THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse
Circuit Court Judge

Appellate Case No. 2024-000057
Circuit Court Case No. 2019-CP-04-01942

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

v.

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

and

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

v.

A&J Framing, Inc.; A-Z, Inc.; AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC; Allpro Textures, LLC; Alpha E.M.C.; Alpha Omega Construction Group, Inc.; American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; BFK Builders, Inc.; BMC East LLC D/B/A Coleman Floor, LLC; Brand-Vaughn Lumber Co, Inc.; Bravo Carpenters, Inc.; Builders Designhouse, LLC; Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.; Builders Services Group, LLC, F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A Gale Contractor Services; Cannaday Siding & Gutter, Inc.; Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; CBU Enterprises, Inc.; Cortes Painting, LLC; CPI Security Systems, Inc.; Dom Group, LLC; Dupree Plumbing Company, Inc.; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II; GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.; General Shale Brick Inc.; Get Floored, LLC; Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC; Installed Building Products, LLC A/K/A Installed Building Products II, LLC; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry,

Inc.; Kings Landscaping, LLC; L&M Electric, Inc.; Lade-Danlar, Inc.; Landshapers, LLC; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; M&L General Construction, LLC, A/K/A M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&L Enterprises, LLC; P&T Construction, Inc., A/K/A P&T Construction, Inc.; Probuild Company, LLC A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Silver Line Building Products Corporation; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services., Inc., A/K/A Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc; and Willow Tree Landscaping, Inc., ... Third-Party Defendants,

and

Aaron D. Peris; Harrelson Painting, LLC, Huttig Building Products; et al, ... Fourth and Fifth-Party

of whom Defendants,

JLS Masonry, Inc. is the ..... Appellants.

and.

Natalie Zitek, individually, and on behalf of all others similarly situated and as assignee of the claims of Third-Party Plaintiff D.R. Horton, Inc., ... Respondent,

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FINAL BRIEF OF APPELLANT
JLS MASONRY, INC.

Respectfully submitted,

Dated: December 23, 2024

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2. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO DISMISS THE GENERAL CONTRACTOR'S CLAIMS AS BARRED UNDER THE STATUTE OF LIMITATIONS OR STATUTE OF REPOSE.

3. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN TREATING APPELLANT AS A *DE-FACTO* CLASS DEFENDANT WITHOUT DUE PROCESS.

4. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO BIFURCATE THE CLASS ISSUES/PARTIES FROM THE NON-CLASS SUBCONTRACTORS IN VIOLATION OF THE TRIAL PLAN ORDER.

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STATEMENT OF THE CASE

This matter is before the Court on appeal from a jury verdict in Trial Court Case No. 2019-CP-04-01942 in the Tenth Judicial Circuit dated September 15, 2023 (the "Verdict"). The lawsuit arises out of a complex construction defect case involving the development of the Rose Hill residential neighborhood located in Easley, South Carolina (the "Project"). The appeal is before the Court because the trial judge conflated the class issues and class parties with non-class issues as to the third-party defendants, including appellant, that were indisputably not part of the class. The trial judge deviated from his own Trial Plan Order which required bifurcation of the class claims and class liability from the non-class claims and parties, and further called for closing arguments and a jury verdict to be determined as to the class parties before proceeding with trial of the non-class issues and parties. R. pp. 25–34. Furthermore, the trial judge failed to give the jury clarifying/curative instructions regarding bifurcation of the class claims from the non-class claims,

and failed to inform the jury that Plaintiff had settled with the general contractor rendering the general contractor a sham defendant for purposes of a jury verdict, resulting in appellant being treated as a *de-facto* class defendant.

In addition, and likely dispositive of the issues presented herein, the trial judge, contrary to established precedent, allowed the general contractor's legally untenable implied warranty claim against appellant to proceed to trial, which is invalid as a matter of law regardless of the conflated class and non-class issues. *See* R. pp. 22–24; R. pp. 43–48; R. pp. 2247–49; R. pp. 2433–47; R. pp. 2590–95. The trial judge subsequently denied appellant's timely motion for a directed verdict based on the statutes of limitations and repose despite record evidence showing the general contractor had actual knowledge of the alleged issues for more than three (3) years before filing its third-party claims against appellant, and more than eight (8) years from substantial completion of appellant's work. R. p. 1670, line 25–p. 1671, line 23; *see also* R. pp. 35–38; R. pp. 2608–15. Likewise, the trial judge denied a timely motion for judgement notwithstanding the verdict and/or new trial by order dated November 8, 2023, and a timely motion for reconsideration by order dated December 12, 2023. R. pp. 39–42; R. pp. 43–45. Appellant JLS Masonry, Inc. ("JLS") filed a timely notice of appeal on January 11, 2024, and was granted an extension of time to file this initial brief on or before June 3, 2024. R. pp. 103–07.

I. THE PARTIES

The original complaint was filed by Natalie Zitek, individually and on behalf of all others similarly situated ("Zitek"), against D.R. Horton, Inc., the general contractor who developed the Project ("D.R. Horton") on September 25, 2019. R. pp. 51–65. The complaint asserted claims of

negligence/gross negligence and breach of implied warranties against D.R. Horton.[1] R. pp. 62–64. The circuit court certified a conditional class with respect to Zitek's allegations against D.R. Horton on January 27, 2021. R. pp. 1–14. D.R. Horton subsequently filed a third-party complaint against multiple subcontractors who performed work at the Project, including JLS, on March 11, 2021, alleging negligence, breach of contract, breach of express and implied warranty, contractual indemnity, and equitable indemnity. R. pp. 85–90.

JLS performed masonry construction services for D.R. Horton at the Project from 2011 through July 31, 2014. R. p. 2437; R. p. 2609. However, the circuit court did not undertake a Rule 23 class analysis with respect to the newly added parties and claims asserted by D.R. Horton against the subcontractors, including JLS, and no class was ever certified with respect to the third-party defendants, including JLS. *See* R. p. 152, line 13–p. 153, line 9; R. p. 592, line 25–p. 593, line 3; R. p. 1473, lines 13–15. Further, during both phases of the trial, the trial court repeatedly denied motions to decertify the class brought by the subcontractors, including JLS, relying on its prior rationale for denying D.R. Horton's motion to decertify, without undertaking any additional analysis regarding applicability of the previously certified class on the subcontractors. R. p. 1471, line 24–p. 1472, line 11; R. p. 1502, lines 5–15; R. p. 1515, line 12–p. 1516, line 23.

II. UNDERLYING FACTS

i. Overview

The Project consists of approximately 261 single-family homes and was initially developed by Poinsett Development, LLC ("Poinsett") between 2006 and 2011. R. p. 1905. Poinsett built twenty-seven homes (27) before deeding the property to Poinsett's bank. R. pp. 1905–06. D.R.

[1] The Complaint included a cause of action for violations of unfair trade practices but Plaintiff dropped that claim after the class was certified.

Horton then purchased the lots from the bank and served as the General Contractor to complete the development of the Project. R. p. 1906. D.R. Horton hired various subcontractors, including JLS, to perform work under subcontractor agreements. R. p. 1911. D.R. Horton built the remaining 234 homes between approximately 2011 and 2017 and sold them to individual owners, including Natalie Zitek. R. p. 1906.

The initial homebuyers were able to customize their homes, choosing from twenty-six (26) different model plans, each with multiple options for exterior cladding materials and window type and placement, resulting in sixty-seven unique configurations and home designs in Rose Hill. R. pp. 1906–07. These designs vary between one-story ranch-style homes, one-story homes with a single room over the garage, and a full two-story home that consists of multiple rooms and bathrooms on the second floor. R. pp. 1910–11. The topography of Rose Hill is hilly, which resulted in variations in the foundations and soil supporting the foundations. R. p. 1907. These variations include slab-on-grade on cut material, slab-on-grade on fill material, homes with basements, and lots with and without soil retaining walls. R. p. 1907. The topography also resulted in variations in site drainage methods and conditions on each lot at the time of construction. R. p. 1907.

The class sought to be certified consisted of 234 homes, of which approximately 150 have some amount of brick exterior. R. pp. 2393–94. Approximately 66 homes have a combination of stone and vinyl exteriors and another 49 have a combination of brick, stone, and either cement or vinyl siding. R. p. 2395; R. p. 2403. JLS worked on 102 of the homes in the class. R. p. 2437. Of those 102 homes, approximately 88 were substantially completed on or before February 27, 2014. R. pp. 2808–09; R. pp. 2835–3466.

On September 25, 2019, Zitek, acting as class representative for approximately 234 Rose Hill neighborhood homeowners, sued D.R. Horton asserting claims of negligence and breach of

implied warranties, and alleging various construction defects and violations of building codes and industry standards. R. pp. 62–65. D.R. Horton, in turn, filed an amended answer and third-party complaint against its subcontractors, including JLS, denying all substantive allegations against it by Zitek and seeking indemnity from the subcontractors for any deficiencies established by Zitek. R. pp. 66–92. D.R. Horton asserted claims for negligence, breach of contract, breach of express and implied warranty, contractual indemnity, and equitable indemnity against all third-party defendants. R. pp. 85–90. D.R. Horton did not file an affidavit of service with respect to JLS, and JLS voluntarily filed an answer on March 9, 2022, approximately one (1) year after D.R. Horton had filed its third-party complaint R. pp. 93–102.

ii. Class Certification

The class was certified on January 27, 2021, and Natalie Zitek was appointed class representative, to represent the class claims against D.R. Horton only. R. pp. 1–14. In granting Plaintiff's Motion for Class Certification, the trial court concluded that all five (5) Rule 23 class certification requirements were met under the South Carolina Rules of Civil Procedure. Specifically, the trial court found that the "case is well-suited for class certification because multiple claims that center on Horton's conduct can be resolved in a single action that poses no unusual manageability problems." R. p. 1. "Zitek's claims arise out of a common pattern of alleged wrongdoing by Horton." R. p. 5. The Order is summarized below.

(A) *Numerosity* met because the class consists of 234 or more members who own 234 houses and Horton agrees there are 234 Horton-built homes in Rose Hill.

