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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2018-CP-07-00911
Appellant Case No. 2022-000016

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III and Alayshia Smith and Nichole J. Verstegen; Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource-Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors, II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; and Valim Construction, LLC, Defendants,

Of Whom Sarmed and Jessica M. Shafi, Lather Construction, Inc., Lather Construction SC, Inc., Hutton's Landscapes, Inc., and East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc. are the Respondents,

And

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

**RECORD ON APPEAL
VOLUME II**

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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

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Plaintiffs,

vs.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Armor Building Solutions, LLC; Atlas Surveying BFT, LLC f/k/a Atlas Surveying Holding Company, LLC; Atlas Surveying, Inc.; Builders FirstSource - Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Jenkins Plumbing Company, LC; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Stier Supply Company f/k/a Stier-Holman Supply Co.; Superior Association Services, LLC; Valim Construction, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL
CIRCUIT

CASE NO.: 2018-CP-07-00911

**EAST COAST CONSTRUCTION
CLEANUP CORP. F/K/A S.C CLEANUP
CO., INC.'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT AGAINST D.R.
HORTON, INC.'S CROSSCLAIMS**

Defendant East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc. (hereinafter "East Coast") submits the following Memorandum in Support of its Motion for Summary Judgment against the crossclaims of Defendant D.R. Horton, Inc. (hereinafter "Horton"). In support of its Motion, East Coast presents the following arguments:

1. Horton has failed to produce a contract with East Coast containing an indemnification provision applicable to the Project;
2. Even if the contract presented by Horton is assumed to apply to the Project, the indemnification provision therein is invalid and unenforceable under South Carolina law;
3. Horton is not without fault and cannot recover against East Coast under a theory of equitable indemnification.

BACKGROUND

This case arises from the construction of a neighborhood on Lady's Island in Beaufort, South Carolina known as Tidewater Creek (hereinafter the "Project"). Horton served as the developer and general contractor for the Project. Each of the named Plaintiffs are homeowners and residents of Tidewater Creek that collectively own fifteen different parcels for property. Plaintiffs filed suit against Horton and its subcontractors alleging causes of action for negligent misrepresentation, negligence and gross negligence, unfair trade practices, breach of contract, and fraudulent inducement due to several allegations of construction deficiencies. Horton then asserted crossclaims of contractual and equitable indemnification against its subcontractors.

SUMMARY JUDGMENT STANDARD

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCP; see Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting Tupper v. Dorchester Cnty., 326 S.C. 318, 487 S.E.2d 187 (1997)).

“Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent’s case, the opponent may not simply rest on the mere allegations contained in the pleadings.” Grant v. Mount Vernon Mills, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). “Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” Id. at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

ARGUMENT

Horton has no right to recovery under its theories of contractual and equitable indemnification. Horton cannot show that there is a valid indemnification provision within a contract that is applicable to the project. Even if the contract Horton has presented is assumed to apply to the Project, the indemnification provision contained therein is invalid and unenforceable as a matter of law. Finally, the Court is well versed in the theories of equitable indemnification and the limits that apply to such a theory. Horton comes with unclean hands and seeks indemnification in matter where it is partially at

fault. As there is no factual dispute for the jury to resolve, East Coast respectfully asks the Court to grant its Motion for Summary Judgment against Horton's crossclaims.

I. D.R. HORTON HAS NOT PRESENTED A CONTRACT WITH EAST COAST APPLICABLE TO THE TIDEWATER CREEK PROJECT.

Horton has produced a "South Carolina Independent Contractor Agreement" between Horton and East Coast dated November 30, 2012. (Attached hereto as Ex. 1). It reads as an agreement applicable to the "Costal Division" of South Carolina and the "Myrtle Beach Area." (Ex. 1, Pg. 1) Additionally, East Coast is assigned Vendor Numbers of 520522 and 528436. On September 23, 2021, Mr. Ronald Bunner was deposed as a 30(b)(6) witness for Horton. Mr. Bunner is the current Division Vice President of the Charleston/Tri-County Area. (Ex. 2 – Deposition of Ronald Bunner, at 12:10-25). His testimony indicates that from a period of about 2003 to 2019, the "Coastal Division" of Horton in included the areas of Myrtle Beach, Charleston, Hilton Head, and Savannah (Ex. 2, at 19:1-20:3). Mr. Bunner also discussed the significance of the Vendor Number while being questioned by counsel for another defendant on the purchase orders Horton sent out for the Project. Below is Mr. Bunner's testimony:

Q: Okay. And then there's a vendor number on the top right-hand corner. Is that the vendor number for Hutton's Landscapes?

A: In Hilton Head/Savannah, yes.

Q: So would it – if Hutton's was doing work in Texas, would it have a different vendor number?

A: Yes.

Q: So that's – so that vendor number is specific to Hilton Head/Beaufort?

A: Hilton Head Hutton – Hilton Head/Beaufort/Savannah/
Hutton's Landscapes, yes. (Ex. 2, at 120:5-16).

Based on this testimony, it is clear that Horton divided up its areas and gave its contractors different vendor numbers depending on which area of the division they were working in. For purposes of clarity, the contract that counsel for Hutton's was discussing bears an area indicator of "Charleston/Hilton Head" and has two Vendor Numbers, "587979 – CS" and "524268 – HH". All purchase orders for the project bear the Vendor Number 524628, which is representative of the Hilton Head Area.

Returning to the purported contract between Horton and East Coast, the contract Vendor Numbers for the Myrtle Beach Area do not match the Vendor Number on the Horton Purchase Orders sent to East Coast for its work on the Project. The Vendor Number on the Purchase Orders sent to East Coast are under Vendor Number 524672, not 520522 or 528436. (See generally, Ex. 3 – D.R. Horton Purchase Orders). Based on the testimony of Horton's own representative, these purchase orders were sent pursuant to a contract different than the one Horton has produced in this litigation. The contract that on which Horton is relying does not apply to the Project, and its provisions regarding indemnification cannot be applied to the work performed at the Project or any claims of deficiencies related to that work. The basic contract principal of the meeting of the minds has not been met. Further, the "four corners" approach of contract review leads to only one conclusion: that the agreement produced by Horton in this litigation is inapplicable to the Tidewater Creek Project. Horton bears the burden of establishing its claim for contractual indemnity. It has failed to do so and cannot be successful in its theory of recovery.

In addition to the above, Olga Aquino, the designee of East Coast and the representative that actually worked at Tidewater Creek, testified on multiple occasions that the contract that Horton is relying on did not apply to Tidewater Creek and that this agreement was for the Myrtle Beach Area. (Ex. 4 – Deposition of Olga Aquino, at 32:1-7; 33:11-16; 39:12-14).

Horton seeking to enforce the terms of a contract that had no bearing on the work performed is against public policy and would also lead to much confusion among the subcontractors working with Horton. If Horton is allowed to assert the language of this contract it will open the door for Horton, a national multi-million-dollar development corporation, to apply any standards, language, or provisions it chooses to the local, small business subcontractors that work with Horton. In Mr. Bunner's own words, "I can tell you these contractors are after us to get work. So they determine whether they want to sign [the contract] or not." (Ex. 2, at 93:22-24). Horton clearly knows many of these subcontractors are dependent on its business. Therefore, it is even more important to ensure that Horton is not allowed to run over them by picking and choosing what contract provisions apply when and where.

Based on the provisions of the contract and the testimony of Horton's representative, the Court should grant East Coast's Motion for Summary Judgment. Horton has failed (over the course of almost four years of litigation) to produce a contract with East Coast that is applicable to Tidewater Creek. As there is no issue of fact, East Coast is entitled to summary judgment on Horton's crossclaim of contractual indemnity.

II. ASSUMING THE CONTRACT PRESENTED BY D.R. HORTON IS VALID, ITS INDEMNIFICATION PROVISION IS VIOLATIVE OF SOUTH CAROLINA LAW AND PUBLIC POLICY.

A. S.C. Code Ann. § 32-2-10

South Carolina's "Anti-Indemnity Statute" provides that:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. S.C. Code Ann. § 32-2-10.

The following is found within the indemnification provision that Horton is relying upon in asserting its contractual indemnification claim:

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. . . .
Indemnitee shall have the right, at its own discretion and choosing, to defend any and all claims which may be asserted against it, and contractor agrees to reimburse indemnitee for any and all expenditures which indemnitee may make or incur on account of any such claim. (Ex. 1, p. 4, Section 10)(emphasis added).

"Indemnity is a form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993).

Section 10.2 of Horton's purported contract requires East Coast to "reimburse" Horton for "any and all" expenses that it incurs in the defense of any claim against Horton. There is no language placing a limit as to what is being indemnified. As there is no exclusion of Horton's "sole negligence" within this provision, it is invalid under the Anti-Indemnity Statute. Since the provision is invalid, the contractual indemnification

claim fails as a matter of law and there is no contractual indemnification issue for the jury to determine. Accordingly, East Coast's Motion for Summary Judgment should be granted.

B. Concord & Cumberland

Our Supreme Court has ruled that "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018).

The indemnification provision found within the purported agreement reads as follows:

10. CONTRACTOR'S INDEMNITY

10.1 GENERALLY. To the fullest extent permitted by law, Contractor agrees to hold harmless, indemnify, and defend [Indemnitee] . . . from and against any and all . . . claims . . . lawsuits . . . for damages from . . . the destruction of property . . . arising out of or resulting from, or related in any way to the work performed . . . regardless of whether or not caused in part by Indemnitee. . . . Losses specifically include but are in now way limited to . . . (1) breach of any warranties, representation, covenants, or obligations of contractor set forth herein; (2) the work performed or to be performed or material supplied by Contractor . . . ; (3) any negligent, grossly negligent, and/or intentional act and/or omission of Contractor . . . ; or (4) any negligent, grossly negligent, and/or intentional act and/or omission of Indemnitee related in any way to the work. Notwithstanding the foregoing, nothing herein shall require indemnity for losses caused solely by fault or negligence of the Indemnitee. . . .

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. . . . Indemnitee shall have the right, at its own discretion and choosing, to defend any and all claims which may be asserted against it, and contractor agrees to reimburse indemnitee for any and all

expenditures which indemnitee may make or incur on account of any such claim. (Ex. 1, p. 4, Section 10)(emphasis added).

Section 10.1 appears to limit the scope of East Coast's obligation to concurrent negligence of Horton and specifically exclude the sole negligence of Horton. However, in the very next section Horton turns around and asserts a right to defend any action that is brought against it and requires East Coast to reimburse Horton for "any and all expenditures" accrued in defense of the claim. The ambiguous language of the provisions do not allow East Coast to determine what exactly its obligations are and what it is responsible for.

In ruling on motions for summary judgment in the *Concord & Cumberland* case, Judge Newman explained that a general contractor must "meet the very high standard of eliminating any possibility that they contract language on which [it] rel[ies] can be read to limit indemnification to the [subcontractor's] own negligence." Judge Newman further explained that "if any other interpretation of the contract language is reasonably possible, [the general contractor] cannot prevail on their contract claims as a matter of law." The above provisions fall directly in line with this decision and are unenforceable as a matter of law. The provision does not clearly and unequivocally state what East Coast's indemnification responsibilities are as they relate to the sole or concurrent negligence of Horton. East Coast is entitled to summary judgment on this additional ground.

C. Public Policy

Even if it assumed that the agreement presented by Horton is valid and applicable to the Project, the indemnity provision therein fails as it is violative of public policy. As a general rule, "courts will not enforce a contract when the subject matter of

the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions. *White v. J.M Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). The Supreme Court of South Carolina has observed that indemnification provisions that seek to indemnify the indemnitee against losses resulting from the indemnitee's own negligence are invalid unless the provision is set forth in clear and unequivocal terms. Here, Horton is attempting to have East Coast indemnify it for its own intentional acts:

To the fullest extent permitted by law, Contractor hereby agrees to hold harmless, indemnify protect and defend Owner ("Indemnitee") . . . from and against any and all demands claims, actions, causes of action, proceedings, lawsuits of any kind . . . for damages from bodily or personal injury, death, the destruction or loss of property (including loss of use), or any other kind of damages or harm arising out of, or resulting from, or related in any way to the work performed and/or the materials supplied under this contract, regardless of whether or not caused in part by indemnitee. Such losses specifically include, but are in no way limited to losses arising out of or attributable to: . . . (4) any negligent, grossly negligent, and/or intentional act and/or omission of the indemnitee related in any way to the work. Notwithstanding the foregoing, nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnitee. (Ex. 1, p. 4, Section 10)(emphasis added).

Plaintiffs are asserting claims for unfair trade practices, breach of contract, and fraudulent inducement. With the indemnification provision above, Horton is attempting to shift the exposure of defending against the intentional acts to its subcontractors. If this provision is allowed to remain in force, it gives Horton incentive to act with impunity in the performance of its work and make its subcontractors pay the price. This is a clear public policy concern that affects how communities are built and who will be ultimately responsible in the event there is an issue.

Based on the above, the indemnity provision in the purported contract produced by Horton is violative of public policy and should be unenforceable. Accordingly, East Coast respectfully asks the Court to grant its Motion for Summary Judgement.

III. D.R. HORTON'S UNCLEAN HANDS PRECLUDE IT FROM RECOVERING UNDER A THEORY OF EQUITABLE INDEMNIFICATION.

Generally, there is no right to indemnification among joint tortfeasors. *Atl. Coast Line R.R. Co. v. Whetsone*, 243 S.c. 61, 70, 132 S.E. 2d 172, 176 (1963). Claims of equitable indemnity can be sought in cases where "the first party is at fault, but the second party is not." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1990). When the "second party" comes before the court at fault, that party has no right to equitable indemnification. *Id.* In order to recover under its theory of equitable indemnification, Horton must show that (1) East Coast is liable for causing the Plaintiff's damages, (2) Horton has been exonerated from liability on those damages, and (3) that Horton has incurred damages as a result of defending Plaintiffs' claims, which have been proven to be the fault of East Coast. *Id.* Further, South Carolina law clearly states that "the most important requirement . . . is that [Horton] is adjudged without fault." *Id.*

Plaintiffs have alleged causes of action for negligent misrepresentation, negligence and gross negligence, unfair trade practices, breach of contract, and fraudulent inducement. (Ex. 5 – Second Am. Comp., at Paragraphs 7 and 8). The specific allegations concern defects in the development, surveying, subdividing, construction, maintenance, marketing, and selling of the homes in Tidewater Creek. *Id.* The alleged defects consist of rusted metal, broken glass, and other debris being found throughout the Plaintiffs' yards. Horton, as the developer and general contractor, bore

ultimate responsibility for the development and construction of the neighborhood. Horton drafted the plans, specifications, and scopes of work; supervised and inspected the work daily; and walked the lots of where the homes were constructed. (Ex. 2, at 36; 52; 53-54; 158; 179). If the jury determines that there was any issue within East Coast's scope of work, then it is clear that Horton would share in that responsibility given that its representatives developed, oversaw, and inspected the project from start to finish. Accordingly, D.R. Horton is not entitled to equitable indemnification from East Coast.

IV. D.R. HORTON'S CLAIM FOR EQUITABLE INDEMNIFICATION IS NOT RIPE FOR ADJUDICATION.

Horton's claim for equitable relief is not ripe as it has not been exonerated from any liability. Horton is "entitled to recover [its] costs and attorneys' fees in the successful defense of this action under an implied contract." *Addy v. Bolton*, 257 S.C. 28, 32, 183 S.E.2d 708, 709 (1971). There has been no "successful defense" of this action for Horton and therefore there is no case for its claim until the conclusion of the current proceeding.

CONCLUSION

Based on the foregoing arguments, the Court should grant East Coast's Motion for Summary Judgment. There is no factual dispute to present to the jury and D.R. Horton's crossclaims should be dismissed as a matter of law. Accordingly, East Coast Construction Cleanup Corp. respectfully asks the Court to grant its Motion for Summary Judgment.

[Signature on the following page]

CLAWSON and STAUBES, LLC

s/ Tyler E. Cloud

Tyler E. Cloud

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Attorney for East Coast Construction Cleanup Corp.
f/k/a S.C. Cleanup Co., Inc.

Charleston, South Carolina

November 12, 2021

D.R. HORTON
America's Builder

SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR EAST COAST CONSTRUCTION CLEAN UP CORP.
 Sole Proprietorship ☐ Partnership ☒ Corporation ☐ LLC ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 571120254
 Name of Owner(s)/Officer(s): SEBASTIAN NUNGARAY - OLGA C. AQUINO
 Division Name: SOUTH CAROLINA Area Name: MURFREESBORO Assigned Vendor No.: 520522
 Address for All Notices: P.O. Box 46 528436
 City: HARDEEVILLE State: SC Zip Code: 29927
 Telephone: 843 384-1310 Fax: 843 384-2936 E-Mail Address: Celina33@hangar.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 30th day of November, 2012, between D.R. HORTON, INC. ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered into on a Market basis. The terms of the Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement (the "Work") shall include all work performed and materials supplied by Contractor to Owner including but not limited to the labor, services and/or materials, equipment, transportation, or facilities necessary to complete the construction-related activities generally described in Exhibit A. The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing will not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to or in place of Contractor. Contractor will be awarded Work on a lot by lot basis. To the extent Exhibit A contains more than one type of construction-related activity, Contractor must clarify with Owner before the Work commences as to which construction-related activity it has been awarded for the lot in question.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, method and performance of the Work. Contractor shall not be considered an agent or employee of Owner for any purpose, nor shall any employee or permitted subcontractors of Contractor. Contractor shall not represent itself as the agent of Owner unless owner has specifically permitted Contractor to do so in writing. The results achieved shall satisfy the requirements of this Agreement. Contractor shall be responsible for the performance of its employees and permitted subcontractors, and all personnel used by Contractor in the performance of Work shall be qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further agrees to provide written notification to all of its present and future employees of Contractor's provision for Worker's Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work herein covered or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall pay and shall be solely responsible for all tax withholding, Social Security, state unemployment and all other withholding as required by law Contractor's employees, agents or permitted subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increase. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNLESS CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule, the accepted Pricing Schedule shall remain in effect for Purchase Orders issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoicing. Contractor shall invoice Owner no later than the earlier of (i) sixty (60) days after completion of the Work or (ii) thirty (30) days from the date of closing of the house incorporating the Work from Owner to a purchaser. Contractor hereby agrees that timely invoicing is an important and material term to this agreement, and timely invoicing is a part of Contractor's performance of all material terms of this contract. Contractor hereby waives payment for any Work when Contractor fails to invoice Owner in a timely manner in conformity to this agreement. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 29-6-30 AND 29-6-40 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR

Executed this 30th day of November, 2012
 Owner: [Signature] Contractor: [Signature]
 By: RON BUNNEN By: SEBASTIAN NUNGARAY
 Title: ASSISTANT VICE-PRESIDENT Title: OWNER

INITIALS: OWNER [Signature] CONTRACTOR [Signature]

APPROVED

DRH-000820
Drier et al v. DRH

ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO SUBCONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN AND THAT OWNER DOES NOT AGREE TO PAY TO SUBCONTRACTOR INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF DELAYED PAYMENTS.

4.2 Payment to Subcontractors. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Order, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed from Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, notwithstanding the fact that the third parties may not endorse the checks. In any instance where Owner receives written notice from one of Contractor's sub-contractors, whereby the subcontractor claims a failure to be paid for the Work, Owner reserves the right to pay the subcontractor directly or to make payment payable to both the Contractor and its subcontractor.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the Contract Price shall waive and release all claims against Owner and the property under this Agreement, but shall not waive any claims of Owner arising out of Work later found to be defective and shall not release Contractor from liability for warranties and warranty service and/or defective Work. Contractor shall remedy any defects and pay for any damage resulting from any defects in or caused by the Work or as required by any other contracts between Owner and Contractor or by law or customary practice. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or assigns is an acceptance of the Work or materials not in compliance with this Agreement.

5. SCHEDULE OF WORK.

5.1 Time is of the Essence. Contractor acknowledges that TIME IS OF THE ESSENCE in the performance of all Work.

5.2 Construction Schedule. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.3 Commencement of the Work. Owner shall issue an authorization (either pursuant to a written purchase order, payment schedule, or work invoice ("Purchase Order") or verbal instructions from an authorized Owner representative) to commence the Work and Contractor shall not commence the Work at a job location until Contractor has received instructions to begin Work at a specific job location. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.4 Changes in Construction Schedule. Contractor agrees that Owner shall have the right to make changes to the schedule of Work at Owner's discretion and agrees to comply with such changes.

6. PERFORMANCE STANDARDS.

6.1 Applicable Standards. Contractor shall perform all Work in a good and workmanlike manner, in accordance with the plans and specifications of Owner, according to industry standard practices, and warrants that the Work will meet or exceed FHA minimum property standards, VA requirements, all laws (statutory or common) and regulations, and any applicable building code requirements.

6.2 Contractors' Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized Owner's employee and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications as the plans and specifications affect the Work and materials incorporated in the Work, and that the plans and specifications are clear and unambiguous, and has accepted and agreed to be bound by all such requirements.

6.3 Government Requirements. Contractor will comply with all applicable federal, state, local, and county statutes, ordinances, regulations, codes, licensing requirements and standards, and the requirements of the Williams-Steiger Occupational Safety and Health Act of 1970 as amended, as well as the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., or similar laws or regulations, and the rules, regulations, or orders of all public authorities relating to performance of the Work, including without limitation, the procurement and posting of all required permits and notices. In addition, Contractor will not discriminate in its hiring or employment and will follow all state and federal employment laws or regulations. Contractor shall perform background checks and use only appropriate employees to perform warranty or repair work after a house is occupied.

6.4 Indemnity. To the fullest extent allowed by law, Contractor will agree to indemnify, defend, and hold Owner harmless from all actions, claims, investigations or other acts to enforce such laws or regulations, and further agrees to indemnify Owner from the payment of any fine, penalty or damages imposed, levied, assessed, or found as a result of the Contractor's failure to comply with or adhere to the applicable laws and regulations, or from Contractor's failure to cause its employees or subcontractors to comply with such laws and regulations.

6.5 Observation and Testing by Owner and Repair by Contractor. Owner shall have the right to observe or test the Work at any time during or after construction, but that observation or testing is solely for the benefit of Owner's and is not for Contractor's benefit. Owner's failure to note defects in the Work during an inspection will not waive any of Contractor's obligations, representations or warranties related to the Work. Notwithstanding anything contained in this Agreement to the contrary, all Work shall be performed and any defects shall be corrected timely and in accordance with this Agreement to the satisfaction of Owner.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work, and shall report in writing to Owner any defects prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractor's work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses and approvals necessary for or applicable to the performance of the Work.

6.8 Change Orders. The Contractor shall furnish the materials for and to make all changes requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed;

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(ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) work site safety requirements.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste materials or rubbish caused by its operations and shall remove all of Contractor's materials, and if materials are furnished by Owner, Contractor shall move all usable materials provided by Owner to a location designated by Owner. Contractor shall sweep out any waste material from inside the home under construction upon completion of its operation. All refuse shall be placed in receptacles provided or at locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up activities and collect a one hundred dollar (\$100.00) fine from Contractor for each incident. The cost of such clean-up and the aforementioned fine shall be deducted from any sums owed by Owner to Contractor, or shall be immediately payable by Contractor upon demand therefore by Owner.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from or in any way related to the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Owner reserves the right to set minimum standards or rules relating to Work on its site. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OWNERS MINIMUM REQUIREMENTS. THE OWNER ASSUMES NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe condition or practice observed on the Work Site. Further, Contractor shall immediately notify Owner of any accidents or injuries on the Work Site. Contractor shall have an ongoing safety program and conduct inspections to determine that safe working conditions and equipment exist and safe practices are observed. Contractor shall prohibit and prevent the presence of children under age eighteen (18) from the Work Site.

7.1 Safety Laws and Indemnity Agreement. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards, statutes, and industry best practices concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations. Contractor shall provide Owner with written verification of its compliance with all applicable safety and health standards and regulations, including but not limited to OSHA's Hazard Communication Standard for the Construction Industry, 29 C.F.R. §1926.59 et seq., and provide written notice to Owner of the contact person responsible for Contractor's compliance with all safety and health standards and regulations. To the fullest extent allowed by law, Contractor agrees to indemnify, defend, and hold Owner harmless from all actions prosecuted to enforce and the payment of any fine or penalty imposed under such safety laws and regulations and shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work.

7.2 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, permitted subcontractors or suppliers at a job location or performance of the Work by any person under the influence of alcohol or drugs.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate corporations, and successors and assigns, that all labor performed and materials furnished by Contractor shall conform to the specifications of this Agreement, shall be free from any defects or deficiencies in workmanship or materials, and will comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, will meet or exceed the FHA/VA minimum property standards, and will comply with the Residential Warranty Corporation ("RWC") Program and the applicable limited warranty standards, which Contractor has read and understands and to which Contractor agrees to be bound. All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects for purposes of Contractor's obligations under this Contract. Contractor shall make good and promptly repair all Work not complying with the standards set forth in this section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Paragraph 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, the initial homeowner of the property on that is the subject of the Work: (i) for a period of ten (10) years all structural elements, including, but not limited to, roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, floors (other than finish supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (i) any statutory warranty or (ii) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner (a "Homeowners Warranty"). Contractor expressly agrees to be bound by any such Homeowners Warranty and to the extension of warranty period hereunder. Furthermore, notwithstanding the foregoing, Contractor agrees that all express and implied warranties shall remain in full force and effect for so long as Owner is obligated to warrant the Work pursuant to applicable law. Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Homeowners Warranty that is longer than the Warranty Periods stated above; provided, however, failure to give that notice will not affect the extension of the Warranty Period to the applicable warranty period under the Homeowner's Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/failure of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty obligations, Contractor's indemnity obligations, or the ability of Owner to request Contractor to perform warranty services in the future.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish all warranties and/or guarantees by manufacturers on appliances and equipment, and shall furnish all certificates required by any municipality and/or VA and/or FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and are not in limitation of periods of applicable statutes of limitation.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Project is located.

9.3 Lien Claim Indemnity. If any liens are filed against Owner relating to portions of the Work for which Owner has paid Contractor, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such lien or affidavit to be removed.

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and released of record. Contractor agrees to INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any liens relating to portions of the Work for which Owner has paid Contractor, and further agrees at Owner's request to any or all of the following: (i) procure a bond to indemnify Owner and any home purchaser from Owner, in an amount sufficient to discharge that lien, or (ii) refund to Owner all monies, including any additional amount necessary to cover all of Owner's or home purchaser's attorneys' fees and court costs paid in discharging the lien, whichever remedy Owner elects in its sole and absolute discretion, or (iii) provide sworn testimony that payment has already been made to Contract for the work for which the alleged lien applies.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO HOLD HARMLESS, INDEMNIFY, PROTECT AND DEFEND OWNER, ITS PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THE AFOREMENTIONED ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "INDEMNITEE"), FROM AND AGAINST ANY AND ALL DEMANDS, CLAIMS, ACTIONS, CAUSES OF ACTION, PROCEEDINGS, LAWSUITS, SETTLEMENTS, JUDGMENTS, FINES, PENALTIES, LOSSES, ATTORNEY'S FEES, LITIGATION COSTS, INTEREST, AND EXPENSES OF ANY KIND (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "LOSSES") FOR DAMAGES FROM BODILY OR PERSONAL INJURY, DEATH, THE DESTRUCTION OR LOSS OF PROPERTY (INCLUDING LOSS OF USE), OR ANY OTHER KIND OF DAMAGES OR HARM, ARISING OUT OF, OR RESULTING FROM, OR RELATED IN ANY WAY TO THE WORK PERFORMED AND/OR THE MATERIALS SUPPLIED UNDER THIS CONTRACT, REGARDLESS OF WHETHER OR NOT CAUSED IN PART BY INDEMNITEE. SUCH LOSSES SPECIFICALLY INCLUDE, BUT ARE IN NO WAY LIMITED TO LOSSES ARISING OUT OF OR ATTRIBUTABLE TO: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS OR OBLIGATIONS OF CONTRACTOR SET FORTH HEREIN; (2) THE WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR, CONTRACTOR'S AGENTS OR EMPLOYEES, SUPPLIERS OR SUBCONTRACTORS AND THEIR RESPECTIVE AGENTS AND EMPLOYEES, AND/OR ALL OTHER ENTITIES OVER WHOM THE CONTRACTOR MAY EXERCISE CONTROL (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "CONTRACTOR'S AGENTS"); (3) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF CONTRACTOR AND/OR CONTRACTOR'S AGENTS; OR (4) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE INDEMNITY FOR LOSSES CAUSED SOLELY BY FAULT OR NEGLIGENCE OF THE INDEMNITEE. THE LOSSES DESCRIBED HEREIN SHALL INCLUDE, BUT ARE NOT LIMITED TO, DEMANDS, CLAIMS, OR ACTIONS ASSERTED BY (1) ANY PRESENT OR FUTURE OWNER OF THE HOUSE INCORPORATING THE WORK; AND (2) ANY OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR AND/OR CONTRACTOR'S AGENTS). THE INDEMNIFICATION OBLIGATION UNDER THIS CONTRACT SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. THE INDEMNITY PROVISIONS CONTAINED HEREIN ARE INTENDED TO BE AS BROAD AND INCLUSIVE AS PERMITTED BY LAW.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ANY AND ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. IT IS THE EXPRESS INTENTION OF THE PARTIES THAT CONTRACTOR'S INDEMNITY OBLIGATIONS HEREIN WILL SURVIVE THE TERMINATION OF CONTRACTOR OR THIS AGREEMENT. INDEMNITEE SHALL HAVE THE RIGHT, AT ITS DISCRETION AND CHOOSING, TO DEFEND ANY AND ALL CLAIMS WHICH MAY BE ASSERTED AGAINST IT, AND CONTRACTOR AGREES TO REIMBURSE INDEMNITEE FOR ANY AND ALL EXPENDITURES WHICH INDEMNITEE MAY MAKE OR INCUR ON ACCOUNT OF ANY SUCH CLAIM.

10.3 CONTRACTOR AND CONTRACTOR'S AGENTS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS OR EQUIPMENT.

10.4 Subcontractor's and Supplier's Indemnity Obligations. Contractor shall require each of its subcontractor to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required in this section and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms as Section 13. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the actions of any subcontractor engaged by Contractor, whether in written agreement or otherwise, or who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed to be the obligation of the subcontractors to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with completed operations coverage which contains a per occurrence limit of no less than one million dollars (\$1,000,000.00), and an aggregate limit of no less than two million dollars (\$2,000,000.00) protecting against liability for bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products and completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (e, c, u) exposures. The CGL Policy shall not exclude from coverage the type of, or nature of the Work or limit the type of structure on which the Work is to be performed. The CGL Policy shall not contain a deductible or self-insured retention of more than \$25,000.00. Contractor shall continuously maintain a CGL Policy covering completed operations for any applicable statute of repose for commencing lawsuits associated with the Work.

11.2 Other Insurance. Contractor agrees to carry (i) Worker's Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Worker's Compensation obligations imposed by law; (ii) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than one million dollars (\$1,000,000.00) and an aggregate of no less than one million dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (iii) Commercial Automobile Liability Insurance coverage with limits of not less than \$300,000 per person (Bodily Injury) and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner as an Additional Insured on the CGL Policy or policies required above covering both on-going operations and completed operations (equivalent to form CG20101185 or form CG2037). Coverage obtained by Contractor naming Owner as an Additional Insured shall be primary with any insurance of Owner being excess coverage. That insurance coverage will be carried continuously during the term of this Agreement and thereafter as required by this Agreement with insurance companies acceptable to Owner in its sole and absolute discretion. That insurance shall provide for a waiver of subrogation. All insurance shall be with

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a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, or certified copies of the required policies. Each Certificate of Insurance or policy shall contain an unqualified clause to the effect that the policy shall (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days' prior written notice to Owner, (ii) be carried continuously from the date of commencement of the Work until expiration of the period of the Contractor's warranty provided in this Agreement, (iii) specifically identify Owner as an Additional Insured, and (iv) indicate that coverage applies in the state where the Work is being performed. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself and the Work required to be performed under this Agreement.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER IN ITS SOLE AND ABSOLUTE DISCRETION) IN EFFECT AT THE TIME WORK IS PERFORMED TO COMPENSATE OWNER FOR ANY ADDITIONAL COSTS OF ITS WORKER'S COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS CONTRACT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work to the extent permitted under this Agreement, Contractor guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Owner as an Additional Insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or another contractor's work is damaged by an act for which Contractor, or its employees, agents or subcontractors, are responsible, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct such Work, replace or repair any defective material, or repair any damage. Contractor shall make all repairs and correct such within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours notice on a non-emergency basis; or (ii) retain a third party or undertake to perform these duties, and retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld resulting in a deficiency, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and reasonable attorneys' fees, incurred by Owner, and shall pay to Owner this amount within thirty (30) days of demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Paragraph 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or permitted subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location as a result of Contractor's actions or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement, Exhibit A of this Agreement, or the specifications; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order that is Contractor's obligation under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary tools, material, or equipment for, or cleaned up after, the Work; (viii) Contractor fails to comply with any other provision of this Agreement.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement and rights and remedies available under this Agreement shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. Owner shall have a right to collect from Contractor its reasonable attorneys' fees and expenses incurred in enforcing Contractor's obligations.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These Disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking equitable relief from and arbitrator or a court of appropriate jurisdiction.

13.3 Arbitration. If mediation fails, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq., regardless of any other choice of law provision in any underlying contract or this Agreement. All demands for arbitration shall be made before the expiration of the applicable statutes of limitations and repose. The award rendered by the arbitrator(s) shall be final, and judgment may be entered upon it in any court of competent jurisdiction.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrators mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes, is over \$200,000, but only one arbitrator shall be appointed if the Dispute is 200,000 or less. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of a mediator or arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint a mediator or arbitrator. The AAA's Code of Arbitrator Ethics (revised March 1, 2004) is applicable to all arbitrations.

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13.5 Rules. To the extent not in conflict with the Federal Arbitration Act, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner may join Contractor in any litigation, mediation, or arbitration initiated against Owner by a third person so that the rights of all parties (Owner, Contractor, Subcontractor, or any third person) shall be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner where necessary to facilitate resolution in a single forum. If multiple lawsuits or arbitrations are commenced, they shall all be consolidated into a single proceeding. Notwithstanding any other provision of this section, if a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect to unilaterally waive mediation or arbitration and litigate the Dispute with Contractor.

14. TERMINATION.

14.1 Termination by Owner for Cause or Convenience. This Agreement shall remain in full force and effect until terminated in writing by mailing notice to the other Party. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) Days' written notice before the effective date of termination, and shall perform fully under this Agreement during that notice period. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.3 Survival. All obligations, duties and warranties for Work performed under this Agreement shall survive termination.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement, (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement, (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms, (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority, (v) Contractor has, and each Contractor's employees, agents or permitted subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement, (vi) Contractor is in compliance with all governmental requirements to which it is subject, and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement, and with respect to prices and quantities only, the Price Schedule and all written Purchase Orders shall be the entire agreement between Owner and Contractor related to the Work, and there are no other agreements, oral or written, made by or relied upon by Owner and Contractor. Except as otherwise provided in this Agreement, no provision of this Agreement may be amended or supplemented except in writing signed by both Owner and Contractor.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractor's rights and obligations are not assignable or transferable without the express written consent of Owner, who may consent in Owner's sole and absolute discretion. Subject to the restrictions and prohibitions on assignment set forth in this section, the terms of the Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Contractor shall provide and transfer ownership to any and all samples and/or shop drawings requested by Owner.

18. NOTICES. All notices required pursuant to this Agreement or otherwise shall be in writing and shall be delivered to the respective business address of Owner and Contractor. However, Contractor's business address shall be as noted on page one (1) of this Agreement. Notices shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by overnight delivery service, and upon confirmation if sent by facsimile transmission.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or articles.

Exhibit "A"
Scope
Exterior Clean

SOUTH CAROLINA REVISED 7/23/2007

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Exhibit "A" Exterior Clean

I. Scope Policies

This scope of work outlines specifications as required by DR Horton (DHI). This scope of work is in addition to the "General Information" scope of work. The specifications and standards outlined below may be modified at the discretion of DHI. In the instance that any changes are made to the scope, contractor will be notified and required to resign a scope within 2 business days. This scope of work shall apply to all DHI communities. In addition, this scope of work shall override all previous signed scopes of work for the construction phase listed above.

II. General Requirements

Contractor will supply all material, equipment, and labor necessary to complete the landscaping final grade phase of construction. All work shall conform to all building codes, DHI standards, plans/details, community specs, and industry standards. Prior to starting any job, subcontractor shall meet with Field Manager to review all plot plan, landscape plan, options, and pending inspections. All work shall be completed per the schedule set forth by the Field Manager. Vendor shall provide unit pricing to DHI purchasing for standard, and any unexpected costs.

III. Bids Requirements

Contractor must provide a material and labor breakdown for all bids. All bids must include the wording "all applicable taxes included". All bids shall be returned to the office by the required deadline. All bids must be accompanied with the following paperwork:

- Signed Scope of Work
- Signed Community Specifications
- Signed Copy of DHI bid Sheet

IV. Material Specifications

Note: This section outlines general material requirements/manufacturers. This list does not represent all material to be supplied by subcontractor. Subcontractor must supply all materials listed throughout the scope of work U.N.O.

V. Scope

- Daily CSMe login.
- Pick-up all construction debris a minimum of 5 days/week (Monday – Friday Saturdays as needed). Construction debris must be picked up every Friday. Depending on volume in subdivisions, DHI reserves the right to require additional pick-ups at no additional charge.
- Set permit box in front of water meter or location dictated by superintendent.
- Pick-up all construction debris at the curb, or at area designated by Superintendent (location to be predetermined by Superintendent and Subcontractor prior to starting).
- Pick-up trash on lot around house daily, including trash that has blown onto adjacent home sites and across the alley.
- Contact Superintendent immediately if other trades are not placing waste in proper location.
- Superintendent may require subcontractor to pick-up trash around house, concrete over pours, general subdivision clean-up, etc. for an additional charge. Cost of this service shall be provided to the Superintendent prior to performing any work.
- Provide a 50 gallon steel trash barrel on each lot at the time of footing preparation. Trash barrel to be located by the water meter. Once the house has been properly backfilled and rough graded (after foundation is complete) the subcontractor is to move the trash barrel to the front corner of the garage. If the house does not have a garage, the barrel is to be placed at the front corner of the house. The trash barrel shall not be placed on a concrete surface.
- Provide one house sweep (including Garage).

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D.R. HORTON
America's Builder

- Dispose of all trash at the construction trailer/office once per week.
- Haul off any debris in concrete washout area as required by Superintendent as an extra.
- Clean the streets of any dirt, mud, nails, screws, aluminum, etc. generated during material delivery and installation.
- Reset and repair any displaced silt fence, orange fencing, signage and permit box as needed. .
- Provide model trash removal at 50% off total cost.
- Dispose of all materials in accordance with local municipality/county, state, and federal guidelines.

Initials: Contractor [Signature] (Exterior Clean)

DHI [Signature]

VI. Payment

All invoices shall not be turned in and approved for payment until phase complete and all deficiencies are remedied. DHI reserves the right to make the final decision in determining the correct course of action for any and all repairs. No Extras will be paid unless negotiated prior to performing any work and an approved P.O. is issued.

Initials: Contractor [Signature] (Exterior Clean)

DHI [Signature]

VII. Additional Costs (includes labor, tax, material, etc.)

\$ <u>55.00</u>	/hr. Bobcat time including operator.
\$ <u>20.00</u>	/hr. General laborer.
\$ <u>75.00</u>	/hr. Truck and operator
\$ _____	/each Haul and dispose of curb cut
\$ _____	/load Haul and dispose of concrete
\$ _____	/trash barrel (Replacement Cost)

VIII. Warranty

- Subcontractor shall warrant all work per DRHI contract. All warranty work must be completed within 72 hours of scheduled date and time.

Subcontractor

East Coast Construction Cleanup
Company Name

Sebastian Nungaray
Representative

Owner
Title

11/12/12
Date

DR Horton

Coastal Carolina

[Signature]
Representative

ASSISTANT VICE-PRESIDENT
Title

11/30/12
Date

Initials: Contractor [Signature] (Exterior Clean)
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Customer Service Center-(CSC)

1. Subcontractor to warrant all work from date of the transfer of the property from D. R. Horton to the homeowner for workmanship and materials where applicable. Subcontractor hereby agrees to repair, replace, or pay the expense of repair / replacement as determined by D.R. Horton. The cost of repair/replacement shall include any and all collateral remediation.
2. Subcontractor will respond within 48 hours to all work order requests from D.R. Horton CSC personnel, 24 hours on emergencies. Failure to respond within 48 hours will result in D.R. Horton to have corrections made and back charge subcontractor for all associated costs. Missed appointments will result in a \$50 back charge per incident. These back charges will be in the form of an offset to any unpaid balances.
3. Subcontractor must respond to CSC via fax once a work order is received and an appointment is made with the homeowner to correct warranty work within 48 hours of receipt of work order.
4. Subcontractor must obtain homeowner signatures on all work orders upon completion of warranty work. Homeowner must sign off on all work as being completed and satisfied.
5. Subcontractor to fax the signed / dated work order from the Homeowner to the CSC. It is the responsibility of the subcontractor to inform the CSC of each completed work order. All work orders must be faxed to the CSC as completed. Work orders will be considered "open" if not faxed and received by the CSC.
6. Bi-monthly Vendor reports will be faxed to subcontractor. Report will indicate warranty work that is outstanding. Upon receipt subcontractor to review all open work orders and note next to each item the work orders that are completed and if not the scheduled appointment date and time. Once reviewed, subcontractor to fax report to CSC for updating. Report is to assist subcontractors in managing warranty work load. Not maintaining a good standing in completing work orders may result in delay in payments.
7. Subcontractor's payments for all work will be placed on hold if any warranty work order remains open for 30 days or more. The payments will remain on hold until all of subcontractor's open warranty work orders of 30 days or more are closed. D. R. Horton may cause the warranty work to be completed at the subcontractor's expense.

Contact: Sebastian Ungaray
Phone#: 1842-384730

Initials: Subcontractor [Signature] (Warranty)

DRH [Signature]
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Subcontractor

East Coast Construction Clean up Corp
Company Name

Sebastian Nungaray
Representative Name

[Signature]
Representative Signature

Owner
Title

11/12/12
Date

DR Horton, Inc.

Coastal Carolina Division

Ron Bunner
Representative Name

[Signature]
Representative Signature

Assistant Vice-President
Title

11/50/12
Date

Initials: Subcontractor [Signature] (Warranty)

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DHI [Signature]
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Exhibit "A"-Field Requirements

Part 1-General

1. This document defines both D. R. Horton and subcontractor responsibilities in the stated phase of construction. It is intended as a checklist that will define the D. R. Horton standard of quality and professionalism. The subcontractor's work will not be considered complete until all specifications herein contained are fully met.
2. The work in this bid and agreement shall be installed per plans, specifications and all applicable local, state, and federal codes. All work will be inspected and certified as complete by the subcontractor. Payment release does not constitute final acceptance from D.R. Horton.
3. The work shall be performed to D. R. Horton's standards of quality. If any part of the work is found to be incorrect or causes damage to other work, the subcontractor will be responsible for all costs to repair, whether prior to or after payment release.
4. All trash, debris, and scraps shall be removed on a daily basis and deposited in a designated area per job superintendent and the home is to be broom swept *daily*. There is no parking on any lots, driveways, or sidewalks. Access to the house will be designated by a DR Horton representative. Violators will be subject to a minimum fine of \$500. Under no circumstance will vehicles be allowed to park blocking occupied driveways, their will be parking designated on one side of the street. Violators will be fined \$75 and could incur additional fines from local municipalities.
5. All good materials left on the job site shall be maintained in neat order and in a location that does not hamper another subcontractor's ability to perform his/her work. The superintendent will designate the location. The home WILL be swept *daily, and upon completion of work*. Also, upon completion of work, a representative of D. R. Horton will walk the job. If it is found to be unorganized and dirty, D.R. Horton will have the house cleaned and swept and the subcontractor will receive a \$75.00 minimum charge.
6. All left over good materials on the job site must be removed within 48 hours of the completion of the work. Failure to remove these materials will result in D. R. Horton removing them at the subcontractor's expense and will also result in a fine of \$100.00 per day until the materials are removed by either the subcontractor or D. R. Horton.
7. D. R. Horton shall issue authorization (either pursuant to a written purchase order or work order (hereinafter the "Purchase Order")) to commence the work, and subcontractor shall not commence the work at a job location until subcontractor has received instructions to begin work at a specific job location. Subcontractor shall commence the work within three (3) days of notice to proceed from D. R. Horton, and if such work is interrupted at the direction of D. R. Horton, subcontractor shall resume such work within two (2) working days from D. R. Horton's direction to resume. Notice to proceed will be provided by both CSMe and confirmation of the schedule for the work on CSMe with the superintendent. It is understood and agreed that the construction start date given to the subcontractor by D. R. Horton at the beginning of the job is approximate. The dates indicated are only intended to give the subcontractor a general idea of the approximate start date. All superintendents will have current schedules. A D. R. Horton supervisor will advise subcontractor or supplier of schedule changes either by voice or electronic notification. All work must be confirmed with the superintendent prior to start. Failure to commence the work within the time frames listed above will result in a Scope of Work

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Violation in the amount of \$100.00 per day. In addition, the schedule for the work as provided in CSMe must be maintained by the subcontractor until the work is completed and approved as completed by the superintendent. A Failure to complete the work in the time frame allowed from commencement to approved completion will result in a Scope of Work Violation in the amount of \$100.00 per day. The Scope of Work Violations will be issued in the form of a back charge to the subcontractor. These back charges will be in the form of an offset to any unpaid balances.

8. All work shall be performed in a safe and professional manner. It is the subcontractor's responsibility to comply with all OSHA requirements. The superintendent will issue a warning to workers on site of violations seen. If after a warning the workers are not in compliance they will be asked to leave the site and no payment will be issued for work completed. All workers must wear hard hats on all job sites at all times. The D.R. Horton representative may issue a written warning to workers on site of violations seen. If after a warning the workers are not in compliance, they will be asked to leave the site. Additionally, fines may increase as follows: 1st offense-a written warning and/or a \$100.00 fine, 2nd offense-\$250.00 fine and a mandatory appearance before safety committee, 3rd offense-\$500.00 fine, and 4th offense-termination. Removal of safety rails will result in a \$300.00 fine. In addition, contractor will be responsible for all costs incurred from missing rail parts. All workers must wear hard hats on all job sites at all times.
9. The subcontractor shall respect the work of the other crafts at all times and take necessary precautions in order to avoid damaging such work. If the subcontractor damages such work, repairs shall be made at the subcontractor's expense.
10. Any and all damages or defective workmanship must be reported to the superintendent. If a subcontractor is found to have covered or hidden damages or defective workmanship, then that subcontractor will incur all repair cost.
11. It is the responsibility of all subcontractors to obtain current product and work specification sheets that are applicable to each and every, all and singular, series, model or plan which D. R. Horton builds. This specification sheet will provide the subcontractor with special conditions, types, brands, methods, colors and manufacturers that are the express responsibility of each and every subcontractor.
12. DR Horton paperwork hierarchy is as follows: 1. Customer Selection Sheets 2. Community Specifications 3. Scopes of Work 4. Plans. #1 overrides everything. Field Superintendents are not authorized to make changes to any of the above. If you are asked to do something that does not follow the above paperwork hierarchy please contact the Construction Area Manager or the Purchasing Manager immediately. In addition, if you find something within our documents that do not comply with industry standards, is costing you or DR Horton additional money, or could be done more efficiently, please bring to our attention immediately. If you do not follow the proper paperwork hierarchy or make changes without written approval, DR Horton will not absorb the additional costs.
13. Subcontractors are not permitted to eat or smoke in a D. R. Horton home. No drinking of alcoholic beverages is allowed on any D. R. Horton job site. No uncovered shoes are permitted in a carpeted home.
14. No work should be considered complete until all errors are corrected and all applicable inspections have been passed.
15. All punch out list generated by the D. R. Horton superintendent will be complete before payment will be made. The subcontractor understands that the deliveries are sometimes delayed and that D. R. Horton has little control

Initials: Subcontractor [Signature] (General)

DRI [Signature]
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over material delivery. In the event delivery delays slow down work, the subcontractor will not be due payment of the job until the job is complete and punched out.

16. Subcontractors are responsible for reimbursing D.R. Horton the cost of municipal re-inspection fees directly related to their work. Any re-inspections or engineering costs as a result of poor workmanship are to be paid by the subcontractor. If D. R. Horton pays for these costs, the subcontractor will be charged the cost and D. R. Horton will offset any unpaid balances to subcontractor to recover these costs.
17. In the event a worker is injured on a job site, please follow these steps:
 - A. Verify the injury.
 - B. Contact the office so that we may document the incident.
 - C. The superintendent should fill out an "Accident Report" and return to the office within 48 hours.
18. D. R. Horton strictly forbids the subletting of work by any subcontractor. D. R. Horton will terminate any subcontractor found to be subletting work and D. R. Horton has no responsibility of payment to anyone whom has sublet from the subcontractor. This agreement is between D. R. Horton and the listed subcontractor only.
19. Payment is not due until the subcontractor has completed all punch lists to D.R. Horton, Inc.'s expectations. Do not turn in purchase orders for a house that is not punched out and *verified* by a D.R. Horton, Inc. representative.
20. No extras will be paid for without written approval from a D. R. Horton superintendent and DR Horton Purchasing. All extra work must be submitted to superintendent prior to DR Horton management's approval for payment. Acceptance will be verified with a PO being issued.
21. Most of D. R. Horton's jobs are paid by an auto pay system. The subcontractor will be issued a P.O. prior to performing work. Once the work is complete, the job superintendent will progress CSMe which will release the subcontractor's payment. Do not submit invoices for auto pay work. The subcontractors check will itemize each job task being paid using the P.O. number. It is the subcontractor's responsibility to properly keep track of their receivables by cross referencing the P.O. numbers. If for some reason the subcontractor feels that payment for a job that is complete has not occurred, the subcontractor is to contact the Purchasing Department and provide the needed details. The Purchasing Department will research the situation and provide instruction to the subcontractor.
22. Subcontractor shall comply with all insurance requirements including the subcontractor agreement before setting foot on any D. R. Horton site. If insurance lapses, contractor will be required to leave the site until they are in full compliance. If insurance cannot be reinstated they will be terminated.
23. All materials shall be installed per local, state, and federal codes. Installation of all products shall follow manufacturers' instructions. Any discrepancies between D.R. Horton's requirements and code/manufacturers' should be reported to D.R. Horton Construction and Purchasing Department in writing.
24. No invoices over 90 days from the date work was completed will be paid.
25. Subcontractor shall provide qualified supervision on all job sites to monitor work. This person shall be competent and able to make decisions on behalf of the subcontractor's company. Each subcontractor will have a qualified English speaking job supervisor on the job site. Each subcontractor is to furnish a representative for

Initials: Subcontractor (General)

DRI
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Drier et al v. DRH



subcontractor meetings as scheduled by DR Horton.

26. Subcontractors shall not discuss pricing or any agreements w/D.R. Horton with any other subcontractors. Violation of this policy will result in termination of subcontractor.
27. Subcontractor shall supply an OSHA compliant safety plan to D.R. Horton prior to starting work. It is the responsibility of the subcontractor to maintain the safety plan and update D.R. Horton with all revisions. Upon request, subcontractor shall supply D.R. Horton with MSDS sheets.
28. Once the doors or windows have been installed it is the responsibility of each subcontractor to close them during inclement weather in an effort to minimize damage to the home.
29. The following trades must provide a 24 hr emergency warranty phone number and contact. Any phone number or contact information changes must be reported to the Construction Department and Purchasing Department immediately.
Electrician Plumber Gas HVAC Roofer
30. Subcontractor is responsible for obtaining and forwarding a working email address to DR Horton. This account must be monitored at least once each working day. High Speed internet access is not required but is highly recommended.
31. In the event of a violation of any of these General Scopes of Work or in the event of a violation of a subcontractor's Specific Scope of Work for their particular trade, a Scope of Work Violation will be issued in the form of a back charge to the subcontractor. These back charges will be in the form of an offset to any unpaid balances.

Contact: Sebastian Nungaray
Phone#: 1843 3841310

Contractor

East Coast Construction Cleanup Co.
Company Name

Sebastian Nungaray
Representative Name

[Signature]
Representative Signature

Owner
e

DR Horton, Inc.
Coastal Carolina Division

Ron Borne
Representative Name

[Signature]
Representative Signature

Assistant Vice President
Title

Initials: Subcontractor [Signature] (General)

DHI [Signature]
Page 4 of 5

Revision 11/15/11

DRH-000833
Drier et al v. DRH



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Initials: Subcontractor S (General)

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DRH 
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DRH-000834
Drier et al v. DRH

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 BEAUFORT COUNTY

4 DEPOSITION OF RONALD BUNNER
30(B)(6) D.R. HORTON, INC.

5 RICHARD W. AND REBECCA A. DREIER; YOLANDA J.
6 DRIER; JACOB R. AND CARLA EMERSON; JOHN B. AND
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15 M. SHAFI; JAMES J. SMITH, III, AND ALAYSHIA
16 SMITH; AND NICOLE J. VERSTEGEN,

17 Plaintiffs,

18 vs. CASE NO. 2018-CP-07-00911

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23 HOLDING COMPANY, LLC; ATLAS SURVEYING, INC.;
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25 CROSSROADS ENTERPRISES, LLC; D.R. HORTON, INC.;
DEAN CUSTOM AIR, LLC; EAST COAST CONSTRUCTION
CLEANUP CORP. f/k/a CLEANUP CO., INC.; FREEDOM
HOMES, INC. f/k/a ARMOR BUILDING SOLUTIONS,
INC.; HUTTON'S LANDSCAPES, INC.; JENKINS
PLUMBING COMPANY, LC; LATHER CONSTRUCTION
SC, INC.; LATHER CONSTRUCTION, INC.; MASCO
CABINETRY, LLC; PROBUILD EAST, LLC;
PROFESSIONAL DRYWALL & PAINT SERVICES, LLC;
PROFESSIONAL EXTERIORS II, LLC; QUALITY ELECTRIC
OF THE COASTAL CAROLINAS INCORPORATED; STIER
SUPPLY COMPANY f/k/a STIER-HOLMAN SUPPLY
CO.; SUPERIOR ASSOCIATION SERVICES, LLC; and
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Defendants.

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BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC;
CROSSROADS ENTERPRISES, LLC; D.R. HORTON, INC.;
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37 SUPPLY COMPANY f/k/a STIER-HOLMAN SUPPLY
38 CO.; SUPERIOR ASSOCIATION SERVICES, LLC; and
39 VALIM CONSTRUCTION, LLC,

40 Defendants.

1 DEPONENT: RONALD BUNNER
2
3 DATE: SEPTEMBER 23, 2021
4
5 TIME: 10:05 AM
6
7 LOCATION: VIA REMOTE VIDEOCONFERENCE
8
9 REPORTED BY: DARAH BOLEN, RPR, CSR(IA)
10 CLARK BOLEN
11 CHARLESTON, SC 29415
12 843-762-6294
13 WWW.CLARK-ASSOCIATES.COM
14 Darah@clark-associates.com
15
16
17
18
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20
21
22
23
24
25

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 BEAUFORT COUNTY

4 DEPOSITION OF RONALD BUNNER
5 30(B)(6) D.R. HORTON, INC.

6 RICHARD W. AND REBECCA A. DREIER; YOLANDA J.
7 DRIER; JACOB R. AND CARLA EMERSON; JOHN B. AND
8 LORI ANNE GECY; AARON M. AND STASHA R.
9 GROOMS; ADAM F. GROOMS; AVARAE HALL;
10 MICHAEL B. AND CHEYENNE M. JOHNSON; KENNY
11 MANUEL LOPEZ AND KELSEY TRUDEL LOPEZ; DYLAN
12 C. AND SAMANTHA DAWN MACHADA; MARVIN K. AND
13 MARYALICE MAMARIL; CORY M. MCDANIEL;
14 THOMAS R. AND MELISSA S. MCFEELY; MICHAEL
15 AND KAREN M. RODRIGUEZ; SARMED AND JESSICA
16 M. SHAFI; JAMES J. SMITH, III, AND ALAYSHIA
17 SMITH; AND NICOLE J. VERSTEGEN,

18 Plaintiffs,

19 vs. CASE NO. 2018-CP-07-00911

20 ADVANCED FLOORING & DESIGN DIVISION OF ISI,
21 LLC f/k/a ADVANCED FLOORING AND DESIGN, LLC;
22 ARMOR BUILDING SOLUTIONS, LLC; ATLAS
23 SURVEYING BFT, LLC f/k/a ATLAS SURVEYING
24 HOLDING COMPANY, LLC; ATLAS SURVEYING, INC.;
25 BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC;
26 CROSSROADS ENTERPRISES, LLC; D.R. HORTON, INC.;
27 DEAN CUSTOM AIR, LLC; EAST COAST CONSTRUCTION
28 CLEANUP CORP. f/k/a CLEANUP CO., INC.; FREEDOM
29 HOMES, INC. f/k/a ARMOR BUILDING SOLUTIONS,
30 INC.; HUTTON'S LANDSCAPES, INC.; JENKINS
31 PLUMBING COMPANY, LC; LATHER CONSTRUCTION
32 SC, INC.; LATHER CONSTRUCTION, INC.; MASCO
33 CABINETRY, LLC; PROBUILD EAST, LLC;
34 PROFESSIONAL DRYWALL & PAINT SERVICES, LLC;
35 PROFESSIONAL EXTERIORS II, LLC; QUALITY ELECTRIC
36 OF THE COASTAL CAROLINAS INCORPORATED; STIER
37 SUPPLY COMPANY f/k/a STIER-HOLMAN SUPPLY
38 CO.; SUPERIOR ASSOCIATION SERVICES, LLC; and
39 VALIM CONSTRUCTION, LLC,

40 Defendants.

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IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
BEAUFORT COUNTY

DEPOSITION OF RONALD BUNNER
30(B)(6) D.R. HORTON, INC.

RICHARD W. AND REBECCA A. DREIER; YOLANDA J.
DRIER; JACOB R. AND CARLA EMERSON; JOHN B. AND
LORI ANNE GECY; AARON M. AND STASHA R.
GROOMS; ADAM F. GROOMS; AVARAE HALL;
MICHAEL B. AND CHEYENNE M. JOHNSON; KENNY
MANUEL LOPEZ AND KELSEY TRUDEL LOPEZ; DYLAN
C. AND SAMANTHA DAWN MACHADA; MARVIN K. AND
MARYALICE MAMARIL; CORY M. MCDANIEL;
THOMAS R. AND MELISSA S. MCFEELY; MICHAEL
AND KAREN M. RODRIGUEZ; SARMED AND JESSICA
M. SHAFI; JAMES J. SMITH, III, AND ALAYSHIA
SMITH; AND NICOLE J. VERSTEGEN,

Plaintiffs,

vs. CASE NO. 2018-CP-07-00911

ADVANCED FLOORING & DESIGN DIVISION OF ISI,
LLC f/k/a ADVANCED FLOORING AND DESIGN, LLC;
ARMOR BUILDING SOLUTIONS, LLC; ATLAS
SURVEYING BFT, LLC f/k/a ATLAS SURVEYING
HOLDING COMPANY, LLC; ATLAS SURVEYING, INC.;
BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC;
CROSSROADS ENTERPRISES, LLC; D.R. HORTON, INC.;
DEAN CUSTOM AIR, LLC; EAST COAST CONSTRUCTION
CLEANUP CORP. f/k/a CLEANUP CO., INC.; FREEDOM
HOMES, INC. f/k/a ARMOR BUILDING SOLUTIONS,
INC.; HUTTON'S LANDSCAPES, INC.; JENKINS
PLUMBING COMPANY, LC; LATHER CONSTRUCTION
SC, INC.; LATHER CONSTRUCTION, INC.; MASCO
CABINETRY, LLC; PROBUILD EAST, LLC;
PROFESSIONAL DRYWALL & PAINT SERVICES, LLC;
PROFESSIONAL EXTERIORS II, LLC; QUALITY ELECTRIC
OF THE COASTAL CAROLINAS INCORPORATED; STIER
SUPPLY COMPANY f/k/a STIER-HOLMAN SUPPLY
CO.; SUPERIOR ASSOCIATION SERVICES, LLC; and
VALIM CONSTRUCTION, LLC,

Defendants.

1 DEPONENT: RONALD BUNNER
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1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 BEAUFORT COUNTY

4 DEPOSITION OF RONALD BUNNER
5 30(B)(6) D.R. HORTON, INC.

6 RICHARD W. AND REBECCA A. DREIER; YOLANDA J.
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14 THOMAS R. AND MELISSA S. MCFEELY; MICHAEL
15 AND KAREN M. RODRIGUEZ; SARMED AND JESSICA
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17 SMITH; AND NICOLE J. VERSTEGEN,

18 Plaintiffs,

19 vs. CASE NO. 2018-CP-07-00911

20 ADVANCED FLOORING & DESIGN DIVISION OF ISI,
21 LLC f/k/a ADVANCED FLOORING AND DESIGN, LLC;
22 ARMOR BUILDING SOLUTIONS, LLC; ATLAS
23 SURVEYING BFT, LLC f/k/a ATLAS SURVEYING
24 HOLDING COMPANY, LLC; ATLAS SURVEYING, INC.;
25 BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC;
26 CROSSROADS ENTERPRISES, LLC; D.R. HORTON, INC.;
27 DEAN CUSTOM AIR, LLC; EAST COAST CONSTRUCTION
28 CLEANUP CORP. f/k/a CLEANUP CO., INC.; FREEDOM
29 HOMES, INC. f/k/a ARMOR BUILDING SOLUTIONS,
30 INC.; HUTTON'S LANDSCAPES, INC.; JENKINS
31 PLUMBING COMPANY, LC; LATHER CONSTRUCTION
32 SC, INC.; LATHER CONSTRUCTION, INC.; MASCO
33 CABINETRY, LLC; PROBUILD EAST, LLC;
34 PROFESSIONAL DRYWALL & PAINT SERVICES, LLC;
35 PROFESSIONAL EXTERIORS II, LLC; QUALITY ELECTRIC
36 OF THE COASTAL CAROLINAS INCORPORATED; STIER
37 SUPPLY COMPANY f/k/a STIER-HOLMAN SUPPLY
38 CO.; SUPERIOR ASSOCIATION SERVICES, LLC; and
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14 Darah@clark-associates.com
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PURCHASE ORDER



Check Date 09/17/15
Check Number 126462
Invoice Date 09/09/15
Invoice Number 51566-00200763

VENDOR: 524672 OPEN AMOUNT: 0.00

Express Homes

PO Rev/Date/Page 0 / / 1
Purchase Order Date 07/14/15
Bid Contract Number 100006
FPO Req#/ JDE WO# 00000000 /
Purchase Order Number 200784 ON
Sub # / BU ID# 51566 / 0018
Swing/Plan/Elevation L / 2362 / B

EAST COAST CONST CLEANUP INC
PO BOX 46
HARDEEVILLE SC 29927

Phone: (843) 384-1310 Fax: (843) 784-2936

Remit To

D.R. HORTON - HILTON HEAD/SAVANNAH
PO BOX 3558
BLUFFTON, SC 29910

Phone: (843) 706-3400 Fax: (843) 706-3401

DELIVER TO:

Tidewater Creek Delivery Date
4892 Breeze Way
LADY'S ISLAND, SC 29907
Lot/Block
Plat Lot/Block/Phase 18 / /

Work Description

42030.01 Exterior Clean 1

Description	Option	Qty	Unit Price	Extension
LOT: 515660018 4892 Breeze Way Exterior Clean 1	PLAN: 2362 ELEV: B Phase:	2361.00	.190	448.59

				448.59

PAID

SPECIAL INSTRUCTIONS:

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- Place P.O. number on all invoices.
- A copy of delivery ticket signed by D.R. Horton personnel and this signed P.O. must accompany each invoice submitted for payment with signed lien release.
- Partial Shipments will not be accepted.
- No liability will be assumed for materials placed on the job site that are not installed or that are in the excess of the amount specified on this P.O.
- This P.O. is applicable only to the jobs indicated.
- Receipt of this P.O. is binding on supplier for material at prices specified.
- All terms and conditions of the signed contract and scope of work apply to this document.

Terms	Tax Percentage	Sales Tax	Total PO
			448.59

Superintendent: YANNARELLA, NICHOLAS A Phone: (843) 226-8163

D.R. Horton Appr: _____ DATE: _____

ELECTRONICALLY FILED - 2021 Nov 12 1:43 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

DRH-005858
Drier, et al v. DRH

PURCHASE ORDER



Check Date 10/29/15
 Check Number 145842
 Invoice Date 10/07/15
 Invoice Number 51566-00204509

Express Homes

PO Rev/Date/Page	0 / / 1
Purchase Order Date	07/14/15
Bid Contract Number	100006
FPO Req#/ JDE WO#	00000000 /
Purchase Order Number	200785 ON
Sub # / BU ID#	51566 / 0018
Swing/Plan/Elevation	L / 2362 / B

VENDOR: 524672 OPEN AMOUNT: 0.00

EAST COAST CONST CLEANUP INC
 PO BOX 46
 HARDEEVILLE SC 29927

Phone: (843) 384-1310 Fax: (843) 784-2936

Remit To

D.R. HORTON - HILTON HEAD/SAVANNAH
 PO BOX 3558
 BLUFFTON, SC 29910

Phone: (843) 706-3400 Fax: (843) 706-3401

Work Description

42030.02 Exterior Clean 2

DELIVER TO:

Tidewater Creek Delivery Date
 4892 Breeze Way
 LADY'S ISLAND, SC 29907
 Lot/Block
 Plat Lot/Block/Phase 18 / /

Description	Option	Qty	Unit Price	Extension
LOT:515660018 4892 Breeze Way Exterior Clean 2	PLAN: 2362 ELEV: B Phase:	2361.00	.190	448.59

				448.59

PAID

SPECIAL INSTRUCTIONS:

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7. Receipt of this P.O. is binding on supplier for material at prices specified.
8. All terms and conditions of the signed contract and scope of work apply to this document.

