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Dec 04 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Appellate Case No.: 2024-00124

Fenwick Commons Homeowners Association, Inc., Respondent,

v.

D.R. Horton, Inc., JJA Construction, Inc., d/b/a JJA Framing, JJA Construction, Inc. d/b/a JJA Framing Company, Jose Castillo d/b/a JJA Framing, Jose Castillo d/b/a JJA Framing Company, United Siding Specialists, Inc., Heritage Construction Consultants, Inc., Robert H. Yarnall d/b/a Heritage Construction Consultants, Inc., Built Right Construction, LLC, Alfonso Villavicencio d/b/a Alfonso's Painting, Alfonso Painting & Drywall, Inc., Diria Tawi Painting, Inc., 84 Lumber Company, Builders FirstSource - Southeast Group, LLC, Americo Roofing Concepts f/k/a Americo Roofing Concepts Enterprises, Inc., Americo Roofing Concepts, Inc. f/k/a American Roofing Concepts, Archer Exteriors, Inc. and Professional Exteriors, LLC, Luciano Dias Gomes d/b/a Prestige Home Construction, Geraldo Da Cunha, Pablo Rojas Franco, Charles Gunter, Henry A. Palmer, Julio C. Crespo, Brasilican Contracting, LLC, Charles Bowser d/b/a CWB Services, Jose Geraldo Dos Reis, Leandro De Paulo Araujo, Helio A. De Rezende, Vinicius Araujo De Freitas a/k/a Vinicius Araujo, Robert M. Huges d/b/a Robert's Vinyl Siding, Lucas Rodrigues Barcelos a/k/a Lucas Rodriguez Barcelos, Karla Bezerra, Rodrigo B. Vasconcelos, Rondinelly G. Da Silva, Marcio Nunes Da Silva, W&M Vinyl Siding, LLC, and Donald Lee d/b/a Vinyl Siding Specialists, Defendants,

of which Builders FirstSource - Southeast Group, LLC is the Appellant.

**RESPONDENT FENWICK COMMONS HOMEOWNERS ASSOCIATION, INC.'S
MOTION TO DISMISS**

This Motion is brought by the Respondent, Fenwick Commons Homeowners Association, Inc. (“HOA”), in this Action seeking dismissal of an Appeal taken by the Appellant, Builders FirstSource – Southeast Group, LLC (“BFS”), of two Orders issued by the court appointed Special Referee, Retired Judge Nicholson, arising from BFS’s motion for summary judgment filed on July 3, 2024. In this appeal, BFS is appealing the portion of the Special Referee’s August 1, 2024, order for which its motion for summary judgment was denied and also the portion of the August 1, 2024, order for which it was granted summary judgment. Additionally, BFS is appealing a second order dated August 2, 2024, being the denial of its motion for reconsideration of the denial of summary judgment. These orders are not appealable under long standing South Carolina law, and therefore, BFS’s appeal should be dismissed. In support of this Motion, Respondent would show as follows.

INTRODUCTION

A hearing was held on July 26, 2024, before Special Referee, Retired Judge Nicholson, on BFS’s motion for summary judgment. There was no court reporter present, and therefore, there is no transcript of this hearing. BFS’s counsel argued why it believed summary judgment should be granted, and the HOA’s counsel argued why it should not. At the hearing, the HOA’s counsel informed the Special Referee that it was not bringing claims against BFS for the installation of window screens, the trusses that BFS supplied or the window glass surfaces. After hearing arguments of counsel, the Special Referee ruled on BFS’s motion for summary judgment at the hearing. Following the hearing, counsel for BFS and counsel for the HOA did not agree on how the Special Referee ruled, so counsel for the parties agreed to each submit proposed orders to the Special Referee based on each side’s understanding of the ruling. The proposed order submitted by BFS contained similar findings as it argues in its brief to this Court, however, the Special Referee rejected BFS’s proposed order and signed the HOA’s proposed order. Thereafter, BFS filed

a motion for reconsideration which was denied by the Special Referee. BFS has noticed an appeal from these two separate Orders entered by the Special Referee appointed by the Circuit Court. Neither of the Orders are immediately appealable.