(B) *Commonality* met because there are common legal and factual questions such as "whether Horton's construction practices damaged class members." The court pointed to evidence introduced by Plaintiff "supporting commonality of the claims at issue", including

(1) all 234 homes contain many of the same components and have experienced the same weather conditions, (2) defects and damages observed are typical and consistent and affect all 234 Rose Hill Homes, (3) "all-inclusive unit costs for the repair of these common defects are typical and consistent", (4) defects can be classified singularly as defective exterior building envelopes, (5) photo documentation of six common defects throughout the homes' envelopes, (6) D.R. Horton admitted it hired subcontractors to perform nearly identical scopes of work, and (7) D.R. Horton observed sealant failure at windows in 96% of homes it inspected and damaged patio doors in 52% of the homes.

(C) *Typicality* met because Plaintiff's claims against D.R. Horton arise out of a common pattern of alleged wrongdoing by D.R. Horton and the same legal and factual theories.

(D) *Adequacy* met because Natalie Zitek voluntarily accepted her role as class representative and no material conflict exists between Zitek and the other owners of D.R. Horton-built homes. D.R. Horton's argument that Zitek's upscale residence should disqualify her is "inadequately supported and misplaced."[2]

R. pp. 1–14.

The circuit court concluded that D.R. Horton had conceded common conditions in its previous offers to homeowners to cure at least two common and typical conditions relating to these homes' envelopes. R. p. 7. It is undisputed that the circuit court's class analysis only considered the Plaintiff's class claims against D.R. Horton because there were no other parties involved as of January 27, 2021, and clearly, no allegations against the third-party or fourth-party defendants upon

[2] The Rule 23 *Amount in Controversy* requirement was not addressed by the court presumably because at that time, the only class defendant was D.R. Horton.

which to conduct a Rule 23 class analysis. *See* R. p. 592, line 17–p. 593, line 3; R. p. 1473, lines 13–15; R. p. 1502, lines 5–15.

After the initial class was certified, some homeowners chose to opt out of the class, and the final number of homes in the class dropped to 221. R. p. 2220, n.1.

iii. Pre-Trial Motions

From the onset, the third and fourth-party defendants including JLS, asserted they were not part of the class, and further moved for orders decertifying/confirming that they were not part of the class and that class issues and damages should not be imputed to them. *See* R. pp. 2250–78; R. pp. 2279–2307; R. pp. 2315–17; R. pp. 2331–35. All the pre-trial motions to decertify were denied. R. pp. 18–21.

In addition, JLS, disputed and moved to dismiss D.R. Horton's implied warranty claim on the basis that it was a purely indemnity claim that would not pass muster under *Stoneledge v. Clear View*, 413 S.C. 615, 622, 776 S.E.2d 426, 430 (Ct. App. 2015) (*Stoneledge I*) and *Stoneledge v. Builders Firstsource*, 413 S.C. 630, 637, 776 S.E.2d 434, 438 (Ct. App. 2015) (*Stoneledge II*).[3] R. pp. 2247–49; R. pp. 2433–56; R. pp. 2590–95; R. pp. 2602–04. JLS also argued that D.R. Horton lacked standing to bring an implied warranty claim because D.R. Horton's indemnity claims were purely derivative of Zitek's claims. *See* R. pp. 2247–49; R. pp. 2433–56; R. pp. 2590–95; R. pp. 2602–04. The trial court denied these Motions on July 28, 2023. R. pp. 22–24. The trial court further denied the motions to reconsider on August 18, 2023. R. pp. 35–38.

JLS further argued and submitted motions seeking dismissal of D.R. Horton's claims pursuant to the statute of limitations. *See* R. pp. 2602–04; R. pp. 2608–15; R. pp. 2616–23; R. pp.

[3] Collectively the "*Stoneledge* precedent".

2802–13. The statute of limitations begins to run when a cause of action reasonably ought to have been discovered. S.C. Code Ann. § 15-3-530. JLS argued the evidence showed D.R. Horton had actual knowledge of the issues giving rise to Zitek's claims as early as March 11, 2016. R. pp. 2608–15. Zitek had multiple and repeated repairs performed at her house, including stripping large portions of brick off the house and re-applying, starting in 2013 and continuing through 2017. R. p. 452, line 22–p. 453, line 9. As such D.R. Horton was on notice of any alleged defective work by JLS and had three (3) years from that time to assert its claims against JLS, arising out of JLS's work at the Project. The trial judge denied the motions. R. pp. 39–42; R. pp. 43–50.

Likewise, JLS argued and submitted motions seeking dismissal of D.R. Horton's claims pursuant to the statute of repose. R. pp. 2602–04; R. p. 2608–15; R. pp. 2616–23; R. pp. 2802–13. The statute of repose for substantial completion after July 1, 2005, is eight (8) years. S.C. Code Ann. § 15-3-640. JLS argued that with respect to the 86–88 homes that were completed on or before March 9, 2014, any recovery sought by D.R. Horton was barred pursuant to the statute of repose. R. pp. 2608–15. Although JLS voluntarily served its answer on March 9, 2022, D.R. Horton did not file an affidavit of service showing that JLS was timely served within the statute of repose period. Notably, JLS served its answer approximately one (1) year after D.R. Horton had filed the third-party complaint. R. pp. 93–102. As such, D.R. Horton's claims were barred by the statute of repose. *See* R. pp. 2608–15. Yet again, the trial court denied JLS' motions. R. pp. 39–42; R. pp. 43–48.

iv. Motion to Bifurcate

In preparation for trial, JLS also moved for bifurcation of Zitek's class claims from D.R. Horton's individual claims against JLS. R. pp. 2311–14. JLS again argued that the sole defendant in the certified class was D.R. Horton, and that trial of Zitek's class claims should be bifurcated from D.R. Horton's claims against the non-class third-party defendants. R. pp. 2312–13. In addition,

JLS requested commencement of the trial of D.R. Horton's claims against the non-class third-party defendant immediately after the jury had rendered a verdict with respect to the class claims (Phase I). R. p. 2313.

v. Trial Plan Order

In response to the subcontractors', including JLS' motions bifurcate, the trial judge entered a Trial Plan Order on August 17, 2023. R. pp. 25–34. Due to the complex nature of the lawsuit, the Trial Plan specifically required trial of the class claims between Zitek and D.R. Horton, including closing arguments and a jury verdict regarding liability of D.R. Horton to Zitek, before Phase II could begin. R. pp. 29, 31–32. After a verdict had been rendered as to D.R. Horton's liability, then Phase II would begin, consisting of D.R. Horton's claims against its subcontractors. R. pp. 29, 31–32. Notably however, the Trial Plan contained inconsistent instructions: While the Trial Plan provided that the trial would be bifurcated and proceed in two phases, with Phase I consisting of Plaintiff's class action claims against D.R. Horton and Phase II consisting of D.R. Horton's individual claims against the subcontractors, the Trial Plan also incorporated language allowing designated representatives of the non-class third-party defendants to make opening statements, and "to cross examine any witness regarding matters not covered in the direct or cross examination by the Plaintiff or Defendant." R. p. 32.

vi. Trial Phase 1

Several parties settled their claims prior to commencement of Phase I, as noted on the record on September 5, 2023. R. p. 136, lines 1–21. Zitek brought her case against D.R. Horton first, and in accordance with the Trial Plan, third-party defendants were allowed to have only their principal party present in the courtroom to observe. R. p. 135, lines 12–19. Further compounding the inconsistent Trial Plan instructions and conflation of the class issues and parties versus non-class

parties and issues, the trial judge instructed all the parties that, "we're going to cover the ground once during the trial." R. p. 1247, lines 3–10. Both D.R. Horton and the non-class third-party defendants asked the trial judge for clarification regarding conflation of the Phase I and Phase II issues, including "a combination of liability stuff" and the understanding that subcontract agreement issues are reserved for Phase II. *See* R. p. 1246, line 11–p. 1250, line 7; R. p. 1593, lines 12–18. Tacitly acknowledging the class and non-class issues had already been conflated, the trial judge agreed that although contractual and indemnity issues are Phase II issues, some questions may be "merged" and "the waters may be muddied" but that these are "tactical decision[s]" left to the attorneys. R. p. 1249, lines 7–21.

Likewise, Zitek also acknowledged directly that the non-class third and fourth-party defendants were not part of the class and represented to the jury that the class claims are "purely against D.R. Horton." R. p. 152, lines 13–15. Zitek further explained that D.R. Horton sued its subcontractors "relating to our claims" and that, "although [the parties are all] in the same courtroom[,]" Plaintiff is not part of that suit directly. R. p. 152, line 23–p. 153, line 9. Zitek introduced evidence of alleged construction defects and presented a single claim for all-inclusive ***class damages*** in the amount of $28,525,942.00. R. p. 797, lines 9–14. In response to JLS' and the non-class third and fourth-party defendants' renewed Motions to Decertify the class and Dismiss D.R. Horton's claims against the subcontractors, Zitek explicitly represented to the court that "***these third and fourth-party defendants have no standing to argue anything regarding the Plaintiff [because] they're not [part of Plaintiff's case against D.R. Horton].***"[4] R. p. 592, line 25–p. 593, line 3; R. p. 1473, lines 13–15. And ***the trial judge agreed,*** stating ***the trial so far is Phase I, which***

[4] Emphasis added.

applies to Plaintiff's claims against D.R. Horton, not the subcontractors. *See* R. p. 1502, lines 5–15. Plaintiff rested its case against D.R. Horton on September 14, 2023.

vii. Settlement, Assignment of Claims and Trial Motions

After Zitek rested her case against D.R. Horton, but before D.R. Horton had put up its case, Zitek and D.R. Horton entered into a confidential settlement agreement. The agreement, in part, assigned all of D.R. Horton's remaining claims against its subcontractors (the third-party defendants) to Zitek. R. p. 1504, line 4–p. 1505, line 14. JLS immediately moved for disclosure of the settlement amount, and the trial judge denied the request. R. p. 1508, lines 10–23. Likewise, the trial judge denied JLS's Motions for decertification and dismissal of D.R. Horton's indemnity claims from the bench. R. p. 1515, line 12–p. 1517, line 13. JLS further moved to dismiss Zitek's claims pursuant to the statute of limitations and argued that Zitek was not an adequate class representative. R. p. 1537, line 10–p. 1538, line 4. Subsequently, all remaining subcontractors except JLS entered into settlement agreements, and JLS was the sole remaining defendant on September 15, 2023, when the trial resumed.