Terms	Tax Percentage	Sales Tax	Total PO
			448.59

Superintendent: YANNARELLA, NICHOLAS A Phone: (843) 226-8163

D.R. Horton Appr: _____ DATE: _____

ELECTRONICALLY FILED - 2021 Nov 12 1:43 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

DRH-005859
 Drier, et al v. DRH

PURCHASE ORDER



Check Date 11/05/15
Check Number 148588
Invoice Date 10/22/15
Invoice Number 51566-00206218

VENDOR: 524672 OPEN AMOUNT: 0.00

Express Homes

PO Rev/Date/Page	0 / / 1
Purchase Order Date	07/14/15
Bid Contract Number	100006
FPO Req#/ JDE WO#	00000000 /
Purchase Order Number	200786 ON
Sub # / BU ID#	51566 / 0018
Swing/Plan/Elevation	L / 2362 / B

EAST COAST CONST CLEANUP INC
PO BOX 46
HARDEEVILLE SC 29927

Phone: (843) 384-1310 Fax: (843) 784-2936

Remit To

D.R. HORTON - HILTON HEAD/SAVANNAH
PO BOX 3558
BLUFFTON, SC 29910

Phone: (843) 706-3400 Fax: (843) 706-3401

DELIVER TO:

Tidewater Creek	<u>Delivery Date</u>
4892 Breeze Way	
LADY'S ISLAND, SC 29907	
Lot/Block	
Plat Lot/Block/Phase	18 / /

Work Description
42030.03 Exterior Clean 3

Description	Option	Qty	Unit Price	Extension
LOT:515660018 4892 Breeze Way Exterior Clean 3	PLAN: 2362 ELEV: B Phase: 2361.00		.190	448.59

				448.59

PAID

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Terms	Tax Percentage	Sales Tax	Total PO
			448.59

Superintendent: YANNARELLA, NICHOLAS A Phone: (843) 226-8163

D.R. Horton Appr: _____ DATE: _____

ELECTRONICALLY FILED - 2021 Nov 12 1:43 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

DRH-005860
Drier, et al v. DRH

PURCHASE ORDER



Check Date 11/19/15
Check Number 153678
Invoice Date 11/10/15
Invoice Number 51566-00207662

Express Homes

PO Rev/Date/Page	0 / / 1
Purchase Order Date	07/14/15
Bid Contract Number	100006
FPO Req#/ JDE WO#	00000000 /
Purchase Order Number	200787 ON
Sub # / BU ID#	51566 / 0018
Swing/Plan/Elevation	L / 2362 / B

VENDOR: 524672 OPEN AMOUNT: 0.00

EAST COAST CONST CLEANUP INC
PO BOX 46
HARDEEVILLE SC 29927

Phone: (843) 384-1310 Fax: (843) 784-2936

Remit To

D.R. HORTON - HILTON HEAD/SAVANNAH
PO BOX 3558
BLUFFTON, SC 29910

Phone: (843) 706-3400 Fax: (843) 706-3401

Work Description

42030.20 Pressure Wash

DELIVER TO:

Tidewater Creek Delivery Date

4892 Breeze Way

LADY'S ISLAND, SC 29907

Lot/Block

Plat Lot/Block/Phase 18 / /

Description	Option	Qty	Unit Price	Extension
LOT: 515660018 4892 Breeze Way Pressure Wash	PLAN: 2362 ELEV: B Phase:	1.00	150.000	150.00
				----- 150.00

PAID

SPECIAL INSTRUCTIONS:

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Terms	Tax Percentage	Sales Tax	Total PO
			150.00

Superintendent: YANNARELLA, NICHOLAS A Phone: (843) 226-8163

D.R. Horton Appr: _____ DATE: _____

ELECTRONICALLY FILED - 2021 Nov 12 1:43 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

DRH-005861
Drier, et al v. DRH

PURCHASE ORDER



Check Date 11/19/15
 Check Number 153678
 Invoice Date 11/10/15
 Invoice Number 51566-00207663

VENDOR: 524672 OPEN AMOUNT: 0.00

Express Homes

PO Rev/Date/Page	0 / / 1
Purchase Order Date	07/14/15
Bid Contract Number	100012
FPO Req#/ JDE WO#	00000000 /
Purchase Order Number	200821 ON
Sub # / BU ID#	51566 / 0018
Swing/Plan/Elevation	L / 2362 / B

EAST COAST CONST CLEANUP INC
 PO BOX 46
 HARDEEVILLE SC 29927

Phone: (843) 384-1310 Fax: (843) 784-2936

Remit To

D.R. HORTON - HILTON HEAD/SAVANNAH
 PO BOX 3558
 BLUFFTON, SC 29910

Phone: (843) 706-3400 Fax: (843) 706-3401

DELIVER TO:

Tidewater Creek	<u>Delivery Date</u>
4892 Breeze Way	
LADY'S ISLAND, SC 29907	
Lot/Block	
Plat Lot/Block/Phase	18 / /

Work Description

45270.02 Interior Final

Description	Option	Qty	Unit Price	Extension
LOT:515660018 4892 Breeze Way	PLAN: 2362 ELEV: B	Phase:		
Interior Final		2361.00	.140	330.54

				330.54

PAID

SPECIAL INSTRUCTIONS:

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Terms	Tax Percentage	Sales Tax	Total PO
			330.54

Superintendent: YANNARELLA, NICHOLAS A Phone: (843) 226-8163

D.R. Horton Appr: _____ DATE: _____

ELECTRONICALLY FILED - 2021 Nov 12 1:43 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

DRH-005895
 Drier, et al v. DRH

PURCHASE ORDER



Check Date 12/17/15
Check Number 166596
Invoice Date 12/07/15
Invoice Number 51566-00209830

Express Homes

PO Rev/Date/Page	0 / / 1
Purchase Order Date	07/14/15
Bid Contract Number	100012
FPO Req#/ JDE WO#	00000000 /
Purchase Order Number	200822 ON
Sub # / BU ID#	51566 / 0018
Swing/Plan/Elevation	L / 2362 / B

VENDOR: 524672 OPEN AMOUNT: 0.00

EAST COAST CONST CLEANUP INC
PO BOX 46
HARDEEVILLE SC 29927

Phone: (843) 384-1310 Fax: (843) 784-2936

Remit To

D.R. HORTON - HILTON HEAD/SAVANNAH
PO BOX 3558
BLUFFTON, SC 29910

Phone: (843) 706-3400 Fax: (843) 706-3401

Work Description

45270.03 Interior Clean Touch Up

DELIVER TO:

Tidewater Creek Delivery Date
4892 Breeze Way
LADY'S ISLAND, SC 29907
Lot/Block
Plat Lot/Block/Phase 18 / /

Description	Option	Qty	Unit Price	Extension
LOT:515660018 4892 Breeze Way Interior Clean Touch Up	PLAN: 2362 ELEV: B Phase:	1.00	50.000	50.00
				----- 50.00

PAID

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Terms	Tax Percentage	Sales Tax	Total PO
			50.00

Superintendent: YANNARELLA, NICHOLAS A Phone: (843) 226-8163

D.R. Horton Appr: _____ DATE: _____

ELECTRONICALLY FILED - 2021 Nov 12 1:43 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

DRH-005896
Drier, et al v. DRH

PURCHASE ORDER



Check Date 12/17/15
Check Number 166596
Invoice Date 12/01/15
Invoice Number 51566-00209299

Express Homes

PO Rev/Date/Page	0 / / 1
Purchase Order Date	07/14/15
Bid Contract Number	100012
FPO Req#/ JDE WO#	00000000 /
Purchase Order Number	200823 ON
Sub # / BU ID#	51566 / 0018
Swing/Plan/Elevation	L / 2362 / B

VENDOR: 524672 OPEN AMOUNT: 0.00

EAST COAST CONST CLEANUP INC
PO BOX 46
HARDEEVILLE SC 29927

Phone: (843) 384-1310 Fax: (843) 784-2936

Remit To

D.R. HORTON - HILTON HEAD/SAVANNAH
PO BOX 3558
BLUFFTON, SC 29910

Phone: (843) 706-3400 Fax: (843) 706-3401

Work Description

45270.04 Int Clean Touch Up 2

DELIVER TO:

Tidewater Creek Delivery Date

4892 Breeze Way

LADY'S ISLAND, SC 29907

Lot/Block

Plat Lot/Block/Phase 18 / /

Description	Option	Qty	Unit Price	Extension
LOT:515660018 4892 Breeze Way	PLAN: 2362 ELEV: B Phase:			
Int Clean Touch Up 2		1.00	50.000	50.00

				50.00

PAID

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Terms	Tax Percentage	Sales Tax	Total PO
			50.00

Superintendent: YANNARELLA, NICHOLAS A Phone: (843) 226-8163

D.R. Horton Appr: _____ DATE: _____

ELECTRONICALLY FILED - 2021 Nov 12 1:43 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

DRH-005897
Drier, et al v. DRH

PURCHASE ORDER



Check Date 12/29/15
Check Number 170770
Invoice Date 12/15/15
Invoice Number 51566-00210314

Express Homes

PO Rev/Date/Page	0 / / 1
Purchase Order Date	07/14/15
Bid Contract Number	100012
FPO Req#/ JDE WO#	00000000 /
Purchase Order Number	200824 ON
Sub # / BU ID#	51566 / 0018
Swing/Plan/Elevation	L / 2362 / B

VENDOR: 524672 OPEN AMOUNT: 0.00

EAST COAST CONST CLEANUP INC
PO BOX 46
HARDEEVILLE SC 29927

Phone: (843) 384-1310 Fax: (843) 784-2936

Remit To

D.R. HORTON - HILTON HEAD/SAVANNAH
PO BOX 3558
BLUFFTON, SC 29910

Phone: (843) 706-3400 Fax: (843) 706-3401

Work Description

45270.05 Int Clean Touch Up 3

DELIVER TO:

Tidewater Creek Delivery Date
4892 Breeze Way
LADY'S ISLAND, SC 29907
Lot/Block:
Plat Lot/Block/Phase 18 / /

Description	Option	Qty	Unit Price	Extension
LOT: 515660018 4892 Breeze Way	PLAN: 2362 ELEV: B Phase:	1.00	50.000	50.00
Int Clean Touch Up 3				50.00

PAID

SPECIAL INSTRUCTIONS:

- We reserve the right to cancel if not filled as specified.
- Place P.O. number on all invoices.
- A copy of delivery ticket signed by D.R. Horton personnel and this signed P.O. must accompany each invoice submitted for payment with signed lien release.
- Partial Shipments will not be accepted.
- No liability will be assumed for materials placed on the job site that are not installed or that are in the excess of the amount specified on this P.O.
- This P.O. is applicable only to the jobs indicated.
- Receipt of this P.O. is binding on supplier for material at prices specified.
- All terms and conditions of the signed contract and scope of work apply to this document.

Terms	Tax Percentage	Sales Tax	Total PO
			50.00

Superintendent: YANNARELLA, NICHOLAS A Phone: (843) 226-8163

D.R. Horton Appr: _____ DATE: _____

ELECTRONICALLY FILED - 2021 Nov 12 1:43 PM - BEAUFORT - COMMON PLEAS - CASE#2018CP0700911

DRH-005898
Drier, et al v. DRH

In the Matter of:

**RICHARD W. and REBECCA A. DREIER, ET
AL**

VS.

AMERICO ROOFING CONCEPTS, INC., ET AL

Olga Aquino

April 2, 2021



www.spectrumcourtreporing.com

P.O. Box 1296

Mt. Pleasant, SC 29465

843-849-0133

Spectrumaaa@gmail.com

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

COURT OF COMMON PLEAS
14TH JUDICIAL CIRCUIT

RICHARD W. and REBECCA A.
DREIER, et al.,

Plaintiffs,

vs.

AMERICO ROOFING CONCEPTS,
INC.; ARCHER EXTERIORS,
INC.; BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC;
CROSSROADS ENTERPRISES, LLC;
D.R. HORTON, INC.; DEAN
CUSTOM AIR, LLC; EAST COAST
CONSTRUCTION CLEANUP CORP.
f/k/a S.C. CLEANUP CO., INC.;
FREEDOM HOMES, INC. f/k/a
ARMOR BUILDING SOLUTIONS...

CASE NO.

2018-CP-07-00911

(Caption continues on Page 2)

VIDEO CONFERENCE 30(b)(6) DEPOSITION OF
EAST COAST CONSTRUCTION CLEANUP CORPORATION,
through its designated representative, OLGA AQUINO

DATE TAKEN: Friday, April 2, 2021
TIME BEGAN: 10:08 a.m.
TIME ENDED: 2:43 p.m.
LOCATION: Clawson & Staubes
126 Seven Farms Drive, Suite 200
Daniel Island, South Carolina
REPORTED BY: Marie H. Bruegger, RPR, CRR
(Appearing Remotely)

1 (Caption Continued)
2 INC.; HUTTON'S LANDSCAPES, :
3 INC.; LATHER CONSTRUCTION SC, :
4 INC.; LATHER CONSTRUCTION, :
5 INC.; PROBUILD EAST, LLC; :
6 PROFESSIONAL DRYWALL & PAINT :
7 SERVICES, LLC; PROFESSIONAL :
8 EXTERIORS II, LLC; QUALITY :
9 ELECTRIC OF THE COASTAL :
10 CAROLINAS INCORPORATED; and :
11 VALIM CONSTRUCTION, LLC, :
12
13 Defendants. :
14

15 BUILDERS FIRSTSOURCE - :
16 SOUTHEAST GROUP, LLC and :
17 PROBUILD COMPANY, LLC, :
18
19 Third-Party Plaintiffs, :
20
21 vs. :
22
23 BLUE MESA CONSTRUCTION, INC., :
24
25 Third-Party Defendant. :
26

1 A Once in a while because when something --
2 they call or something, it's overflowing or
3 whatever it is, then I go to check how long we will
4 spend or report to the superintendent what would be
5 extra work. Sometimes they want prices, something
6 like that.

7 Q And I believe you said that Sebastian
8 passed away in May of 2016, correct?

9 A Yes.

10 Q Was East Coast still working on the
11 Tidewater Creek project when he passed away?

12 A I don't remember if he was still -- I
13 don't remember if they still have building houses.
14 We build everything from the start to the end with
15 Tidewater, but I don't remember he was there.

16 Q And back to Plaintiff's Exhibit 1. If
17 you'll go to the page that's numbered DRH-825. And
18 there is writing there at the bottom that says:
19 Exhibit A, scope exterior clean. And then when you
20 turn to DRH-826, this is labeled: Exhibit A
21 Exterior Clean.

22 So the scope of work listed here starting
23 on DRH-826 and going to 827, was this the scope of
24 work for East Coast exterior clean at the Tidewater
25 Creek project?

1 **A** No, no, no, because you see here we had
2 this one for the Myrtle Beach area. It's similar
3 in some stuff, but right here, like provide a
4 50-gallon -- in the Exhibit DR Horton 826, in the
5 Number 5, it's -- things are different. This is
6 Myrtle Beach. In Tidewater, we don't put the
7 50-gallon trash barrel.

8 **Q** And I'll represent to you --
9 (Plaintiff's Exhibit 2, Exhibit A
10 Part I-Scope of Work-General [East
11 Coast 1-4], was marked for
12 identification.)

13 BY MS. WILLIAMS:

14 **Q** We can look at Plaintiff's Exhibit 2,
15 which I guess you might have a printed copy there,
16 which is Bates labeled East Coast Construction
17 Cleanup Corp. 1 through 4, and I'll represent to
18 you that this was the scope of work document that
19 was provided by your attorneys; whereas, the other
20 document was provided by DR Horton.

21 And if you turn to the last page, which
22 is East Coast Construction Cleanup Corp. 4, is that
23 your signature on the last page?

24 **A** Yes.

25 **Q** Okay. And so this is dated 2018, so this

1 than the Myrtle Beach area?

2 A No.

3 Q And what was the basis of your
4 understanding that this pick up trash around the
5 house daily item didn't apply in the Tidewater
6 Creek project?

7 A This -- because this only was in Myrtle
8 Beach. We don't do that is why -- in Myrtle Beach,
9 they pay more money for we do these items, and
10 here, they pay less because we don't do that
11 neither.

12 Q And was there -- so was there a separate
13 contract for the Beaufort/Hilton Head area?

14 A Yes.

15 Q Do you have a copy of that contract?

16 A I have to look for. I don't remember
17 that I still have it. I have to look for.

18 Q How did you transmit signed contracts to
19 DR Horton? Did you email the contracts to somebody
20 at DR Horton, or fax them, or did you sign the
21 contract in person?

22 A Depends. Sometimes we do in person or
23 email or fax. We did like different. We don't
24 specifically do one. We do different.

25 Q If you had a contract from DR Horton for

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-07-00911

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Versteegen;

Plaintiffs,

v.

**SECOND AMENDED SUMMONS
(Jury Trial Demanded)**

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource - Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; Valim Construction, LLC;

Defendants.

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint on the subscriber, at the address shown below, within thirty (30) days after service hereof, not including the day of such service, and if you fail to answer the complaint within the time stated above, judgment by default will be rendered against you for the relief demanded in the complaint. In addition, your answer should be filed with the court within five (5) days after service thereof.

Respectfully Submitted,

s/Alexandra Scott Williams

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Alexandra Scott Williams, S.C. Bar No. 102862
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Attorneys for the Plaintiffs

November 20, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III, and Alayshia Smith; and Nicole J. Verstegen;

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource - Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; Valim Construction, LLC;

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-07-00911

SECOND AMENDED COMPLAINT
(Jury Trial Demanded)

COME NOW THE PLAINTIFFS, complaining of the Defendants, alleging as follows:

PARTIES AND JURISDICTION

1. The Plaintiffs are residents of the Tidewater Creek neighborhood in Beaufort County, South Carolina, and are the owners of real property situated at 4926 Tidal Walk Lane, Beaufort, SC (Richard Dreier and Rebecca Adams); 4898 Breeze Way, Beaufort, SC (Yolanda Dreier); 4953 Tidal Walk Lane, Beaufort, SC (Jacob and Carla Emerson); 4836 Breeze Way, Beaufort, SC (John B. and Lori Anne Gecy); 4861 Tidal Walk Drive, Beaufort, SC (Aaron and Stasha Grooms); 4915 Tidal Walk Drive, Beaufort, SC (AvaRae Hall); 4881 Tidal Walk Drive, Beaufort, SC (Michael and Cheyenne Johnson); 4884 Breeze Way, Beaufort, SC (Kenny and Kelsey Lopez); 4897 Tidal Walk Lane, Beaufort, SC (Dylan and Samantha Machado); 4908 Tidal Walk Lane, Beaufort, SC (Marvin and Maryalice Mamaril); 4942 Tidal Walk Lane, Beaufort, SC (Thomas and Melissa McFeely); 4855 Tidal Walk Drive, Beaufort, SC (Michael and Karen Rodriguez); 4892 Breeze Way, Beaufort, SC (Sarmed and Jessica Shafi); 4846 Breeze Way, Beaufort, SC (James and Alayshia Smith); 4899 Tidal Walk Drive, Beaufort, SC (Nicole Ash née Verstegen).

2. Defendants Americo Roofing Concepts, Inc., East Coast Construction Cleanup Corp.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; and Quality Electric of the Coastal Carolinas Incorporated are domestic corporations that conduct business in Beaufort County, South Carolina. Defendants Archer Exteriors, Inc. and Hutton's Landscapes, Inc. are foreign corporations that conduct business in Beaufort County, South Carolina. Defendant D.R. Horton, Inc. is a foreign corporation which conducts business and owns property in Beaufort County, South Carolina. Defendants Lather Construction SC, Inc. and Lather Construction, Inc. are domestic corporations which conduct business and own property in Beaufort County, South Carolina. Defendant Valim Construction, LLC is a domestic limited liability company that

conducts business in Beaufort County, South Carolina. Defendants Armor Building Solutions, LLC; Crossroads Enterprises, LLC; Dean Custom Air, LLC; Professional Exteriors II, LLC; and Superior Association Services, LLC are domestic limited liability companies that conduct business and own property in Beaufort County, South Carolina. Defendants Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Builders FirstSource - Southeast Group, LLC; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; and Professional Exteriors II, LLC are foreign limited liability companies which conduct business in Beaufort County, South Carolina.

3. This civil action concerns the wrongful conduct of all Defendants in connection with the land purchase, design, development, construction, sale, and management of the Tidewater Creek neighborhood, including the Plaintiffs' property and the common areas owned by the HOA.

4. This Court has subject matter and personal jurisdiction, and venue is proper.

GENERAL ALLEGATIONS

5. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

6. For a period spanning approximately October 2015 through July 2017, the Plaintiffs purchased the individual properties identified above, which were owned, surveyed, platted, subdivided, constructed, marketed, sold, and maintained by the Defendants, individually and collectively.

7. Upon moving into their houses the Plaintiffs began to notice the products of a host of defective, wrongful, and negligent practices on the part of the Defendants related to their ownership, survey, platting, subdividing, construction, marketing, selling and/or maintenance of their properties; all of which constituted breaches of the contracts between and among the parties

and breaches of other legal and equitable duties held by the Defendants. Among the issues noticed are: improper site preparation; improper and inadequate infrastructure installation; inadequate inspections and testing of the site during surveying, platting and subdividing; rusted metal, broken glass, and other hazardous debris strewn throughout the properties; premature erosion; water intrusion; improperly installed siding; dead and dying trees; and other deficiencies which shall be demonstrated through discovery and at trial; and which are further detailed in the Notice and Opportunity to Cure correspondence sent to the Defendants and incorporated herein by reference. The Plaintiffs submitted these issues to the Defendants for remediation, but the Defendants refused and/or failed to rectify them. These deficiencies, and others which shall be shown through discovery and at trial, were the result of negligent, grossly negligent, and otherwise wrongful conduct by the Defendants in their ownership, survey, platting, subdividing, construction, marketing, selling and/or maintenance of the Tidewater Creek neighborhood.

8. In developing, surveying, platting, subdividing, constructing, maintaining, marketing and selling the Tidewater Creek neighborhood, the Defendants made, without limitation, the following misrepresentations of material fact, and concealments of material facts the disclosure of which was necessary to make the representations truthful:

- a. That the site preparation and other construction work had been conducted in accordance with the law, when in fact it had not;
- b. That the Plaintiffs' properties were habitable, when in fact they were not;
- c. That the Plaintiffs' properties were built in accordance with industry standards and good construction practices, when in fact they were not;
- d. That the site preparation and other construction work had been conducted in a workmanlike fashion, when in fact it violated City and/or County ordinances, was substandard, and violated building code requirements;

- e. That the site preparation and other construction work had been conducted by competent workmen, when in fact it had been conducted by unskilled and incompetent contractors and subcontractors;
- f. That they provided a viable, legitimate warranty under which they would be responsive, when in fact the warranty was a ruse to mislead the Plaintiffs into accepting limitations of their rights which were false; and
- g. In other and further ways to be shown through discovery and at trial.

9. As a result of the Defendants' wrongful conduct, described above, and as shall be shown in greater particularity as discovery progresses; and as the further result of loss which resulted from accidental occurrences and from intentional and/or foreseeable acts of these Defendants, the Plaintiffs have suffered recoverable damages including, without limitation: loss of use of their properties, constructive eviction from their properties, the denial of the benefit of their bargain, personal injury, expert expenses, legal expenses, diminution in value of their properties, repair costs, environmental consulting costs, incidental and consequential damages, and such other and further damages as shall be proved in discovery and at trial. For these damages and such other damages as will be revealed in discovery, the Plaintiffs are entitled to recover actual damages, punitive damages, attorney and other litigation fees, treble damages and all other available special and general damages.

FOR A FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligent Misrepresentation/ Recission)

10. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

11. The Defendants' false statements and concealments of material facts, as outlined above, were false; any Defendants who did not make specific misrepresentations or concealments, knew or had reason to know of the false statements and concealments being made.

12. Each of the Defendants profited from the misrepresentations.

13. The Defendants owed a duty of care to the Plaintiffs to ensure that all material information was disclosed, and that it was disclosed accurately and truthfully; the Defendants breached these duties via misrepresentations made or permitted, or via failure to correct them once made.

14. The Plaintiffs justifiably relied on the Defendants—each of whom held itself out as having expertise and specific reliability in these fields—with the proximate result being pecuniary loss as set forth above.

15. As a result, the Plaintiffs are entitled to recover actual and punitive damages, consequential and incidental damages, all in amounts to be determined at trial. Alternatively, the Plaintiffs are entitled to rescind the contracts for purchase of their properties, on the grounds that the Defendants' fraud, and fraud in the inducement, invalidates the contracts *ab initio*.

FOR A SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Negligence/Gross Negligence)

16. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

17. Having held themselves out as being knowledgeable, experienced, and trustworthy in the relevant fields, and having solicited the Plaintiffs' trust, reliance, and investment, the Defendants owed a duty of care to the Plaintiffs to act with the knowledge, experience, and trustworthiness they claimed to possess, and which are customary in the development, construction, marketing, and sales settings.

18. As set forth above, and as shall be shown through discovery, the Defendants breached these duties—negligently, grossly negligently, recklessly, willfully, and wantonly—via the conduct described above, which proximately caused the Plaintiffs to suffer the injuries and

losses described above, entitling them to a judgment for all recoverable actual and, should the jury deem them appropriate, punitive damages.

FOR A THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Unfair Trade Practices Act)

19. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

20. The Defendants' wrongful and unlawful scheme and conspiracy to victimize the Plaintiffs for their own financial enrichment—in particular, both their deliberate and unlawful effort to conceal what they knew to be improperly prepared home sites, and their intentionally misleading warranty and action pursuant thereto—their many and material misrepresentations of their competence, expertise and trustworthiness, and subsequent misappropriation of the Plaintiffs' funds, were unfair and deceptive practices in the conduct of trade and commerce, within the meaning of the South Carolina Unfair Trade Practices Act. S.C. Code Section 39-5-10 *et seq.*

21. As set forth above, these unfair and deceptive practices proximately caused the Plaintiffs to suffer an ascertainable loss of money: The entirety of the sums expended in the purchase and occupancy of their properties.

22. The Defendants' wrongful conduct and violations of the Act certainly are capable of repetition: The Plaintiffs are some of thousands who have purchased houses from a combination of these Defendants, all of whom remain active in the Beaufort metropolitan market and throughout the State.

23. As a result, the Plaintiffs are entitled to recover actual and punitive damages, consequential and incidental damages, interest, attorney's fees and costs, and treble damages, all in an amount to be determined at trial.

FOR A FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Breach of Express and Implied Warranties)

24. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

25. The Defendants gave various warranties, express and implied, including without limitation that the Property was habitable, was lawfully constructed, and was fit for its intended purpose, and that the site preparation and other construction work had been performed in a good and workmanlike fashion.

26. As set forth above, the Defendants breached these warranties in a host of particulars, entitling the Plaintiffs to judgment for all recoverable actual, incidental, consequential, and punitive damages.

FOR A FIFTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Breach of Contract/Breach of Duty of Good Faith and Fair Dealing)

27. The Plaintiffs reallege every prior paragraph of this Complaint as fully as if set forth herein verbatim.

28. The Plaintiffs entered into binding contracts with the Defendants.

29. As set forth above and as shall be shown more fully via discovery and at trial, the Defendants breached the contracts in various particulars, including but in no way limited to breaching the implied covenant of good faith and fair dealing, proximately causing the Plaintiffs' losses described above, and entitling the Plaintiffs to a judgment for the same.

FOR A SIXTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Fraud in the Inducement/Rescission)

30. The Plaintiffs reiterate every prior paragraph of this Complaint as fully as if set forth herein verbatim.

31. As set forth above, the Defendants made a host of misrepresentations, fraudulent and otherwise, concerning material elements of the contracts, with the intent that these misrepresentations would induce the Plaintiffs to enter into the agreements.

32. These misrepresentations and fraud were relied upon by the Plaintiffs, justifiably; absent the misrepresentations and fraudulent statements and omissions, the Plaintiffs would not have entered into the contracts, which has resulted in extensive losses and damages by the Plaintiffs, as described hereinabove.

33. As a result, the Plaintiffs are entitled to rescind the contract, which should be deemed void *ab initio*, and recover all incidental and consequential damages, and interest.

WHEREFORE, having set forth their causes of action, the Plaintiffs request trial by jury, and a judgment for all recoverable actual, special, general, incidental, consequential, punitive, treble, and statutory damages, for rescission of the contracts, for costs, fees and interest, and for such other and further relief as the Court deems appropriate and just.

[SIGNATURE PAGE FOLLOWS]

Respectfully Submitted,

s/Alexandra Scott Williams

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Attorneys for the Plaintiffs

November 20, 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
Richard W. and Rebecca A. Drier; *et al.*,)
Plaintiffs,)
v.)
Americo Roofing, Inc. *et al.*;)
Defendants,)
Builders FirstSource-Southeast Group, LLC)
and ProBuild Company, LLC,)
Third Party Plaintiff,)
v.)
Blue Mesa Construction, Inc.,)
Third Party Defendant)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C.A. No.: 2018-CP-07-00911

**D.R. HORTON'S MEMORANDUM IN OPPOSITION TO EAST COAST
CONSTRUCTION CLEANUP CORPORATION'S MOTION FOR SUMMARY
JUDGMENT**

COMES NOW the Defendant, D.R. Horton, Inc. ("Crossclaimant" or "DRH"), pursuant to South Carolina Rule of Civil Procedure 56, and files this Memorandum in Opposition to Defendant, East Coast Construction Cleanup Corporation's ("East Coast" or "Defendant") Motion For Summary Judgment.

DRH will show that East Coast's Motion for Summary Judgment should be denied because there exists at least a scintilla of evidence that: (1) DRH has produced a contract applicable to East Coast's work at the subject project; (2) the contract provisions presumably at issue between DRH

and East Coast are valid, legal, and enforceable; and (3) the unhand cleans and ripeness defense is without merit.

I. BACKGROUND

A. The Contracts

This case concerns alleged defects in the site development and construction of homes in Tidewater Creek, a neighborhood in Beaufort County, South Carolina (hereafter "Tidewater"). Specifically, Plaintiffs allege that they are finding varying degrees of trash and debris in their yards. DRH at all times prior to the sale of the properties was the Owner of Tidewater after purchasing the land in 2014, and served as the general contractor during vertical construction. DRH and East Coast entered into an "Independent Contractor Agreement" ("ICA"), which governed the relationship between DRH and East Coast at the time East Coast commenced its work at Tidewater.

B. DRH's Cross-Claims Against East Coast

Having been sued under tort and warranty theories by the Plaintiffs, as the owner, for alleged deficiencies in the work performed by East Coast, DRH has properly alleged a cross-claim for contractual indemnity against East Coast. Therein, DRH expressly alleges that:

104. East Coast entered into the Contract with DRH pursuant to which East Coast agreed to defend, indemnify, and hold DRH harmless against any and all claims, losses, costs, and damages including but not limited to claims for property damage, pertaining to East Coast's performance under the Contract and caused in whole or in part by East Coast's conduct.

105. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which are denied, DRH alleges that any damages were in fact sustained by the Plaintiffs in this action arose out of the conduct of East Coast or its agents in connection with East Coast's performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of East Coast or its agents and not a result of any actions or omissions on the part of DRH.

106. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied. DRH is entitled to contractual indemnity against East Coast in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys' fees and costs.

(DRH Ans. to 2nd Amnd Comp & Cross-claims at ¶¶ 104-106.)

DRH's contractual indemnity claim is based on the indemnity provision of the ICA, copied below:

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO HOLD HARMLESS, INDEMNIFY, PROTECT AND DEFEND OWNER, ITS PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THE AFOREMENTIONED ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "INDEMNITEE"), FROM AND AGAINST ANY AND ALL DEMANDS, CLAIMS, ACTIONS, CAUSES OF ACTION, PROCEEDINGS, LAWSUITS, SETTLEMENTS, JUDGMENTS, FINES, PENALTIES, LOSSES, ATTORNEYS FEES, LITIGATION COSTS, INTEREST, AND EXPENSES OF ANY KIND (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "LOSSES") FOR DAMAGES FROM BODILY OR PERSONAL INJURY, DEATH, THE DESTRUCTION OR LOSS OF PROPERTY (INCLUDING LOSS OF USE), OR ANY OTHER KIND OF DAMAGES OR HARM, ARISING OUT OF, OR RESULTING FROM, OR RELATED IN ANY WAY TO THE WORK PERFORMED AND/OR THE MATERIALS SUPPLIED UNDER THIS CONTRACT, REGARDLESS OF WHETHER OR NOT CAUSED IN PART BY INDEMNITEE. SUCH LOSSES SPECIFICALLY INCLUDE, BUT ARE IN NO WAY LIMITED TO LOSSES ARISING OUT OF OR ATTRIBUTABLE TO: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS OR OBLIGATIONS OF CONTRACTOR SET FORTH HEREIN; (2) THE WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR, CONTRACTOR'S AGENTS OR EMPLOYEES, SUPPLIERS OR SUBCONTRACTORS AND THEIR RESPECTIVE AGENTS AND EMPLOYEES, AND/OR ALL OTHER ENTITIES OVER WHOM THE CONTRACTOR MAY EXERCISE CONTROL (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "CONTRACTOR'S AGENTS"); (3) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF CONTRACTOR AND/OR CONTRACTOR'S AGENTS; OR (4) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE INDEMNITY FOR LOSSES CAUSED SOLELY BY FAULT OR NEGLIGENCE OF THE INDEMNITEE. THE LOSSES DESCRIBED HEREIN SHALL INCLUDE, BUT ARE NOT LIMITED TO, DEMANDS, CLAIMS, OR ACTIONS ASSERTED BY (1) ANY PRESENT OR FUTURE OWNER OF THE HOUSE INCORPORATING THE WORK; AND (2) ANY OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR AND/OR CONTRACTOR'S AGENTS). THE INDEMNIFICATION OBLIGATION UNDER THIS CONTRACT SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. THE INDEMNITY PROVISIONS CONTAINED HEREIN ARE INTENDED TO BE AS BROAD AND INCLUSIVE AS PERMITTED BY LAW.

C. East Coast's Motion For Summary Judgment Against DRH

East Coast filed this motion, alleging that summary judgment is proper because: (1) it has allegedly failed to produce a contractual indemnification provision applicable to Tidewater; (2) the indemnification provision is purportedly void and unenforceable; and (3) DRH's claim for equitable indemnity fails because it is not ripe and DRH has unclean hands.

For the reasons and authority set forth below, the Court should find that East Coast has failed to show that summary judgment is appropriate as to each of Crossclaimant's claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. An issue of fact is "genuine" when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Turner v. Milliman*, 392 S.C. 116, 122 (2011) (citing *Fleming v. Rose*, 350 S.C. 488, 493). Summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusion to be drawn from those facts. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). Unless the case requires a heightened burden of proof, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (quoting *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C.1975)) (internal quotations omitted).

III. ANALYSIS

A. DRH has produced a contract applicable to East Coast's work at Tidewater.

Pursuant to the Affidavit of Ron Bunner, who was deposed as DRH's corporate representative in this case, DRH has produced the applicable contract at issue. *See Exhibit A.* This sworn testimony alone creates a genuine issue of fact as to East Coast's claims.

B. The indemnity provision at issue is valid and enforceable under S.C. Code § 32-2-10.

Defendant's anticipated accusation that the indemnity provision requires East Coast to indemnify DRH for DRH's sole negligence is false. The indemnity provision explicitly and expressly excludes from indemnity liability for DRH's sole negligence in accordance with S.C. Code § 32-2-10.

C. The indemnity provision at issue is valid and enforceable under South Carolina Common Law.

In South Carolina, courts enforce the valid provisions of a contract in accordance with the parties' intent at the time the contract was executed. *See Beach Co. v. Twillman, Ltd.*, 566 S.E.2d 863, 866-67 (S.C. Ct. App. 2002). Should a court determine that an unenforceable provision exists in a contract, "the next question becomes whether, under any appropriate circumstances, the ... agreement[] can be reformed, or the identified illegal provisions ... severed, thus preserving ... [the] agreement between the parties." *Hooters of Am., Inc. v. Phillips*, 39 F. Supp.2d 582, 624 (D.S.C. 1998), *aff'd* 173 F.3d 933 (4th Cir. 1999). It is not proper to sever a provision where it is part of several interdependent provisions in the contract. *Beach Co.*, 566 S.E.2d at 867. However, a provision may be severed when it is susceptible to division, has two or more parts, is not dependent on other parts of the contract, and is not intended by the parties to be an interdependent clause. *Id.*; *see also Columbia Architectural Grp., Inc. v. Barker*, 266 S.E.2d 428, 429 (S.C. 1980).

Where the parties intend to make separate and not interdependent promises, the Court should consider the enforceability of the provision at issue separately. *See Columbia Architectural Group*, 266 S.E.2d at 429. The parties' listing or denoting of promises separately is evidence of their intent that promises be separate and independent. *Id.* Further, where separate provisions, even in the same section of a contract, contain rights wholly independent of each other, one provision may be severed while the other is enforced. *Beach Co.*, 566 S.E.2d at 867 (severing an unenforceable provision and enforcing another provision in the same section of the contract). In contrast, courts have found that unenforceable provisions could not be severed, such that an entire section or contract was unenforceable, where multiple provisions were interrelated and pervasive. *Simpson.*, 644 S.E.2d 674 n.9 (comparing the strike to an entire arbitration section with several unenforceable, interrelated provisions to the severability of "one offending provision"). Finally, the Court of Appeals, in a case DRH's expects will be cited by East Coast to support their position that D.R. Horton's indemnity provision is wholesale illegal, selectively enforced provisions of D.R. Horton's indemnity language in a contract similar to one at issue here. *See D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45.

This is not a case where the parties' contract cannot be enforced as written in the absence of several interdependent, allegedly unenforceable, provisions. Here, the one allegedly unenforceable provision is not at issue and is clearly susceptible to division such that the parties' agreement on point may still be enforced. Indeed, Defendant's indemnification promises are divided on purpose by the parties, themselves, and thus separately numbered.

Indemnification for liability arising out of the "work performed or to be performed or material supplied by contractor or by the contractor or contractor's agents or employees" is numbered (2), while indemnification for liability arising out of DRH's negligence or intentional

act is numbered (4). *Id.* The fourth indemnification provision follows an "or" in this list, not an "and." *Id.* Defendant agreed it would indemnify Crossclaimant for amounts, including reasonable attorneys' fees and defense costs arising out of East Coast's work *or* DRH's negligence/intentional act. *Id.* The duty to defend provision is explicitly stated as being "separate, distinct, and independent" from the duty to indemnify. *Id.* Thus, it is clear the parties intended these to be separate promises. The separate promises show that the parties intended that East Coast indemnify DRH for defense costs and attorneys' fees related to or arising from East Coast's work. Defendant's contention that East Coast may avoid his entire promise to indemnify on the basis that East Coast promised to indemnify DRH for amounts related to DRH's negligence or intentional acts (of which DRH contends there was none) is meritless. Thus, Defendant's promise to defend and indemnify is valid under common law.

Nonetheless, DRH expects East Coast will rely upon *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp, LLC*, to conclude that the ICA is illegal and unenforceable. 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). This conclusion misconstrues the holding of *Builders FirstSource*. That case held, based on the unique facts of that case, that the single provision of the contract purporting to require the subcontractor to indemnify the contractor for liability to which it did not contribute was unenforceable. *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018). That case was superficially similar to the present case only in that it involved DRH seeking indemnity from its subcontractor based on a contract between the parties. *Id.* at 43. However, there, the facts diverge. In that case, the claim for indemnity was asserted after the conclusion of an arbitration to which the indemnitor was not a party. Therein, the arbitrator had issued a simple award stating only the amount awarded to the

plaintiff, with no findings as to the allocation of liability between DRH and any subcontractor. *Id.* at 44. Moreover, DRH had specifically requested that the arbitrator not allocate liability.

Because of this, the trial court held that it had no basis for determining whether the award was based in whole or in part on any act or omission attributable to the subcontractor, or in what amount. *Id.* The court held that it would be against public policy for the subcontractor to indemnify a party for liability not shown or alleged by the plaintiff in the underlying lawsuit to be caused by the subcontractor, and accordingly found the claim for indemnification was foreclosed for want of any evidentiary basis to discern whether any of the liability imposed upon DRH was the result of anything but its own conduct. *Id.* at 45. In this regard, the issue of indemnity against the negligence of the indemnitor was relevant only because, in the absence of any evidence to allow it to find otherwise, the court was constrained to either allow DRH to proceed on a claim for indemnity for damages that could not under any circumstance be separated from its own conduct (since the only finding by the arbitrator was that DRH was liable), or dismiss DRH's claim. Such is not the case here, where DRH and East Coast are both being sued, and the claims against them will be tried together, with the jury having the opportunity to allocate fault. Accordingly, the *Builders FirstSource* opinion is simply not contrary to DRH's position in this matter.

To that end, perhaps the most important takeaway of *Builders FirstSource*, as it applies here, is what the Court of Appeals did not say. The Court of Appeals did not find that because the contract contained an unenforceable provision (concerning indemnification of D.R. Horton from its own sole negligence) that renders the entire indemnity clause invalid. In contrast, the Court of Appeals addressed another provision of the contract at issue in that case, and this case, and found it enforceable. The court specifically noted that S.C. Code Ann. § 32-2-10, "allows D.R. Horton and BFS to agree that BFS will indemnify D.R. Horton for damages caused by BFS or its

subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree.” *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45. Indeed, if the Court of Appeals had intended to invalidate the entire indemnity clause on a wholesale basis, it would have been explicit in stating that it was doing so. Without such a statement, East Coast cannot properly infer such a drastic conclusion in an attempt to avoid their duty to indemnify D.R. Horton.

In total, insofar as East Coast’s arguments require construction of the contract (e.g., parsing out whose negligence East Coast is responsible for and in what respect), summary judgment is improper because contract construction is an issue of fact. If there is an ambiguity in a contract that could lead to more than one reasonable construction, it is appropriate for the court to take extrinsic evidence as to the intent of the parties, and therefore summary judgment is wholly inappropriate. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007) (internal citations omitted).

D. The Unclean Hands Argument is Meritless.

As an initial matter, the unclean hands defense is inapplicable to DRH’s cause of action for contractual indemnity, since it is an equitable defense. With respect to the claim for equitable indemnity, proof of this affirmative defense requires a showing that the party seeking equity has acted inequitably toward the party against which equity is sought. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010). Moreover, East Coast bears the burden of proof in seeking summary judgment on an affirmative defense. Yet East Coast has failed to come forward with any evidence that DRH has unclean hands as a matter of law. In order to succeed on this Motion, East Coast must show that evidence in the record requires that any reasonable jury must find that DRH has engaged in inequitable conduct toward the plaintiffs such that DRH

may not seek equity for itself. This is a nearly insurmountable burden for East Coast to meet at this stage of the litigation, and East Coast has presented no evidence in support of its contention.

In asserting unclean hands (without evidence) as a grounds for summary judgment, East Coast is seeking to turn the doctrine of equitable indemnity on its head. It is well settled that where a party is exposed to liability to a third party due to the conduct of another, through no fault of its own, that party may recover in equitable indemnity against the second party. *See South Carolina Electric & Gas Co. v. Utilities Const. Co.*, 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964) (holding that even though indemnitee was found to be at fault, it was entitled to seek equitable indemnity because there was no breach of a legal duty); *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990). The fact that a general contractor remains liable to its customer in warranty, despite the express recognition that it is not liable in negligence for a subcontractor's conduct necessarily requires that implied warranty claims must constitute "no fault liability." *See Fields vs. J. Haynes Waters Builders*, 658 S.E.2d 80 (S.C. 2008). In stark contrast to Defendant's arguments, a case such as this one is the textbook definition of the circumstance in which equitable indemnity applies. Indeed, the seller of a new home's "[l]iability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 503, 229 S.E.2d 728, 730-31 (1976).

The *Town of Winnsboro* case, cited above, is particularly instructive. There, a municipality brought causes of action for negligence, breach of contract, and fraud against a general contractor and a subcontractor in relation to the construction of a facility (all fault-based claims). *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct. App. 1990). The general

contractor asserted crossclaims against the subcontractor for indemnity for the extent of its attorneys' fees and liability incurred. *Id.* After a trial, the jury returned a verdict finding only the two subcontractors negligent. *Id.* The prime contractor was exonerated of all claims. *Id.* After the jury's verdict, the trial court granted a directed verdict in favor of the general contractor on its crossclaims for indemnity. *Id.* The trial court's decision that the prime contractor was entitled to equitable indemnity was affirmed by both the Circuit Court of Appeals and the Supreme Court of South Carolina. Both appellate courts reasoned that the prime contractor was entitled to equitable indemnity on the basis that it was placed in the position of defending against a lawsuit because of the subcontractor's tortious conduct. The prime contractor was entitled to indemnity for its attorneys' fees and defense costs.

The facts of this case are similar to *Town of Winnsboro*. DRH has been placed in the position of defending a lawsuit related to the alleged defective work of its contractor, East Coast. DRH maintains that it was not in any way negligent. Moreover, DRH's liability, if found, under the implied warranty will result as an operation of law, not fault. As previously discussed, being liable for an implied warranty does not require a finding of fault. The alleged fault for the defective condition of the Plaintiffs' properties arose, in part, from the work of East Coast. As the above authority indicates, it is fault—not liability—that determines a party's right to equitable indemnity. Defendants cannot avoid their obligation to indemnify DRH on the basis that DRH may be found liable for breach of warranty.

However, this is precisely what East Coast appears to be attempting by way of its Motion. It has no evidence of negligence or other wrongful conduct by DRH, and certainly not evidence sufficient to foreclose DRH's defense to the same as a matter of law. Instead, East Coast appears to argue that because DRH *might* be held liable to Plaintiffs, it must be presupposed to have

unclean hands and therefore be precluded from equitable indemnity against East Coast. This statement cannot be reconciled with *Town of Winnsboro* wherein the prime contractor was exonerated of liability while its subcontractors were not. Thus, a reasonable jury could find East Coast liable and exonerate DRH. Moreover, the very gravamen of equitable indemnity is recovery against another for liability without fault. Therefore, the apparent rationale underlying East Coast's Motion falls completely flat.

E. DRH's claims are ripe.

South Carolina courts have consistently found that equitable indemnity claims may be brought against a negligent co-defendant during the initial action. See e.g. *Stoneledge at Lake Keowee Owners' Ass'n v. Clear View Constr., LLC*, 413 S.C. 615, 622, 776 S.E.2d 426, 430 (Ct. App. 2015) (stating that "[w]e agree *Addy* controls this case to the extent it shows Marick may assert a claim for equitable indemnity against a negligent co-defendant.). Additionally, *Stoneledge* held that the lower court erred in granting summary judgment on the merits of General Contractor's equitable indemnity cross-claim because the General Contractor's presented a question of fact as to whether it was at fault for the alleged construction defect. Thus, Defendant's argument is specious. Like the General Contractor in *Stoneledge*, DRH has presented a question of fact as to its claims.

IV. CONCLUSION

For the foregoing reasons, summary Judgment should be denied.

Dated this 12th day of November, 2021.

Respectfully submitted,

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
Richard W. and Rebecca A. Drier, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2018-CP-07-00911
	)	
Americo Roofing, Inc., <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW D.R. Horton, Inc. ("Crossclaimant" or "DRH"), and files this Motion to Alter or Amend Judgment, pursuant to Rule 59(e), SCRCP. DRH moves the Court to alter or amend its November 16, 2021, bench ruling dismissing DRH's cross-claims because the dismissal was procedurally inappropriate and there was no legal basis for the dismissal. DRH respectfully requests that the Court reconsider its ruling for the reasons stated below.¹

I. Relevant Procedural & Factual Background

Plaintiffs brought various claims against Defendants in this matter alleging defects in the site development and construction of homes located in the Tidewater Creek neighborhood in Beaufort County, South Carolina. Having been sued under tort, contract, and warranty theories, as well as the South Carolina Unfair Trade Practices Act by Plaintiffs for alleged deficiencies in the work performed by its general contractor and subcontractors, DRH alleged claims for equitable indemnity and contractual indemnity against Defendants Lather Construction, Inc. ("Lather"),

¹ DRH also incorporates all legal arguments issued in response to Defendants' motions for summary judgment and those arguments related to procedure and contract enforceability at trial.

Hutton's Landscapes, Inc. ("Hutton's"), and East Coast Construction Cleanup Corporation ("East Coast") (sometimes herein collectively referred to as "Defendants").² DRH properly alleged cross-claims for contractual indemnity against Defendants. Therein, DRH expressly alleges that:

94. [Defendant] entered into the Contract with DRH pursuant to which [Defendant] agreed to defend, indemnify, and hold DRH harmless against any and all claims, losses, costs, and damages including but not limited to claims for property damage, pertaining to [Defendant's] performance under the Contract and caused in whole or in part by [Defendant's] conduct.

95. To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which are denied, DRH alleges that any damages were in fact sustained by the Plaintiffs in this action arose out of the conduct of [Defendant] or its agents in connection with [Defendant's] performance under the Contract and were a direct and proximate result of the wrongful acts and omissions of [Defendant] or its agents and not a result of any actions or omissions on the part of [Defendant].

96. DRH alleges that if Plaintiffs are entitled to recover, by damages or otherwise against it, which is denied, DRH is entitled to contractual indemnity against [Defendant] in the same amount. DRH further alleges that it should be reimbursed and indemnified for such settlement amounts as it may pay to Plaintiffs in this action, if any. DRH further alleges that, pursuant to the Contract, it is entitled to be reimbursed and indemnified for the costs of this action, including but not limited to attorneys' fees and costs.

(See, e.g., DRH Ans. to 2nd Amd. Compl. & Cross-claims at ¶¶ 94-96.)

DRH's contractual indemnity claim is based on the indemnity provision appearing as Section 10 of the Independent Contractor Agreement ("Section 10"), copied in pertinent part below:

² Numerous other named-defendant subcontractors settled with Plaintiffs and DRH before the commencement of trial.

TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER... ("INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF AND ATTORNEYS' FEES) WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY... ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION I, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR CONTRACTOR'S AGENTS, OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OF INDEMNITEE, RELATED IN ANY WAY TO THE WORK, EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE.³

Section 10 appears in the Independent Contractor Agreement ("ICA") in all-caps and in bold text.

The representative of each respective Defendant initialed the bottom of the page below Section 10.

³ All applicable contracts/provisions have been made part of the docket/record.

In October 2021, Hutton's and Lather filed motions for summary judgment as to DRH's cross-claims. On October 29, 2021, oral arguments were heard before The Hon. Steven DeBerry. On November 12, 2021, this Court denied Hutton's and Lather's motions on a Form 4 Order.

This matter proceeded to trial on November 15-19, 2021, before The Hon. Bentley Price. During Plaintiffs' case-in-chief, Defendants purported to revive the issue of the cross-claims through a motion for bifurcation of DRH's cross-claims.

In a ruling from the bench on November 16, 2021, during Plaintiffs' case-in-chief and before DRH had the opportunity to present its case, the Court dismissed DRH's cross-claims, including DRH's cross-claims against East Coast. DRH was improperly denied the opportunity to be heard on its cross-claims.

II. Grounds for Motion to Alter/Amend

A party should consider filing a Rule 59(e) motion when the party believes the Court has misunderstood, failed to fully consider, or failed to rule on an argument or issue. *See Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (Ct. App. 2004). In this case, the Court's November 16, 2021, bench ruling did not fully indicate the basis for its dismissal of DRH's cross-claims. Therefore, DRH cannot specifically identify the arguments or issues on which it seeks reconsideration or that impacted the Court's ruling. However, it is DRH's understanding that the Court ruled as a matter of law that Section 10 is void as against public policy and therefore unenforceable, thereby dismissing DRH's cross-claims for contractual indemnity against each of the Defendants.

A. The Court's Dismissal of DRH's Cross-Claims for Contractual Indemnity was Procedurally Improper.

i. It Is Improper To Adjudicate the Merits of a Case On A Motion To Bifurcate.

Under SCRCP 42(b), the Court, "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim . . . always preserving inviolate the right of trial by jury . . ." A Motion to Bifurcate is a motion on how to resolve a claim procedurally. Adjudicating the merits of the claim is not before the Court on a Motion to Bifurcate. Accordingly, adjudicating the merits of DRH's cross-claims was not before the court on Defendants' Motion to Bifurcate.

In *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019) the court found that determining whether a couple was common law married was a pre-determinative factor to resolving equitable distribution. After a hearing on one spouse's motion to dismiss claims for equitable distribution of assets and for a motion to bifurcate the issue of whether there was a common law marriage, the family court denied the spouse's motion to dismiss but granted her motion to bifurcate, ordering a trial on the sole issue of whether a common-law marriage existed between the parties. The court reasoned that should it determine no marriage existed it would not need to address the other issues of equitable distribution. *Stone v. Thompson*, 426 S.C. 291, 293, 826 S.E.2d 868, 869 (2019).

Similarly here, Defendants posited to the Court during Plaintiffs' case-in-chief that should the Court find Section 10 unenforceable, it would not need to address the other issues of DRH's claims. DRH was given approximately one hour to prepare for oral arguments pertaining to the enforceability of Section 10, which had already been received and accepted by the Court in the summary judgment hearing. Unbeknownst to DRH, counsel for Lather, Hutton's, and East Coast

Construction presented the Court with paper copies of their Memorandums in Support of *Summary Judgment* (which, again, had already been briefed, orally argued and denied). Upon realizing that other parties had supplied the Court with briefs unrelated to bifurcation, DRH emailed the Court copies of their Memorandums in Opposition to the Defendants' Summary Judgment Motions, but the record is devoid of any indication that they were read or considered by the Court. Nor were they properly before the Court for a procedural Motion for Bifurcation hearing.

In effect, Defendants requested the Court to make (another) SCRCP 56 Ruling. However, it was improper for the Court to rule on the merits of DRH's claims on a Motion to Bifurcate. Like the court in *Thompson*, the Court should have ordered a trial on the sole issue of whether Section 10 was enforceable. Instead, the Court did not rule on a Motion to Bifurcate at all. It merely re-considered the Defendants' summary judgment motions, which should have been re-considered, if at all, through a SCRCP 59 Motion to the Hon. Steven DeBerry, the judge who denied Defendants' motions for summary judgment. However, Defendants did not move for an SCRCP Rule 59 Motion. As such, the Order denying summary judgment became final until Defendants had the opportunity to move for Directed Verdict at the close of DRH's case. Defendants had two, and only two, methods of challenging Judge DeBerry's denial of their summary judgment: either by bringing a Motion to Reconsider before Judge DeBerry or by moving for Directed Verdict at the appropriate time. *Watson v. Underwood* 407 S.C. 443 756 S.E.2d 155. Neither option involves a Motion for Bifurcation. *See Id.* (laying out the two ways to challenge a summary judgment ruling).

ii. It Was Improper For The Court To Re-Consider A Motion For Summary Judgment Through A Motion To Bifurcate.

Before trial, Defendants' motions for summary judgment were properly denied. In support of their previous motions for summary judgment, Defendants had argued that DRH's cross-claims

for contractual indemnity should be dismissed because, *inter alia*, Section 10 violated public policy and was unenforceable as a matter of law. *See* Hutton's Mem. In Supp. Of SJ. Having received briefs and oral argument, the Court *rejected* Defendants' argument. *See* Form 4 Orders Denying Summary Judgment. It was improper for the Court to hear the issue a second time, and error for the Court to reverse its own ruling. The Court cannot make a decision and then contradict itself on the same issue in the same case based on the same set of facts before it and during the same procedural posture or else all parties would move for summary judgment multiple times throughout a case.

This is precisely what Defendants sought from the Court. In an improper attempt to revive their failed summary judgment arguments, Defendants improperly couched the same arguments it made in relation to summary judgment under the guise of a motion to bifurcate DRH's cross-claims during trial.⁴

The Court's decision to hear arguments related to the purported unenforceability of the contractual provisions at issue during the Plaintiffs' case-in-chief deprived DRH of its due process rights to pursue its cross-claims.⁵ It was procedurally improper for the Court to take up the Motion during trial and it was further improper for the Court to receive re-argument of the already denied motion for summary judgment in the guise of the bifurcation argument, because in addition to rehearing and reversing the Court's ruling on Summary Judgment the Court effectively heard a

⁴ At the outset, DRH notes that Defendants should have brought their Motion to Bifurcate before the trial began and not during Plaintiffs' case-in-chief.

⁵ DRH believes that the Court's decision resulted in further delay of the trial (which concluded at approximately 6:45 p.m. ET on Friday, November 19, after DRH was left with less than one day to present its case-in-chief) and was premature (dismissal occurred *before* DRH was even allowed to present testimony and evidence in support of its claims through its Constitutional right to a trial by jury).

Directed Verdict motion by co-defendants before any evidence (much less DRH's case-in-chief) on the issue was presented. Before DRH could present its case in chief, its cross-claims were dismissed perfunctorily. "It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have *a day in court, or opportunity to be heard*, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights." *Murdock v. Murdock*, 338 S.C. 322, 334, 526 S.E.2d 241, 248 (Ct. App. 1999) (quoting *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972)).

B. Section 10 Of The Independent Contractor Agreement Is Enforceable And Does Not Violate The Public Policy Of South Carolina.

Even if the Court's premature dismissal of DRH's cross-claims for contractual indemnity were procedurally sound and not contrary to the Court's prior orders, the legal holding regarding the enforceability of Section 10, and therefore the viability of DRH's cross-claims for contractual indemnity, is incorrect. The Court improperly determined that Section 10 of the ICA between sophisticated parties is against public policy as a matter of law.

There is no legal basis whatsoever to support the finding that Section 10 is against public policy as a matter of law.

"Public policy' is a term of vague and uncertain meaning, which it pertains to the lawmaking power to define, and courts are apt to encroach upon the domain of that branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. Sir George Jessel, as master of the rolls, said in *Besant v. Wood*, L. R. 12 Ch. Div. 605, that public policy is 'to a great extent a matter of individual opinion, because what one man or one judge might think against public policy another might think altogether excellent public policy.' And in another case (*Printing etc. Co. v. Sampson*, L. R. 19 Eq. 465) the same jurist said: 'If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that

their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice."

Wiley v. Advance Am., Civil Action No. 3:07-3533-TLW-TER, 2008 U.S. Dist. LEXIS 130677, at *25-26 (D.S.C. July 16, 2008) (citing *Alderman v. Alderman*, 178 S.C. 9, 17, 181 S.E. 897, 904 (1935)).

"A sound public policy requires the enforcement of contracts deliberately made, which do not clearly contravene some positive law or rule of public morals...Courts should not annul contracts on doubtful grounds of public policy. In such matters it is better that the legislature should first speak." *Rice v. Multimedia, Inc.*, 318 S.C. 95, 100, 456 S.E.2d 381, 384 (1995). See also *Wilson v. Builders Transp., Inc.*, 330 S.C. 287, 297, 498 S.E.2d 674, 679 (Ct. App. 1998).

Accordingly, irrespective of the merits of meaning or application of the contract, the Court was without legal basis to declare the contract void for violation of public policy. The Court's Ruling appears devoid of any reference to a specific statute or other well-settled legal authority that Section 10 in its entirety violates. The Court appears to not have relied on anything other than Defendants' vague, conjectured, and legally unsupported policy arguments in reaching its conclusion that Section 10 violated the public policy of South Carolina. To prevail on a public policy argument, Defendants needed to present well-settled legal authority that Section 10 violated. They did not do so.

C. The Court Failed to Consider the Rules of Contract Construction and Interpretation.

If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its

lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ellie* at 93, 594 S.E.2d at 493 (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)). However, where an agreement is ambiguous, the court should seek to determine the parties' intent. *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001); *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct. App. 1998).

In contrast, "[a] contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007) (internal citations omitted). "An ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." *Id.*

The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007) (internal citations omitted). Whether a contract's language is ambiguous is a question of law. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007) (citing *South Carolina Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001); *Southern Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct. App. 2002)). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. *Id.*; see also *Charles v. B & B Theatres, Inc.*, 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959) ("[W]hen the written contract is ambiguous in its terms, ... parole and other extrinsic evidence will be admitted to determine the intent of the parties"). The determination of the parties' intent is then a question

of fact for the jury to determine. *South Carolina Dep't of Natural Resources*, 345 S.C. at 623, 550 S.E.2d at 303.

In this instance, the Court had already found that the contract was not unenforceable as a matter of law when it denied Defendants' Motions for Summary Judgment. Accordingly, the only issue before the Court on the Motion to Bifurcate (allowing, solely for the sake of discussion, that any issue other than whether to bifurcate the claims was properly before the Court) was whether the contract was unambiguously enforceable (and therefore enforceable as a matter of law) or whether there was a question of fact regarding the parties' intent. To the extent there was ambiguity in Section 10 that could lead to more than one reasonable construction, it is appropriate for the court to take extrinsic evidence as to the intent of the parties, and therefore ruling as a matter of law was wholly inappropriate. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007) (internal citations omitted). Moreover, the fact that one judge had already found that Section 10 was not unenforceable as a matter of law is evidence that the contract is capable of more than one interpretation. Therefore, as a practical matter, the trial Court's only options with respect to the enforceability of Section 10 were to either (1) grant DRH dispositive relief in finding that Section 10 is enforceable against Defendants as a matter of law; or (2) sending the question to the jury. The Court erred by reversing its own prior ruling and depriving DRH of the right to a jury determination.

D. The indemnity provision at issue is unambiguous, valid, and enforceable under South Carolina Law.

The *only* binding statement of public policy raised by Defendants or, for that matter, that exists in South Carolina law pertinent to the enforceability of an indemnity agreement in a construction subcontract, is codified at S.C. Code § 32-2-10. Defendants relied upon the assertion that Section 10 requires Defendants to indemnify DRH for DRH's sole negligence. That position

(which the Court appears to have accepted) is simply incorrect (as reflected by the Court's denial of the Defendants' motions for summary judgment predicated on the same argument). Section 10 explicitly and expressly excludes from the subcontractor's duty to indemnify liability for DRH's sole negligence in compliance with S.C. Code § 32-2-10. That should be the end of the analysis.

Nonetheless, Defendants contended that the exclusion, and indeed the whole indemnity provision, is worthless because of a "broad and expansive duty to defend", which requires Defendants to bear the costs of DRH's defense, regardless of whether Defendants are ultimately required to indemnify DRH. Hutton Mot. Sum. J at 6. Apparently, the Court embraced this position and purportedly found that the duty to defend provision violated S.C.'s anti-indemnity provision § 32-2-10. This position overlooks the fact that S.C. Code § 32-2-10 does not mention "duty to defend" and refers only to promises to "indemnify." "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570-71, 666 S.E.2d 892, 896 (2008) (citing *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994)). S.C. Code § 32-2-10 is plain and unambiguous in only referencing the duty to indemnify. If the legislature had intended to reference the "duty to defend" it would have done so.

Additionally, imposing the same standards on the duty to defend as those applied to the duty to indemnify ignores the established principle that the duty to defend *is* broader than the duty to indemnify. South Carolina insurance case law makes clear that the duty to defend the promisee is separate and distinct from the obligation to pay a judgment rendered against the indemnitee.

Defendants' position, as apparently embraced by the Court, ignores the numerous cases delineating the differences between the duty to defend and duty to indemnify in order to reach the

legally unfounded conclusion that Section 10 of the ICA, which separately addresses both the duty to defend and the duty to indemnify, is illegal and wholesale void.

Defendants' position is unfounded, as illustrated by the fact that Defendants cite to no case authority to support the notion that the duty to defend and duty to indemnify are one in the same in a non-insurance contract. Moreover, DRH is unaware of any case that would support Defendants' self-serving conclusion. While Hutton's in their brief in support of summary judgment cite to a non-binding Ohio case, *Stickovich v. City of Cleveland*, 2001-Ohio-4117, 143 Ohio App.3d 13, 40, 757 N.E.2d 50, 71, for the proposition that different principles of law apply to insurance contracts versus contractual indemnity, that case does not explicitly address the issue in the duty to defend context. Moreover, *Stickovich* did conclude that the duty to defend is broader than the duty to indemnify by stating that: "the duty to defend a claim is distinct from the duty to pay that claim and does not mean that the insurer has a duty to pay if the facts subsequently show there is no coverage or liability of its insured. *Stickovich v. City of Cleveland*, 2001-Ohio-4117, 143 Ohio App.3d 13, 40, 757 N.E.2d 50, 71. Hutton's cites to *Stickovich* for the proposition that an insurance contract denotes a policy issued by an authorized and licensed insurance company whose primary business it is to assume specific risks of loss, but Hutton's fails to mention that pursuant to the contractual indemnity provision of the ICA, Hutton took out liability insurance policies, listing DRH as an additional insured, thereby shifting any potential risk of loss pertaining to the duty to defend and indemnify DRH arising from the ICA to a licensed insurance company in the business of assuming risks of loss. That DRH is an additional insured on the Defendants' own insurance policies pursuant to Section 10, presents additional evidence that a reasonable juror could have found Section 10 valid. At the very least, it is evidence of Defendants' intent when they

executed and undertook to perform under the respective ICAs. It also is indicative of the kind of evidence the Court deprived DRH of the opportunity to present during its case in chief.

Additionally, Defendants cite to *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) in support of their contention that the duty to defend is somehow subsumed under the duty to indemnify. However, *Addy* says no such thing, and the duty to defend was not at issue or once mentioned in *Addy*.

Addy concluded that: "[i]t is generally held that where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the *legal consequences* of the original wrongful act and may be recovered as damages. *Addy v. Bolton*, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) (internal citations omitted). *Addy* did not hold that because damages for indemnity may include attorneys' fees, among other things, the duty to defend is somehow conflated with the duty to indemnify.

If Defendants' position were taken as true, there would be no contracts pertaining to the duty to defend. But this Court's decision necessarily decides just that: that as a matter of law, the duty to defend is equivalent to the duty to indemnify in all contracts other than insurance contracts, and is accordingly unenforceable pursuant to S.C. Code § 32-2-10 because it will at times necessarily involve a promisor defending a promisee even where the promisee may ultimately be found liable.

But the duty to defend must be construed as a present duty, triggered upon *allegations* of the promisor's wrong doing, or else any promise purporting to include a duty to defend would be illusory. It would be illusory because the promise to defend would only be enforceable upon a verdict of liability for the indemnitor, which would, of course, at that point, just be a claim for

indemnity. Moreover, such a finding would undermine the very premise behind agreement to defend, but it would permit promisors to, as a matter of practice, refuse to defend any claim involving an allegation of negligence, force the party to which they promised a defense to incur the costs of trying the case to a verdict, and then seek reimbursement (indemnity). In other words, the rationale that the Court accepts would encourage contracting parties to breach their defense obligations with near impunity.

i. South Carolina Courts have long differentiated between the duty to defend and the duty to indemnify in the insurance contract.

While DRH is unaware of South Carolina case law addressing the contractual duty to defend outside the insurance context, case law pertaining to insurance principles support DRH's position that the duty to defend is separate from the duty to indemnify and is bound by a different set of standards triggering its applicability.

In South Carolina, an insurer has a duty to provide a defense, "even if any of the allegations of the suit are groundless, false or fraudulent," and "the duty to defend exists regardless of the insurer's ultimate liability to the insured." *Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha*, 269 S.C. 183, 186-87, 236 S.E.2d 818, 820 (1977)). The South Carolina Supreme Court has further held that a duty to defend arises where the "underlying complaint creates a *possibility* of coverage under an insurance policy" *City of Hartsville v. South Carolina Municipal Insurance and Risk Financing Fund*, 382 S.C. 534, 535, 677 S.E.2d 574, 575 (2009) (citing *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38 (1980) (emphasis added)). Similarly here, Hutton's duty to defend DRH is a present one that was triggered by the Plaintiff's allegations pertaining to Hutton's work, as laid out in the contract:

Contractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify and is triggered immediately when any claim, demand, or other assertion of liability is made

against Indemnitee, which potentially or arguably is subject to Contractor's duty to indemnify regardless of Contractor's ultimate liability for indemnity. *See* South Carolina Independent Contractor Agreement at p. 4, § 10.

This contract language between DRH and Defendants is consistent with the duty to defend case law cited above: the agreement that the duty to defend is triggered when any claim of liability is made against the indemnitee which potentially is subject to the subcontractor's duty to indemnify is consistent with *City of Hartsville v. South Carolina Municipal Insurance and Risk Financing Fund*, where the mere *possibility* of property damage caused by the work of the indemnitor was enough to trigger the duty to defend.

In contrast to the duty to defend, indemnity is "that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." *Concord and Cumberland Horiz. Prop. Regime v. Concord and Cumberland, LLC*, 424 S.C. 639, 646-47, 819 S.E.2d 166, 170 (Ct. App. 2018) (quoting *Campbell v. Beacon Mfg. Co.*, 313 S.C. 313, S.C. 451, 454, 438 S.E.2d 271, 272 (Ct. App. 1993)). "A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Id.* (quoting *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999)).

E. The Court Overlooked the Separation of Promises Provision of § 32-2-10.

S.C. Code § 32-2-10 provides that separate promises to indemnify the indemnitee for acts arising out of the indemnitee's partial negligence or unrelated to the indemnitee's negligence are not invalidated by the statute. S.C. Code § 32-2-10. This means that the State Legislature expressly contemplated, in the plain language of the statute, that while an indemnification promise related

to the indemnitee's sole negligence is unenforceable, other promises in an indemnification section are still valid.

