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August 8, 2025



**VIA E-MAIL & US MAIL**
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: *Natalie Zitek, Individually, and on Behalf of All Others Similarly Situated v. DR Horton, Inc.*
Civil Action No.: 2019-CP-04-01942 (Anderson County)
Appellate No.: 2023-001401
R&L File No.: 28102.0051

Dear Ms. Kitchings:

Enclosed, please find Respondent Builder Services Group, Inc d/b/a Gale Contractor Services' *Final Brief* filing in the above referenced matter.

Should you have any questions or require anything further, please do not hesitate to contact me.

With kindest regards, I am

Very truly yours,

*s/Alicia N. Bolyard, Esq.*
Alicia N. Bolyard, Esq.
For the Firm

ANB/kbs
Enclosures

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

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Case No. 2019CP011942
APPEAL NO. 2023-001401

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# FINAL BRIEF OF RESPONDENT BUILDER SERVICES GROUP, INC. D/B/A GALE CONTRACTOR SERVICES

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

v.

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

D.R. Horton, Inc., …….Appellant,

vs

AJ Landscaping & Grading LLC, A/K/A AJ Landscaping & Grading, Inc; Allpro Textures, LCC; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc., A/K/A ACP Concrete, Inc.; A&J Framing, Inc; Alpha E.M.C; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughan Lumber Co., Inc.; BKF Builders, Inc; Builders Designhouse, LLC; BMC East, LLC D/B/A Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC,A/K/A Builders Firstsource, Inc; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc.; Caryl Mechanicals, Inc.; Cannaday Siding and Gutter, Inc; Cortes Painting, LLC; CBU Enterprises, Inc.; CPI Security Systems, Inc.; Dom Group, LLC; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc.; A/K/A Galloway-Bell, Inc. II BGET Floored, LLC; GBS Building Supply-Us LBM, LLC, A/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danler, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.;

L&M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC. A/K/A M&L General Construction, Inc.; M&Lreyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC, NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, LLC; P&L Enterprises, LLC; Probuild Company, A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; TopBuild Home Services, Inc, A/K/A Gale Contractor Services; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc., Dupree Plumbing Company, Inc.; Willow Tree Landscaping, Inc.;
……Third-Party Defendants,

of which Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractor Services)[1]; and IBP Asset, LLC d/b/a Blue Ridge Building Products; ……Respondents

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

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II. The trial court properly applied the "clear and unequivocal" standard to the addendum contracts' provisions referring to indemnity and correctly decided that the provisions violate South Carolina public policy even if the addendum contracts apply to respondent's work at Rose Hill.

III. The trial court properly granted summary judgment to respondent on Appellant's breach of contract cause of action.

## STATEMENT OF THE CASE

Plaintiff Natalie Zitek, individually, and on behalf of all others similarly situated ("Plaintiff" or "Zitek"), filed a Complaint[2] against Appellant D.R. Horton, Inc. ("Appellant" or "D.R. Horton"), as the developer and general contractor for the Rose Hill subdivision located in Anderson County, South Carolina ("Rose Hill"). (Record pp. 92-106) Plaintiff's Complaint alleged failures in load-bearing components, exterior cladding systems, and water intrusion via doors, windows, and envelope components. (Record p. 96) Plaintiff brought claims against Appellant for negligence, gross negligence, breach of implied warranty, and violations of the South Carolina Unfair Trade Practices Act. (Record pp. 103-106) Plaintiff moved for class certification, which was granted. (Record pp. 1-14) The class totaled approximately 234 homes. (Record pp. 1-14)

On February 23, 2022, D.R. Horton filed a Second Amended Answer and Third-Party Complaint, naming Builder Services Group, Inc. d/b/a Gale Contractor Services ("Respondent" or "Gale") as a Third-Party Defendant. (Record pp. 298-324) In its Third-Party Complaint, D.R. Horton demanded that Gale defend D.R. Horton in this lawsuit and indemnify D.R. Horton for the damages it has and will sustain as a result of Gale's work in the Rose Hill subdivision. (Record pp. 318-320). Appellant also brought causes of action against Gale for contractual indemnification, equitable indemnification, breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness. (Record pp. 313-324) Gale's scope of work at Rose Hill consisted of installing garage doors, gutters and downspouts, and batt and blown insulation. (Record pp. 632-697) This scope of work is derived

[2] Plaintiff sent a Notice and Opportunity to Cure ("NOC") letter to Appellant on December 11, 2019. This letter implicated Respondent's work by noting "12. MEP: Inadequate . . . insulation in attics . . ." NOC Letter at p. 2.

from Gale's work tickets and purchase orders, which identify, *inter alia*, all of the work that Gale performed at Rose Hill, the dates the work was performed, and how much Gale was paid for the work. (Record pp. 632-697) Gale did not work on every home in Rose Hill. (Id.) Nor did Gale install garage doors and gutters, downspouts, and batt and blown insulation in each home because its scope of work varied. (Id.)

On April 21, 2023, during a hearing before the Honorable R. Scott Sprouse, Plaintiff's counsel admitted that Plaintiff was making no claims regarding Gale's scope of work at Rose Hill. (Record p. 1425).