This appeal was filed by BFS on Friday August 9, 2024, just prior to the date certain jury trial that was scheduled to begin before the Honorable Jennifer McCoy on August 12, 2024. All other parties in the case have settled. Therefore, because BFS seeks to appeal the Special Referee's Orders that are not appealable and to avoid any further disruption and delay of the adjudication of this matter in the Circuit Court, BFS's appeal should be immediately dismissed.

BACKGROUND

This action arises out of a construction defect case in the Charleston County Court of Common Pleas, which involves allegations of construction defects in the Fenwick Commons townhome community brought by Fenwick Commons Homeowners Association, Inc. ("HOA"). The action specifically involves construction defect claims related to the building exteriors and common elements for which the HOA is responsible pursuant to the applicable governing documents. Appellant filed a Motion for Summary Judgment as to the HOA's claims on July 3, 2024, which was heard by Special Referee, Retired Judge Nicholson, on July 26, 2024. Exhibit 1. The motion was granted only as to units wherein Appellant solely installed window screens, but the remainder of Appellant's motion for summary judgment relating to the window installation, flashings and weather barrier was denied. Exhibit 2. Thereafter, Appellant filed a Motion to Reconsider. Appellant's motion to reconsider was for the "August 1, 2024, Order *denying* BFS summary judgment as to Plaintiff Fenwick Commons Homeowners Association, Inc. claims." Exhibit 3 (emphasis added). Appellant's Motion for Reconsideration was also denied. Exhibit 4.

This Appeal was filed on Friday, August 9, 2024, before the start of the date certain trial to begin on August 12, 2024.

ARGUMENT

BFS was a subcontractor of D.R. Horton in the construction of the D.R. Horton built portion of the Fenwick Commons project. BFS sought summary judgment as to all work it performed and materials it supplied at Fenwick Commons. Counsel for the Respondent advised the Special Referee during the hearing that it was not pursuing claims against BFS for the installation of window screens, trusses BFS supplied or any window glass surfaces, but rather only pursuing claims against BFS for its work related to window installation, flashings and weather barriers. This appeal arises from the Special Referee's denial of BFS's motion for summary judgment regarding its installation of windows, flashing and weather barriers. It is well established law that an order denying summary judgment is not appealable. *Ballenger v. Brown*, 313 S.C. 476, 443 S.E.2d 379 (1994) (citing *Willis v. Bishop*, 276 S.C. 156, 276 S.E.2d 310 (1981); *Mitchell v. Mitchell*, 276 S.C. 44, 275 S.E.2d 1 (1981); *Neal v. Carolina Power & Light*, 274 S.C. 552, 265 S.E.2d 681 (1980); *U.S. Fidelity & Guaranty Co. v. City of Spartanburg*, 267 S.C. 210, 227 S.E.2d 188 (1976); *Medlin v. W.T. Grant, Inc.*, 262 S.C. 185, 203 S.E.2d 426 (1974); *Greenwich Savings Bank v. Jones*, 261 S.C. 515, 201 S.E.2d 244 (1973); *Geiger v. Carolina Pool Equipment Distributors, Inc.*, 257 S.C. 112, 184 S.E.2d 446 (1971)). "A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial." *Id.* at 477, 443 S.E.2d at 380. Furthermore, it "does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable." *Id.* at 477-78, 443 S.E.2d at 380 (citing *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942)).

In addition to appealing the Special Referee's denial of summary judgment as to BFS's installation of the windows, flashings and weather barrier at issue, BFS contends in this appeal that the Special Referee's ruling granting it summary judgment on units where it installed window screens only is somehow contingent on the non-moving party's consent. This is simply not the case. The HOA's counsel advised in the hearing that it was not bringing claims against BFS for the installation of window screens. The Special Referee unequivocally granted BFS's summary judgment where BFS performed window screen installation only, but as described above denied summary judgment for its installation of windows, flashings and weather barrier. Counsel for both parties advised the Special Referee when asked that they would be able to agree on which units BFS installed window screens only and as such were ordered to submit a consent order accordingly. "Generally, orders granting partial summary judgment may be immediately appealable under either the 'involving the merits' or 'substantial rights' categories of section 14-3-330(1) and 2(c)." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011). Where an order granting summary judgment "neither involves the merits nor affects a substantial right, it is not immediately appealable." *Id.* at 307, 705 S.E.2d 480-81. The issue of BFS's installation of the screens does not involve the merits especially in light of the HOA stipulating to the Special Referee that the screen installation is not part of its claim, nor was any substantial right of BFS affected by the two orders it is appealing. Therefore, BFS prevailing on the issue of the granting of summary judgment for the units in which it installed window screens only is not appealable either.