The provision at issue here contains such separate promises. Defendants promised to defend and to indemnify DRH for liability arising out of Defendants' work, and that was the provision of the ICA at issue in this case. ¶ 10.1. Thus, even if § 32-2-10 invalidates any promise by Defendants to defend or indemnify DRH for its own sole negligence, the separate promise to defend and to indemnify DRH for amounts related to or arising out of Defendants' work, either in whole or in part, is valid and enforceable. *See* S.C. Code § 32-2-10. Again, nothing in the statute removes Defendants' obligation to indemnify DRH for liability arising out of Defendants' own work, which is the remedy that was asserted by DRH.⁶ *Id.* Defendants' promises to defend and indemnify DRH are valid under the statute.

F. Any Unenforceable Provisions of Section 10 Could Be Severed.

In South Carolina, courts enforce the valid provisions of a contract in accordance with the parties' intent at the time the contract was executed. *See Beach Co. v. Twillman, Ltd.*, 566 S.E.2d 863, 866-67 (S.C. Ct. App. 2002). In other words, "whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." *Id.* at 867. Should a court determine that an unenforceable provision exists in a contract, "the next question becomes whether, under any appropriate circumstances, the ... agreement can be reformed, or the

⁶ DRH's pleading alleged that, "To the extent that Plaintiffs are entitled to recover damages against DRH for the injuries complained of in the Second Amended Complaint, which is denied, and to the extent that the fact finder determines that any damages sustained by Plaintiffs were the result of the materials supplied by, work performed by or other acts and/or omissions of Hutton, DRH alleges that any damages that were in fact sustained by the Plaintiffs in this action were a direct and proximate result of the wrongful acts and omissions of Hutton or its agents and not a result of any actions or omissions on the part of DRH." *See* DRH Second Amnd. Ans. to Plaintiff's Second Amnd. Comp. ¶ 106.

identified illegal provisions ... severed, thus preserving ... [the] agreement between the parties." *Hooters of Am., Inc. v. Phillips*, 39 F. Supp.2d 582, 624 (D.S.C. 1998), *aff'd* 173 F.3d 933 (4th Cir. 1999). It is not proper to sever a provision where it is part of several interdependent provisions in the contract. *Beach Co.*, 566 S.E.2d at 867. However, a provision may be severed when it is susceptible to division, has two or more parts, is not dependent on other parts of the contract, and is not intended by the parties to be an interdependent clause. *Id.*; *see also Columbia Architectural Grp., Inc. v. Barker*, 266 S.E.2d 428, 429 (S.C. 1980). The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002).

Where the parties intend to make separate and not interdependent promises, the Court should consider the enforceability of the provision at issue separately. *See Columbia Architectural Group*, 266 S.E.2d at 429. The parties' listing or denoting of promises separately is evidence of their intent that promises be separate and independent. *Id.* Further, where separate provisions, even in the same section of a contract, contain rights wholly independent of each other, one provision may be severed, while the other is enforced. *Beach Co.*, 566 S.E.2d at 867 (severing an unenforceable provision and enforcing another provision in the same section of the contract). Finally, the Court's Ruling ignored the fact that the S.C. Court of Appeals selectively enforced provisions of DRH's indemnity language in a contract similar to one at issue here, in a case cited by Defendants to support their position that DRH's indemnity provision is wholesale illegal. *See D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45.

Defendant's indemnification promises are divided on purpose by the parties themselves, and thus separately numbered. (See Ex. 2, at ¶ 10., hereto attached). Indemnification for liability

arising out of the "work performed or to be performed or material supplied by contractor or by the contractor or contractor's agents or employees" is numbered (2), while indemnification for liability arising out of DRH's negligence or intentional act is numbered (4). *Id.* The fourth indemnification provision follows an "or" in this list, not an "and." *Id.* Defendants agreed it would indemnify DRH for amounts, including reasonable attorneys' fees and defense costs arising out of Defendants' work *or* DRH's negligence/intentional act. *Id.*

Similarly, the duty to defend provision is explicitly and expressly stated as being "separate, distinct, and independent" from the duty to indemnify. *Id.* This language unambiguously shows that the parties intended the duty to defend to be separate from the duty to indemnify and thus the duty to defend is severable based on the face of the contract. But even if the Court found that the face of the contract was ambiguous as to whether the parties intended for the provisions to be interdependent, it would then have been appropriate to consider extrinsic evidence to determine intent and thus was a question for the jury.

Nonetheless, Defendants relied upon *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, to conclude that the ICA is illegal and unenforceable. 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). This conclusion misconstrues the holding of *Builders FirstSource*. That case held, based on the unique facts of that case, that the single provision of the contract purporting to require the subcontractor to indemnify the contractor for liability to which it did not contribute was unenforceable. *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018). That case was superficially similar to the present case, only in that it involved DRH seeking indemnity from its subcontractor based on a contract between the parties. *Id.* at 43. However, there, the facts diverge. In that case, the claim for indemnity was asserted after the conclusion of an arbitration to which the indemnitor was not a party. Therein, the

arbitrator had issued a simple award stating only the amount awarded to the plaintiff, with no findings as to the allocation of liability between DRH and any subcontractor. *Id.* at 44. Moreover, DRH had specifically requested that the arbitrator not allocate liability.

Because of this, the trial court held that it had no basis for determining whether the award was based, in whole or in part, on any act or omission attributable to the subcontractor, or in what amount. *Id.* The court held that it would be against public policy for the subcontractor to indemnify a party for liability not shown or alleged by the plaintiff in the underlying lawsuit to be caused by the subcontractor, and accordingly found the claim for indemnification was foreclosed for want of any evidentiary basis to discern whether any of the liability imposed upon DRH was the result of anything but its own conduct. *Id.* at 45. In this regard, the issue of indemnity against the negligence of the indemnitee was relevant only because, in the absence of any evidence to allow it to find otherwise, the court was constrained to either allow DRH to proceed on a claim for indemnity for damages that could not, under any circumstance, be separated from its own conduct (since the only finding by the arbitrator was that DRH was liable), or dismiss DRH's claim. Such is not the case here, where DRH and Defendants were both being sued by Plaintiffs, and the claims against them would have been tried together, with the jury having the opportunity to allocate fault. Accordingly, the *Builders FirstSource* opinion is simply not contrary to DRH's position in this matter, and the holding of that case explicitly afforded DRH the opportunity to have its claims heard by the jury.

To that end, perhaps the most important takeaway of *Builders FirstSource*, as it applies here, is what the Court of Appeals did not say. The Court of Appeals did not find that because the contract contained an unenforceable provision (concerning indemnification of DRH from its own sole negligence) that renders the entire indemnity section invalid. In contrast, the Court of Appeals addressed another provision of the same section at issue in that case, and this case, and found it

enforceable. The court specifically noted that S.C. Code Ann. § 32-2-10, “allows D.R. Horton and BFS to agree that BFS will indemnify D.R. Horton for damages caused by BFS or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree.” *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45. Indeed, if the Court of Appeals had intended to invalidate the entire indemnity clause on a wholesale basis, it would have been explicit in stating that it was doing so. Without such a statement, it was improper for the Court to draw such a drastic conclusion in an attempt to alleviate the subcontractors of their duties to defend and indemnify DRH.

Defendants also trumpeted *Concord and Cumberland Horiz. Prop. Regime v. Concord and Cumberland, LLC*, 424 S.C. 639, 646-47, 819 S.E.2d 166, 170 (Ct. App. 2018) in support of their contention that Section 10 is not clear and unequivocal. The facts of *Concord* are distinguishable from the issue before the Court. In *Concord*, following a settlement of the underlying lawsuit, the general contractor, Superior Construction Corporation, brought a claim for contractual indemnity against its subcontractor, Muhler. *Id.* Specifically, the General Contractor filed a motion for partial summary judgment against Muhler, claiming it was entitled to contractual indemnity from Muhler for Superior’s own negligence in the amount of the settlement amount along with attorneys’ fees and expenses. *Id.* In response, Muhler moved for partial summary judgment arguing that the subcontractor agreement did not obligate it to indemnify Superior for Superior’s “own wrongdoing.” *Id.* Muhler claimed such an indemnity clause must be clear and unequivocal in the contract, and the contracts at issue failed to meet that burden. *Id.* The circuit court denied Superior’s motion for partial summary judgment and granted Muhler’s motion to the extent Muhler sought a declaration the language of the subcontractor agreements as written did not require Muhler to indemnify Superior for Superior’s own negligence. *Id.* The Court of Appeals affirmed.

Superior cited several other cases where contractual indemnity provisions where the indemnitor agreed to indemnify the indemnitee had been upheld and argued that theirs should, as well. *Id.* at 174-175. The Court noted that a contract of indemnity will be construed to indemnify the indemnitee against losses resulting from its own negligent acts so long as the intention is expressed in clear and unequivocal terms. *Id.* at 172. The Court found that the Superior-Muhler contract was not.

At the outset, it is important to note that in *Concord* the court's holding was expressly predicated upon the predetermination of Superior's own negligence. At the time this Court's Ruling was made, no negligence for any party had been established and thus it was procedurally premature to rely on *Concord*.

Further, the sustainability of DRH's claims in this case did not depend upon its ability to successfully frame the relief it seeks as indemnity for its "concurrent negligence," as was the circumstance attendant to Superior's claims in *Concord*. While the Court in *Concord* strictly construed the contract between Superior and Muhler, strict construction was not applicable here because DRH properly pled claims for indemnity for losses arising from liability derivative from the liabilities of Lather, and did not plead for indemnity for losses arising from DRH's liability. The pleadings are clear that DRH alleged that, to the extent DRH is found liable for damages sustained by the Plaintiff, which are denied, and to the extent that the fact finder determines the they were the result of the materials supplied by, work performed by or other acts and/or omissions of Defendants then DRH alleges Defendants are required to indemnify DRH for liability arising out of Defendants' work. See DRH's Second Amnd. Ans. to Plainiff's Second Amnd. Comp.

Moreover, *Concord* did not establish a clear and unequivocal standard for the duty to defend. Thus, the duty to defend provision of DRH's contract is not subject to strict construction

and should have been interpreted as any ordinary contract. But even if the Court found that *Concord* applied to the duty to defend, the duty to defend provision of Section 10 meets the clear and unequivocal standard established by *Concord*. Section 10 clearly and unequivocally states that promisor's duty to defend is "triggered immediately when any claim...of liability is made against indemnitee which potentially or arguably is subject to contractor's duty to indemnify." Thus, the language of Section 10 is clear that the promisor must defend DRH upon allegations arising from their scope of work.

To the extent the Court relied upon *Concord* in reaching its ruling, it was both procedurally premature and substantively incorrect for it to do so. Pursuant to the ICA, the Defendants agreed to indemnify DRH against claims arising out of the work they performed on the subject properties. Therefore, because Defendants obligated themselves to defend and indemnify DRH against any claim arising out of their work, the Plaintiffs ultimate success on their claims against Defendants' work, which is what *Concord* concerns, was immaterial to Defendants' liability to DRH.

III. Conclusion

Based on the above and additional argument made at or prior to the hearing on this matter, DRH respectfully requests that the Court vacate its November 16, 2021, bench ruling and provide DRH with the opportunity to present its cross-claims for contractual indemnity to a jury or to such alternative trier of fact as to whom the parties may agree.

Dated this 24th day of November, 2021.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Jessica and Sarmed Shafi,

Plaintiffs,

v.

D.R. Horton, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-07-00911

**DEFENDANT'S, D.R. HORTON, INC., MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR A NEW
TRIAL ABSOLUTE, OR IN THE ALTERNATIVE, FOR A NEW TRIAL NISI
REMITTITUR**

Defendant, D.R. Horton, Inc. (hereinafter "DRH" or "Defendant") hereby moves the Court for a Judgment Notwithstanding the Verdict, pursuant to Rule 50(b) and, in the alternative, a New Trial Absolute, or in the alternative, New Trial *Nisi Remittitur*.¹ This motion is based on the following:

I. RELEVANT BACKGROUND

During a status conference on May 12, 2021, the Court ruled that the Plaintiffs' counsel must select one home to be tried the week of November 15, 2021, which was formally confirmed by written order dated July 6, 2021. The Court also ordered that Plaintiffs' counsel select the home to be tried at least two months before the trial date. On September 20, 2021, Plaintiffs' counsel selected the home located at 4892 Breeze Way (Lot 18) in the Tidewater Creek neighborhood, owned by Sarmed and Jessica Shafi (the "Shafi Property"), to be the subject of trial.

¹ DRH separately filed a (1) Motion to Alter or Amend a Judgment (November 24, 2021) and Memorandum in Support of its Motion for Set Off (November 29, 2021) regarding separate issues. To the extent such issues overlap, DRH incorporates its position as if fully stated verbatim herein.

DRH sold the home in question to Plaintiffs, Sarmed and Jessica Shafi ("Plaintiffs" or "the Shafis"). The home in question sits within the property purchased by DRH from Crossroads Enterprises, LLC. This property was ultimately named the "Tidewater Creek" subdivision. The Plaintiffs alleged that their property has been damaged as the result of the preparation and development of the land on which their property is located. They alleged causes of action against DRH and numerous other defendants for negligent representation/rescission and fraudulent misrepresentation/rescission, negligence/gross negligence, breach of contract/breach of duty of good faith and fair dealing, breach of express and implied warranties, and violations of the South Carolina Unfair Trade Practices Act (SCUTPA).

At the trial by jury, conducted the full week of November 15, 2021, the claims remaining to be considered by the jury were: negligence/gross negligence, breach of contract, and SCUTPA.² On November 19, 2021, the jury returned a verdict in favor of Plaintiffs concerning the negligence and breach of contract causes of action and awarded Plaintiffs an amount of \$140,000.00.

Following the presentation of Plaintiffs' case-in-chief, and Defendant's case-in-chief, DRH moved for a directed verdict (collectively referred to as "Directed Verdict Motions") on all of Plaintiffs' remaining causes of action.³ The Court denied both Directed Verdict Motions.⁴

² Before the charge conference, Plaintiffs voluntarily dismissed all of their other claims.

³ DRH incorporates all arguments raised its Directed Verdict Motions and open court at trial, which properly preserved its ability to file the immediate Motion. *See Grooms v. Zander*, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (post-trial motion for judgment notwithstanding the verdict is authorized only when a motion for a directed verdict has been made at the trial and a verdict has been returned against the movant.).

⁴ Immediately following the trial, DRH issued a request for a "rough" draft trial transcript to assist the Court in ruling on the immediate Motion. DRH has not yet received it and has been informed by the court reporter that it cannot be made available before the date of this filing. However, if the Court would find it useful, DRH will supplement this briefing upon request and receipt of the transcript.

II. ARGUMENT

A. A Judgment Notwithstanding the Verdict is Proper Because no Reasonable Jury Could Have Reached the Challenged Verdict as to the Negligence and Breach of Contract Causes of Action.

A motion for a judgment notwithstanding the verdict (JNOV) is merely a renewal of the directed verdict motion. *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006). The trial Court must grant a motion for directed verdict or for judgment notwithstanding the verdict unless “the evidence yields more than one inference or its inference is in doubt.” *Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). Moreover, “[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.” *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998).

DRH respectfully contends that the Court committed error when it denied DRH’s motion for directed verdict on Plaintiffs’ claims of negligence and breach of contract. DRH hereby respectfully requests that this Court alter or amend its decision and grant DRH’s judgment notwithstanding the verdict on Plaintiffs’ causes of action for negligence and breach of contract or, in the alternative, grant DRH’s motion for new trial absolute or new trial *nisi remittitur*.

1. Negligence

Plaintiffs have failed to present sufficient evidence to support their claim for negligence. In order to succeed on a claim of negligence for an alleged residential building defect, a plaintiff must prove: (1) the builder has violated an applicable building code; (2) the builder has deviated from industry standards; or (3) the builder has constructed housing that he knows, or should know, will pose serious risks of physical harm. *Kennedy v. Columbia Lumber and Manufacturing Co., Inc.*, 299 S.C. 335, 347, 384 S.E.2d 730, 738 (1989). For a builder, like DRH, to be culpable as it relates to the construction phase of the home/lot as the general contractor, it must be negligent in

its own capacity. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 560, 658 S.E.2d 80, 88 (2008). It is not sufficient to show that a subcontractor was negligent without proof that the builder's own negligence operated to cause the alleged harm. *Id.*, 376 S.C. at 561, 658 S.E.2d at 88. The negligence of a subcontractor is not automatically imputed to a builder. *Id.*

Here, Plaintiffs' expert engineer, Matt Hines, testified DRH had a duty to remove debris that *it was aware of*. On this point, the evidence is overwhelming, and even viewing the evidence in the light most favorable to the Plaintiffs: DRH had no knowledge of any debris on the Shafi Property before it sold them the home. By way of example, the Phase I Environmental Site Assessment documented any debris the third party engineer observed on the property before DRH purchased it and only noted debris near Lots 28 and 1 off the northern boundary of the property (away from the southern portion where the Shafi Property is located). Plus, during the construction phase, DRH utilized inspectors from GHD to perform weekly inspections and to note the presence of any debris. Shara Frazier, the primary GHD inspector on the project, testified that she did not observe anything other than typical construction debris on site. On the other hand, any evidence of purported "knowledge" of debris presented by Plaintiffs is pure speculation.

Further, no testimony has been offered as to how the debris, if any, arrived on the Shafi Property or that debris was ever buried⁵ or if/how debris/glass "surfaces" following rain events. Plaintiffs' own expert, Mr. Hines, did not opine on causation. More specifically, he did not (1) opine to a reasonable degree of engineering certainty that it is possible for debris to "rise" up through the earth such that debris is present and visible on some days but not on other days (2) if

⁵ In fact, witnesses for Lather Construction, Inc. ("Lather") and Hutton's Landscapes, Inc. ("Hutton's") testified that they did not bury debris and DRH never directed them to bury any debris.

it is possible, he did not present a methodology explaining how it is possible and (3) if he had presented a methodology explaining the how, he did not then opine that a misfeasance or malfeasance of DRH *caused* the debris to rise up through the earth and appear on the surface. Moreover, he could not point to a specific standard of care that DRH violated. Similarly, and among other things, DRH's expert engineer, Steve Moore, opined that DRH complied with all applicable industry standards in the development of the lot and did not act improperly in any way in the land development process.

For these reasons, Plaintiffs did not present any evidence from which a reasonable jury could conclude that DRH breached any duty owed to Plaintiffs or that DRH caused the presence of any debris on the Shafi Property.

As to DRH's purported duty to supervise during the land development phase as the owner of the property, no evidence supports a finding that DRH breached any duty to supervise its general contractor, Lather, because Plaintiffs did not show that DRH had a duty to supervise Lather or that it breached such a duty. To the contrary, Mr. Ron Bunner, DRH's corporate designee whom of Plaintiffs' presented in their case-in-chief, testified that the contract documents between Lather and DRH indicate that Lather, as the general contractor, held supervisory authority and controlled the means and methods of its work.⁶ This testimony went un rebutted. Even more, Jeff Ackerman, the site engineer who prepared the site plans and was on site during the land development phase, and Steve Moore confirmed this. They also testified that Lather had a duty to remove any debris it may have observed on site. Mr. Ackerman further emphasized that the contract between DRH and

⁶ Indeed, the applicable contracts, which are in evidence, validate Mr. Bunner's testimony. Sean Higgs, the superintendent for Lather also confirmed that Lather could hire its own subcontractors (which it did), supervise them (which it did), and control the means and methods of the land development work (which it did).

Lather, including the specifications, is standard in the industry. Finally, Mr. Ackerman testified that it is standard in the industry for an owner to hire a general contractor who is then responsible for supervising their own employees during site development and to be responsible for the means and method of their work.

The amount of supervision that DRH exercised toward Lather did not rise to such level that DRH is then liable for any negligent acts of Lather. South Carolina has adopted the Restatement (Second) of Torts approach to general contractor liability for the negligent acts of its subcontractors, which holds that “[i]t is not enough that he has merely a general right to order the work stopped or resumed, to inspect the progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of right of supervision that the contractor is not entirely free to do the work in his own way.” Restatement (Second) of Torts § 414 cmt. c.” *See also Evergreen International, S.A. v. Marinex Construction Company, Inc.*, 477 F.Supp.2d 696 (D.S.C. 2007) (“[a] contractor is not liable for damage caused by the negligence of its subcontractor, unless it can be shown that the contractor retained or exercised control over the subcontractor’s work.”) (citing *Ross v. Dae Julie, Inc.*, 341 Ill. App.3d 1065, 1070, 793 N.E.2d 68, 72, 275 Ill. Dec. 588, 592 (2003)). Therefore, DRH cannot be liable based on breach of a duty to supervise because it was not shown through the contract, nor through the actions of DRH employees, that DRH controlled the manner and methods that the general contractor, Lather, performed their work. Plaintiffs merely relied on the fact that DRH could stop the work of Lather to conclude DRH had supervisory duties. This is not enough. Indeed, any property owner may order a contractor to stop working on their property at any time

for any reason and not have assumed supervisory responsibilities.⁷ In addition, while Plaintiffs' allegations center on the land development portion of the project, Plaintiffs also did not show that DRH failed in its duty to supervise Hutton's during the construction phase of the Shafi Property.

All in all, Plaintiffs were required to show that DRH engaged in misfeasance or malfeasance during the development of the property (as the owner) or construction of the lot (as the general contractor). However, Plaintiffs did not present any evidence that DRH did not act as a reasonable owner during the land development phase or general contractor in regards to the construction process at the Shafi Property. Further, even if Plaintiffs were able to create a reasonable inference that a *subcontractor* (like Hutton's) failed to perform its work adequately, Plaintiffs have certainly failed to present any evidence that DRH was negligent in failing to identify or remedy the deficient work. By way of example, Mr. Hutton, the owner of Hutton's, testified that DRH, in response to the Shafis' complaints, sent Hutton's Landscaping to clean up the yard on several occasions. Mr. Hutton also testified that DRH paid over \$3,000 for eight (8) hours of cleanup on the Shafi Property, and laid sod in the backyard at no charge to the Shafis. Moreover, Mr. Shafi himself acknowledged that he approved of the remediation work performed by Hutton's at the time it was performed, and that no debris was present in his yard at the time the sod was laid. This work was not even covered under any applicable warranty. Thus, it is clear that DRH acted as any reasonable seller would in addressing the Plaintiffs' complaints and that Plaintiffs failed to present any cognizable evidence to the contrary.

⁷ Plaintiffs theory requires the conclusion that any property owner who hires a contractor, such as a plumber, electrician, or other kind of handyman services, would be tasked with supervising them simply because they are the owner who can order their work to cease.

2. Breach of Contract

In an action for breach of contract, the burden is on the plaintiff to prove the contract, its breach, and the damages caused by such breach. *Allegro, Inc. v. Scully*, 418 S.C. 24, 791 S.E.2d 140 (2016). In general, a breach of contract is defined as a failure without legal excuse to perform any promise which forms a whole or a part of a contract. *Freeman Dodge, Inc. v. MCC Financial Services, Inc.*, 272 S.C. 164, 249 S.E.2d 897 (1978). Further, in every contract, there exists an unspoken, but legally enforceable, promise of good faith and fair dealing. *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966). However, there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do. *See Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 473 S.E.2d 52 (1996).

Plaintiffs did not present evidence of any contractual provision of the Home Purchase Agreement that DRH allegedly violated, other than their subjective belief that “they did not receive the benefit of the bargain.” This vague, self-serving testimony is not enough to create a reasonable inference that DRH violated any contractual provision contained in the Home Purchase Agreement. *See Taylor v. Cummins Atl., Inc.*, 852 F. Supp. 1279, 1286 (D.S.C. 1994) (In order to prevail on a breach of contract claim under South Carolina law, a plaintiff bears the burden of establishing the existence and terms of the contract, *defendant's breach of one or more of the contractual terms*, and damages resulting from the breach. (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962) (emphasis added)). Even more specifically, the language of the contract does not contemplate a cleared, graded, and sodded backyard. This fact is not disputed. Plaintiffs did not prove that their alleged damages were caused by any act or

omission by DRH in breach of the contract, or that such alleged damage could be attributed to any such act or omission or any condition affecting the Property.

As a result, Plaintiffs' claim for breach of contract fails as a matter of law, and judgment notwithstanding the verdict is appropriate.

B. In the Alternative, a New Trial is Warranted Due to Legal Errors Affecting the Jury's Verdict in the Form of Admission of Improper Evidence.

1. New Trial Absolute

"The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) (citation omitted). "The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror 'hangs' the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome." Each time that the South Carolina Supreme Court has had an opportunity to reconsider the thirteenth juror doctrine, it has "refused to abolish the doctrine" and "refused to require trial judges to explain the reasons for the ruling." *Id.* Because "the result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings." *Id.*

a. DRH is entitled to a New Trial Absolute due to the erroneous grant of Defendants/Cross-Claim Defendants motion for bifurcation under the guise of a revived motion for summary judgment.

DRH incorporates its arguments raised in its Motion to Alter or Amend the Judgment related to this issue. The Court's granting of the subcontractor defendants/cross claim defendants motion inhibited DRH's ability to effectively present its case-in-chief and thereby affected the jury's decision in at least three particulars:

- (1) The defendants/cross-claim defendants were not listed in the verdict form, eliminating the possibility that fault could be allocated amongst all joint tortfeasors.
- (2) Following the granting of defendants/cross-claim defendants motion, the Court nevertheless allowed testimony related to contract formation and purported coercion by DRH against Hutton's. Such testimony⁸ was barred by SCRCP 404's exclusion of improper character evidence; was unfairly prejudicial and was not at all probative in light of the fact that DRH's claims for contractual indemnity had already been dismissed at this juncture.
- (3) DRH's submission of a jury charge to remedy its concerns in (2) above by confirming that "disparaging comments . . . should not be considered" was erroneously denied.

The submission of prior "bad acts" in the form of disparaging remarks of a former co-defendant was highly prejudicial to DRH in this case. Because Plaintiffs were unable to prove negligence or breach of contract (as more fully set forth above), they instead were permitted to try a case painting DRH in a bad light in the hopes of arousing the jury's passion and prejudice.

Therefore, DRH respectfully contends that the Court committed error in the above particulars, and as stated more fully in DRH's Motion to Alter or Amend the Judgment as to its Cross-Claims. DRH, therefore, requests that a new trial absolute be ordered so that DRH may properly assert its cross-claims and remedy concerns of irrelevant and improper character evidence infecting the jury's decision on liability and damages.

⁸ By way of example, Matt Hutton's *de bene esse* deposition was played at trial. In the deposition, he stated that DRH is "bad people doing bad things" and that DRH "forced" and "coerced" him to sign "the contract" (referring to the applicable Independent Contractor Agreement between the parties).

- b. DRH is entitled to a New Trial Absolute due to the erroneous admission of testimony and evidence concerning other properties and other plaintiffs not associated with the Shafi Property.

Before trial, DRH filed numerous motions in limine, including motions to exclude evidence related to other properties and other plaintiffs not associated with the Shafi Property. The motion was denied, but Plaintiffs voluntarily agreed to limit any “non-Shafi” evidence to the surrounding homes/properties only located in the same cul-de-sac on Breeze Way.

The essence of DRH’s pre-trial motions, which it incorporates herein, was threefold:

- (1) Evidence of alleged “debris” concerning other plaintiffs’ lots or any other property is irrelevant to the Shafis’ claims because the Shafi Property is fundamentally unique and they can only recover damages related to their own property.
- (2) The *de minimis* probative value of presenting the jury with evidence of debris found in other lots or properties is outweighed by the danger of unfair prejudice to DRH, confusion of the issues, and misleading the jury.
- (3) Presenting evidence of debris on neighboring properties was substantially outweighed by the danger of unfair prejudice to DRH and confused the jury because it improperly suggested that the existence of debris is widespread in the Plaintiffs’ neighborhood and/or that because debris is present on another property, the jury should conclude (irrespective of the lack of evidence of debris actually located on Shafis’ Property) that debris is present on the Shafis’ Property. The Shafis’ claims relate only to their property and alleged damages associated with the remediation of their property. Allowing evidence of the condition of neighboring properties served only to confuse the jury about the condition of the Shafis’ Property, mislead the jury about the condition of the Shafis’ Property, and create prejudice based upon the jury’s potential evaluation

of properties that 1) were never worked on or owned by any defendant or 2) have unique characteristics specific to each lot, including the location of trees, landscaping and the location of the home.

At trial, Plaintiffs presented evidence in the form of testimony, photographs, and physical evidence of debris found on a neighbor's lot, as well as property never owned or controlled by DRH. In light of all of the evidence presented regarding the Shafi Property, it is evident that the non-related evidence inflated and confused the jury's view of issues alleged concerning the Shafis' Property. Had the jury been limited to reviewing the evidence that was presented related only to the Shafi Property, it is inevitable that they would not have found DRH liable.

Because this evidence was improperly admitted and argued to the jury, under Rule 59(a), SCRPC, and the Thirteenth Juror Doctrine, the court should, respectfully, order a new trial absolute.

- c. DRH is entitled to a New Trial Absolute due to the erroneous admission of testimony concerning Plaintiffs' dog and child being cut by glass at the Shafi Property.

Before trial, DRH filed a motion in limine to exclude testimony and evidence related to the allegation that Plaintiffs' dog and child were cut by a piece of glass at the Shafi Property. DRH's motion was centered on the minimal probative value of such testimony being substantially outweighed by the danger of unfair prejudice. Indeed, the testimony is entirely irrelevant as well since the Plaintiffs admit that they are not alleging personal injury damages, and their dog/child are not plaintiffs to the action.

However, Plaintiffs were permitted to testify concerning the allegations, and did not provide any medical documentation or evidence in support of the testimony. Therefore, as DRH feared, the testimony served only to improperly garner sympathy from the jury members.

- d. DRH is entitled to a New Trial Absolute due to the Court's failure to charge the jury on loss or destruction of evidence.

During the charge conference, DRH requested that a spoliation charge be given to the jury and provided a ready example of the same: "If you find that a party has lost or destroyed evidence, you may infer that the lost or destroyed evidence would have been adverse to that party." (citing *Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 394-95, 396 S.E.2d 369, 372 (1990); *Gathers ex rel. Hutchinson v. South Carolina Elec. and Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993)).

DRH's request for the above-referenced charge arose from Plaintiffs' presentation of a red solo cup of glass they allegedly collected from their yard approximately one month before trial and presented to the jury. They testified that they have picked up glass/debris at various times since the commencement of the lawsuit in May 2018 but threw out the glass/debris and did not preserve it. There is no evidence other than their self-serving testimony that they collected any debris. They provided no detail concerning the characteristics or location of the alleged debris, either. Plaintiffs also submitted photographs and testimony regarding shingles discovered in the ground when they built their fence. However, Mr. Bunner confirmed that the fence was built off of the Shafi Property line. Notably, multiple parties and experts visited the Shafi Property on October 29, 2021, and, by all accounts, no one observed debris. The members of the jury themselves participated in a site visit to the Shafi Property during trial, and the undersigned did not note any debris on the Shafi Property. If that was not enough, the only subsurface investigation of the Shafi Property that has ever been performed was (1) ground penetrating radar by Penhall; and (2) a metal detector used by Plaintiffs' repair expert, Roger Odum. The former only identified one rock. The latter only identified a bottle of caulk and several rocks.

In light of the above, DRH's request to charge was reasonable and should have been submitted to the jury. If it would have, there is no doubt that the jury would have found an adverse inference in light of all of the evidence (or lack thereof) before it.

Because this charge was improperly excluded from presentation to the jury, under Rule 59(a), SCRCP, and the Thirteenth Juror Doctrine, the court should, respectfully, order a new trial absolute.

- e. DRH is entitled to a New Trial Absolute due to the Court's submission of an improper verdict form to the jury.

The negligence section of the jury verdict form asks the jury: "Do you find by a preponderance of the evidence that defendant, D.R. Horton, was negligent in the construction *and supervision* of Plaintiffs' property?" (emphasis added).

The addition of "and supervision" to the form confused the issues for the jury. As stated *supra* and at trial, the standard of care for supervision is different for an owner (like DRH in the land development phase) and the general contractor (like DRH in the construction phase). By including the phrase, it is unclear as to whether the jury decided in which phase DRH failed to supervise and, if so, which contractor(s) the duty of supervision applied to. As such, the cause of action was misstated, and if it was stated properly (without the "*and supervision*" language), the jury would have found in favor of DRH.

2. In the Alternative, the Court should order a New Trial Absolute or New Trial *nisi remittitur* due to excessive verdict.

In the alternative, the Court should, respectfully, order a new trial absolute or new trial *nisi remittitur* because the verdict is objectively excessive, not supported by the evidence, and is the clear result of undue prejudice or passion caused by the improper admission of evidence and argument pertaining to the same.

A trial court “may grant a new trial absolute on the ground that the verdict is excessive or inadequate.” *Brinkley v. S.C. Dep’t of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) (internal citations omitted). “A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the ‘result of caprice, passion, prejudice, partiality, corruption, or other improper motives.’” *Smalls v. S.C. Dep’t of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000) (citations omitted). To warrant a new trial, the verdict must be so grossly excessive as to clearly indicate the influence of an improper motive on the jury. *Welch*, 342 S.C. at 302, 536 S.E.2d at 420. The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion. *Wright*, 372 S.C. at 35-36, 640 S.E.2d at 504-05.

A motion for new trial nisi remittitur asks the trial court to reduce the verdict because the verdict is merely excessive. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). “A new trial nisi is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court.” *Waring v. Johnson*, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000) (further citations omitted). The trial court alone has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive. *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 88-89, 610 S.E.2d 852, 856 (Ct. App. 2005).

Plaintiffs presented evidence of actual damages in the form of a repair estimate of approximately \$150,000.00. Plaintiffs proffered Roger Odum, of U.S. Waste, in support of the proposed repair. Mr. Odum’s estimate, however, is speculative because he admitted that he had “no earthly idea” what needed to be done to the lot until he “dug” in the yard. He also based his estimate off of a one acre yard (when the Shafi Property is .35 acres) and classified the proposed estimate as a “worst case scenario.” On the other hand, DRH proffered Dusty Williams of

Dustcom in support of its counter-estimate. Mr. Williams performed work on Lot 19 (next to the Shafi Property) owned by DRH in May 2018. Mr. Williams performed the same scope of work estimated by Mr. Odum, here, for under \$13,000.00. Following the work, a GHD engineer, Chuck Rushing, affirmed the success of the work. Steve Moore also affirmed that the work was done properly and effectively.

Dustcom's work on Lot 19 is the only example of an actual repair performed in the neighborhood. As it relates to the Shafi Property, Mr. Williams prepared a three-tiered estimate to perform work, if necessary. The first tier essentially mirrored the work on Lot 19 (\$16,102.00). The second tier contemplates work being performed in the whole yard, front and back (\$26,523.00). The third tier contemplates giving the Plaintiffs more than they had before: "all yard, replace irrigation, sod,⁹ and landscaping" (\$42,348.00). Steve Moore also endorsed Mr. Williams' repair costs, in the event it were deemed necessary.

The jury was not presented with any cognizable evidence to support damages in the amount awarded. Therefore, DRH respectfully asserts that the verdict, under these circumstances and the facts and evidence presented at trial, is grossly excessive in light of the evidence presented, and requires that the Court either order a new trial absolute or new trial *nisi remittitur*.

III. CONCLUSION

WHEREFORE, Defendant D.R. Horton, Inc., prays this Court will grant its Motion for Judgment Notwithstanding the Verdict or, in the alternative, will grant DRH a New Trial Absolute, or, in the alternative, will grant DRH a New Trial Nisi Remittitur.

⁹ Mr. Odum's estimate does not even include sod, which is more favorable to the Plaintiffs and more expensive.

Dated this 29th day of November, 2021.

Respectfully submitted,

s/ S. Michael Nail

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Kirsten Peterson, S.C. Bar No. 104226

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49434372.1

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2018-CP-07-00911
COUNTY OF BEAUFORT

Richard W. and Rebecca
A. Drier; Sarmed and
Jessica M. Shafi, et al.

Plaintiff,

vs.

PRETRIAL HEARINGS

D.R. Horton, et al.,

Defendants.

October 29, 2021
Beaufort, South Carolina

B E F O R E:

The Honorable H. Steven
DeBerry, Judge Presiding

R E P O R T E D B Y: Kymberlee M. Williams, RPR

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* * *

THE COURT: All right, the next case is 2018-CP-07-00911, Richard Drier vs. Atlas Surveying. So I see there's about five motions on the docket, in regards to this case; is that right?

MR. ROSS: Yes, Your Honor.

THE COURT: So there's some -- about four of them are motions for summary judgment, and the one motion to compel; is that right?

MS. LUCEY: I believe so.

MR. ROSS: I believe that's correct, Your Honor.

THE COURT: All right, and who's here on behalf of the Plaintiff?

MS. WILLIAMS: Your Honor, may it please the Court, my name is Alexandra Williams on behalf of the Plaintiff.

THE COURT: Okay. And on behalf of the Defendants?

MS. WHITE: Good morning, Your Honor, Megan White, on behalf of Hutton's Landscaping, along with Emily Gifford Lucey.

MS. LUCEY: Good morning, Your Honor.

THE COURT: Good morning.

1 MS. PETERSON: Kirsten Peterson, on behalf of D.R.
2 Horton.

3 THE COURT: All right, hang on one sec. All right.

4 MR. ROSS: Good morning, Your Honor, Jeff Ross here on
5 behalf of the Lather Entities, and I'll go a little bit
6 more into that later.

7 THE COURT: Okay.

8 MR. ROSS: For now it just summarizes.

9 THE COURT: All right, well -- and I'll defer to -- to
10 the lawyers to tell me how this best makes sense to move
11 forward with these motions this morning.

12 MR. ROSS: Yes, sir, if -- if I could, again, they're
13 on behalf of Lather. I've got to two motions pending
14 before the Court, and we'd move to join with the Hutton's
15 motion as to Plaintiff's claims, but the first motion we
16 have before the Court was on behalf of Lather Construction,
17 SC, and we have reached an agreement with both Plaintiff's
18 counsel and counsel for D.R. Horton, that that claim -- the
19 claims against Lather Construction, SC will be dismissed,
20 so that motion does not need to be heard.

21 THE COURT: All right, and there -- well, are you
22 gonna submit an Order to that effect, or --

23 MR. ROSS: I -- I just found it out like within 30
24 seconds --

25 THE COURT: Okay.

1 MR. ROSS: -- to stand before you.

2 THE COURT: I understand.

3 MR. ROSS: I'm happy to submit an Order though.

4 THE COURT: Or we can -- all right.

5 MR. ROSS: Again, I think it's important for you to
6 know this case is up for trial on the date November 15th.

7 THE COURT: Okay.

8 MR. ROSS: There's been something like 30 depositions
9 taken. It's almost fully discovered, if not, completely
10 discovered, and we're at the end of the road.

11 THE COURT: November 15th, that's in -- all right,
12 so --

13 MR. ROSS: And I mean we can do a four and four Order,
14 or I can submit an Order, whatever Your Honor --

15 THE COURT: Well, we'll just get through all these and
16 see where we stand and then go from there.

17 MR. ROSS: Yes, sir.

18 THE COURT: All right?

19 MR. ROSS: The second motion that we had is a motion
20 to dismiss the contractual indemnity claims against D.R.
21 Horton or that are brought by D.R. Horton.

22 THE COURT: All right. So is that on the docket?

23 MR. ROSS: Yes, motion for summary judgment.

24 THE COURT: Okay.

1 MR. ROSS: Yes, it's -- it's showing as number three
2 motion for summary judgment.

3 THE COURT: Okay. All right, go ahead.

4 MR. ROSS: All right. The -- the basis of this
5 motion, Your Honor, is their claims for -- they have two
6 claims, they have one claim for contractual indemnity, and
7 one claim for equitable indemnity. The claim for
8 contractual indemnity, it's our position that they do not
9 have a contractual indemnification clause in the contract.
10 We took the 30(b)(6) deposition of D.R. Horton, and one of
11 the things we wanted to find out is, you know, what
12 obligations and what contracts are we supposed to operate
13 under? And, their 30(b)(6) witness, there are two
14 contracts potentially in play here. One was a December
15 2nd, 2013, what they referred to as a master contract,
16 which says nothing about this project that we're here about
17 today.

18 The other one was a June 30th, 2014 contract that is
19 project-specific. Both of these are attached as exhibits
20 to our motion and memo, the 2014 contract as Exhibit A, and
21 a 2013 contract as Exhibit B. The project-specific
22 contract does not have any contractual indemnification
23 language in it. And we took the 30(b)(6) witness'
24 deposition of D.R. Horton, and as Your Honor knows, the
25 purpose of the 30(b)(6) designation is so we don't get --

1 have to, you know, hop between deponent and deponent and
2 deponent, we get to designate one person or the -- the
3 named party, if you will, to designate one person or
4 multiple people, to talk about certain topics. And we
5 deposed this person, and he said, and I quote, "That the
6 entire universe," and that's the only thing I'm going to
7 quote, 'cause I can't get the rest of the sentence right,
8 but he said, "The entire universe of what we were supposed
9 to comply with, we being Lather, was the June 30th, 2014
10 contract." That's what their witness said.

11 Now we've got an affidavit that comes back in their
12 motion in opposition, that there was a set of
13 specifications that's unsigned that has a contractual
14 indemnification provision in it. What we've got is, a
15 situation where the actual witness for D.R. Horton said one
16 thing, and no offense, the lawyers are doing what they're
17 supposed to be doing, but now the lawyers seem to be
18 testifying to something else. And so we ask that --

19 THE COURT: Who's the affidavit from?

20 MR. ROSS: What's that?

21 THE COURT: Who's the affidavit from?

22 MR. ROSS: The affidavit is from their witness, it's
23 Ron -- Ron Bunner, but -- but the affidavit's in direct
24 contradiction to what we talked about in his deposition.
25 That was our time to ask him questions. And so now we get

1 an affidavit that says, "Hey, I've got a set of
2 specifications," not signed and no evidence at all, and no
3 testimony that was ever presented to us, given to us, or
4 shown to us or was part of a contract, but for an affidavit
5 after we filed this motion. So we're asking the Court to
6 dismiss the -- the claims for contractual indemnity on that
7 grounds.

8 We've also got a second ground in here, based on the
9 Concord and Cumberland case. I'm sure Your Honor is
10 familiar with it, but, basically, that's where the Courts
11 threw out a claim for contractual indemnity, because the
12 contract said it concluded the concurrent negligence of the
13 general contractor; and what the Court said is, it wasn't
14 clear and explicit enough, so that the subcontractor signed
15 the contract, and knew that they would be defending the
16 general contractor for its concurrent negligence, which is
17 the same thing as its own negligence.

18 And what the Court said is, "It's not clear and
19 specific, we're not gonna enforce it. We've never seen a
20 clause for a contract written that we're going to enforce."
21 And in the footnote they say, "To the lawyers drafting
22 contracts, we're sorry, can't help you, don't know what to
23 tell you, but we've never seen one," And so what we've got
24 here is a contract that is asking for us to indemnify the
25 general contractor, even for their concurrent negligence,

1 which is exactly what Concord and Cumberland said you can't
2 do. So we -- we're asking for the claims to be dismissed
3 on two grounds.

4 The third thing that we would ask is, the equitable
5 indemnity claim be dismissed, because, if -- frankly, if
6 there's any obligation on behalf of D.R. Horton to take
7 money, that means they don't have clean hands, and if
8 there's no obligation on behalf of D.R. Horton to pay, then
9 they have no damages, and, therefore, it doesn't apply
10 either way, so --

11 THE COURT: Uh-huh.

12 MR. ROSS: -- that's our argument, Your Honor. If you
13 have any questions, I'm happy to answer.

14 THE COURT: So what -- what are you -- what's your
15 position about this affidavit creating a question of fact
16 now? Are -- I mean he's -- he's providing an affidavit in
17 contradiction to his deposition; is that right?

18 MR. ROSS: That's correct, Your Honor.

19 THE COURT: And you would, ordinarily, just impeach
20 him at trial for -- for that, right?

21 MR. ROSS: Well, Your Honor, when we had a chance to
22 talk to him, that was our chance for him to testify and
23 give us his position and to submit an affidavit after the
24 fact in direct contradiction, I mean that defeats the whole
25 30(b)(6) witness designation. The other side of it is,

1 that -- that what the specifications he -- he's suggesting,
2 there's no evidence that that was ever even part of the
3 contract submitted to us that we've seen, and they're not
4 signed. It's everyday knowledge you can't enforce a
5 contract against somebody that hasn't signed it, unless you
6 have some other information that provides, for example, it
7 was ratified by way of a change order or reference, and
8 it's -- it's -- we don't have that here. And given that
9 we're two weeks away from trial, I -- we asked the witness
10 for exactly the information, and he told us what our entire
11 universe was, and now we've got something directly
12 contradicting what his testimony was two weeks before
13 trial.

14 THE COURT: And when were these motions filed?

15 MR. ROSS: August 12th, I think.

16 THE COURT: Okay. It seems awful close to trial to be
17 having these motions heard, but I understand, we'll get
18 them done, all right?

19 MR. ROSS: Okay, and -- and, Your Honor, if I could,
20 usually, when we come up in front of the Court with a
21 motion for summary judgment, the first words out of the
22 opposing counsel's mouth is, "Well, discovery's not
23 complete." So the reason we waited so long is because
24 we're going to trial.

25 THE COURT: I understand.

1 MR. ROSS: Thank you, Your Honor.

2 THE COURT: All right.

3 MS. PETERSON: Good morning, Your Honor, Kirsten
4 Peterson for D.R. Horton. As an initial matter, D.R.
5 Horton and Lather entered into the independent contractor
6 agreement on December 2nd, 2013. What he failed to mention
7 is that Lather's own fact witness, the owner of Lather,
8 acknowledged in his deposition that this ICA did govern the
9 work at the time in the neighborhood in dispute here. So
10 that in and of itself creates a factual dispute from what
11 the attorney is now saying.

12 Additionally, as he mentioned the deposition of the
13 D.R. Horton's 30(b)(6) witness was their time to ask
14 questions. They never once presented D.R. Horton's
15 30(b)(6) witness with this independent contractor agreement
16 that contains the indemnification provision. When they
17 asked him about the specs -- I'll call it the site
18 development contract, which was a huge project, so we had
19 the ICA document, you know, that kind of governed the
20 relationship, and then you had the specs that covered the
21 specifications for what Lather was required to do, while
22 they were performing -- actually performing their job, and
23 I dispute that it wasn't signed, or that it wasn't -- that
24 they weren't required to follow everything, absolutely
25 were.

1 And so when they presented the site development
2 contract in front of Mr. Bunner, Mr. Bunner said, "Yes,
3 this is a contract that applied to the work at Tidewater,"
4 which -- which is true, it is a contract. I remember they
5 showed him the ICA and asked, "What did this cost to
6 apply?" That is what Mr. Bunner's affidavit is for, to
7 clarify, "Yes, I testified that the site development
8 contract was a contract, and in conjunction with the
9 independent contractor agreement that Lather's own, you
10 know, owner acknowledged govern the work, and they signed
11 it prior to the work commencing at Tidewater."

12 So I definitely think there is -- they have raised an
13 issue of material fact, as to which contract applies. D.R.
14 Horton's position is that it would be this ICA in
15 conjunction with the site development contract. As to his
16 position that the I -- the indemnify provision in the ICA
17 is unlawful, I believe his reliance on Concord is totally
18 procedurally immature. In that case the general contractor
19 actually acknowledged that they were at least partially
20 negligent, and so it was very clear that concurrent
21 negligence was an issue in that case. In this case D.R.
22 Horton is expressly denying any negligence. No factfinder
23 has found that D.R. Horton was negligent. We are not
24 asking to be indemnified for D.R. Horton's own negligence,
25 our pleadings are extremely clear that to the extent that

1 D.R. Horton is found liable for damages sustained by
2 Plaintiff, which are denied, and to the extent the fact-
3 finder determines that those damages were the result of
4 Lather's work, then we expect to be indemnified in
5 accordance with the contract. So his reliance on Concord,
6 this case has totally different facts than that case.

7 I would also further state that to the extent that
8 this motion is about parsing out who's negligent for who,
9 and what the contract language means, that's an issue of
10 fact. As Your Honor knows, contract interpretation is an
11 issue of facts. As to the -- I believe -- I'm not sure if
12 he argued it orally, but his memo talked about the unclean
13 hand argument; that D.R. Horton cannot present an equitable
14 indemnity claim, because -- because we were sued -- also
15 sued by the Plaintiffs, that somehow it gives us unclean
16 hands, as a matter of law.

17 Again, no factfinder has found that D.R. Horton has
18 unclean hands. We expressly deny that we do. It would
19 also be totally inapplicable to our contractual indemnity
20 claims. I think that position also goes against the case
21 law. You could look up Town of Winnsboro, where the Court
22 found that the general contractor could bring equity --
23 equitable indemnity claims against a subcontractor in the
24 underlying lawsuit

1 And, in fact, in that case, the general contractor was
2 exonerated of all liability, and the subcontractor was the
3 one who was found liable. So it is not a matter of law
4 that D.R. Horton is going to be found negligent in this
5 instance. And then there's -- there's another case too
6 called Stoneledge where the same thing happened, the
7 general contractor -- a subcontractor moved for summary
8 judgment against the general contractor on the grounds that
9 the general contractor had unclean hands as a matter of
10 law. That case was overturned by the Court of Appeals.
11 They said, "No, it's too early in litigation to say that
12 the general contractor has unclean hands as a matter of
13 law."

14 Finally, that argument would not work at all for the
15 breach of warranty claims that the plaintiff has also
16 brought, and Your Honor knows breach of warranty is
17 premised not on fault, it's, you know, essentially, strict
18 liability, so the unclean hands defense that they arose
19 isn't applicable there.

20 THE COURT: All right. All right, who's next?

21 MR. ROSS: May I respond briefly, Your Honor?

22 THE COURT: Sure.

23 MR. ROSS: In Concord and Cumberland, she is correct
24 that there was a finding already when the Court dismissed
25 it, but nowhere in the ruling did it talk about the fact

1 that there was a finding. The question of contract
2 interpretation, I would respectfully disagree. That is a
3 question of law is for the Court to decide.

4 As the Court knows, when you're interpreting a
5 contract, you only work within the four corners of the
6 contract. I'd like to go back to what we've talked about
7 with the 30(b)(6) witness. I pulled up the -- it's in the
8 memo, and I want to read two brief snippets, and then I'll
9 -- I'll sit down, Your Honor, and I appreciate your
10 indulging me.

11 On Page 168 the question was, "Okay, so it's your
12 understanding that this will be the contract that will
13 govern the work of this project?" The answer, "Yeah, this
14 is contract that governs the scope and pricing and
15 agreement for this project."

16 Then on 171. "So these documents listed here it says,
17 'Article 9, contract documents, and then 901,' it lists a
18 bunch of things. These are the kind of documents that were
19 forming the entire universe of what Lather would have to be
20 familiar with and be responsible for complying with?" And
21 the witness says, "I will say yes." And so we relied on
22 that, and that's -- I mean, primarily, that's the basis for
23 our motion, Your Honor.

24 THE COURT: All right. Thank you. All right, the
25 next motion, who's going to argue that?

1 MS. LUCEY: Well, Your Honor --

2 THE COURT: Or how do -- go ahead.

3 MS. LUCEY: It's -- my name is Emily Lucey, good
4 morning, representing Hutton's Landscaping with Ms. White.
5 The next motion on the roster deals with Hutton's motion
6 for summary judgment against the Plaintiffs, but Hutton
7 also has a motion for summary judgment based on -- against
8 Horton's cross-claim, so it's a nice follow-up to Mr. Ross'
9 argument, although our arguments are slightly different.

10 THE COURT: So you want to argue the cross-claim
11 summary judgment motion first; is that right?

12 MS. LUCEY: If -- if you -- if, Your Honor --

13 THE COURT: Yeah, that's fine.

14 MS. LUCEY: -- would like that. And just a little bit
15 of background, just to give you a little bit of context
16 about what this case is about, we've all been living with
17 it for several years, but, if Your Honor would like, I'll
18 be happy to briefly go over some of the facts.

19 This case arises out of an alleged construction defect
20 in the neighborhood called Tidewater Creek, over on Lady's
21 Island. There are 29 named Plaintiffs in the case, 15
22 homes. The trial on November 15th relates to one of the
23 homeowners, the Shafis, but these motions are for the
24 entire case of all of the homeowners. The first case was

1 severed from the rest of the homeowners so we could
2 actually get the case to trial.

3 The action was filed against D.R. Horton, who I've
4 been referring to as Horton, who, according to who we
5 represent, was either an owner, developer and/or a general
6 contractor for the project. They developed this
7 subdivision, which has more than the 15 homes that are in
8 the litigation.

9 The Plaintiffs have asserted various claims and causes
10 of action. They, essentially, relate to a claim that, one,
11 the homes were built on either an unregistered or an
12 illegal landfill, and that the owner, contractor and
13 subcontractors failed to properly remediate that issue; or,
14 alternatively had notice of the issue and failed to do
15 anything about it, and, in fact, concealed that from the
16 homeowners

17 So that's sort of the background and what the claims
18 relate to in this particular case. My client is Hutton's
19 Landscape. They performed as a subcontractor to D.R.
20 Horton. There were, essentially, two phases of
21 construction. There was a land development phase, which
22 involved labor construction, Mr. Ross' client, who did the
23 earthwork moving, clearing, that type of work; and then
24 there is what Horton refers to as the vertical
25 construction, obviously, the construction of the homes.

1 And Hutton's Landscape was involved in the vertical
2 construction, it did landscaping, it poured the driveways,
3 it poured the slabs, it laid sod.

4 So that was Hutton's' scope of work, pursuant to an
5 independent contractor agreement with Horton. It was a
6 blanket basis. It was signed in 2014 between Hutton's and
7 Horton and applied to all work that Hutton's would have
8 performed, which would include the work at the Tidewater
9 neighborhood.

10 This particular motion seeks summary judgment against
11 Horton on the equitable and contractual indemnity clause.
12 So we are seeking relief from those cross-claims. The memo
13 that was submitted includes a very lengthy indemnity
14 provision included in that contract, it's Section 10.1 of
15 the agreement. It's cited in the memo, and it's also an
16 exhibit, the independent contractor agreement is an exhibit
17 to the motions for the memo.

18 We are specifically focused on that provision for our
19 motion. In that indemnity provision, Horton seeks to
20 require Hutton's to indemnify it for a number of things,
21 but not only to indemnify it, it requires Hutton's to
22 defend Horton for any and all claims asserted against
23 Horton. Some of the language says, "Once the duty to
24 defend is triggered, the contractor, Hutton, is obligated

1 to defend the entire action, including any claims not
2 subject to indemnity."

3 So it says you have to indemnify us for certain causes
4 of action. Not only that but you've got to pick up the
5 bill for the entire lawsuit even if you don't have to
6 indemnify the current claim.

7 And our position is that indemnity provision in and of
8 itself is void and unenforceable pursuant to the Anti-
9 Indemnity Statute, which is South Carolina Code Section 32-
10 2-10. And the reason we believe it's unenforceable is,
11 because it requires Hutton's to defend and pay attorney's
12 fees for Hutton's, one, sole negligence, and, two,
13 intentional acts.

14 So the Anti-Indemnity Statute prohibits one party from
15 requiring another, it prohibits Horton from requiring
16 Hutton's to indemnify Horton for Horton's own negligence.

17 But Horton can't say, "Hutton's, if I'm solely
18 negligent for something, you still have to pay for it," and
19 that's the purpose of the Anti-Indemnity Statute. So we
20 acknowledge that the Anti-Indemnity Statute doesn't
21 explicitly include the duty to defend with it. It says you
22 cannot require someone to indemnify you for your own
23 language -- or your own negligence; but our position is
24 that the indemnity provision is so broad and overreaching
25 it requires Hutton's to defend Horton for an entire claim.

1 Any claim asserted against Horton, even if it includes
2 things for which Hutton's doesn't have to indemnify.

3 So it adds a whole other layer of obligation and
4 responsibility. Now, in the insurance contract, there is a
5 distinct difference between duty to defend and the duty to
6 indemnify. An insurance company has a broader duty to
7 defend than it does to indemnify, but our position is this
8 contract is not an insurance contract, it -- it's not.
9 It's a business contract, an agreement entered into between
10 the parties. It has nothing to do with additional
11 insurance status, it has nothing to do with insurance
12 contracts, it's strictly a contractual indemnity claim.
13 And because it requires this overarching duty to defend as
14 part of the duty to indemnify, it's void. There's a strong
15 public policy argument underlined, why it's illogical and
16 unenforceable for the Horton to have this type of
17 provision.

18 Why would a leg- -- the legislature with this statute
19 protect a subcontractor, saying you can't -- you don't have
20 to indemnify the general for its sole negligence, but you
21 still have to pay for their defense costs on that claim.
22 It makes no sense, it's illogical, and it -- it creates a
23 huge public policy issue, and it potentially creates a
24 situation where Hutton's would be required to defend claims

1 and have to pay legal fees far in excess of its liability
2 or fault; and so it's just an illogical result.

3 Within Horton's memorandum in opposition, which was
4 filed I think yesterday, they -- they pointed at the Addy
5 case (phonetic), and we relied on the Addy case in our
6 memo. And Horton's position is that duty to defend is not
7 mentioned in the Addy case. What the Addy case says is
8 where the duty to indemnify is either implied by law or
9 rises under contract, which is what is alleged here,
10 reasonable attorney's fees incurred in resisting the claim
11 indemnified may be recovered.

12 So our position is Addy says the duty to defend costs
13 are included as part of duty to defend when the language
14 says the reasonable attorney's fees incurred in defending
15 the claim.

16 So the Court didn't explicitly say fees incurred in
17 defending the claim, but it says resisting the claim. Some
18 synonyms withstand, hold out. I think the Court is saying
19 defend the claim when it says resisting the claim. And I
20 think it's -- it's synonymous. Withstand, hold out,
21 combat. I think the Court is saying defend the claims when
22 it says resisting the claim. It's synonymous. I think our
23 reading of Addy case is accurate.

24 So, Your Honor, in addition to requiring Hutton's to
25 indemnify -- potentially, indemnify and defend the claims

1 for sole negligence, it also requires Hutton's to defend
2 claims against Horton for Horton's intentional acts. So
3 that removes any incentive for Horton to act with any care
4 on any project, because it can rely on this, what we
5 believe a void policy provision, which says, well, if we're
6 sued for our negligent -- or intentionally negligent act or
7 intentional acts, Hutton's will pay the bill, 'cause they
8 signed this contract. And, again, that creates an
9 illogical, unreasonable result that is void against public
10 policy because it shifts the entire burden to Hutton's for
11 the sole negligence and the intentional acts of Horton
12 under the contract.

13 So for those reasons, Your Honor, we would argue that
14 the contractual indemnity provision is void against public
15 policy, because it requires this duty to defend, which is
16 much broader, and requires Hutton's to defend Horton's sole
17 negligence and intentional act. We believe that violates
18 the Anti-Indemnity Statute and we further believe its void
19 against public policy.

20 One issue, additionally, on the indemnity claims that
21 was raised by Horton in reply are severability. Our
22 position is that the entire provision, the entire paragraph
23 in 10.1 should be stricken from the contract, it's
24 unenforceable. Horton makes the argument that within this
25 paragraph, which is quite lengthy, all single-spaced, a

1 long paragraph, can contain separate and not interdependent
2 clauses. I - I don't understand that. I -- I do agree
3 there's a list of four things for which Hutton's has to
4 potentially indemnify or defend Horton for, but I sort of
5 look at it like a plate of spaghetti.

6 Horton has said, "Look, there are some pieces of
7 spaghetti that you have to indemnify us for. There are
8 some pieces of spaghetti you have to defend us for and
9 we're just gonna throw it on the plate for you and hand you
10 a plate of spaghetti. And there is no easy way for the
11 Court or jury or anyone else to pull out the pieces of
12 spaghetti on the plate. So it's not something that can be
13 easily severed or parsed, they're all inter-dependent and
14 related to each other.

15 Finally, Your Honor, we did file a motion for summary
16 judgment as to the equitable indemnity claims. Mr. Ross
17 addressed some of that. Horton on the vertical
18 construction, it's 30(b) witness -- 30(b)(6) witness said
19 it drafted the project specifications, the building permits
20 for these homes, so it's important that the contractor --
21 there's no question, in my mind at least, that the Jury
22 will have a fault and liability. Horton distinguishes
23 between fault and liability.

24 There's no question in my mind that it's the general
25 contractor's fault will be -- and liability will be

1 allocated to D.R. Horton, the general contractor. They
2 drafted these specs. They had a superintendent on site.
3 You know, they weren't an actual owner, they weren't an
4 actual general contractor, you know, there wasn't a man
5 behind the curtain in Texas. There were people on the
6 ground, on-site, managing the vertical construction of
7 which Hutton's was part of. Based on those arguments, Your
8 Honor, we would -- we, being Hutton's, would respectfully
9 request that you grant summary judgment as to Horton's
10 equitable and contractual indemnity process.

11 Thank you, Your Honor.

12 THE COURT: All right, thank you.

13 MR. ROSS: Your Honor, again, Jeff Ross for Lather.
14 We move to join in the motion. I just want to point out to
15 the Court the contracts that we're all talking about have
16 very, very similar language in them.

17 THE COURT: So you're moving to join in this motion
18 with Hutton's?

19 MR. ROSS: Yeah, we filed a motion several days ago to
20 join in their arguments, as to their claims against both
21 the Plaintiffs and D.R. Horton. And the arguments that
22 she's making are very much, you know, similar to what I'm
23 making, and the same language applies to both, so I just
24 wanted to point that out to the Court.

25 Thank you, Your Honor.

1 THE COURT: All right.

2 MS. PETERSON: And, Your Honor, I just have a few
3 comments in response. I think the crux of her argument
4 comes down to two points. The first point is that D.R.
5 Horton is asking to be indemnified for sole negligence.
6 That is just absolutely not accurate. You can look at the
7 face of the complaint, D.R. Horton is clear that to the
8 extent it is found liable for damages pertaining to
9 Hutton's' performance, under the contract, caused in whole
10 or in part by Hutton's' conduct, then it is entitled to
11 indemnity.

12 The contract explicitly exempts indemnity for D.R.
13 Horton's sole negligence. At the very last sentence it
14 says, "Notwithstanding the foregoing, nothing herein shall
15 require contractor, Hutton's or Lather, to indemnify D.R.
16 Horton against liability for damages," blah, blah, blah,
17 "resulting from the sole negligence -- or sole intentional
18 act or admission -- or omission of D.R. Horton."

19 So this whole sole negligence issue is simply not at
20 issue here at all. We are not asking Hutton's to indemnify
21 us for D.R. Horton's sole negligence, or, for that matter,
22 D.R. Horton's concurrent negligence. And once again, it's
23 too early to say whether D.R. Horton is gonna be found sole
24 negligent -- solely negligent, as a matter of law, or
25 concurrently negligent, as a matter of law.

1 I submit to you that before that -- we could even get
 2 to the starting point of that, you would have to grant
 3 Plaintiff's motion for summary judgment -- or Hor- --
 4 Hutton's motion for summary judgment against Plaintiffs,
 5 saying that, as a matter of law, Hutton's has no liability
 6 here. That still would not do away with D.R. Horton's
 7 cross-claims against Hutton's, because of the breach of
 8 warranty issues and the duty to defend; which brings me to
 9 my second point.

10 Hutton's tried to equate the duty to defend with the
 11 duty to indemnify in order to say that South Carolina's
 12 Anti-Indemnity Statute applies to the duty to defend.
 13 Hutton's cites no case law whatsoever that the duty to
 14 defend and the duty to indemnify are one in the same. I'm
 15 not aware of any case law that says that. I'm only aware
 16 of case laws pertaining to the duty to defend in the
 17 insurance context. Those cases say that the duty to defend
 18 is much broader than the duty to indemnify. The duty to
 19 defend is triggered upon mere allegations of wrongdoing of
 20 the promisor.

21 So in this instance, as soon as D.R. Horton was sued
 22 for Hutton's wrongdoing, we had a right to -- to issue our
 23 cross-claim, saying, okay, we're being sued for your work,
 24 now defend us. To the extent that they're saying that
 25 because now we're seeking legal fees, 'cause we asked them

1 to defend us, they refused, they just, you know, ignored
2 our tender, and now we are seeking our legal fees
3 pertaining to Defendant, Hutton's, the claim that involved
4 Hutton's in this matter.

5 I think if we submitted this to a jury and Hutton's
6 was dismissed as a matter of law, and we said, now we want
7 to be indemnified for 100 percent of our legal fees, even
8 for work done, you know, didn't result -- involve Hutton's,
9 I don't think we'd be successful on that, which is why Hut-
10 -- or -- which is why D.R. Horton is not asking to be
11 indemnified for their sole negligence.

12 Third, all of that is kind of irrelevant in light of
13 the fact that no Court -- none of these cases that they've
14 cited have said that whole indemnity provision is void,
15 illegal, none of it is enforced. They cannot evade their
16 duty to indemnify and defend D.R. Horton for damages
17 resulting from their work, by claiming that parts of the
18 provision are illegal.

19 If Your Honor finds parts of the provision are illegal
20 and unenforceable, which we contend they are not, then we
21 could get into severability. Builders First Source, a case
22 cited by them, specifically noted that South Carolina Code
23 Annotated 32-2-10, which is the Anti-Indemnity Statute,
24 specifically allows D.R. Horton and BFS to agree that BFS

1 will indemnify D.R. Horton for damages caused by D -- BFS
2 or its subcontractors.

3 To the extent trial Court found that aspect of the
4 agreement to be against public policy, we disagree.

5 If you look at the contract at issue now, Subsection
6 2, is exactly asking that, that Hutton's indemnify D.R.
7 Horton for work related to Hutton's performance, it's not
8 asking for them to indemnify D.R. Horton for D.R. Horton's
9 sole negligence.

10 I think if the Court of Appeals had intended to
11 invalidate the whole indemnity clause, because in that case
12 it did find that a portion of it was unenforceable, they
13 would have just voided the whole clause. Instead, they
14 specifically called out, and said, "No, it is legal for
15 y'all to contract for the subcontractor to indemnify the
16 general contractor for work relating to the subcontractor's
17 work."

18 I disagree that it wouldn't be easy to sever. Again
19 we're -- they are specifically outlined, you know, one,
20 two, three, four. The duty to defend says clearly -- I
21 think the language is something like this is separate and
22 independent from everything that was just said above. So I
23 think a jury could easily separate it. I think that Your
24 Honor could easily separate the provision.

1 And then, finally, as to the equitable indemnity
2 claims, I'm not gonna repeat myself for what I did with --
3 'cause a lot of the arguments overlap with Lather. Again,
4 it's -- it's simply too early to say that D.R. Horton has
5 unclean hands, as a matter of law. Every case I've cited
6 in my brief, the factfinder found that the general
7 contractor had no liability. So they can sit here all day
8 and say, "Well, we know in our heart that D.R. Horton's
9 gonna be found liable," but, you know, until the -- until
10 the jury decides that, it's -- it's just simply too -- too
11 soon to assert that.

12 THE COURT: All right. Thank you.

13 MS. LUCEY: Your Honor, may I briefly respond?

14 THE COURT: Please, please.

15 MS. LUCEY: Our position is not that the provision
16 requires us to indemnify Horton for its sole negligence,
17 that's not our position. We don't -- I -- I don't think it
18 says that. Our position is that the indemnity provision,
19 which includes the duty to defend all of these other
20 claims, including Horton's own negligence and Horton's
21 intentional act, is voiding its public policy; because
22 within that duty to defend, Hutton's is required to pay
23 these attorney's fees and etcetera, which, Addy says is
24 included in the duty to defend.