On May 1, 2023, Respondent filed its Motion for Summary Judgment (the "Motion") and a corresponding memorandum in support on July 10, 2023, requesting the Trial Court grant summary judgment as to all of D.R. Horton's crossclaims as it was clear from the Plaintiff that Gale's scope of work was not implicated in her damages. (Record pp. 600-603) and (Record pp. 604- 830) On July 20, 2023, Plaintiff filed a written stipulation memorializing her counsel's admission that Plaintiff was making no claims related to Gale's scope of work at the April 21, 2023, hearing. (Record pp. 969-971)

On July 21, 2023, the trial court heard arguments on the motions for summary judgment filed by various third-party defendants, including Gale's Motion. (Record pp. 1467- 1483) The trial court dismissed D.R. Horton's negligence and breach of warranty claims against Gale during oral arguments and took Gale's Motion with respect to the parties' contractual dispute under advisement. (Record pp. 1467-1483).

The trial court issued a Form 4 Order granting summary judgment to Gale on July 28, 2023 (the "Form 4 Order"). (Record pp. 1115-1117) The Form 4 Order did not explain why Respondent's Motion was granted; it only noted that the Motion was granted. (Id.)

On August 7, 2023, the trial court issued an Order granting summary judgment to Gale (the "Full Order"). (Record pp. 1070-1080). The Full Order provides the reasoning for granting Gale's Motion, which included the following: Plaintiff stipulated that there were no allegations regarding Gale's work at Rose Hill; Appellant presented no evidence of a "standard agreement" with Gale that is referenced in the Addendum Contracts; Appellant presented no evidence that the Addendum Contracts encompass the construction at Rose Hill; Appellant presented no evidence that it incurred any damages resulting from Respondent's work; Appellant presented no evidence that Gale was bound by the Indemnification Clause referenced in its Tender; and Appellant's claim for contractual indemnity failed pursuant to Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (2018) and violated public policy. (Id.) Appellant moved the Court to reconsider its August 7, 2023, Order and the Court denied the Motion to Reconsider. (Record pp. 1081-1084) D.R. has never produced an Independent Contractor Agreement with Gale with respect to Rose Hill during the entirety of this litigation.

## STANDARD OF REVIEW

In reviewing a motion for summary judgment, the Court of Appeals applies the same standard applied by the trial court under Rule 56(c). Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Summary judgment in favor of the movant "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 a judgment as a matter of law." S.C. R. Civ. P. 56(c). A party opposing summary judgment must show more than metaphysical doubt as to the material facts and must instead come forward with specific facts showing that there is a genuine issue for trial. Baughman v. AT&T,

306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). A "scintilla" of evidence is not enough to overcome a motion for summary judgment. Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 461, 892 S.E.2d 297, 300 (2023). While the Court must view all reasonable inferences in the light most favorable to the non-moving party, where "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Ellis v. Davidson, 358 S.C. 509, 517–18, 595 S.E.2d 817, 822 (Ct. App. 2004).

## COUNTER STATEMENT OF FACTS

Gale objects to numerous self-serving and argumentative comments in Appellant's Summary of Facts including, but not limited to the following:

Appellant characterized Gale as a sophisticated business/contractor throughout its brief. There is no evidence in the record that was cited to support that characterization. Appellant asserts that "No one forced the Respondents to sign these contracts and they have not repaid the Appellant one dime of what the Appellant paid the Respondents." Again, the Appellant failed to cite anything in the record to support this statement. Additionally, there is no evidence in the record that supports DR Horton's claim of reputational harm. Appellant asserts multiple facts and arguments related to insurance and the duty to defend that do not belong in this case.

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

the Standard Agreement was not provided only Addendum Contracts) It is clear that there has been no Independent Contractor Agreement or Standard Agreement with respect to Rose Hill ever produced in this case.

## ARGUMENT

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

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

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

A breach of contract claim is a failure to perform a contractual promise without legal excuse. The action is one at law, predicated on the existence of a contract. *See* Sterling Development Co. v. Collins, 309 S.C. 237, 421 S.E.2d 402, 404 (1992); Cain v. United States Insurance, Co., 232 S.C. 397, 102 S.E.2d 360 (1958). Any modification of a written contract must satisfy all requisites of a valid contract. Bishop Realty and Rentals, Inc. v. Perk, Inc., 292 S.C. 182, 355 S.E. (2d) 298 (S.C. App. 1987), *cert. denied*, 293 S.C. 538, 362 S.E. (2d) 26 (1987).

"Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law." Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 577, 762 S.E.2d 696, 700 (2014) (quoting Capital City Garage & Tire Co. v. Elec. Storage Battery Co., 113 S.C. 352, 362, 101 S.E. 838, 841 (1920)). A binding, valid contract must exist for there to be a cause of action for breach of contract. *Id*. The party asserting such a claim must, therefore, allege and prove each material element of the contract sued on. Rabon v. State Financial Corp., 203 S.C. 183, 26 S.E.2d 501

(1943).

A contract only arises when there is actual agreement by parties in which they demonstrate mutual intent to be bound. Electro-Lab of Aiken, Inc. v. Sharp Construction Co. of Sumter, Inc., 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004). South Carolina common law requires that there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement in order to have a valid and enforceable contract. Hughes v. Edwards, 265 S.C. 529, 220 S.E. (2d) 231 (1975). The required "meeting of minds" is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention that has been made known or which, from all the circumstances, should be known. McClintock v. Skelly Oil Co., 232 Mo. App. 1204, 114 S.W.2d 181 (1938). A breach of contract claim is a failure to perform a contractual promise without legal excuse. *See* Sterling Development Co. v. Collins, 309 S.C. 237, 421 S.E.2d 402, 404 (1992); Cain v. United States Insurance, Co., 232 S.C. 397, 102 S.E.2d 360 (1958).