CONCLUSION

For the foregoing reasons, the Respondent respectfully asks this Court to dismiss BFS's appeal and award the Respondent attorney's fees and costs.

By: s/ John T. Chakeris

John T. Chakeris

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S.C. Bar No.: 102801

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*Attorneys for Respondent Fenwick Commons
Homeowners Association, Inc.*

December 4, 2024

Charleston, South Carolina

Exhibit 1

**Respondent's Motion to Dismiss
Appellate Case No.: 2024-00124**

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF CHARLESTON) CIVIL ACTION NO: 2018-CP-10-00330

Fenwick Commons Homeowners)
Association, Inc.)
)
Plaintiff,)

-vs-

DEFENDANT BUILDERS
FIRSTSOURCE – SOUTHEAST
GROUP, LLC’S MOTION-FOR
SUMMARY JUDGMENT AS TO
PLAINTIFF’S CLAIMS

Portrait Homes - South Carolina, LLC;)
Portrait Homes-Fenwick Commons, LLC;)
D.R. Horton, Inc.; Samuel Glover d/b/a)
Glover's Brickworks; Glover's)
Brickworks, Inc.; JJA Construction, Inc.)
d/b/a JJA Framing; JJA Construction,)
Inc. d/b/a JJA Framing Company; Jose)
Castillo d/b/a JJA Framing; Jose Castillo)
d/b/a JJA Framing Company;)
International Construction Services, Inc.;)
International Construction Services, Inc.,)
d/b/a International Construction; United)
Siding Specialists, Inc.; Old Charleston)
Builders, LLC; Heritage Construction)
Consultants, Inc.; Robert H. Yarnall d/b/a)
Heritage Construction Consultants, Inc.;)
PNL Construction, LLC; Clear Choice)
Group, LLC; Built Right Construction,)
LLC; Alfonso Villavicencio d/b/a)
Alfonso's Painting; Alfonso Painting &)
Drywall, Inc.; Diria Tawi Painting, Inc.;)
Juan Luis Sanchez d/b/a Sanchez Brothers)
Painting; Sanchez Brothers Painting, Inc.;)
Windward Shutters, LLC, d/b/a Windward)
Hurricane Shutters, LLC;)
84 Lumber Company; **Builders**)
Firstsource - Southeast Group, LLC;)
Americo Roofing Concepts, f/k/a Americo)
Roofing Concepts, f/k/a Americo Roofing)
Concepts Enterprises, Inc.; Americo)
Roofing Concepts, Inc. f/k/a American)
Roofing Concepts; Archer Exteriors, Inc.;)
and Professional Exteriors, LLC; Luciano)
Dias Gomes d/b/a Prestige Home)

Construction; Geraldo Da Cunha; Pablo
Rojas Franco; Charles Gunter; Henry A.
Palmer; Julio C. Crespo; Brasilican
Contracting, LLC; Charles Bowser d/b/a
CWB Services; Levi Arruda; Jose Geraldo
Dos Reis; Leandro De. Paulo Araujo;
Helio A. De Rezende; Vinivius Araujo De
Freitas a/k/a Vinicius Araujo; Robert M.
Hughes d/b/a Robert's Vinyl Siding;
Lucas Rodrigues Barcelos a/k/a Lucas
Rodriguez Barcelos; Karla Bazerra;
Rodrigo B. Vasconcelos; Rondinely G.
Da Silva; Marcio Nunes Da Silva; W&M
Vinyl Siding, LLC; Bar Contractors, Inc.;
William Construction Services, LLC; and
Donald Lee d/b/a Vinyl Siding Specialists

Defendants.

Archer Exteriors, Inc.

Third-Party Plaintiff,

vs.

Henry A. Palmer,

Third-Party Defendant.

International Construction Services, Inc. and
International Construction Services, Inc.
d/b/a International Construction,

Third-Party Plaintiffs,

vs.