1 So our -- our position is not that it's viol- -- it
2 violates the statute, because it requires us to defend.
3 And -- and I'm glad their pleadings are clear, but at the
4 end of the day the contract provision which they are
5 seeking to enforce says, once I get sued, Horton -- or
6 Hutton's, you get the whole plate of spaghetti, no matter
7 whether or not you have to indemnify me or not, you've got
8 to pay that whole big legal -- legal fee and costs,
9 regardless of whether you have a duty to indemnify, which,
10 again, is just absolutely illogical and void against public
11 policy. Thank you.

12 THE COURT: All right. Is it --

13 MS. WHITE: All right, Your Honor, Megan White on
14 behalf of Hutton's as well. We have also filed a motion
15 for summary judgment as to all six plaintiff's causes of
16 action. In response to our motion for summary judgment,
17 Plaintiffs have agreed to withdraw their causes of action
18 for negligent misrepresentation, the South Carolina Unfair
19 Trade Practices Act violations.

20 So based on that, Hutton's is requesting an Order for
21 summary judgment on the claims for breach of contract,
22 breach of express implied warranties, and Plaintiffs filed
23 an action for negligence and gross negligence. And so just
24 as straightforward as I can be, Your Honor, I'll start with
25 why I think it's the easiest cause of action to dispose of,

1 which is Plaintiff's cause of action for breach of
2 contracts.

3 We've heard a lot today, which I'm benefitting from
4 the other about this. The independent contractor agreement
5 that was entered into between D.R. Horton and Hutton's, or
6 D.R. Horton and its subcontractors, that -- that contract
7 was entered into on a blanket basis between those two
8 parties. Specific to Hutton's, it was for construction
9 services related to landscaping and flowers. After those
10 construction services were performed by Hutton's, then D.R.
11 Horton entered into a home purchase agreement with the
12 specific purchaser/homeowner in this development.

13 And so, similarly, Your Honor, regarding breach of
14 contract, there is no contract between Plaintiffs and
15 Hutton's. And it's pretty clear-cut, as I can see, and,
16 you know, that's an issue that is a matter that the Court
17 can decide as a matter of law. And so there is no privity of
18 contract between Plaintiff and Hutton's, and that's just
19 basically as simply as I can put it, Judge.

20 THE COURT: Right.

21 MS. WHITE: What I will say is, I'll just go ahead and
22 address -- the Plaintiffs in their memorandum in
23 opposition, assert that they are a third-party beneficiary
24 of Hutton's' contract with D.R. Horton, which, Judge, I
25 completely disagree with. The rule for this is, generally,

1 third-party is not in privy of contract, that the
 2 contracting party has no right to enforce the contract;
 3 however, which is what Plaintiffs are relying on, when a
 4 contract is made for the benefit of a third person, that
 5 person may enforce the contract if the contracting party
 6 intended to create a direct rather than incidental or
 7 consequential benefit to the third person.

8 So -- and I will speak for Ms. Williams, what the
 9 Plaintiffs are trying to say is, that Hutton's contract
 10 with D.R. Horton somehow created some direct benefit, when
 11 this was a contract that was entered on a blanket basis, it
 12 wasn't a custom home they were talking about, this was a
 13 tract housing development.

14 It doesn't even reference the neighborhood that we're
 15 here for today. There is no direct benefit that the
 16 contracting party when they contracted for these
 17 construction services were contemplating a benefit to be
 18 received by the homeowners. Plaintiffs cite a case, which
 19 is Hammond v. Banks, to support that the homeowners were
 20 third-party beneficiary. And, Judge, that case actually
 21 found that the third-party was not an intended beneficiary
 22 of the contract. In that case it's the reverse.

23 A subcontractor was an incidental beneficiary of a
 24 contract between a general contractor and SCDOT, and,
 25 therefore, they could not maintain an action against SCDOT.

1 The Court found there that, "The mere fact that the third-
 2 party might ultimately and indirectly benefit from a
 3 contract is just not sufficient." The Plaintiffs must show
 4 that the contract between D.R. Horton and Hutton's was
 5 entered into to directly benefit the homeowner, which, Your
 6 Honor, I contend it's just -- it's just not the case here.
 7 In order for the Court to figure that out, the Court should
 8 look to the contract and the intent of the contracting
 9 parties at the time they executed the contract; which I
 10 agree with Mr. Ross, this is an issue for the Court to
 11 determine as a matter of law, by looking at the four
 12 corners of the contract.

13 First of all, you can see any specific homeowner is
 14 not referenced in before their home was constructed, but --
 15 the Plaintiffs are not a party to this contract, they're
 16 not a signature to this contract.

17 There's nothing, I believe it's something that there
 18 was an intended benefit to the Plaintiffs here, and so
 19 speaking specifically as to the language of the contract,
 20 the contract was for, as I said, for Hutton's to perform
 21 construction services for slab, flat work and landscaping.

22 As part of those construction services, and what
 23 Plaintiff will point out is that Hutton's agreed to provide
 24 a warranty related to its scope of work, "where
 25 applicable." This was an agreement to repair or replace

1 work as determined by D.R. Horton, as requested by D.R.
2 Horton to landscape.

3 So at the time that D.R. Horton had entered into this
4 contract they did not contemplate the future of unknown
5 homeowners that did not come to this agreement to directly
6 benefit those future and unknown homeowners. Simply
7 because there's two sentences in the entirety of the
8 contract, which I believe the Court has to read as a whole,
9 saying that a homeowner must sign a work order upon
10 completion is simply not a direct-intended benefit of a
11 contractor of construction services.

12 This was related to the contract of construction
13 services and repairs between D.R. Horton and Hutton's. How
14 could Hutton's possibly have intended to provide a direct
15 benefit to these Plaintiffs for work they had not yet
16 performed at an unspecified lot and unspecified
17 neighborhood? It's our position that Hutton's agreement to
18 perform warranty work was with D.R. Horton, and the fact
19 that warranty work may consequentially benefit the
20 homeowner, is -- is simply a consequential benefit, it's
21 not a directed intended benefit, and that's our position on
22 the breach of contract.

23 THE COURT: All right.

24 MS. WHITE: So I will go to our argument for gross
25 negligence in the case. Judge, we recognize that

1 negligence is typically an issue that goes to the jury;
2 however, we are requesting an order granting summary
3 judgment on the Plaintiffs' claims for gross negligence in
4 this case.

5 So as the Court is well familiar, negligence is
6 exercised -- I'm sorry, negligence is the failure to
7 exercise due care while gross negligence is the failure to
8 exercise slight care. Plaintiffs will prove that a lot of
9 hyperbolic arguments about these quote, "piles of trash out
10 on the property," and show pictures of shingles and roofing
11 nails, stained glass bottles, and other garbage out there.
12 And, Judge, maybe there -- it is -- or there was trash out
13 there, this was an active construction site.

14 I have a house being built next to me right now and
15 the contractors. I see trash everywhere, so it's been fun
16 to watch that. That's as a complete aside.

17 Anyways, for gross negligence, Judge, the Plaintiffs
18 must establish more than the fact that the debris exists on
19 the site to establish negligence as to Hutton's. And,
20 accordingly, for the Court's consideration today, to reach
21 gross negligence, the Plaintiffs must establish that
22 Hutton's failed to exercise slight care, or intentionally
23 failed to do something that they have a duty to do. It's
24 undisputed that Hutton's Landscape arrived on the job for
25 this vertical construction. Matt Hutton of Hutton's

1 Landscape has testified when he arrives on the job. He
2 says all Hutton's does is, quote, "Light dirt movement.
3 That's about the only digging Hutton's does on-site is to
4 dig the foundation footers, dig to plant trees, and dig to
5 install irrigation, that's the gist of Hutton's' scope of
6 work out here."

7 Plaintiffs will also point out that Matt Hutton also
8 testified, if his field crew found debris, glass bottles,
9 rusted metal, they should notify a superintendent. Those
10 are the facts of the case, but for Plaintiffs to reach
11 gross negligence, they have to establish that Hutton's knew
12 there was debris on the property and that it was Hutton's
13 responsibility to clean it up and intentionally did not do
14 so. And that simply, Judge, is not evidence that we've
15 seen in this case.

16 Plaintiffs only evidence that Hutton's quote, "knew or
17 should have known about debris on the property, is by way
18 of expert, Matt Hines of the Dennis Corporation." And,
19 Judge, Plaintiffs appear to hang their hat on this expert's
20 statement that, quote, "The developer and grading
21 contractors knew or should have known that debris remaining
22 from a historic landfill was present at or near the surface
23 of the finished lots." That's in their report, however,
24 this expert was deposed in this case, and when asked about
25 his basis for that statement, the expert testified the only

1 evidence that he has to support that statement is this
2 Phase I site assessment, which was done very early on in
3 the infancy of the land development of this neighborhood.
4 And I will say what he points to from this Phase I
5 environmental site assessment, which was prepared for D.R.
6 Horton, there's no mention of Lather, there's no mention of
7 the landscapers who come by however long after this.
8 Refuse was observed along the northern boundary of the
9 target property, that's it.

10 First of all, this isn't even clear if this garbage is
11 on the property that did become the Plaintiff's home.
12 Second of all, Plaintiff's expert testified he has no
13 evidence that a grader would have reviewed that report.
14 So, Judge, Plaintiff's expert's opinion collapses in on
15 itself, because he may say that he knew or should have
16 known, but he has no evidence that in either of the grading
17 subcontractors, which I reluctantly lump a landscaper in
18 with, but I will, he has no evidence that those contractors
19 knew about this report, which is his only evidence, as to
20 trash being on the property.

21 This expert further acknowledged he did not review any
22 building codes or written industry standards to form his
23 opinion in his report. He could not cite any specific
24 building code that the grading contractors violated. He

1 further testified that he did not perform a storm water
2 analysis or look at the grading in detail.

3 So, Judge, recognizing that negligence is ordinarily a
4 question left for the jury, we believe that the Court could
5 rule, as a matter of law, on gross negligence. None of the
6 evidence, Judge, rises to a level that Hutton's
7 intentionally failed to do something that had to be done,
8 or acted in a willful, reckless or wanton manner.

9 So for those reasons we are seeking summary judgment
10 on the breach of contract claim, which would include the
11 claim for an express warranty.

12 THE COURT: All right, thank you. Ms. Williams?

13 MS. WILLIAMS: Thank you, Your Honor.

14 The attorneys conveniently omit from the scope of work
15 that not only does it include the slab work and the
16 landscaping, but it explicitly included rough grading and
17 fine grading. So I have no problem lumping together the
18 grading contractors, but even, specifically, as separate
19 from each other, Hutton's was responsible for rough grading
20 of the lots in their entirety. As to breach -- the breach
21 of contract argument, again, in the contract between D.R.
22 Horton and Hutton's, there's a specific provision in which
23 the contractor warrants all work from the date of transfer
24 of the property from the owner to the homeowner for
25 workmanship and materials where applicable. Contractors

1 hereby agrees to repair, replace or pay -- pay the expense
2 of repair replacement as determined by the owner, the cost
3 of repair replacement shall include any and all collateral
4 remediation. That provision of the contract is not for the
5 benefit of any eventual homeowners, specifically, including
6 the Plaintiffs in this case; who else would that -- that
7 provision be for?

8 All subcontractors who enter -- contract with D.R.
9 Horton -- I have no disagreement with the attorneys for
10 Hutton's or Lather, but these contracts are burdensome and
11 put all of the weight on the subcontractors to do not only
12 all the work in constructing the homes, but then all of the
13 work under the same contract in handling any warranty work
14 or remediation needed under the warranty, but that is a
15 direct benefit for the Plaintiffs and the eventual
16 homeowners.

17 Just because the contract itself doesn't cite that the
18 contract is for the benefit of or specifically related to
19 the Tidewater Creek neighborhood, it is not a stre- --
20 doesn't take a stretch of the imagination to understand,
21 but, again, warranting any work that has been done to
22 include a responsibility to do warranty claims -- through
23 remediation of warranty claims made by the Plaintiffs, that
24 provision in itself is for the benefit of the homeowners.

1 Furthermore, the -- the -- Hutton's, as the contractor
2 who did rough grading, fine grading, landscaping, flat
3 work, all of that work that they contracted with D.R.
4 Horton to perform in this neighborhood was for the benefit
5 of these homeowners. In no way was the work of building
6 the houses intended to be for the benefit of D.R. Horton.
7 D.R. Horton isn't moving into this house, it's for the
8 benefit of -- doing that work is for the benefit of the
9 eventual homeowners.

10 The -- as to the gross negligence -- and -- and so the
11 arguments as to expressed warranty and implied warranty,
12 are -- fall under the same contract provision. The
13 Hutton's explicitly agreed with D.R. Horton to warrant
14 their work, and that the Plaintiffs, the homeowners in this
15 case, were the third-party beneficiary of that expressed
16 warranty.

17 As to the gross negligence claims, to give you a
18 little bit more detail about what's happening in this
19 neighborhood, so this is a neighborhood on Lady's Island,
20 back off of Holly Hall Road, where the Plaintiffs'
21 allegations are that the neighborhood was built on an
22 unregistered dump site. So this was an area that was
23 largely undeveloped for a long period of time, had a dirt
24 road down it, and for what appears to be years and years
25 people would drive down the dirt road, dump piles of

1 shingles, piles of bottles and household trash, mattresses,
 2 rusted-out Coca-Cola refrigerators. All evidence of that
 3 is in the surrounding area of the Plaintiff's homes, as
 4 even to this day. You can walk in the area around and see
 5 that And the Plaintiffs' allegations are that instead of
 6 removing those materials from the land that would become
 7 the Plaintiffs' lots, that the subcontractors with D.R.
 8 Horton, specifically, including Hutton's as the sub-grading
 9 contractor, instead of removing those materials simply
 10 plowed over them.

11 And Plain- -- Plaintiffs' Exhibit Number 4 to the memo
 12 is just a minor assortment of pictures, of the types of
 13 materials that have been found out there. It is not
 14 present-day construction trash. There are completely
 15 rusted-out saw blades that are found on Plaintiffs'
 16 property, shards of glass that to this day are surfacing in
 17 lots out there. There are evidence of rusted pieces of G-
 18 metals. It wasn't present-day construction trash not only
 19 that was found on these lots, it's the -- it's materials
 20 that are extremely old.

21 There are trees growing up through the shingles, and
 22 you can see the shingles in the roots of the tree, they've
 23 been there that long. And, again, this is on individual
 24 lots of the Plaintiffs' houses. And so the Plaintiffs'
 25 allegations that are that all of this material was obvious,

1 it was all over the site, and that neither -- neither
 2 Lather, as a site work contractor, or Hutton's, as a rough
 3 grading contractor, performed their scope of work and
 4 remove those materials, and instead just plowed over them
 5 and brought in fill and poured it on that; and in terms of
 6 the rough grading scope of work that is specific to
 7 Hutton's, there are multiple provisions in the contract
 8 with D.R. Horton that state, for example, and this is in
 9 Plaintiffs' Exhibit 9, the memo, on the rough grade scope
 10 of work, "The Hutton's are obligated to remove all trash
 11 throughout the dirt, branches and debris from site
 12 generated from this phase of destruct- -- of construction.

13 Do not pile on patio driveway or at the curb. Do not
 14 place on any adjacent owner's planned to be lots and all
 15 paths. Do not drag waste to edge of lot, landscaped
 16 perimeters and leave, remove from job site." And the same
 17 scope of work for rough grading, "Underbrush all natural
 18 material less than three inches in diameter remove debris
 19 and dead limbs of and cut them." The entire lot is to be
 20 quote, "Finished, as designed by property pin locations."
 21 So -- and -- and that just one of the multiple scopes of
 22 work that Hutton's obligated to perform here, final
 23 grading, clean job site, be landscape turn-key, clean job
 24 site.

1 And if any of those specific scopes of work had been
2 performed in line with the contract, then to -- within the
3 standard of care of any grading worksite with subcontractor
4 in the industry, then none of these materials would be
5 surfacing on these lots. And to give you -- and so in
6 terms of evidence of gross negligence, I think there's more
7 of a scintilla of evidence that slight care was not used in
8 these lots. The fact that we had the deposition last night
9 of one of the homeowners in this neighborhood, who -- who
10 moved in in 2015, pointed these materials out to D.R.
11 Horton.

12 Hutton's came out with a -- with a bobcat and cleaned
13 -- cleared the property. They asked for that on multiple
14 lots, raked the property and, you know, hydroseeded,
15 brought in sod. All of these lots, where they've done even
16 further warranty work, continue to have broken glass that
17 fills buckets, coming up through the yards, shingles that
18 are an- -- like, clearly ancient and disintegrated, not
19 shingles from the present construction, all coming up
20 through the yard.

21 There's more than enough evidence of gross negligence.
22 And, again, just to reiterate, as to the arguments of
23 breach of contract and expressed warranty, there's a
24 provision in the contract with D.R. Horton, where the

1 subcontractor warrants the work that it's doing, after the
2 home had been transferred to the buyer from D.R. Horton.

3 So the -- as to the conflicted -- work by Hutton's was
4 in breach of that provision, the Plaintiffs were the third-
5 party beneficiaries -- intended beneficiaries of that
6 provision of the contract; and the -- that is not only
7 evidence of a breach of the expressed warranty, but all of
8 these materials further surfacing from the ground are
9 evidence of breach of the implied warranty of workmanlike
10 service.

11 THE COURT: All right.

12 MS. WHITE: Your Honor, if I may.

13 THE COURT: Sure.

14 MS. WHITE: So going back to the third-party
15 beneficiary breach of contract, Judge, this agreement, if
16 there is an agreement, must be a direct and intended
17 benefit to the homeowners, not consequential. What
18 Plaintiff's counsel just explained to you is a
19 consequential benefit of D.R. Horton's offering a warranty
20 work to the ultimate purchaser. Hutton's did not agree or
21 intend to extend any benefits at all to the ultimate
22 purchaser.

23 Hutton's agreed to provide repair or warranty work to
24 D.R. Horton, as a result of its scope of work. That is
25 just a consequence the Plaintiffs received from that

1 warranty work that Hutton's agreed to provide to D.R.
 2 Horton. Second, I will say whenever I've seen the third-
 3 party beneficiary issue come up, it's been in relation
 4 reversed actually. So -- and it's usually in relation to
 5 enforcing arbitration agreements; and so I just saw Judge
 6 Price deny a motion, where the architect, who actually was
 7 in a contract construction agreement with the general
 8 contractor, which lists the ultimate homeowner, the
 9 ultimate property owner, Judge Price denied an order
 10 seeking to compel into arbitration, based on the
 11 arbitration language of that construction contract. So --
 12 and -- and Judge Price said they're not a party, and they
 13 were not a signatory, and, therefore, they cannot be
 14 compelled into arbitration.

15 Recognizing arbitration is slightly different, that
 16 that's the context that that arose, and it was found that
 17 they were not a party and not a signatory. Either way,
 18 Your Honor, if -- oh goodness, if we're going to assume
 19 that Plaintiffs are a third-party beneficiary for this
 20 warranty work that Hutton's agreed to provide to D.R.
 21 Horton, in the home purchase agreement that D.R. Horton and
 22 the ultimate purchaser signed, D.R. Horton explicitly
 23 excludes any warranty related to landscaping, any work
 24 relating to grading, any warranty related to trees, shrubs,
 25 grass and flowers. It excludes in this lens any, quote,

1 "responsibility for soil erosion, soil conditions or the
2 growth of dead grass, trees or shrubbery after closing."

3 So this section even points out that, just for
4 understanding of the claims out here, that the growth of
5 grass and the prevention of erosion are dependent on the
6 purchaser's care of that.

7 So if we're even assuming that Plaintiffs are a third-
8 party beneficiary to this warranty work that Hutton's has
9 agreed to perform, that warranty was disclaimed. The
10 homeowners received no warranty as to the landscaping and
11 other issues that were in Hutton's' scope of work.

12 As to the negligence response, first of all, I think
13 Plaintiff is trying to conflate rough grading with making
14 it sound more than what it is.

15 When Hutton's Landscape gets on the job to dig the
16 footers, its rough grading scope of work is to knock down
17 any piles of dirt that may have been left over simply to
18 get the site to grade. This isn't some mass earth moving
19 that I think is. Regardless, that's what rough grading is
20 for the purposes of Hutton's Landscape. I've not denied
21 that rough grading was in their scope of work, but that's
22 what rough grading is.

23 It's this very light dirt movement when Hutton's got
24 on to pour the footers and pour the slab. Plaintiffs
25 points out in Hutton's' scope of work all of these

1 references to waste, debris and to clean up, but if you
2 read the contract as a whole, all of these references to
3 waste are as referred to as waste generated during that
4 phase of construction; and that's what Matt Hutton
5 testified to during his deposition. It's not his job or
6 his crew's job, and it's not in his scope of work to pick
7 up hundred year old debris, it's in his job to clean up
8 debris that may have been generated during his phase of
9 construction. Each subcontractor is supposed to clean up
10 after their work.

11 That's what that scope of work is for, it's not some
12 cleaning excessively of this site. And, simply, Your
13 Honor, you know Plaintiffs pointed out that scope of work.
14 All of that fails to establish that Hutton's was willful,
15 wanton or reckless, and that it intentionally failed to do
16 something, Plaintiffs haven't put forth any evidence of
17 gross negligence, as to Hutton's, rather than saying that
18 debris exists on the property. We don't recognize res ipsa
19 here.

20 They can't just say it was there, therefore, Hutton's
21 was grossly negligent. That's -- they just have to prove
22 more than that, Judge. Thank you.

23 THE COURT: I understand.

24 MS. WILLIAMS: Your Honor, just to briefly respond.

25 Simply by way of -- of one example of gross negligence, is

1 the reckless -- either reckless or wanton or having noticed
2 the materials, I'd point you to the photographs in
3 Plaintiffs' Exhibit 4, that there -- where there's multiple
4 pictures of what used to be, basically, the sod mesh, that
5 green mesh that comes under sod that was laid by Hutton's
6 Landscapes, where you see pieces of glass come -- and other
7 materials coming up under this sod mesh. So this is sod
8 being laid on top of this broken glass debris, and other --
9 other items that are unsafe for the Plaintiffs to use their
10 yard, where Hutton's knew or should have known, based on
11 the fact that, Your Honor, as early as -- and if I may
12 approach Your Honor, I have one additional item that was
13 not part of the MEMO. May I approach?

14 THE COURT: Sure.

15 MS. WILLIAMS: So in addition to the -- and I've
16 already provided Hutton's copy. In addition to the fact
17 that Hutton's came out and did warranty work, and as --
18 this is Plaintiff's Exhibit 11, is warranty work ordered of
19 Plaintiff -- of Hutton's contracting coming out and doing
20 work, just by way of example, on the Shafi property, where
21 they were tasked with raking, clearing, and then laying sod
22 on one of the properties that is in -- which was in 2016,
23 As early as November of 20 -- November 2nd of 2015,
24 Hutton's-- D.R. Horton's representative is telling Hutton's
25 in the exhibits I've just hand- -- handed you, on one of

1 the lots in the neighborhood, to clean debris from the
 2 backyard, not clean debris from this phase of construction.
 3 To finish backyard grading, not finish grading around the
 4 building pad, not finish grading of the slab, finish
 5 backyard grading. Complete irrigation install. And -- and
 6 Ms. White mentions that some of the provisions of the
 7 contract, as to clearing, have a phrase in some of the
 8 provisions, not all, of clearing debris from quote, "this
 9 phase of construction."

10 I would say that the fact that we're even arguing the
 11 semantics of the meaning of that phrase would be enough to
 12 provide summary judgment on these issues; however, that's -
 13 - those are only some of the provisions. Additional
 14 provisions in the very same contract with no qualifications
 15 whatsoever, say clean job site -- clean job site, entire
 16 ra- -- lot be hand-raked.

17 So I think there's sufficient evidence that the --
 18 this work was within Hutton's scope of work that they
 19 didn't warrant, and if there's any circumstantial or
 20 sufficient evidence that Hutton's knew or should have
 21 known, just from the materials that are out there and where
 22 they are surfacing in the property, including under the sod
 23 laid by Hutton's, as they performed work at this property.

24 THE COURT: All right, thank you. Anything -- does
 25 that conclude all the motions, or is there -- there's still

1 a motion to compel? All right, if we can hear that very
2 briefly, and try to move on.

3 MS. PETERSON: Yes, Your Honor, this is civil
4 discovery dispute under Rule 34, request for inspection.
5 As you've heard from Ms. Williams, Plaintiff's are alleging
6 that there is -- that these homes were built on an
7 unlawful, illegal either landfill or a dumping site. They
8 are specific -- specifically alleging that the debris is
9 buried, that the subcontractors or general contractor
10 buried the debris at the direction of D.R. Horton, and that
11 D.R. Horton failed to supervise.

12 So because they're alleging that this debris is
13 buried, they have alleged that our visual observation that
14 is only on the surface, of course, our position is it's
15 only on the surface, is insufficient.

16 During the course of trial prep, D.R. Horton realized
17 that it would be beneficial to present the jury with
18 evidence that there is nothing buried underground. So we
19 have requested from the Plaintiffs to do ground-penetrating
20 radar. This is a non-destructive test. It's, basically, a
21 baby stroller, where they walk it across the yard and it
22 picks up abnorm-- abnormalities or irregularities up to
23 six to seven feet below the surface.

24 We have our guys, 'cause we know, you know, trial's
25 around the corner, we have our guys here today. After this

1 MS. PETERSON: We did have a huge rainstorm yesterday,
2 so while we have the guy here ready to go, it's possible
3 that they won't be able to do it, because the ground's too
4 wet, but they are here and they're ready to go.

5 THE COURT: Okay. All right. And I will consider
6 these motions and let you know as soon as I can. I
7 understand that trial is just a few short days away, all
8 right?

9 MS. WILLIAMS: Thank you, Your Honor.

10 MS. PETERSON: Thank you, Your Honor.

11 THE COURT: All right. Thank you all.

12 MS. LUCEY: Thank you for your patience.

13 THE COURT: All right, we're gonna take a few minutes
14 break, and we'll be back maybe a few minutes after 11:00,
15 and we'll hear the next motion.

16 (At 10:47 a.m., the proceedings were concluded.)

17 ***

18 END OF TRANSCRIPT

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STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT 2018-CP-07-00911

Richard W. and Rebecca
A. Drier; Sarmed and
Jessica M. Shafi, et al.

Plaintiff,

vs.

D.R. Horton, et al.,

Defendants.

TRANSCRIPT OF JURY TRIAL
VOLUME I
PAGES 1 - 171

November 15, 2021
Beaufort, South Carolina

B E F O R E:

The Honorable Bentley Price,
Judge Presiding

R E P O R T E D B Y: Kymberlee M. Williams, RPR

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PROCEEDINGS

MONDAY, NOVEMBER 15, 2021

BEAUFORT, SOUTH CAROLINA

JURY SELECTION

1 THE COURT: Good morning. You have all been
2 pulled. What we are going to do what is called jury
3 call clarifications. I will determine whether you
4 are qualified to sit on a jury. There is only one
5 case this week, I will go into more detail as to
6 whether in fact you know some parties or witnesses
7 to something alone those lines to see if you can be
8 fair and impartial to sit on a jury for this week.

9 There is one trial this week. It will last for
10 about four days. It will be a lot of questions. If
11 any of these apply to you, stand up, please remember
12 to give us your juror number, we are taking
13 everything down and I will ask you how it applies to
14 you.

15 If you say you can, I will ask you to be seated
16 if you say you can't, we will deal with that when we
17 have to deal with it.

18 These first set of questions are called
19 exemption questions. You can elect to take the
20 exemption if you want to, but you don't have to take
21

1 your day.

2 (Unselected jurors exit the courtroom.)

3 THE COURT: All right. Ladies and gentlemen of
4 the jury, let me go over a few things with you. You
5 have been selected for the trial of this case.
6 Again, I am not sure exactly how long it will last,
7 but in doing so, we think it should last until
8 Thursday. So for planning purposes, understand that
9 we start at 9:30 and end at 5:00. We take a break
10 almost every hour. There will be other times where
11 I have to take up legal issues outside of your
12 preference, so you will have the opportunity to go
13 back and forth.

14 Ma'am, 62.

15 THE COURT: Your last name?

16 THE JUROR: Clifford.

17 THE COURT: All right. Ms. Clifford, you will
18 be our forelady for the jury. The only duties that
19 you have currently -- I will explain your duties at
20 a later date, but for right now if anything arises
21 that needs to be brought to my attention, just
22 reduce it to writing and give it to the bailiff who
23 will be bring it to me, and I will be happy to
24 address whatever issues that rise.

25 Just so everybody understands, this is your

1 witness.

2 THE COURT: That's fine. I'll probably still
3 say "hostile" because I've always done it because
4 it's in the rules, but just stop me if I do it.

5 Personal beliefs or opinions of counsel for any
6 party, can't do that. Stipulations, I'll charge
7 them on that. Is there any evidence that has not
8 been timely produced?

9 MS. LUCEY: I think they're -- both parties have
10 been producing documents within the past three days
11 that may need to be addressed.

12 THE COURT: All right. We'll leave six open.
13 Seven's a non-issue.

14 Eight and nine they've consented to. We're not
15 going to talk about insurance and settlements, of
16 course.

17 Twelve goes against the oath.

18 What's illegal? Oh, illegal dumping?

19 MS. LUCEY: Right.

20 MR. ROSS: Your Honor, I beg your pardon. May I
21 just point something out about number twelve?

22 THE COURT: Uh-huh.

23 MR. ROSS: Clearly, none of the lawyers here,
24 we're all -- we're all pretty -- pretty collegial
25 here. None of our -- we're not going to be getting

1 into pejorative comments about one another or about
2 the parties. But this says that -- you know, this
3 includes a motion to exclude the fact that the
4 subcontractor Ben Lather and Hutton are out of
5 business, and part of our, you know, theory of this
6 case is that D.R. Horton chews these subcontractors
7 up and spits them out as part of their business
8 model. And we're already on the record with Matt
9 Hutton's deposition. He's the owner of Hutton's
10 Landscaping.

11 Well, he's already on the record in a de bene
12 esse deposition with unobjected to testimony that he
13 had to litigate with D.R. Horton that D.R. Horton
14 put him out of business, et cetera. And we
15 certainly think the jury is entitled to hear that.

16 MS. LUCEY: Well, I think perhaps it's -- I
17 think what we were going for is that it's -- for
18 example, Mr. Hutton is in Texas now. We don't want
19 the suggestion or the implication that he has run
20 away or he's run away from the trial because he's
21 not in business, that type of thing.

22 THE COURT: Right.

23 MR. TRAYWICK: Well, I certainly think the fact
24 that he's -- I mean he's on record saying, Oh, I
25 really, really do care about this, but he's not

1 showing up for trial.

2 THE COURT: Yeah, we're not bringing that up.

3 All right, anything else?

4 MR. TRAYWICK: But the fact that they're out of
5 business, Your Honor, that's fair game.

6 THE COURT: That's they're out of business?

7 MS. LUCEY: I think that's fine.

8 THE COURT: That's fine. If they're out of
9 business, they're out of business. That's just
10 fact.

11 All right. Are y'all going to utilize the word
12 "illegal dumping"?

13 MS. LUCEY: I feel certain plaintiff's counsel
14 will use try to use the words "illegal dumping."

15 THE COURT: All right.

16 MR. TRAYWICK: Your Honor, we do, and here's
17 why. Testimony from Shawn Lather, the owner of
18 Lather Construction. "Question: Would it ever be
19 appropriate to simply plow that type of material
20 under or cover it up with field dirt? Answer:
21 Absolutely not. Question: Would it be unlawful to
22 do that? Answer: It would be." Which is exactly
23 what we realized they did. Sean Higgs, I've asked
24 him, why can't you do that, and he says, "Answer:"
25 This is the Lather's superintendent on site.

1 ten-minute comfort break?

2 THE COURT: Yes, I said we'll take a five or
3 ten-minute break.

4 MR. NAIL: Thank you, Your Honor.

5 MS. PETERSON: And I'd just like to clarify, I
6 didn't mean to misrepresent the subpoena. That
7 slipped me through all this.

8 THE COURT: All right.

9 (A brief recess is taken.)

10 MR. CLOUD: Your Honor, there are two more
11 motions I have that need to be heard before we get
12 started.

13 THE COURT: Well, wonderful. What are they?
14 What are your motions?

15 MR. CLOUD: One is motion for summary judgment
16 and the other is a motion in limine. The motion in
17 limine is dependent on the motion for summary
18 judgment, so we'll hear the summary judgment motion
19 first.

20 THE COURT: All right.

21 MR. CLOUD: Am I good to go?

22 THE COURT: Yeah, you're good to go. We got one
23 from every party.

24 MR. CLOUD: All right. Tyler Cloud on behalf of
25 East Coast Construction Cleanup Corporation. We are

1 moving for summary judgment on D.R. Horton's loss
2 claims for contractual and equitable indemnity on
3 three different grounds. The first being that D.R.
4 Horton has not presented a valid contract for this
5 project with East Coast Construction.

6 D.R. Horton is relying on an agreement that is
7 for the division of Coastal Carolina, the area of
8 Myrtle Beach, with assigned vendor numbers of 520522
9 and 528436. We're not in Myrtle Beach today.
10 Tidewater Creek is not in Myrtle Beach. D.R. Horton
11 is also relying on purchase orders to prove that
12 East Coast performed work on the project. Those
13 purchase orders are issued under vendor number
14 524672.

15 So it's obvious that there is another contract
16 floating out there with a different vendor number on
17 it. D.R. Horton has not produced that. The
18 contract itself is not ambiguous. There's no two
19 different interpretations that are there.

20 The POs are the same way. There's no difference
21 -- or there's no reasonable difference in
22 interpretation of that vendor number. The D.R.
23 Horton testimony provided that the vendor numbers
24 are assigned for different areas. There are
25 different areas that D.R. Horton covers: Myrtle

1 Beach, Charleston, Hilton Head, and Savannah. These
2 purchase orders are for the work at Tidewater Creek
3 and only Tidewater Creek.

4 The vendor number that's on the agreement is for
5 the Myrtle Beach area. It's not Tidewater Creek.
6 There is testimony from my client that indicates
7 there is a different agreement that D.R. Horton has
8 not produced.

9 The other contractors that are working in
10 Tidewater Creek were working under contracts with
11 that vendor. All purchase orders match the vendor
12 numbers on their agreement. This is the only one
13 that doesn't. Accordingly, there is no issue of
14 fact being considered. The contract doesn't apply
15 to the purchase orders that were issued.

16 D.R. Horton sent out an affidavit from its
17 representative Mr. Barne stating that this contract
18 doesn't apply. As I've stated, the contract is not
19 ambiguous. It's for the Myrtle Beach area under a
20 different vendor number. That affidavit is parol
21 evidence and can't be used to interpret the terms of
22 this contract.

23 The second ground is under the Concord and
24 Cumberland standard of clear and unequivocal. The
25 indemnification provision was in that contract if

1 it's considered a but for. It is not clear and
2 unequivocal of what East Coast had identified D.R.
3 Horton for.

4 One provision excludes sole negligence and says
5 any negligence in whole or in part are concurrent
6 negligence for D.R. Horton with East Coast. The
7 next paragraph turns around and requires East

8 Coast to identify or reimburse D.R. Horton for
9 any and all expenses for any claims asserted against
10 them. That's the sole negligence of D.R. Horton.
11 There's no limiting language and it's unclear and
12 not unequivocal as to what East Coast's obligations
13 are.

14 Also public policy determinations show that
15 Horton cannot see contractual indemnification for
16 the claims against them.

17 Plaintiff has alleged that D.R. Horton has
18 engaged in unfair trade practices and fraudulent
19 inducement in the contract. That same provision is
20 requiring East Coast to defend and indemnify Horton
21 on those claims is against public policy.

22 The exact language is that East Coast much
23 indemnify Horton for its own negligent and/or
24 intentional facts. That is sole negligence. That
25 is exactly what our statute and public policy

1 considerations are against.

2 Moving on to equitable indemnity, which is one
3 that D.R. Horton is also asserting against East
4 Coast. Horton was the role -- or Horton's role in
5 this project was the developer and coordinator of
6 the entire community. Based on the allegations from
7 the plaintiff, there's no way that Horton can clear
8 its responsibility for this issues of this project
9 that are alleged. At the end of the day, it can't
10 pursue equitable indemnity against East Coast
11 because it has unclean hands. There's no other
12 reasonable conclusion that can be drawn.
13 Accordingly, we're asking the Court to grant summary
14 judgment in favor of this defendant.

15 THE COURT: All right.

16 MS. PETERSON: And I'll try to be brief. To
17 address the equitable indemnity claim first, unclean
18 hands argument is without merit because no jury has
19 -- no fact finder has yet found that D.R. Horton is
20 liable in any way, shape, or form.

21 I saw case law out there where, in fact, the
22 general contractor or the owner is exonerated of all
23 liability and it's put on the subcontractors, so we
24 do not believe that unclean hands argument is
25 applicable here until the jury finds liability. But

1 even if the jury were to find liability on D.R.
 2 Horton for those breach of warranty claims, and as
 3 Your Honor knows, that's basically extra liability,
 4 so we could be found liable without being at fault.
 5 So we would still have clean hands in that instance.
 6 To his contractual indemnity arguments, first of
 7 all, I'll talk about whether there is a contract.

8 I think there is clearly a genuine issue of
 9 material fact whether a contract for the Tidewater
 10 project existed. Ms. Oquino testified in her
 11 deposition this is the contract that governed East
 12 Coast work at Tidewater. There were no other
 13 contracts between 2012 and 2015 when work began on
 14 Tidewater.

15 And of course we produced the affidavit saying
 16 this is the contract that applied at Tidewater. I
 17 can get into the details about the difference
 18 between the vendor number, blah, blah, blah, we are
 19 going to have our 30(b)(6) witness testify to what
 20 the vendor number means, what the area number means.

21 I can tell you Coastal Carolina Division at that
 22 point in time did cover the Beaufort area as well as
 23 the Myrtle Beach area. So there's definitely a
 24 dispute as to whether there was a contract. So if
 25 Your Honor finds, you know, there's a dispute into

1 that, we can get into the contractual indemnity
2 stuff now or later. Obviously, this does meet the
3 Concord standard for clear and unequivocal. We
4 exempt sole negligence. That's explicitly exempted.
5 There's other cases, Builders FirstSource, where the
6 Court severs the provisions that may be against
7 public policy and maintains the other provisions.

8 So you don't get out of your obligation to
9 indemnify just because maybe, which hasn't even been
10 determined yet, one provision of the contract is
11 against public policy.

12 So we think there's definitely issues for the
13 factfinder to work out prior to summary judgment.

14 THE COURT: All right.

15 MR. CLOUD: A couple of things I'd like to
16 respond with. Her argument clearly states there's
17 two different areas in the Coastal Carolina
18 division, Myrtle Beach and Beaufort. This contract
19 that they presented to us is for the Myrtle Beach
20 area with different vendor numbers.

21 There should be no evidence allowed to
22 contradict or bury the terms in this agreement.
23 That's the four corners approach. That's how we
24 have to review a contract.

25 My client testified multiple times in her

1 deposition that this is not the contract that
2 applied to the Tidewater Creek area. We went
3 through it, and she said what work they did and
4 didn't do. She says three times that this is not
5 the contract that applied to Tidewater Creek. And
6 in regards to the equitable indemnity and, you know,
7 the contractual parts, we've reached an agreement
8 with the plaintiffs. The plaintiffs are not
9 pursuing any further action with East Coast.

10 THE COURT: All right.

11 MS. PETERSON: And to clarify, there's one
12 Coastal Carolina division and one contract that
13 governs all of the different areas.

14 MR. CLOUD: Your Honor, that would be incorrect
15 because I have other contracts for the Beaufort
16 area.

17 MS. PETERSON: Well, today, but it was different
18 back in the time that --

19 THE COURT: Did East Coast Construction come and
20 do Tidewater's?

21 MR. CLOUD: Yes, we're not -- we're not stating
22 that they didn't perform any work. We take issue
23 with the contract where they're trying to enforce
24 contractual indemnity provisions for a different
25 area.

1 THE COURT: All right.

2 MR. CLOUD: They haven't presented any
3 contractual indemnifications provision for the
4 Beaufort or Hilton Head area.

5 THE COURT: All right. Well, let me see what
6 comes out further into the trial and then I'll make
7 a ruling.

8 MS. PETERSON: Thank you.

9 MR. CLOUD: Thank you, Your Honor.

10 THE COURT: All right. Anything before I bring
11 them out?

12 MR. CLOUD: And was that a denial of motion in
13 limine to keep that contract out as well?

14 THE COURT: When do you-all -- when do they plan
15 to bring up the contract?

16 MS. PETERSON: It will be our case in chief, and
17 we'll call their 30(b)(6) witness.

18 THE COURT: All right. I'll make a ruling prior
19 to that.

20 MR. CLOUD: Thank you, Your Honor.

21 THE COURT: All right. You can bring out the
22 jury.

23 MR. TRAYWICK: Oh, Your Honor, I beg your
24 pardon. There is one matter. We have a defendant
25 that we'd like to put a settlement on the record

* * * * *

OPENING STATEMENT BY MS. GIFFORD LUCEY

* * * * *

BY MS. GIFFORD LUCEY: Good afternoon, everyone.

My name is Emily Gifford Lucey, and I along with Meghan White who is seated over at the table represent Hutton's Landscapes, Inc. Now for me that's a tongue twister, so during the trial I'm probably going to say Hutton's. And every once in a while, I might get confused and say Horton. Just remember, I'm landscape, I'm green. Okay?

So you've heard a little bit about Matt Hutton. He's the owner of Hutton's Landscapes. And you will not hear from him in person. His company has been wound down. Mr. Hutton lives in Texas now, and we took his deposition by video last week. So you will have the opportunity to hear from him, and he will tell you that this lawsuit is important, but he's not here in the courtroom with us today.

Hutton's, you've heard, was the landscape company. So let's talk about their scope of work.

A contractor's scope of work is what they do on a job, what they've been asked to do. Hutton's did what we call knock-down grading, sort of rough grading, they did fine grading, they installed the

1 irrigation, they put down sod in the front yards and
2 the side yards of these homeowners -- or of the
3 Shafis' builder. And they poured the slab
4 foundation in the driveway. So sometimes you can
5 call that flat work. They do some of the flat work.
6 So what does all that mean?

7 When the land had been stripped and cleared, so
8 when the lot, this lot was cleared, there was
9 nothing -- nothing left except for some trees.
10 Hutton's comes in, there's a cleared lot and there's
11 a building pad, and Hutton's will come in and
12 they'll form the slab.

13 So they'll cut down some pieces of wood and form
14 out where the slab is going to go. And then they
15 step away from the project. And then the plumber
16 comes in, which sometimes pipes have to go
17 underground. So the plumber is going to trench his
18 -- slab going to lay his pipe. And then Hutton's is
19 going to come back, and they're going to dig holes
20 for the footers. These are slab foundations,
21 footers that go down into the ground with rebar and
22 concrete.

23 So they have to dig these holes. And an
24 inspector from the County comes out and they look at
25 the holes and make sure that it is okay. And then

1 Hutton pours the foundation, pours the footers and
2 pours the slab.

3 Now once that slab is ready, Hutton's does its
4 first knock-down grading, it's first round of
5 grading. Some folks today or during the course of
6 this trial may call it rough grading. Hutton's
7 refer to it typically as knock-down grading. It
8 would knock down piles of dirt that were on the lot
9 while digging the footers, for example, or if the
10 plumber, when he dug his trenches, he would move his
11 dirt. The rough grading that Hutton's did is very
12 different from the rough grading you're going to
13 hear about that Lather performed. So there's two
14 kinds of rough grading.

15 Like I said, Hutton's call it knock-down
16 grading. That's what we did on the slab. And
17 you'll hear about that from Matt Hutton, and you'll
18 be presented with testimony from Kevin Ciccarella
19 who was the general manager of Hutton's, and he was
20 out there during the project and will offer some
21 testimony about that.

22 So once the slab is poured and Hutton's has done
23 the knock-down grading, we -- we walk away from the
24 lot. There's other things that have to be done. So
25 the house is constructed and then Hutton's comes

1 back and pours the driveway. Because everyone wants
2 to have a driveway to their house.

3 And they'll also remove some silt fencing. You
4 may hear about silt fencing. It's that kind of
5 black mesh you see a lot of times on construction
6 sites, it looks like it's coming up out of the
7 ground. It's keeping dirt from getting onto the
8 roadway.

9 So we would take that down. And then the
10 landscape crew would arrive and they would install
11 the irrigation for the front and side yard of the
12 Shafis' lot and then they would do a fine grading to
13 get the yard ready for sod. Now Mr. Traywick
14 described it as hand raking. Sometimes they do that
15 with a machine that has the same effect. That's a
16 fine grading to prepare the top level of a building.

17 So other than digging footers and installing
18 irrigation lines, Hutton's doesn't do any digging.
19 We don't do any digging. Hutton's also doesn't do
20 any fill work. We don't really bring any dirt in to
21 raise up the lot.

22 You heard some -- Mr. Traywick mentioned
23 bringing in fill, coming up a couple of feet, that
24 doesn't -- that's not what we do. We get to the
25 lot, it's ready, it's fairly-well graded and it's

1 ready for construction of the house. And all of
2 this work by Hutton's was done under the watchful
3 eyes of D.R. Horton who pulled the building permit
4 for the Shafi house. They are listed as the
5 contractor on the building permit.

6 And it's important to note that all of Hutton's
7 work was done after the land development. It was
8 done after the land was purchased. It was done
9 after property surveys. It was done after the
10 design of the neighborhood, and after all of the
11 sitework and the earth moving. So Hutton's comes in
12 in a different phase, they may call it vertical
13 construction as opposed to horizontal construction
14 or the sitework.

15 I think Mr. Nail mentioned the Phase I report.
16 That's something that was done for the benefit of
17 D.R. Horton in evaluating this overall piece of
18 property. That report was prepared for Horton, and
19 it wasn't shared with Hutton's. There would have
20 been no reason to share it with Hutton's, but it was
21 not shared.

22 So let's talk about the plaintiffs' claims for a
23 minute. My client, Hutton's, has been sued by the
24 plaintiffs, the Shafis, who are here with us today.
25 And they've -- I'm going to talk a little bit of

1 legal jargon about what they've alleged against my
2 client.

3 First, they're claiming that Hutton's was
4 negligent in performing its work and that that
5 negligence has caused or led to the debris in the
6 Shafis' yard. So that's the first one.

7 Second, the plaintiffs claim they entered into a
8 binding contract with Hutton's and that my client
9 has breached that contract.

10 Third, the plaintiffs claim that Hutton's has
11 breached what we would call an express and possibly
12 an implied warranty. An express warranty is an
13 explicit warranty that's given. An implied warranty
14 can arise by affirmation of law. So the Judge will
15 talk to you about the law, and you will apply the
16 law to the evidence. But I wanted to give you sort
17 of a sneak peak of the claims that have been alleged
18 as to Hutton's.

19 So as you're sitting here, you may be wondering
20 why or how is the debris starting to surface in the
21 Shafi yard. What we have learned, and what you will
22 hear from geotechnical engineer, Mr. Andy Whitfield,
23 geotechnical engineer is an engineer who deals with
24 the dirt.

25 So he's digging the dirt, talks about the dirt,

1 and is about the dirt. So it's almost like this
2 debris appears to bubble up when it rains. So how
3 does that happen?

4 So what's happening is the debris, which is
5 below the top layer of the dirt, and it's mixed in
6 with the dirt, starts showing up. The rain is
7 eroding soil, so when the rain is eroding soil, you
8 can start to see the debris. And it's cleaning off
9 any debris that may have been mixed in under that
10 top surface layer. And until the soil washes away,
11 or is eroded, no one can see it. You can't see the
12 dirt that's there. And how does the rain get to the
13 soil? Well, if there's no grass in the yard or if
14 the grass has died and there's exposed dirt, you can
15 have some erosion. You can also have it around the
16 base of trees, and you can also have it in areas of
17 pine straw.

18 You're going to hear us talk about tree
19 protection in this case, which is important.
20 Beaufort -- I'm not from Beaufort, and Beaufort has
21 beautiful trees, and Beaufort County takes steps to
22 protect those trees. So when there's construction,
23 contractors have to set up a tree protection zone.
24 It's this orange netting that protects a tree and
25 that signifies that no contractor can go inside that

1 netting and do any work around the base of the
 2 trees. Because when you start digging around the
 3 base of the tree or working around the base of the
 4 tree, you can damage the roots which will kill the
 5 trees. And the County wants to preserve the trees
 6 that are already here. So when there's no --
 7 there's no grass around those roots and those trees,
 8 you can have a grassy areas.

9 So some of the attorneys have told you what
 10 you're going to hear today, which is very helpful.
 11 But let me tell you what you're not going to hear
 12 during the trial of this case. You won't hear any
 13 evidence that the contractor who pulled the building
 14 permit, Horton, or anyone else ever told Hutton's
 15 that this location may have a history of debris.

16 You won't hear that Hutton's violated any
 17 standard of care in conducting and carrying out its
 18 work. You won't hear any testimony that Hutton's
 19 work violates any building codes. And you won't
 20 hear any testimony that Hutton's buried debris on
 21 the Shafi lot. You won't hear that Hutton's had
 22 actual knowledge of debris on site as it was doing
 23 its work.

24 No one told Horton -- or excuse me, see, I did
 25 it, Hutton's that there was a history of debris.

1 You won't hear that Hutton or Lather told Hutton's
2 about debris. You won't hear that Hutton's has a
3 contract with the Shafis. And you won't hear that
4 Hutton's made express warranties to the Shafis.

5 And Mr. Nail mentioned there were some claims
6 between Horton and Hutton's. Hutton's had an
7 independent contractor agreement, and one of the
8 provisions is an indemnity provision, and Horton is
9 seeking to have Hutton's pay for its defense of any
10 claims asserted and potentially indemnify or pay for
11 those claims on behalf of Horton that means and
12 that's what Hutton -- that's what Horton has done
13 against Hutton's in this case, and you will hear
14 some testimony about that.

15 Hutton's acknowledges that the Shafis have
16 experienced debris in the yard. We recognize that,
17 and we are sorry for that. And, in fact, after the
18 Shafis moved in, Horton called Hutton's and asked
19 them to come out and try to help address the issue.

20 They performed a surface cleanup of the debris
21 that was visible in the backyard and put down sod.
22 But before they put down the sod, Mr. Shafi came out
23 and looked and said it was okay after the hand-
24 grading was done.

25 Mr. Nail mentioned this, and I'll echo his

1 thoughts. What it all boils down to is two things.
2 Who is at fault, if anyone, in the case for the
3 debris that has surfaced in the plaintiffs' yards
4 and how to fix it. What is the best way to fix it
5 at a reasonable cost to the parties involved?

6 I certainly appreciate everyone's attention
7 today and appreciate your efforts this week.

8 * * * * *

9 OPENING STATEMENT BY MR. ROSS

10 * * * * *

11 BY MR. ROSS: Good afternoon, ladies and
12 gentlemen. My name is Jeff Ross. I represent
13 Lather Construction.

14 My client Sean Lather cannot be in the courtroom
15 today. He was planning on being here. His daughter
16 was diagnosed with COVID late yesterday evening, and
17 so I figured you probably didn't want him here
18 anyway.

19 So he is not here, but we will make an effort to
20 get his testimony in front of you so he can tell our
21 side of the story. I see a number of you are
22 wearing masks, some of you are not, the COVID's kind
23 of changed the world, and likewise, with me, I'm
24 almost 50, and for 30 plus years, my hair has been
25 an inch long.

1 state your first and last name, and spell out your
2 last name for the court reporter.

3 THE WITNESS: Okay, Robert Duncan O'QUINN, III.

4 ROBERT DUNCAN O'QUINN, III,

5 having been duly sworn,

6 testifies as follows:

7 * * * * *

8 DIRECT EXAMINATION

9 BY MS. WILLIAMS:

10 Q. All right, while I work this out, Mr.
11 O'Quinn, thank you very much for being here today.
12 Are you familiar with the neighborhood now known as
13 the Tidewater Creek neighborhood?

14 A. Yes.

15 Q. All right, and what's -- what's your
16 involvement with that property?

17 A. I was once the owner of the raw land, and I
18 sold it to D.R. Horton.

19 Q. Okay, and what year did you sell that
20 property to D.R. Horton?

21 A. 2013.

22 Q. And prior to selling to D.R. Horton, what
23 -- how did you first purchase that property?

24 A. I purchased it from the owners that owned
25 it, there was three different parcels that I

1 purchased and put together and farmed.

2 Q. And what -- so do you know -- do you
3 remember what year you first purchased the property,
4 but from the prior owners?

5 A. Early 2000 -- in 2003.

6 Q. Okay, between 2003 and when you sold the
7 property to D.R. Horton, how did you use that
8 property?

9 A. As a hunting area for my family, and I
10 stored some of my -- I'm in the marine construction
11 business, and I had some piles we had just placed in
12 there and hauled them off, and that was it, and then
13 we'd hunt.

14 Q. As far as your knowledge of how the
15 property was used prior to your ownership, what --
16 what do you know about how the property was used --

17 A. It was--

18 Q. -- before you bought it.

19 A. As far as I knew, it was a wooded area, the
20 property.

21 Q. And so after you purchased the property,
22 what was your intention of what you were going to do
23 with the property, other than hunt?

24 A. Well, at the time, it was an investment in
25 Beaufort, I lived there all my life, buying property

1 was an important way to make -- make some money and
2 an investment.

3 Q. The -- and in terms of that it being an
4 investment, what -- what did you do with the
5 property after just hunting on it?

6 What were you going to do to make it an invest -
7 - a return on your investment?

8 A. Well, for a number of years we just hunted
9 it and used it and had the land. And then probably
10 2010 or so I engaged the engineer and I started -- I
11 drew up the development, Andrews Engineering did it
12 for me, and I was going to develop the property.

13 Q. Okay. And so you said you hired Andrews
14 Engineering to draw up the development for you?

15 A. And get the permits.

16 Q. And how far along in the permitting process
17 were you before selling to D.R. Horton?

18 A. Oh complete. I'd -- I'd been complete
19 probably for a year and a half or so.

20 Q. Why did you not develop the neighborhood
21 yourself?

22 A. A downturn in the market, and I didn't have
23 the funds to do it, because it's so costly.

24 Q. And you mentioned that your -- what was --
25 what's your primary --

1 A. I'm -- I'm --

2 Q. -- line of business?

3 A. -- the marine construction business. I
4 build docks, seawalls, things of that nature in
5 Beaufort.

6 Q. Okay, and -- and at the time in 2010, did
7 you -- had you developed any other neighborhoods
8 other than --

9 A. No.

10 Q. Okay. What was the status of the property
11 at the time that you sold to D.R. Horton?

12 A. I had -- after I got my permits, I started
13 digging the lake that was there.

14 Q. Okay. And we're -- we have a map here of
15 what is the present-day Tidewater Creek
16 neighborhood; does this appear to be the present
17 day --

18 A. Uh-huh.

19 Q. -- neighborhood to you?

20 A. Yes, ma'am.

21 Q. All right, and when you say you started
22 digging the lake, where -- what area are you
23 referring to?

24 A. Right in the center. You can see the water
25 there between the big cul-de-sac, well, the circle I

1 would say, whatever the name of that road is, and
2 then you had the road that goes to the right down to
3 the south, and there's a -- there's a body of water
4 in between those two roads.

5 Q. Okay, and when you were digging the lake
6 and beginning to develop the property, did you make
7 any observations of any garbage or construction
8 waste, any other materials like that on the
9 property?

10 A. Well, there's always been waste on back
11 roads along the roadway that comes in that runs east
12 to west off of Little Capers Road all the way to the
13 end.

14 Q. Okay.

15 MS. WILLIAMS: And I'm still trying to get this
16 working for you guys, it'll make things a lot
17 easier.

18 BY MS. WILLIAMS:

19 Q. Okay, so you said that there was landfill
20 trash -- we don't need to watch a movie, and along
21 the roadway that came off Little Capers Road, so
22 you're referring to this top northern portion road
23 that is now drawn out?

24 A. No.

25 Q. Okay, where are you referring to?

1 A. The road winded in and out across the
2 property line onto my property and onto the Pratt
3 property, which is Holly Hall Plantation, we call it
4 Capers, and that road ran down the property line;
5 and that's what -- it'd come off about 150 feet to
6 the north of where the road is. There's an old gate
7 there. There's a big old tree fallen in the road.
8 That road had been there for a long, long time.

9 Q. Okay, and so even prior to your purchase of
10 the property, did -- had you -- were you aware of
11 that road and the adjoining property?

12 A. Yes, ma'am.

13 Q. Okay, so if you'll -- if you'll just
14 explain -- expand for the Jury, again, you know,
15 what that road was used for.

16 A. That road, what it was exactly built or
17 used for, I couldn't tell you that. I've been aware
18 of the road since about eight -- '83, '84. I've
19 lived right down the road from this property, and
20 I've always hunted and been friends with the Pratts
21 that own the plantation there, which encompasses
22 that 150 acres, and then 500 acres of another piece
23 of property. And that road --

24 Q. Okay.

25 A. -- I -- I've always been aware, 'cause

1 we've always hunted that property and walked down
2 that little road there. Now we didn't own, I didn't
3 own, Pratts didn't own the piece of property that I
4 bought, we would hunt the property above it.

5 Q. I'm sorry?

6 A. So I knew, I'd walk down that road and --

7 Q. And I've finally gotten the technology
8 working here for you.

9 (Whereupon, Plaintiff's Exhibit Number 2, Google
10 Earth Map, has been marked for the record.)

11 BY MS. WILLIAMS: (Continuing)

12 Q. So I'm showing you what has been marked
13 here as Plaintiff's Exhibit 2.

14 A. Uh-huh.

15 Q. And this is a Google Earth image of -- and
16 you'll see down there on the bottom that the imagery
17 is dated June 14th, 2005.

18 A. (Reviews document. Mm-hm.

19 Q. Does this appear to be -- obviously, the --
20 the road, Google Earth overlaying the road for you
21 that would eventually be there --

22 A. Uh-huh.

23 Q. -- but does this appear to be a true and
24 accurate representation of what the property was
25 like in 2005?

1 A. Oh, yes, ma'am.

2 Q. Okay. And to be clear for the purposes of
3 the Jury, the -- the roads that are highlighted and
4 marked there, Tidewater Breezeway, Tidal Walk Lane,
5 etcetera, there was no road there at that time, --

6 A. No.

7 Q. -- correct?

8 A. No, that was all woods.

9 Q. Okay, and when you're referring to the
10 rural road that people would drive down, where on
11 this image is that depicted?

12 A. Okay. North of Tidal Walk Drive, and do
13 you see that other body of water, okay, right there?
14 That body of water above where it says Tidal Walk
15 Drive, that's a pond, okay?

16 Q. Okay.

17 A. Right above that pond is the property line
18 for all parcels of land. All the land's laid out in
19 ten-acre squares in Beaufort County, and that line
20 right there ran east west all the way along. Do you
21 see the spotted parts up at the top? See those
22 spots, that's -- that's open spaces where there were
23 piles of debris.

24 Q. Okay, and as far as your knowledge, what
25 was the source of that debris?

1 A. Well, people just trespassing and going
2 down the road and dumping trash.

3 Q. Okay, well, did you notice, at that time,
4 around this time in 2005 any other areas of the
5 property where there was debris or evidence of trash
6 dumping?

7 A. It's the -- the main part of the trash
8 starts right where you see -- where it says Tidal
9 Walk Lane, you see how that's the circle, the U
10 portion, if you go up, right underneath where it
11 says Exhibit Plaintiff, see that -- that white spot
12 there? That's an open spot. That's about where the
13 debris starts right in there, and it runs all the
14 way to the end of the property, and it's just
15 scattered, it would be dump trucks, trailer loads,
16 you know, just debris and trash, and it had been
17 there for years. 'Cause in 1985, Clyde and I put up
18 a fence on Pavers Road to keep people from dumping.
19 Most of all that stuff had been covered up for
20 another, you know, when I bought the property, most
21 of it had trees growing out the middle of the stuff,
22 you know?

23 It was always flat on top of the ground, it
24 was never buried, there wasn't no holes, there
25 wasn't nothing, they'd just back the truck up off

1 the side of the road and they'd dump the trash off.
2 Well, the road meandered through trees and stuff, so
3 it would come onto the property that I bought, and
4 then it would come off the property, but if you'd go
5 there today, I'm sure you'd find debris on the Pratt
6 side.

7 (Whereupon, Plaintiff's Exhibit 3, Topo, has
8 been marked for the record.)

9 BY MS. WILLIAMS: (Continuing)

10 Q. Okay, and I am showing you -- a page from
11 what has been marked as Plaintiff's Exhibit 3. Do
12 you recognize this document? And I'll zoom in for
13 you, so you can see it --

14 A. Yes, ma'am.

15 Q. -- a little bit better. What is this
16 document?

17 A. That is a tree in Topo that I had done for
18 the property, and it specifically shows that old
19 dirt path at the very top.

20 Q. Okay. And you mentioned earlier that you
21 hired Andrews and Burgess Engineering when you were,
22 originally, planning on developing the property
23 yourself, correct?

24 A. Uh-huh.

25 Q. So were these plans drawn up as part of

1 your original plan to deve -- to develop and sell --

2 A. Yes, ma'am.

3 Q. -- the property?

4 A. Yeah, it was a sheet inside the plan.

5 Q. Okay, and this sheet is identified as
6 existing site and demolition plan; is that correct?
7 I'll --

8 A. (Reviews document.) Correct.

9 Q. -- zoom in for you there. Okay.

10 A. Thank you, ma'am.

11 Q. So if we look at the -- this Plaintiff's
12 Exhibit 3, this existing site and demolition plan,
13 there are a number of existing dirt roads that are
14 referenced on these plans. So is this existing dirt
15 road that we're looking at here on Plaintiff's
16 Exhibit 3, is this what you were referring to that
17 people would drive down and dump debris?

18 A. No, ma'am.

19 Q. Okay. And the -- this dirt road, you
20 mentioned that you and Clyde chained off a part of
21 the road.

22 A. Further up.

23 Q. Okay. As far as the -- the -- the date
24 that these plans are dated, March 9th, and last
25 revised August 2010, so at this point you owned the

1 property, correct?

2 A. Yeah.

3 Q. All right. What -- as the existing dirt
4 road that is shown on these existing site plans, who
5 put in that dirt road?

6 A. I did. I cut it by hand and -- and driving
7 in and out of it, created that road from Little
8 Capers through my property, and then that's where we
9 would park, right in that area; and then I'd jump
10 onto the old road that's at the very top of the
11 north side, and see where it -- there's only a few
12 dotted lines? No, go that way, go to the --

13 Q. Okay, sorry.

14 A. Right there, see where those dotted lines
15 are at the top that come off the plat, the property
16 lines, that road right there leads back to Little
17 Capers, that's where we put the gate. That's the
18 road they would come down and dump along that old
19 dirt road.

20 You see it'd come onto the property that I had
21 purchased, and then goes back off the property, and
22 then goes back off the property at the very end.
23 Well, it's the DeLoach's property.

24 Q. Okay, and --

25 A. I just made that road go in there. That's

1 where we would go in and park to go hunt.

2 Q. All right, and I'll show you back to
3 Plaintiff's Exhibit 2, this is a Google Earth image
4 that is dated February 29th, 2008.

5 Does this appear to be an accurate
6 representation of the property in 2008?

7 A. (Reviews document.) Uh-huh.

8 Q. Okay, so at this point had you -- had you
9 begun your clearing work to develop the property?

10 A. No, we just went in there out these open
11 spaces, the small pond and things like that, so
12 where there was open areas, that's where I would
13 come in and, you know, during the time like I said
14 earlier, if I had like old piles and we had torn
15 down a dock, or something like that, I would lay
16 them there, because they were good piling, and then
17 I would give them away to friends and stuff like
18 that.

19 (Whereupon, Plaintiff's Exhibit Number 4,
20 Photographs, is marked for the record.)

21 BY MS. WILLIAMS: (Continuing)

22 Q. Okay, and I'll show you what has been
23 marked as Plaintiff's Exhibit 4; and I'll represent
24 to you that these are photographs that were produced
25 to us by Andrews and Burgess.

1 Do you -- and the photograph is dated May
2 3rd, 2000 -- it's a little bit difficult to see with
3 the coloring, but 2013. Does this appear to be an
4 accurate representation of the dirt road that was
5 the entrance to the --

6 A. That's -- that's at the beginning -- right
7 at the entrance off of Capers Road.

8 Q. Okay, and, again, this is -- is this coming
9 further onto your property in 2013?

10 A. That's correct.

11 Q. Okay. And at this point you have not sold
12 to D.R. Horton; is that correct?

13 A. No, it's probably soon.

14 (Whereupon, Plaintiff's Exhibit Number 1,
15 Document to Sell, is marked for the record.)

16 BY MS. WILLIAMS: (Continuing)

17 Q. Okay, and for the sake of refreshing your
18 recollection, I will show you what has been marked
19 as Plaintiff's Exhibit 1, and it's Bates-labeled,
20 Crossroads Contract, one through 16; do you
21 recognize this document?

22 A. (Reviews document.) Yes, it's a document
23 where I was to sell it to him.

24 Q. Okay.

25 A. What's the date?

1 Q. And I will get that for you, or everyone, I
2 know everyone is busy. Here we go. Okay.

3 A. Thank you.

4 Q. Okay, so this is dated -- is that your
5 signature there on --

6 A. It is.

7 Q. -- the page we're looking at?

8 A. (Reviews document.) Yes, ma'am.

9 Q. And so your -- you signed this contract for
10 sale on -- in February of 2014?

11 A. That's correct, that's what it says.

12 Q. Okay, and who is Allie Hevner?

13 A. Not sure.

14 Q. Okay, did you, personally, have any
15 communications with either Allie Hevner or Brian
16 Gardner --

17 A. No.

18 Q. -- in any --

19 A. None of those people.

20 Q. Okay. As -- as far as at the time that you
21 were preparing to sell your property --

22 A. Uh-huh.

23 Q. -- how did you first reach out to D.R.
24 Horton?

25 A. At that time, I'm sure people remember the

1 downturn in the construction industry in '10, '11
 2 and '12, and I was looking for a way to get out of
 3 the property and just -- just to move it, you know,
 4 it was pretty bad for everybody in the construction
 5 industry, so I reached out to D.R. Horton, and *
 6 with Brian *Wiles from Andrews, and they had done
 7 some work with them, and they knew Gerard Osaka, and
 8 I reached out. I think I called Gerard first, and
 9 that's how I pursued it from there.

10 Q. Okay, and -- and, again, when -- so we
 11 looked at the contract, which was dated February
 12 2014, when in relation to that do you think you
 13 first re -- reached out to D.R. Horton?

14 A. It had to be before -- I would say, before
 15 the first of the year. I mean probably in November
 16 or December.

17 Q. Did you go and walk the property that you
 18 were trying to sell with any representatives of D.R.
 19 Horton?

20 A. I believe Gerard and I met out there once
 21 on the property, just to show him where it was at,
 22 and we go down in there.

23 I don't remember us walking the property.
 24 I remember us talking about the property and
 25 stopping in that big open area where you were at

1 there. And then from there -- then on, you know, I
2 never walked with him.

3 Q. Okay, so this is the Google Earth image
4 from 2008, and now we're looking at an image dated
5 2011. So the work that is being depicted here, does
6 this appear to be a true and accurate representation
7 of work that you did to begin developing --

8 A. That is -- that is correct. I cleared it
9 after I got all my permits and my right-of-way
10 permits from the County, I started clearing -- I had
11 the bushhogging done. Didn't clear anything, the
12 only thing we did was take up all of the
13 bushhogging, we got these huge Gyro-Trac machines,
14 and he cut all where the roads are and just
15 bushhogged everything.

16 Q. Okay.

17 A. And then I started -- was able to start
18 digging some dirt.

19 Q. The -- so that was 2011, this is 2012, and,
20 again, these -- the overlay of the road that says
21 Tidal Walk Drive, there's no road there yet,
22 correct?