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

The universe of documents upon which Appellant relies for its claims against Gale are: 1) The "First Amendment to Master Addendum to Independent Contractor Agreement," executed on March 8, 2006 (Record pp. 747-769); 2) the "Master Addendum to Independent Contractor Agreement," executed on October 23, 2015 (Id.) (the foregoing two documents are collectively referred to herein as the "Addendum Contracts"); and 3) Plaintiff's Notice and Opportunity to Cure Improper Construction Conditions and Resulting Damages correspondence served December 11, 2019 (Record pp. 770-774) .

Appellant contends that an indemnity provision in a purported Independent Contractor Agreement with Gale creates Gale's duty to defend and indemnify D.R. Horton and reimburse it

for defense costs related to the litigation of this case, but it has never produced that Agreement. (Record pp. 831-898; Record pp. 604-830) In D.R. Horton's March 17, 2023 "Indemnification and Additional Insured Tender"(Record pp.775-829) (the "Tender Letter to Gale 3/17/2023"), D.R. Horton asserts that Gale entered into an Independent Contractor Agreement with the following **irrelevant** indemnification clause:

> To the fullest extent remitted by law, contractor shall protect, defend, indemnify, and hold owner and owner's parent corporation, subsidiaries, affiliates, successors and assigns, and each of these entities' respective officers, directors, partners, employees, agents and insurers (individually or collectively "Indemnitee"), free and harmless from and against any and all claims, demands, lawsuits or other litigation, … on account of damage to or loss of tangible or intangible property. Contractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify and is triggered immediately when any claim, demand, or other assertion of liability is made against indemnitee which potentially or arguably is subject to contractor's duty to indemnify, regardless of contractor's ultimate liability for indemnity. Contractor must defend indemnitee even where the allegations against indemnitee are ambiguous or incomplete with respect to the issue of contractor's duty to indemnify. The defense duty is triggered by allegations in a lawsuit or other similar action, regardless of whether they are groundless, false or fraudulent, or alternatively by any facts (extrinsic to the allegations) not plead, or not pled with specificity, by the claimant. Once the duty to defend is triggered, contractor is obligated to defend the entire action, lawsuit, arbitration, or other litigation, including any claims therein not subject to indemnity by contractor.

(Record pp. 775-829)

Again, **D.R. Horton failed to produce a copy of any Independent Contractor Agreement with Gale,** or any agreement whatsoever, that contains this indemnification clause. (Record pp. 831-898; Record pp. 604-830).

The only contract documents produced by D.R. Horton are the Addendum Contracts. (Record pp. 747-769) In the Addendum Contracts the indemnification language states in pertinent part:

> Indemnity and Insurance. Any defense, indemnification hold harmless or similar obligation (collectively "Indemnification") **imposed on Contractor under the Standard Agreement** shall be limited to any claims, demands, damages, defense

> expenses (including attorneys fees and litigation costs) or liabilities (collectively "Loss") covered by the terms of the Indemnification in the Standard Agreement that are caused by Contractor's negligence or the negligence of its subcontractors or its Work (**including any liability of Builder for its supervision of Contractor**, Contractor's subcontractors, or Contractor's Work). Other than as set forth above, Contractor's Indemnification shall not apply (based on indemnity, insurance, warranty, strict liability or otherwise) to the extent that the Loss arises out of the work, negligence or misconduct of Builder or any other indemnitee as defined in the Standard Agreement, third parties, or Builder's (or any other indemnitee's) activities related to supervision of third parties. Except as set forth above, Contractor shall not be responsible to the extent that the Loss arises out of (a) accident, misuse, abuse or neglect by someone other than Contractor or its agents; or (b) alteration, repair or attempted alteration or repair by anyone other than Contractor or its authorized agent.
>
> Where Builder or other indemnitee as defined under the Standard Agreement (collectively "Indemnitee") demands indemnification for Loss falling within the terms of this indemnity, Builder may retain counsel of Builder's own choosing that is reasonably acceptable to Contractor. **Contractor shall then have the duty to reimburse Builder only for the proportion of Builder's defense expenses that are attributable to Loss caused by Contractor** and not excluded from indemnification in the preceding paragraph. The proportion of Builder's defense costs to be reimbursed by Contractor shall be calculated by Builder based upon Builder's reasonable and good faith allocation of the proportion of the Loss attributable to Contractor's conduct for which indemnity is owed in the preceding paragraph. Contractor's proportion of the defense costs may be subject to reasonable adjustment (upward or downward) in the event the original allocation provided for in this paragraph proves to be inequitable. In such case, the parties shall reimburse each other accordingly. In the event of a judgment or award against an Indemnitee, Contractor shall indemnify Indemnitee for that portion of the judgment or award attributable to Loss caused by Contractor and not excluded from indemnification in the preceding paragraph. In the event of a settlement, Contractor shall only be responsible for that portion of the settlement attributable to Loss allegedly caused by Contractor and not excluded from indemnification in the preceding paragraph; but no such settlement shall be entered into without Contractor's consent, such consent not to be unreasonably withheld.

( Record pp. 747-769) (emphasis added). By the plain and express language of the Addendum Contracts, any indemnification obligation imposed on Gale is based on the existence of a "Standard Agreement," also referred to herein as an Independent Contractor Agreement (ICA). (Id.) D.R. Horton cannot prove the existence or terms of any such "Standard Agreement" because it never produced a copy of the same. Thus, there is no indemnification clause for this Court to enforce.

D.R. Horton also relies on Plaintiff's NOC Letter[3] as justification for a contractual indemnification demand. (Record pp.775-829). While the Plaintiffs' NOC Letter cites "missing/inadequate insulation at exterior walls" and "insufficient insulation in attics" (Record pp. 770-774), discovery revealed that neither Plaintiff nor any of her experts had any criticisms of Gale's work. (Record pp.713-730) Per the admission of her counsel, the Class did not seek compensation for damages related to Gale's scope of work (Record pp. 969-971).