Bar Contractor, Inc., and William
Construction Services, LLC,

Third-Party Defendants.

TO: ALICIA D. PULLANO, ESQUIRE, JOHN T. CHAKERIS, ESQUIRE, PHILLIP W. SEGUI, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE THAT the Defendant, Builders FirstSource-Southeast Group, LLC will move on the tenth day after service hereof, or as soon thereafter as counsel may be heard, for an Order of this Court granting Summary Judgment upon the claims raised by the Plaintiff Fenwick Commons Homeowners Association, Inc.

This motion is made pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, and upon the grounds that there is no question of material fact and Defendant Builders FirstSource-Southeast Group, LLC is entitled to summary judgment as a matter of law. Discovery has confirmed that Plaintiff Fenwick Commons Homeowners Association, Inc. does not own any residential units at issue in this litigation. Discovery has also confirmed that Plaintiff Fenwick Commons Homeowners Association, Inc. did not receive and does not possess necessary assignments from the owners of the residential units to pursue claims for purported deficiencies in the installation of material components with glass surfaces. Therefore, Plaintiff Fenwick Commons Homeowners Association, Inc. lacks standing to pursue claims against Builders FirstSource-Southeast Group, LLC for damages allegedly resulting from deficiencies in the installation of material components with glass surfaces.

This motion shall be based upon the statutory and common laws of the State of South Carolina, the South Carolina Rules of Civil Procedure, the pleadings, affidavits and discovery documents exchanged herein.

HOWELL, GIBSON & HUGHES, P.A.

By: s/William H. Cox, III
William H. Cox, III
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(843) 522-2400
wcox@hgpha.com

*Attorney for Builders Firstsource -
Southeast Group, LLC*

Beaufort, South Carolina

July 3, 2024

RULE 11 CERTIFICATION

I certify pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that

- I have consulted with opposing counsel and have been unable to resolve the matter.
- Consultation with opposing counsel would serve no useful purpose, or is not required.
- Consultation with opposing counsel could not be timely held
- I certify that there is no duty of consultation for the attached motion (to dismiss, for summary judgment, for new trial, for judgment NOV, in real estate foreclosures, or with pro se litigants.)

Exhibit 2

**Respondent's Motion to Dismiss
Appellate Case No.: 2024-00124**

STATE OF SOUTH CAROLINA
COUNTY OF CHARLETON

Fenwick Commons Homeowners Association, Inc.,

Plaintiffs,

v.

D.R. Horton, Inc., JJA Construction, Inc. d/b/a JJA Framing, JJA Construction, Inc. d/b/a JJA Framing Company, Jose Castillo d/b/a JJA Framing, Jose Castillo d/b/a JJA Framing Company, United Siding Specialists, Inc., Heritage Construction Consultants, Inc., Robert H. Yarnall d/b/a Heritage Construction Consultants, Inc., Built Right Construction, LLC, Alfonso Villavicencio d/b/a Alfonso's Painting, Alfonso Painting & Drywall, Inc., Diria Tawi Painting, Inc., 84 Lumber Company, Builders FirstSource – Southeast Group, LLC, Americo Roofing Concepts f/k/a Americo Roofing Concepts Enterprises, Inc., Americo Roofing Concepts, Inc. f/k/a American Roofing Concepts, Archer Exteriors, Inc. and Professional Exteriors, LLC, Luciano Dias Gomes d/b/a Prestige Home Construction, Geraldo Da Cunha, Pablo Rojas Franco, Charles Gunter, Henry A. Palmer, Julio C. Crespo, Brasilican Contracting, LLC, Charles Bowser d/b/a CWB Services, Jose Geraldo Dos Reis, Leandro De Paulo Araujo, Helio A. De Rezende, Vinicius Araujo De Freitas a/k/a Vinicius Araujo, Robert M. Hughes d/b/a Robert's Vinyl Siding, Lucas Rodrigues Barcelos a/k/a Lucas Rodriguez Barcelos, Karla Bezerra, Rodrigo B. Vasconcelos, Rondinely G. Da Silva, Marcio Nunes Da Silva, W&M Vinyl Siding, LLC, and Donald Lee d/b/a Vinyl Siding Specialists

Defendants.