23 A. No, no, just a cleared wide road.

24 Q. All right. And it looks like here in the
25 center, is this what you were talking about where

1 you had started to dig the pond?

2 A. Yes, ma'am.

3 Q. All right, and as far as the clearing, it
4 appears that you cleared the -- what would become
5 sort of the loop --

6 A. Uh-huh.

7 Q. -- for the property, but what sort of
8 clearing had you done in the southern section of the
9 property?

10 A. None at all.

11 Q. Okay.

12 A. We didn't -- just some bushhogging. You
13 can see the little bit of bushhogging in there.
14 Just the underbrush underneath all the big trees and
15 things like that.

16 Q. Did you make any observations about any
17 trash or debris or anything in that southern portion
18 of the property?

19 A. No, there was never -- all of the property
20 was cleared except for that one road, that was it,
21 there was the only trash --

22 Q. Okay.

23 A. -- on the property.

24 Q. The -- so now we're looking at November of
25 2014. So we looked earlier at your contract with

1 D.R. Horton that was dated February of 2014, so what
2 we're seeing here, this would be after D.R. Horton
3 had purchased the property, correct?

4 A. Yes, ma'am.

5 Q. Okay.

6 A. Is what it looks like.

7 Q. Okay. So going back to those Andrews and
8 Burgess images that are Plaintiff's Exhibit 4,
9 again, this is May of 2013. At this point, you had
10 not yet sold it to D.R. Horton, correct?

11 A. No. No, I had not.

12 Q. Okay. And this -- we're looking at a road,
13 is this on your property, to the best of your --

14 A. That's in that big open spot from your
15 aerial.

16 Q. Okay.

17 A. Pond -- the pond is straight ahead. Do you
18 see the excavator?

19 Q. Yes, and I'll go back just for everyone's
20 reference.

21 A. Uh-huh.

22 Q. Again, I don't want to make everyone
23 seasick. Okay, so the big open spot you're
24 referring to in 2013, are you referring to this
25 initial area that I've zoomed in on?

1 A. Yes, ma'am.

2 Q. Okay. And you mentioned that you would
3 store dock pilings on the property; is that correct?

4 A. Uh-huh.

5 Q. To -- to your knowledge, does this image
6 depict an area of dock pilings that was stored on
7 the property at this time?

8 A. It's hard to tell, but that's where I -- we
9 -- put them at.

10 Q. Okay. The -- back to the Andrews and
11 Burgess photos, again, this is 2013, so who was
12 doing the work for you for clearing out this pond?

13 A. I did.

14 Q. And when you say you did, you mean you,
15 personally, were doing the --

16 A. Me, personally.

17 Q. -- digging?

18 A. Me, personally. I hauled up every tree in
19 that lake and burned it and dug all that dirt out.

20 Q. Okay. What did you do with the dirt?

21 A. Sold it.

22 Q. To whom?

23 A. Anybody that needed dirt in Beaufort
24 County.

25 Q. All right. Did you keep any sort of

1 records of how much dirt you sold?

2 A. No. When I sold it to D.R. Horton, one of
3 the things they were requesting was that to make
4 sure that I left enough dirt there for them, and
5 they did a survey to make sure there was enough dirt
6 left for them to develop the property, which is
7 understandable.

8 Q. Okay.

9 A. That's kind of why everything was in limbo,
10 'cause I knew they would have needed the rest of
11 that dirt to develop the property.

12 Q. And when you say that D.R. Horton did a
13 survey, and that they -- as a condition of the sale,
14 they wanted a certain amount of dirt, was that --

15 A. It wasn't a condition of the sale, it was
16 an inquiry from them just to make sure that they had
17 enough dirt onsite to finish the development. So
18 dirt's a commodity in Beaufort, so you -- they want
19 to make sure they didn't have to buy any.

20 Q. Okay, and I understand that, and I just
21 wanted to make sure, timeline wise, at the time of
22 this survey, D.R. Horton hadn't purchased the
23 property, correct?

24 A. Right.

25 Q. And --

1 A. And that's about -- that's -- that's pretty
2 much how I left it, what you see right there.

3 Q. All right, and you mentioned earlier about
4 leaving dock materials, so is this what you were
5 referring to when you said --

6 A. Uh-huh.

7 Q. -- that there -- there'd be certain
8 materials you'd leave on the property?

9 A. Yes, ma'am.

10 Q. Okay, so as far as this pile of materials
11 in 2013, was this on the property at the time that
12 you were looking at selling to D.R. Horton?

13 A. Most likely it was on the property, but
14 what we would do is, we'd pile up our debris, then
15 I'd pile it up and take it down to Barnwell
16 Resources --

17 Q. Okay.

18 A. -- and haul it off.

19 Q. And what's Barnwell Resources?

20 A. They're a landfill right down the road on
21 Lady's Island.

22 Q. And as far as, you know, why would you take
23 the debris, rather than just leaving it out on the
24 property? Why would you take it to Barnwell
25 Resources?

1 A. Well, that's the facility to haul the trees
2 on. The tree lumber we'd pick through, you see like
3 there's trees and debris there, we'd separate that
4 and burn it, 'cause we do docks and seawalls and
5 stuff like that, so I'd clear a lot of bluffs, but
6 I'd have trees and debris and stuff like that, so my
7 guys would mix it all up, and then I'd have to go
8 and separate everything.

9 Q. Okay. And, again, this is a picture, it
10 looks like, of the same material on the property in
11 2013, correct?

12 A. Yeah, that's just at a different angle.

13 Q. Okay. All right, and you mentioned the
14 dock piles, --

15 A. Uh-huh.

16 Q. -- is this what you were referring to when
17 you said dock piles?

18 A. Yes, ma'am.

19 Q. All right. Did you leave dock piles on the
20 property when you sold it to D.R. Horton?

21 A. There was not many left there. The ones
22 that I know were left there, there was two as soon
23 as you'd come in on the right-hand side, 'cause
24 somebody called me and asked me if I wanted them
25 back, and I said, "No, y'all can have them." And

1 then I took a bunch of them, because all of the cor-
2 -- corner markers in the development, and I was
3 thinking about developing it, it had all my pins,
4 you know, iron rebar, and I put a pile in the hole
5 and put a pile underneath -- beside each one, so
6 that pin wouldn't get knocked over. So I cut piles
7 up probably four to six feet long and dug them in
8 the ground right next to the property pins.

9 Q. Okay.

10 A. So each pile were scattered all over the
11 property at every property pin.

12 Q. And if you'll just describe that for us.
13 So at the time you sold to D.R. Horton, were -- did
14 you have piles that were sort of vertically placed
15 throughout the edge of the property line?

16 A. Yes, ma'am.

17 Q. Okay, and so that was what those piles were
18 meant for, correct?

19 A. Correct.

20 Q. All right. And from this angle, can you
21 tell if this was on your property, the property that
22 you sold to D.R. Horton?

23 A. Yes, ma'am.

24 Q. And, again, this is -- if you can describe
25 for us, basically, on this plot plan, to the best of

1 your ability, do you know where this image would be
2 in relation to the neighborhood that was eventually
3 developed?

4 A. That picture is looking towards the pond,
5 and the roadway is right -- see those vertical piles
6 up? You see one, it's got an orange ribbon around
7 it, and the next one right behind it, that's the
8 property pins. See the property flag right there at
9 the bottom and the stake? When they staked them all
10 out and put the pins in, they're easy to get knocked
11 over, and they cost a lot of money to call a -- so I
12 wouldn't go ask anybody to knock them down, so I put
13 a pile next to them, so they could be found again.

14 Q. Okay, and what I just circled, just for you
15 to confirm this, this is what you're referring to,
16 the property pin?

17 A. Yes, ma'am.

18 Q. Okay.

19 A. 'Cause there's -- that's a survey flag, and
20 that's a survey stake, which is just regular pine
21 and it rots within a couple months.

22 Q. Okay.

23 A. Those piles won't rot.

24 Q. And the -- so back to the site development
25 -- sorry, back to the Andrews and Burgess images, at

1 this image it looks like is taken from around the
2 same time of -- as the other images.

3 Do you recognize this image?

4 A. (Reviews photograph.) That's the
5 entranceway off of Capers Road.

6 Q. Okay, and so when you say the entranceway,
7 we were referring to a couple of different roads,
8 this is the entranceway onto the prop -- your
9 property referred --

10 A. That is correct.

11 Q. -- to, correct?

12 A. That is the entranceway where Tidewater is.

13 Q. Okay, and you mentioned something about,
14 you said you put up a -- a gate with somebody. What
15 were you referring to there?

16 A. A gate at the other entrance, where the
17 other dirt road was, where people had been coming
18 in, you know, undoubtedly through the '60s and '70s
19 and early '80s, until we put the gate there. It got
20 really bad there for a while.

21 Q. And what you're referring to though, you're
22 not referring to the entrance to -- to property --

23 A. Oh no, no, no, I had to make that entrance,
24 there was no way to get through there when I bought
25 the property.

1 Q. Okay. And looking here at Plaintiff's
2 Exhibit 4, what is this that I've zoomed in on here?
3 What is this depicting?

4 A. I believe that's silt fence.

5 Q. Okay. And I -- I'll show you another
6 image.

7 A. Uh-huh. That silt fence, I piled it up,
8 'cause, like I said, after I got my permits I
9 started cleaning up the roads, especially going in,
10 and then I had Walter Oliver do all of my
11 bushhogging on the inside of the property, but the
12 entranceway going in, I took a bunch of the dirt out
13 of the pond and built the road up in through there.
14 That's why you see it's sandy soil, 'cause it's
15 clear soil.

16 Q. Okay, and do you recognize what this
17 material is?

18 A. No, that's not, that looks like -- yeah, I
19 remember exactly what that is, it's asphalt.

20 Q. Okay, and what -- where -- where did that
21 come from?

22 A. Probably a job I was demo-ing.

23 Q. And was this on your property?

24 A. Yes.

25 Q. Okay. And at the time that you sold to

1 D.R. Horton, was the asphalt on your property?

2 A. Yes, ma'am.

3 Q. The -- and when you say a job you were
4 demoing, you mean a dock building job?

5 A. No, that was probably from something else,
6 because if it's asphalt, it might have been like a
7 boat landing, or something like that, that we had to
8 tear up.

9 Q. Okay. All right, what other materials
10 would you store on the property when you owned it?

11 A. That's it, the wood, soil and asphalt, then
12 floats, the -- you know, that's about it. That was
13 another thing, that float that was laying there,
14 we'd brought that there and flipped it over, and
15 taken all the flotation out of it.

16 Q. Okay, and this is, again, Plaintiff's
17 Exhibit 4 you're looking at, Andrews and Burgess,
18 looking --

19 A. Yeah.

20 Q. -- at 11, so is this what you're referring
21 to that you'd taken out --

22 A. (Reviews document.) See, that's an old
23 floating dock, and it had these black flotation
24 fillings in them that's full of polystyrene, and we
25 got all them off Hickory Hill.

1 Q. What's Hickory Hill?

2 A. That's Waste Management --

3 Q. Okay.

4 A. -- near Ridgeland.

5 Q. And why would you take that -- that
6 material there?

7 A. Because Barnwell won't accept the -- accept
8 the polystyrene.

9 Q. Okay.

10 A. It don't rot.

11 (Whereupon, Plaintiff's Exhibit Number 5, Notice
12 of Suitability, is marked for the record.)

13 BY MS. WILLIAMS: (Continuing)

14 Q. In terms of -- okay, and I'll show you
15 what's been marked as Plaintiff's Exhibit 5, and
16 this is a documented dated June 2014; do you
17 recognize this document?

18 A. (Reviews document.) I have seen it, yes,
19 ma'am.

20 Q. Okay, and it looks like this is marked as a
21 notice of suitability, pursuant to the contract,
22 which was written by D.R. Horton, correct?

23 A. (Reviews document.) Correct, it's some
24 paperwork.

25 Q. Okay, and -- and as far as the -- in

1 between June of 2014 and when you signed the
2 contract back in February, March of 2014, what sort
3 of questions was D.R. Horton asking you, or as an
4 investigation, anything else into the nature of the
5 property?

6 A. There wasn't a lot. Not many -- I mean
7 nothing really, just -- they were doing their due
8 diligence and I was waiting to get paid.

9 Q. And as far as your awareness of their due
10 diligence, did you have any involvement with their
11 due diligence?

12 A. No, ma'am.

13 Q. Okay, and I believe you were in the
14 courtroom for opening presentations, and you may
15 have heard some people reference a Phase I
16 environmental report. Did -- did you speak with
17 anybody from any companies, D.R. Horton, or
18 otherwise, about your ownership of the land as part
19 of the -- of Phase I?

20 A. No, ma'am.

21 Q. Okay. All right, and we discussed -- sorry
22 about that, the -- so at the time that you sold to
23 D.R. Horton, again, looking just back at those
24 Google Earth images, that the -- in terms of what
25 had been cleared, so, again, looking at Plaintiff's

1 Exhibit 2, here is the image from November 2014, and
2 it appears to be still fairly wooded; would you
3 agree with that?

4 A. Yes, ma'am.

5 Q. Okay, and -- and at this point, this is
6 after it's been sold to D.R. Horton, correct?

7 A. It's --

8 Q. I'll -- I'll zoom in on the date for you.

9 A. Yeah, 11/20.

10 Q. Yes. Okay, and so prior to the sale to D.R.
11 Horton, again, that -- that the southern area of the
12 property was still fairly wooded, correct?

13 A. Correct.

14 Q. Did you have any intention or discuss any
15 intention with D.R. Horton of developing property
16 south of the property that you purchased?

17 A. Well, I had pur -- like I said earlier, I
18 had bought three parcels. So there was a parcel on
19 the road which needed access, the main parcel, and
20 then a five-acre parcel to the south.

21 Q. Okay. And so the -- the five-acre parcel
22 to the south, and I'll show you from Plaintiff's
23 Exhibit 3 --

24 A. Uh-huh.

25 Q. -- in terms of the five-acre parcel to the

1 south, is that depicted in this aer -- in this
2 image?

3 A. Yes, ma'am, where you see that cul-de-sac?

4 Q. Yes.

5 A. I purchased that at a later time from a
6 person, 'cause I was looking at all the properties
7 there, because I owned the other piece down below
8 that, and that five-acre parcel that's blank, if you
9 can zoom in on that, that piece at the end of Sandy
10 Lane's cul-de-sac, that parcel there I wanted to buy
11 it, but it's -- it's slammed full of trash.

12 Q. Okay, and -- and if you could expand on
13 that, what -- what are -- what are you referring to
14 there?

15 A. The whole -- the whole center of that
16 parcel of land.

17 Q. All right, and did you -- so, again, these
18 -- these construction plans it looks like were drawn
19 up in 2009, 2010, so you -- had you witnessed the
20 trash on that area prior to selling it to D.R.
21 Horton?

22 A. Yeah, and after, you know, going out * and
23 walking around and looking at everything, I saw the
24 -- I mean the whole center of it is just dumped
25 debris. It's not buried or anything, it's just

1 dumped debris. People would back up there and for
2 years and years.

3 Q. Okay, and in -- in terms of the access to
4 that area, the -- so you said it was slammed full of
5 trash. What types of material did you see?

6 A. There -- anything and everything you can
7 imagine from, you know, from glass to -- I've seen,
8 like, shingles in it, old lawnmowers, you know, just
9 debris. Anything you can imagine from household to
10 construction.

11 Q. Did you see any car parts or -- a car
12 frame?

13 A. Uh-huh. Yeah, there's two cars on that
14 parcel of land.

15 Q. Okay.

16 A. Like, in the woods.

17 Q. What kind of car did you see -- you think
18 you saw?

19 A. Who knows? It's all -- there's nothing but
20 frames left.

21 Q. Okay. As far as the status of the car that
22 you saw, what -- how would you describe it?

23 A. Oh, old, I mean it was probably in the
24 '50s, whatever it was, 'cause it had a big 'ole
25 round hood, and a big 'ole -- the fins off the back,

1 that's why -- the reason I remember.

2 Q. Okay. So a -- again, you said that that
3 southern area was slammed full of debris. And -- as
4 -- and did you discuss, or do you remember
5 discussing that with anyone from D.R. Horton?

6 A. No, because they weren't interested in
7 buying that parcel. If -- no -- I mean, no, we
8 didn't discuss that.

9 Q. Okay. Did you discuss with them that that
10 had been your plan to buy that parcel?

11 A. Me and Gerard might have discussed it in a
12 conversation, you know, because of the other land
13 that were around it I didn't own, except for that
14 one piece.

15 Q. You mentioned that you saw that that area
16 was chucked full of debris when you were hunting, so
17 was --

18 A. Uh-huh.

19 Q. -- was it fairly obvious just from being in
20 the --

21 A. I mean --

22 Q. -- area?

23 A. Yeah. Yeah, you walk down the road.

24 Q. All right.

25 MS. WILLIAMS: Well, Mr. O'Quinn, thank you very

1 much. I think that's all the questions I have for
2 you at the moment. I'm going to pass you off to the
3 other attorney.

4 WITNESS: Thank you, and you're welcome.

5 THE COURT: All right, ladies and gentlemen, it
6 is 5 o'clock, and as I indicated before that I'd
7 like to try to get you out of here at 5:00. I know
8 you have other obligations and things to get to, so
9 we will adjourn for today. If you will be here
10 tomorrow before 9:30, we'll get started promptly,
11 okay? All right.

12 All right, sir, you're free -- you're free to go
13 until in the morning at 9:30, if you'll be back
14 here, we'll resume your testimony. You'll remain
15 under oath, which all that means is, just don't talk
16 to the lawyers.

17 WITNESS: Okay.

18 THE COURT: Simple enough?

19 WITNESS: All right.

20 THE COURT: Thank you, sir.

21 WITNESS: Thank you.

22 THE COURT: All right, yes, sir.

23 THE WITNESS: Have a good evening.

24 THE COURT: You do the same.

25 All right, anything before we adjourn for the

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF BEAUFORT 2018-CP-07-00911

3 _____

4

5 Richard W. and Rebecca
6 A. Drier; Sarmed and
7 Jessica M. Shafi, et al.

8

9 Plaintiff,

10

11 vs. TRANSCRIPT OF JURY TRIAL

12 VOLUME II AMENDED

13 D.R. Horton, et al.,

14

15 Defendants.

16 _____

17

18 DATE: November 16, 2021

19

20 LOCATION: Beaufort, South Carolina

21

22

23 B E F O R E: The Honorable Bentley Price, Judge Presiding

24

25 R E P O R T E D B Y: Kymberlee M. Williams, RPR

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PROCEEDINGS

TUESDAY, NOVEMBER 16, 2021

BEAUFORT, SOUTH CAROLINA

* * *

(The following proceedings were held in open court. All parties were present along with their attorneys.)

THE COURT: Before we bring out the jury, is there anything from the plaintiffs?

MR. TRAYWICK: Nothing from the plaintiff, Your Honor.

THE COURT: Anything from the defense?

MS. PETERSON: Yes, Your Honor. Briefly.

THE COURT: All right.

MS. PETERSON: We have discussed this, and I think -- Michael and I have discussed this, and I think we have come to sort sort of resolution that if the parties are able to reach a settlement with the plaintiffs -- if Hutton and Lather are able to reach a settlement with the plaintiffs, we will not hold the cross-claims hostage. We will refer them to a special referee, ADR, separate case. But that is dependent on actual settlement.

THE COURT: Okay.

MS. PETERSON: If this case is to go forward with the trial and the jury deciding, then we believe it's wholly improper for the summary judgment to be re-heard.

1 THE COURT: I agree with that. I don't think I can
2 do that. So I am agreeing with you 100% on that. That is what
3 we talked about. I don't think that is something I can do.
4 You don't get to just bring it back up again because a prior
5 circuit judge has already ruled on that. So I am with you on
6 that.

7 MS. PETERSON: Right. So at that point the only
8 two options are either Your Honor decides as a matter of law
9 that it's enforceable. It's already been held as a matter of
10 law. It's a question of fact whether it's unenforceable.

11 THE COURT: Okay.

12 MS. PETERSON: So Your Honor can decide whether
13 it's enforceable as a matter of law or it's a jury question.

14 THE COURT: Okay. All right. I'm with you on
15 that.

16 All right. Well, THE only unique aspect of that is
17 that if that actually does transpire, that just leaves you-all
18 the only one sitting there.

19 MS. PETERSON: We will, of course, work with the
20 plaintiffs, too, to try to resolve this matter.

21 THE COURT: Then there you go.

22 MR. NAIL: The only other thing I would add to that
23 is that we would reserve -- assuming all of that were to
24 happen -- because we don't know that it would -- we would
25 reserve all rights to pursue the claims in the remainder of

1 this case.

2 Remember, it's a one-day case. It's just one
3 house. We wouldn't be waiving any rights related to the Shafis
4 to the extent -- you know, there are fees and costs for trial,
5 for example. That would have to be deferred to the rest of the
6 matter to be pursued separately.

7 THE COURT: That still kind of leaves you-all right
8 where you-all are again.

9 MS. LUCEY: A lot of uncertainty for us in terms of
10 trying to resolve the claim.

11 THE COURT: Right.

12 MS. LUCEY: Another alternative, Your Honor, is for
13 Hutton's and likely Lather to raise a motion -- in an effort to
14 expedite the trial, raise a motion to bifurcate the
15 cross-claims.

16 But I think the threshold issue and whether we can
17 bifurcate the claims is to determine whether or not the
18 contractual indemnity provision would remain enforceable. If
19 they are enforceable -- if they are not enforceable, which is
20 our position, then there is no reason to bifurcate them and
21 they can be dismissed. And that's already been decided then,
22 Your Honor.

23 THE COURT: Well, see, there is a little bit of a
24 -- well, we can kind of -- I mean, for the bifurcation portion
25 of it, if we bifurcated that portion of it, it would just leave

1 it out there.

2 MS. LUCEY: Well, but that still creates the issue
3 of the uncertainty, Your Honor. There -- I don't know what the
4 incentive is for Hutton's to be able to settle all of the
5 claims.

6 I think the only reasonable way to do it is for
7 Hutton's to settle all of the claims for all of the homes with
8 plaintiffs' counsel. I don't know that I am in a position to
9 try to negotiate one house settlement; because that simply
10 kicks the can down the road, and we will be here in three
11 months.

12 THE COURT: Right. You will be right back in front
13 of me in February.

14 MS. LUCEY: Right.

15 MR. NAIL: The only thing that I would add to that,
16 Your Honor, is if the cross-claims were to be bifurcated, it
17 could actually extend the trial because the witnesses are
18 already going to be up there. The same witnesses --

19 THE COURT: Oh, I get it. Basically, that just
20 leaves them out there to be tried at a separate time. I get
21 that.

22 I mean, I understand what she is saying, also, that
23 that portion of it can be -- if we did go forward with the jury
24 trial, that portion of it could be -- we wouldn't be able to
25 appoint that to a special referee. They don't want us doing

1 that anyway.

2 MS. LUCEY: I don't know if we can fold in
3 determining whether or not -- the contract interpretation is a
4 matter of law.

5 MS. PETERSON: Right. A judge has already decided
6 as a matter of law that it's not unenforceable.

7 MS. LUCEY: We didn't decide it was enforceable
8 either.

9 MR. PETERSON: No. So that's what I am saying.
10 The only issue that is a matter of law is is it enforceable as
11 a matter of law.

12 MS. LUCEY: Right. And I think that is within
13 Judge Price's purview.

14 MS. PETERSON: It is, and he can say, "No, it's
15 not. Go to the jury."

16 THE COURT: I agree.

17 MR. NAIL: I would just suggest, Your Honor, that
18 maybe we see how much we get through today.

19 THE COURT: The concern I have, of course, with
20 that -- I am fine with that. But if we don't get through
21 enough, we have backed ourselves into a corner.

22 MS. LUCEY: Your Honor, based on -- I can't imagine
23 we would finish by Thursday.

24 THE COURT: Well, what did -- do you have
25 authority?

1 MS. LUCEY: I do have authority. I mean, I have
2 extended an offer to plaintiffs' counsel. I extended an offer
3 last week. Part of the issue was the cross-claims, and
4 plaintiffs' counsel wouldn't provide an issue release for my
5 client.

6 THE COURT: They can't let you out of the
7 cross-claims.

8 MS. LUCEY: Right.

9 MS. PETERSON: For --

10 THE COURT: I'm talking about the plaintiff.

11 MS. LUCEY: No. I'm sorry.

12 THE COURT: You said, "they." I'm sorry.

13 MS. LUCEY: Yeah. And Michael and I have
14 communicated and exchanged emails. I understood that corporate
15 Horton was declining to really engage in any kind of discussion
16 because of the incredibly high attorneys' fees' bill that my
17 client apparently may be forced to shoulder for things it
18 didn't even do. That is part of the issue again.

19 THE COURT: You are talking about --

20 MS. LUCEY: I reached out to Michael, and I said,
21 "Hey, Is there a way that Horton can make a demand to my client
22 as a way to try to resolve my claims with plaintiffs' counsel?"

23 THE COURT: Right.

24 MS. LUCEY: I think corporate's response was, "Our
25 fees are so high that it's really not gonna happen."

1 And I think -- I don't know if Michael is
2 comfortable in disclosing what I understand the attorneys' fees
3 are in the case.

4 THE COURT: I assume they are very high. This is a
5 very old case. I think he said you-all had 50 depositions.

6 MS. LUCEY: They are over \$500,000.

7 THE COURT: Yeah. Sure. That is what I would
8 expect.

9 MS. LUCEY: That is part of the issue of the burden
10 and how we are arguing that provision is unenforceable because
11 they are defending other claims other than what is related to
12 the landscaper, yet my client is going to be forced to pay
13 \$750,000 in attorneys' fees.

14 THE COURT: Right.

15 MS. LUCEY: So that is the rub that we have all had
16 in trying to settle the case.

17 THE COURT: Fair enough. What happened to --

18 MR. WINOGRAD: I am here. He is out working on the
19 settlement part.

20 THE COURT: Oh. I thought he just decided he was
21 going to bail.

22 MR. WINOGRAD: Yeah. We are going to echo a lot of
23 what Hutton has said. I think we have the ability to work a
24 settlement out with the plaintiffs. It will just be a matter
25 of D.R. Horton.

1 I think the same thing she said about legal fees,
2 and that is kind of what is tripping it up.

3 MS. LUCEY: I think, Your Honor, if I can represent
4 to my clients that a settlement is possible and it would
5 include the Horton cross-claims, it would potentially increase
6 my authority.

7 THE COURT: Meaning, it would include the Horton
8 cross-claims or -- or if I rule as a matter of law that they
9 are not enforceable, then that would exclude the Horton claims.

10 MS. LUCEY: That's right. We would just be
11 strictly dealing with plaintiffs' counsel and try to settle.
12 It would leave an equitable indemnity claim.

13 THE COURT: Okay.

14 MS. LUCEY: But in all reality, despite the valiant
15 arguments of Horton, I don't think they will be found without
16 fault.

17 MR. WINOGRAD: Just real quick, Your Honor. All
18 the arguments that Ms. Lucey is making about the
19 unenforceability, we would support and join. So I would say
20 consider that first before we even have to get into our dispute
21 where we have a dispute about which contract applies.

22 If you are going to kick it out on that, then we
23 don't have to worry about which contract applies.

24 THE COURT: They indicated that there was a master
25 contract and also a subcontract with you all, correct?

1 MR. WINOGRAD: Right. If you are just going to
2 say, either one -- no matter which one is unenforceable -- then
3 we can avoid going through that whole rigmarole.

4 MR. CLOUD: East Coast would join in that as well,
5 Your Honor.

6 MS. PETERSON: Part of the reason why we can't
7 settle the cross-claims is because the plaintiffs won't provide
8 an issue or a release to their scope of work.

9 THE COURT: Meaning what?

10 MR. NAIL: If they provide an issue release --

11 THE COURT: I have never heard of an issue release.

12 MR. NAIL: So, for example, this worked out this
13 way with the vertical subs. These settlements have been
14 disclosed. So I hope I'm not speaking out of turn here, but
15 for example, the painter was one of the defendants. They
16 settled. They released any claims --

17 THE COURT: When you say "they," you mean the
18 plaintiffs?

19 MR. NAIL: The plaintiffs released any claims
20 related to the painting work at the home to include D.R.
21 Horton. Otherwise, D.R. Horton would still be defending the
22 paint claims.

23 THE COURT: That's correct.

24 MR. NAIL: That is what has happened with East
25 Coast, I believe. They couldn't provide an issue release for

1 East Coast because it has to do with the cleanup in a sense.
2 So we are left defending a claim related to their scope of
3 work.

4 So that is one of the issues we are dealing with
5 too. Needless to say, it's kind of a mess.

6 THE COURT: Well, it's a huge mess. Where are
7 you-all at with that?

8 MS. WILLIAMS: I would just clarify, Your Honor,
9 the particular problem just with these subcontractors -- we
10 would be happy to try to think of any different way to settle
11 with the subs that have anything to do with the horizontal
12 construction.

13 The problem is -- and just go against D.R. Horton
14 related to their oversight and general contractor practices, et
15 cetera.

16 But the issues with the individual
17 subcontractors -- the settlement discussions are -- some of
18 them are like getting there; some of them are nowhere near, and
19 all of their scopes overlap.

20 So we can't give -- of the three defendant that are
21 left, we can't -- three subcontractor defendants -- we can't
22 give one of them an issue release because -- at least in the
23 way that the contracts are written and the testimony sort of
24 came out is that they each understand parts of the contract and
25 not be their job, even though it's in the contract and it

1 overlaps between them.

2 THE COURT: Are you saying you can't issue an
3 individual release for one if all three -- if you don't issue
4 just one big blanket one for all of them.

5 Could you issue one for all of them in a global
6 settlement?

7 MS. WILLIAMS: Could we?

8 THE COURT: Sure.

9 MS. WILLIAMS: I believe so. I will have to check
10 with Ben to make sure, but, yeah, I think we were trying to
11 figure out a way to do that, but we just couldn't get the --

12 MS. LUCEY: Your Honor, I think -- when I spoke to
13 Ben, I think he talked about trying to settle Lather and
14 Hutton's together.

15 THE COURT: I mean, and I get that, but at that
16 point in time, obviously, that leaves only those two sitting in
17 the chair, and you don't want to deal with that. I mean, that
18 is a waste of your time at that point.

19 MS. WILLIAMS: Well, it is and it isn't. There are
20 scenarios where we have tried this case against Horton without
21 any subs in the case before. If we liked the outcome there, we
22 shouldn't stand in it until verdict, we probably wouldn't all
23 be here today.

24 THE COURT: But does this resolve this entire -- we
25 are talking about the issue releases?

1 MS. WILLIAMS: If we can settle with the site work
2 subs as a group and just have D.R. Horton.

3 THE COURT: Because what they are saying is if
4 there is no issue release, then they are still going to be
5 stuck and on the hook.

6 So -- and she was saying that she didn't
7 individually want to give one to, let's say, you know, Hutton
8 and then the other two not get them; because then the other two
9 are sitting there stuck with holding the bag as well.

10 MR. TRAYWICK: Your Honor, the thing about that
11 is -- and we are not adverse to settling with the subs and
12 giving issue releases, but the price for that -- and I am not
13 speaking for what I want. I am with you. I would like to
14 settle the cases.

15 I have obligations. My clients have given me
16 marching orders. We can settle with the subs and get the issue
17 releases, but if we do so, it's going to very profoundly
18 imperil any remaining claims that we have against D.R. Horton
19 for the simple reason that these guys, you know -- D.R. Horton
20 doesn't sell perfromity work.

21 THE COURT: I know.

22 MR. TRAYWICK: All of the work is done through
23 Lather and Hutton's.

24 THE COURT: Sure.

25 MR. TRAYWICK: So certainly Michael -- I am just

1 being fair. I think we can kind get around to a big ferret.
2 Mr. Nail is going to -- as soon as we settle with them with an
3 issue release, that is going to be a pretty -- I'm not saying
4 that's necessarily winning, but it's going to be a --

5 THE COURT: Well, he is going to say, "We are the
6 developer. They did all the work. Don't blame us.

7 MR. TRAYWICK: You got it, Your Honor. It's going
8 to be a pretty -- and for that reason, we really need to hit a
9 minimum floor that we can sell for our clients to give issue
10 releases. I'm just being completely straight.

11 THE COURT: I'm with you all. I'm trying to work
12 it with you.

13 But you're saying that --

14 MR. TRAYWICK: I did make --

15 THE COURT: The biggest issue continues to be the
16 cross-claims. That is the biggest snag. Because without that
17 being resolved, then it's never going to settle or be resolved.
18 It will always be -- there will always be this, you know, this
19 case out there with you-all, and it's just never going to end.

20 MS. LUCEY: And the attorneys fees will continue --

21 THE COURT: That's the thing, yeah. And it will
22 just continue on and on and on. And, again, this can't be
23 diverted to a special referee or anything along those lines.
24 It's going to end up being tried.

25 MR. NAIL: And even if they settle with the land

1 contractors with an issue release, we still say they should be
2 sitting in that chair; because we are still defending against
3 their work.

4 THE COURT: I understand that. If she is correct,
5 you-all contracted -- they were supposed to be defending you
6 all; because you-all are just developers. You-all don't do any
7 of the work.

8 MS. PETERSON: Right. Our position is there is a
9 present breach of contract.

10 THE COURT: Right.

11 MS. LUCEY: Right. But our position is that
12 provision is unenforceable even going forward.

13 THE COURT: Right because we can't dump everything
14 out on you-all.

15 MS. LUCEY: Right.

16 THE COURT: I get it.

17 MS. LUCEY: I can't be forced to pay for their --
18 not you -- the Court's bad behavior.

19 THE COURT: I get it. All right.

20 MR. NAIL: That's going to be for the jury to
21 decide.

22 MR. ROSS: I was out. I just caught the tail end.
23 I heard talking about the issue release. If there is an issue
24 release given -- they are not defending anything we did. All
25 of our work has been released. I mean, you are familiar with

1 this, so I am not clear where they are coming from. Our work
2 is gone, so they got to defend what they did on the project.

3 THE COURT: That's right. But what Mr. Traywick is
4 saying is he is not going to give you-all issue releases
5 because then D.R. Horton is sitting there in the seat by
6 themselves, and they are going to say, "We are just the
7 developer. We didn't do any of the work. All the people that
8 did all the crappy work are already out of this. Their
9 bargaining chip or bargaining power is D.R. Horton is gone.

10 MR. ROSS: Right. But alternative to that -- D.R.
11 Horton has the responsibility to oversee and manage and
12 supervise.

13 THE COURT: And that is why they are going to be
14 still sitting in that chair.

15 MR. ROSS: Right. But have you -- there is another
16 option here, which we are exploring, which is something -- I
17 thought we were creative when we drafted it, and somebody
18 pointed out there is a thing that is called parajury release.
19 It's a modification somewhere between a liability release and
20 an issue release.

21 Basically, what it says is, the parties have
22 reached a settlement, and plaintiffs have released all of the
23 claims -- for example, the dirt work -- as to Lather. They are
24 only pursuing D.R. Horton for what they had to do on the
25 project: Supervise, manage, et cetera.

1 It's effectively the same thing. It has been
2 upheld out west. I have done it a few times. I have never
3 been in front of a court with it, but it's effectively the same
4 thing as an issue release. It just doesn't say "issue
5 release." It leaves D.R. Horton standing defending their
6 supervision, their management, et cetera.

7 MR. NAIL: Your Honor, there are a couple problems
8 with that. Number one, we disagree on the supervision aspect
9 as it relates to the land development is different on the
10 vertical side, when the lots are being prepared and the homes
11 are being constructed.

12 THE COURT: Did you-all own the property and hire
13 these subs?

14 MR. NAIL: Lather was not a sub. It was the
15 general contractor for the land development process.

16 THE COURT: All right. Did you-all own the
17 property at the time?

18 MR. NAIL: Yes.

19 THE COURT: You-all are still on the hook, so I am
20 not going to buy that argument.

21 MR. NAIL: Okay. With the issue release, even if
22 they get an issue release for the land, we have still been
23 defending against those allegations for four years.

24 So we are still pursuing against these three
25 contractors, so we are still going to pursue -- they didn't

1 call.

2 THE COURT: You cross-claimed against them.

3 MR. NAIL: Yes.

4 THE COURT: So you are not defending them. You
5 sued them.

6 MS. PETERSON: Defending their scope of work, I
7 think he meant.

8 MR. NAIL: I meant, so even if they get an issue
9 release, we have still incurred a lot of fees and costs
10 defending against allegations made by the plaintiffs against
11 Horton.

12 THE COURT: Against them. Okay. I understand.

13 MR. NAIL: So we would still have to pursue the
14 cross-claims, even with an issue release. The difference in
15 the vertical side is that the vertical subs paid D.R. Horton to
16 release the cross-claims.

17 THE COURT: Okay.

18 MR. NAIL: So if they haven't paid anything, then
19 we still need to pursue those cross-claims even with an issue
20 release.

21 MS. LUCEY: Your Honor, I would like to make a
22 distinction. My client, Hutton's was a vertical construction.
23 My client was not land development. There is testimony in the
24 record from Horton that my client's scope was not part of land
25 development. I touched the dirt, yeah, but I was part of

1 vertical construction.

2 THE COURT: What did you-all do? I thought you-all
3 were landscapers.

4 MS. LUCEY: Yeah. But we did it under the
5 supervision of Horton.

6 THE COURT: Got it.

7 MS. LUCEY: We didn't do it as a sub to Lather. We
8 did it as a sub to Horton on the vertical construction, and the
9 gentleman who was in charge of land development, Mr. Osaka, I
10 think has testified, "I didn't have anything to do with
11 Hutton's on the landscaping because that is part of vertical
12 construction."

13 THE COURT: Okay.

14 MS. LUCEY: So just a point to clarify --

15 MR. NAIL: I agree with that.

16 THE COURT: So now we are just dealing with the
17 people who move dirt.

18 MR. NAIL: Well, no, we are still dealing with
19 Hutton's because we haven't gotten or recovered any of the fees
20 and costs associated with the fees and claims.

21 MS. LUCEY: How are they going to parse out those
22 claims? Are you going to assign me a certain percentage of
23 your legal fees? How are you going to do that? Or do I have
24 to pay for all the fees you have incurred that the painter
25 didn't pay as part of their subs.

1 MS. PETERSON: I think the jury --

2 THE LUCEY: That's part of the issue here.

3 MR. NAIL: If we get to that point. The jury -- we
4 have made the motion to apportion the fault, if we get to that
5 point. That is really --

6 THE COURT: You are going to then go after Hutton's
7 and say that, "I have been apportioned 30% of the costs, and
8 you owe 30% of my fees?

9 MS. LUCEY: I think it would be if Hutton's was
10 apportioned 10% of the fault, then they can get 10% of their
11 fees from me. That is how I would look at it.

12 MR. WINOGRAD: I would agree with that.

13 THE COURT: I wouldn't agree with any of that, but
14 that's just -- I would say you are stuck with your fees are
15 your fees. I get what Mr. Nail is saying that they have
16 created all of this problem, "they" being the plaintiffs.
17 Since these two haven't settled -- because you-all are the
18 developer, you have had to assist in the defense and incur all
19 of this cost because "they" the plaintiffs won't let them out,
20 and now everybody is mad at them again.

21 MR. NAIL: The longer it has gone on, the worse it
22 gets.

23 MS. LUCEY: It's like quicksand. The more you
24 struggle, the more you're stuck.

25 THE COURT: Yep. The fact that you sink.

1 MS. LUCEY: Yes.

2 THE COURT: I'm noticing that. I'm working hard
3 and I'm struggling here and sinking quick because I'm not
4 getting anywhere. I feel like -- what is it Aimee says she is
5 like a duck. She is calm in water, but underneath she is in an
6 abyss. That's how I feel right now.

7 Where is corporate?

8 MS. LUCEY: Texas.

9 THE COURT: Do they have a jet?

10 MS. LUCEY: Hanging out with Hutton's. My guy is
11 out of business and unemployed.

12 THE COURT: What does he do?

13 MS. LUCEY: He is unemployed. He is a stay-at-home
14 dad right now.

15 THE COURT: He is so lucky.

16 MS. LUCEY: I don't know.

17 THE COURT: Actually, he is not lucky. My son is
18 at MUSC today, so my wife is there. So that is all the more
19 reason why I don't want to be sitting here.

20 MS. LUCEY: I think, Your Honor, the people behind
21 that curtain are in Texas.

22 THE COURT: Do they got a jet?

23 MR. NAIL: I'm sure they do.

24 MS. LUCEY: Hutton's doesn't have a lot of jets.

25 THE COURT: Have they got a jet?

1 MS. LUCEY: Hutton's Landscape doesn't have a jet.

2 THE COURT: D.R. Horton has one, I bet.

3 MS. LUCEY: I bet Horton's jets are very nice.

4 THE COURT: How long would it take them to fly
5 here? About an hour-and-a-half?

6 MR. NAIL: I have no idea.

7 THE COURT: I'm telling you it would take about an
8 hour-and-a-half. I've been to Texas in a private jet.

9 MR. ROSS: Judge, if I could add one more thing. I
10 was out on the phone with Michael. The adjuster is trying to
11 figure out a way to settle this safely in here.

12 I know you guys talked about the motion to
13 bifurcate, and Mike was going to say that, you know, the fees
14 that they have incurred already -- it would still remain. But
15 if we were able to get dues, for example, Baringer release
16 (phonetic) and it was bifurcated, that cuts off any future fees
17 for him. So it doesn't just entirely kick it down the road.
18 We can still fight about what's incurred so far, and we can do
19 that in a separate motion, which would come promptly from me,
20 but it would be from all 16 of these properties. But it cuts
21 off him from preventing future cases.

22 THE COURT: Is there a way that you could file a
23 motion if, in fact, everyone settled and D.R. Horton could then
24 file a motion and have the judge determine the apportionment of
25 the fees, if at all -- any? Is there a way to do that?

1 My whole point is so we don't have to have a jury
2 or a special referee determining any of that. I think that's
3 what Horton is saying. What Horton is saying is "F" you-all
4 because, you know, we have to defend for something you-all did.
5 But you of course are saying, "This isn't fair. We have to pay
6 all this money." Is there a way for either a judge, or I guess
7 you could appoint a special referee or had to consider Marvin
8 Dukes -- he is the most reasonable Judge around -- and just
9 say, you-all make you-all's arguments to him, and he can
10 apportion the fees accordingly. That would be one way to
11 resolve all of this.

12 MR. ROSS: The alternative is to listen to Ms.
13 Lucey's argument as the idemnification clause is against public
14 policy, and they are not entitled to anything anyway. So that
15 just shuts the whole thing down.

16 THE COURT: Well --

17 MS. LUCEY: The question is, how do we get that in
18 front of the Court?

19 THE COURT: I think with a bifurcation motion, and
20 I am okay with that. And I think that's more than fair.

21 MS. LUCEY: If we all could just settle with the
22 plaintiffs, we won't have to get into any of this.

23 MR. TRAYWICK: I am certainly ready, willing, and
24 able to accept their money, Your Honor. And we are also ready,
25 willing, and able on a serious note to be -- we are more

1 motivated than we were, you know, five days ago. So we are
2 prepared to talk in our actual way.

3 THE COURT: I think that -- I mean, I'm not
4 know-it-all judge, but any extent. You probably are all ten
5 times better trial lawyers than I ever was, but that jury does
6 hear me. I mean, that is a very unique jury.

7 MR. TRAYWICK: I can see it in different ways.

8 It likes looking at my children. There are four of
9 them, and they are 18 years of age and they still live at home.
10 They have no idea what I am talking about. They have no idea
11 what the word indemnification means. So, I mean -- I don't
12 know. Again, they could get \$36 million because they think
13 it's funny. Or they can say, like I told you, I work for \$12
14 an hour. I aint giving you-all a dime, you know?

15 Pay me \$12.95 an hour and I'll go pick up the glass in
16 the back of the yard. So there is just no telling. It makes
17 me a little bit nervous.

18 THE COURT: I tell you what I am going to do. Out
19 of an abundance of caution -- it's 10:20. I hate to leave them
20 here. I am going to tell them to come back at 12:00. We will
21 take about an hour and 40 minutes to see if you-all can work
22 something out.

23 But at the close of that, I will tell you this -- I
24 am going to give them an hour break. But at the close of the
25 hour I am going to hear your motion; okay.

1 If you are telling me the truth, I am a big fan of
2 that.

3 MS. LUCEY: I am telling you the truth, sir.

4 THE COURT: Well, give me a copy of the contract,
5 and let me take a look at it for an hour.

6 (Recess.)

7 (The following proceedings were held in open court.
8 All parties were present along with their
9 attorneys.)

10 * * *

11 PROCEEDINGS CONTINUE

12 * * *

13 THE COURT: Who wants to start?

14 Are you ready, Kym?

15 THE COURT REPORTER: Yes, sir.

16 THE COURT: All right. Who wants to start?

17 MS. LUCEY: Your Honor, I am happy to try to update
18 the Court on the status of settlement talks, if you want to
19 jump right into that.

20 THE COURT: Where are we as to settlement talks?

21 MS. LUCEY: The parties have been talking, and
22 Hutton's and Lather have communicated or are working on putting
23 money on the table to settle the plaintiffs' claims. I don't
24 believe that Horton has contributed any money towards a
25 settlement, a global settlement.

1 Lather and I are talking, and I am waiting -- my
2 folks had a 4:00 conference call today waiting to see. We
3 communicated with Mr. McDougall about an individual demand.

4 Again, also, if we can try to resolve it globally.
5 I think several of the parties are working towards that.

6 MR. NAIL:

7 THE COURT: All right. Where are you all at,
8 Mr. Nail?

9 MR. NAIL: I have been on the phone as well, Your
10 Honor. We did issue a demand to Hutton's and Lather. That is
11 where we are. We are still in discussions, but we did issue
12 demands. I wanted to put that out there that we are at least
13 making an attempt.

14 THE COURT: All right.

15 MS. LUCEY: Your Honor, I don't know how specific
16 Horton is or what kind of specifics you want, but I think it's
17 important to know that there is an AI demand that Horton has
18 made that's separate and apart from resolving this case. It's
19 over \$1 million in attorneys' fees.

20 MR. NAIL: I move to strike that. That is subject
21 to confidential settlement communication. That is also what
22 was requested.

23 MS. LUCEY: It was, but I think it's relevant and
24 is part and parcel of part of the issue with the contractual
25 indemnity claims.

1 THE COURT: All right.

2 MR. ROSS: No. Your Honor, I was just going to
3 say, I think, for what it's worth, we -- Hutton's and Lather
4 are close enough that this will go away. I think we are just
5 waiting on her carrier to get back to her. We have got the
6 residual issue like we talked about beforehand of a past KI and
7 'a past AI , whether or not we do a Paringer release, we still
8 have to deal with the past fees and costs from Horton, but I
9 think we are close enough to be able to get to a place with
10 plaintiffs' counsel which would pare this case down to a
11 two-party case.

12 Then if we bifurcate the cross-claims of Horton out
13 from what we are dealing with today, again, a two-party case.
14 I think they would agree it gets done by Thursday. We can deal
15 with the past AI and KI at a later date. It would make this
16 case tryable. Our position still remains the same.

17 THE COURT: Tell us what they have to do.

18 MR. ROSS: We have maintained the position that the
19 contractual indemnity claims of D.R. Horton are unenforceable
20 either as against public policy or based on the Concord and
21 Cumberland.

22 Pretty much no matter which provision we look at
23 here, the specifications that they referenced in their motion
24 in opposition to our motion had two parts. One of them was a
25 6.11, and it was an indemnification provision. The title to

1 that Section 6.11 is called Use of Site and Other Areas. So
2 it's intended to be a provision very clearly for if you are
3 using the site, if you are on the site and you do something to
4 screw it up, it's not intended to cover construction defect
5 claims. But under 6.20 there is an indemnification provision
6 "Any negligent acts of contractor or any subcontractor -- this
7 is what is critical of this section -- of any of contractor or
8 any supplier or any individual employed by any of them --

9 That provision is not limiting the amounts -- who
10 is -- my client would be required screw-ups. It says, we are
11 responsible for our work and any other subcontractor or
12 supplier and anybody that would be hired by them.

13 The -- document that I have came from the drafter,
14 who was a subpoena from Carolina Engineering Consultants. It's
15 not signed. I wasn't even aware of it until they brought it up
16 in their motion.

17 So, one, we say it doe sn't apply. Two, it's not
18 signed, so it's not enforceable. Three, we think it's against
19 public policy.

20 So we have got multiple issues with the contractual
21 indemnity clauses. Nevertheless, that is what is holding this
22 together. We have got a demand from the plaintiffs and the
23 contractual indemnity and AI clause, which is is blocking it.

24 MS. LUCEY: At this time, may I make a motion to
25 bifurcate the contractual and equitable indemnity claims that

1 D.R. Horton has asserted against Hutton's?

2 THE COURT: Sure.

3 MR. ROSS: We would like to join, Your Honor.

4 MR. CLOUD: East Coast would join in that as well.

5 MS. PETERSON: For the record, I think any
6 arguments that go to the enforceability of contracts and which
7 contracts apply have already been dealt with on the summary
8 judgment motion.

9 They made the same arguments, and the Court did not
10 rule in their favor.

11 THE COURT: All right.

12 MS. LUCEY: The Court said there was an issue of
13 fact. The threshold issue is the enforceability. We would
14 like to make a motion to bifurcate the contractual and
15 equitable indemnity cross-claims pursuant to Rule 42(b) of the
16 South Carolina Rules of procedure. The Court when separate
17 trials will be conducive to expedition and economy may order a
18 separate trial of any claim, cross-claim, counterclaim, or
19 third-party claim. That is completely within Your Honor's
20 discretion. A trial of all issues under the Flagstar court
21 case, 341 SC 68. "The trial of all issues in a case in a
22 single proceedings is not a mode of trial to which the parties
23 are entitled by a matter of rights."

24 It's within the Court's discretion to bifurcate
25 those claims. Hutton's seeks to bifurcate the contractual and

1 the equitable indemnity claim. I think the threshold issue for
2 the Court to decide in bifurcating is whether those are
3 actually enforceable and can be bifurcated.

4 I think the Court has to determine initially
5 whether the contractual indemnity claim, in particular, is
6 enforceable. Hutton's did file -- Ms. Peterson is right. We
7 did file a motion for summary judgment that was argued in front
8 of Judge DeBerry. He denied it on an issue -- indicating there
9 was an issue of fact.

10 I believe the interpretation of contracts, if they
11 are clear and unambiguous lies within the Court's discretion.
12 It is a matter of law for the Court to decide, but we would
13 incorporate by reference all of the motions and memos we filed
14 in connection with that summary judgment motion.

15 Your Honor has heard, I think, some comments or
16 arguments from counsel. There is an independent contractor
17 agreement between Hutton's and Horton. It's a blanket
18 agreement that covers work for a variety of projects. For this
19 particular Tidewater project, a PO was issued to Hutton's. At
20 the heart of the matter is -- in the contract is the indemnity
21 provision. It's quite lengthy. I believe Your Honor has a
22 copy of the contract, and the language is included also in
23 Hutton's motion for summary judgment.

24 The issue is -- Hutton's is arguing that the
25 indemnity provision is void and unenforceable under South

1 Carolina's anti-indemnity statute, which is South Carolina Code
2 Section 32-2-10, which at its heart prevents one party from
3 requiring another to indemnify it for its own negligence;
4 namely, Horton cannot require Hutton's to indemnify and defend,
5 is our position for its own negligence. The indemnity clause
6 in the contract does purport to exclude indemnity liability for
7 Horton's sole negligence, but within that same provision, there
8 is a broad and expansive duty to defend that Hutton's is
9 required to undertake.

10 So the indemnity clause requires Hutton's Landscape
11 to defend D.R. Horton against all of the plaintiffs' claims,
12 including those that may be based on Horton's sole negligence.
13 It's our position that that violates the anti-indemnity
14 statute. Horton seeks to be fully reimbursed for the cost of
15 defending the entire action pursuant to the terms of that
16 indemnity provision.

17 We believe that it's an illegal contract because it
18 does that. The anti-indemnity statute talks about
19 indemnification, but it's Hutton's position that when reviewing
20 a contract that is not an insurance contract, indemnification
21 and defense are the same thing for purposes of the
22 anti-indemnity statute.

23 South Carolina case law found that reasonable
24 attorneys' fees incurred in resisting a claim indemnified
25 against may be recovered. I think the defense costs -- the

1 duty to defend is rolled into the duty to indemnify for the
2 purposes of contract.

3 We are not trying to conflate the terms, which I
4 think is Horton's position, but in the context of the
5 contractual indemnity claim, they are the same thing.

6 Now, an insurance contract is different. The sole
7 purpose of insurance is to indemnify. So they are separate.
8 This is a traditional contract in risk-sharing agreement, and
9 the essence of the agreement is not solely to indemnify, but
10 there are all these other terms.

11 We distinguish Hutton's contract from the insurance
12 contract. We think in the typical contract case, the duty to
13 indemnify and duty to defend can be read together. That is
14 what leads to the violation of the anti-indemnity act

15 Additionally, the legislature would have used the
16 commonlaw understanding, a regular understanding of the word
17 indemnity. Additionally, if you read the anti-indemnity
18 statute, it actually exempts insurance contracts from the
19 anti-indemnity statute. So there is a clear line drawn between
20 insurance contracts and regular contracts, which is what we
21 have here.

22 So I think additionally the indemnity provision is
23 void against public policy. The public policy behind the
24 anti-indemnity statute is to prohibit a promise to defend
25 another party for their sole negligence. That in the

1 construction context is to prevent a general contractor from
2 shifting its exposure for its sole negligence to the
3 subcontractor. So if you take that out, it's illogical that
4 the legislature would say, we can't indemnify Horton for its
5 sole negligence, but you can still be required to pay the full
6 weight of their legal fees while you are defending claims in
7 the lawsuit.

8 So we think that the all-encompassing duty to
9 defend provision -- I'll read it to Your Honor.

10 It says in the indemnity provision, "Once the duty
11 to defend is triggered, contractor," Hutton's, "is obligated to
12 defend the entire action, lawsuit, arbitration, or other
13 litigation, including any claims therein not subject to
14 indemnify the contractor."

15 That means Hutton's can be required and is required
16 under this provision to defend Horton for claims related to
17 Horton's gross negligence, sole negligence, and intentional
18 negligence.

19 We believe that that violates public policy. It
20 also does require indemnity. If you look within the provision,
21 it requires Hutton's to indemnify for any negligent or
22 intentional act of the indemnity of Horton. It actually
23 includes a provision that requires Hutton's to indemnify Horton
24 for its intentional acts, as long as they are not the sole
25 intentional. It does require Hutton's to indemnify for

1 intentional acts of Hutton's.

2 Additionally, Your Honor -- Lather may go into this
3 a little bit more. We believe that under the rubric of Concord
4 and Cumberland, which says if there is an obligation to defend
5 for the concurrent negligence of Horton, it has to be stated in
6 a way that is clear and unequivocal. We would argue that it's
7 not clear and unequivocal. The purpose of that rationale is to
8 deter negligent conduct by Horton.

9 If Horton knows it can shift the cost of defense
10 and potentially shift indemnification for its negligent acts,
11 where is the incentive for Horton to do right and do good with
12 the building in the community?

13 Additionally, Your Honor, we believe that the
14 contractual indemnity provision can be severed from the
15 contract in Provision 11. South Carolina courts will enforce
16 valid provisions, but should a court determine that a provision
17 is unenforceable, the question is then whether it can be
18 severed but still preserve the agreement between the parties.

19 Here a provision can be severed when it's not
20 dependent on other parts of the contract. Severing the
21 indemnity provision doesn't affect the other potential
22 obligations of Hutton's under the contract and can be severed
23 completely.

24 Horton will argue you can parse -- there is a list
25 of four things in there. So that means we can pluck that out

1 and carve out what is not enforceable. Our position is because
2 Horton itself says in the agreement that once the duty to
3 defend is triggered, the duty to defend is for all claims.

4 Again, I think I mentioned this off the record.
5 It's like a plate of spaghetti. Horton makes a plate of
6 spaghetti with claim and hands it to Hutton's and says, "You
7 have to deal with it whether or not you have to indemnify it or
8 not."

9 Our position is that you can't start pulling pieces
10 of the spaghetti off the plate without affecting the count. So
11 our position is that the entire indemnity provision is
12 severable as a whole. You can't go in and red-line it because
13 of how it's written with those overly broad and expansive duty
14 to defend tying them together and explicitly being tied
15 together by Horton such that Hutton's has to defend claims even
16 for which it doesn't have a duty to indemnify, but it still has
17 to pay the freight for those claims.

18 Your Honor, we would argue that indemnity clause
19 itself is not susceptible to division. Rather, it's a series
20 of interconnected obligations that D.R. Horton has imposed upon
21 Hutton's. So to the extent that the Court finds that the
22 contractual indemnity provision is void, illegal, and
23 unenforceable, which is our position, then it can sever the
24 entire provision from the contract.

25 Thank you, Your Honor.

1 THE COURT: All right.

2 MR. ROSS: Your Honor, I would like to add just one
3 thing. The Concord and Cumberland cases say if you have to
4 indemnify somebody for their concurrent negligence, it has to
5 be clear and unequivocal. The document -- which we dispute --
6 the document that D.R. Horton is referring to here is 159-page
7 document in which they buried the indemnification provision
8 deep in its -- it purports to require us to indemnify D.R.
9 Horton for it's concurrent negligence. 159-page document and
10 you are giving it to a dirt guy. I would say that is not clear
11 and unequivocal.

12 THE COURT: All right. All right.

13 Yes, ma'am.

14 MS. PETERSON: As a general matter, we believe that
15 the motion to bifurcate is not proper to bring procedurally at
16 this time.

17 We do not think it is procedurally appropriate.
18 Again, once again, be arguing the enforceability of the
19 contract provisions given that the Court has already found that
20 these provisions are not unenforceable as a matter of law.

21 So we believe if there is any issue before the
22 Court pertaining to these provision, it is one, is it
23 enforceable as a matter of law, or, two, does it need to go to
24 a jury to parse out the different negligence of the parties.

25 We believe that the duty to indemnify provision is

1 valid and enforceable under South Carolina 32.2-10.

2 That statute addresses sole negligence. The
3 contract provision explicitly exempts sole negligence. So that
4 statute doesn't even apply here.

5 That statute goes on to say that an indemnitee can
6 -- the indemnitor can still promise to indemnify the indemnitee
7 for damages caused by their scope of work. That is what is
8 brought here.

9 They want to say it's against public policy for
10 them to indemnify D.R. Horton for D.R. Horton's sole
11 negligence, fine. That is what the contract says, but they
12 cannot escape their duty to indemnify for allegations resulting
13 from their work. We believe that the contract is severable.
14 It has been severed before by the Court of Appeals in Builder's
15 First Source v. D.R. Horton.

16 To the extent that Your Honor finds certain parts
17 of the duty to indemnify provision are unenforceable, they
18 still cannot escape their duty to indemnify for allegations
19 pertaining to their scope of work.

20 We believe that trying to put the duty to defend
21 under the anti-indemnity statute is improper. There is no case
22 law to support that. There is case law to support that the
23 duty to defend is broader than the duty to indemnify, and it is
24 triggered upon mere allegations. We would not be having this
25 argument right now if when we tendered to Hutton's and we

1 tendered to Lather their duty to defend, they said, okay. We
2 will defend you for the allegations resulting from our work.

3 The reason why it's more comprehensive is because
4 we are not aware of any partial duty to defend. You would have
5 17 lawyers defending against them. That is why the contract is
6 written that way.

7 The gist of the contract is trying to get them to
8 defend for allegations resulting from their work.

9 Even to the extent that you find the duty to defend
10 is overly broad, the duty to indemnify -- which we believe is
11 enforceable -- legal fees are a legal consequence of the duty
12 to indemnify.

13 At that point they would still owe D.R. Horton the
14 legal fees resulting from the allegations pertaining to their
15 scope of work, which is what our pleadings state and which is
16 what we are asking for in this case.

17 Obviously, we are not trying to double-dip and get
18 that amount from Hutton's and then get the same amount from
19 Lather. I think getting into the numbers of what we are owed
20 is procedurally premature. At this point, we just need to
21 decide whether there is a duty defend in some capacity and
22 whether there is a duty to indemnify in some capacity I think
23 that is all the points I wanted to make.

24 The Concord case is clear and unequivocal. First
25 of all, that case -- the facts are different. In that case the

1 general contractor had admitted liability.

2 So it was clear as a matter of law that they had
3 been negligent, and they were asking the subcontractor to
4 indemnify them for that negligence.

5 That is not the case here because no factfinder has
6 found that D.R. Horton is negligent. So that case is
7 procedurally premature to cite. That would be something we
8 would discuss after the jury has allocated liability.

9 We do believe that the contract meets the clear and
10 unequivocal standard. It doesn't get clearer than they will
11 indemnify for any negligent or intentional act or omission of
12 contractor, regardless of whether caused in part by indemnity.

13 It contains different language that is much more
14 specific than that that was put forth to the Court in
15 Cumberland. I think that is a very important fact.

16 You can't equate the two because it's different
17 contractual language. Now, even if they say Horton imposed
18 this on them, they signed it. This is a contract between two
19 sophisticated parties. Even if they find it repugnant, this
20 Court has to enforce contracts that have been entered into by
21 two parties unless, of course, they find it's against public
22 policy.

23 In this case, the Legislature has not acted. There
24 is no statute on the duty to defend for the scope of it, so we
25 believe that -- not say that it's a matter of law; rather the

1 duty to defend is enforceable.

2 For those reasons I think those are all of my
3 points on the enforceability of that particular indemnity
4 provision found in the independent contractor agreement.

5 I wanted to tell you that Lather's point of the
6 contract he keeps bringing up, which is the spec book -- one,
7 it's a contract here, but as Lather knows, in the independent
8 contractor agreement, that indemnity provision is what would
9 apply in this instance.

10 The indemnity provision he referenced, it is
11 signed. There is a seven-page document that incorporates by
12 reference the 150-page document. So I would like to
13 incorporate by reference all of our memorandums in opposition
14 to their summary judgment claims. I do feel like we are
15 arguing summary judgment again, which is procedurally
16 inappropriate at this time.

17 MS. LUCEY: Your Honor, just briefly if I might.

18 Judge DeBerry's ruling -- he did not make any
19 finding as a matter of law. He issued a Form 4 order with one
20 lines and there is no genuine issue of material fact. He did
21 not make any specific finding of fact or specific rulings.

22 Horton has said that it is seeking indemnity for
23 the allegations relating to Hutton's. We have heard that
24 several times. That is not what their contract says.

25 THE COURT: That is where I agree with you the

1 most. If you follow that contract, Subsection 10, by the
2 letter of the contract as it's written, D.R. Horton shouldn't
3 be in this courtroom. You should be the only two in this
4 courtroom.

5 MS. LUCEY: Right. But if you look at Provision
6 10.2, it says that Horton may have a right to -- if it so
7 chooses in its absolute discretion -- to defend all claims
8 which may be asserted and contractor, Hutton, is reimbursed for
9 all expenditures. Horton is talking out of both sides of his
10 mouth.

11 THE COURT: Sure. They want you to be here and
12 tell you-all to pay for it.

13 MS. PETERSON: Yeah, and that is not true. We
14 tendered to them. We wanted them here. As soon as we got that
15 complaint, we tendered our defense to them, which they ignored.

16 MS. LUCEY: There has been no D.J. action. No
17 further correspondence that I am aware regarding the tender,
18 Your Honor.

19 Going back to the issue, it's not just the
20 indemnification for claims related to Hutton's work. That is
21 not what their contract says. They have a lot of lawyers who
22 do a lot of contracts and they could have written that into
23 their contract. What is said is: Once the duty to defend is
24 triggered, Hutton's is obligated to defend the entire action,
25 including any claims not there and subject to indemnity.

1 So if Lather was out of business and not here and
2 no one came, I guarantee that they would be looking to me,
3 Hutton's, to cover fees related to the dirt work.

4 THE COURT: It's essentially an adhesion contract.
5 It's a take-it-or-leave-it style contract.

6 MS. LUCEY: And there is testimony --

7 THE COURT: Essentially, you either sign this and
8 you get the work, or you don't sign it and you have to
9 indemnify us as to everything, which, again, I agree with your
10 position. That's actually what I was thinking about earlier
11 --not that I'm smart or anything -- what is it that D.R. Horton
12 has to even oversee the project if you are going to indemnify
13 them against anything.

14 MS. LUCEY: Absolutely not, Your Honor.

15 THE COURT: They should just buy the lot and
16 leave.

17 MS. LUCEY: And they make all the money when they
18 sell the house. Sole negligence is, again, accepted and the
19 Courts have held that --

20 THE COURT: I agree. I don't think that they are
21 alleging that they are not responsible, per se, for their
22 negligence, and they are going to -- they are here to defend
23 them.

24 MS. LUCEY: Right.

25 THE COURT: But now what you are saying is they're

1 not responsible for you-all's best because of what you-all put
2 in the contract. You-all wanted them to sign. They signed it,
3 and now you-all can pay for it. I don't see how that is fair.

4 I agree. I don't think it's legally enforceable, to
5 be quite honest with you. Again, there would be absolutely no
6 reason to even be here if you follow to the letter of the
7 contract. You-all should be the ones here, and all the other
8 16 or 17, that they settled with.

9 MS. PETERSON: I still think there is a difference
10 between a duty to defend and a duty to indemnify.

11 The COURT: I agree with that. I see your point on
12 that.

13 MS. LUCEY: I think it's different, though, Your
14 Honor. In an insurance contract, the whole purpose of the
15 insurance contract is the indemnification. This is a business
16 contract.

17 THE COURT: Well, back to her point. Sorry. I
18 didn't mean to interrupt. There is a difference in a duty to
19 defend and a duty to indemnify, but not really. If their duty
20 is to defend you, then you-all should never even have come
21 here. They wouldn't have to indemnify you-all for anything
22 because you put everything on them to defend you. It's in the
23 contract so there should be no indemnification whatsoever,
24 because you shouldn't even be here.

25 MS. PETERSON: Well, if the jury then came back

1 with a verdict against D.R. Horton, that would be --

2 THE COURT: I got that. You see my point because I
3 am just saying, obviously, the plaintiffs have you sued
4 you-all, if you have that. But what I am saying is, your
5 contract pushes the burden, I guess, if that's what you want to
6 call it, on them to defend you.

7 So if D.R. Horton is responsible, I understand that
8 D.R. Horton wants their representatives here, but that is not
9 what you contractually obligated them to.

10 Why would they have to pay you-all's money? You
11 all choose to be here.

12 MS. PETERSON: No, we didn't.

13 THE COURT: "To the fullest extent permitted by
14 law, contractors shall protect, defend, and indemnify and hold
15 owner and owner's parent corporations" -- I can keep reading,
16 but that's the ones that you need to hear.

17 MS. PETERSON: No, I understand what you are
18 saying, but as soon as we got their complaint, we immediately
19 tendered our defense to them. If they had accepted it, we
20 wouldn't be here. But we couldn't just not defend the case.

21 THE COURT: I agree.

22 MS. PETERSON: We were forced to defend it.

23 THE COURT: You and I are in 100% agreement on
24 that. You were forced to defend yourself, but you can't make
25 them pay you for it.

1 MS. PETERSON: I believe we can under the contract
2 and under --

3 THE COURT: Which I'm saying is not enforceable.

4 MS. PETERSON: You're saying the whole contract is
5 not enforceable?

6 THE COURT: No. I'm saying the indemnification
7 portion is not. Again, I think it's like an adhesion contract.
8 You can take it or leave it. Again, the fact that you -- that
9 D.R. Horton can pass all of its liability whatsoever off to
10 other people, obviously, I think is completely unenforceable.

11 MS. PETERSON: Well, again, I think the duty to
12 defend is separate, and that's the position that they are
13 arguing passes all the liability.