viii. Trial Phase II

Instead of a bifurcated trial pursuant to the Trial Order, the trial court permitted a co-mingled Phase II trial incorporating class evidence and allegations with respect to JLS, a non-class member. *See* R. p. 1541, line 9–p. 1542, line 12. The trial judge did not inform the jury that Plaintiff and D.R. Horton had settled, nor did he inform the jury that JLS was not subject to the class allegations, issues, and damages, rather, the trial judge instructed the jury as follows:

> "D.R. Horton has assigned [its] claims against [JLS] to the Plaintiff. Therefore, the ***Plaintiff is continuing to seek a monetary verdict against Horton***, and the Plaintiff is now additionally prosecuting D.R. Horton's claims against [JLS]. The ***Plaintiff,***

> ***through D.R. Horton's*** claims, is entitled to hold the remaining subcontractor responsible ***for a portion of*** the Plaintiff's burden – ***verdict against D.R. Horton***. . .. ***This [has] turned into . . . a single trial, so we're going to deal with all of it . . . now."*** [5]

R. p. 1541, line 13–p. 1542, line 4. However, no verdict had been reached as to D.R. Horton's liability as set forth in the Trial Plan. ***Notably, Zitek had no claims against JLS, and D.R. Horton had previously admitted liability regarding the stone improperly adhered to brick issues***. *See* R. p. 167, lines 1–3; R. p. 170, line 18–p. 173, line 7. The trial judge issued a directed verdict on that issue and instructed the jury as to D.R. Horton's admission of liability as regards to the class claims in Phase II of the trial. R. p. 1542, lines 16–23. Further D.R. Horton admitted its plans failed to instruct its masonry subcontractors on many aspects of brick installation, including the failure to isolate foundation-supported brick and frame-supported brick. R. p. 1390, line 16–p. 1391, line 3; R. p. 2394. ***However, JLS did not at any time, admit liability with respect to its work at the Project.***

In addition, Zitek proceeded to put forth her case against D.R. Horton ***concurrently*** with D.R. Horton's case against JLS seeking to recover class damages against D.R. Horton, ***and a portion of the verdict against D.R. Horton***. Phase II trial proceeded with the same evidence as to class damages using prior expert testimony and the same jury as Phase 1. *See* R. p. 1471, line 16–17; R. p. 1541, line 9–p. 1542, line 12. The experts agreed as follows: Zitek's garage brick wall was rebuilt in 2017 (*See* R. p. 167, line 8–p. 168, line 8; R. 891, lines 3–12; R. p. 1576, lines 22–25); Plaintiff's expert did not know which houses JLS had worked on and admitted all the houses did not look the same; and that the houses are very different and have different exterior components,

[5] Emphasis added.

which necessitated classification of the homes into three (3) distinct categories: basic, moderate, and complex. R. p. 1654, lines 4–10, 18–24; R. p. 1656, line 8–p. 1658, line 6. Plaintiff's expert was unable to identify how many homes JLS had worked on in each category; agreed most of the homes JLS worked on were encompassed in phase 1 of the construction; agreed that homes constructed during phase 1 of the Project are mostly in the "basic" category, and the cost to repair a basic home is approximately 50% less than the cost to repair a complex home. R. p. 1654, lines 4–10, 18–24; R. p. 1656, line 8–p. 1658, line 6; R. p. 1658, line 21–p. 1659, line 3; R. p. 1665, lines 15–21. D.R. Horton was likewise unable to identify which homes JLS worked on or confirm whether any defects were attributable to JLS. R. p. 1627, lines 17–23; R. p. 1658, line 3.

ix. Post-Trial Motions

a. JLS Motion for Directed Verdict 9.14.2023

In support of its motion for directed verdict ("MDV"), JLS argued that D.R. Horton's claims on any issues relating to the manufactured stone veneer and installation of the brick veneer were barred by the statute of limitations, and D.R. Horton's claims regarding any homes that were substantially completed before March 9, 2014, were barred by the statute of repose. R. pp. 2608–15. The trial judge denied this motion on November 8, 2023. R. pp. 39–41.

b. JLS Motion for Judgement Notwithstanding the Verdict 9.22.2023

JLS moved for judgement notwithstanding the verdict and/or new trial ("JNOV") as to D.R. Horton's claims on September 22, 2023, asserting the following:

1. D.R. Horton's claims are disguised claims for indemnity, which should be dismissed pursuant to the *Stoneledge* decisions and their progeny;

2. D.R. Horton's contractual indemnity claim does not clearly and unequivocally show that the parties intended JLS to indemnify D. R. Horton for its concurrent negligence, and should therefore, be dismissed pursuant to *Concord & Cumberland,*[6] in addition to violating public policy;
3. D.R. Horton's claims are barred by the statute of limitations;
4. D.R. Horton's claims are barred by the statute of repose;
5. JLS is not responsible for the consequences of defects in the plans and specifications;
6. the evidence presented does not support a verdict against JLS because the experts could not identify which homes JLS worked on and whether those homes were all brick, partial brick, or no brick;
7. no evidence was presented regarding the concrete claims showing that the cracks exceeded industry standards or that the cracks were caused by JLS' defective installation;
8. D. R. Horton does not have standing to bring a breach of implied warranty claim against JLS because D.R. Horton does not own the homes, cannot compel the homeowners to make the repairs, and therefore, has not suffered a concrete injury that is redress by a favorable judicial decision;
9. no class was ever certified as to JLS, but the trial judge treated D.R. Horton's claims against JLS as a *de-facto* class claims;
10. the settlement amount between Plaintiff and D. R. Horton should have been disclosed to the jury pursuant to *Poston v. Barnes,*[7] and that;

[6] *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).
[7] 294 S.C. 261, 265, 363 S.E. 2d 888 (1987).

11. Plaintiff's expert based his critique of the concrete work based on plans that were not in effect at the time of construction, in violation of the trial judge's order.

The trial judge denied this motion on December 12, 2023. R. pp. 43–48.

c. *JLS Motion for Reconsideration 11-20-2023*

JLS moved for reconsideration of the trial judge's denial of its MJNOV on November 20, 2023. The motion to reconsider asserted that the trial judge had failed to address JLS' *Stoneledge* arguments; D.R. Horton's lack of standing to bring an implied warranty claim; unenforceability of D.R. Horton's contractual indemnity claim; the statutes of limitations and repose arguments; the request for disclosure of the settlement agreement and settlement amount to the jury; the trial judge's co-mingling of class claims and damages and treating JLS as part of the class where no class existed as to JLS; to the extent the claims were treated as a class as to JLS, the class should have been decertified because the homes are different and subject to different defenses; and that the jury award was grossly excessive. R. pp. 2802–13.

The trial judge denied the motion by order dated December 12, 2023. R. pp. 43–48.

STANDARD OF REVIEW

With respect to the trial judge's interpretation of D.R. Horton's causes of action against JLS for breach of implied warranty, "[t]he character of an action is primarily determined by the allegations contained in the complaint." *Stoneledge I* (quoting *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). Thus, as to the construction of D.R. Horton's pleadings and the nature of the claims asserted therein, this appeal presents a question of law, and the lower court's decision is to be renewed *de novo*. *Id.*; *see also Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E. 2d 40, 41 (2008).

When instructing the jury, the trial judge is required to charge only the current and correct

law of South Carolina. *Cohens v. Atkins*, 333 S.C. 345, 349, 509 S.E.2d 286, 288 (Ct. App. 1998) citing *McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995). "The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing *Estelle v. McGuire*, 502 U.S. 62 (1991)).

Appellate review of an action at law on appeal of a case tried by a jury is with respect to corrections of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. *Cohens v. Atkins*, 333 S.C. 345, 347–48, 509 S.E.2d 286, 288 (Ct. App. 1998) (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)). An appellate court will reverse only where there is no evidence to support the trial judge's ruling, or where the ruling was controlled by an error of law. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 491, 649 S.E.2d 494, 498 (Ct. App. 2007) (citing *Clark v. S.C. Dep't of Public Safety*, 362 S.C. 377, 382–83, 608 S.E.2d 573, 576 (2005)); *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); *Abu–Shawareb v. S.C. State Univ.*, 364 S.C. 358, 613 S.E.2d 757 (Ct. App. 2005); *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). Essentially, the appellate court must resolve whether it would be reasonably conceivable to have a verdict for a party opposing the motion under the facts as liberally construed in the opposing party's favor. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. at 491, 649 S.E.2d at 498.

SUMMARY OF ARGUMENT

This appeal presents a classic text-book case of a convoluted trial encompassing the trial judge's failure to acknowledge the unenforceability of D.R. Horton's nonexistent implied warranty claim against JLS; conflation of class claims and non-class claims while simultaneously imputing

class status upon the admitted non-class parties without conducting a Rule 23 class analysis as to the non-class parties; failure to properly instruct the jury as to the bifurcated class claims from the non-class claims; failure to inform the jury that D.R Horton had settled with Zitek immediately after Zitek's closing arguments but was still a defendant for purposes of a jury verdict; failure to inform the jury of the settlement amount; and failure to apply the proper legal analysis with respect to JLS' statute of limitations and statute of repose arguments, all culminating in a prejudicial verdict not supported by the law or facts against JLS.

The trial court irreconcilably acknowledged that JLS was not a part of the class and did not have standing to challenge the class, while at the same time, failing to bifurcate and/or instruct the jury regarding the bifurcated claims. Further, the trial court allowed the claims against JLS to go to the jury based solely on the class-damages model prepared by Zitek's expert, thereby confusing the jury into believing the class damages against D.R. Horton were interchangeable with/satisfied D.R. Horton's separate burden to prove its individualized damages against JLS. JLS objected to being considered a class defendant and moved to decertify the class multiple times throughout the litigation, attempted multiple times to have the class damages parsed out from any individual damages that D.R. Horton was claiming, and argued *ad nauseum* that D.R. Horton's claims were time-barred as they relate to JLS's work on the Project. The trial court repeatedly declined and/or denied JLS's motions and objections at trial. However, the addition of JLS not only created a new suit, but it also disrupted the "commonality," "typicality," and "adequacy of representation"[8] elements of the previously certified class.

[8] The trial judge did not address the amount in controversy element.

