proposed amendment. Respondent's attempt to distinguish the anti-indemnity statute use of "indemnity" from the other uses of "indemnity" in South Carolina Statutes is confusing and tortured. The Legislature has shown repeatedly that it knows what "duty to defend" means and that it is different from "duty to indemnify" as Appellant discusses at length in its Initial Brief.

The parties agreed how any necessary defense would be undertaken and the State of South Carolina honors businesses' contracts on such matters.

Sixth, Respondents also argue that the indemnification provision is not clear that Appellant would be indemnified for its concurrent negligence and therefore fails. The indemnity language is clear and unequivocal as to any concurrent negligence between Appellant and each Respondent. The duty to indemnify provision follows the language the court suggested in *Concord & Cumberland Horiz. Prop. Regime v. Concord & Cumberland, LLC,* 424 S.C. 638,658 n. 6, 819 S.E.2d 166, 176 n.6 (S.C. App. 2018). Respondents do not identify a single sentence

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[5] As discussed in Appellant's Initial Brief, the South Carolina Legislature considered and *declined* to add a duty to defend to the very statute at issue, S.C. Code Ann. § 32-2-10, when it considered an amendment to that statute. S. 422, 124th Sess. (2021) (included in the designations on the Record on Appeal). Dreier R.pp. 1023 – 1025 The proposed amendment, in paragraph (D) would have expressly prohibited a duty to defend in construction contracts that include design professional services. Additionally, the proposed amendment *would not* have prohibited a duty to defend in construction contracts that did not include design professional services *such as this very contract*. *See* Paragraph (B), S. 422, 124th Sess. (2021). Dreier R.p. 1024 (ROA) The legislature chose not to amend S.C. Code Ann. § 32-2-10 and the proposed amendment clearly shows the legislature knows how to include a duty to defend when it wants to – *and it decided it does not want to*. The legislature has clearly spoken on this issue.

that is not clear and unequivocal. The provisions clearly exempt sole negligence and fault from being indemnified and clearly state that concurrent negligence will be indemnified. Respondents' argument seems to be that the duty to defend concerns them, but that is not the issue that *Concord  Cumberland* addresses. Again, Respondents want to conflate provisions in a way the contract the parties agreed to does not contemplate and specifically disallows. Respondents' ignore that the language in the contract is the language this very Court of Appeals suggested as clear and uneqivocal. Additionally, should any provision be deemed not clear and unequivocal, as discussed previously, the provisions may be severed as the parties expressly stated the provisions are separate and distinct duties.

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

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

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

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

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

Due process would preclude Appellant's breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness claims from being heard at the summary judgment hearing because Hutton's *only* moved for summary judgment "on the contractual and equitable indemnity cross-claims asserted against it by Defendant D. R. Horton," and Lather and Lather SC *only* moved for summary judgment *by joining Hutton's motion that was limited to contractual and equitable indemnity cross-claims*, stating that they "hereby joins in totality and hereby adopts by reference as allowed by South Carolina Rules of Civil Procedure 10(c), Hutton's Landscapes, Inc. Motion for Summary Judgment on the Cross-Claims of D. R. Horton, Inc., filed on or about December 9, 2021. (ROA ) [Hutton's Landscape's, Inc.'s Motion for Summary Judgment on the Cross-Claims of D. R. Horton, Inc.], [Defendant Lather Construction, Inc. and Lather Construction, SC, Inc.'s Joinder in Hutton's Landscapes, Inc.'s Motion for Summary Judgment] Thus, Appellant's breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness claims were not properly a part of the summary judgment motions, hearing, or the Court's Order.

Lather Construction makes a convoluted argument that it included these cross claims by including them in its eve of hearing memorandum of law in support of summary judgment or by vague language that its summary judgment joinder of Hutton's motion was for the cross-claims by Appellant – but neither of these arguments has merit.

First, a memo of law is not a motion. It does not put a litigant on notice that a hearing on the cause of action will be heard and does not meet due process.