IN THE
COURT OF
COMMON
PLEAS
IN THE
NINTH
JUDICIAL
CIRCUIT

CASE NO:
2018- CP-10-
0330

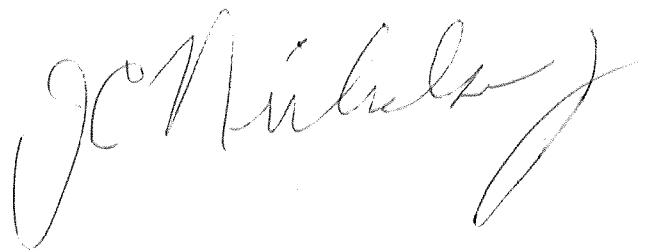
ELECTRONICALLY FILED - 2024 Aug 05 12:57 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1000330

This matter came before me on July 26, 2024, with regard to Defendant Builders FirstSource – Southeast Group, LLC's Motion for Summary Judgment seeking dismissal of Plaintiff's Claims pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Witt Cox

appeared on behalf of Builders FirstSource – Southeast Group, LLC, while Phillip W. Segui, Jr., appeared on behalf of Plaintiff.

Before the Court were Builders FirstSource – Southeast Group, LLC’s Motion and Memorandum in Support of Summary Judgment as well as Plaintiff’s Memorandum in Opposition. Upon review and consideration of these filings, and counsel’s oral arguments, the Court finds that Builders FirstSource – Southeast Group, LLC’s Motion for Summary Judgment is granted solely as to units Builders FirstSource – Southeast Group, LLC, only installed window screens. The parties shall work together collectively to agree on which units Builders FirstSource – Southeast Group, LLC, only installed windows screens on. Plaintiff’s Counsel stipulated that it is not bringing any claims as it pertains to Builders FirstSource – Southeast Group, LLC’s trusses supplied at the Portrait units.

AND IT IS SO ORDERED.



The Honorable J.C Nicholson, Jr. (Ret.)
Special Referee

August 1, 2024
Charleston, South Carolina

Exhibit 3

**Respondent's Motion to Dismiss
Appellate Case No.: 2024-00124**

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF CHARLESTON) CIVIL ACTION NO: 2018-CP-10-00330

Fenwick Commons Homeowners)
Association, Inc.)
)
Plaintiff,)

-vs-

DEFENDANT BUILDERS
FIRSTSOURCE – SOUTHEAST
GROUP, LLC’S MOTION TO
RECONSIDER

Portrait Homes - South Carolina, LLC;)
Portrait Homes-Fenwick Commons, LLC;)
D.R. Horton, Inc.; Samuel Glover d/b/a)
Glover's Brickworks; Glover's)
Brickworks, Inc.; JJA Construction, Inc.)
d/b/a JJA Framing; JJA Construction,)
Inc. d/b/a JJA Framing Company; Jose)
Castillo d/b/a JJA Framing; Jose Castillo)
d/b/a JJA Framing Company;)
International Construction Services, Inc.;)
International Construction Services, Inc.,)
d/b/a International Construction; United)
Siding Specialists, Inc.; Old Charleston)
Builders, LLC; Heritage Construction)
Consultants, Inc.; Robert H. Yarnall d/b/a)
Heritage Construction Consultants, Inc.;)
PNL Construction, LLC; Clear Choice)
Group, LLC; Built Right Construction,)
LLC; Alfonso Villavicencio d/b/a)
Alfonso's Painting; Alfonso Painting &)
Drywall, Inc.; Diria Tawi Painting, Inc.;)
Juan Luis Sanchez d/b/a Sanchez Brothers)
Painting; Sanchez Brothers Painting, Inc.;)
Windward Shutters, LLC, d/b/a Windward)
Hurricane Shutters, LLC;)
84 Lumber Company; **Builders**)
Firstsource - Southeast Group, LLC;)
Americo Roofing Concepts, f/k/a Americo)
Roofing Concepts, f/k/a Americo Roofing)
Concepts Enterprises, Inc.; Americo)
Roofing Concepts, Inc. f/k/a American)
Roofing Concepts; Archer Exteriors, Inc.;)
and Professional Exteriors, LLC; Luciano)
Dias Gomes d/b/a Prestige Home)