In this case, although the procedural morass regarding conflation of the class and non-class issues and attendant insufficient and confusing jury instructions warrant a new trial, resolution of the nonexistent implied warranty claim in JLS' favor pursuant to established precedent moots the improper class status imputed to JLS without the proper legal analysis. In other words, regardless of the procedural legal quagmire arising out of the conflated class certification and jury instruction issues, the implied warranty claim is legally untenable, even if a new trial is ordered. The jury determined JLS had no liability to D.R. Horton under the contractual and equitable indemnity claims, but returned a Four Million Dollar ($4,000,000.00) verdict with respect to the breach of implied warranty claim. Notably, the contractual and equitable indemnity causes of action were on the jury verdict form, and the jury actively considered those claims and asked for instructions about indemnity during deliberations (R. p. 1733, line 13–p. 1740, line 5), and ultimately concluded that D.R. Horton was not entitled to recover under those theories. R. pp. 49–50. Additionally, the same jury, during the same deliberations, also found that D.R. Horton had not breached any warranties to Zitek, but was liable to Zitek in the amount of Fifteen Million Dollars ($15,000,000.00) only for the negligent construction of the homes. R. pp. 49–50.

Under South Carolina law, "a claimant cannot maintain…breach of warranty claims arising only from the claimant's potential liability for another party's damages and the claimant's need to defend itself in litigation; such contingent claims lie in indemnity." *BEI-Beach v. Christman*, 440 S.C. 98, 889 S.E. 2d 601 (Ct. App. 2023). As such, any indemnification that JLS may have owed to D.R. Horton, if valid, would necessarily arise from a finding of sole negligence attributable to JLS. *Id.* Further, JLS was not the builder or seller so that D.R. Horton did not have its own implied warranty claim to assign to Zitek. *See, e.g., Drucker v. Witt*, 2005 WL 7083476 (Feb. 18, 2005) (citing *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 229 S.E.2d 728, (1976)). Because the jury found D.R. Horton

liable for its own negligent conduct, D.R. Horton did not have a valid implied warranty claim against JLS, and the purported assignment of the implied warranty claim to Zitek was in essence, an exercise in futility and not a cognizable claim under South Carolina law.

ARGUMENT

I. THE TRIAL COURT WRONGLY, AND CONTARY TO ESTABLISHED PRECEDENT, ALLOWED DISGUISED EQUITABLE INDEMNITY CLAIMS TO PROCEED TO TRIAL AGAINST JLS

D.R. Horton conceded it had made mistakes during its construction of the Project, and specifically admitted it had an obligation to supervise the subcontractors and was responsible for the construction, notwithstanding the use of subcontractors, including its own liability for implied warranties. R. p. 167, line 1–p. 169, line 10; R. p. 170, line 18–p. 173, line 7; R. p. 1390, line 16–p. 1391, line 14; R. p. 1449, line 21–p. 1450, line 2; R. p. 1450, lines 15–23; R. p. 1482, lines 1–13. The trial judge agreed, and ruled from the bench that there was sufficient evidence supporting the conclusion that D.R. Horton admitted its liability with respect to the issue of stone adhering to brick only, and directed a verdict regarding D.R. Horton's admission as to its liability with respect to the stone adhered to brick. *See* R. 1518, lines 15–25; R. p. 1542, lines 16–23. However, in spite of these admissions and the directed verdict, the trial court incorrectly failed to recognize that D.R. Horton's breach of warranty claim against JLS was merely derivative of Zitek's claims against D.R. Horton, and thus barred under the *Stoneledge* cases and their progeny. Based on its own admissions of negligent construction and lack of standing, D.R. Horton did not have a valid breach of implied warranty claim against JLS to assign to Zitek. Accordingly, the trial court erred when it denied JLS' motions prior to and during the trial to dismiss D.R. Horton's claims, and erred again when it denied JLS' post-trial motions without properly applying the precedent set forth in the *Stoneledge* cases and

their progeny to the breach of implied warranty claim. These errors resulted in misdirected jury deliberations and a verdict against JLS with respect to an invalid cause of action.

A. Applicable Law

Under South Carolina law, a claimant cannot maintain tort or breach of contract claims that arise only when the claimant faces potential liability for another party's damages and must defend itself in litigation, because such causes of action are not independent and are merely claims for equitable indemnity. *Stoneledge I*, 413 S.C. at 622, 776 S.E.2d at 430; *Stoneledge II*, 413 S.C. at 637, 776 S.E.2d at 438. To properly analyze whether a claim is disguised indemnity, the Court will look to the allegations contained in the complaint. *Stoneledge I*, 413 S.C. at 620, 776 S.E.2d at 429. The dispositive inquiry is whether the claimant suffered its own damages as a direct result of the alleged tort or breach, independent of having to defend the lawsuit against the claimant. *Stoneledge II*, 413 S.C. at 638, 776 S.E.2d at 439. Analyzing the same issue in the *Stoneledge* cases, this Court specifically found that contingent breach of warranty claims brought by a general contractor were properly dismissed as disguised indemnity claims, and affirmed this holding in *BEI-Beach, LLC v. Mashburn Christman, JV, et al.*, 440 S.C 98, 889 S.E.2d 601 (Ct. App. 2023).

In the *Stoneledge* cases, a homeowners' association (Stoneledge) sued the general contractor and its subcontractors for construction defects in a townhome complex. *Stoneledge I*, 413 S.C. at 618, 776 S.E.2d at 428; *Stoneledge II*, 413 S.C.at 633, 776 S.E.2d at 436. The general contractor, in turn, filed cross-claims against its subcontractors for negligence, breach of contract, breach of warranty, and equitable indemnity. *Stoneledge I*, 413 S.C. at 619, 776 S.E.2d at 428; *Stoneledge II*, 413 S.C.at 634, 776 S.E.2d at 436. The Court of Appeals upheld dismissal of the general contractor's claims for negligence, breach of contract, and breach of warranty against its subcontractors, holding that those

claims were actually derivative claims for equitable indemnity. *Stoneledge I*, 413 S.C. at 619, 776 S.E.2d at 428–29; *Stoneledge II*, 413 S.C.at 634, 776 S.E.2d at 436–37.

In analyzing the validity of the general contractor's claims, the Court of Appeals pointed to the general contractor's breach of warranty claim that stated "If [Stoneledge's] allegations are true…, [the respondents] breached their express and/or implied warranties… Should [Stoneledge] prevail on [its] claims, [the general contractor] will be damaged as a direct and proximate result of [the respondents'] breach of their express and/or implied warranties." *Stoneledge II*, 413 S.C. at 636, 776 S.E.2d at 437. The Court of Appeals explained the general contractor's cause of action against its subcontractors stemmed from the potential liability it could face for the damages claimed by Stoneledge, and noted that the general contractor did not allege personal injury or property damage as to itself. *Id*. Stoneledge was the party that suffered damages and the general contractor's injuries arose exclusively from having to defend itself in Stoneledge's lawsuit. *Stoneledge I*, 413 S.C. at 619, 776 S.E.2d at 428; *Stoneledge II*, 413 S.C.at 634, 776 S.E.2d at 436.

In a strikingly similar recent case, BEI-Beach brought claims against its general contractor, which in turn, brought third-party claims, including breach of warranty, against its subcontractors and the project architect. *BEI-Beach, LLC v. Mashburn Christman, JV, et al.*, 440 S.C 98, 889 S.E.2d 601 (Ct. App. 2023). The general contractor sought to recover damages for any settlement or judgment it must pay to BEI-Beach, plus costs to defend the lawsuit. *BEI-Beach*, 440 S.C. at 108, 889 S.E.2d at 606. Citing the *Stoneledge* cases, the *BEI-Beach* Court found that the third-party claims "set forth no proper independent claim resulting from any breach of warranty" by the project architect. *BEI-Beach*, 440 S.C. at 108, 889 S.E.2d at 606. Instead, BEI-Beach was the party that allegedly suffered damages and the general contractor's alleged injuries "arise exclusively from having to defend itself against BEI's lawsuit." *BEI-Beach*, 440 S.C. at 103, 108, 889 S.E.2d at 603,

606. Accordingly, the Court of Appeals held that the general contractor's breach of warranty claim was "merely disguised equitable indemnity" and subject to dismissal under the *Stoneledge* precedent. *BEI-Beach*, 440 S.C. at 108, 889 S.E.2d at 606.

B. D.R. Horton's Breach Of Implied Warranty Claim Against JLS Is Barred Under *Stoneledge*

This Court has squarely addressed the validity of a general contractor's contingent breach of warranty claims against its subcontractor. Under South Carolina law, a general contractor cannot sue its subcontractor for breach of warranty where a plaintiff purchaser suffered actual damages, and the contractor's alleged injuries arose exclusively from having to defend itself against the purchaser's lawsuit. This is because the general contractor has no independent damages other than the cost to defend the suit, and does not own the property for which they are seeking damages. *See BEI-Beach v. Christman*, 440 S.C. at 108, 889 S.E. 2d at 606 (general contractor, sued by development's purchaser for construction defects, may cross-claim against the project's architect to recoup litigation costs, but only under a theory of equitable indemnity). The Court's analyses in *Stoneledge* and *BEI-Beach* are directly on point and determinative of the dispositive issue raised in this appeal, *i.e.* D.R. Horton's implied warranty claim against JLS is legally untenable under South Carolina law, and the trial court erred in allowing that issue to be submitted to the jury.

In its third-party complaint, D.R. Horton alleges the subcontractors' work on the Project "gave rise to contractual and common law duties in tort and/or warranty." R. p. 84. D.R. Horton further alleges that the subcontractors' work, if deficient, "gave rise to causes of action in favor of D.R. Horton… and caused D.R. Horton damages…." R. p. 84. D.R. Horton's claim for breach of implied warranties alleges that JLS "implicitly warranted that any materials, installation, and workmanship they perform at the [Project] were proper [and if] not in accordance with contract requirements,

construction plans, industry standards, and/or building code requirements, then [JLS has] materially breached their express warranties." R. p. 90.

Unquestionably, D.R. Horton acknowledged in its third-party complaint that its claims against JLS stem from Zitek's allegations that the subcontractors failed to construct the homes in accordance with construction documents, contract documents, industry standards, and/or building code requirements so as to avoid construction defects. R. p. 84. D.R. Horton's allegations against JLS were always merely contingent claims. Just like the general contractors in *Stoneledge* and *BEI-Beach*, D.R. Horton brought a third-party claim against JLS for breach of warranty that arises exclusively from having to defend itself against Zitek's lawsuit. D.R. Horton did not allege or offer any evidence of actual damages it suffered independently, as a result of any breach of implied warranty by JLS. Instead, D.R. Horton's claim against JLS is based solely on its potential liability for Zitek's damages and D.R. Horton's costs incurred in defending itself against Zitek's lawsuit. In fact, D.R. Horton was unable to even testify regarding which homes JLS worked on and could not identify any defects attributable to JLS. R. p. 1627, lines 17–23.