Second, a vague reference to cross-claims in the joinder of Hutton's motion for summary judgment that is only a motion for summary judgment on contractual and equitable indemnification claims is not a motion for summary judgment on every other cross claim. The truth is, neither Hutton's nor Lather Construction filed a motion for summary judgment as to Appellant's breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness claims, and they are now trying to cure their mistake with a short paragraph in a memo of law and one sentence at the end of a hearing to which Appellant did not even have an opportunity to respond. (ROA) [Hearing, March 3, 2022 Tr. pp. 33]

Moreover, Lather Construction's argument that Appellant knew about and expected to argue about those cross claims because Appellant discussed *Stoneledge* at the hearing and used it in its bench memo confuses Appellant's reference to *Stoneledge.* Appellant's *Stoneledge* reference had nothing to do with Appellant's breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness claims. (ROA) That discussion centered on *Stoneledge's* application to contractual indemnification when the contracts were signed after the work was completed. (ROA) [Hearing, March 3, 2022 Tr. pp. 21, l 15 – 22, l 5]. Respondent Hutton's misrepresented both Appellant's bench memo and summary

judgment argument in its brief. (ROA) [Respondent Hutton's Brief pp. 11-12.] Appellant did not argue *Stoneledge* or anything else about its breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness claims at the summary judgment hearing because those causes of action were not properly before the court. Lather Construction did not argue it either. It simply threw out one sentence at the end of the hearing as the last speaker. (ROA ) [Hearing, March 3, 2022, Tr. p. 33, lines 19-20.] His throwaway line was, "[a]nd then, of course, under the *Stoneledge*, the other four claims should be out as well." That is not really an argument. It is a statement unsupported by facts, analysis, or anything. That was the totality of the "argument", *and* there was no motion on these causes of action. That does not rise to the status of a motion sufficient to meet Appellant's due process rights before important rights are foreclosed.

Respondents attempt to convince this Court that Appellant waived this argument, but that is also false. Appellant's Motion to Alter and Amend Judgment clearly alerts the judge to the fact that there was no procedurally proper motion before the court regarding any cross claims other than contractual and equitable indemnification. (ROA) [Appellant Motion to Alter and Amend Judgment.]

Procedural due process was absent - *if* Judge Price's Order includes a grant of summary judgment as to those causes of action. We simply do not know because he did not tell us in his original Order, and he did not tell us when clarification was requested. (ROA ) [Order Denying Motion to Alter or Amend filed March 22, 2022]

## CONCLUSION

Respondents incorporated *Dreier* into the *Eberly* summary judgment hearing, but now want to disavow any entanglement or carryover of the bias and unfair treatment towards Appellant. Respondents fueled and benefitted from the situation in both cases. They went so far as to ask Judge Price to find fault on Appellant's part in *Eberly* based on *Dreier.* It was wrong for Judge Price not to consider this case on its own, apart from his rulings in the *Dreier* case. There was so much wrong at the trial court level in both these cases. Litigants should have a fair shot at an impartial judicial proceeding in South Carolina where their business contracts are respected and upheld.

This appeal involves motions for summary judgment pursuant to Rule 56(c), SCRCP. The threshold to survive such a motion is extremely low. Hutton's and Lather have failed to meet their "initial responsibility of demonstrating the absence of a genuine issue of material fact." That alone is dispositive. D. R. Horton has gone beyond what it was required to show. It has shown affirmatively that such an issue does exist.

For these and the other reasons set forth in this reply brief and Appellant's Initial Brief, Appellant D. R. Horton respectfully requests that the Order of the Hon. Bentley D. Price filed March 11, 2022, granting summary judgment against it be reversed and the case remanded for trial of its cross-claims against Hutton's and Lather.

November 12, 2024

Respectfully,

*s/Carl F. Muller*, SC Bar #4131
Carl F. Muller, Attorney-at-Law, P.A.
PO Box 1717
Greenville, SC 29602-1717
864-991-8904 Phone
864-751-2831 FAX
carl@carlmullerlaw.com
Attorney for Appellant
D. R. Horton, Inc.

John T. Crawford, Jr.,
(S.C. Bar No. 69355)
Kenison, Dudley & Crawford, LLC
704 McBee Ave.
Greenville, South Carolina 29601
(864) 242-4899
(864) 242-4844 (fax)
crawford@conlaw.com
Attorneys for Appellant
D. R. Horton, Inc.