Construction; Geraldo Da Cunha; Pablo
Rojas Franco; Charles Gunter; Henry A.
Palmer; Julio C. Crespo; Brasilican
Contracting, LLC; Charles Bowser d/b/a
CWB Services; Levi Arruda; Jose Geraldo
Dos Reis; Leandro De. Paulo Araujo;
Helio A. De Rezende; Vinivius Araujo De
Freitas a/k/a Vinicius Araujo; Robert M.
Hughes d/b/a Robert's Vinyl Siding;
Lucas Rodrigues Barcelos a/k/a Lucas
Rodriguez Barcelos; Karla Bazerra;
Rodrigo B. Vasconcelos; Rondinely G.
Da Silva; Marcio Nunes Da Silva; W&M
Vinyl Siding, LLC; Bar Contractors, Inc.;
William Construction Services, LLC; and
Donald Lee d/b/a Vinyl Siding Specialists

Defendants.

Archer Exteriors, Inc.

Third-Party Plaintiff,

vs.

Henry A. Palmer,

Third-Party Defendant.

International Construction Services, Inc. and
International Construction Services, Inc.
d/b/a International Construction,

Third-Party Plaintiffs,

vs.

Bar Contractor, Inc., and William
Construction Services, LLC,

Third-Party Defendants.

TO: THE HONORABLE J.C. NICHOLSON, JR, SPECIAL REFEREE:

YOU WILL PLEASE TAKE NOTICE THAT the Defendant, Builders FirstSource-Southeast Group, LLC (hereinafter “BFS”), by and through its undersigned counsel, pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure, moves for Reconsideration of the August 1, 2024 Order denying BFS summary judgment as to Plaintiff Fenwick Commons Homeowners Association, Inc. claims. BFS respectfully requests that this Court reconsider its Order for the reasons set forth below and grant summary judgment upon the Plaintiff’s claims.

1. Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, “judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” During the July 26, 2024 motion hearing, BFS presented evidence that the work it performed was not the defective work discovered and complained of by Plaintiff. Rule 56 provides that, “an adverse party may not rest upon the mere allegations ... of his pleading, but his response, by affidavit or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” During the July 26, 2024 motion hearing, Plaintiff failed to present any evidence that would create a question of material fact and preclude summary judgment in BFS favor. The Court’s August 1, 2024 Order fails to consider the provisions of Rule 56 that require the Court to enter

summary judgment for BFS against Plaintiff due to Plaintiff's failure to comply with its burden of proof. On this basis alone, the Court must amend its August 1, 2024 Order.

2. In the August 1, 2024 Order, the Court incorrectly states, "[b]efore [it] were Builders FirstSource – Southeast Group, LLC's Motion and Memorandum in Support of Summary Judgment as well as Plaintiff's Memorandum in Opposition." During the July 26, 2024 motion hearing, counsel for BFS presented evidence to the Court including photographs taken by Plaintiff's expert witness professional engineer Robert G. Sisnroy, photographs taken by D.R. Horton's expert witness professional engineer Jason Gregorie, and sales orders evidencing the work performed by BFS at 1117 Santa Elena Way and 1119 Santa Elena Way. Counsel for BFS also presented an Order issued by the Honorable Jennifer B. McCoy in the *Lakeview Commons* matter CA 2018-CP-08-02142 pending in the Ninth Judicial Circuit where the Court found that the property regime did not have standing to pursue any claims for any deficiencies in the windows, including any claims for repair or replacement of the windows premised upon the verbatim language of the relevant master deed for the Fenwick Commons community. The Court's August 1, 2024 Order makes it clear that the Court failed to consider this evidence when ruling upon BFS Motion. This basis alone also requires the Court to amend its August 1, 2024 Order.
3. In the August 1, 2024 Order, the Court fails to include that Plaintiff stipulated that it is not bringing any claims for defective windows or for defective

installation of windows. During the July 26, 2024 motion hearing, in response to BFS' lack of standing to assert window claims argument, Plaintiff stipulated that it was not bringing any claims for windows, neither a defect in the window itself nor a defect in the installation of the window. Instead, Plaintiff clarified and stipulated that it was only bringing claims for defective installation of flexible flashing at and around the windows. This basis alone also requires the Court to amend its August 1, 2024 Order.