Consistent with the holdings in *Stoneledge* and *BEI-Beach*, D.R. Horton's implied warranty claim against JLS is disguised indemnity and legally untenable. The circuit court erred by failing to dismiss the implied warranty claim.

C. D.R. Horton Lacks Standing To Bring A Claim for Breach Of Warranty Against JLS

Further buttressing dismissal of D.R. Horton's implied warranty claim, South Carolina law provides that D.R. Horton had no standing to bring its implied warranty claim against JLS, and therefore, had no valid claim to assign to Zitek. More to the point, Zitek admitted she had no direct claims against JLS. R. p. 152, lines 13–25; R. p. 592, line 25–p. 593, line 3; R. p. 1473, lines 13–15.

To assert a valid claim against JLS, D.R. Horton must first have standing. *Youngblood v. S.C. Dep't of Soc. Servs*., 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Standing requires a concrete and particularized injury, traceable to the allegedly unlawful actions of the opposing party, and that is redressable by a favorable judicial decision. *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (2020) (setting forth the three elements of constitutional standing). Implied warranties arise between a seller, commercial builder, or developer of a new house, who put the house in the stream of commerce, and the buyer. *Drucker v. Witt*, 2005 WL 7083476; *Lane v. Trenholm Bldg. Co*., 267 S.C. 497, 229 S.E.2d 728. Although privity of contract is not required, an implied warranty of workmanlike service only applies to builders in the business of building new dwellings for sale. *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008). Importantly, JLS was not the seller, commercial builder, or developer of the Project—that onus falls squarely on D.R. Horton's shoulders.

JLS is cognizant of prior case law where the South Carolina Supreme Court previously found standing to bring a claim of implied warranty in construction defect cases because the claimant had an ownership interest or had a duty to maintain the property at issue. *See Charleston Joint Venture v. McPherson*, 308 S.C. 145, 417 S.E.2d 544 (1992); *Queens Grant Villas Horizontal Property Regimes v. Daniel International Corp.*, 286 S.C. 555, 335 S.E.2d 365 (1985). The facts and analyses of those cases are inapposite here because it is D.R Horton, not Zitek who is asserting the implied warranty claim against JLS. Our courts have consistently applied the "standing" analysis in other contexts to limit the circumstances that can create an implied warranty of a new home. *See Kennedy v. Columbia Lumber and Mfg. Co., Inc*. 299 S.C. 335, 384 S.E.2d 730 (1989) (finding no implied warranty arose from a material supplier with a lien).

Here, Zitek at best, not D.R. Horton, has standing to bring breach of implied warranty claims that could potentially be redressed by a court decision. And Zitek did in fact, assert damages caused by D.R. Horton's negligence and breach of warranty. R. pp. 62–64. Zitek made no such claim against JLS. There is no question that D.R. Horton does not own any of the homes, has no duty to maintain the homes, and therefore cannot have any injury that is redressable by a favorable judicial decision. *See Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518; *Pres. Soc'y of Charleston*, 430 S.C. at 210, 845 S.E.2d at 486. The court cannot force D.R. Horton to fix the homes and any award to D.R. Horton under this theory does not remedy the harm caused by the alleged defective work by JLS. The breach of implied warranty cause of action rests solely with the homeowner plaintiffs – not D.R. Horton. Because D.R. Horton had no cognizable cause of action for breach of warranty against JLS, any attempted assignment of that claim was invalid. As an assignee, Zitek stood in the shoes of D.R. Horton and was subject to the same claims and defenses as the assignor. *Dixie Wood Preserving Co. v. Albert Gersten & Assocs*., 244 S.C. 57, 64–65, 135 S.E.2d 368, 371 (1964) (explaining as assignee acquires no greater right than was possessed by his assignor, but simply stands in the shoes of the latter, subject to all equities and defenses available to assignor at the time of the assignment). If D.R Horton did not have a claim against JLS for breach of implied warranty, *a fortiori*, it could not assign what it did not have. *Id.*

Accordingly, D.R. Horton cannot recover from JLS for this claim because D.R. Horton has not suffered any separate damage other than having to defend itself in and to pay Zitek for its own negligent conduct, pursuant to its own admission and the directed verdict. As a result, by submitting this issue to the jury, the jury was misled into believing it could find JLS partially responsible for the class damages under D.R. Horton's legally untenable breach of warranty claim.

II. D.R. HORTON'S CLAIMS ARE BARRED UNDER THE STATUTE OF LIMITATIONS OR STATUTE OF REPOSE

JLS worked on Rose Hill Homes between 2011 and 2014. R. p. 2437. Despite receiving notice of alleged deficiencies relating to masonry work at the project as early as 2013, and despite making repairs to brick work at Zitek's home at least four times between 2013 and 2018[9], D.R. Horton did not bring any claims against JLS until 2021, almost a year and a half after Plaintiff filed its lawsuit against D.R. Horton, and approximately eight (8) years after D. R. Horton had actual notice of the claims for which it now seeks to recover. The statute of limitations runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from wrongful conduct. S.C. Code Ann. § 15-3-530; *Dean v. Ruscon*, 321 S.C. 360, 366, 468 S.E.2d 645, 648 (1996). The statute of repose requires claims arising out of substantial completion after July 2005 to be brought within eight (8) years of the date of substantial completion. S.C. Code Ann. § 15-3-640; *Lawrence v. General Panel Corp.*, 425 S.C. 398, 405, 822 S.E.2d 800, 803 (2019); *see also Ocean Winds Corp. v. Lane Drywall and Plastering*, 347 S.C. 416, 419, 556 S.E.2d 377, 379 (2001) (holding the substantial completion date for the window installer was the day the installation of windows was completed).

Here, the issue of whether D.R. Horton's claims against JLS are time-barred is separate and apart from the issue of whether Zitek's claims against D.R. Horton are time-barred. *See* R. pp. 2608–15. In denying JLS' motions to dismiss based on statute of limitations, the trial court again wrongly conflated the parties and the claims. The trial judge ruled from the bench that the question of when

[9] Plaintiff's expert Dr. Whitlock testified that D.R. Horton made repairs at Zitek's house in 2013 and between 2017-2018. R. 142, lines 3–24; D.R. Horton testified that it received a warranty request relating to stone veneer issues dated March 3, 2016. R. p. 1629, lines 17–22; Zitek testified that she submitted a warranty claim in June 2017 and Horton sent an engineer to inspect, and brick repairs started March 2018. R. p. 452, line 16–p. 456, line 1.

Zitek, not D.R. Horton, had notice was a jury question. R. p. 594, lines 12–21. The question of when D.R. Horton had actual notice of masonry claims from homeowners was for the court, not the jury, based on admitted evidence of 2016 warranty claims and testimony by Zitek and Plaintiff's expert. R. p. 452, lines 16–24; R. p. 591, lines 1–8; R. p. 1387, line 22–p. 1388, line 3; R. p. 1629, lines 3–22.

JLS joined D.R. Horton's oral motion to dismiss based on the expiration of the limitation periods, and specifically argued that the claims against JLS should be treated differently, that equitable tolling does not apply to subcontractors, and that the class should be decertified accordingly. *See* R. p. 1502, line 19–p. 1503, line 14; R. p. 1537, line 10–p. 1538, line 7. The trial court did not address this argument and failed to acknowledge the distinct claims asserted by D.R Horton against JLS as opposed to Zitek's claims against D.R. Horton. *See* R. p. 1537, line 10–p. 1538, line 7. Neither did the trial judge issue a curative instruction to the jury distinguishing the applicable standard regarding determination of the limitations periods with respect to the distinct claims and parties.

Zitek and her expert testified that D.R. Horton made repairs to brick at her home at least four times, beginning in 2013. R. p. 452, line 12–p. 453, line 9; R. p. 1387, line 22–p. 1388, line 3. D.R. Horton admitted it received a warranty request relating to the stone veneer dated March 3, 2016. R. p. 1628, line 4–p. 1629, line 22; R. pp. 2608–15. Unquestionably, D.R. Horton had actual knowledge of a potential cause of action regarding its subcontractors who installed brick and stone at the Project, including JLS, when it began making repairs to the homes. D.R. Horton filed its third-party claims against its subcontractors on March 3, 2021. There is no affidavit of service filed with the court for JLS; however, JLS voluntarily filed its answer on March 9, 2022. By the time D. R. Horton filed its third-party claims, more than three (3) years had elapsed from the time that it had actual knowledge of the alleged defects, including when it knew or should have known of a potential cause of action

against JLS for its work at the Project. Further, as JLS noted, equitable tolling does not apply to subcontractors and any assurances that could have tolled the statute, were statements made to Zitek by D.R. Horton, not JLS. *See* R. p. 590, line 15–p. 591, line 8. "Equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Crocker v. S.C. Dep't of Health & Env't Control*, 428 S.C. 1, 9, 831 S.E.2d 924, 929 (Ct. App. 2019). The party claiming the statute of limitations should be tolled must show that (1) the defendant attempted to deceive or mislead him and (2) the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge. *Id.* D. R. Horton has not, and cannot argue that JLS attempted to deceive it and the evidence at trial shows D.R. Horton had actual notice of the any claims it may have had against JLS as early as 2016. Thus, D.R. Horton's claims are barred by the statute of limitations.

As to the statute of repose, eight (8) years prior to the filing of JLS' answer is March 9, 2014. JLS submitted payment records into evidence at trial for final payments issued to JLS before March 9, 2014. R. pp. 2616–23; R. pp. 2640–2748; R. pp. 2802–13. Similar to the window installer in *Ocean Winds*, JLS' work on these homes was substantially completed when the brick and stone work was complete. Therefore all of D.R. Horton's claims relating to homes that were completed on or before March 9, 2014 are barred by the statute of repose. The exception to the statute of repose is gross negligence, and there was no finding of gross negligence against any of the parties. *See Napier v. Mundy's Construction, Inc.*, 2024 WL 1434409 at *3 (Ct. App. Apr. 3, 2024) (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999)).

As such, the circuit court erred by failing to recognize that the claims against JLS are barred by the statute of limitations or statue of repose.