The trial court correctly found that Appellant failed to produce any evidence of an enforceable contract with respect to Gale's work at Rose Hill.

### *3. There was no meeting of minds as to any Independent Contractor Agreement or "Standard Agreement" concerning Rose Hill.*

Appellant argues that because D.R. Horton had previous and subsequent contractual relationships with Gale as to other projects, this Court must infer that a contract between Gale and D.R. Horton as to Rose Hill exists. That argument is meritless. Any evidence of contracts between Appellant and Gale as to other projects does not equate to evidence of an enforceable contract between Appellant and Gale concerning Rose Hill. There must be a meeting of minds between them with regard to *all* essential and material terms of the agreement for there to be a valid and enforceable contract between Appellant and Gale concerning Rose Hill. Hughes v. Edwards, 265 S.C. 529, 220 S.E. (2d) 231 (1975). The Appellant has failed to show even a scintilla of evidence that an enforceable contract with Gale even exists with respect to Rose Hill.

Appellant presented the trial court with six versions of an Independent Contractor Agreement it had with various subcontractors other than Gale. (Record pp. 854-898) D.R. Horton did not, and cannot, show that Gale executed or otherwise agreed to an Independent Contractor

[3] D.R. Horton enclosed the NOC Letter with its March 17, 2023 Tender, which was more three years and three months after the date of the NOC Letter. (Record pp.775-829) D.R. Horton did not offer any evidence that it sent the NOC Letter to Gale prior to its March 17, 2023 Tender Letter.

Agreement in any manner. (Record pp. 854-898). D.R. Horton's counsel also admitted at the hearing on Gale's Motion that such agreements with other subcontractors are different from the non-existent Independent Contractor Agreement (or "Standard Agreement") that D.R. Horton seeks to enforce against Gale and agreed that those other agreements should not be used for comparison. (Record pp.1476-1477). Indeed, the very fact that D.R. Horton offered up *six* agreements with different terms shows that each contract is a unique document with its own terms and conditions. Frankly, even D.R. Horton does not know what terms such an agreement with Gale allegedly contains because it does not have the agreement. Thus, there can be no meeting of the minds between Gale and D.R. Horton on the terms of an ICA relative to Rose Hill.

Appellant also contends that Gale knew its obligations under a non-existent Independent Contractor Agreement simply because it performed work at Rose Hill. But the terms of any such purported agreement are unknown, necessarily ambiguous and uncertain, and therefore are clearly unenforceable. Simply put, Appellant has not produced an ICA or "Standard Agreement" with Gale for Rose Hill, and the trial court correctly found that the ambiguous terms of this purported agreement are not enforceable.

### B. Appellant cannot prove that the Addendum Contracts apply to Gale's work at Rose Hill.

Appellant contends that, even without production of an underlying ICA or "Standard Agreement" the Court should bind Gale to the terms of the Addendum Contracts without any evidence that these Addendum Contracts apply to Gale's work at Rose Hill. Axiomatically, the terms of a contract speak for themselves. C.A.N. Enters., Inc., 296 S.C at 377, 373 S.E.2d at 586. Without an underlying Independent Contractor Agreement or "Standard Agreement," what are the Addendum Contracts addendums to? The Addendum Contracts refer to a "Standard Agreement" and purport to modify or limit such an agreement. Any modification of a written contract must

satisfy all requisites of a valid contract. Bishop Realty and Rentals, Inc. v. Perk, Inc., 292 S.C. 182, 355 S.E.2d 298 (S.C. App. 1987), *cert. denied*, 293 S.C. 538, 362 S.E.2d 26 (1987). The Addendum Contracts do not satisfy all the requirements of a valid and enforceable contract.

First, the Addendum Contracts do not provide any terms suggesting that they apply to Gale's work at Rose Hill. (Record pp. 747-769 and Record p. 830) Without an underlying "Standard Agreement," the Addendum Contracts do not even define the scope of work Gale was hired to perform. (Record pp. 747-769) There was no "meeting of minds" in the Addendum Contracts that Gale was to install gutters and downspouts, garage doors, and insulation at Rose Hill. Furthermore, Appellant's own Rule 30(b)(6) designee agreed that he did not know if the Addendum Contracts applied to Gale's work at Rose Hill:

> Q. Do you know if this amendment would apply to the construction at the Rose Hill project?
>
> A. No, ma'am. No.
>
> Q. Why do you not know whether or not that addendum or amendment applies to the construction at Rose Hill?
>
> A. Because I'm not familiar with what work they did in Rose Hill.
>
> Q. But looking at that contract alone, you don't know if it applied to the work at Rose Hill?
>
> A. Correct.

(Record p. 830).

In addition, the lack of an underlying "Standard Agreement" to which the Addendum Contracts explicitly refer inherently creates an issue of ambiguity. The contract governing the relationship between Gale and Appellant at Rose Hill, including any indemnity obligations imposed on Gale relative to the same, are entirely unknown. Any such ambiguity must be

construed against the drafter – Appellant D.R. Horton. A court construes any doubts and ambiguities in an agreement against the drafter of the agreement. Ecclesiastes Prod. Ministries v. Outparcel Assocs., *LLC*, 374 S.C. 483, 499–500, 649 S.E.2d 494, 502 (Ct. App.2007). ("Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." (quoting Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (internal quotation marks omitted)).