4. Rule 56 provides that “[i]f on a motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.” The Court’s August 1, 2024 Order makes a partial ruling and fails to provide what material facts are actually and in good faith controverted. This basis alone also requires the Court to amend its August 1, 2024 Order.

This motion shall be based upon the statutory and common laws of the State of South Carolina, the South Carolina Rules of Civil Procedure, the pleadings, affidavits and discovery documents exchanged herein.

HOWELL, GIBSON & HUGHES, P.A.

By: s/William H. Cox, III
William H. Cox, III
PO Box 40
Beaufort, SC 29901-0040
(843) 522-2400
wcox@hgpha.com

*Attorney for Defendant Builders Firstsource
- Southeast Group, LLC*

Beaufort, South Carolina

August 1, 2024

RULE 11 CERTIFICATION

I certify pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that

- I have consulted with opposing counsel and have been unable to resolve the matter.
- Consultation with opposing counsel would serve no useful purpose, or is not required.
- Consultation with opposing counsel could not be timely held
- I certify that there is no duty of consultation for the attached motion (to dismiss, for summary judgment, for new trial, for judgment NOV, in real estate foreclosures, or with pro se litigants.)

Exhibit 4

**Respondent's Motion to Dismiss
Appellate Case No.: 2024-00124**

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

CASE NO. 2018 CP-10-0330

Fenwick Commons Homeowners, Assoc.

Portrait Homes – South Carolina, LLC, Portrait Homes-

PLAINTIFF(S)

Fenwick Commons LLC, D.R. Horton, Inc. ET AL
 DEFENDANT(S)

Submitted by: J.C. Nicholson, Jr. Esq. (Special Referee)	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
--	--

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: Statement of Judgment by the Court: Defendant Builders Firstsource – Southeast Group, LLC’s Motion to Reconsider filed on 08/01/2024 is denied

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate “N/A” in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

RECEIVED

Dec 04 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Appellate Case No.: 2024-00124

Fenwick Commons Homeowners Association, Inc., Respondent,

v.

D.R. Horton, Inc., JJA Construction, Inc., d/b/a JJA Framing, JJA Construction, Inc. d/b/a JJA Framing Company, Jose Castillo d/b/a JJA Framing, Jose Castillo d/b/a JJA Framing Company, United Siding Specialists, Inc., Heritage Construction Consultants, Inc., Robert H. Yarnall d/b/a Heritage Construction Consultants, Inc., Built Right Construction, LLC, Alfonso Villavicencio d/b/a Alfonso's Painting, Alfonso Painting & Drywall, Inc., Diria Tawi Painting, Inc., 84 Lumber Company, Builders FirstSource - Southeast Group, LLC, Americo Roofing Concepts f/k/a Americo Roofing Concepts Enterprises, Inc., Americo Roofing Concepts, Inc. f/k/a American Roofing Concepts, Archer Exteriors, Inc. and Professional Exteriors, LLC, Luciano Dias Gomes d/b/a Prestige Home Construction, Geraldo Da Cunha, Pablo Rojas Franco, Charles Gunter, Henry A. Palmer, Julio C. Crespo, Brasilican Contracting, LLC, Charles Bowser d/b/a CWB Services, Jose Geraldo Dos Reis, Leandro De Paulo Araujo, Helio A. De Rezende, Vinicius Araujo De Freitas a/k/a Vinicius Araujo, Robert M. Huges d/b/a Robert's Vinyl Siding, Lucas Rodrigues Barcelos a/k/a Lucas Rodriguez Barcelos, Karla Bezerra, Rodrigo B. Vasconcelos, Rondinelly G. Da Silva, Marcio Nunes Da Silva, W&M Vinyl Siding, LLC, and Donald Lee d/b/a Vinyl Siding Specialists, Defendants,

of which Builders FirstSource - Southeast Group, LLC is the Appellant.

CERTIFICATE OF SERVICE

I, Alicia D. Pullano, certify that I have served *Respondent Fenwick Commons Homeowners Association, Inc.'s Motion to Dismiss*, by electronic mail, on December 4, 2024, addressed to all attorneys of record, as follows:

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December 4, 2024
Charleston, South Carolina