III. THE TRIAL JUDGE'S TREATMENT OF APPELLANT AS A *DE-FACTO* CLASS DEFENDANT WITHOUT DUE PROCESS IS REVERSIBLE ERROR.

A. A New Rule 23 Class Analysis Was Required When D. R. Horton Added New Parties

It is undisputed that the only class certified was that of Zitek's claims against D.R. Horton on January 27, 2021. *See* R. pp. 1–14; R. pp. 25–34; R. p. 592, line 25–p. 593, line 3; R. p. 1473, lines 13–15; R. p. 1502, lines 5–23. JLS was not a party to the lawsuit at that time and was never given the ability contest the class certification in violation of its due process rights prior to the Court certifying the class against D.R. Horton. D.R. Horton filed its third-party complaint against JLS on March 11, 2021, approximately six (6) weeks after the class had been certified with respect to D.R. Horton's liability to Zitek. R. pp. 66–92. D.R. Horton's third-party complaint does not purport to bring "class claims" against JLS or any of the subcontractors, nor does it seek class certification with respect to the third-party allegations. *See id.*

While JLS has not yet identified direct precedent from South Carolina, other jurisdictions have held that adding a new party as a defendant to a class action commences a new suit. *Braud v. Transp. Serv. Co. of Illinois,* 445 F.3d 801, 806 (5th Cir. 2006). This is because bringing in a new party changes the character of the litigation so much so that it is considered substantially a new suit. *Id.* Along the same lines, the filing of a summons or complaint constitutes the commencement of a new action under South Carolina law. SCRCP 3(a). Therefore, D.R. Horton's third-party complaint against JLS changed the character of the previously certified class against D.R. Horton and compelled a new class certification analysis with respect to the new claims and parties added, which the trial judge failed to do. As new class action suits commence, it is in the interest of equity and justice to re-evaluate the propriety of proceeding as a class action, instead of imputing an antiquated class on to new defendants where the elements of class certification no longer hold true.

In *Lowery v. Honeywell Int'l, Inc.*, 460 F. Supp. 2d 1288, 1292 (N.D. Ala. 2006), *aff'd on other grounds sub nom. Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), the court concluded that the addition of a new defendant constituted the commencement of a new action with respect to that defendant; therefore, the second defendant's action wasn't commenced until 2006. *Id.*[10] New York courts have buttressed the same logic, holding that a new suit is effectively commenced if an amended petition (1) creates a new basis for removal or (2) changes the character of the litigation. *MG Bldg. Materials, Ltd. v. Paychex, Inc.*, 841 F. Supp. 2d 740, 744 (W.D.N.Y. 2012). Reinforcing the same logic and analysis, a federal court in Georgia ruled that the amendment and addition of a new defendant created a new action under CAFA for the purposes of removal because it did not relate back to the original complaint. *Senterfitt v. SunTrust Mortg., Inc.*, 385 F. Supp. 2d 1377 (S.D. Ga. 2005).

Although a doctrine of federal law, the courts' treatment of Class Action Fairness Act ("CAFA") illustrates the fundamental importance of "commencing a new suit" and the analyses are hand-in-glove with the language in SCRCP 3(a). Simply put, the creation of new conditions that changed the character of litigation – *i.e.* D.R. Horton's new third-party claims against new parties – commenced a new suit, and the trial court was required to determine the propriety of the previously certified class against D.R. Horton in the context of the new claims and parties, or, undertake a separate class-action analysis with respect to D.R. Horton's new suit. Failure to do so warrants reversal of the verdict against JLS, and a new trial, after a Rule 23 class certification analysis has been undertaken with respect to D.R. Horton's claims against JLS. The trial court must evaluate each

[10] The *Lowery v. Honeywell* court was tasked with determining removability in the context of Class Action Fairness Act of 2005 (CAFA) where one defendant was added via the original complaint in 2003, and another was added via an amended complaint in 2006.

element of Rule 23 before a class can be certified: (1) numerosity, (2) commonality in questions of law or fact, (3) typicality, and (4) fair and adequate protection of class interests. SCRCP 23(a).

In this case, JLS was deprived of its procedural due process to have each element evaluated with respect to D.R. Horton's claims against JLS when the trial judge determined that Phase I and II had been merged and continued with the trial as if it was a single class action lawsuit against all the parties, including JLS. *See* R. p. 1541, line 9–p. 1542, line 12.

B. Only Zitek's Claims Against D.R. Horton Are Subject To Class Treatment In This Case

It is within a trial court's discretion whether a class should be certified. *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 421, 717 S.E.2d 765, 774 (Ct. App. 2011) (quoting *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 42, 508 S.E.2d 16, 21 (1998)). The party seeking certification must prove all five elements of Rule 23(a) SCRCP: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (4) the representative parties must fairly and adequately protect the interests of the class; and (5) the amount in controversy must exceed one hundred dollars for each member of the class. *Pope*, 395 S.C. at 421, 717 S.E.2d at 774 (citing *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 20–21, 577 S.E.2d 190, 200 (2003). Failure to satisfy even one of the Rule 23 criteria is fatal to class certification. *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200.

In this case, the class was certified only as to Zitek's claims against D.R. Horton. Specifically, the common questions alleged were:

1) Whether [D.R Horton's] conduct was negligent, reckless, willful, wanton, or the like;
2) Whether [D.R Horton's] breached their implied warranties;
3) Whether [D.R Horton's] knew or should have known of latent defects;
4) Whether [D.R Horton's] failed to disclose defects or unsuccessful repairs; and

5) Whether Plaintiffs are entitled to recover damages arising from construction defects and loss of use.

R. p. 1762. In support of her arguments for certification, Zitek relied on two (2) prior, but inter-related cases where the court certified a construction defects class involving third-party defendants.[11] R. pp. 2136–37. The class certification analyses in those matters highlight precisely the argument against class certification as to JLS in the present matter. Notably, plaintiffs in those cases alleged and represented that the subcontractors in the related cases were either direct defendants or third-party defendants who were "served, have answered, and are participating in this lawsuit." R. p. 2204, n.4. There, the subcontractors participated in the hearing opposing class certification and the court's Rule 23 analysis specifically contemplated the named subcontractors' conduct. In contrast, here, Zitek argued that having unnamed subcontractors was irrelevant to Zitek's claim against Horton and stated ***the "John and Jane Doe subcontractors will be dismissed if class [certification is] granted."***[12] R. p. 3, n.4. The trial court ruled in favor of Plaintiff and found that Plaintiff's case against D.R. Horton was "well-suited for class certification because multiple claims that center on Horton's conduct can be resolved in a single action that poses no unusual manageability problems." R. p. 1.

The *Napier* and *Marcum* analyses are inapplicable here. First, Zitek specifically asked for class certification regarding her claims against D.R. Horton only. R. p. 152, lines 13–22; R. p. 592, line 25–p. 593, line 3. Zitek also represented to the court that the unnamed subcontractors would be dismissed if class certification is granted. R. p. 3, n.4. In addition, the class was certified before JLS was added to the lawsuit. Further, Zitek explicitly represented to the court that "***these third and***

[11] In support its Motion to Certify the Class, Plaintiff introduced as an example, *Napier et al. v Adiz,et. al*, 2016-CP-02-0263 (S.C. Com. Pl.), which incorporated four related lawsuits involving the same Developer and many of the same subcontractors, which were previously certified as class actions, including *Marcum, et al. v. Adiz, et al*, 2012-CP-02-03191 (S.C. Com. Pl.). R. pp. 2136–37, 2180–98, 2201–15. Mr. Justin Lucey represented plaintiffs in those matters.

[12] Emphasis added.

fourth party defendants have no standing to argue anything regarding the Plaintiff [because] they're not [part of Plaintiff's case against DRH]."[13] R. p. 593, lines 1–3; *see also* R. p. 1473, lines 13–15. And ***the trial judge agreed,*** stating ***the trial so far is Phase I, which applies to Plaintiff's claims against D.R. Horton, not the subcontractors.*** *See* R. p. 1502, lines 5–15. Likewise, JLS moved for bifurcation asserting it was not part of the class, ***and importantly, the trial judge agreed***, and issued a Trial Plan explicitly acknowledging that JLS was not part of the class. R. pp. 25–34; R. pp. 2311–14. Thus, there is no legitimate dispute that only Zitek's claims and damages were subject to class treatment, and imputing class evidence and damages to JLS was reversible error.

C. It Was Legal Error To Deny The Motions To Decertify

The United States Supreme Court recognizes class certification as a tentative order that can be altered at any time. *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 160, 102 S. Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982). In general, an objection to a class or an attempt to decertify a class may be raised at any point before a judgement is rendered. *Mendez v. The Radec Corp.*, 260 F.R.D. 38, 42 (W.D.N.Y. 2009). However, it is customary for a motion for class decertification to be set forth during the early stages of litigation. *Gortat v. Capala Bros.*, No. 07 CIV. 3629 ILG SMG, 2012 WL 1116495, at *4 (E.D.N.Y. Apr. 3, 2012), *aff'd,* 568 F. App'x 78 (2d Cir. 2014).

The class was certified based on common defects but only with regard to D.R. Horton's common course of conduct and based on the same legal theory, *i.e.* Plaintiff's claims of negligence and breach of implied warranty against D.R. Horton.[14] ***After*** the class was certified, D.R. Horton brought third-party claims against its subcontractors, including JLS. The third-party defendants

[13] Emphasis added.
[14] Plaintiff stipulated that unfair trade practices claims against D.R. Horton would be abandoned upon class certification. R. p. 3, n.4.

were never part of the class and were never contemplated in the trial court's Rule 23 analysis. JLS and the other third and fourth-party defendants moved to decertify the class, alleging the class was inappropriate as to them and that Zitek had not met her burden with respect to incorporating the third and fourth-party defendants into the previously certified class. R. pp. 2315–17; R. pp. 2250–66; R. pp. 2279–95; R. pp. 2331–35; R. p. 582, line 2–p. 595, line 3; R. p. 1471, line 6–p. 1473, line 11. Zitek readily conceded that JLS and the third/fourth-party defendants were not part of the class. R. p. 592, line 25–p. 593, line 3; R. p. 1473, lines 13–15. And ***the trial judge agreed,*** stating ***the trial so far is Phase I, which applies to Plaintiff's claims against D.R. Horton, not the subcontractors***. *See* R. p. 1502, lines 5–15. Furthermore, D.R. Horton, the only party with claims against JLS, never moved to certify the class against JLS or any of the third or fourth party defendants. Therefore, it is undisputed that JLS was not a part of the class and it was legal error to treat JLS as a *de-facto* class defendant during Phase II of the trial.