Read as a whole, the Addendum Contracts are ambiguous as to what scope of work is contemplated. McGill v. Moore, 381 S.C. 179 at 185, 672 S.E.2d 571 at 574 (citation omitted) ("A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause."). Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract. Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975) (citation omitted). Nowhere in the Addendum Contracts is the Rose Hill subdivision or the scope of work Gale was hired to perform at Rose Hill even mentioned. (Record pp. 747-769 and Record p. 830)

Second, D.R. Horton failed to produce any contract Gale entered into containing the Indemnification clause cited in its Tender. It strains reason for D.R. Horton to assert that Gale is bound by an indemnification clause in a contract that has never been produced and that D.R. Horton cannot prove Gale agreed to.

Appellant's arguments based on the indemnification clause cited in the Tender are not valid as a matter of law. Accordingly, the trial court properly found that Gale was not bound by the

indemnification clause referenced in its Tender or the Addendum Contracts because Appellant failed to prove that the contract purportedly containing the indemnification clause exists and that the Addendum Contracts apply to Gale's work at Rose Hill. The trial court correctly granted summary judgment to Gale.

## II. THE TRIAL COURT PROPERLY APPLIED THE "CLEAR AND UNEQUIVOCAL" STANDARD TO THE ADDENDUM CONTRACTS' PROVISIONS REFERRING TO INDEMNITY AND CORRECTLY DECIDED THAT THE PROVISIONS VIOLATE SOUTH CAROLINA PUBLIC POLICY EVEN IF THE ADDENDUM CONTRACTS APPLY TO RESPONDENT'S WORK AT ROSE HILL.

### A. The trial court properly applied the "clear and unequivocal" standard to the Addendum Contracts because D.R. Horton is seeking indemnification from Gale for its own negligence.

#### *1. South Carolina mandates that the intention to protect an indemnitee from the consequences of its own negligence in an indemnity agreement must be expressed in clear and unequivocal terms.*

As a matter of law, D.R. Horton's claim for indemnity for its own negligence fails if the language contained in the indemnity clause does not clearly and unequivocally provide indemnity for D.R. Horton's own negligence. *See* Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018). While South Carolina courts generally construe an indemnification provision under typical contract construction rules, *e.g.*, Johnson v. Little, 426 S.C. 423, 430, 827 S.E.2d 207, 211 (Ct. App. 2019) (quoting Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 650, 819 S.E.2d 166, 172 (Ct. App. 2018)), an indemnity provision in a contract purporting to relieve an indemnitee from the consequences of its own negligence is strictly construed, Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (citing Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)). In other words, "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***." *Id.* (quoting Fed. Pac. Elec., 298 S.C. at 26, 378 S.E.2d at 57) (internal quotations omitted) (emphasis added); Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 490, 763 S.E.2d 19, 21 (2014) (quoting Laurens, 355 S.C. at 111, 584 S.E.2d at 379); Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170 (Ct. App. 2018) (quoting Fed. Pac. Elec., 298 S.C. at 26, 378 S.E.2d at 57); Hazel v. Blitz U.S.A., Inc., 425 S.C. 361, 373, 822 S.E.2d 338, 344 (Ct. App. 2018) (quoting Fed. Pac. Elec., 298 S.C. at 26, 378 S.E.2d at 57).

The clear and unequivocal standard applies any time the indemnitee seeks indemnification for its own negligence, whether sole or concurrent. Concord & Cumberland, 424 S.C. at 646, 649, 819 S.W.2d at 170, 172; Laurens, 355 S.C. at 110-12, 584 S.W.2d at 378-79 (applying the clear and unequivocal standard to an indemnitee's attempt to seek indemnification for its concurrent negligence). Indeed, the term "own negligence" can be viewed two ways—the sole or concurrent negligence of Appellant. Concord & Cumberland, 424 S.C. at 646, 819 S.E.2d at 170 ("the circuit court properly applied the clear and unequivocal standard because it applies whether Superior sought indemnification for its sole or concurrent negligence."). Appellant's sole negligence would be areas in which Appellant—and only Appellant—caused injury to Plaintiff; for example, areas in which *only* the general contractor and developer could be (or was) negligent. *See* O'Neal v. Carolina Farm Supply, Inc., 279 S.C. 490, 494, 309 S.E.2d 776, 779 (1983) (defining sole negligence). Appellant's concurrent negligence would be areas where Appellant's negligence *combined* with Respondent's negligence to create the single harm—for example, where the actions of both Appellant and Respondent caused injury to Plaintiff. Id.

The public policy behind the heightened standard applied to such indemnification provisions is deterrence:

> The policy basis for the negligence rule is simple—barring indemnification when the indemnitee is at fault for the damages serves to deter negligent conduct in the future, for the indemnitee will know that the indemnification agreement will not save it from liability if it fails to act with due care.

Ashley II, 409 S.C. at 490-91, 763 S.E.2d at 21; Concord & Cumberland, 424 S.C. at 649, 819 S.W.2d at 172.

***2. The "indemnification" provision in the Addendum Contracts fails the clear and unequivocal standard.***

Concord & Cumberland applies to the interpretation of the Addendum Contracts because, contrary to Appellant's assertions, Appellant *is* seeking indemnity for its own negligence. The "indemnification" provision at issue does not clearly and unequivocally express an intention for Gale to indemnify Appellant for Appellant's 's own negligence. The provision provides, in relevant part, as follows:

> Indemnity and Insurance. Any defense, indemnification hold harmless or similar obligation (collectively "Indemnification") imposed on Contractor under the Standard Agreement shall be limited to any claims, demands, damages, defense expenses (including attorneys fees and litigation costs) or liabilities (collectively "Loss") covered by the terms of the **Indemnification in the Standard Agreement that are caused by Contractor's negligence or the negligence of its subcontractors or its Work (including any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's Work**)….
>
> **Where Builder or other indemnitee as defined under the Standard Agreement** (collectively "Indemnitee") demands indemnification for Loss falling within the terms of this indemnity, Builder may retain counsel of Builder's own choosing that is reasonably acceptable to Contractor. **Contractor shall then have the duty to reimburse Builder only for the proportion of Builder's defense expenses that are attributable to Loss caused by Contractor and not excluded from indemnification in the preceding paragraph**. . . .