14 So, fine, you say duty to defend "That's not
15 enforceable," but we still need to look at the duty to
16 indemnify, which clearly exempts the sole negligence. In the
17 duty to indemnify, your damages are legal fees arising out of
18 their work.

19 THE COURT: I understand that. I mean, that's your
20 main point. That's the whole reason that you have the
21 indemnification in there, so that if they screw up and you have
22 to come in and defend all of this stuff, then, obviously, they
23 are going to need to pay some sort, you know, damages. But
24 that's not the way the contract is written.

25 MS. PETERSON: Well, I think the contract is

1 written that the duty to defend is separate and apart than the
2 duty to indemnify. So I think those provisions can be
3 separated.

4 THE COURT: I don't. I think you and I disagree.
5 I mean -- I'm being respectful. I'm just saying, I think
6 that's mine and your disconnection comes in.

7 MS. PETERSON: No. I'm not going to argue with
8 you.

9 THE COURT: You know me. I'm easy going. I want
10 you to do everything for your record, and make sure -- and I
11 think that's where mine and you -- that's where the
12 disagreement is. I understand your position, but I think
13 that's where I'm, like, no, it's not. So --

14 MS. PETERSON: You think the duty to -- defend the
15 duty to indemnify are the same?

16 THE COURT: No. You said that you didn't -- you
17 can take part and parcels of it out, and I said, "No, you
18 can't. You have to take it as a whole."

19 MS. PETERSON: I think there is case law that says
20 you can.

21 THE JUDGE: Okay.

22 All right. What are we going to do?

23 MS. LUCEY: Well, Your Honor, we would ask that you
24 would declare the indemnity provision unenforceable and void
25 against public policy.

1 THE COURT: All right.

2 MR. ROSS: I mean, Obviously, we ask for the same
3 thing and also that the contract, as far as the indemnity
4 provision, is an adhesion contract, and with that in mind, I
5 think --

6 MS. LUCEY: I am saying, if and when the
7 contractual indemnity provision is separate from the contract,
8 that leaves Horton only with equitable cross-claims against
9 Lather and Hutton, which I think you would decide at the end of
10 the trial of this case, based upon the jury's decision on fault
11 or liability.

12 THE COURT: All right.

13 MS. PETERSON: And one more -- quick to this issue
14 of the contract being one of adhesion. There is going to be
15 testimony from D.R. Horton's representatives about negations
16 that does go into it related to price.

17 THE COURT: Okay. That's fair enough.

18 All right. Is the jury back?

19 THE BAILIFF: Yes, sir.

20 THE COURT: Do you know if they ate or not?

21 THE BAILIFF: Yes, sir.

22 THE COURT: They did or did not?

23 THE BAILIFF: They did.

24 THE COURT: Well, now we have got ourselves in
25 another quandary.

1 MR. ROSS: Judge, can I just get a little bit of
2 clarity? I heard as you were sitting up there and you were
3 talking, before we asked you for a ruling, you said, "I think
4 the contract is unenforceable," for the indemnity provision at
5 least is unenforceable.

6 Can we proceed based on that?

7 THE COURT: I haven't made my ruling yet. I was
8 just trying to figure out what we are doing.

9 MR. ROSS: That's why I am trying to ask for some
10 clarity.

11 THE COURT: There is nothing we can do. I mean,
12 the staff has to eat, and so does everybody else.

13 MS. LUCEY: I could eat too, Your Honor.

14 THE COURT: Yeah. Everybody has to eat. There is
15 nothing we can do. I mean, I hate to do it to the jury, but it
16 is what it is.

17 Yeah. I will find that the contract
18 indemnification and Subsection 10 is unenforceable. I think
19 it's an adhesion contract. I think it's take-it-or-leave-it.
20 I think it's similar and likened to a non-compete in the sense
21 that if the opposing party doesn't have a whole lot of
22 negotiating power, then it can be deemed unenforceable. I
23 don't think it's enforceable. I think it violates public
24 policy.

25 So I am going to grant the motion, and we are going

1 to take an hour break so everyone can eat and we will come
2 back.

3 MR. CLOUD: Your Honor, is that applicable to East
4 Coast Construction and Hutton's and Lather?

5 THE COURT: Correct. Yes. To everybody who just
6 argued.

7 MS. LUCEY: Thank you, Your Honor.

8 THE COURT: All right. You guys take a break.

9 I will go tell the jury they can take a break.

10 (Lunch recess.)

11 * * *

12 (The following proceedings were held in open court.
13 All parties were present along with their attorneys.)

14 * * *

15 PROCEEDINGS CONTINUED

16 THE COURT: We are still waiting for two jurors.
17 They said they wanted to put something on the record if you are
18 ready, Ms. Kym. Are you ready to go?

19 THE COURT REPORTER: Yes, sir.

20 MR. ROSS: The superintendent for my client, Lather
21 Construction, was here most of the morning. When we broke for
22 lunch, he was thinking he would be in and out in about an hour.
23 He runs a horse farm and he manages over 40 horses. It would
24 have been an extreme hardship for him to either stay or come
25 back. So I reached out to plaintiffs' counsel, and I asked

1 plaintiffs' counsel if you will be willing to accept and submit
2 the deposition testimony that they have already designated.
3 And the response I got from plaintiffs' counsel is that they
4 would.

5 I wanted to see if Your Honor would allow them to
6 do so based on the witness being unavailable pursuant to the
7 rules. We actually were going to come in front of you before
8 we broke for lunch and ask. I am hoping you will be willing to
9 say, okay. He is not here. We can't get him here immediately.
10 I agree you can go get a sheriff and bring him in. I talked
11 with plaintiffs' counsel and they are willing to use the
12 transcript.

13 Would that be agreeable to the Court?

14 THE COURT: Sure. Not a problem.

15 MR. NAIL: I just wanted to clarify one thing about
16 your ruling earlier. I didn't stand by Ms. Peterson's
17 objection to the procedural nature of the ruling. If there was
18 a ruling to the extent that there was and making a
19 determination that contract was one of adhesion --

20 THE COURT: I said it was my thoughts on it. It's
21 not part the of the ruling.

22 MR. NAIL: We were going to object based on the
23 lack of facts.

24 THE COURT: That is me talking out loud and working
25 through it. No. I am not making that ruling.

1 MR. NAIL: Understood. Thank you.

2 THE COURT: Yes, sir.

3 MS. LUCEY: Your Honor, also in terms of the jury
4 view. Given that we are starting the witnesses this afternoon,
5 should we plan for it on Thursday at lunch? I know plaintiffs'
6 counsel wanted it to be done after they presented their case in
7 chief.

8 THE COURT: Let's just keep going and let me think
9 about it.

10 (Jury enters courtroom.)

11 THE COURT: All right. Ladies and gentlemen of the
12 jury, I apologize for the obvious extensive delay, but we will
13 continue with the trial. Mr. O'Quinn, you are still under
14 oath, okay?

15 THE WITNESS: Yes, sir.

16 * * *

17 ROBERT DUNCAN O'QUINN, III,
18 being previously duly sworn testified as follows:

19 * * *

20 DIRECT EXAMINATION

21 BY MS. PETERSON:

22 Q. Good afternoon, Mr. O'Quinn. You talked a little
23 with Ms. Williams yesterday about what became the Tidewater
24 creek neighborhood. At the time you sold the Tidewater Creek
25 neighborhood to D.R. Horton, had Beaufort County already

Robert Duncan O'Quinn (Cross)

Examination by Emily Gifford Lucey, Attorney for Appellant Hutton's Landscapes, Inc.

1 A. Yes, ma'am.

2 Q. Have you ever met or know anyone with Hutton's
3 Landscape?

4 A. No, ma'am. I sure don't.

5 Q. Is it fair to say you never told anyone from
6 Hutton's about any of the debris that you marked on this map.
7 You never told them about it, did you?

8 A. No, ma'am.

9 MS. LUCEY: Those are all the questions I have.
10 Thank you, sir.

11 MR. ROSS: Your Honor, Lather has no questions for
12 the witness.

13 THE COURT: All right. Call your next witness

14 MR. TRAYWICK: The plaintiffs call Sean Higgs. As
15 we discussed, Mr. Higgs was unable to be here, so we will
16 introduce it by his deposition testimony.

17 THE COURT: Who are you going to have read it?

18 MR. TRAYWICK: Mr. Redfern.

19 THE COURT: Ladies and gentlemen, the witness is
20 unavailable. As we discussed earlier, we are having some
21 issues. So they have already taken what is called a sworn
22 deposition. The witness is placed under oath and asked the
23 exact same questions that will be read to you today. You are
24 to consider the testimony as if the witness was here
25 themselves.

1 MR. NAIL: Your Honor, I would renew any motions in
2 limine that would be subject to his testimony. We have worked
3 out the specifics as related to his deposition testimony.

4 THE COURT: Noted for the record.

5 (Deposition testimony of Sean Higgs was read into
6 the record.)

7 THE COURT: Call your next witness.

8 MR. TRAYWICK: The plaintiffs call Shawn Iams.

9 MS. PETERSON: The Defendants would renew their
10 motion in limine as it pertains to the expert testimony of this
11 witness.

12 MR. TRAYWICK: We are offering him as a fact
13 witness.

14 THE COURT: For the record, it's moot at this
15 point. They are not going to try to call him as an expert.

16

17 SHAWN IAMS,

18 being first duly sworn testified as follows:

19 * * *

20 DIRECT EXAMINATION

21 BY MR. TRAYWICK:

22 Q. State your name for the record.

23 A. Shawn Iams.

24 Q. Mr. Iams, good afternoon. Where do you live?

25 A. I live in Port Royal.

1 picked up by GPR, I presume you would defer to the certified
2 operator?

3 A. certainly, yes.

4 MR. TRAYWICK: Thank you.

5 THE COURT: Thank you very much. You may step
6 down.

7 Call your next witness.

8 MR. TRAYWICK: Your Honor, the plaintiffs call
9 Sarmed Shafi.

10 SARMED SHAFI,

11 being first duly sworn testified as follows:

12 * * *

13 DIRECT EXAMINATION

14 BY MR. TRAYWICK:

15 Q. Please your first and last name.

16 A. My name is Sarmed Shafi.

17 Q. Sarmed, can you tell us where you are from, please.

18 A. I was born in Pakistan. I grew up in New York City
19 and moved to Upstate New York. I moved to South Carolina when
20 I went into the Marine Corps.

21 Q. And what year was that that you were posted down
22 here?

23 A. I moved down here originally in 2011. I bought a
24 house at the end of 2015.

25 Q. Where did you live when you first moved down here?

Sarmed Shafi (Direct)

Examination by Benjamin A.C. Traywick, Attorney for Respondent Plaintiffs

1 A. The only neighbor that lived there were the Lopez'.
2 We didn't talk to them.

3 Q. You moved in. You closed the at the bare end of
4 2015. You are moving in during January of 2016?

5 A. Correct.

6 Q. Was there grass in the backyard when you moved in?

7 A. So when we moved in, they had sprayed the backyard
8 with hydroseed. They told us not to step on it or go in the
9 backyard until the grass actually grew. It would mess up the
10 growth, and we would potentially drag in hydroseed into the
11 house. It wasn't safe. So just stay off it until the grass
12 actually sprouted.

13 Q. Was there sod up front when you moved in or the
14 sides?

15 A. Yes.

16 Q. When did you first realize that there was a problem
17 with the debris in the yard?

18 A. We moved in in January. Mid to late February, I
19 had to go buy a lawnmower to start mowing the grass. It was
20 sprouted, and it needed to be cut. First time was when I went
21 to mow the grass. When I was walking, I started noticing all
22 this debris as I was stepping.

23 Q. What was it that caused you to notice it?

24 A. I would say it was like sprouts of grass. It
25 wasn't thick grass. So from the green and the brown, I started

1 seeing glistens of glass where the sun hit it, and then the
2 blackness of shingles. It just stood out.

3 Q. What did you do? What action did you take?

4 A. The first thing we did was I called or submitted
5 the warranty paperwork for D.R. Horton to come out there and
6 fix it. I told them that there is all this debris throughout
7 the whole yard.

8 Q. Let me ask you. First of all, was it -- debris
9 from construction sites will have debris, boxes that they took
10 doors and windows out of, whatever. Was it that kind of trash?
11 Was it new?

12 A. No. It was old. Like the shingle pieces when you
13 tried picking any of them up, they would break apart and
14 practically disintegrate in your hands.

15 Q. And what areas over time have you found this debris
16 in?

17 A. I found all the shingle debris in the back and the
18 left side yard. And then the glass I found throughout the
19 whole backyard and then at the base of the trees in the front
20 yard.

21 Q. How about the side yards?

22 A. Only along the driveway.

23 Q. Does your house back up to the pond that we have
24 heard a fair amount about?

25 A. Yes. When we originally bought the property, the

1 quickly, and we are going to take you to the site in a van. It
2 should take about 45 minutes. It's about 7 miles from here.
3 It should take us about 10, 12 minutes to get there. We will
4 allow you about 30 minutes. I will reinstruct you at that time
5 that you are not to talk while you are there, discuss anything,
6 deliberate, do anything apart from just take a look at the
7 jobsite. We will bring you right back and we will continue
8 testimony. Okay?

9 So dress accordingly tomorrow.

10 (Jury exits courtroom.)

11 THE COURT: Earlier when I got the update from the
12 settlement conference that you all went into, why did D.R.
13 Horton not throw anything in the pot? They had previously.

14 MR. NAIL: I don't have an answer. It was two
15 years ago.

16 THE COURT: I am talking about today.

17 MR. NAIL: Today?

18 THE COURT: Yes.

19 MR. NAIL: I don't have a good answer for that.
20 It's same position that they have taken for the last two years.
21 Two years ago, it was a different math.

22 THE COURT: How close did you get? Don't tell me
23 the money. Just tell me the yard line. On the 90 yard line?
24 95? 80?

25 MS. LUCEY: With Horton?

1 THE COURT: With the overall just global
2 settlement.

3 MS. LUCEY: I think we were reasonably close
4 between Lather and Hutton's but not close enough to get it
5 done. There is the outstanding issue of additional insureds'
6 claims, which are not part of this litigation. But it's sort
7 of a cloud over settlement. I will say I think the plaintiffs
8 have been trying to make progress and we have been trying to
9 make progress. It has still been a problem with the
10 communications with Horton.

11 MR. TRAYWICK: I think everybody should throw some
12 more money on the table. I would just generally join. We have
13 had conversations, and we will continue to have conversations
14 with both Lather and Hutton's. We have spent a good chunk of
15 today trying to cram our clients -- not these clients
16 particularly. We have 15 others all over the world. We have
17 been devoting a fair amount of energy of cramming them down so
18 that we can try to get something done.

19 THE COURT: I am getting really concerned about the
20 time and what is going to happen Thursday at 3:00.

21 All right. Tell D.R. Horton they are being
22 absolutely ridiculous. I want you to email them, and I want
23 you to bring me the email and tell them I said that, all right?
24 Ask them if they know what an additur is, all right?

25 Bring it to me tomorrow.

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF BEAUFORT 2018-CP-07-00911

3

4

5 Richard W. and Rebecca
6 A. Drier; Sarmed and
7 Jessica M. Shafi, et al.

8

9 Plaintiff,

10

11 vs. TRANSCRIPT OF JURY TRIAL

12 VOLUME III

13 D.R. Horton, et al., PAGES 263 - 351

14

15 Defendants.

16

17

18 DATE: November 17, 2021

19

20 LOCATION: Beaufort, South Carolina

21

22

23 B E F O R E: The Honorable Bentley Price, Judge Presiding

24

25 R E P O R T E D B Y: Kymberlee M. Williams, RPR

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PROCEEDINGS

WEDNESDAY, NOVEMBER 17, 2021

BEAUFORT, SOUTH CAROLINA

* * *

(The following proceedings were held in
open court. All parties were present along with
their attorneys.)

* * *

THE COURT: Anything before we get started?

All right. Bring them out.

MS. LUCEY: Your Honor, the video deposition on
Matt Hutton, we recorded it last week. There are a few
objections that we need addressed before being able to play the
video or offer this testimony.

The attorneys worked last night to try to resolve
some of the disputes.

I emailed them this morning. I have a copy of the
transcript with the objections that need to be addressed
highlighted.

THE COURT: Okay.

MS. LUCEY: I think there may be some argument
about some of them.

THE COURT: First one.

MS. LUCEY: Your Honor, the parties have have
agreed to edit out some materials. Page 11 is the first one.

1 MR. NAIL: Beginning on Page 11, line 18 through
2 Page 12, Line 7. Matt Hutton is talking about -- beginning on
3 Page 11, Line 22, about the fact that the contract with D.R.
4 Horton wasn't negotiable. I think that is irrelevant at this
5 time

6 THE COURT: It's relevant. It's coming in.

7 MS. LUCEY: The next one is Page 61.

8 MR. NAIL: Page 61, Your Honor, on mine as well,
9 beginning on Line 23 and ending on Page 63, Line 19.

10 This is talking about -- Mr. Traywick was asking
11 Mr. Hutton about whether D.R. Horton contributed to his company
12 going out of business, and he indicated that he was paid for
13 the Tidewater Creek Project, which is what we are here to
14 discuss this week, but not for other communities.

15 We believe that is also irrelevant. It relates to
16 payments outside of this neighborhood

17 MR. TRAYWICK: Your Honor, this morning I
18 emailed -- the aspect of the the question at Line 12, Page 62,
19 does D.R. Horton owe you money right now? They do.

20 I am happy to remove that. The first part of about
21 D.R. Horton putting them out of business and being difficult
22 and takes months and years to get paid for Tidewater Creek is,
23 I think, relevant. But we are happy to exclude the portion
24 about money owed on other jobs. I agree with Mr. Nail on that

25 THE COURT: All right. Take that out.

1 MR. TRAYWICK: Your Honor. This topic is covered
2 elsewhere. I can just move on. That is fine.

3 THE COURT: All right

4 MS. LUCEY: I think next is Page 76. It looks like
5 Mr. Traywick agrees to taking it out.

6 THE COURT: All right.

7 MR. TRAYWICK: Starting at Line 5 through 19. We
8 can take that out.

9 MS. LUCEY: Your Honor, I think that is it. We
10 will be in a position at the break or if I may sit at the desk
11 and email the videographer, unless Mr. Traywick wants to
12 present it pretty quickly

13 THE COURT: Sure. Not a problem.

14 MS. LUCEY: Thank you, Your Honor.

15 MR. ROSS: Jeff Ross here from Lather's
16 Construction. I thought we would start this morning on a
17 better note. We came together yesterday afternoon.

18 I am pleased to announce that Lather and plaintiffs
19 have reached a settlement agreement. The terms of the
20 agreement are confidential. It is for all homes listed in the
21 Drier lawsuit, which is the caption, 2018-CP-07-00911.

22 THE COURT: All right. Thank you, sir.

23 MR. ROSS: Thank you. Yes, sir.

24 THE COURT: All right. Anything else before we get
25 started?

Sarmed Shafi (Cross)

Examination by Michael Nail, Attorney for Appellant D.R. Horton

1 A Yes.

2 Q. Just to be clear, you didn't see any of that before
3 you moved in?

4 A. Correct.

5 Q. You don't have any testimony to offer that anyone
6 at D.R. Horton knew about the items that you observed before
7 you moved in before you moved in either, correct?

8 A. I do not.

9 Q. So you don't have any testimony to offer to the
10 jury either that D.R. Horton made false statements to you prior
11 to selling you the home, correct?

12 A. I do not.

13 Q. When you did observe the items in your yard after
14 you moved it? It was primarily towards the backyard; is that
15 also true?

16 A. Correct.

17 Q. I believe you said the shingles. Glass pieces that
18 you observed were about the size of a nickel, around the size
19 of a coin?

20 A Yes.

21 Q. I believe you testified yesterday that when you
22 would see items like glass orbits of shingles, you would
23 dispose of them?

24 A. Yes.

25 Q. What was the process?

1 A. Glass and sharp objects were put in a container.
2 Taped it up and put it in the dumpster.

3 Q. You didn't maintain the materials or keep them in
4 any way?

5 A. I didn't feel the need to keep them.

6 Q. Were you aware that you needed to preserve evidence
7 related to the case?

8 MR. TRAYWICK: Objection, Your Honor

9 THE COURT: I will sustain it.

10 BY MR. NAIL:

11 Q. The red Solo cup right here that we talked about
12 yesterday, that is all the glass or other material -- that is
13 all that you have to show the jury today about what you
14 collected in your yard?

15 A. Only on that day, October 15.

16 Q. Let's talk about your interaction with Mr. Iams,
17 who we heard from yesterday from DHEC. I believe that was in
18 2016, isn't that right?

19 A. April, May, yes.

20 Q. He came out to your property and met with you?

21 A. Yes.

22 Q. You informed him about the items that you were
23 observing in your backyard?

24 A. Correct.

25 Q. You also showed him some items that you were

Sarmed Shafi (Cross)

Examination by Megan C. White, Attorney for Respondent Hutton's Landscapes, Inc.

1 Did you see what they did in your backyard

2 A. No.

3 Q. Do you believe that you would have spoken with
4 Hutton the first time they came out to your backyard?

5 A. I don't believe so. There were just two workers.
6 It was not like any supervisors. They just have laborers to
7 clean up.

8 Q. That is fair. I just wanted to clarify.

9 I believe yesterday you testified that during this
10 initial visit with Hutton, you told them the rake wasn't going
11 to fix it.

12 A. The rake personnel were not going to fix it.

13 Q. That was not a conversation with Hutton's?

14 A. It was not.

15 Q. After that, how many times were you present when
16 Hutton's came out to your yard?

17 A. I don't have an exact count.

18 Q. You had some discussions with Hutton's employees?

19 A. Later on I did.

20 Q. You spoke with Jeff with Hutton's Landscapes?

21 A. Jeff and I believe Dave, or David.

22 Q. Dan sound right?

23 A. It might have been Dan.

24 Q. Mr. Shafi, tell me, do you recall the gist of the
25 discussions you had with the Hutton folks or Jeff?

1 A. The gist was along the lines of we understand what
2 you are wanting done with your property; however, we can only
3 do what we are paid to do. When we are paid to send two rakers
4 with a rake. That is all we can send.

5 So, basically, if we are not given the funds to
6 send heavy equipment, we cannot send them.

7 Q. Moving onto some more work that was done in your
8 yard.

9 Before the sod installation in the backyard, you
10 said yesterday or today, you would primarily see debris come up
11 after a rain, is that fair?

12 A. Yes.

13 Q. Please flip to Tab 43. It might be in the second
14 volume.

15 Once you get to 43, Mr. Shafi, we will tab about 40
16 pages into that document.

17 A. The very bottom.

18 Q. The very bottom Number T 029.

19 Do you have any issue referencing what is on the
20 screen, Mr. Shafi?

21 Q. I do not.

22 Q. We are looking at T. 029. Let me just ask you.

23 Do you recognize this document?

24 A. I believe it's what the people come out with,
25 saying that they were given permission to do some work by D.R.

1 Horton.

2 We will scroll down. I think this document a
3 little bit -- will you tell me, is your signature reflected at
4 the bottom of this sheet?

5 A. It is.

6 Q. Mr. Shafi, we will scroll back up to the work that
7 is the description.

8 Can you explain to the jury in big pictures, the
9 sequence of events of work that happened in your backyard as a
10 result of this warranty request order.

11 A. That is to sod the entire backyard. That is when
12 they got authority to sod the entire backyard.

13 Q. Do you see where it says, owner needs to inspect
14 raking before sod is placed?

15 A. I do.

16 Q. Let's just walk through this. First, did Hutton's
17 come out and rake your backyard?

18 A. They had some sort of raking machine.

19 Q. Do you know what kind of machine that was?

20 A. I do not.

21 Q. You were not home for the time that Hutton came out
22 with the machine in your backyard, right?

23 A. I was not.

24 Q. You came home that day and found the work complete?

25 A. Correct.

1 Q. We see this note in the warranty service order. It
2 was important to you to walk your backyard before the sod got
3 put down. Is that a fair statement?

4 A. Yes.

5 Q. Did you go out the night that and inspect the yard?

6 A. I did.

7 Q. Was that the night that Hutton's did the work?

8 A. It was the night that they cleared the glass and
9 such, the debris before the irrigation.

10 Q. What did you observe whenever you inspected the
11 raking?

12 A. That it was just dirt.

13 Q. Did you notice any debris?

14 A. No. Not that night.

15 Q. At that time, were you satisfied with the condition
16 of your backyard?

17 A. Momentarily, yes.

18 Q. Then you gave Hutton's the go-ahead to proceed with
19 your irrigation and sod?

20 A. Correct.

21 Q. During the irrigation install, did Hutton notify
22 you that they found debris in your yard?

23 A. I was home that day. And inside I saw the debris
24 flying out when the trencher was making his path.

25 Q. Did you go outside and talk to them about it?

1 A. I did.

2 Q. I just want to make sure that I heard your
3 testimony yesterday.

4 Did Hutton's remove the debris that they found
5 during the irrigation install?

6 A. Everything that the trencher took out, they
7 removed.

8 Q. At that point, were you satisfied enough to give
9 Hutton's the go-ahead and lay the sod?

10 A. I called D.R. Horton to ask about what else was in
11 the trenches. At that time, I was told that the sod was being
12 delivered and that was the only thing I was getting.

13 Q. You wouldn't have allowed someone to lay sod if
14 there was still debris sitting on top of the dirt, would you?

15 A. If it was visible debris, no.

16 Q. Do you see any visible debris before the sod went
17 down?

18 A. Not on the surface.

19 Q. Ultimately, you approved that this work of Hutton's
20 was adequate and acceptable. We saw your signature on this
21 document, is that fair?

22 A. Yes.

23 Q. So after the installation of the sod, do you see
24 less debris in your backyard than you did before?

25 A. For a moment, for a period of time, I did. Now,

1 A. Yes.

2 Q. What else?

3 A. \$90,000.

4 MR. TRAYWICK: No further questions.

5 THE COURT: You may step down.

6 MR. NAIL: We renew our motion in limine for the
7 record.

8 THE COURT: Noted for the record.

9 Call your next witness.

10 MR. TRAYWICK: The plaintiff calls Matt Hines.

11 ***

12 **MATTHEW HINES,**

13 being first duly sworn was examined and testified as follows:

14 * * *

15 DIRECT EXAMINATION BY MR. TRAYWICK

16 BY MR. TRAYWICK:

17 Q. State your first and last name and spell it for
18 the Court reporter.

19 A. Matthew Hines, M-a-t-t-h-e-w H-i-n-e-s.

20 Q. Mr. Hines, good morning.

21 A. Good morning.

22 A. I am Ben Traywick. We know each other?

23 A. Yes.

24 Q. We, the plaintiffs, has hired you as an expert
25 witness in this case, is that correct?

- 1 A. That's correct.
- 2 Q. You are being paid for your services?
- 3 A. Yes.
- 4 Q. Do you do a lot of this kind of work, expert
5 witness work?
- 6 A. I do a fair amount, but not the majority of the
7 work I do.
- 8 Q. Where do you work?
- 9 A. I work for a civil engineering and inspections
10 testing firm in Columbia, South Carolina.
- 11 Q. You build stuff?
- 12 A. Yes.
- 13 Q. How much stuff do you do that is engineering kind
14 of stuff and how much is expert What is the kind of split
15 there?
- 16 A. I would say probably 80 percent of the work that we
17 do is in design and permitting and construction services, and
18 the remainder is -- probably less than that -- 5 percent or so
19 is expert witness work.
- 20 Q. Have you testified on the stand before?
- 21 A. Once before. Yes.
- 22 Q. Were you qualified as an expert in that case?
- 23 A. Yes, I was.
- 24 Q. In what areas where you qualified as an expert?
- 25 A. Civil engineering related to land development and

Matthew Hines (Cross)

Examination by Michael Nail, Attorney for Appellant D.R. Horton

1 Q. If you need a reference that's up there, it's
2 Defendant's Exhibit 10.

3 What is your conclusion of the Phase 1
4 environmental site assessment that D.R. Horton obtained related
5 to this project?

6 A. The conclusion that no environmental concerns were
7 identified for the project.

8 Q. There wasn't a Phase 2 recommended here based on
9 the documents that you reviewed?

10 A. That's correct.

11 Q. If the Phase 1 doesn't recommend a Phase 2, an
12 owner/developer like D.R. Horton doesn't have an obligation to
13 have a Phase 2 performed; is that correct?

14 A. That's correct.

15 Q. You would agree that D.R. Horton as the owner and
16 developer of a project would only have an obligation to remove
17 debris that it was aware of; is that correct?

18 A. Yes. I believe you can only remove things you are
19 aware of, so, yes.

20 Q. Does that phase make any reference to debris?

21 A. I would have to look at it again. I believe it
22 actually does make reference to some debris on site.

23 Q. Turn to Page 2, Paragraph 5.

24 Do you see that, sir?

25 A. Yes.

Matthew Hines (Cross)

Examination by Emily Gifford Lucey, Attorney for Respondent Hutton's Landscapes, Inc.

1 remove it or to at least report it to whoever they were working
2 for.

3 Q. You can't testify as to what Hutton's actually
4 observed when it was out there?

5 A. No. I could not.

6 Q. Have you seen any documents that suggest that
7 Hutton's during original construction was aware of the debris
8 out there?

9 A. I have not seen any documents. No.

10 Q. Have you seen any evidence of hazardous waste on
11 the Shafi's yard?

12 A. I don't believe so. No.

13 Q. Is there any other testimony that you are offering
14 today about Hutton's work, other than what we just discussed?

15 A. No. The only -- my only opinion about Hutton's
16 work is, as it relates as to the performance of the grading,
17 any refuse that was observed should have been identified prior
18 to moving on to the next step.

19 Q. You talked earlier in your testimony with Mr.
20 Traywick about rough grading.

21 Are you aware of what kind of grading Hutton would
22 have performed in connection with the Shafi's lot?

23 A. Yes. My understanding was that Hutton's was
24 contracted to do the lot grading. I know there were a number
25 of terms that were used, but my understanding is that it was

1 the lot grading that would be done prior to the setting of the
2 pouring of the foundation slabs and setting the foundation.

3 That would have been done after the overall
4 mass-grading for the site as a whole but prior to the work that
5 was done specifically for that lot.

6 Then after that, they would come back and do what
7 they were calling fine grading, which is where you would
8 literally bring everything to the exact -- within the
9 tolerances that are allowed -- the exact shape of the ground
10 that is supposed to be for the plan for the landscaping would
11 be next.

12 Q. Do you believe that Hutton's performed any -- I
13 describe it as cut and fill work, or would that have been
14 another contractor?

15 A. They would not have done -- I would not have done
16 anything that -- I would not expect them to have done anything
17 to bring in imported material.

18 They would have cut and filled onsite material.
19 They would have moved dirt from one place on in the ground to
20 another place, even if it's a foot to one side to the other,
21 yes.

22 Q. Have you reviewed Hutton's contract as it relates
23 to their general scope?

24 A. I have.

25 Q. Have you read any testimony from Matt Hutton about

Matthew Hines (Cross)

Examination by Emily Gifford Lucey, Attorney for Respondent Hutton's Landscapes, Inc.

1 geo-technical engineering, do you?

2 A. Not as a specialization, but certainly as it
3 pertains to civil engineering as a whole.

4 Q. Do you remember in your deposition you said you
5 would not consider yourself an expert in geo-technical
6 engineering?

7 A. I may said that, sure, in the same context of what
8 I just said.

9 Q. Mr. Nail asked you about the Phase 1 report.
10 Do you have any evidence that Hutton ever reviewed
11 that report or saw the report?

12 A. Which report is that?

13 Q. The Phase 1 report.

14 A. That D.R. Horton saw it?

15 Q. No. Do you have any evidence that Hutton's saw
16 that?

17 A. No. I do not know if they did or not.

18 Q. You can't point to anything that would suggest that
19 Hutton's had any knowledge about any of the debris on site if
20 they didn't see it, right?

21 You have not seen any paperwork that said that
22 Hutton's knew it was there, correct?

23 A. I would not.

24 Q. Mr. Traywick asked you a little bit about your
25 background, sir.

Matthew Hines (Cross)

Examination by Jeffrey A. Ross, Attorney for Respondent Lather Construction, Inc., and Lather Construction SC, Inc.

1 Q. Good. I believe you testified that you are aware
2 that Lather brought the existence of trash on the site to D.R.
3 Horton during original construction.

4 Did I hear that right?

5 A. That is my understanding.

6 Q. D.R. Horton is the general contractor for this
7 property?

8 A. That's correct.

9 Q. As a general contractor, they have the overall
10 responsibility for the condition of the property.

11 Would you agree with that?

12 A. Yes. Also through their role as an owner, too.

13 Q. If there is trash on this site when the property
14 was sold to the Shafi, that would ultimately be the
15 responsibility of D.R. Horton, correct?

16 A. Yes.

17 Q. Are you aware that the Shafis made multiple claims
18 for warranty to D.R. Horton for glass and debris that kept
19 showing up at the property?

20 A. Yes. I am aware of that.

21 Q. Are you aware that D.R. Horton hired contractors
22 multiple times to go out and attempt to clean up the glass on
23 the property?

24 A. That is my understanding.

25 Q. So, then, if the fact that Mr. and Mrs. Shafi are

1 Do not discuss the case with anybody, including do
2 not ask any questions of the lawyers or anyone else who may be
3 there. Mr. Foreman, if anyone violates this, you need to let
4 me know that. That is one of your tasks.

5 THE FOREPERSON: Yes, sir.

6 THE COURT: You will get 30 minutes at the
7 property. So at that time the bailiffs will then load everyone
8 back up and they will come back out.

9 (Jury exits courtroom.)

10 (Bailiff sworn by Court.)

11 THE COURT: All right, then. Enjoy your lunch.
12 Enjoy the visit. We will get you right back.

13 (The proceedings remained at ease during the jury's
14 site visit. The court was present at the site
15 visit along with the jury and the parties and their attorneys.

16 No matters were heard for the record during this
17 time.)

18 * * *

19 PROCEEDINGS CONTINUED

20 (Jury enters courtroom.)

21 THE COURT: Ladies and gentlemen of the jury, thank
22 you all so very much. For the record, we did a site view.
23 Everyone abided by my order. No one spoke or had any other
24 issues. We thank you very much for that.

25 We have now a video deposition, as I indicated. We

1 are going to be out of here at 4:30 today.

2 (Video testimony of Matt Hutton was played for the
3 jury.)

4 THE COURT: All right. We will probably,
5 hopefully, be able to finish the case tomorrow, but we may end
6 up going into Friday morning, just for planning purposes.

7 We wanted to let you know that we are trying our
8 best for planning purposes on not being here Friday for some
9 period of time.

10 I promised you we would stop at 4:30, and it's 4:30.
11 We will begin tomorrow morning at 9:30. We will complete this
12 video, and then we have three more witnesses to go. So that is
13 how we are going to continue to proceed.

14 Hope you all have a wonderful rest of your evening.
15 I will see you back here in the morning. Thank you all so very
16 much.

17 (Jury exits courtroom.)

18 THE COURT: Thank you very much. I will beat the
19 traffic. If you all can get Aimee your proposed jury
20 instructions and the verdict sometime between now and tomorrow
21 so she can start working on it tomorrow.

22 Is there anything before we adjourn?

23 MR. ROSS: On behalf of Lather, this is a separate
24 suit that was filed in the same community. I am representing
25 the same party. Mr. Traywick and I are representing the same

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2 COUNTY OF BEAUFORT 2018-CP-07-00911

3

4

5 Richard W. and Rebecca
6 A. Drier; Sarmed and
7 Jessica M. Shafi, et al.

8

9 Plaintiff,

10

11 vs. TRANSCRIPT OF JURY TRIAL

12 VOLUME IV

13 D.R. Horton, et al., PAGES 352 - 491

14

15 Defendants.

16

17

18 DATE: November 18, 2021

19

20 LOCATION: Beaufort, South Carolina

21

22

23 B E F O R E: The Honorable Bentley Price, Judge Presiding

24

25 R E P O R T E D B Y: Kymberlee M. Williams, RPR

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PROCEEDINGS

THURSDAY, NOVEMBER 18, 2022

BEAUFORT, SC

* * *

THE COURT: All right. Anything before we get started?

THE COURT: Plaintiffs have agreed to dismiss all claims against East Coast Construction Clean-up Corp, 2018-CP-0700911, 2019, CP 072629. And the terms of the settlement are released.

THE COURT: You are out of here

MR. ROSS: We will be in a second.

I will speak on behalf of both Lather and East Coast in light of settlements that we reached with the plaintiffs, and we have been in negotiations with D.R. Horton. They have voluntarily agreed to dismiss both parties from the case without prejudice. With that said, we will all leave.

THE COURT: You all drive safely.

MR. NAIL: Good morning, Your Honor.

THE COURT: We are ready when you are.

MS. LUCEY: Hutton's landscape has reached a settlement agreement with the plaintiffs, the terms of which are confidential for this litigation. Horton has offered settlement terms to us on the equitable we will remain in the case on equitable cross-claim.

Roger Odum (Redirect)

Examination by Benjamin A.C. Traywick, Attorney for Respondent Plaintiffs

1 A. Yes.

2 Q. Can you do it right, with proper documentation?

3 A. Yes.

4 Q. Proper disposal?

5 A. Yes.

6 Q. All of the loose ends tied up?

7 A. Yes, sir.

8 MR. TRAYWICK: Thank you sir. No further
9 questions.

10 THE COURT: Thank you very much. You may be
11 excused. Have a wonderful rest of your day.

12 MR. TRAYWICK: Our next witness. Plaintiffs call
13 Ronald Bunner.

14 RONALD BUNNER,
15 being first duly sworn testified as follows:

16 * * *

17 DIRECT EXAMINATION

18 BY MR. TRAYWICK:

19 Q. Mr. Bunner, good afternoon.

20 A. Good afternoon.

21 Q. Just tell us what your role is at D.R. Horton?

22 A. Division vice-president of operations. Hilton
23 Head, Savannah, and Charleston area.

24 Q. I understand there has been some kind of
25 reconfiguring at times about the divisions over the course of

1 your career at D.R. Horton.

2 A. That's correct.

3 Q. How long have you been with the company?

4 A. 23-and-a-half years.

5 Q. Reconfiguring then -- your territory have you been
6 in the division that includes Beaufort for the last 15 years?

7 A. Longer than that. Yes.

8 Q. I want to ask you in particular about the Beaufort
9 Savannah division in 2014, 2015 range when Tidewater Creek was
10 being developed.

11 A. Okay.

12 Q. What your role?

13 A. Vice-president of operations. At that time I
14 did -- I believe I did have territory all the way from Hilton
15 Head to Savannah, Wilmington, including Myrtle Beach.

16 Q. If you will just show me, please. Number 2 is --
17 just real briefly. It has been a thorn in my side.

18 Can you tell me what that is?

19 A. That looks like a quick overview area map. This is
20 the Hilton Head/Beaufort area.

21 Q. Can you see that as of January 1, 2014, down on the
22 left.

23 A. If that is what it says. I just can't see it.

24 Q. Can you see this is a map legend over here on the
25 right on the bottom existing communities close out.

Ronald Bunner (Direct)

Examination by Benjamin A.C. Traywick, Attorney for Respondent Plaintiffs

1 A. No.

2 Q. You are the operations manager for the division?

3 A. That's correct.

4 Q. You are certainly familiar with bidding, purchasing
5 contracting, yes?

6 Q. You signed the contract.

7 A. I sign many contracts. I signed the ICA.

8 Q. What is the ICA?

9 A. Independent contractor agreement.

10 Q. What is the difference?

11 A. Blanket agreement identifies the relationship
12 between D.R. Horton and a specific contractor. The other one
13 is a specific contract for the development, including scopes of
14 work specifications, details for the actual site development of
15 Tidewater Creek.

16 Q. Did you wind up having to add money to pay Lather
17 to build the building pad?

18 A. I don't know.

19 Q. Did Lather build the building pads?

20 A. Yes.

21 Q. Do you know at what point in construction that D.R.
22 Horton had misunderstood Lather's scope?

23 A. Within days. That didn't mean that it caused it to
24 go over budget. Does that make sense?

25 Q. Sure.

Ronald Bunner (Direct)

Examination by Benjamin A.C. Traywick, Attorney for Respondent Plaintiffs

1 grading plan. Some sort of grading plans.

2 Q. They are for the entire lot, correct?

3 These are for the building pads. That is here
4 going to sit. I am not going to bring in fill in my yard?

5 Q. What is the raise for lot 18?

6 A. 3.3 feet.

7 Q. What is the raise for Lot 19?

8 A. 3.3 feet.

9 Q. Is that the Stevens' property?

10 A. Yes.

11 Q. What is the raise for Lopez property?

12 A. At Lot 20, 3 feet.

13 Q. For 16.

14 A. Over at the right, that shows how much dirt you
15 will have to bring in?

16 A. Correct.

17 Q. Did you tell us the other day at your deposition
18 that D.R. Horton did not supervise Lather's work?

19 A. I believe that is what I told you. Yes.

20 Q. Was that just happenstance? Was there some error
21 that caused you to not supervise your subcontractor?

22 A. Lather's scope was to provide supervision. We
23 provide oversight.

24 Q. What is the difference between oversight and
25 supervision?

1 A. We make sure they are showing up and some work is
2 going on. We asked the engineer. The design engineer.
3 Everything is done between as far as -- we are just making sure
4 they are working towards the schedule. Get a schedule
5 confirmation. How much they have actually progressed through
6 the year.

7 Q. There and working. You are not confirming that
8 they are doing the work properly?

9 A. Right.

10 Q. That is a conscious decision that D.R. Horton makes
11 to not supervise?

12 A. That is why we make sure that it's in their scope
13 of work.

14 Q. All the permits for Tidewater Creek pulled by D.R.
15 Horton?

16 A. I would to review them and make sure before I can
17 answer that question.

18 Q. Did D.R. Horton, supervise Hutton's Landscape?

19 A. No. We hired them as a professional landscaper.

20 Q. You recognize D.R. Horton is the general contractor
21 for your house?

22 A. That's correct.

23 Q. For the house at Tidewater Creek?

24 A. That's correct.

25 Q. D.R. Horton doesn't provide supervision to any of

1 its subs. We schedule them. If there is a conflict between
2 subs, we try to resolve that conflict. If there is anything
3 that we need to ask an expert on, we hire contractors as
4 experts for whatever the phase or task that we are hiring them
5 for. Just like we hire HVAC. They carry mechanical license
6 because they are required to. They are the expert on HVAC, not
7 me.

8 I just wanted to make sure that they show up, pass
9 their inspections. If it's an inspectable item, we need to
10 know that they completed their thing before we can.

11 That is what I mean. Question work on the
12 scheduling, the completion of task.

13 Q. Quality and consistency and compatibility and
14 compliance with the plans specs, building codes, and industry
15 standards is not part of what D.R. Horton does?

16 A. No. We look at that. We look to see and make sure
17 that they're using the carrier unit that they are supposed to
18 use. They install things that we know any lay person can see
19 what it is. We also rely on information from Beaufort County.
20 In this particular case, or from to do their inspections and
21 come oversee it as well.

22 We walk through. We can see if the painter showed
23 up. And if the house isn't painted, the painter didn't do its
24 job.

25 Q. Does D.R. Horton provide inspections of the

1 subcontractor's work?

2 A. We do review it, yes.

3 Q. What is the difference between review and inspect?

4 A. It's probably about the same thing. Yes. We don't
5 provide like a certificate or anything like that, like you
6 would for a municipal inspection. That would be the only real
7 difference between review and inspect the scope of the visual
8 part of that would be the same.

9 Q. That is inspection that D.R. Horton apparently do
10 provide for Lather, Hutton's, inspecting to ensure the work is
11 being done properly?

12 A. Lather is the general contractor.

13 THE COURT: Lather is a general contractor?

14 THE WITNESS: For the site development of Tidewater
15 Creek.

16 BY MR. TRAYWICK:

17 Q. You all get that by putting contractor agreement at
18 the top of the contract?

19 A. We are the owner, and they are the general
20 contractor. It's the same contract with Hutton's and Lather,
21 just with different scopes of work.

22 Q. How are they different?

23 A. Hutton's is a landscaper. Lather builds the
24 foundation for us as well.

25 Q. One is a site developer?

1 Q. Your mass grading looks pretty much like a finished
2 grader.

3 A. They have completely different scopes of work, and
4 there is also an additional contract for the site development
5 with Lather that specifies what I described before.

6 Q. You hired them both?

7 A. Yes.

8 Q. Paid them both?

9 A. Yes.

10 Q. Your lawyers drafted the contracts for both?

11 A. It's the same contract for the independent contract
12 agreement. They are both labeled as independent contractor
13 agreements and one is a subcontractor and one is not. That is
14 your testimony?

15 A. I didn't say that. One is a general contractor and
16 we are the owner on the site developer.

17 Q. You had the authority, D.R. Horton did, to order
18 either Lather or Hutton's out to do warranty work?

19 A. We don't order. We would request.

20 Q. Uh-huh. You can fire either of them at any time
21 for any reason?

22 A. Yes.

23 Q. You could tell either of them to stop working if
24 during your inspections that they are running afoul of the plan
25 and specifications?

1 A. Yes.

2 Q. Did you deny that in your deposition the other day,
3 sir?

4 A. Deny?

5 Q. That you had the authority to tell them to stop
6 work?

7 A. I don't think I did.

8 Q. Let's move on. We will come back to it.

9 On occasions where -- you heard Mr. Higgs testify
10 that he as the superintendent for Lather brought Mr. Osako to
11 the job to show him the junk yard on Lots 15 through 20

12 A. I don't remember the term junk yard, if that is
13 what he said. I heard the testimony, yes.

14 Q. Is that something that happened, as far as you
15 know?

16 A. As far as I know.

17 Q. Did D.R. Horton pay Lather to go pick up all that
18 trash get rid of it, dispose of it properly?

19 A. It was supposed to be.

20 Q. Did you pay him to do it?

21 A. Part of the contract, yes. It was in his scope of
22 work to do.

23 Q. Let me just read. Let me see if you recognize
24 this, so we can skip ahead. You were asked could D.R. Horton
25 superintendent's stop -- that you were asked if D.R. Horton

1 could see a subcontractor or an independent contractor who is
2 doing something that did not comply with the project specs, the
3 superintendent stopped that contractor and directed them on how
4 to complete the work.

5 A. Correct.

6 Q. I will admit I am a little all over the place.
7 engineer that could come out ask do a site visit.

8 I am talking about the authority, D.R. Horton's
9 authority?

10 A. We have the authority to stop.

11 Q. That is true for Lather and Hutton's?

12 A. Yes.

13 Q. You are the owner?

14 A. Correct.

15 Q. You are the developer and you hold all the permits.
16 You hired everybody. You fire everybody?

17 A. That's correct.

18 Q. It's your job?

19 A. Yes.

20 Q. Let's look at Number 40. Do you know who Jennifer
21 Berg is?

22 A. I do know who Jennifer Berg is.

23 Q. Who is that?

24 A. She is a sales manager.

25 Q. You can see this is from May of 2016?

Ronald Bunner (Direct)

Examination by Benjamin A.C. Traywick, Attorney for Respondent Plaintiffs

1 under 300 then.

2 Q. How many nationwide in the last year?

3 A. 830 thousand.

4 Q. Ms. Hefner responded. Forwarded it to Carl.

5 A. At the time was the construction manager.

6 Q. What does this say?

7 A. Paraphrase it. Get it cleaned up today. The last
8 thing we need is another lawsuit.

9 Q. More colorful language, obviously. That is what
10 she says?

11 A. That's correct.

12 Q. Exclamation point in all caps?

13 A. Yes.

14

15 Q. That is it for that one. Do you know whether that
16 happened?

17 A. I don't know what action was taken to clean this.

18 A. On May 18, to 16. I do not know what happened on
19 this day.

20 Q. Did you all send out Hutton to fix it?

21 A. It sounds like we sent out Hutton's to do some
22 work. I believe we sent out Hutton's.

23 Q. To clean this shit up today?

24 A. Yeah. I don't know if it happened that day.

25 Q. Forget the?

1 A. She insisted for him to go get it done today,
2 immediately.

3 Q. Was Hutton's acting as D.R. Horton contractor when
4 it went out to conduct a clean-up operation?

5 A. Yes.

6 Q. Do you know if it actually worked? Did they get it
7 cleaned up? Was the contract directly carried out properly and
8 thoroughly?

9 A. As far as I am aware it was.

10 Q. Back in 2016, the Shafi property was cleaned up by
11 your contractor and your instruction, thoroughly and properly?

12 A. That is what we paid them to do.

13 Q. Did you go out and inspect?

14 A. I can't testify to that. I don't know either or, if
15 we went out and inspected during the process of it or after the
16 fact. I don't know.

17 Q. Did you tell us in your deposition the other day as
18 D.R. Horton's representative that as far as D.R. Horton knew,
19 it still -- at that point seen any evidence that there was
20 debris. Trash dump. Did you agree on your Tidewater Creek
21 property?

22 A. I believe that was my testimony. I didn't see any
23 evidence.

24 Q. No evidence nowhere on that whole property?

25 A. I didn't say there wasn't debris. I don't know

Ronald Bunner (Direct)

Examination by Benjamin A.C. Traywick, Attorney for Respondent Plaintiffs

1 MS. LUCEY: No objection, Your Honor.

2 MS. PETERSON: No objection.

3 THE COURT: Without objection.

4 BY MR. TRAYWICK:

5 Q. I am sorry to keep jumping around. We will get
6 finished here. When Mr. Osako told Sean Higgs and Lather to go
7 in and clean up all at that stuff over in lots 15 to 20, did
8 they do it properly?

9 A. I would say -- is it Mr. Higgs?

10 Q. Yes, sir.

11 A. In the deposition you read through on Tuesday, I
12 believe he made the statement that he says he didn't do it
13 properly. Because they are supposed to remove the debris, and
14 if there is any debris left, then they didn't do it properly.
15 If there is no debris left they did do it properly.

16 Q. Did you go check up and check that they did it
17 properly?

18 A. We didn't do any visual inspection to tell us it
19 wasn't done properly. At the time while the scene was
20 underdeveloped, I am not aware of debris that would have been
21 visible that came to our attention. I am not saying someone
22 walked through there and didn't see. I saw testimony -- I
23 heard testimony on Tuesday that certain debris was only visible
24 when the grass started growing in. I believe in your yard,
25 when the grass wasn't growing as much, all of a sudden you

Ronald Bunner (Cross)

Examination by Emily Gifford Lucey, Attorney for Respondent Hutton's Landscapes, Inc.

1 license?

2 A. I believe we worked under that license.

3 MS. LUCEY: At this time, Your Honor, I with move
4 to enter Exhibit 46 into evidence, please.

5 THE COURT: Any objection?

6 MR. TRAYWICK: No, Your Honor,

7 THE COURT: Without objection.

8 (Defendant's Exhibit 46 was marked for
9 identification and accepted into evidence.)

10 BY MS. LUCEY:

11 Q. Exhibit 48, do you recognize that?

12 A. I do.

13 Q. What is that?

14 A. Certificate of occupancy.

15 Q. What does that mean?

16 A. It has passed all of its municipal inspections.
17 The municipality has deemed that it's a good house. It's
18 complete and ready for someone to move in.

19 Q. Does this appear to be the CO for the Shafi
20 residence?

21 A. It does.

22 Q. Who does it list as the contractor?

23 A. D.R. Horton.

24 Q. Do you know if Hutton's Landscape had to pull any
25 permits for its work on the Shafi residence?

Ronald Bunner (Cross)

Examination by Emily Gifford Lucey, Attorney for Respondent Hutton's Landscapes, Inc.

1 Q. Is Mr. Henderson still with D.R. Horton?

2 A. No. He is not.

3 Q. We and had some discussion at your deposition. Did
4 D.R. Horton act as the general contractor for the project
5 vertical instruction?

6 A. Vertical construction, yes.

7 Q. It would be your superintendent who would oversee
8 the work of the subcontractors. Is at that fair?

9 A. That's correct.

10 Q. Were those superintendents employed by Horton?

11 A. Yes.

12 Q. At least one a week you have a construction manager
13 putting eyeballs on the Tidewater Creek neighborhood?

14 A. Should be, yes.

15 Q. At least one superintendent putting eyeballs on the
16 neighborhood?

17 A. That's correct.

18 Q. While the houses are being built?

19 A. That's correct.

20 Q. What is going on at the site?

21 A. Visual, abandoned vehicles anything weird.

22 Q. It's strictly the vertical construction phase?

23 A. Yes.

24 Q. Who prepared the scopes of work that were attached
25 to Hutton's and Lather?

Ronald Bunner (Cross)

Examination by Emily Gifford Lucey, Attorney for Respondent Hutton's Landscapes, Inc.

1 Basically, the structure people are in charge of the rough
2 grades and fine grades after the vertical construction
3 standard. Making sure the final lot drainage works. Not like
4 little pot holes in the yard area, holding water. There are
5 codes. A certain amount of slope water drains away from the
6 house after a certain amount of time in the a rain event.
7 Drainage as well as whatever there is for that particular
8 property for water to get away from the house.

9 That is usually biggest thing for warranty for
10 landscaping problems. We typically don't warrant living plants
11 material. It's actually stated that we don't warrant plant
12 material.

13 Q. You don't recall that happening with Hutton on that
14 particular project?

15 A. I didn't, me, myself, speak with Hutton's about
16 this particular project or the concern we are here about today.

17 Q. No one brought it to your attention that they were
18 having problem with Hutton's this particular project, did they?

19 A. No.

20 Q. Do you have any evidence Mr. Bunner that Hutton's
21 participated in concealing or burying any debris on the
22 Tidewater Creek neighborhood

23 A. I have no evidence of that.

24 Q. You are not aware of an incident where Horton had
25 to pay a civil suit of \$2,500 because it performed substandard

1 work at a residence?

2 A. No. I was not aware of that.

3 MS. LUCEY: Thank you. Those are all the questions
4 I have.

5 THE COURT: Thank you. You can step down.

6 THE COURT: Ladies and gentlemen of the jury, we
7 will call a witness out of order. This will be a deposition,
8 and the parties will be reading it out loud.

9 (Deposition read.)

10 THE COURT: All right. Who is your next witness?

11 MS. WILLIAMS: The plaintiff calls Jessica Shafi.

12 JESSICA SHAFI

13 being first duly sworn testified as follows:

14 * * *

15 DIRECT EXAMINATION

16 BY MS. WILLIAMS:

17 Q. Good morning, Ms. Shafi. Time is a flat circle at
18 this point. How are you doing this afternoon?

19 A. I am going okay.

20 Q. The jury has had an opportunity to meet your
21 husband. I just wanted to give them a brief opportunity to
22 meet you. If you will just clarify for me, where do you work?

23 A. I am actually employed by Coastal Diagnostics. I
24 am contracted by Beaufort Memorial Hospital as one of their lab
25 supervisors.

* * *

DIRECT EXAMINATION

BY MS. PETERSON:

Q. Good afternoon, Mr. Ackerman. Nice to meet you. I am Kristen Peterson.

A. Nice to meet you.

Q. Could you tell the jury what is your job is and what your involvement was at the Tidewater Creek neighborhood?

A. I am a civil engineer with Carolina Engineering. I am a co-owner of the company. I have been doing engineering for 27 years.

Q. Specifically, what was Carolina Engineering's role at Tidewater Creek?

A. The Tidewater project a permitted project. Another engineering firm had do the design work, and we were hired to write the contract for the site work.

Q. Who was the general contractor for this site development stage of Tidewater Creek?

A. Lather Construction.

Q. Mr. Ackerman, do you recognize this document?

A. Yes. It's an email.

Q. Would you tell the jury who it's from and who it's too and what it's about?

A. From me to Duke Deal (phonetic), who is an engineer who worked for BJWA. I had given him the subcontractor's

1 license for Lather Construction.

2 Q. If you flip to the next page. Does it appear that
3 you were attaching anything else to the email?

4 A. Just a copy of the general contractor's license
5 from July 27, 2014.

6 Q. MS. PETERSON: Defendant moves into evidence
7 Exhibit 51.

8 MR. TRAYWICK: No objection.

9 THE COURT: Without objection.

10 BY MS. PETERSON:

11 Q. Would you explain what it means to be the general
12 contractor on site development?

13 A. The general contractor is the contractor who is
14 going to do the work. In this case, it would be the clearing
15 the grading, the drainage, the curbs and gutters, the paving,
16 water and sewer, utility work, drainage work. That sort of
17 thing. In our field, it's the horizontal work.

18 Q. Was there a contract that governed Lather's work on
19 this project?

20 A. Yes, there was.

21 Q. Are you familiar with that contract?

22 A. I am.

23 Q. Approach the witness, Your Honor?

24 THE COURT: Yes, ma'am.

25 BY MS. PETERSON:

1 Q. Do you recognize that document?

2 A. Yes. This is the contract document, front-end
3 documents and technical specifications that our firm prepared
4 for D.R. Horton to contract with Lather construction.

5 Q. Who are the parties to that contract?

6 A. D.R. Horton and Lather Construction Company.

7 Q. Does it appear to be a true and accurate copy of
8 the contract governing the scope of work between D.R. Horton
9 and Lather for the Tidewater Creek neighborhood?

10 A. Yes, it does.

11 Q. Kept in the ordinary course of business for
12 Carolina Engineering?

13 A. Yes.

14 Q. At this time D.R. Horton moves to admit Defendant's
15 Exhibit 52 into evidence.

16 THE COURT: Any objection?

17 MR. TRAYWICK: No objection, Your Honor.

18 THE COURT: Without objection.

19 (Defendant's Exhibit 52 was marked for
20 identification and accepted into evidence.)

21 BY MS. PETERSON:

22 Q. You talked a little bit about Lather's job duties
23 and general duties in Tidewater, who is responsible for
24 supervising Lather's employees?

25 A. Lather Construction would have done their own

1 supervision.

2

3 Q. Is that standard in the industry for the general
4 contractor to supervise their own employees?

5 A. Yes.

6 Q. Was that actually a term in this contract that that
7 Lather would provide supervision?

8 A. I believe it was would be. It's definitely in the
9 contract, and it's more than likely in the general provisions.

10 Q. You bring up a good point. If you will go with me
11 to Carolina Engineering 094, the numbers on the bottom
12 right-hand corner.

13 A. In the contract?

14 Q. Yes.

15 A. Okay.

16 Q. What page would you like me to turn to?

17 A. 094.

18 Q. Under what section?

19 A. Contract documents and specifications for Tidewater
20 creek.

21 A. Okay.

22 Q. Then you should be looking at Section 9, contents
23 of the contract documents?

24 A. Okay.

25 Q. Are you there?

1 A. I am at 10-2, table of contents.

2 Is that what you are looking for?

3 Q. Yes?

4 A. Okay.

5 Q. Carolina Engineering Consultants Subpoena Response,
6 0094?

7 A. Okay.

8 Q. What does the very top of that say? Article 9.

9 A. You are in the contract?

10 Q. At the very top in bold letters tell me what that
11 says?

12 A. Article 9 contract documents.

13 Q. It says contents of the contract documents consist
14 of the following. Could you read Lines 4 and 5 for me?

15 A. Yes. Line 4 is the general conditions pages
16 00700-1 to 00700-42 inclusive.

17 Item 5 supplementary conditions 00815-1 to 00815-5,
18 inclusive.

19 Q. Very good. Does that tell you that the contract
20 was not just the first few pages but also included everything
21 referenced in the contents?

22 A. Correct. That's right.

23 Q. Lather's was required to follow all of these
24 specifications?

25 A. That's correct.

1 Q. If we turn to the Bates label 0116. There is 718?

2 A. Okay.

3 Q. Could you read section 6.01, supervision and
4 superintendents to the jury?

5 A. Contractor shall supervise, inspect, and direct
6 all work competently and efficiently devoting such attention
7 thereto and apply such skills and expertise as may be necessary
8 in accordance with the contract documents.

9 Contractor shall be solely responsible for the
10 means, methods, techniques, sequences, and procedure of
11 construction. The contractor shall not be responsible for
12 negligence of owner or engineer and the design or specification
13 of a specific means, method, technique, sequence, or procedure
14 of construction, which is shown as indicated in and expressly
15 required by the contract documents.

16 Contractor shall be responsible to see that the
17 completed work applies accurately with the contract documents.

18 Q. When It says contractor, that is referring to
19 Lather Construction, correct?

20 A. Correct.

21 Q. Do you agree with me if Lather came across any
22 debris, it was within their contract scope to remove it?

23 A. Yes.

24 Q. Again, they should supervise that removal as the
25 general contractor?

1 A. That's correct, yes.

2 Q. Did the County ultimately approve the Tidewater
3 Creek subdivision for residential development?

4 A. They did.

5 Q. Did you perform a final inspection of the Tidewater
6 Creek neighborhood before that occurred?

7 A. Yes. We did a walk-thru with the County inspector.

8 Q. Did you see any red flags at the neighborhood?

9 A. We did not.

10 Q. What was your general impressions of the Tidewater
11 Creek neighborhood it?

12 A. A nice-looking subdivision.

13 Q. Did you ever see any debris in the Shafi's
14 backyard, Lot 18?

15 A. Can you show me what lot that is on the -- that map
16 would be fantastic if I could see that. I would just like to
17 know what lot we are talking about.

18 Q. Lot 18 is where the sticky note is.

19 A. Not that I remember. The site was a pretty clean
20 site from what I remember.

21 Q. In your experience as a civil engineer who handles
22 the permitting and the zoning applications for residential
23 subdivisions, would the County approve a subdivision that was
24 situated on a bunch of debris?

25 A. Not normally.

1 Q. I think those are all the questions I have for you,
2 Mr. Ackerman. I appreciate your time. Please answer any
3 questions that the plaintiff may have.

4 ***

5 CROSS-EXAMINATION BY MR. TRAYWICK
6 BY MR. TRAYWICK:

7 Q. Mr. Ackerman, I am Ben Traywick. We emailed. I
8 don't know if we have spoken. How are you?

9 A. Fine. Night to meet you.

10 Q. You were shown two documents that say Lather and
11 general contractor. One of them was a license?

12 A. Yes.

13 Q. General contractor's license.

14 A. Yes.

15 Q. Does D.R. Horton also have a general contractors
16 license?

17 A. I do not know.

18 Q. Would you think that they would?

19 A. Not normally.

20 Q. I presume you would defer to D.R. Horton itself on
21 that subject?

22 A. Yes, sir.

23 Q. What Mr. Bunner testified to earlier?

24 A. Yes. That's correct.

25 Q. The other one was a contract that you drew up for

1 LARRY (STEVE) MOORE,
2 being first duly sworn testified as follows:

3 * * *

4 DIRECT EXAMINATION

5 BY MR. NAIL:

6 Q. Good afternoon, Mr. Moore. Hope you are doing well
7 this afternoon.

8 Please summarize your educational background for
9 the jury, please.

10 A. A bachelor's of science in civil engineering from
11 North Carolina State University. I graduated in 1976 with
12 emphasis in soils mechanics and water resources.

13 Q. Are you an engineer?

14 A. I am a professional engineer in nine states.
15 Registered in North Carolina in 1980 and South Carolina in
16 1992.

17 Q. Do you have hold a license for being an engineer?

18 A. I do hold a professional engineering license.

19 Q. How long have you held that, sir?

20 A. In South Carolina 29 years.

21 Q. Is there any type of continuing education you need
22 to maintain that license?

23 A. I do have to have so many continuing education
24 units for my civil engineering license. I think it's 12 to 15
25 per year.

Larry (Steve) Moore (Direct)

Examination by Michael Nail, Attorney for Appellant D.R. Horton

1 became involved in the site.

2 Q. What type of things have you done to evaluate this
3 site?

4 A. I have walked Tidewater Creek a couple of days,
5 August 29 to 30 in 2019. I looked at a great many of the lots
6 individually. I made notes on what I found on the lot. A rock
7 or a piece of concrete, whatever. I have also looked at the
8 Shafi's lot. I looked at the Stevens' lot. Looked at the
9 contract documents, the grading plans. I have looked at the
10 other information that has been provided, depositions, et
11 cetera.

12 I looked at the U.S. waste information where they
13 went on the site and the GPR that was performed on October 29
14 of this year

15 Q. I want to focus specifically on your observations
16 of the Shafi property.

17 When did you first go out there? What did you do?

18 A. I went out there October 29, 2019. As part of the
19 investigation, I literally had a sketch plan of the lot with
20 the house I drew on it. I walked the entire lot, front to
21 back, side to side. I documented everything I found, a piece
22 of concrete, a piece of glass, anything that was found was
23 noted on the plan that I had I photographed it.

24 I took some 80 pictures that day of everything that
25 was noted on the Shafi lot

1 Q. What is your recollection of what you saw, if
2 anything, on the Shafi lot?

3 A. Almost all of it was erosion control stump. You
4 have to have a gravel-like entranceway to keep the mud off the
5 street and off the tires. Generally, that is what we saw.
6 Aggregate stone was scattered around the lot.

7 There were a few shingles on the left side. We did
8 see that. There was a broken bottle on the front corner of
9 the -- like a Pepsi bottle or something that was on the grass.
10 I did document it. It had nothing to with the debris.

11 Q. Is there any part of the lot that you did not walk
12 that day?

13 A. Not one part.

14 Q. Were you specifically looking for any debris,
15 trash, et cetera?

16 A. My goal was to document everything on that lot.
17 What it was, it didn't matter to me. The goal was to document
18 it so I could, in fact, explain later what was there. I walked
19 the lot multiple times to make sure I caught all the
20 information.

21 Q. Did you do any type of other investigation, other
22 than visual walking around the lot?

23 A. At that time, I did not. It was strictly a visual
24 observation of that lot. Later we certainly had the GPR that
25 was discussed. I didn't do anything on that lot that day,

1 other than just walk the lot and make sure I documented
2 everything I saw on the site.

3 Q. Is there a particular reason why you wouldn't have
4 felt the need to do anything else?

5 A. Certainly, there was no indication. There was no
6 indication of heavy glass. There was no indication of buried
7 debris at that time. We were looking for surface debris. The
8 intent was to try to find out if there was stuff buried on the
9 surface. That was the intent. I know there was trash off the
10 premises. That didn't come into play. It was off the
11 premises.

12 Q. Did you note whether the debris was concentrated in
13 any particular area?

14 A. Some of the shingle debris was on the left side of
15 the house on the left yard. A couple of the right stones in
16 the front yard. Generally it was in the backyard, in the rear
17 yard area.

18 Q. Have you developed any opinions on whether there is
19 any buried debris on Lot 18?

20 A. I don't believe there was much, if anything. With
21 the ground penetrating Radar, we dug a couple of locations up.
22 One of the men from my firm was there on the 29th. He dug up
23 some hole and found one rock along the rear 6 feet off the
24 property line, 40 inches deep.

25 Other than that, I don't think he found anything

1 else. I know there has been some photographs of the shingle
2 remnants along the fence along the back left side.

3 Other than that, there hasn't been any evidence --
4 I know that the day before the 29, on the 28th it rained
5 significantly in the area. There was one small fragment of
6 glass that was identified on the 29th.

7 Q. I want to make sure the jury is clear. We jumped
8 around from your initial site visit now to another visit a
9 couple of weeks ago. Were you actually there?

10 A. I was there on the 29th of 2019.

11 Q. What about earlier when the GPR was performed?

12 A. I was not there.

13 Q. Who was there?

14 A. Mike McClean was one of our engineers from Applied
15 Building Science. He was there on my behalf.

16 Q. What was his purpose that day?

17 A. To observe and document the GPR and to dig up
18 anything that was identified by that equipment.

19 Q. I will go ahead and show you what was previously
20 marked as an exhibit from Mr. Broadway who has testified. Have
21 you reviewed that, sir?