JLS and the third/fourth-party defendants timely objected to the class by way of pre-trial and oral motions to decertify before the trial and during Phase I and Phase II of the trial, but the trial court denied those motions, in part, stating the third-party defendants lacked standing/were not part of the class. R. pp. 18–21; R. pp. 35–38. During trial, the trial judge stated, "I'm not going to revisit the arguments that have already been ruled on by the Court, and I recognize that the decertification arguments are on appeal." R. p. 1032, lines 4–6.

JLS renewed its motion to de-certify after trial (R. pp. 2616–23; R. pp. 2802–13), and yet again, the trial judge court denied the motion, this time, referencing its prior class analysis, which indisputably never contemplated third/fourth-party defendants. R. pp. 39–42; R. pp. 43–48. Plaintiff only put forward evidence of a single class-damages model. R. p. 1471, lines 16–23; R. p. 1653, line 14–p. 1655, line 4; R. p. 1655, line 25–p. 1658, line 6. As such, the trial judge's rulings regarding

class certification and class parties are irreconcilable, and impermissibly treated JLS as a class defendant for purposes of a jury award while acknowledging that JLS was not a part of the class, and simultaneously and prejudicially, refusing JLS the opportunity to have the class re-examined with respect to D.R. Horton's individual claims against JLS.

Because adding a new party to the litigation is a significant event that changes the character of the litigation, the class should have been re-examined. *Brooks v. GAF Materials Corp.*, 301 F.R.D. 229, 231 (D.S.C. 2014) (holding that a court should not disturb its findings that a class was certified unless there is some significant intervening event or a compelling reason to reexamine the question). Additionally, JLS should have been allowed to require re-examination of the class previously certified instead of being treated as a *de-facto* class defendant with respect to D.R. Horton's third-party claims. The trial judge's failure to do so is reversible error.

IV. FAILURE TO BIFURCATE THE CLASS ISSUES AND PARTIES FROM THE NON-CLASS SUBCONTRACTORS WAS A VIOLATION OF THE TRIAL PLAN ORDER, PREJUDICIAL TO APPELLANT, AND A REVERSIBLE ERROR

A. Conflation Of The Class Issues And Damages With The Individualized Damages Was Prejudicial To JLS

It is well settled that "the imposition of a bifurcation requirement to prevent prejudice is consistent with the power of this Court to supervise the order of presentation of evidence and other procedural matters." *State v. Cross* 427 S.C. 465, 481 (2019). "If the trial court were to find the potential for prejudice too severe, it could order bifurcation of the issues and liability pursuant to Rule 42(b) SCRCP." *Doe ex rel Roe v. Orangeburg County School District No. 2*, 335 S.C. 556, 559 (1999).

JLS moved for a bifurcated trial, asserting that the sole defendant in the certified class was D.R. Horton, and that trial of Zitek's class claims should be bifurcated from D. R. Horton's claims

against the non-class third-party defendants. R. pp. 2311–14. In addition, JLS requested that Zitek's class claims against D.R. Horton be tried first, to verdict, and that D.R. Horton should start its individual claims against JLS immediately after the jury had rendered a verdict with respect to the class claims (Phase I). R. p. 2313. In recognition of the distinction between D.R. Horton's liability and attendant damages to the class, and the non-class claims asserted by D.R. Horton against JLS, the trial judge granted the motion to bifurcate D.R. Horton's alleged liability to Zitek, from JLS' alleged liability to D.R. Horton. R. p. 25–34.

By acknowledging that JLS was not a class member and therefore had no standing to move for decertification, both Zitek and the trial judge implicitly recognized that the same class claims and alleged class damages did not apply to JLS, and that proceeding with class claims and damages against JLS would be prejudicial to JLS. *See* R. pp. 25–34; R. p. 152, lines 13–25; R. p. 592, line 25–p. 593, line 3; R. p. 1473, lines 13–15; R. p. 1502, lines 5–23. However, at the conclusion of Zitek's case, the trial judge required JLS to proceed with Phase II as a *de facto* class defendant, contrary the Trial Plan and the court's own prior acknowledgement that JLS was not a class defendant. The trial judge previously instructed all the parties that, "we're going to cover the ground once during the trial." R. p. 1247, lines 9–10. D.R. Horton and the non-class third-party defendants objected to the "a combination of liability stuff" and pointed to the prior agreement that subcontract agreement issues were reserved for Phase II. R. p. 1247, line 3–p. 1250, line 7.

Similarly, contrary to the Trial Plan, the trial judge's, and Zitek's acknowledgement that JLS was not a part of the previously certified class, the trial judge required Phase II to begin ***before*** a verdict had been reached as to Zitek's class allegations and damages. In addition, the trial judge allowed Phase II to begin without any clarification/curative instructions to the jury regarding the distinct class claims raised by Zitek and opposed to D.R. Horton's individual claims against JLS. In

so doing, the trial judge, and by default, the jury too, essentially treated JLS as a *de-facto* class defendant. The continuation of the case without re-examination of the class constituted an unjust, prejudicial, and inappropriate imputation of the class and class damages onto JLS. JLS, as one of many individual contractors, was only involved in a finite number of houses whereas D.R Horton was involved in the entirety of them and the class size was derived from D.R. Horton's work on all the homes belonging to the class. Further, JLS substantially completed all of its work by July 2014 so that its limitations defenses are different from D.R. Horton's limitations/notice defenses against the class allegations.

Ultimately, even though it is undisputed that JLS was not part of the class, the determination of damages attributed to JLS by the jury was borne from the class claims, which converted JLS to a class defendant without the requisite Rule 23 analysis as to D.R. Horton's individual claims against JLS. Based on the trial judge's failure to give correct instructions regarding the class versus non-class parties and issues, damages were awarded against JLS notwithstanding there was no evidence as to what damage could be attributable to JLS for the specific homes they worked. *See* R. p. 1661, line 6–p. 1663, line 1; R. p. 1653, line 14–p. 1655, line 4; R. p. 1655, line 25–p. 1658 line 6; R. p. 1665, lines 9–21. Thus, the trial judge's failure to bifurcate the class issues from the non-class issues and to abide by the Trial Plan unduly prejudiced JLS.

B. The Trial Judge Was Required To DiscloseThe Settlement Amount And Terms To The Jury Before Commencing Phase II

The Trial Plan specifically required trial of the class claims between Zitek and D.R. Horton, including closing arguments and a jury verdict regarding liability of D.R. Horton to Zitek, before Phase II could begin. R. pp. 25–34. After a verdict had been rendered as to D.R. Horton's liability, then Phase II would begin, consisting of D.R. Horton's claims against its subcontractors. However,

Zitek and D.R. Horton settled their claims at the close of Zitek's case. R. p. 1503, line 16–p. 1505, line 14. Zitek represented on the record that the class covenants not to collect against D.R. Horton, except as to D.R. Horton's rights against the subcontractors, and D.R. Horton will assign all its claims against subcontractors to the class except the claims against Probuild. R. p. 1504, line 4–p. 1505, line 14. In response to JLS' Motion to Disclose the Settlement Amount, Zitek represented "we're going to get a verdict against D.R. Horton and ***we're going to seek to hold JLS liable for half of that verdict***."[15] R. p. 1534, lines 21–23. There can only be one reasonable interpretation of Zitek's statements: Although Zitek had settled with D.R. Horton, Zitek had not agreed to dismiss D.R. Horton and D.R. Horton was still a defendant in the case.

Pursuant to *Poston v. Barnes*, the settlement agreement between Zitek and D.R. Horton should have been disclosed to the jury because D.R. Horton was still a defendant in the case. The trial judge's failure to require disclosure of the settlement to the jury "made [D.R. Horton] a "sham" defendant, thereby deceiving the jury and resulted in an unfair and inequitable verdict. 294 S.C. at 263, 363 S.E.2d at 889.

In *Poston*, the plaintiff was injured when another driver struck a school van in which the plaintiff was a passenger. The plaintiff, driver defendant, and the defendant's insurance company entered into a covenant not to execute. *Id.* at 263, 363 S.E.2d at 889. This covenant limited the defendant driver's liability for damages, while requiring her to remain a co-defendant, along with the school district, outwardly still subject to joint and several liability. *Id.* at 265, 363 S.E.2d at 890. The court found the covenant was a facade, and the failure to disclose it to the jury tainted the judicial process:

[15] Emphasis added.

> "[T]he jury was denied information to which it was entitled as to the sources of remuneration available to the plaintiff and by whom such remuneration would be paid. The fact that the agreement was not disclosed to the jury in this instance facilitates inequity and injustice in the judicial process.... Under the circumstances of this case, the agreement should have been allowed into evidence to insure that an equitable verdict was reached."

Id. at 265, 363 S.E.2d at 890. The circumstances under which the settlement was reached in *Poston* are indistinguishable from the circumstances surrounding the Zitek/D.R. Horton settlement. As in *Poston*, Zitek did not dismiss D.R. Horton from the lawsuit, but specifically represented that in spite of the "settlement," Zitek intended to "get a verdict against D.R. Horton and ***we're going to seek to hold JLS liable for half of that verdict***."[16] R. p. 1534, lines 21–23. The failure to inform the jury that Zitek and D.R. Horton had settled misled and deceived the jury into believing D.R. Horton was still a real party in the lawsuit. *See also Ward v. Ochoa*, 284 So.2d 385 (1973) ("Secret agreements between plaintiffs and one or more of several multiple defendants can tend to mislead judges and juries, and border on collusion. To prevent such deception, we are compelled to hold that such agreements must be produced for examination before trial, when sought to be discovered under appropriate rules of procedure.").

As in *Poston*, the settlement between Zitek and D.R. Horton should have been disclosed to the jury, and failure to do so is reversible error.