(Record pp. 747-769) (emphasis added). This provision, however, is not really an indemnification provision at all. Instead, by its very terms, it is a limitation on a purported indemnity provision contained in another document—the "Standard Agreement." As set forth in Section I, *supra*, Gale is not bound by a "Standard Agreement" or any of its unknown provisions.

Even if this provision were a stand-alone indemnification provision or if it were found that Gale is bound by the non-existent "Standard Agreement," the subject provision itself does not express any intention that Gale indemnify D.R. Horton for D.R. Horton's negligence. Gale's purported obligation to indemnify is limited to "any claims, demands, damages, defense expenses . . . or liabilities . . . that are caused by Contractor's [Gale] negligence or the negligence of its subcontractors or its Work." (Record pp. 747-769) The provision's terms clearly and unambiguously apply only to the negligence of Gale, Gale's subcontractors, or Gale's "Work." (Record pp. 747-769) The provision also includes "any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's work" (via parenthetical) within the ambit of Gale's purported indemnification obligation. (Record pp. 747-769) "Liability" and "supervision" are broad and undefined terms however, those terms are included within Gale's purported obligations. Such an inclusion is internally contradictory with the limitation already imposed, namely, that indemnification is limited to "Contractor's negligence or the negligence of its subcontractors or its Work." (Record pp. 747-769) Stated another way, the clause in the parenthetical is outside of the limitation group already set forth and cannot be "include[ed]" in that group. These undefined terms used by D.R. Horton do not express a clear and unequivocal intent to hold Gale liable for D.R. Horton's own negligence. See also, e.g., Including, OXFORD ENGLISH DICTIONARY (2016) ("Used to indicate that the specified person or thing is part of the whole group or category being considered"); *Include*, MERRIAM-WEBSTER, https://www.merriam-

webster.com/dictionary/including (last visited March 19, 2024); *Include*, Black's Law Dictionary (8th ed. 2004 and 6th ed. 1990) ("to contain as part of something").

Moreover, the provision expressly provides that "Contractor shall then have the duty to reimburse Builder ***only*** for the proportion of Builder's defense expenses that are attributable to Loss caused by Contractor" (emphasis added). Reading the provision as a whole, nothing about this attempt by D.R. Horton to include its "supervision" or "liability" within Gale's negligence, the negligence of its subcontractors, or Gale's Work clearly and unequivocally expresses an intent that Gale be held liable for D.R. Horton's own negligence. *E.g.*, Concord & Cumberland, 424 S.C. at 654, 819 S.E.2d at 174 (must read the indemnity provision as a whole).

***3. The "indemnification" provision in the Addendum Contracts is unenforceable as a matter of law and public policy.***

Under South Carolina law, a contract that purports to indemnify an indemnitee for the indemnitee's sole negligence is unenforceable. Concord & Cumberland, 424 S.C. at 650, 819 S.E.2d at 172 (citing S.C. Code Ann. § 32-2-10 (2007)). This section of the South Carolina Code of Laws provides, in relevant part, 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. D.R. Horton is the only party responsible for its "supervision" of Gale, Gale's subcontractors, and Gale's Work. So, as a matter of law and South Carolina public policy, the attempt by D.R. Horton to have Gale indemnify D.R. Horton for D.R. Horton's sole negligence is unenforceable. Thus, rendering the entire indemnity agreement unenforceable.

#### *4. Even if the "indemnification" provision in the Addendum Contracts is enforceable, it has not been triggered.*

Even if the Court found that the subject provision is enforceable, which it should not, Gale's indemnity obligation is only triggered if Gale or its subcontractors engaged in negligent acts or Gale's "Work" was performed negligently. ( Record pp. 747-769) Gale's scope of work on the Rose Hill project was limited to installation of insulation, garage doors, and gutters and downspouts. (Record pp. 632-697) The summary-judgment record, including pleadings, stipulations, and admissions, conclusively rules out any defects with the installation of any of those items. (Record pp. 42-52 and Record pp. 969-971) As a result, Gale's acts and work were not negligent, and D.R. Horton is not entitled to indemnification.

## III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT ON APPELLANT'S BREACH OF CONTRACT CAUSE OF ACTION

### A. Appellant abandoned its argument because it failed to offer citations to supporting authority.

Appellant abandoned any argument that the trial court improperly concluded that D.R. Horton was not damaged by Respondent's alleged breach of contract. See Appellant's Statement of Issue No. 3. Appellant offered no citations to supporting authority and instead offered only conclusory allegations that failed to meet the required standard to properly argue an issue on appeal. Arguments that are not adequately briefed are abandoned. Hotel & Motel Holdings, LLC v. BJC Enters., LLC, 414 S.C. 635, 656, 780 S.E.2d 263, 275 (2015) (citing Rule 208(b)(1)(D), SCACR and other authority for this proposition); State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (the failure to provide arguments or supporting authority for an issue renders it abandoned). See also Rule 208(b)(1)(D), SCAR ("At the head of

each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority."). As Appellant has abandoned this issue, the Court should not consider it.