22 A. Yes.

23 Q. Is that something that you would review in
24 developing your opinions in this matter?

25 A. Yes.

1 Q. Did you speak with Mr. McClean about his
2 observations that day as well?

3 A. I did.

4 Q. What was your understanding of what was done on the
5 day that the GPR was performed?

6 A. The GPR was utilized over the entire lot, up and
7 ask down across the entire lot. It tries to pick up anomalies
8 in the ground. It's not perfect, but it's as good as you have
9 before you start digging up the whole yard. It does pick up
10 anomalies. I have been involved in one before. You dig up to
11 see what is in the ground. You find a rock. A lot of tree
12 roots. In this particular case, that is all we found.

13 Q. The purpose of GPR to identify glass underneath the
14 ground?

15 A. The purpose is to try to identify any anomalies
16 that may be in the ground, any trash. Not perfect but as best
17 we have.

18 Q. Any other option that would be better than GPR?

19 A. The only option is to start digging up the entire
20 yard. Those are the only two options you really have.

21 Q. Do you think it's necessary in this matter to do
22 any other investigation?

23 A. No.

24 Q. Why is that?

25 A. There has been a lot of evidence that if you look

1 at the Phase 1, which is the performed, look at the soils
2 report. You look at the street development, the lot
3 developments, the utilities going in, the storm drain going in,
4 the house going on. All of those things involve digging up the
5 ground. We dug holes in the ground for the foundation. We dug
6 holes in the foundation for the storm drain. We had to dig the
7 ground up for the piping. None of that generated trash. Dug
8 the foundation for the house. Didn't generate trash.

9 There has been no evidence that there is buried
10 trash out there. There is some superficial things on some of
11 the lots on the surface on the lots. We talked about there is
12 has not been evidence that there is buried trash on this lot.
13 The evidence hasn't shown that by the work that was done by the
14 general contractor and by Horton.

15 Q. You mentioned Phase 1. You are referring to the
16 Phase 1 environmental site assessment?

17 A. Yes.

18 Q. We have looked at that before. What other types of
19 due diligence should a landowner perform in the land
20 development phase, if anything?

21 A. When I worked for Centex, we were a national
22 builder. We used the Phase 1 as one part of the process. The
23 soils report for Phase 1. What that tells you is we used it
24 from the standpoint that -- we self-funded our work. We wanted
25 to know if there is an environmental issue that could come back

1 to bite us, if you would. That is one phase of it.

2 You look at soils, walk the site. These are steps
3 that you take as you walk through the development process to
4 the point when you decide to purchase and develop or not to
5 purchase and walk away.

6 Q. Mr. Moore, I will hand you -- this has been marked
7 as Defendant's Exhibit 58.

8 Have you reviewed this report, sir?

9 A. I have. Phase 1 environmental.

10 Q. What is the purpose of this report?

11 A. I have always used it as a part of the process in
12 the planning phase of land development to make a determination
13 whether there was an environmental issue recognized or
14 historically recognized that would be a detriment to the site.

15 Q. You are saying environmental issue. Would that
16 include solid waste like glass or trash?

17 A. Anything.

18 Q. Turn to DRH 01082105? Part of the executive
19 summary?

20 A. Yes.

21 Q. Have you seen that before?

22 A. I have.

23 Q. Paragraph, 35, what are we looking at there?

24 A. Along the north boundary of the target property,
25 near Lot 28, refuse is mainly household garbage.

1 Q. Which lot again?

2 A. 28, from the north boundary.

3 Q. If you could move to the bottom right-hand corner,
4 DRH 0182121. We are also going to get that pulled up for the
5 jury here. This is Section 3.1.4 of the report, labeled solid
6 waste.

7 A. Yes, sir.

8 Q. Is this also identifying that there is some solid
9 waste noted on the site?

10 A. Correct, sir. Here again the northern boundary of
11 the target property near Lot 28 and Lot 1 at the time.

12 Q. What was the conclusion at the end of the
13 paragraph?

14 A. No other significant quantity of solid waste or
15 evidence of landfill waste was identified CDI site
16 reconnaissance.

17 Q. Pictures here toward the end. This is bottom
18 right-hand corner. 0182163.

19 A. Yes, sir.

20 Q. 0182155.

21 A. Yes.

22 Q. Show the jury where the picture was taken or where
23 it shows it was depicted?

24 A. Photo ten. Photo ten was the debris behind Lot 28.

25 Q. Move onto Photo 26 for me, please.

1 What does that photo depict?

2 Q. 26 is the debris of household waste along the
3 unpaved road near the interstate. This material is, I believe,
4 off site.

5 Q. You have reviewed that report. Did you see any
6 other notations of trash, debris, anything like that in your
7 report?

8 A. No. The trash and debris was discussed all along
9 the northern boundary from 1 to 28.

10 Q. Is Phase 1 environmental site assessment something
11 that you have reviewed and evaluated as a part of developing
12 your opinions in this matter?

13 A. It is.

14 MR. NAIL: At this time we would like to enter the
15 Phase 1 Environmental Site Assessment into evidence.

16 MR. TRAYWICK: Your Honor, we have our objections
17 as we discussed at side bar. This was produced to us just a
18 couple of days before trial. It is hearsay. We have had no
19 opportunity to review it, other than the executive summary, to
20 which is the first sum number of pages which we have no
21 objections.

22 THE COURT: All right. I will allow it.

23 (Defendant's Exhibit 58 was marked for
24 identification and accepted into evidence.)

25 BY MR. NAIL:

1 Q. Let me ask you this question. We just heard Mr.
2 Ackerman testify.

3 What is your opinion on who was the general
4 contractor for the land development part of this Tidewater
5 Creek Construction?

6 A. Lather Construction.

7 Q. Why is that?

8 A. Lather Construction was hired by contractual
9 documents to do the clearing, grading, concrete, paving, sewer,
10 install storm drains. Their license was provided in the
11 documentation to the state of South Carolina, for example, for
12 the roadway work.

13 Horton was not the general contractor for the site
14 work. They are the owners.

15 Q. Have you reviewed the contract documents? I don't
16 want to belabor the point?

17 A. Yes.

18 Q. Is that something that you would also evaluate as
19 part of developing your opinions in this matter?

20 A. Yes. Those documents is what you would expect
21 someone to see as the site general contractor.

22 Q. If there was debris found on this site during the
23 land development process, who would have had responsibility for
24 the removal of that debris?

25 A. That would have been Lather. There was a specific

1 specification, 2230 discussed that they were to remove surface
2 debris.

3 Q. In reviewing those documents, did it mention
4 anything about who was responsible for supervision during the
5 land development phase?

6 A. Absolutely. Lather is responsible to supervise
7 their own crews. That is not something the owner would do.

8 Q. I want to talk again about Lot 18. I want to
9 fast-forward to a couple of weeks ago when Mr. McClean was out
10 and the GPR report was done.

11 What else have you looked at, if anything, recently
12 to determine whether or not there was any fill dirt placed on
13 Lot 18?

14 A. I have looked at the grading plan that has been
15 discussed here, as well as looked at the other documents that
16 have been presented that had the different field and elevations
17 for each lot the ones at 53.

18 Q. Have you developed an opinion on whether there was
19 any fill dirt on the Shafi lot?

20 A. There was a little fill dirt in the middle part of
21 the lot. When the elevations were revised.

22 I agree with Mr. him. The basic of the lot is a
23 16. The contour 16 front. The 16, 15, 14 contour, the
24 back-left corner of the lot was re-contoured to provide a
25 proper drainage of the lot for the low end. The other contours

1 were not changed, 13, 12, 11, 10 are still there. The
2 original -- there was a little bit of fill from material, but
3 not much on the lot at all.

4 Q. Where was the fill dirt placed on the lot, in your
5 opinion?

6 A. In the back third. The contours Mr. Ackerman
7 discussed, there was a little fill dirt there.

8 Q. Was that any any area of the yard?

9 A. A little bit on the house pad. Originally a 15
10 contour. There was some dirt and soil put there. And the back
11 toward the left corner of the lot for the small direction.

12 Q. Based on your visual observations and the photos
13 that you reviewed from the site visit on October 29 of this
14 year. does that help confirm or deny your opinion on that
15 subject?

16 A. Absolutely. I agree that the pad was about a 16.
17 You look at the connection of the driveway to the street, there
18 is actually high point at the street, 15.77. If this house was
19 set at 19.73, you have a driveway about 77 feet from the street
20 to the front of your garage. Driveway rise 4 feet in height in
21 order to get up to the garage.

22 Q. Is there any documents like the plot plan or
23 anything else that would confirm your opinion or help support
24 it?

25 A. Obviously, the grading plan for that lot would show

1 the contour on the backside. There is not -- nowhere does it
2 show anything but the 16 on the land, on that individual lot
3 that shows a 16 contour and that is it.

4 Q. Is the plot plan itself useful in making that
5 determination?

6 A. Absolutely. That is what it was graded to.

7 Q. Please explain briefly to the jury. I know we
8 heard a lot about those contours and all. I just want to make
9 sure we are clear and understand your opinion. This is a plot
10 plan that has previously been used at trial?

11 A. As we discussed, this is the 16 contour. The new
12 contour. It ties back in here. 15 here. And 14 here. These
13 are original contours that Mr. Ackerman discussed. They were
14 not revised.

15 Q. We looked into the Lather plan documents. This was
16 admitted into evidence by the plaintiffs' counsel earlier.

17 A. That's correct.

18 Q. You would agree that it says the raise for Lot 18
19 is 3.3.

20 A. It just didn't happen. There is an interesting
21 thing about this plan. All the lots are different different
22 out there. If you look at the raise for every tenth of a foot
23 for every lot, it's about 13 yards. It doesn't matter what lot
24 it is. For every tenth it's 13 yards.

25 Q. Talked about whether you believe that there was

1 debris buried. I believe you said, no, right?

2 A. That's correct, sir.

3 Q. What about the notion that glass or debris arises
4 or whatever the term may be when it rains? Have you developed
5 an opinion on that?

6 A. I have. On the 28th of October, this past month,
7 there was a rainfall event that you may recall from Hilton Head
8 to Savannah, Charleston, Beaufort area. Depending on which
9 weather station you looked at, anywhere from .18 to 8,200 of an
10 inch of rain.

11 Our team was there on the 29th. He found one small
12 piece of glass. Very small. When I was there, I didn't find
13 any glass fragments. So it just dispels the fact that they had
14 a significant rain event on the 28th and there was one small
15 shred of glass found on the 29th.

16 Q. You are referring to October 28 when it rained?

17 A. That's correct.

18 Q. You collected that data?

19 A. I did.

20 Q. Turn to Tab 18 for me. Let me know if you
21 recognize that as the weather data that you collected.
22 Defendant's Exhibit 18.

23 A. This is the data that I collected. Yes, sir.

24 Q. Is that something that you have used to evaluate
25 your opinions in this matter?

1 A. That is correct.

2 MR. NAIL: I would like to offer this in evidence
3 at this time.

4 (Defendant's Exhibit 59 was marked for
5 identification and accepted into evidence.)

6 BY MR. NAIL:

7 Q. I would like to talk about your observations at Lot
8 19. When did you go out there, and what was your purpose in
9 going out there?

10 A. My first visit was in November of 2020. I was
11 asked by you and your office to go look at the site. Horton
12 had done some reclamation work on the site. We had to go
13 evaluate it in the same mannerism that we evaluated the other
14 lot, the Shafi lot.

15 I took the drawing and I walked the lot front and
16 backwards to document any debris, any glass, that I could find.
17 I couldn't find anything. It was a very strong stand of grass,
18 very green. I went back in October of 2021, just a few weeks
19 ago, and did the same operation again.

20 Walked the lot, looked for any debris, any trash,
21 any glass. I could not find anything whatsoever. Just a
22 healthy stand of grass.

23 Q. Before you went out there, did you have any
24 knowledge the history of that lot?

25 A. I knew that there had been dirt work performed on

1 the lot. That they had taken and remove material on the lot.
2 It had some material looked at. They had found a small shred
3 of glass and a piece of metal in a small open space. Other
4 than that, they didn't find any other debris.

5 Q. Do you know when that work was performed or who
6 performed it?

7 A. It was done several years ago. I know it was done
8 at the direction of Horton.

9 Q. Have you reviewed any documents related to that
10 work?

11 A. I have seen the videos that were taken. I watched
12 the operation. There has been a report generated by GDH of the
13 inspection. I know a rough cost analysis was done.

14 Q. Did you take any pictures while you were out on the
15 site?

16 A. I did take a lot of pictures when I was out there.

17 Q. Is that one of the pictures that you took out on
18 the site of Lot 19?

19 A. That's correct. The house would be to my back
20 left. Shooting down the right property line.

21 Q. 181791. Are we looking at the backyard here?
22 Front yard? Where is this?

23 A. This is the backyard. There is a natural area to
24 the left and several natural areas in front of you.

25 Q. Did you walk the whole area of this property as

1 well?

2 A. I walked the front and the rear of the whole lot.

3 Yes, sir.

4 Q. Do you think this is a pretty good representation
5 of what you generally observed out there?

6 A. Yes, sir.

7 Q. Did you notice anything like grass, trash, debris?
8 Anything like that?

9 A. There was absolutely no glass, no debris, nothing
10 on that lawn in the backyard or the front. In the backyard
11 where the work was done, there was no trash, no glass, no
12 debris.

13 Q. You went out there recently as well?

14 A. I went in October of 2021.

15 Q. Was there anything different about the property
16 that you observed?

17 A. Not at all.

18 Q. This is Defendant's Exhibit 13. I would like to
19 move these photographs into evidence at this time.

20 MR. TRAYWICK: Without objection.

21 THE COURT: Without objection.

22 (Defendant's Exhibit 60 was marked for
23 identification and accepted into evidence.)

24 BY MR. NAIL:

25 Q. I want to ask you a couple of things before I leave

1 you. Wrapping up some of the things that you have talked
2 about, I want to be clear on a few things.

3 Q. Were the acts of D.R. Horton, in your opinion,
4 improper in any way during the land development process as the
5 owner or the vertical construction process as a general
6 contractor?

7 A. Not as the owner as the site development
8 contractor. They went through a process that most people go
9 through as a national builder. You evaluate the property. You
10 plan the property. And then you hire a licensed contractor to
11 perform the work, then you let them do it.

12 There was a process, they follow the process. I
13 see no areas where they were derelict or didn't perform as they
14 should have. The same as the house, the house side. They are
15 the general contractors. The building license. They performed
16 as they should have in the presentation of building the house.

17 Q. When D.R. Horton received the Phase 1 Environmental
18 site assessment that found no RECs or recognized environmental
19 conditions as you have said, is there any obligation that you
20 had anything else done at that point, as far as the due
21 diligence?

22 A. You would not. You have to be able to rely on the
23 professionals that you hire. They hired a profession firm.
24 Phase 1 was just the one item of trash on the northern
25 boundary. You move on. One step in the process. That is a

1 positive step. You move to the next one.

2 Q. Is it the Phase 1 engineer's responsibility to
3 perform the investigation properly?

4 A. That's correct. You talk to a lot of folks. You
5 do investigations. You dig it deep. You look at the history.
6 That is what the engineer does. That is why it's important to
7 know what site was used for before, so as you go forward you
8 have a good feeling of what the site can be used for now.

9 Q. Can you identify any industry standard of care that
10 D.R. Horton violated on this project?

11 A. None whatsoever.

12 Q. Is there any additional due diligence that you
13 believe D.R. Horton should have performed, based on all the
14 land development documents that you have reviewed as part of
15 developing your opinion?

16 A. No. I think they followed a normal process and
17 normal procedure that I would have followed that most national
18 builders follow. I think they did it all correctly.

19 Q. In your opinion, is the Shafi's yard, Lot 18,
20 usable?

21 A. Yes. They are using it today.

22 Q. Have you developed an opinion on what might need to
23 be done, if anything, to address the Shafi's concern from a
24 remediation perspective?

25 A. I certainly believe that if there is any glass that

1 is remaining, it should be cleaned up. I have no problem with
2 that. I think it could be easily accomplished by a couple of
3 guys going back there and truly picking up the material.

4 Q. Do you have any idea what that might cost?

5 A. I think somewhere in the \$2,500, \$3,000 range.

6 Q. We talked about the investigation that you
7 performed on Lot 19, the work that was done. Do you know how
8 much that work costs to be done at the Stevens' project?

9 A. My understanding somewhere in the \$12,000 to
10 \$13,000 range to do that work.

11 Q. Have you reviewed any other estimates in this
12 matter as it relates to the Shafi lot?

13 A. I looked at the Dustcom estimate.

14 Q. When did you look at that, sir?

15 A. It has been several weeks ago. I have looked at
16 the Dustcom and discussed it.

17 Q. This is already in evidence as one of the
18 defendant's exhibit.

19 Is that the Dustcom estimate?

20 A. It is, sir.

21 Q. For Lot 18? That is the Shafi lot?

22 Q. Yes. We are also going to pull up it up here on
23 the screen so the jury can see it.

24 What I want to do before I leave you is ask you. I
25 know you said that you believe the work would probably be done

1 for --

2 A. \$2,500.

3 Q. You looked at this estimate and it looks like there
4 are three different options here. If there was any work
5 performed like what was done at Lot 19, the next-door
6 neighbors, did you think that this would be a reasonable
7 solution as well?

8 A. I do. A reasonable approach to clear the backyard
9 and remove some of the material away from the trees and bring
10 in new material.

11 Q. What is the total cost of -- do you believe Option
12 1 or Option 2 or Option 3 would even be necessary?

13 I think if you are going to do something, you would
14 do one. The option one. There is a little bit of irrigation
15 back in the back. The \$16,102 would be a reasonable approach
16 to doing the work

17 Q. Do you think there would be any specialization that
18 would be required to perform that type of work?

19 A. No.

20 Q. Have all of your answers today been provided to a
21 reasonable degree of engineering certainty?

22 A. Yes, sir.

23 MR. NAIL: Thank you for your time.

24 THE COURT: Mr. Nail, is your expert local?

25 MR. NAIL: No, sir.

1 THE COURT: I am going to request -- I know that
2 you have to be pretty exhaustive. I will give you some time,
3 but I can't give you too much. I have to be somewhere. I
4 don't want to keep this jury here very long.

5 MR. TRAYWICK: I don't want to keep the jury here
6 very long either, Your Honor. We just covered a lot ground.
7 This is a very important witness. I don't mean to go on and
8 on, but there is a lot to cover, Your Honor.

9 THE COURT: All right.

10 MR. TRAYWICK: I would probably be more efficient
11 tomorrow morning.

12 THE COURT: Here is what I will let the expert do.
13 Is that your lovely wife?

14 MS. PETERSON: No. That is my lovely mother.

15 THE COURT: I don't want to keep the jury here too
16 long. We have a funky day tomorrow. I will just let you enjoy
17 your night in Beaufort. Enjoy a nice evening out. We will see
18 you back here tomorrow about mid morning. You are still under
19 oath. Ultimately, you just can't talk to the lawyers.

20 THE WITNESS: I understand, sir.

21 The COURT: Ladies and gentlemen of the jury, we
22 have many things that the lawyers need to discuss before we get
23 going here tonight. I will let you all go ahead and go. I
24 need to go ahead and tell you.

25 I need to be out of town. I told you that I

1 thought this case would finish on Thursday. I am going to
2 travel out of town tonight, but I will be back in the morning,
3 but I am going to be late. I should be here by 11:15. I would
4 ask all of you to be here around 11:00.

5 Sleep in. Get some errands run. We will be done
6 tomorrow. Have a good evening.

7 (Jury exits courtroom.)

8 THE COURT: All right.

9 Did you all get the proposed jury charges or
10 verdict form?

11 MS. PETERSON: I haven't hit send yet.

12 MR. NAIL: I need to do that and eliminate the ones
13 that --

14 MR. TRAYWICK: I think if we can have an hour to
15 just take out ones that don't apply now.

16 THE COURT: Aimee will come in the morning and do
17 that.

18 All right. Have a good evening. See everyone at
19 10:00 tomorrow.

20 (At 5:56 p.m. the proceedings were continued until
21 the following day without interruption.)

22 ***

23 END OF VOLUME IV

24

25

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
2018-CP-07-00911
COUNTY OF BEAUFORT

Richard W. and Rebecca
A. Drier; Sarmed and
Jessica M. Shafi, et al.

Plaintiff,

vs.

D.R. Horton, et al.,

Defendants.

TRANSCRIPT OF JURY TRIAL
VOLUME V
PAGES 492 - 656

November 19, 2021
Beaufort, South Carolina

B E F O R E:

The Honorable Bentley Price,
Judge Presiding

R E P O R T E D B Y: Kymberlee M. Williams, RPR

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EXHIBIT LIST

NUMBER	DESCRIPTION	ADMITTED	PAGE
D-62	Storm Water Report	Y	507
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1 witness.

2 MR. NAIL: The defense calls Shara Frazier, Your
3 Honor, she's right outside the courtroom.

4 THE COURT: Okay.

5 * * *

6 SHARA FRAZIER

7 * * *

8 being first duly sworn, testified as follow:

9 THE COURT REPORTER: Could you spell your first
10 name?

11 WITNESS: I'm sorry, S-H-A-R-A.

12 ***

13 DIRECT EXAMINATION

14 BY MR. NAIL:

15 Q. Good morning, Ms. Frazier, it's nice to meet
16 you, I'm Michael Nail.

17 Could you please tell the jury what your -- if
18 you're familiar with the Tidewater Creek Community?

19 A. I do remember conducting inspections at
20 Tidewater Creek.

21 Q. Okay. So what kind of inspections did you
22 conduct?

23 A. Erosion inspections.

24 Q. Okay, and where did you work at the time?

25 A. GHD --

1 Q. Okay.

2 A. Yes.

3 Q. Do you still work at GHD today?

4 A. I do.

5 Q. Okay, and what is your official title?

6 A. Environmental Technician.

7 Q. Okay, and how long have you held that role
8 with GHD?

9 A. Probably ten years.

10 Q. Okay. You mentioned inspections, what work,
11 specifically, do you do as a technician?

12 A. I conduct erosion inspections on active
13 construction sites, and sometimes I sample water and
14 soil.

15 Q. Okay. And in order to perform that role, do
16 you hold any licenses or certifications for that
17 area?

18 A. I do hold a South Carolina certification for
19 erosion control --

20 Q. Okay.

21 A. -- and one for Georgia, as well.

22 Q. Okay, and how long have you held that?

23 A. Probably since 2007.

24 Q. Okay. And so tell me, or tell the jury, I
25 should say, specifically, what your inspections at

1 the Tidewater Creek Community entail.

2 A. Generally, we're given a set of engineering
3 plans for that site, and the engineering plans will
4 spell out what is needed for erosion control, and
5 what the BMPs are, Best Management Practices, should
6 be onsite during construction.

7 So I take those plans and I walk the site, and I
8 let -- on the report I note what's in compliance and
9 what's not.

10 Q. Okay. And how often are you out onsite or
11 how often were you out onsite at Tidewater Creek?

12 A. Once every seven days or once a week.

13 Q. Okay, and for what period of time?

14 A. With Tidewater?

15 Q. Yes, ma'am.

16 A. I do not remember how long that project was.

17 Q. Okay. But as part of your inspections,
18 would you walk the specific properties?

19 A. Yes. Everything that was in the phase that
20 is actually what I walked -- the lots.

21 Q. Okay, is there any lot that you did not walk
22 in that community?

23 A. No.

24 Q. Okay. And what kind of things would you
25 note on an inspection report, if you came across any

1 deficiencies?

2 A. So reports, they have a list of questions,
3 and you answer each of those questions yes or no,
4 and any questions that are no, or that notes that
5 there was a problem, you have to detail what the
6 problem is, and where it is located, and the date
7 that you noted it.

8 Q. Okay. And is one of the things that you're
9 looking for debris or trash of any kind?

10 A. Yes.

11 Q. Okay, and did you ever note that there was
12 any debris found on this property?

13 A. Yes.

14 Q. Okay. Do you remember any specific
15 locations?

16 A. No, I do not.

17 Q. And if you noted on the report that there
18 was debris, what kind of debris do you recall that
19 was?

20 A. Generally, waste produced from construction;
21 so from cutting wood, scraps of wood, whatever
22 wrappers, lunch trays from the workers working
23 onsite, things like that.

24 Q. Okay. Outside of the items that you just
25 mentioned, did you ever note the presence of any

1 other type of debris?

2 A. I don't recall noting anything outside of
3 construction in my notes either.

4 Q. Okay, and how many -- I'm assuming you have
5 performed inspections like this in other
6 communities, as well?

7 A. I have.

8 Q. About how many have you performed in total;
9 do you think?

10 A. I don't know, but I have consistently worked
11 60-plus hours a week for the past ten years, so
12 that's about -- and I only do erosion control
13 inspections, but I can't give you a number, I just
14 know it's a lot of sites.

15 Q. Okay. Out of all those sites, has there
16 ever been a point in time when you haven't noted
17 some type of debris on a site?

18 A. No.

19 Q. Okay, so it's pretty common?

20 A. Yes.

21 Q. Okay. And -- okay, is there anything,
22 specifically, that you remember about Tidewater
23 Creek that was unique or unusual in any way?

24 A. No.

25 Q. Okay. So how would you generally describe

1 it?

2 A. A general construction site.

3 Q. Okay, okay. And I'd like to present you
4 with a document here.

5 THE COURT: This is --

6 (Court Reporter marks Defendant's Exhibit Number
7 62, Storm Water Report, as attached hereto.)

8 BY MR. NAIL:

9 Q. I'd like to present you with a document now
10 that's been marked as Defendant's Number --

11 THE COURT REPORTER: 62.

12 BY MR. NAIL:

13 Q. -- 62. Have you seen this document, Ms.
14 Frazier?

15 A. Yes.

16 Q. Okay, what is it?

17 A. It is the storm water report, dated November
18 4, 2016, that I created.

19 Q. Okay. And is that a true and accurate copy
20 of the report that you completed on November 4th of
21 2016?

22 A. Yes.

23 Q. Okay, and is that your final inspection
24 report on this property?

25 A. I don't know if this is my last report. I

1 don't remember what date my last report was.

2 Q. Okay, and what was your conclusion at the
3 end of that report? Are there any outstanding
4 items?

5 A. There are no action items for us to address.

6 Q. Okay.

7 MR. NAIL: At this time, I'd like to move
8 Defendant's Exhibit 62 into evidence.

9 THE COURT: All right, any objection?

10 MS. WILLIAMS: No objection, Your Honor.

11 THE COURT: All right, without objection.

12 MR. NAIL: And I have no further questions,
13 Your Honor, thank you.

14 THE COURT: All right.

15 ***

16 CROSS-EXAMINATION

17 BY MS. WILLIAMS:

18 Q. Ms. Frazier, I'll be incredibly brief. What
19 was your primary responsibility, in terms of doing
20 site inspections? Did that involve mostly checking
21 on erosion control measures, such as silt fencing?

22 A. Yes. Everything that is the questions on
23 the report --

24 Q. Oh --

25 A. -- that's what we list.

1 rest of your day. All right, call your next
2 witness.

3 MS. PETERSON: D.R. Horton calls Jared Osako.

4 THE COURT: All right.

5 * * *

6 JARED OSAKO

7 * * *

8 DIRECT EXAMINATION

9 BY MS. PETERSON:

10 Q. Good morning, Jared.

11 A. Good morning.

12 Q. Could you please tell the jury how you were
13 involved in the Tidewater Creek neighborhood?

14 A. I was the land development project manager.

15 Q. Okay, was that for D.R. Horton?

16 A. Correct.

17 Q. And what is your current job title with D.R.
18 Horton?

19 A. I'm a Land Development Manager.

20 Q. All right, and about how long have you lived
21 in the Beaufort area?

22 A. Pretty much all my life.

23 Q. Okay, do you have any kids?

24 A. Two children.

25 Q. All right. And I understand that D.R.

1 Horton purchased the site that would become
2 Tidewater from Crossroads; would you agree with me?

3 A. Correct.

4 Q. Okay. And if I wanted to develop a
5 neighborhood, build homes, what do I do? What's the
6 first steps?

7 A. The first step is find a piece of property
8 that is properly zoned. Properties are zoned by the
9 County, so step one is find a property that could be
10 built as a residential neighborhood, and then you
11 have to perform due diligence, including
12 engineering, soil analysis, Phase I environmental
13 analysis, title research, and --

14 Q. Okay, lots of steps. And if you don't mind
15 speaking up, I'm having a --

16 A. Okay.

17 Q. And I have a burst eardrum, so I'm kind of
18 deaf. But did you or Horton perform those items at
19 the Tidewater Creek neighborhood?

20 A. We performed the majority of those on our
21 own, but the Tidewater Creek neighborhood was unique
22 because that neighborhood we purchased from Duncan.
23 It was already fully engineered, it was already
24 approved by the County, approved by the State, and
25 other agents including water, sewer, and stormwater.

1 Q. Okay, and when you say approved by the
2 County, does that mean that the County had already
3 approved that development for residential homes?

4 A. That's correct, or there are already working
5 engineers probably, I would guess, typically, maybe
6 nine months to a year.

7 Q. Okay, and you mentioned that you've got to
8 pick out a site prior to purchasing it. Did you go
9 out to Tidewater before you purchased it --

10 A. Yes.

11 Q. -- before you owned it?

12 A. Yes.

13 Q. And did you walk the entire site?

14 A. I walked everything that was reasonable.
15 Some areas are heavily wooded, not passable for a
16 person in my type of clothes, you know.

17 Q. All right. Well, did D.R. Horton have
18 anybody walk the site before they purchased it?

19 A. Yeah, we have many professionals, there were
20 civil engineers, surveyors. We hired CBNI to do a
21 Phase I environmental analysis, where they did walk-
22 thru of the entire site looking for debris and other
23 things like that on the site.

24 Q. All right, and we'll get to that in a
25 minute. I'm curious, did you notice any unusual

1 household garbage on the actual site?

2 A. I didn't notice anything unusual on this
3 construction site.

4 Q. Okay. Was there anything unique about this
5 neighborhood?

6 A. We had two things that were unique. One
7 being that we were able to purchase a property that
8 was already fully permitted.

9 It's not that usual, for you to be able to
10 get a piece of property that someone's already hired
11 a whole team to do all the soil analysis,
12 engineering, surveying, design, permitting, get --
13 walking it through say Beaufort County, the State
14 and all the different agencies. This site was
15 already fully permitted and approved --

16 Q. Okay.

17 A. -- for construction.

18 Q. And what was your impression of the site?

19 A. It was very pretty. I liked the site.

20 Q. Okay. Was there anything else that was
21 unique about this development?

22 A. In Beaufort County one of the things is
23 Beaufort County is very strict with their tree
24 ordinance, and I know everybody went to the site.
25 We saved a lot of trees out there. They were very

Jared Osaka (Direct)

Examination by Kirsten M. Peterson, Attorney for Appellant D.R. Horton

1 Q. Okay, and was that a lot of neighborhoods
2 for D.R. Horton?

3 A. No.

4 Q. Okay. Why was it so few?

5 A. At that time the economy was just starting
6 to come back.

7 Q. Okay. How many is D.R. Horton developing
8 today in the Beaufort area?

9 A. We probably are working on ten to 15 under
10 development.

11 Q. Okay. And back during -- while Tidewater
12 was being developed, did you feel overworked?

13 A. No.

14 Q. Okay. Did you feel like D.R. Horton was
15 understaffed?

16 A. No.

17 MS. PETERSON: May I approach the witness?

18 THE COURT: Absolutely.

19 BY MS. PETERSON:

20 Q. Oh, you have the exhibit binder. Can you
21 open it up to the Crossroad's contract?

22 A. These are all tabbed. Should I go to one of
23 the tabs?

24 Q. You know what? We'll just talk about that.
25 I mean, it's already been admitted into evidence.

1 A. All right.

2 Q. Did the contract -- did D.R. Horton enter
3 into a contract with Duncan O'Quinn and Crossroads
4 prior to purchasing this property?

5 A. Yes.

6 Q. Okay. Was there an inspection period in
7 that contract?

8 A. Absolutely.

9 Q. Okay, and what is an inspection period?

10 A. The inspection period is the time that the
11 purchaser, who is given to do an analysis of the
12 property, whether it's onsite, and all those
13 studies.

14 Q. All right. Did D.R. Horton undertake any
15 action during this inspection period?

16 A. Absolutely. We have a very elaborate
17 inspection process. It's a checklist -- our
18 checklist, what we're responsible for doing is 110
19 items.

20 Q. Okay. And so would D.R. Horton have a right
21 to enter the property, to inspect it, and to examine
22 it, and to do any sort of testing it wanted during
23 that inspection period?

24 A. Yeah.

25 Q. Okay, and you're telling me they did do

1 things, correct?

2 A. Absolutely.

3 Q. Okay. If you will turn to tab number seven
4 in the black binder.

5 A. Uh-huh.

6 Q. This is the land purchase checklist that has
7 already been admitted into evidence by the
8 Plaintiffs. And just let me know when you get
9 there.

10 A. Okay, I'm here.

11 Q. Okay, and what is this?

12 A. This is the land purchase checklist.
13 There's a ton of questions about things that are
14 pertaining to the property.

15 Q. Okay, and how many line items are on the
16 checklist?

17 A. I believe they're somewhere in the area of
18 100, 110.

19 Q. Okay. Was soil testing on this checklist?

20 A. It is.

21 Q. Okay, and was it marked as complete and
22 clean?

23 A. It was.

24 Q. Okay. Were aerial photographs of the
25 property reviewed as part of this checklist?

1 A. Yes.

2 Q. Was a Phase I environmental site assessment
3 performed as part of D.R. Horton's due diligence?

4 A. Yes.

5 Q. Okay. Was a Phase II environmental site
6 assessment recommended or required?

7 A. Phase II was not required on this site.

8 Q. Okay. Was the vicinity actually screened
9 for offensive land uses nearby?

10 A. Yes.

11 Q. Okay. And did D.R. Horton perform this
12 checklist of 110 items prior to going through with
13 the closing of Tidewater Creek neighborhood?

14 A. Absolutely.

15 Q. Okay. If you want to dive a little deeper
16 into not all 110 items on the checklist, but just a
17 few of some of them. And I think you can start with
18 the Phase I environmental site assessment, and this
19 is in your notebook as -- well, we'll see what you
20 remember without looking at it.

21 Do you know who performed the Phase I
22 environment site assessment?

23 A. CBNI, I believe.

24 Q. Okay. And would a Phase I environmental
25 site assessment of the property identify household

1 debris present?

2 A. Yes.

3 Q. Okay. And did the environmental site
4 assessment note any household debris?

5 A. It did.

6 Q. Okay, do you remember what lot that was?

7 A. I believe it was lot -- it was on the other
8 side of the neighborhood from the Shafi's, it was
9 Lot 28, I believe.

10 Q. Okay. If you had to put a mileage estimate
11 on it, about how far from the Shafi's lot is Lot 28?

12 A. A quarter-mile.

13 Q. Okay. Is that lot at issue today?

14 A. No.

15 Q. Okay. Do you know whether the inspectors
16 identified household garbage on the Shafi lot?

17 A. They did not.

18 Q. Okay. Did D.R. Horton have that household
19 garbage on Lot 28 removed?

20 A. We did.

21 Q. Okay. How did they do that?

22 A. We hired Labor Construction as our general
23 contractor, and it was in their scope of work, the
24 specific job specifications.

25 Q. Okay. And this might sound like a silly

1 question, but why did you have it removed?

2 A. Because we were made aware of it, and it's
3 not standard for D.R. Horton to leave anything that
4 shouldn't be there.

5 Q. And also that you know about?

6 A. That's right. We were made aware of it, so
7 we addressed the issue.

8 Q. Okay. How long have you been in the land
9 development business?

10 A. 25 years.

11 Q. Okay. So based on your knowledge and
12 experience in land development for the past 25
13 years, is it standard for an owner of a property to
14 rely on the Phase I environmental site assessment to
15 identify issues of waste or household garbage
16 present on the property?

17 A. It is.

18 Q. Okay. And, again, did the Phase I find any
19 household garbage on the Shafi lot?

20 A. Not on the Shafi lot.

21 Q. Okay. Did it identify any glass on the
22 Shafi lot?

23 A. It did not.

24 Q. Okay. And did D.R. Horton actually rely on
25 the Phase I environmental site assessment, in

1 determining whether to go through with developing a
2 home on the Shafi's lot?

3 A. Absolutely.

4 Q. Okay. I understand that there was some soil
5 testing done on the Tidewater Creek neighborhood.

6 Can you tell me what that process would entail?

7 A. Yeah. The soils testing done would be prior
8 to the engineering, or the master plan being done.
9 It's a series of -- they can either do test kits or
10 do -- they can take samples of different methods,
11 but, basically, they set up a grid.

12 They start at the rear of the property, go left
13 to right, that basically covers the entire property
14 in general areas, so that the engineers would have
15 an idea of the soil conditions on the site, and that
16 would allow them to decide, if they need to -- maybe
17 some areas are better for a pond, maybe some areas
18 are better for a dog park, homes, roads. Just, you
19 know, it depends on the results of the analysis, and
20 that the engineer bases his design on the results of
21 that analysis.

22 Q. Okay. Are you saying that soil testing is
23 performed not just on the building pads?

24 A. That's correct. You wouldn't know where the
25 building pads were at this time.

1 Q. Okay. And when you say this time, what are
2 you referring to?

3 A. Well, the site plan is not even drawn out,
4 so they, literally, the boundaries of the property,
5 they probably go -- I don't know exactly, but say
6 ever 150 feet or something, and do -- and just,
7 literally, check off like a grid.

8 Typically, that's what's done, so that they'll
9 have an idea of what's onsite.

10 Q. Okay. At any time, would some of this soil
11 go to a lab for testing?

12 A. Absolutely.

13 Q. Okay. Was this soil found suitable for
14 residential development?

15 A. Absolutely.

16 Q. Okay. Is there a governmental agency that
17 gives the stamp of approval for residential
18 developments to actually begin work?

19 A. Both Beaufort County and the State.

20 Q. Okay. Does that County agency and the State
21 continue their involvement throughout the site
22 development, or do they just say -- they check it
23 off, and kind of leave you alone?

24 A. No, they continue throughout the entire
25 process.

1 Q. Okay. What do you know about their
2 involvement in Tidewater?

3 A. Well, first off, I guess, they approved the
4 property for residential development. It has its
5 own as such. They visited the site many times and
6 worked with the engineers, which are engineers
7 Duncan O'Quinn, Anderson Burgess, I believe, but --
8 and other engineers. It takes more than a few guys
9 to get a neighborhood approved, but they work with
10 the different groups to approve that.

11 Q. Okay, so someone from the County or the
12 State was out onsite during site development; is
13 that correct?

14 A. Yes.

15 Q. Okay. Was this land, ultimately, approved
16 through zoning to be a residential development by
17 the County?

18 A. Yes.

19 Q. Okay. In your 25 years or so in site
20 development, would you, or would you not expect that
21 land that had been a prior junkyard, or opened
22 dumping ground could be approved for zoning as a
23 residential development?

24 A. No, I would not. That would not happen, no.

25 Q. Okay. Did D.R. Horton rely on the County's

1 inspection and the permitting process, in
2 determining whether it could begin development on
3 this site, and continue development on this site?

4 A. Absolutely.

5 Q. Okay. We talked a little bit about Mr.
6 O'Quinn. Do you remember him pointing out any
7 debris to you on the Tidewater site?

8 A. There was debris on the site that would not
9 require Mr. O'Quinn to point out. He's -- there
10 were pictures up here of pilings and things of that
11 nature.

12 Q. Oh, so are you talking about the dock
13 piling?

14 A. The dock pilings, yeah, he viewed the dock
15 pilings.

16 Q. Okay. Did Mr. O'Quinn make any written
17 warranties to D.R. Horton, regarding the presence of
18 debris?

19 A. In the contract he stated that there was
20 some debris.

21 Q. Okay. And did D.R. Horton rely on Mr.
22 O'Quinn's representation, that no landfill type
23 debris was deposited on the property in the
24 contract?

25 A. Absolutely.

Jared Osaka (Direct)

Examination by Kirsten M. Peterson, Attorney for Appellant D.R. Horton

1 THE COURT: Without objection.
2 (Court Reporter marks Defendant's Exhibit Number
3 63, as attached hereto.)
4 BY MS. PETERSON:
5 Q. Okay.
6 THE COURT REPORTER: Wait, I need --
7 MS. PETERSON: I'm sorry.
8 THE COURT REPORTER: I need to mark it.
9 THE CLERK: She needs to put a stamp on it.
10 MS. PETERSON: Oh.
11 BY MS. PETERSON:
12 Q. Who was the general contractor for the land
13 development phase of Tidewater?
14 A. Lather Construction.
15 Q. Okay. How do you know this?
16 A. Because they had to have a general
17 contractor's license, in order to do the project.
18 Q. Okay. Does D.R. Horton, itself, have the
19 proper permits to self-perform any work during site
20 development?
21 A. We do not.
22 Q. Okay. If you will turn back, again, to
23 DRH00468, if you look at the line that says,
24 "License number," do you know whose general
25 contractor number that is on this contract?

1 A. Lather Construction.

2 Q. Okay. And can you tell the jury what it
3 means to be the general contractor?

4 A. A general contractor is responsible for
5 constructing the set of plans, building the
6 neighborhood, a proper set of plans from a project
7 specification book, and following whatever rules,
8 regulations, laws, as well as all the plans and
9 specifications.

10 Q. Okay, and that would be the big contract
11 document that has the specifications?

12 A. Correct.

13 Q. Okay. Were you involved with the bidding
14 process to actually select Lather as the general
15 contractor?

16 A. I was.

17 Q. Okay. Why did you choose Lather?

18 A. Lather Construction is basically a local
19 contractor, that's in the same area as the site.
20 The owner himself lives down the street, the main
21 manager lives down the street, their family lives
22 there. They --

23 Q. Were they familiar with the job site?

24 A. Yeah, they were very familiar with the job
25 site.

1 Q. Okay.

2 A. They had a schedule that was -- matched our
3 timeline. They had a price that matched, you know,
4 what we were looking to pay, and they had the
5 ability to get the equipment, and they had the guys
6 with the knowledge and the ability to do the work.

7 Q. Okay. Did D.R. Horton, and I guess,
8 specifically, it would have been you, rely on
9 Lather's representations that they understood the
10 plans and the scheduled work, and the
11 responsibilities for the project, when you selected
12 them as general contractor?

13 A. Yes. Myself and Carolina Engineering were
14 involved in selecting contractors, but, yes.

15 Q. Okay. Would that be Jeff Ackerman?

16 A. Correct, Jeff Ackerman.

17 Q. Okay. Was Jeff involved with also selecting
18 Lather as the general contractor?

19 A. He helped me in this process, yes.

20 Q. Okay. Was your decision to choose Lather
21 impacted by their bid amount?

22 A. Absolutely.

23 Q. Okay. Were they the lowest bidder?

24 A. I don't recall.

25 Q. Okay. Is it D.R. Horton's policy to always

1 go with the lowest bidder?

2 A. No.

3 Q. Why not?

4 A. The schedule is equally as important, and so
5 we rely on both the schedule, the dollar amount, and
6 the ability of the contractor. We take into account
7 and we'll ask local engineers, we'll ask local
8 municipalities, the inspectors for the city, or
9 Beaufort, Jasper, or the testing companies. You
10 know, we rely on basically all of our team of
11 professionals that we trust. We'll get their
12 opinions on these contractors as well.

13 Q. Okay, so you got multiple opinions.

14 A. True.

15 Q. Okay. Would a contractor like Lather be
16 permitted to raise his prices, and still be
17 considered by D.R. Horton to perform the work?

18 A. Yes.

19 Q. Has that ever happened?

20 A. Yes.

21 Q. Okay. Did -- we've already mentioned that
22 the contract between D.R. Horton and Lather. As
23 general contractor, did Lather control the means and
24 methods of its work, or did D.R. Horton?

25 A. Now, per the contract, Lather controls all

1 the means, methods, supervisor of all the people.

2 Q. Okay, so I'll stop you right there. As a
3 general contractor, was Lather responsible for
4 supervising their employees and their work?

5 A. They are.

6 Q. Okay.

7 MS. PETERSON: And, Michael, if you don't mind
8 putting CarolinaEngineering0116 on the screen, so
9 the jury can see it.

10 BY MS. PETERSON:

11 Q. And while he's working on that, do you know
12 whether Lather hired any of its own subcontractors?

13 A. They did.

14 Q. Okay. And was D.R. Horton expected to
15 supervise Lather's subcontractors?

16 A. They're not.

17 Q. Okay. Did you, personally, or anyone at
18 D.R. Horton supervise Lather?

19 A. We did not, we're the owner.

20 Q. Okay. In your 25 years of experience in
21 site development, is that common for the general
22 contractor to be responsible for supervising its
23 employees?

24 A. Yes, and it's actually stated in the
25 contract, that the contractor's responsible for

1 their own employees, and that the owner has no right
2 to direct them.

3 Q. And would you say that last part again?

4 A. I said the owner has no right to direct
5 them.

6 Q. Okay.

7 A. They're not allowed.

8 Q. Well, did you ever go out onsite during site
9 development?

10 A. Absolutely.

11 Q. Okay. About how often?

12 A. Every week or two, or more often, if there's
13 certain tests going on, or in this case, the trees.
14 Sometimes we spent every day of the week out there,
15 sometimes dealing with these trees.

16 Q. Okay. And can you see what Section 6.01 of
17 that contract says?

18 A. Yes.

19 Q. Okay. And when it says contractor, who does
20 that refer to?

21 A. Lather Construction.

22 Q. Okay.

23 MS. PETERSON: Michael, could you put up
24 Carolina Engineering0117?

25 BY MS. PETERSON:

1 Q. Did Later assume responsibility for the
2 services, the equipment and labor for their work?

3 A. They did.

4 Q. Okay, was that also in the contract?

5 A. It is.

6 Q. Okay. What was Lather's obligation to do,
7 if they came across debris during site development?

8 A. They were obligated to inform the engineer
9 and myself, the owner.

10 Q. Okay. Was that pursuant to the contract?

11 A. Correct.

12 Q. Did they ever inform you of debris?

13 A. They did not.

14 Q. Okay. Did they inform you of debris that
15 was not on the Tidewater Creek property line?

16 A. We did -- they did.

17 Q. Okay.

18 MS. PETERSON: Michael, could you go to
19 CarolinaEngineering120? And, actually, Michael, you
20 can leave it right here, this is perfect.

21 BY MS. PETERSON:

22 Q. Can you read Section B to me?

23 A. "Removal of debris during performance of the
24 work. During the progress of the work, contractor
25 shall keep the site and other areas free from

1 accumulation of waste materials, rubbish and other
2 debris. Removal and disposal of such waste
3 materials, rubbish and other debris shall conform to
4 applicable laws and regulations."

5 Q. Okay, and would you just read the first
6 sentence of Section C to me, cleaning?

7 A. "Cleaning. Prior to the substantial
8 completion of the work, contractor shall clean the
9 site, and make it ready for utilization by the
10 owner."

11 Q. Okay.

12 MS. PETERSON: Michael, can you go to
13 CarolinaEngineering176, please?

14 BY MS. PETERSON:

15 Q. Okay, if you look at Section 1.2A2, payment,
16 will you read that to me?

17 A. "This is a unit price measurement payment,
18 site clearing, basis of payment, includes clearing
19 the site, loading and removing waste materials from
20 a site."

21 Q. Okay, so did the basis of D.R. Horton's
22 payment to Lather include clearing the site, and
23 removing waste from the site that it came across?

24 A. It did.

25 Q. Okay. And, again, was Lather obligated to

1 report any abnormal site conditions to D.R. Horton?

2 A. They were.

3 Q. And did they ever inform you, or anybody at
4 D.R. Horton, of abnormal site conditions?

5 A. They did not.

6 Q. What would happen if they had informed you
7 of abnormal site conditions?

8 A. Depending on the information, but,
9 typically, we would stop the project, then -- I had
10 this happen on another site recently, where the
11 engineers worked with the Phase I site analysis
12 team, and they came up with a plan to remediate the
13 area.

14 Q. Okay, but did you have to do that here?

15 A. We did not.

16 Q. Okay. There's been some discussion in this
17 trial about the type of equipment Lather used, or
18 whether they did use -- ever used their hands. Do
19 you know whether Lather only used equipment, or they
20 were they also responsible for using their hands?

21 A. They're also responsible for using their
22 hands.

23 Q. Okay. What kind of work would require that
24 they use their hands?

25 A. Pretty much all of the work that they do, if

1 they have a guy on a machine, they'll typically have
2 a support group working to move things around. If
3 one guy is on the excavator, he's not going to be
4 able to handle all the chains and different things,
5 installing, separate, drain behind the curve.

6 There's -- I don't think you could run a
7 construction site without using your hands.

8 Q. Okay. If they came across something, a
9 piece of debris on the ground that they would need
10 to use their hands to remove, would D.R. Horton
11 expect that they would use their hands and remove
12 it?

13 A. Absolutely.

14 Q. Okay. How many people would you say were
15 out onsite during land development?

16 A. Daily?

17 Q. Daily.

18 A. Probably ten to 20.

19 Q. Okay. And none of those people ever
20 reported to you, or to Jeff Ackerman, the presence
21 of debris on Tidewater, correct?

22 A. We never -- it was never reported onsite.

23 Q. Okay. Would you -- to your knowledge, did
24 anyone at D.R. Horton direct a contractor to bury
25 trash?

1 A. No.

2 Q. Okay. Did you direct anybody to bury trash?

3 A. No.

4 Q. Okay. Did you ever see fill dirt being
5 poured over trash?

6 A. No.

7 Q. Okay. Are you aware of any contractor who
8 did that?

9 A. No.

10 Q. Okay. Is it legal to bury trash?

11 A. I think it -- well, I can say this, I don't
12 know as far as legal, or illegal, but I know that
13 it's just not standard in the industry, and it's not
14 accepted by D.R. Horton.

15 Q. Okay. Did you want to testify that it was
16 illegal to bury trash?

17 A. I did, but I've since learned that there are
18 instances, in the State of South Carolina, where you
19 can legally bury stuff, but that's very specific,
20 and it's not something that we're allowed to do.

21 Q. Something that D.R. Horton does not do?

22 A. No, we do not.

23 Q. Okay. Mr. Osako, do you think it's
24 acceptable for a homeowner of a D.R. Horton house to
25 find glass in their backyard?

Dusty Williams (Direct)

Examination by Kirsten M. Peterson, Attorney for Appellant D.R. Horton

1 property correctly is a site visit that we had there
2 a few weeks ago, when the -- all the parties were
3 gathered in the investigation. That's the only time
4 I have been on their property.

5 Q. Okay, and who had hired you to go out to the
6 site?

7 A. I had been contacted by Hutton's counsel,
8 initially, to come be a part of the deposition, and
9 then to come to the site visit.

10 Q. Okay, is that Hutton's Landscaping?

11 A. Yes, Megan White, I believe it is.

12 Q. Okay. Do you have any business relationship
13 with D.R. Horton?

14 A. Yes, I do.

15 Q. Okay. Can you tell me about when those
16 first started?

17 A. I believe it was 2013, maybe 2012, I started
18 doing site work for D.R. Horton. My first project
19 was in Georgia.

20 Q. Okay. Do you find D.R. Horton easy to work
21 with?

22 A. They have a set of standards that I have to
23 conform to. There's not a lot of contractors who
24 will perform to their standards, but as far as being
25 fair, and -- yes, I do, or I wouldn't continue the

1 long-term relationship.

2 Q. Okay. Does your business continue to make a
3 profit working for D.R. Horton?

4 A. Yes.

5 Q. Okay. Do you ever feel forced or coerced
6 into contracts with D.R. Horton?

7 A. No. No.

8 Q. Okay. You mentioned that you actually were
9 onsite a few weeks ago, and I actually want to go
10 through some photos from that day. And while I'm
11 pulling these up, what did you observe when you were
12 onsite?

13 A. The day we walked the Shafi residence?

14 Q. Yes, and I believe that was October 29th.

15 A. Yeah, it was the day before the Georgia,
16 Florida game, yeah.

17 Q. Okay, and what had you observed?

18 A. We walked around. I think there was a
19 general -- a contractor there doing GPR, Ground
20 Penetrating Radar, was looking for buried debris we
21 all assumed.

22 I think a soil scientist was there, and there
23 were a few fragments that were found on the surface;
24 but there were two locations the GPR, I believe,
25 indicated something, and we dug it up and it wound

Closing Argument

Benjamin A.C. Traywick, Attorney for Respondent Plaintiffs

1 but we have more fill at 18. And the big concern
2 that we have, that these people have, and why we're
3 sitting here, well, why they are sitting here is,
4 that we don't know what's under there.

5 We just don't know. There's plenty of evidence
6 that, you know, this was collected five years after
7 they moved in, after they spent five years picking
8 this stuff up. So they want to know what's down
9 there, and they want to get it done once and for
10 all. They want to have this done with, and they
11 want to have, you know, the confidence and the
12 assurance that everybody else has. Now, on that
13 point, I believe that what Mr. Nail is going to say
14 is, that we're speculating about how far down do you
15 have to go? Ally, will you pull up the Coastal
16 pictures?

17 How far down you have to go? And this is just
18 to remind you that it's not like there's no evidence
19 that it's down in the ground. If we go back, Mr.
20 Shafi testified that that's -- they went two feet
21 down, or I think even more, and they're pulling out
22 all of that.

23 So there's evidence that it's under the ground.
24 They're worried that it's under the ground. It's
25 still coming out of the ground five years later, six

1 years later. Mr. Moore told us on the stand that,
 2 hey, you know, glass doesn't come up out of the
 3 ground, you know, it doesn't work that way. And
 4 then when I asked him, see, that's when he said in
 5 talking to Mr. Nail.

6 When I asked him on the stand, "Well, where did
 7 this come from, and where did this come from five
 8 years later?" Of course, he had no response, no
 9 respond. So the answer -- the question is this, we
 10 don't know how much stuff is down there. We don't
 11 know exactly what it is.

12 The circumstantial evidence is strong, because
 13 of the fill, and because of what Mr. Higgs said, but
 14 this stuff is all over the place, that it's down
 15 there. And here's the question, they're going to
 16 tell you there's almost nothing. We're concerned
 17 that there's a lot. There's evidence that it's
 18 several feet down, and it's all got to be removed.
 19 My question to you all is this, who should bear the
 20 risk that it's feet down there, you know?

21 Whose responsibility is this to take care of?
 22 Is it these people, or is it D.R. Horton? You know,
 23 these people have one house, D.R. Horton builds and
 24 sells 80,000 a year, 80,000 houses a year is what
 25 Mr. Bunner told us, 80,000 houses. Who should be

1 THE BAILIFF: The jury's cleared, Your Honor.

2 THE COURT: All right.

3 ***

4 **READING OF THE VERDICT**

5 THE COURT: We have a verdict. Bring them out.

6 (Jury enters courtroom.)

7 THE COURT: Madam forelady, you have a verdict?

8 THE FOREPERSON: Yes, Your Honor.

9 THE COURT: Hand it to the bailiff, please.

10 (Foreperson complies. Bailiff hands verdict
11 form to the court.)

12 THE COURT: All right.

13 Sarmed and Jessica Shafi against D.R. Horton,
14 Case Number 2018-CP-0911.

15 Do you find by a preponderance of the evidence
16 that the defendant, D.R. Horton was negligent in the
17 construction and supervision of plaintiff Shafi's
18 property?

19 You answered "yes."

20 Do you find that the Defendant's negligence was
21 a foreseeable and actual cause of damages to the
22 Plaintiff, Shafi?

23 "Yes."

24 Breach of contract. Do you find by the
25 preponderance of the evidence that the defendant

1 breached its contract with the plaintiffs Shafi?

2 "Yes."

3 Do you find that plaintiff Shafi is entitled to
4 actual damages for harming the property as a result
5 of defendant's breach of contract?

6 "Yes."

7 Do you find by clear and convincing evidence
8 that the defendants committed an unfair or deceptive
9 trade practice in violation of South Carolina Unfair
10 Trade Practices Act as to Plaintiff
11 Shafi?

12 "No."

13 Do you find that plaintiff Shafi is entitled to
14 actual damages for harm to their property as a
15 result of the defendants unfair or deceptive trade
16 practices?

17 "No."

18 The amount of actual damages, if any, to be
19 awarded to the Plaintiff Shafi for harm to their
20 property as a result of the defendant's violation of
21 any of the causes of action.

22 "\$140,000."

23 You are finished. Signed by the foreperson.

24 Is that your signature?

25 THE FOREPERSON: Correct.

1 THE COURT: Is this your verdict and was it
2 unanimous?

3 THE FOREPERSON: It was unanimous.

4 THE COURT: Thank you so very much. We have
5 hung in there until 6:30.

6 Do we have anything else that we need to
7 consider?

8 MR. TRAYWICK: Probably, yes.

9 THE COURT: All right. Can you give us five
10 minutes? I just need to speak to the attorneys for
11 a quick second, and I will bring you right back out.

12 (Jury exits courtroom.)

13 THE BAILIFF: The jury is clear, Your Honor.

14 MR. TRAYWICK: Your Honor, since the jury has
15 found that D.R. Horton is negligent and awarded
16 damages, I think we have an opportunity now to ask
17 them to enter the damages.

18 THE COURT: What's your position?

19 MR. TRAYWICK: Your Honor, we'd like to renew
20 the motion for setoff at this time, based on the
21 settlements received. Under Statute 15-38-15 and
22 15-38-50.

23 THE COURT: Okay.

24 Also, Your Honor, under the jury form -- that
25 the jury already determined that there wasn't clear

1 specifically, are Ellis v. Oliver, which is
2 335SC106, as well as Smith v. Wagner, 397SC468. So
3 that would be the position of D.R. Horton, Your
4 Honor, as it relates to setoff.

5 Of course, we don't know with any finality what
6 the verdict is, but that was -- would be our
7 position that a setoff be applied to any verdict
8 there.

9 THE COURT: All right.

10 MR. TRAYWICK: Your Honor, it's 15-38-15.

11 MR. NAIL: 15 and 50.

12 MR. TRAYWICK: So, Your Honor, under 15-38-50,
13 it specifically applies when there is a verdict for
14 damages against two or more defendants, which,
15 clearly, there's not in this case.

16 THE BAILIFF: Bring them in?

17 THE COURT: Yeah, bring them in.

18 (Jury enters courtroom.)

19 THE BAILIFF: The jury's entered the courtroom,
20 Your Honor.

21 ***

22 **READING OF THE PUNITIVE DAMAGES VERDICT**

23 THE COURT: All right, can you hand it up?
24 Thank you very much. All right, as to gross
25 negligence, there's no further award.

1 All right, ladies and gentlemen of the jury,
2 that concludes all of your jury service. This was a
3 very, very long week. I know that you've been away
4 from your family.

5 Today's my daughter's ninth birthday, so they're
6 waiting on me to get home to do the cake, so imagine
7 how many texts I've gotten today.

8 So I know it's been a rough week for you-all,
9 and I want you to get back to your families, and
10 enjoy the rest of your weekend, all right?

11 Thank you again for your service.

12 (Jury exits courtroom.)

13 THE COURT: All right, ladies and gentlemen,
14 appreciate it, thank you. Ten days from today's
15 date brief all that for me, all right?

16 MR. TRAYWICK: Thank you, Your Honor.

17 THE COURT: All right.

18 MR. NAIL: Thanks for everything, good working
19 with everybody here.

20 Thank you-all.

21 THE COURT: All right, you-all drive safely.

22 I have a birthday party waiting on me.

23 MS. PETERSON: Thank you so much, Judge.

24 THE COURT: You're more than welcome.

25 MS. WILLIAMS: Thanks, everyone.

D.R. HORTON
America's Builder

SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR: EAST COAST CONSTRUCTION CLEAN UP CORP.
 Sole Proprietorship ☐ Partnership ☒ Corporation ☐ LLC ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 57 112 0254
 Name of Owner(s)/Officer(s): SEBASTIAN NUNGARAY - OLGA C. AQUINO
 Division Name: CAROLINA Area Name: MYRTLE BEACH Assigned Vendor No.: 52-0522
 Address for All Notices: P.O. Box 46
 City: HARDEEVILLE State: SC Zip Code: 29927
 Telephone: 843 384-1310 Fax: 843 384-2936 E-Mail Address: Celina33@hargray.com
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 30th day of November, 2012, between
D.R. HORTON, INC. ("Owner") and Contractor.

1. SCOPE OF WORK This Agreement is entered on a lump sum basis. The terms of the Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement (the "Work") shall include all work performed and materials supplied by Contractor to Owner including but not limited to the labor, services and/or materials, equipment, transportation, or facilities necessary to complete the construction-related activities generally described in Exhibit A. The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing will not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee to this Agreement. Contractor will be awarded Work on a lot by lot basis. To the extent Exhibit A contains more than one type of construction-related activity, Contractor must clarify with Owner before the Work commences as to which construction-related activity it has been awarded for the lot in question.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, method and performance of the Work. Contractor shall not be considered an agent or employee of Owner for any purpose, nor shall any employee or permitted subcontractors of Contractor. Contractor shall not represent itself as the agent of Owner unless owner has specifically permitted Contractor to do so in writing. The results achieved shall satisfy the requirements of this Agreement. Contractor shall be responsible for the performance of its employees and permitted subcontractors, and all personnel used by Contractor in the performance of Work shall be qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further agrees to provide written notification to all of its present and future employees of Contractor's provision for Worker's Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work herein covered or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall pay and shall be solely responsible for all tax withholding, Social Security, state unemployment and all other withholding as required by law Contractor's employees, agents or permitted subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increase. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNLESS CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule, the expected Pricing Schedule shall remain in effect for Purchase Orders issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoicing. Contractor shall invoice Owner no later than the earlier of (i) sixty (60) days after completion of the Work or (ii) thirty (30) days from the date of closing of the house (excluding the Work from Owner to a purchaser. Contractor hereby agrees that timely invoicing is an important and material term to this agreement, and timely invoicing is a part of Contractor's performance of all material terms of this contract. Contractor hereby waives payment for any Work where Contractor fails to invoice Owner in a timely manner in conformity to this agreement. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 27-6-30 AND 27-6-30 CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR

Executed this 30th day of November, 2012
 By: [Signature] Contract Officer
 Name: SEBASTIAN NUNGARAY
 Title: OWNER
 Division/Department: RESIDENTIAL

INITIALS: OWNER ABCONTRACTOR [Signature]

APPROVED

DRH-000820
Drier et al v. DRH

ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO SUBCONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN AND THAT OWNER DOES NOT AGREE TO PAY TO SUBCONTRACTOR INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF DELAYED PAYMENTS.

4.2 Payment to Subcontractors. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Order, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed from Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, notwithstanding the fact that the third parties may not endorse the checks. In any instance where Owner receives written notice from one of Contractor's sub-contractors, whereby the subcontractor claims a failure to be paid for the Work, Owner reserves the right to pay the subcontractor directly or to make payment payable to both the Contractor and its subcontractor.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the Contract Price shall waive and release all claims against Owner and the property under this Agreement, but shall not waive any claims of Owner arising out of Work later found to be defective and shall not release Contractor from liability for warranties and warranty service and/or defective Work. Contractor shall remedy any defects and pay for any damage resulting from any defects in or caused by the Work or as required by any other contracts between Owner and Contractor or by law or customary practice. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or assigns is an acceptance of the Work or materials not in compliance with this Agreement.

5. SCHEDULE OF WORK.

5.1 Time is of the Essence. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work.

5.2 Construction Schedule. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.3 Commencement of the Work. Owner shall issue an authorization (either pursuant to a written purchase order, payment schedule, or work invoice ("Purchase Order") or verbal instructions from an authorized Owner representative) to commence the Work and Contractor shall not commence the Work at a job location until Contractor has received instructions to begin Work at a specific job location. Contractor shall commence the Work no later than three (3) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.4 Changes in Construction Schedule. Contractor agrees that Owner shall have the right to make changes to the schedule of Work at Owner's discretion and agrees to comply with such changes.

6. PERFORMANCE STANDARDS.

6.1 Applicable Standards. Contractor shall perform all Work in a good and workmanlike manner, in accordance with the plans and specifications of Owner, according to industry standard practices, and warrants that the Work will meet or exceed FHA minimum property standards, VA requirements, all laws (statutory or common) and regulations, and any applicable building code requirements.

6.2 Contractors' Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized Owner's employee and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications as the plans and specifications affect the Work and materials incorporated in the Work, and that the plans and specifications are clear and unambiguous, and has accepted and agreed to be bound by all such requirements.

6.3 Government Requirements. Contractor will comply with all applicable federal, state, local, and county statutes, ordinances, regulations, codes, licensing requirements and standards, and the requirements of the Williams-Steiger Occupational Safety and Health Act of 1970 as amended, as well as the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., or similar laws or regulations, and the rules, regulations, or orders of all public authorities relating to performance of the Work, including without limitation, the procurement and posting of all required permits and notices. In addition, Contractor will not discriminate in its hiring or employment and will follow all state and federal employment laws or regulations. Contractor shall perform background checks and use only appropriate employees to perform warranty or repair work after a house is occupied.

6.4 Indemnity. To the fullest extent allowed by law, Contractor will agree to indemnify, defend, and hold Owner harmless from all actions, claims, investigations or other acts to enforce such laws or regulations, and further agrees to indemnify Owner from the payment of any fine, penalty or damages imposed, levied, assessed, or found as a result of the Contractor's failure to comply with or adhere to the applicable laws and regulations, or from Contractor's failure to cause its employees or subcontractors to comply with such laws and regulations.

6.5 Observation and Testing by Owner and Repair by Contractor. Owner shall have the right to observe or test the Work at any time during or after construction, but that observation or testing is solely for the benefit of Owner's and is not for Contractor's benefit. Owner's failure to note defects in the Work during an inspection will not waive any of Contractor's obligations, representations or warranties related to the Work. Notwithstanding anything contained in this Agreement to the contrary, all Work shall be performed and any defects shall be corrected timely and in accordance with this Agreement to the satisfaction of Owner.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work, and shall report in writing to Owner any defects prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractor's work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses and approvals necessary for or applicable to the performance of the Work.

6.8 Change Orders. The Contractor shall furnish the materials for and to make all changes requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed;

INITIALS: OWNER DM CONTRACTOR JS

(ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) work site safety requirements.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste materials or rubbish caused by its operations and shall remove all of Contractor's materials, and if materials are furnished by Owner, Contractor shall move all usable materials provided by Owner to a location designated by Owner. Contractor shall sweep out any waste material from inside the home under construction upon completion of its operation. All refuse shall be placed in receptacles provided or at locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up activities and collect a one hundred dollar (\$100.00) fine from Contractor for each incident. The cost of such clean-up and the aforementioned fine shall be deducted from any sums owed by Owner to Contractor, or shall be immediately payable by Contractor upon demand therefore by Owner.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from or in any way related to the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Owner reserves the right to set minimum standards or rules relating to Work on its site. **UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OWNERS MINIMUM REQUIREMENTS. THE OWNER ASSUMES NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE.** Contractor shall immediately notify Owner of any accidents or injuries on the Work Site. Contractor shall have an ongoing safety program and conduct inspections to determine that safe working conditions and equipment exist and safe practices are observed. Contractor shall prohibit and prevent the presence of children under age eighteen (18) from the Work Site.

7.1 Safety Laws and Indemnity Agreement. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards, statutes, and industry best practices concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations. Contractor shall provide Owner with written verification of its compliance with all applicable safety and health standards and regulations, including but not limited to OSHA's Hazard Communication Standard for the Construction Industry, 29 C.F.R. §1926.59 et seq., and provide written notice to Owner of the contact person responsible for Contractor's compliance with all safety and health standards and regulations. To the fullest extent allowed by law, Contractor agrees to indemnify, defend, and hold Owner harmless from all actions prosecuted to enforce and the payment of any fine or penalty imposed under such safety laws and regulations and shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work.