C. The Trial Judge's Failure To Instruct The Jury Regarding Settlement Of The Class Claims Prior To Commencing Phase II Was Unduly Prejudicial To JLS

After Zitek rested and D.R. Horton had assigned its claims to Zitek, the trial court erroneously allowed Zitek to present D.R. Horton's claims against JLS in a *de-facto* class action manner, without instructing the jury regarding the distinction between the class parties and claims, and the individual

[16] Emphasis added.

claims asserted by D.R. Horton against JLS. It is the court's duty to instruct the jury on the law, and "[t]he jury ought not to be left to cut a way through the woods with no compass to guide it." *Fairchild v. South Carolina Department of Transportation, et al*, 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012), quoting *Collins-Plass Thayer Co. v. Hewlett*, 109 S.C. 245, 253-54, 95 S.E. 510, 513 (1918), cited in *Eaddy v. Jackson Beauty Supply Co.*, 244 S.C. 256, 259, 136 S.E.2d 297, 298 (1964).

At the close of her arguments, Zitek stated on the record: "we're going to get a verdict against D.R. Horton ***and we're going to seek to hold JLS liable for half of that verdict***."[17] R. p. 1534, lines 21–23. By so stating, Zitek impermissibly imputed class damages onto JLS, but the trial judge failed to properly instruct the jury regarding the bifurcated class and non-class issues, thereby creating confusion and leading the jury to issue a verdict on D.R. Horton's invalid breach of warranty claim.

Further, because JLS was not part of the class, the damages estimate, prepared under the Plaintiff's class litigation strategy, was improperly imputed to JLS in support of D.R. Horton's alleged individualized damages. Because the trial court failed to follow its trial plan and failed to issue curative instructions, the issues and parties were wrongly conflated such that Zitek's class damages were unfairly imputed in part to JLS. This was an error of law.

V. THE VERDICT IS NOT SUPPORTED BY THE FACTS

After reaching a settlement with D.R. Horton, Zitek continued to "prosecute" her class claims against D.R. Horton, seeking class damages for negligence and breach of implied warranty, while simultaneously prosecuting D.R. Horton's non-class claims but relying on the same class damages with respect to the claims against the non-class defendant JLS. Upon taking over D.R. Horton's claims, Zitek disingenuously flipped from her original argument that she had no direct claims against

[17] Emphasis added.

JLS (*see* R. p. 152, lines 13–25), and argued instead, that Zitek intended to seek to hold JLS liable for half the verdict awarded against D.R. Horton, (*see* R. p. 1534, lines 21–23) even though the damages asserted against D.R. Horton were class damages, and no individualized damages were presented by D.R. Horton against JLS. The jury then determined D.R. Horton was not liable for the implied warranty claims but liable to Plaintiff for its own negligence in an amount of $15 million. R. pp. 49–50. The jury also found JLS had no liability to D.R. Horton under the contractual and equitable indemnity claims, but returned a $4 million verdict with respect to D.R. Horton's implied warranty claim against JLS. R. pp. 49–50. The verdict against JLS is both inconsistent and unsupported by the facts.

In a civil case, a plaintiff has the burden of persuasion to prove her case by a preponderance of the evidence. *Smith v. Barr*, 375 S.C. 157, 161, 650 S.E.2d 486, 489 (Ct. App. 2007). Plaintiff's expert, Dr. Whitlock, testified that he was retained to prepare one cost of *repair estimate for the entire neighborhood* and he admitted he did not know which houses JLS had worked on, nor could he articulate which houses that JLS had worked on would fit into which of the three (3) categories he had grouped the homes into based on their differences. *See* R. p. 1655, line 25–p. 1658, line 6; R. p. 1658 line 21–p. 1659, line 3; R. p. 1661, lines 6–12; R. p. 1662, line 22–p. 1663, line 1; R. p. 1665, lines 9–21. Dr. Whitlock testified that the houses are very different and have different components, which necessitated classification of the homes into three (3) distinct categories: basic, moderate, and complex. R. p. 1656, lines 8–10; R. p. 1665, lines 15–21. Likewise, Dr. Whitlock was unable to point to any individualized damages attributable to JLS, specific to JLS' work on each home. R. p. 1655, line 25–p. 1658, line 6; R. p. 1658 line 21–p. 1659, line 3; R. p. 1661, lines 6–12; R. p. 1662, line 22–p. 1663, line 1; R. p. 1665, lines 9–21. Plaintiff, standing in D.R. Horton's shoes,

had the burden to prove its damages by the preponderance of evidence. However, the only evidence of damages put forth was Zitek's class damages against D.R. Horton.

Similarly, not only did the Plaintiff fail to establish that D.R. Horton had a valid implied warranty claim to assign, she produced no evidence to support a factual finding that JLS breached any implied warranty as to D.R. Horton. As an initial matter, "a claimant cannot maintain…breach of warranty claims arising only from the claimant's potential liability for another party's damages and the claimant's need to defend itself in litigation; such contingent claims lie in indemnity." *BEI-Beach v. Christman*, 440 S.C. 98, 889 S.E. 2d 601 (Ct. App. 2023). The jury found D.R. Horton liable for its own negligent conduct, and found that D.R. Horton had not breached any warranties to Zitek. Therefore, no evidence of D.R. Horton's individual damages were introduced at trial to support a breach of implied warranty by JLS. In addition, JLS's work at the Project did not create an implied warranty that is enforceable by D.R. Horton. *Smith v. Breedlove*, 377 S.C. at 422, 661 S.E.2d at 71 (explaining implied warranties are intended to protect a new home buyer who is forced to rely on the skill of the professional builder). JLS was not a builder, developer, or seller. Any warranty that could arise from JLS' work at the project was owed to Plaintiff, not D.R. Horton and Plaintiff did not bring any direct claims against JLS. There was no evidence at trial that JLS owed an implied warranty to D.R. Horton and the jury verdict conflated the claims and damages to find JLS liable for an invalid warranty claim by D.R. Horton that could not have been assigned to Plaintiff.

Further, the jury verdict is inconsistent with the evidence that D.R. Horton's claims against JLS are time-barred. The statute of limitations begins to run when a party knew or should have known about the cause of action. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787, 793. The inquiry is objective rather than subjective, and therefore the court must determine whether the circumstances of the case would put a party on notice that some claim

might exist. *Id*. Again, the trial court conflated the parties and claims when it instructed that the question of when Zitek was on notice of alleged defects was for the jury. *See* R. p. 594, lines 11–24. The trial court allowed Zitek to present evidence of class damages that should have been time-barred as they relate to D.R. Horton's claims against JLS. D.R. Horton filed its claims against JLS on March 11, 2021. The uncontested facts established that D.R. Horton began making repairs to brick work at Zitek's home as early as 2013, performed brick repairs around mid-2015, and received a warranty request dated March 3, 2016. R. pp. 142, lines 3–24; R. p. 452, line 16–p. 455, line 5; R. p. 1387, line 22–p. 1388, line 20; R. p. 1629, lines 1–22. The evidence at trial clearly shows that D.R. Horton had ***actual*** notice of warranty claims by homeowners more than three years prior to filing its lawsuit against JLS. While it ***may*** have been a question for the jury as to when Zitek had sufficient notice, or whether D.R. Horton's conduct tolled the statute of limitations for Zitek's claims against it, it was an error to conflate the same notice inquiry for the jury as they relate to D.R. Horton's claims against JLS given the weight of uncontested evidence presented during trial. Accordingly, the jury verdict was in error when the jury was allowed to conflate the issue of Plaintiff's notice with D.R. Horton's notice and failed to address the notice issues in a bifurcated way with respect to each party.

In yet another example of the confusing and inconsistent instructions given to the jury, the trial judge acknowledged the correct legal standard when it issued its jury instructions regarding implied warranty of workmanship: Implied warranty of workmanship instruction – a ***builder***[18] warrants the home…was constructed in a workmanlike manner." R. p. 1721, lines 19–21. However, because the trial judge had so conflated the class and non-class liability and damages issues and because the trial judge had failed to provide adequate and curative instructions regarding the

[18] Emphasis added.

bifurcated claims, the jury rendered a verdict not supported by the facts. JLS served as a subcontractor, not the builder.

CONCLUSION

For the foregoing reasons, the Court should dismiss the case based on the nonexistent implied warranty claim that was impermissibly allowed to go to the jury. In the alternative, a new trial is warranted based on the trial court's improper conflation of the class versus non-class issues and damages, including improper treatment of JLS as a *de facto* class defendant, improper denial of the Motion to Decertify, JNOV, and denial of the Motion for Reconsideration.

Dated: December 23, 2024

By *s/Nosizi Ralephata*

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse
Circuit Court Judge

Appellate Case No. 2024-000057
Circuit Court Case No. 2019-CP-04-01942

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

v.

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

and.

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

v.

A&J Framing, Inc.; A-Z, Inc.; AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC; Allpro Textures, LLC; Alpha E.M.C.; Alpha Omega Construction Group, Inc.; American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; BFK Builders, Inc.; BMC East LLC D/B/A Coleman Floor, LLC; Brand-Vaughn Lumber Co, Inc.; Bravo Carpenters, Inc.; Builders Designhouse, LLC; Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.; Builders Services Group, LLC, F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A Gale Contractor Services; Cannaday Siding & Gutter, Inc.; Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; CBU Enterprises, Inc.; Cortes Painting, LLC; CPI Security Systems, Inc.; Dom Group, LLC; Dupree Plumbing Company, Inc.; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II; GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.; General Shale Brick Inc.; Get Floored, LLC; Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC; Installed Building Products, LLC A/K/A Installed Building Products II, LLC; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry,

Inc.; Kings Landscaping, LLC; L&M Electric, Inc.; Lade-Danlar, Inc.; Landshapers, LLC; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; M&L General Construction, LLC, A/K/A M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&L Enterprises, LLC; P&T Construction, Inc., A/K/A P&T Construction, Inc.; Probuild Company, LLC A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Silver Line Building Products Corporation; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services., Inc., A/K/A Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc; and Willow Tree Landscaping, Inc., ... Third-Party Defendants,

and.

Aaron D. Peris; Harrelson Painting, LLC, Huttig Building Products; et al, ... Fourth and Fifth-Party

of whom Plaintiffs and Defendants,

JLS Masonry, Inc. is the ..... Appellant.

v.

Natalie Zitek, individually, and on behalf of all others similarly situated and as assignee of the claims of Third-Party Plaintiff D.R. Horton, Inc., ... Respondent,

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PROOF OF SERVICE

I, the undersigned of the law offices of Gordon Rees Sculls Mansukhani LLP, does hereby certifies that I served JLS Masonry, Inc.'s Final Brief of Appellant via email on counsel of record via email as listed below:

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Dated: December 23, 2024

By: _____