**B. Even if Appellant did not abandon the issue, the trial court properly granted summary judgment to Gale on Appellant's breach of contract claim because it was a disguised indemnity claim.**

Even if this Court finds that Appellant properly preserved the issue as to its breach of contract claim, the trial court did not err in dismissing this claim. This Court has held that disguised equitable indemnity claims should be summarily dismissed. Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 619, 776 S.E.2d 426, 428 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 633, 776 S.E.2d 434, 436 (Ct. App. 2015). In Stoneledge, this Court held that a general contractor cannot maintain a breach of contract cause of action against its subcontractors when that cause of action is merely a disguised indemnity claim. Stoneledge, 413 S.C. at 639, 776 S.E.2d at 439.

Here, in D.R. Horton's Third-Party Complaint, Appellant alleged:

> 115. To the extent that Plaintiff proves that the work was not performed correctly, Subcontractors materially breached the Agreements in failing to construct the Homes in Rose Hill in accordance with contract requirements, industry standards, and/or building code requirements so as to avoid construction defects.
>
> 116. D.R. Horton is entitled to judgment against Subcontractors for breach of contract plus costs, expenses, attorneys' fees, and other damages associated therewith.

(Record p. 321) Appellant did not present any evidence of a breach by Gale in completing its scope of work proficiently. (Record pp. 1480-1481)

Appellant's allegations are almost identical to the allegations this Court found to be disguised indemnity claims. *See* Stoneledge, at 635–39, 776 S.E.2d at 437–39. Here and in Stoneledge, a GC/developer filed claims against subcontractors for negligence, breach of contract,

breach of warranty, as well as contractual and equitable indemnity all stemming from the fact that the Plaintiff sued GC for construction defects. Id. Both the allegations contained in Stoneledge and Appellant's allegations here fail to demonstrate it suffered *its own damages* as a result of any breach of contract by Respondent. Id. at 636, 776 S.E.2d at 437. This is because Appellant's claims against Gale are derivative of Plaintiffs' claims against Appellant in the underlying suit, as evidenced by Appellant seeking to recover from Gale only those liabilities/costs/damages it allegedly has incurred or will incur because of Plaintiffs' direct claims against Appellant. (Record pp. 298-324) Specifically, the Third-Party Complaint alleges that Respondent "may be liable for any costs, losses, or damages D.R. Horton may incur as it relates to the Plaintiff in this action, to include D.R. Horton's attorneys' fees, costs, and any and all other expenses incurred in defending this action;" (Record pp. 323-324) Just like *Stoneledge*, Appellant's damages here arose *exclusively from having to defend itself*. Id.

While Appellant argues that it suffered reputational harm, it has failed to both plead this in its breach of contract cause of action and offer *any* evidence for it whatsoever (Record p. 321) It presented no evidence of any supposed reputational harm throughout the multiple years that this case was pending. Even in its Initial Brief, Appellant continues to point to its damages related to defending itself in the litigation and only offers the conclusory allegation that it suffered reputational harm. Recently, this Court ruled that claims for damage to business and business reputation as a result of a lawsuit are among those it deems as part of the indemnity damages. BEI-BEACH, LLC v. Mashburn Christman, 440 S.C. 98, 106-07, 899 S.E.2d 601, 605 (Ct. App. 2023). As such, Appellant's unsupported claims for reputational harm were properly dismissed by the trial court. Exactly like the contractors' causes of action in Stoneledge and Mashburn, without Plaintiff's suit against Appellant, Appellant's so called "independent claims" against

Respondent would not exist. *See* Stoneledge, 413 S.C. at 673, 776 S.E.2d at 438 and BEI-BEACH, LLC v. Mashburn Christman, 440 S.C. 98, 106-07, 899 S.E.2d 601, 605 (Ct. App. 2023)

Appellant's failure to properly plead or show any evidence whatsoever that it suffered its own damages related to any breach of contract shows that the trial court did not err in applying Stoneledge and dismissing Appellant's breach of contract claim. Id.

**C. Appellant cannot use the severability clause to save itself from the ambiguity it created, because application of the severability clause as suggested by Appellant would require the Court to re-write the contract.**

Indemnity is a form of compensation where a first party is liable to pay a second party for loss or damage the second party incurs to a third party. Concord & Cumberland, 424 S.C. at 646-47, 819 S.E.2d at 170 (*quoting* Laurens, 355 S.C. at 111, 584 S.E.2d at 378-79). Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect. C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586(1988). It is not the function of the court to rewrite contracts for parties. *See* York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 90, 749 S.E.2d 139, 150 (Ct. App. 2013). The court is without authority to alter a contract by construction or to make a new contract for the parties. C.A.N Enterprises, 296 S.C. at 378, 373 S.E.2d at 587 (1988).

First, Appellant contends again that contract terms should be imputed to Gale when it has failed to produce a contract with the specific terms. Appellant states the language contained in Co-Respondent IBP Asset, LLC d/b/a Blue Ridge Building Products' ("IBP") contract was the typical language used in the Independent Contractor Agreements with other subcontractors at Rose Hill and therefore Gale should also be bound by those terms. Frankly, that argument has no evidence to support it. As fully addressed in Section I, supra, Appellant failed to produce any contract signed by Gale with respect to the Rose Hill development and any argument Appellant makes that

Gale is bound by such terms is without merit and should be disregarded by this Court.