7.2 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, permitted subcontractors or suppliers at a job location or performance of the Work by any person under the influence of alcohol or drugs.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate corporations, and successors and assigns, that all labor performed and materials furnished by Contractor shall conform to the specifications of this Agreement, shall be free from any defects or deficiencies in workmanship or materials, and will comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, will meet or exceed the FHA/VA minimum property standards, and will comply with the Residential Warranty Corporation ("RWC") Program and the applicable limited warranty standards, which Contractor has read and understands and to which Contractor agrees to be bound. All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects for purposes of Contractor's obligations under this Contract. Contractor shall make good and promptly repair all Work not complying with the standards set forth in this section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Paragraph 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, the initial homeowner of the property on that is the subject of the Work: (i) for a period of ten (10) years all structural elements, including, but not limited to, roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; (d) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (i) any statutory warranty or (ii) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner (a "Homeowners Warranty"). Contractor expressly agrees to be bound by any such Homeowners Warranty and to the extension of warranty period hereunder. Furthermore, notwithstanding the foregoing, Contractor agrees that all express and implied warranties shall remain in full force and effect for so long as Owner is obligated to warrant the Work pursuant to applicable law. Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Homeowners Warranty that is longer than the Warranty Periods stated above; provided, however, failure to give that notice will not affect the extension of the Warranty Period to the applicable warranty period under the Homeowner's Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty obligations, Contractor's indemnity obligations, or the ability of Owner to request Contractor to perform warranty services in the future.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish all warranties and/or guarantees by manufacturers on appliances and equipment, and shall furnish all certificates required by any municipality and/or VA and/or FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and are not in limitation of periods of applicable statutes of limitation.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Project is located.

9.3 Lien Claim Indemnity. If any liens are filed against Owner relating to portions of the Work for which Owner has paid Contractor, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such lien or affidavit to be removed.

INITIALS: OWNER DM CONTRACTOR SC

and released of record. Contractor agrees to INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any liens relating to portions of the Work for which Owner has paid Contractor, and further agrees at Owner's request to any or all of the following: (i) procure a bond to indemnify Owner and any home purchaser from Owner, in an amount sufficient to discharge that lien, or (ii) refund to Owner all monies, including any additional amount necessary to cover all of Owner's or home purchaser's attorneys' fees and court costs paid in discharging the lien, whichever remedy Owner elects in its sole and absolute discretion, or (iii) provide sworn testimony that payment has already been made to Contractor for the work for which the alleged lien applies.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO HOLD HARMLESS, INDEMNIFY, PROTECT AND DEFEND OWNER, ITS PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THE AFOREMENTIONED ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "INDEMNITEE"), FROM AND AGAINST ANY AND ALL DEMANDS, CLAIMS, ACTIONS, CAUSES OF ACTION, PROCEEDINGS, LAWSUITS, SETTLEMENTS, JUDGMENTS, FINES, PENALTIES, LOSSES, ATTORNEYS FEES, LITIGATION COSTS, INTEREST, AND EXPENSES OF ANY KIND (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "LOSSES") FOR DAMAGES FROM BODILY OR PERSONAL INJURY, DEATH, THE DESTRUCTION OR LOSS OF PROPERTY (INCLUDING LOSS OF USE), OR ANY OTHER KIND OF DAMAGES OR HARM, ARISING OUT OF, OR RESULTING FROM, OR RELATED IN ANY WAY TO THE WORK PERFORMED AND/OR THE MATERIALS SUPPLIED UNDER THIS CONTRACT, REGARDLESS OF WHETHER OR NOT CAUSED IN PART BY INDEMNITEE. SUCH LOSSES SPECIFICALLY INCLUDE, BUT ARE IN NO WAY LIMITED TO LOSSES ARISING OUT OF OR ATTRIBUTABLE TO: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS OR OBLIGATIONS OF CONTRACTOR SET FORTH HEREIN; (2) THE WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR, CONTRACTOR'S AGENTS OR EMPLOYEES, SUPPLIERS OR SUBCONTRACTORS AND THEIR RESPECTIVE AGENTS AND EMPLOYEES, AND/OR ALL OTHER ENTITIES OVER WHOM THE CONTRACTOR MAY EXERCISE CONTROL (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "CONTRACTOR'S AGENTS"); (3) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF CONTRACTOR AND/OR CONTRACTOR'S AGENTS; OR (4) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE INDEMNITY FOR LOSSES CAUSED SOLELY BY FAULT OR NEGLIGENCE OF THE INDEMNITEE. THE LOSSES DESCRIBED HEREIN SHALL INCLUDE, BUT ARE NOT LIMITED TO, DEMANDS, CLAIMS, OR ACTIONS ASSERTED BY (1) ANY PRESENT OR FUTURE OWNER OF THE HOUSE INCORPORATING THE WORK; AND (2) ANY OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR AND/OR CONTRACTOR'S AGENTS). THE INDEMNIFICATION OBLIGATION UNDER THIS CONTRACT SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. THE INDEMNITY PROVISIONS CONTAINED HEREIN ARE INTENDED TO BE AS BROAD AND INCLUSIVE AS PERMITTED BY LAW.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ANY AND ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. IT IS THE EXPRESS INTENTION OF THE PARTIES THAT CONTRACTOR'S INDEMNITY OBLIGATIONS HEREIN WILL SURVIVE THE TERMINATION OF CONTRACTOR OR THIS AGREEMENT. INDEMNITEE SHALL HAVE THE RIGHT, AT ITS DISCRETION AND CHOOSING, TO DEFEND ANY AND ALL CLAIMS WHICH MAY BE ASSERTED AGAINST IT, AND CONTRACTOR AGREES TO REIMBURSE INDEMNITEE FOR ANY AND ALL EXPENDITURES WHICH INDEMNITEE MAY MAKE OR INCUR ON ACCOUNT OF ANY SUCH CLAIM.

10.3 CONTRACTOR AND CONTRACTOR'S AGENTS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS OR EQUIPMENT.

10.4 Subcontractor's and Supplier's Indemnity Obligations. Contractor shall require each of its subcontractor to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required in this section and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms as Section 13. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the actions of any subcontractor engaged by Contractor, whether in written agreement or otherwise, or who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed to be the obligation of the subcontractors to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGL Policy"), with completed operations coverage which contains a per occurrence limit of no less than one million dollars (\$1,000,000.00), and an aggregate limit of no less than two million dollars (\$2,000,000.00) protecting against liability for bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products and completed operations including materials designed, furnished, and/or modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type of, or nature of, the Work or limit the type of structure on which the Work is to be performed. The CGL Policy shall not contain a deductible or self insured retention of more than \$25,000.00. Contractor shall continuously maintain a CGL Policy covering completed operations for any applicable statute of repose for commencing lawsuits associated with the Work.

11.2 Other Insurance. Contractor agrees to carry (i) Worker's Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Worker's Compensation obligations imposed by law; (ii) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than one million dollars (\$1,000,000.00) and an aggregate of no less than one million dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (iii) Commercial Automobile Liability Insurance coverage with limits of not less than \$300,000 per person (Bodily Injury) and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner as an Additional Insured on the CGL Policy or policies required above covering both on-going operations and completed operations (equivalent to form CG20101185 or form CG2037). Coverage obtained by Contractor naming Owner as an Additional Insured shall be primary with any insurance of Owner being excess coverage. That insurance coverage will be carried continuously during the term of this Agreement and thereafter as required by this Agreement with insurance companies acceptable to Owner in its sole and absolute discretion. That insurance shall provide for a waiver of subrogation. All insurance shall be with

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a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, or certified copies of the required policies. Each Certificate of Insurance or policy shall contain an unqualified clause to the effect that the policy shall (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days' prior written notice to Owner, (ii) be carried continuously from the date of commencement of the Work until expiration of the period of the Contractor's warranty provided in this Agreement, (iii) specifically identify Owner as an Additional Insured, and (iv) indicate that coverage applies in the state where the Work is being performed. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself and the Work required to be performed under this Agreement.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER IN ITS SOLE AND ABSOLUTE DISCRETION) IN EFFECT AT THE TIME WORK IS PERFORMED TO COMPENSATE OWNER FOR ANY ADDITIONAL COSTS OF ITS WORKER'S COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS, CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS CONTRACT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work to the extent permitted under this Agreement, Contractor guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Owner as an Additional Insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or another contractor's work is damaged by an act for which Contractor, or its employees, agents or subcontractors, are responsible, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct such Work, replace or repair any defective material, or repair any damage. Contractor shall make all repairs and correct such within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours notice on a non-emergency basis; or (ii) retain a third party or undertake to perform these duties, and retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld resulting in a deficiency, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and reasonable attorneys' fees, incurred by Owner, and shall pay to Owner this amount within thirty (30) days of demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Paragraph 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or permitted subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location as a result of Contractor's actions or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement, Exhibit A of this Agreement, or the specifications; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order that is Contractor's obligation under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary tools, material, or equipment for, or cleaned up after, the Work; (viii) Contractor fails to comply with any other provision of this Agreement.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement and rights and remedies available under this Agreement shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. Owner shall have a right to collect from Contractor its reasonable attorneys' fees and expenses incurred in enforcing Contractor's obligations.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These Disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking equitable relief from and arbitrator or a court of appropriate jurisdiction.

13.3 Arbitration. If mediation fails, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq., regardless of any other choice of law provision in any underlying contract or this Agreement. All demands for arbitration shall be made before the expiration of the applicable statutes of limitations and repose. The award rendered by the arbitrator(s) shall be final, and judgment may be entered upon it in any court of competent jurisdiction.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrators mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes, is over \$200,000, but only one arbitrator shall be appointed if the Dispute is 200,000 or less. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of a mediator or arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint a mediator or arbitrator. The AAA's Code of Arbitrator Ethics (revised March 1, 2004) is applicable to all arbitrators.

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13.5 Rules. To the extent not in conflict with the Federal Arbitration Act, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision, except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner may join Contractor in any litigation, mediation, or arbitration initiated against Owner by a third person so that the rights of all parties (Owner, Contractor, Subcontractor, or any third person) shall be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner where necessary to facilitate resolution in a single forum. If multiple lawsuits or arbitrations are commenced, they shall all be consolidated into a single proceeding. Notwithstanding any other provision of this section, if a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a just adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect to unilaterally waive mediation or arbitration and litigate the Dispute with Contractor.

14. TERMINATION.

14.1 Termination by Owner for Cause or Convenience. This Agreement shall remain in full force and effect until terminated in writing by mailing notice to the other Party. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) Days' written notice before the effective date of termination, and shall perform fully under this Agreement during that notice period. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.3 Survival. All obligations, duties and warranties for Work performed under this Agreement shall survive termination.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement, (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement, (iii) this Agreement is or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms, (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority, (v) Contractor has, and each Contractor's employees, agents or permitted subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement, (vi) Contractor is in compliance with all governmental requirements to which it is subject, and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement, and with respect to prices and quantities only, the Price Schedule and all written Purchase Orders shall be the entire agreement between Owner and Contractor related to the Work, and there are no other agreements, oral or written, made by or relied upon by Owner and Contractor. Except as otherwise provided in this Agreement, no provision of this Agreement may be amended or supplemented except in writing signed by both Owner and Contractor.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights and obligations are not assignable or transferable without the express written consent of Owner, who may consent can be withheld in Owner's sole and absolute discretion. Subject to the restrictions and prohibitions on assignment set forth in this section, the terms of the Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Contractor shall provide and transfer ownership to any and all samples and/or shop drawings requested by Owner.

18. NOTICES. All notices required pursuant to this Agreement or otherwise shall be in writing and shall be delivered to the respective business address of Owner and Contractor. However, Contractor's business address shall be as noted on page one (1) of this Agreement. Notices shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by overnight delivery service, and upon confirmation if sent by facsimile transmission.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or articles.

Exhibit "A"
Scope
Exterior Clean

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Exhibit "A" Exterior Clean

I. Scope Policies

This scope of work outlines specifications as required by DR Horton (DHI). This scope of work is in addition to the "General Information" scope of work. The specifications and standards outlined below may be modified at the discretion of DHI. In the instance that any changes are made to the scope, contractor will be notified and required to resign a scope within 2 business days. This scope of work shall apply to all DHI communities. In addition, this scope of work shall override all previous signed scopes of work for the construction phase listed above.

II. General Requirements

Contractor will supply all material, equipment, and labor necessary to complete the landscaping final grade phase of construction. All work shall conform to all building codes, DHI standards, plans/details, community specs, and industry standards. Prior to starting any job, subcontractor shall meet with Field Manager to review all plot plan, landscape plan, options, and pending inspections. All work shall be completed per the schedule set forth by the Field Manager. Vendor shall provide unit pricing to DHI purchasing for standard, and any unexpected costs.

III. Bids Requirements

Contractor must provide a material and labor breakdown for all bids. All bids must include the wording "all applicable taxes included". All bids shall be returned to the office by the required deadline. All bids must be accompanied with the following paperwork:

- Signed Scope of Work
- Signed Community Specifications
- Signed Copy of DHI bid Sheet

IV. Material Specifications

Note: This section outlines general material requirements/manufacturers. This list does not represent all material to be supplied by subcontractor. Subcontractor must supply all materials listed throughout the scope of work U.N.O.

V. Scope

- Daily CSMe login.
- Pick-up all construction debris a minimum of 5 days/week (Monday – Friday Saturdays as needed). Construction debris must be picked up every Friday. Depending on volume in subdivisions, DHI reserves the right to require additional pick-ups at no additional charge.
- Set permit box in front of water meter or location dictated by superintendent.
- Pick-up all construction debris at the curb, or at area designated by Superintendent (location to be predetermined by Superintendent and Subcontractor prior to starting).
- Pick-up trash on lot around house daily, including trash that has blown onto adjacent home sites and across the alley.
- Contact Superintendent immediately if other trades are not placing waste in proper location.
- Superintendent may require subcontractor to pick-up trash around house, concrete over pours, general subdivision clean-up, etc. for an additional charge. Cost of this service shall be provided to the Superintendent prior to performing any work.
- Provide a 50 gallon steel trash barrel on each lot at the time of footing preparation. Trash barrel to be located by the water meter. Once the house has been properly backfilled and rough graded (after foundation is complete) the subcontractor is to move the trash barrel to the front corner of the garage. If the house does not have a garage, the barrel is to be placed at the front corner of the house. The trash barrel shall not be placed on a concrete surface.
- Provide one house sweep (including Garage).

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- Dispose of all trash at the construction trailer/office once per week.
- Haul off any debris in concrete washout area as required by Superintendent as an extra.
- Clean the streets of any dirt, mud, nails, screws, aluminum, etc. generated during material delivery and installation.
- Reset and repair any displaced silt fence, orange fencing, signage and permit box as needed. .
- Provide model trash removal at 50% off total cost.
- Dispose of all materials in accordance with local municipality/county, state, and federal guidelines.

Initials: Contractor [Signature] (Exterior Clean)

DHI [Signature]

VI. Payment

All invoices shall not be turned in and approved for payment until phase complete and all deficiencies are remedied. DHI reserves the right to make the final decision in determining the correct course of action for any and all repairs. No Extras will be paid unless negotiated prior to performing any work and an approved P.O. is issued.

Initials: Contractor [Signature] (Exterior Clean)

DHI [Signature]

VII. Additional Costs (includes labor, tax, material, etc.

\$ 55.00 /hr. Bobcat time including operator.
 \$ 20.00 /hr. General laborer.
 \$ 75.00 /hr. Truck and operator
 \$ _____ /each Haul and dispose of curb cut
 \$ _____ /load Haul and dispose of concrete
 \$ _____ /trash barrel (Replacement Cost)

VIII. Warranty

- Subcontractor shall warrant all work per DRHI contract. All warranty work must be completed within 72 hours of scheduled date and time.

Subcontractor

DR Horton

East Coast Construction Cleanup Coastal Carolina
 Company Name

Sebastian Nungaray
 Representative

[Signature]
 Representative

Owner
 Title

ASSISTANT VICE-PRESIDENT
 Title

11/12/12
 Date

11/30/12
 Date

Initials: Contractor [Signature] (Exterior Clean)
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Customer Service Center-(CSC)

1. Subcontractor to warrant all work from date of the transfer of the property from D. R. Horton to the homeowner for workmanship and materials where applicable. Subcontractor hereby agrees to repair, replace, or pay the expense of repair / replacement as determined by D.R. Horton. The cost of repair/replacement shall include any and all collateral remediation.
2. Subcontractor will respond within 48 hours to all work order requests from D.R. Horton CSC personnel, 24 hours on emergencies. Failure to respond within 48 hours will result in D.R. Horton to have corrections made and back charge subcontractor for all associated costs. Missed appointments will result in a \$50 back charge per incident. These back charges will be in the form of an offset to any unpaid balances.
3. Subcontractor must respond to CSC via fax once a work order is received and an appointment is made with the homeowner to correct warranty work within 48 hours of receipt of work order.
4. Subcontractor must obtain homeowner signatures on all work orders upon completion of warranty work. Homeowner must sign off on all work as being completed and satisfied.
5. Subcontractor to fax the signed / dated work order from the Homeowner to the CSC. It is the responsibility of the subcontractor to inform the CSC of each completed work order. All work orders must be faxed to the CSC as completed. Work orders will be considered "open" if not faxed and received by the CSC.
6. Bi-monthly Vendor reports will be faxed to subcontractor. Report will indicate warranty work that is outstanding. Upon receipt subcontractor to review all open work orders and note next to each item the work orders that are completed and if not the scheduled appointment date and time. Once reviewed, subcontractor to fax report to CSC for updating. Report is to assist subcontractors in managing warranty work load. Not maintaining a good standing in completing work orders may result in delay in payments.
7. Subcontractor's payments for all work will be placed on hold if any warranty work order remains open for 30 days or more. The payments will remain on hold until all of subcontractor's open warranty work orders of 30 days or more are closed. D. R. Horton may cause the warranty work to be completed at the subcontractor's expense.

Contact: Sebastian Nungaray
Phone#: 1843 3841310

Initials: Subcontractor [Signature] (Warranty)

DRH [Signature]
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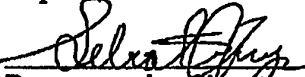
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Subcontractor

East Coast Construction Clean up Corp
Company Name

Sebastian Nungaray
Representative Name


Representative Signature

Owner
Title

11/12/12
Date

DR Horton, Inc.

Coastal Carolina Division

Ron Bunner
Representative Name


Representative Signature

Assistant Vice-President
Title

11/50/12
Date

Initials: Subcontractor  (Warranty)

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Exhibit "A"-Field Requirements

Part 1-General

1. This document defines both D. R. Horton and subcontractor responsibilities in the stated phase of construction. It is intended as a checklist that will define the D. R. Horton standard of quality and professionalism. The subcontractor's work will not be considered complete until all specifications herein contained are fully met.
2. The work in this bid and agreement shall be installed per plans, specifications and all applicable local, state, and federal codes. All work will be inspected and certified as complete by the subcontractor. Payment release does not constitute final acceptance from D.R. Horton.
3. The work shall be performed to D. R. Horton's standards of quality. If any part of the work is found to be incorrect or causes damage to other work, the subcontractor will be responsible for all costs to repair, whether prior to or after payment release.
4. All trash, debris, and scraps shall be removed on a daily basis and deposited in a designated area per job superintendent and the home is to be broom swept *daily*. There is no parking on any lots, driveways, or sidewalks. Access to the house will be designated by a DR Horton representative. Violators will be subject to a minimum fine of \$500. Under no circumstance will vehicles be allowed to park blocking occupied driveways, their will be parking designated on one side of the street. Violators will be fined \$75 and could incur additional fines from local municipalities.
5. All good materials left on the job site shall be maintained in neat order and in a location that does not hamper another subcontractor's ability to perform his/her work. The superintendent will designate the location. The home WILL be swept *daily, and upon completion of work*. Also, upon completion of work, a representative of D. R. Horton will walk the job. If it is found to be unorganized and dirty, D.R. Horton will have the house cleaned and swept and the subcontractor will receive a \$75.00 minimum charge.
6. All left over good materials on the job site must be removed within 48 hours of the completion of the work. Failure to remove these materials will result in D. R. Horton removing them at the subcontractor's expense and will also result in a fine of \$100.00 per day until the materials are removed by either the subcontractor or D. R. Horton.
7. D. R. Horton shall issue authorization (either pursuant to a written purchase order or work order (hereinafter the "Purchase Order")) to commence the work, and subcontractor shall not commence the work at a job location until subcontractor has received instructions to begin work at a specific job location. Subcontractor shall commence the work within three (3) days of notice to proceed from D. R. Horton, and if such work is interrupted at the direction of D. R. Horton, subcontractor shall resume such work within two (2) working days from D. R. Horton's direction to resume. Notice to proceed will be provided by both CSMe and confirmation of the schedule for the work on CSMe with the superintendent. It is understood and agreed that the construction start date given to the subcontractor by D. R. Horton at the beginning of the job is approximate. The dates indicated are only intended to give the subcontractor a general idea of the approximate start date. All superintendents will have current schedules. A D. R. Horton supervisor will advise subcontractor or supplier of schedule changes either by voice or electronic notification. All work must be confirmed with the superintendent prior to start. Failure to commence the work within the time frames listed above will result in a Scope of Work

Initials: Subcontractor SE (General)

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Violation in the amount of \$100.00 per day. In addition, the schedule for the work as provided in CSMe must be maintained by the subcontractor until the work is completed and approved as completed by the superintendent. A Failure to complete the work in the time frame allowed from commencement to approved completion will result in a Scope of Work Violation in the amount of \$100.00 per day. The Scope of Work Violations will be issued in the form of a back charge to the subcontractor. These back charges will be in the form of an offset to any unpaid balances.

8. All work shall be performed in a safe and professional manner. It is the subcontractor's responsibility to comply with all OSHA requirements. The superintendent will issue a warning to workers on site of violations seen. If after a warning the workers are not in compliance they will be asked to leave the site and no payment will be issued for work completed. All workers must wear hard hats on all job sites at all times. The D.R. Horton representative may issue a written warning to workers on site of violations seen. If after a warning the workers are not in compliance, they will be asked to leave the site. Additionally, fines may increase as follows: 1st offense-a written warning and/or a \$100.00 fine, 2nd offense-\$250.00 fine and a mandatory appearance before safety committee, 3rd offense-\$500.00 fine, and 4th offense-termination. Removal of safety rails will result in a \$300.00 fine. In addition, contractor will be responsible for all costs incurred from missing rail parts. All workers must wear hard hats on all job sites at all times.
9. The subcontractor shall respect the work of the other crafts at all times and take necessary precautions in order to avoid damaging such work. If the subcontractor damages such work, repairs shall be made at the subcontractor's expense.
10. Any and all damages or defective workmanship must be reported to the superintendent. If a subcontractor is found to have covered or hidden damages or defective workmanship, then that subcontractor will incur all repair cost.
11. It is the responsibility of all subcontractors to obtain current product and work specification sheets that are applicable to each and every, all and singular, series, model or plan which D. R. Horton builds. This specification sheet will provide the subcontractor with special conditions, types, brands, methods, colors and manufacturers that are the express responsibility of each and every subcontractor.
12. DR Horton paperwork hierarchy is as follows: 1. Customer Selection Sheets 2. Community Specifications 3. Scopes of Work 4. Plans. #1 overrides everything. Field Superintendents are not authorized to make changes to any of the above. If you are asked to do something that does not follow the above paperwork hierarchy please contact the Construction Area Manager or the Purchasing Manager immediately. In addition, if you find something within our documents that do not comply with industry standards, is costing you or DR Horton additional money, or could be done more efficiently, please bring to our attention immediately. If you do not follow the proper paperwork hierarchy or make changes without written approval, DR Horton will not absorb the additional costs.
13. Subcontractors are not permitted to eat or smoke in a D. R. Horton home. No drinking of alcoholic beverages is allowed on any D. R. Horton job site. No uncovered shoes are permitted in a carpeted home.
14. No work should be considered complete until all errors are corrected and all applicable inspections have been passed.
15. All punch out list generated by the D. R. Horton superintendent will be complete before payment will be made. The subcontractor understands that the deliveries are sometimes delayed and that D. R. Horton has little control

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D.R. HORTON
America's Builder

over material delivery. In the event delivery delays slow down work, the subcontractor will not be due payment of the job until the job is complete and punched out.

16. Subcontractors are responsible for reimbursing D.R. Horton the cost of municipal re-inspection fees directly related to their work. Any re-inspections or engineering costs as a result of poor workmanship are to be paid by the subcontractor. If D. R. Horton pays for these costs, the subcontractor will be charged the cost and D. R. Horton will offset any unpaid balances to subcontractor to recover these costs.
17. In the event a worker is injured on a job site, please follow these steps:
 - A. Verify the injury.
 - B. Contact the office so that we may document the incident.
 - C. The superintendent should fill out an "Accident Report" and return to the office within 48 hours.
18. D. R. Horton strictly forbids the subletting of work by any subcontractor. D. R. Horton will terminate any subcontractor found to be subletting work and D. R. Horton has no responsibility of payment to anyone whom has sublet from the subcontractor. This agreement is between D. R. Horton and the listed subcontractor only.
19. Payment is not due until the subcontractor has completed all punch lists to D.R. Horton, Inc.'s expectations. Do not turn in purchase orders for a house that is not punched out and *verified* by a D.R. Horton, Inc. representative.
20. No extras will be paid for without written approval from a D. R. Horton superintendent and DR Horton Purchasing. All extra work must be submitted to superintendent prior to DR Horton management's approval for payment. Acceptance will be verified with a PO being issued.
21. Most of D. R. Horton's jobs are paid by an auto pay system. The subcontractor will be issued a P.O. prior to performing work. Once the work is complete, the job superintendent will progress CSMe which will release the subcontractor's payment. Do not submit invoices for auto pay work. The subcontractors check will itemize each job task being paid using the P.O. number. It is the subcontractor's responsibility to properly keep track of their receivables by cross referencing the P.O. numbers. If for some reason the subcontractor feels that payment for a job that is complete has not occurred, the subcontractor is to contact the Purchasing Department and provide the needed details. The Purchasing Department will research the situation and provide instruction to the subcontractor.
22. Subcontractor shall comply with all insurance requirements including the subcontractor agreement before setting foot on any D. R. Horton site. If insurance lapses, contractor will be required to leave the site until they are in full compliance. If insurance cannot be reinstated they will be terminated.
23. All materials shall be installed per local, state, and federal codes. Installation of all products shall follow manufacturers' instructions. Any discrepancies between D.R. Horton's requirements and code/manufacturers' should be reported to D.R. Horton Construction and Purchasing Department in writing.
24. No invoices over 90 days from the date work was completed will be paid.
25. Subcontractor shall provide qualified supervision on all job sites to monitor work. This person shall be competent and able to make decisions on behalf of the subcontractor's company. Each subcontractor will have a qualified English speaking job supervisor on the job site. Each subcontractor is to furnish a representative for

Initials: Subcontractor *CS* (General)

DRI *[Signature]*
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subcontractor meetings as scheduled by DR Horton.

26. Subcontractors shall not discuss pricing or any agreements w/D.R. Horton with any other subcontractors. Violation of this policy will result in termination of subcontractor.
27. Subcontractor shall supply an OSHA compliant safety plan to D.R. Horton prior to starting work. It is the responsibility of the subcontractor to maintain the safety plan and update D.R. Horton with all revisions. Upon request, subcontractor shall supply D.R. Horton with MSDS sheets.
28. Once the doors or windows have been installed it is the responsibility of each subcontractor to close them during inclement weather in an effort to minimize damage to the home.
29. The following trades must provide a 24 hr emergency warranty phone number and contact. Any phone number or contact information changes must be reported to the Construction Department and Purchasing Department immediately.
Electrician Plumber Gas HVAC Roofer
30. Subcontractor is responsible for obtaining and forwarding a working email address to DR Horton. This account must be monitored at least once each working day. High Speed internet access is not required but is highly recommended.
31. In the event of a violation of any of these General Scopes of Work or in the event of a violation of a subcontractor's Specific Scope of Work for their particular trade, a Scope of Work Violation will be issued in the form of a back charge to the subcontractor. These back charges will be in the form of an offset to any unpaid balances.

Contact: Sebastian Nungaray
Phone#: 1843 3841310

Subcontractor

Company Name

East Coast Construction Cleanup, Corp.
Sebastian Nungaray

Representative Name

Sebastian Nungaray
Representative Signature

Owner
e

DR Horton, Inc.

Coastal Carolina Division

Ron Buma
Representative Name

Ron Buma
Representative Signature

Assistant Vice President
Title

Initials: Subcontractor S

(General)

DHI mm
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Date

Initials: Subcontractor S (General)

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Exhibit B

D.R. HORTON
America's Builder

SOUTH CAROLINA INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR: igthe Construction ("Contractor")
 Sole Proprietorship ☐ Partnership ☐ Corporation ☒ LLC ☐ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 46-4003042
 Name of Owner(s)/Officer(s): Shawna Lather
 Division Name: Central Carolina Area Name: Hilton Head/Isle Assigned Vendor No.: 11009167
 Address for All Notices: 1 East River Dr
 City: Beaufort State: SC Zip Code: 29907
 Telephone: 813 297-3487 Fax: () E-Mail Address: Shawna.Lather@igtheconstruction.com
 Insurance Carrier: ATTACH INSURANCE CERTIFICATE, OR THERE WILL AUTOMATICALLY BE WITHHOLDING AND DEDUCTIONS.
 This agreement (the "Agreement") is entered into on this 2nd day of December, 2013, between DR Horton, Inc. ("Owner") and Contractor.

1. SCOPE OF WORK. This Agreement is entered on a blanket basis. The terms of this Agreement shall govern all current and future work of Contractor for Owner. The work to be performed under this Agreement shall include all work performed and materials supplied by Contractor, directly or indirectly, to Owner, including but not limited to the labor, services and/or materials, equipment, transportation, or facilities used or required to complete the construction-related activities of Owner authorized by written purchase order, or similar document by Owner's authorized field personnel (the "Work"). The applicable quantities and pricing for the Work shall be reflected in the price sheet, proposal, bid, or purchase order issued by Owner, or in other documentation most recently accepted and approved in writing by Owner (the "Pricing Schedule"). The Pricing Schedule or any other writing shall not modify any of the terms of this Agreement unless executed in the form of an amendment to this Agreement. Owner is not obligated to award any work on specific property to Contractor regardless of the Pricing Schedule, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform the Work or similar work at any job location in addition to, or in place of, Contractor.

2. INDEPENDENT CONTRACTOR STATUS. Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right and obligation to control the manner, means, method and performance of the Work. Contractor shall ensure that the results achieved satisfy the requirements of this Agreement. Contractor shall be responsible, and liable, for all acts and omissions of its employees, agents, subcontractors and other persons performing any portion of the Work, and shall ensure that all personnel performing the Work are qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor further shall provide written notification to all of its present and future employees of Contractor's provision for Workers Compensation Insurance. Any provisions in this Agreement which may appear to give Owner the right to direct Contractor as to the details of doing the Work or to exercise a measure of control over the Work shall be deemed to mean that Contractor shall follow the desires of Owner in the results of the Work only.

3. CONTRACT PRICE.

3.1 Pricing Schedule. The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor.

3.2 Taxes. Contractor shall be solely responsible for and will pay all withholding, Social Security, state unemployment and all other similar taxes for Contractor's employees, agents or subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work, unless Owner furnishes Contractor with a Resale Certificate or Exemption Certificate. If Contractor performs under a fixed-price contract (one price for materials and incorporated skill and labor), the contract price includes all sales and use taxes.

3.3 Price Increases. NO PRICE INCREASE SHALL BE BINDING UPON OWNER UNTIL CONTRACTOR GIVES OWNER ONE HUNDRED TWENTY (120) DAYS WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule implementing a price increase, the superseded Pricing Schedule shall remain in effect for Purchase Orders, as defined herein, issued after the date of any new Pricing Schedule until the expiration of the notice period.

4. PAYMENT.

4.1 Invoices. Contractor shall invoice Owner no later than the earlier of (i) ninety (90) days after completion of the Work or (ii) thirty (30) days from the date of closing from Owner to a purchaser of the house incorporating the Work. To the extent permitted by law, Contractor waives its right to payment for any Work not invoiced in a timely manner. Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage at Owner's option. All Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order, as defined herein.

CONTRACTOR SPECIFICALLY WAIVES THE RIGHTS AND REMEDIES SET FORTH AT S.C. CODE ANN. §§ 29-6-30 AND 29-6-50, CONCERNING THE TIMING OF PAYMENTS AND INTEREST ON DELAYED PAYMENTS. CONTRACTOR ACKNOWLEDGES THAT THE TERMS OF THIS AGREEMENT CONTROL AS TO THE TIMING OF PAYMENTS AND THAT NO PROVISION FOR INTEREST DUE TO CONTRACTOR IN THE CASE OF DELAYED PAYMENTS IS MADE HEREIN. CONTRACTOR AGREES THAT OWNER DOES AND WILL NOT OWE INTEREST ON ANY TERMS WHATSOEVER IN THE CASE OF ANY DELAYED PAYMENT.

THIS AGREEMENT CONSISTS OF SEVEN (7) PAGES AND ADDENDA, IF ANY.

Executed this 2nd day of December, 2013.

Owner: DR Horton, Inc.
 By: Tom Bunnett
 Name: Tom Bunnett
 Title: Assistant Vice-President

Contractor: igthe Construction
 By: Shawna Lather
 Name: Shawna Lather
 Title: Owner

INITIALS: OWNER TLB CONTRACTOR SL

4.2 Contractor Payments. No payments shall be due under this Agreement until Contractor's invoice (or Purchase Order, as defined herein, if applicable) for the Work has been submitted to Owner for payment. This action shall constitute a representation and confirmation by Contractor that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. In exchange for progress payments, Owner may require a partial release (to the extent of all payments made) of all liens for materials furnished and labor performed by Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work to be performed, and an affidavit that no person has a right to any lien for materials or labor. Unless otherwise agreed by Owner and Contractor, payment to Contractor shall be made by check. Owner may, at any time, in its discretion, make checks payable jointly to Contractor and one or more third parties; and these joint payments shall satisfy amounts owed by Owner to Contractor, whether or not all parties endorse the checks.

4.3 Acceptance of Work. Acceptance by Contractor of the final payment of the contract price shall waive and release all claims against Owner under this Agreement, but shall not waive any claims of Owner arising out of or resulting from the Work and shall not release Contractor from any obligations under this Agreement, including but not limited to liability for warranties, warranty service, or any other liability for alleged defects in the Work. No certificate issued, nor payment made to Contractor, nor partial or entire use or occupancy of the Work by Owner or its agents or customers or assigns shall constitute an acceptance of the Work or materials not in compliance with this Agreement, or be used in any way as evidence of acceptance by Owner.

5. SCHEDULE OF WORK.

5.1 Construction Schedule. Contractor acknowledges that **TIME IS OF THE ESSENCE** in the performance of all Work and obligations under this Agreement. Owner may alter the time, order and priority for performance of all components of the Work and all matters relative to the timely and orderly conduct of the Work without increase in price or liability of any kind to Contractor or others. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors.

5.2 Authorization and Commencement of the Work. Authorization for any Work shall be in writing, either pursuant to a written purchase order, work invoice, or similar document ("Purchase Order"). Contractor shall have no authority to commence the Work at any specific job location until Owner has issued instructions to proceed. Contractor shall commence the Work no later than (five (5) days after notice to proceed from Owner, and if such Work is interrupted at the direction of Owner, Contractor shall resume such Work within two (2) working days of Owner's direction to resume.

5.3 Changes in Construction Schedule. Owner shall have the right to make changes to the schedule of Work at Owner's sole discretion, and Contractor shall comply with such changes. Contractor shall not be entitled to any additional compensation for such schedule changes.

6. PERFORMANCE OF THE WORK.

6.1 Applicable Standards. Contractor shall perform all Work in accordance with any plans or specifications of Owner, in a good and workmanlike manner, and in accordance with all industry standards and practices. The Work shall meet or exceed FHA minimum property standards, VA requirements, all manufacturers' or suppliers' standards or specifications for use and installation, and all laws (statutory and common law), ordinances, rules (governmental and private agency), and regulations (including but not limited to any applicable building code requirements). In the event of conflicting provisions, specifications will take precedence over the drawings; the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive; later modifications or changes will supersede or take precedence over earlier provisions. Subcontractor shall immediately notify Contractor in writing of any allegedly conflicting provisions.

6.2 Representative(s). Contractor shall have a competent representative at the job site at all times during performance of the Work who shall have absolute authority to act, in all respects, on behalf of and for Contractor.

6.3 Contractors' Acknowledgements Regarding Work. Contractor's commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized employee of Owner and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location, is thoroughly familiar with the plans and specifications, and that the plans and specifications are clear and unambiguous, and that Contractor has accepted and agreed to be bound by all such requirements.

6.4 Government Requirements. Contractor shall comply with all applicable federal, state, and local laws and statutes, ordinances, rules, regulations, orders, codes, licensing requirements and standards relating in any way to the performance of the Work, including but not limited to the requirements of the Occupational Safety and Health Act of 1970 as amended; the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and the procurement and posting of all required permits and notices (the "Requirements"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of or noncompliance with the Requirements, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation of or noncompliance with the Requirements by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, regardless of any alleged fault of Owner. In addition, Contractor shall not discriminate illegally in its hiring or employment and shall comply with all state and federal employment laws or regulations. Contractor shall perform background checks and ensure only suitable persons perform warranty or repair work after a house is occupied.

6.5 Observation, Inspection and Testing. Owner and any government agency inspector ("Inspector") shall have the right, but not the obligation, to observe, inspect or test the Work at any time during or after construction, but that observation, inspection or testing is solely for the benefit of Owner and is not for Contractor's benefit. Contractor shall cooperate with Owner and Inspector during any such inspection. The failure by Owner or Inspector to note defects in the Work during an inspection shall not waive or vary any of Contractor's obligations, representations or warranties related to the Work.

6.6 Work of Others. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work in any way, and shall report in writing to Owner any defect in the work of any other contractor prior to commencement of any Work, or Contractor shall be deemed to have accepted all other contractors' work for inclusion into Contractor's Work.

6.7 Licenses, Permits, and Approvals. Contractor shall secure and maintain all permits, licenses, approvals, and as-built drawings necessary for, or applicable to, the performance of the Work. Contractor shall provide copies to Owner immediately upon request.

6.8 Change Orders. Owner and Contractor agree that no additional charge or increased price shall be charged by Contractor for any change or alteration unless set forth in a written variance agreement or change order ("Change Order") or Purchase Order signed by Owner and Contractor before the commencement of such changes. Contractor shall comply with any Change Order requested by Owner, without nullifying this Agreement, at a reasonable addition to, or reduction from, the Pricing Schedule.

6.9 Subdivision Rules. Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; (iii) regulating trash pick-up and waste collection at the job location; and (iv) Work Site safety requirements. Contractor shall be subject to subdivision rules which provide for fines payable to Owner by Contractor for failure to comply with such

INITIALS: OWNER WJW CONTRACTOR [Signature]

rules, which may be deducted by Owner from any sums owed by Owner to Contractor.

6.10 Clean-up. Contractor shall at all times keep the job site free from accumulation of waste or other discarded materials, including but not limited to trash, unused building materials, garbage, refuse or rubbish ("Waste"), caused by its operations and shall remove all of Contractor's materials at the conclusion of the Work. If materials are furnished by Owner, Contractor shall move all usable materials at the conclusion of the Work to a location designated by Owner. In addition to removal of all Waste upon the conclusion of the Work, Contractor shall leave the inside of any home under construction in "broom clean" condition. Contractor shall dispose of all Waste properly, and may place it in any receptacles intended for that purpose or at other locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean-up. The cost of any such clean-up shall be payable by Contractor immediately upon demand by Owner and may be deducted by Owner from any sums owed to Contractor.

7. SAFETY.

7.1 Contractor Responsibility for Safety. Contractor shall, at its own expense, be solely responsible for protecting its employees, subcontractors, material suppliers and all other persons from risk of death, injury or bodily harm arising from, or in any way related to, the Work or the construction site on which the Work is being performed (the "Work Site"), and ensuring full compliance with all government safety and OSHA rules and regulations. Contractor shall have an ongoing safety program and conduct inspections to ensure that safe working conditions and equipment exist and safe practices are observed. Contractor shall have a competent person on the Work Site at all times in charge of Contractor's safety program. UNDER NO CIRCUMSTANCES SHALL THE ACTIONS OF OWNER IN REQUIRING IMPLEMENTATION OF A SAFETY PROGRAM BE CONSTRUED AS OWNER HAVING CONTROL OVER CONTRACTOR'S SAFETY PROGRAM. CONTRACTOR SHALL BE SOLELY RESPONSIBLE FOR THE CONTENT AND IMPLEMENTATION OF ITS SAFETY PROGRAM WHICH SHALL MEET OR EXCEED APPLICABLE LEGAL STANDARDS. CONTRACTOR AGREES THAT OWNER HAS NO RESPONSIBILITY OR LIABILITY FOR THE PHYSICAL CONDITION OR SAFETY OF THE WORK SITE. Contractor shall immediately notify Owner's construction supervisors of any unsafe conditions or practices observed on the Work Site and promptly send Owner a written notice if the condition or practice is not immediately remedied. Further, Contractor shall immediately notify in writing Owner and Contractor's insurer of any accidents or injuries on the Work Site. Contractor shall prohibit and prevent the presence on the Work Site of persons under age eighteen (18) and all persons not involved in the Work.

7.2 Safety Laws. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations ("Safety Law"). In addition to its obligations under Section 10 of this Agreement, Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work for any violation of, or noncompliance with, the Safety Law, and shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from and against any and all claims, demands, liability, losses, costs, damages or expenses including attorneys' fees and costs incurred, lawsuits, actions, causes of action, citations or work stoppages, or other litigation of every kind and character in any way incident to, in connection with, or arising out of any alleged violation or noncompliance by Contractor, or any individual or entity acting on behalf of or at the direction of Contractor, of the Safety Law, or safety citation, regardless of any alleged fault of Owner. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., and, if required by law, provide written notice to Owner of the contact person responsible for Contractor's safety compliance.

7.3 Hazardous Materials. Contractor shall not permit any Hazardous Substances, defined below, to be brought onto or stored at any job site or used in the construction of the Work, except for commonly used construction materials, provided however, that all such material shall be handled in full compliance with all laws, ordinances and regulations. All notices required to be given with respect to such products shall be given by Contractor. Contractor shall not release or dispose, nor allow any other person to release or dispose, of Hazardous Substances or waste at any job site or into the soil, drains, surface or ground water, or air. "Hazardous Substance" means any substance or material which any state, federal or local governmental authority determines or designates as capable of posing a risk of injury to health, safety, property or the environment.

7.4 No Alcohol or Drugs. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, agents, subcontractors or suppliers at a job location, or performance of the Work by any person under the influence of alcohol or drugs. "Drugs" shall include any substance, whether or not illegal, which upon exposure, ingestion, inhalation, injection or by any other introduction, may impair one's ability to safely perform the Work.

8. CONTRACTOR'S WARRANTIES.

8.1 Against Defective Work. For the longer of ten years or the period of any applicable statute of limitation or repose, Contractor unconditionally warrants to Owner, its parent, subsidiary or affiliate entities, or successors and assigns, that all Work shall conform to the specifications of this Agreement (including but not limited to the standards referenced in Subsection 6.1), shall be free from any defects or deficiencies in workmanship or materials, shall comply with the requirements of all applicable governing authorities, laws, regulations and ordinances, shall meet or exceed the FHA/VA minimum property standards, and shall comply with the Home Owners' Warranty, defined below and its applicable warranty standards (which Contractor has read and understands). All Work not conforming to these requirements shall be considered to be defective. All material shall be new and of best quality within the scope of the Pricing Schedule and free from defects. Contractor shall be liable to make good or promptly repair all Work not complying with the standards set forth in this Section at its own expense.

8.2 Home Owners Warranty. In addition to the warranty in Subsection 8.1, Contractor warrants that the Work shall remain free of defects for the following warranty periods beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, any initial home purchaser of property subject to the Work: (i) for a period of ten (10) years all structural elements, including but not limited to roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (ii) for a period of two (2) years all: (a) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (b) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (c) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; and (iii) all other elements for a period of one (1) year but in no event shall a warranty period or coverage for the system, element or other portion of the Work be less than the applicable warranty period or coverage for such system, element, or other portion of the Work under (a) any statutory warranty or (b) residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner, including but not limited to the Residential Warranty Corporation Program (a "Home Owners' Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty that is longer than the warranty periods stated above; provided, however, failure to give that notice will not affect the extension of the warranty period to the applicable warranty period under the Home Owners Warranty.

8.3 Repair by Owner Does Not Waive Warranty. The performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty or indemnity obligations hereunder, nor shall it affect Owner's right to require Contractor to perform warranty services thereafter.

8.4 Transfer of Manufacturers Warranties. Contractor shall furnish, transfer and assign all warranties, relevant product information, and guarantees by manufacturers on components of the Work, including any appliances or equipment, and shall furnish all certificates required by any third parties such as any municipality, the VA, or the FHA. These warranties, guarantees, and certificates are in addition to all other warranties or obligations of Contractor provided by law or otherwise and shall not limit or reduce any applicable statutes of limitation.

8.5 Transfer of Title and Ownership to Work and Other Documents. Contractor warrants and hereby transfers title to all Work, including, but not limited to all materials, products, samples, as-built drawings and shop drawings, to Owner, either upon incorporation in the construction or upon

INITIALS: OWNER WJW CONTRACTOR WJW

receipt of payment by Contractor, whichever occurs first, free and clear of all liens, claims, security interests or encumbrances. To the extent subject to copyright law, all Work shall be considered a "work made for hire." Upon request of Owner, Contractor shall also provide any other documents necessary to transfer any and all ownership rights to the Work, including, but not limited to any copyright rights, to Owner.

9. LIENS AND RETAINAGE.

9.1 Contractor's Lien Waiver. TO THE EXTENT PERMITTED BY LAW, CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS OR SIMILAR CLAIMS AGAINST OWNER OR ITS PROPERTY.

9.2 Retainage. At all times during the performance of this Agreement and for thirty (30) days afterwards, Owner shall be entitled to hold, for all Work in progress, the greater of ten percent (10%) or any allowable retainage and any statutory sums in accordance with the laws of the state in which the Work is located.

9.3 Lien Claims Indemnity. If any liens, affidavits of claim, stop payment notices, or lis pendens arising out of the Work are filed or provided to Owner, Contractor agrees that Owner shall be entitled to withhold all further payments to Contractor until Contractor causes such lien, affidavit, stop payment notice, or lis pendens to be removed and released of record. In addition to its obligations under Section 10 of this Agreement, Contractor shall, to the fullest extent permitted by law, INDEMNIFY, DEFEND, and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any such liens, affidavit, stop payment notice, or lis pendens, and further agrees immediately upon Owners' request to: (i) procure a bond to indemnify Owner and any purchaser of property including the Work, in an amount sufficient to discharge that lien, or (ii) pay to Owner all monies, including any additional amount necessary to cover all attorneys' fees, expenses and court costs paid by Owner or any home purchaser in discharging the lien, affidavit, stop payment notice, or lis pendens whichever remedy Owner elects in its sole and absolute discretion. The provisions of this paragraph shall be in addition to any rights Owner may have under applicable law with respect to such liens, affidavits, stop payment notices, or lis pendens.

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, and HOLD OWNER AND OWNER'S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY "INDEMNITEE"), FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER (INCLUDING ALL COSTS THEREOF AND ATTORNEYS' FEES), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR'S AGENTS OR EMPLOYEES, OR BY SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE, RELATED IN ANY WAY TO THE WORK, EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR'S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR'S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR'S ULTIMATE LIABILITY FOR INDEMNITY. CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.

10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRACTOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

10.3 NO BAILMENT. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, ALL SUBCONTRACTORS, AND SUPPLIERS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS, MATERIALS, AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO: (1) ANY LOSS OF SUCH TOOLS, MATERIALS, OR EQUIPMENT, OR (2) ANY DAMAGE TO SUCH TOOLS, MATERIALS OR EQUIPMENT.

10.4 Subcontractors and Suppliers Indemnity Obligations. Contractor shall require each of its subcontractors to agree to indemnify Indemnitee to the same extent that Contractor is required to indemnify Indemnitee in this Agreement. Before a subcontractor begins its Work, Contractor shall obtain a signed agreement from that subcontractor indemnifying Indemnitee to the extent required and provide that agreement and evidence of satisfactory insurance to Owner. In addition, to the extent permitted by law, Contractor shall require that each supplier or subcontractor indemnify Indemnitee from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth in Section 13 of this Agreement. For all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for all of the acts and omissions of any subcontractor or supplier who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed also to be the obligation of the subcontractors or suppliers to Owner, for which Contractor shall be fully responsible to Owner.

11. INSURANCE.

11.1 General Liability. Contractor agrees to carry a Broad Form Commercial General Liability Insurance on an Occurrence Form (the "CGI Policy"), with products-completed operations coverage, which contains a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than Two Million Dollars (\$2,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises-operations; (ii) products-completed operations including materials designed, furnished, and/or

INITIALS: OWNER WJW CONTRACTOR [Signature]

modified in any way by Contractor (with a separate aggregate limit at least equal to the general aggregate limit); (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) where applicable, property damage resulting from explosion, collapse, or underground (x, c, u) exposures. The CGL Policy shall not exclude from coverage the type of, or nature of, the Work or limit the type of structure on which the Work is to be performed. The CGL policy shall not contain a deductible or self insured retention of more than \$25,000.00. Contractor shall continuously maintain a CGL Policy covering products-completed operations for any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work.

11.2 Other Insurance. Contractor agrees to carry (a) Workers Compensation Insurance that provides statutory benefits and coverage imposed by applicable state or federal law for Contractor's personnel, employees or agents and Contractor shall satisfy all Workers Compensation obligations imposed by law; (b) if Contractor's Work includes design services, Contractor Professional Liability Insurance or Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment; and (c) Commercial Automobile Liability Insurance coverage with limits of not less than \$500,000 per person for bodily injury and \$500,000 property damage per occurrence specifying "all autos" coverage or "all owned, leased, hired or non-owned autos."

11.3 General Requirements Applicable to All Required Insurance. Contractor shall add Owner as a named, Additional Insured, specifically identifying Owner, on the CGL Policy and policies required above covering both ongoing operations and completed operations (equivalent in scope to form CG 2010 1185 or, if unavailable, both forms CG 2010 1001 and CG 2037 1001). Coverage obtained by Contractor with Owner as an additional insured shall be primary, with any insurance of Owner being excess coverage. Insurance coverages required by this Agreement shall contain unqualified provisions to the effect that the policy shall: (i) not be subject to cancellation, non-renewal, adverse change, or reduction of amounts of coverage without thirty (30) days prior written notice to Owner; (ii) be carried continuously from the date of commencement of the Work until expiration of any applicable warranty period, statute of limitation, or statute of repose, whichever is longer, for the filing or asserting of claims, lawsuits or other actions arising out of or relating to the Work; (iii) provide for a waiver of subrogation; (iv) indicate that coverage applies in the state where the Work is being performed; and (v) be with a carrier licensed to do business in the jurisdiction of the Work with a minimum financial strength rating of A and a financial size rating of VII as determined by A.M. Best with insurance companies acceptable to Owner in its sole and absolute discretion. The amounts and types of insurance required by this Agreement are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and other types of insurance that Contractor shall determine to be reasonably necessary to protect itself, the Work, and its obligations under this Agreement.

11.4 Proof of Insured Status. Contractor shall provide evidence that all required insurance is in full force by furnishing Owner with a Certificate of Insurance, or certified copies of the required policies, as requested by Owner.

11.5 Reduction of Price for Non-Compliance. NOTWITHSTANDING THE FOREGOING, IF THE CONTRACTOR FAILS TO PROVIDE OWNER WITH THE REQUIRED EVIDENCE OF INSURANCE, IN ADDITION TO ALL OTHER REMEDIES, OWNER, AT ITS SOLE OPTION, SHALL BE ENTITLED TO: (A) REDUCE THE AMOUNT DUE CONTRACTOR BY THE AMOUNT (ESTABLISHED BY OWNER BY OWNER POLICY WITH RESPECT TO PARTICULAR TRADE CATEGORIES IN ITS SOLE AND ABSOLUTE DISCRETION IN EFFECT AT THE TIME WORK IS PERFORMED) TO COMPENSATE OWNER REASONABLY FOR ANY ADDITIONAL COSTS OF ITS WORKERS COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND OWNER'S INCREASED RISKS AND ADMINISTRATIVE COSTS ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE AND OWNER IS IN NO WAY AN INSURER OF CONTRACTOR, AND/OR ITS EMPLOYEES OR SUBCONTRACTORS. CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS AGREEMENT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

11.6 Subcontractor and Supplier Insurance Obligations. If Contractor subcontracts any of the Work, Contractor warrants and guarantees that each subcontractor shall carry the same insurance required to be carried by Contractor in this Section 11, and that each subcontractor shall name Owner as an additional insured on the required liability policy or policies to the same extent that Contractor is required to do so. Further, Contractor shall require subcontractors and material suppliers to provide to Owner evidence of satisfactory insurance in accordance with the terms of this Agreement.

11.7 Subrogation. Contractor hereby waives, releases and discharges all claims and/or rights of recovery by subrogation or otherwise (including but not limited to claims relating to deductible or self-insured retention clauses, inadequacy of limits of any insurance policy, insolvency of any insurer, limitations or exclusions of coverage) against Owner or any indemnitee, and any of their consultants, subcontractors, agents, employees and representatives. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

12. REMEDIES.

12.1 Owner's Remedies. If Work performed by Contractor pursuant to this Agreement is defective or incomplete, or if another contractor's work, or other property, is damaged by an act or omission of Contractor, its employees, agents, suppliers, or subcontractors, Owner shall have the right to elect, at its sole discretion to: (i) notify Contractor, at which time Contractor shall promptly correct all or any portion of the Work designated by Owner, and replace or repair any other damaged work or property designated by Owner, at Contractor's expense, within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours of notice on a non-emergency basis; or (ii) correct all or any portion of the Work, and replace or repair all or any portion of the other damaged work or property. Owner may retain any sums otherwise due Contractor under any Purchase Order or invoice and apply these sums against such costs of completion, any related costs or damage, including re-inspection fees, with any excess to be paid to Contractor. If the cost of the remedial work exceeds the funds withheld, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and attorneys' fees incurred by Owner, and shall pay this amount to Owner immediately upon demand.

12.2 Right to Withhold or Offset. In addition to the remedies in Subsection 12.1, Owner may withhold payment otherwise due Contractor and offset that payment against any damages or expenses incurred by Owner, if: (i) Contractor does not make prompt and proper payments to its employees, agents, and/or subcontractors, or fails to pay for any labor, materials or equipment furnished to Contractor by third parties; (ii) claims or liens are filed against the job location as a result of Contractor's acts or omissions; (iii) in Owner's discretion, Owner reasonably believes that Contractor's Work is not progressing satisfactorily or that the Work cannot or may not be completed in accordance with the terms of this Agreement; (iv) Contractor fails to perform, or to pay the costs and expenses of warranty service, any indemnity claim, taxes or legal order owed by Contractor under this Agreement; (v) Contractor fails to timely provide the evidence of insurance required pursuant to this Agreement and Owner has not expressly waived that insurance; (vi) Contractor fails to promptly pay any fines or penalties imposed against Owner or Contractor related directly or indirectly to the Work; (vii) Contractor has not provided necessary or adequate tools, material, or equipment for, or cleaned up after, the Work; or (viii) Contractor fails to comply with any other provision of this Agreement, or any agreement between Contractor and Owner's parent company, any subsidiary or affiliate. Without limiting the generality of the foregoing, Owner may set off from amounts owing to Contractor hereunder any amounts owing by Contractor to Owner's parent company, any subsidiary or affiliate, under any agreement between Contractor and any such entity.

12.3 Remedies Not Exclusive. The duties and obligations imposed by this Agreement, and rights and remedies available under this Agreement, shall be independent and cumulative so that no one of them is exclusive, and each is in addition to and not a limitation of duties, obligations,

INITIALS: OWNER DM CONTRACTOR [Signature]

rights, and remedies otherwise imposed or available by law. The assertion by any party of any right or remedy shall not preclude the assertion by such party of any other rights or the seeking of any other remedies allowed.

12.4 Right to Attorneys' Fees and Expenses. Contractor shall pay any and all attorneys' fees and other expenses incurred by Owner in enforcing Contractor's obligations under this Agreement.

13. ALTERNATIVE DISPUTE RESOLUTION.

13.1 Disputes. All disputes, whether existing now or arising in the future between them, related in any way to this Agreement, to Contractor's Work, or to any dispute that Owner or Contractor shall have with any third party related to the Work ("Disputes") shall be subject to Alternative Dispute Resolution. These disputes shall include claims related to the construction or sale of any home or property incorporating the Work, including any claims asserting any alleged defects in the Work or any alleged representations and/or warranties, express or implied, relating to the property and/or the improvements. Contractor shall incorporate all of Section 13 in its agreements with subcontractors and suppliers, requiring them to participate in the dispute resolution process described in to the same extent Contractor is required to participate.

13.2 Mediation. If a Dispute cannot be settled through negotiation, Owner and Contractor may agree in good faith to settle the Dispute by mediation. Cost of mediation shall be shared equally by the parties. Notwithstanding the foregoing, a party need not resort to mediation before seeking other relief.

13.3 Arbitration. If the parties are unable to resolve any Dispute by agreement, regardless of any other choice of law provision in any underlying contract or this Agreement, the Dispute shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. ("FAA"). All demands for arbitration shall be made before the expiration of the applicable statutes of limitations or repose; except that any claim by Owner shall not accrue for purposes of any time limitation for claims until Owner has discovered the claim, or could have discovered it by reasonable diligence. The award rendered by the arbitrator(s) shall be final and binding. A petition to confirm, vacate, modify or correct an award may be filed in any court of competent jurisdiction, but the award may be vacated, modified or corrected only as permitted by the FAA.

13.4 Choice of Mediator and Arbitrator; Number of Arbitrators. Any mediation or arbitration shall be administered and conducted by a mediator or arbitrator(s) mutually agreeable to the parties. Three neutral arbitrators shall be appointed if the Dispute, or the aggregate amount of all Disputes against Owner, is for \$1,000,000 or more, but only one arbitrator shall be appointed if the Dispute is for less than \$1,000,000. If the Dispute or Disputes is to be decided by three arbitrators, then each party shall select a neutral arbitrator within fourteen (14) calendar days of the demand for arbitration is served and the two party-appointed arbitrators shall select a third neutral arbitrator within fourteen (14) calendar days after the two party-appointed arbitrators are selected. If Owner and Contractor cannot agree on the selection of an arbitrator, or if either Owner or Contractor does not appoint an arbitrator or the two party-appointed arbitrators do not select a third arbitrator within the specified time periods, then either Owner or Contractor may file an action with the appropriate court with proper venue and jurisdiction over the dispute to appoint an arbitrator. The AAA/ADA Code of Ethics for Arbitrators in Commercial Disputes (effective March 1, 2004) is applicable to all arbitrations. Any mediation or arbitration shall be conducted in the county where the Work is performed.

13.5 Rules. To the extent not in conflict with the FAA, any mediation and arbitration shall be conducted in accordance with Construction Industry Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA") and shall follow settled law in rendering a decision; except that any mediation or arbitration shall be administered by the mediator or the arbitrator(s) and not by the AAA.

13.6 Consolidation and Joinder. Notwithstanding any provision in Section 13 to the contrary, Owner in its sole discretion may join Contractor in any litigation, mediation, or arbitration initiated by Owner, or against Owner by a third person, so that the rights of all parties (Owner, Contractor, subcontractor, or any third person) can be subject to resolution in a single forum in the same proceeding. Contractor shall be bound by any arbitration procedures and rules accepted by Owner. If multiple lawsuits or arbitrations are commenced, Owner in its sole discretion may consolidate them into a single proceeding. Notwithstanding any other provision of this Section 13, if Owner determines in its sole discretion that a subcontractor or material supplier of Contractor, or any other third party whose presence is required for a full adjudication of the Dispute, cannot be forced to mediate or arbitrate, Owner may elect unilaterally to waive mediation or arbitration and to litigate the Dispute in court with Contractor.

14. TERMINATION.

14.1 Termination by Owner. This Agreement shall remain in full force and effect until terminated in writing by Owner by mailing notice to Contractor. Owner may terminate this Agreement at any time, whether or not Contractor is in default or breach of the Agreement. If the Agreement is terminated by Owner, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement.

14.2 Termination by Contractor. Contractor shall provide one hundred twenty (120) days written notice to Owner before the effective date of any termination by Contractor, and shall perform fully under this Agreement during that notice period.

14.3 Survival. All obligations, duties and warranties by Contractor under this Agreement shall survive termination of this Agreement.

15. CONTRACTOR'S REPRESENTATIONS. Contractor represents to Owner that: (i) the person executing this Agreement on behalf of Contractor is duly authorized and has full power to execute and deliver this Agreement; (ii) all corporate, partnership, or other action requisite for the due execution of this Agreement has been duly and effectively taken or shall be taken before the execution and delivery of this Agreement; (iii) this Agreement in or will be (when executed) a binding obligations of Contractor, enforceable in accordance with its terms; (iv) this Agreement and Contractor's performance, does not and will not violate any provisions of Contractor's constituent or organizational documents, or any contract, agreement, or governmental requirement to which Contractor is subject, and the same do not require the consent or approval of any governmental authority; (v) Contractor has, and each Contractor's employees, agents or subcontractors shall have, the requisite skills, expertise, experience, licenses, and knowledge to perform the Work in compliance with this Agreement; (vi) Contractor is in compliance with all governmental requirements to which it is subject; and (vii) Contractor has the financial ability and resources to perform the Work and all other obligations, duties, and covenants of Contractor under this Agreement.

16. GENERAL CONTRACT PROVISIONS.

16.1 Entire Agreement. This Agreement shall be the entire agreement between Owner and Contractor related to the Work and shall be deemed to amend and supersede all prior Independent Contractor Agreements (other than any Master National Independent Contractor Agreement) or other prior understandings or written or oral agreements, specifically including but not limited to all prior pre-printed standard contractor/subcontractor agreements (including attached exhibits) entered into between Owner and Contractor for the provision of goods or services or both by Contractor relating to the subject matter herein. All current Pricing Schedules and Purchase Orders shall remain valid and binding for the Work and shall be deemed subject to the terms of this Agreement. Any future Pricing Schedules or Purchase Orders entered into hereafter shall also be deemed to be subject to the terms of this Agreement. Past and future Pricing Schedules and Purchase Orders shall control only for the purpose of establishing prices and quantities of sale only. Nothing in any subsequent agreement or document, unless a new Independent Contractor Agreement, shall alter the terms set forth in this Agreement. To the extent possible, this Agreement shall be deemed to supplement the terms of any other agreement or document, unless a new Independent Contractor Agreement. In the event of any conflict between this Agreement and other such documents, this Agreement shall be deemed to control and prevail. Except as otherwise provided in this Agreement, no amendment or supplement to this Agreement shall be valid or binding unless in writing and signed by both Owner and Contractor. Notwithstanding anything in this Subsection to the contrary, this Agreement shall not amend or supersede any Master National Independent Contractor Agreement; but shall supplement its terms. In the event of a conflict, to the extent permitted by

INITIALS: OWNER CONTRACTOR

law, the Master National Independent Contractor Agreement shall control.

16.2 Severability. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion of it shall not affect the validity or enforceability of any other provision or portion.

16.3 Assignability. Contractors' rights, responsibilities, and obligations under this Agreement are not assignable or transferable without the express written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Any attempted assignment shall be null and void. This restriction includes, without limitation, the delegation or subcontracting of any Work or any amounts which may become due to Contractor as a result of the Work. Contractor shall remain fully liable under this Agreement regardless of any consent by Owner to any assignment or delegation of duties by Contractor, including but not limited to any work by a subcontractor. Contractor shall ensure that any subcontractor receives a copy of this Agreement and agrees in writing to be fully responsible for all obligations of Contractor under this Agreement, including but not limited to the insurance and indemnity provisions. Contractor shall also ensure that Owner is an intended third party beneficiary of any subcontractor agreement by including a specific provision to that effect. Contractor shall be responsible for enforcing any warranties given by its subcontractors, suppliers or manufacturers. Nothing contained herein, however, shall create any contractual relationship between Owner and any subcontractor, nor create any obligation on the part of Owner to make payment of any sums to any subcontractor. Subject to the restrictions and prohibitions on assignment set forth in this Subsection, the terms of this Agreement shall be binding on Owner, Contractor, and their respective successors, representatives, heirs and assigns. Owner may freely assign this Agreement, in whole or in part.

16.4 Conflicts with Purchase Orders or Other Agreements. If this Agreement conflicts with the terms of any Purchase Order or any other agreement or document pertaining to the Work, the terms of this Agreement shall control.

16.5 Waiver. No act or conduct other than a specific, written waiver of a right shall be deemed a waiver by Owner. No delay or failure by Owner to exercise any right under this Agreement, and no partial or single exercise of that right, will waive that or any other right except by written agreement executed by Owner.

16.6 Choice of Law. This Agreement shall be governed by the law of the State of South Carolina.

17. CONFIDENTIALITY. Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of any of that information to any third party. Immediately upon request by Owner, Contractor shall return any and all confidential material or proprietary property or documents to Owner.

18. NOTICES. All notices required or permitted pursuant to this Agreement or otherwise shall be in writing and shall be delivered as follows: to Contractor at Contractor's business address as shown on page one (1) of this Agreement; to Owner through Owner's official Registered Agent for service of legal process in the state where the Work is performed at that Registered Agent's registered office. Notices may be given by personal delivery, facsimile, commercial overnight delivery service, personal delivery or ordinary mail and shall be deemed to be received three (3) business days after deposit, postage prepaid, in the U.S. Mail when sent registered or certified mail, return receipt requested, the following day if sent timely by commercial overnight delivery service, and upon confirmation if sent by facsimile transmission or by personal delivery. Rejection, refusal to accept or the inability to deliver because of changed address shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

19. MISCELLANEOUS. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of its paragraphs, sections or subsections.

SOUTH CAROLINA VERSION (REV. 12 APRIL 2013)

INITIALS: OWNER , CONTRACTOR



Exhibit "A" Part I-General Scope Of Work

General & Miscellaneous

- Mobilization
- Layout and staking
- Build construction entrance
- Asbuilts
- Installation of stop and street signs
- Installation of conduit

Clearing and Demolition

- Clear and grub site

Drainage

- Installation of RCP
- Insulation of HDPE
- Install catch basins, curb inlets, and junction boxes

Erosion Control

- Tree protection
- Temporary gravel
- Silt fence
- Seeding and sod
- Rip-rap sediment basin

Earthwork

- Strip/respreads topsoil
- Off-site fill
- Demucking and backfill
- Rough grade

Initials:

Owner:

A handwritten signature in black ink, appearing to be "J.M.", written over a horizontal line.

Contractor:

A handwritten signature in black ink, appearing to be "J.H.", written over a horizontal line.

Grading

- Fine grade for curb and base
- Fine grade shoulders and easements

Asphalt Paving & Pavement Marking

- Asphalt surface and binder

Concrete

- Concrete curb
- Installation of handicap ramps

Utilities

- Utility layout and record drawings

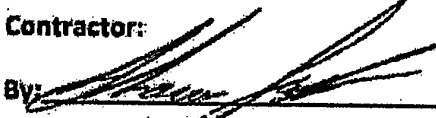
Sanitary Sewer

- Installation of sewer
- Pump stations

Water Distribution

- Installation of water

Owner: _____
By: 
Name: Ron Bunner
Title: Assistant Vice-President
Date: 12/21/13

Contractor: _____
By: 
Name: Thomas L. Lister
Title: Owner
Date: 11-26-13

Initials: Owner: 

Contractor: 