Assuming arguendo that the Court finds that Gale is somehow bound by the terms in another subcontractor's ICA, then Gale contends that duty to defend and duty to indemnify are one of the same and are only triggered by the negligence of Gale, which Plaintiff stipulated does not exist. (Record pp. 969-971)

Appellant attempts to separate the obligation to defend from the obligation to indemnify within the contract; however, this cannot be done—they are one and the same. Providing a defense for Appellant—or, in this case, paying Appellant for Appellant's costs related to defending itself—is nothing more than a form of indemnification of Appellant. Appellant is asking Respondent to pay for the damage Appellant has incurred to a third-party. In other words, Appellant is asking for *indemnification* from Respondent.

The ICA (which does not apply to Gale) itself does not distinguish between the obligations to defend and indemnify. Paragraph 10.1 of Respondent IBP's ICA states:

> Generally, . . . [Respondent] *shall protect, defend, indemnify, and hold* [Appellant] *... free and harmless*. . . from and against any and all claims, demands, lawsuits or other litigation…
> .

(Record p. 909). (emphasis added). Paragraph 10.2 of the ICA, which Appellant claims is the provision that requires Respondent to provide a defense to Appellant, states:

> *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.

(Record p. 909)[4] (emphasis added).

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

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

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

Appellant attempts to turn Respondent into a de-facto insurer—it even uses the same language that would apply to insurers—the duty to defend and indemnify. (Record pp. 906- 911) This Court, the Supreme Court of South Carolina, and even the South Carolina Legislature have expressly prohibited general contractors from attempting to turn their subcontractors into de-facto insurers for themselves and thereby shirking all responsibilities and repercussions. The Supreme

Court of South Carolina held that "barring indemnification when the indemnitee is at fault for the damages serves to deter negligent conduct in the future, for the indemnitee will know that the indemnification agreement will not save it from liability if it fails to act with due care." Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 490–91, 763 S.E.2d 19, 21 (2014). Furthermore, the South Carolina Legislature passed S.C. Code Ann. § 32-2-10 as an explicit message to the general contractors of South Carolina that continued to attempt to misuse their positions of power in drafting these overbroad and unconscionable provisions purporting to indemnify the general contractor. S.C. Code Ann. § 32-2-10, also referred to as the Anti-Broad Form Indemnity Statute, states that any construction contract that purports to indemnify an indemnitee against damages resulting from the indemnitee's own negligence is unenforceable and against public policy.

Additionally, in an effort to try and save itself from the ambiguity it created, Appellant argues that the trial court erred in failing to sever the duties to defend and indemnify from the contracts. Appellant argues that the Court should have used the Severability clause to simply remove any unenforceable obligations, leaving the remaining obligations in place. However, in asking the Court to resolve the ambiguity in that manner, Appellant is asking the Court to re-write the Subcontract. It is not the function of the court to rewrite contracts for parties. York, 406 S.C. at 90, 749 S.E.2d at 150 (Ct. App. 2013). If the Severability clause is invoked, then both 10.1 and 10.2 of the Indemnity provision must be removed. For the Court to do otherwise would result in the Court rewriting the Subcontract and construing the ambiguity in the Indemnity provision in favor of the party that drafted the document, both of which would violate boilerplate legal principles of contract construction. South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy. Poynter Invs. Inc. v. Cent. Builders of

Piedmont, Inc., 386 S.C. 583, 588, 694 S.E.2d 15, 18 (2010). Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." Ecclesiastes Prod. Ministries, 374 S.C. at 499-500, 649 S.E. 2d at 502 (Ct. App. 2007).

Here, it is clear that the trial court did not err in failing to sever any provisions in the contracts because Appellant failed to produce any contract with Gale with these alleged provisions.

## CONCLUSION

Appellant is seeking indemnification from Gale for its own negligence even though Appellant has failed to prove an enforceable contract exists with Gale with respect to the Rose Hill project. For that reason, the trial court's application of the "clear and unequivocal" standard when reviewing the Indemnity Provision of the purported Addendum Contracts or alleged ICA was proper. On one hand, the Indemnity provisions are ambiguous, cannot be reconciled, and violate public policy and are unenforceable. On the other hand, because of the manner in which those paragraphs were drafted by Appellant, they are inextricably linked such that, if the Court were to use the Severability clause to remove one or the other from the Subcontract, then the Court would be re-writing the entire contract.

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

in the briefs of the other Respondents to the extent they are applicable and incorporates those arguments herein.

Respectfully submitted,

Resnick & Louis, P.C.

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August 1, 2025
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

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Case No. 2019CP011942
APPEAL NO. 2023-001401

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

v.

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

D.R. Horton, Inc., …….Appellant,

vs

AJ Landscaping & Grading LLC, A/K/A AJ Landscaping & Grading, Inc; Allpro Textures, LCC; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc., A/K/A ACP Concrete, Inc.; A&J Framing, Inc; Alpha E.M.C; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughan Lumber Co., Inc.; BKF Builders, Inc; Builders Designhouse, LLC; BMC East, LLC D/B/A Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC,A/K/A Builders Firstsource, Inc; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc.; Caryl Mechanicals, Inc.; Cannaday Siding and Gutter, Inc; Cortes Painting, LLC; CBU Enterprises, Inc.; CPI Security Systems, Inc.; Dom Group, LLC; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc.; A/K/A Galloway-Bell, Inc. II BGET Floored, LLC; GBS Building Supply-Us LBM, LLC, A/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danler, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC. A/K/A M&L General Construction, Inc.; M&Lreyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC, NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, LLC; P&L Enterprises, LLC; Probuild Company, A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; TopBuild Home Services, Inc, A/K/A Gale Contractor Services; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc., Dupree Plumbing Company, Inc.; Willow Tree Landscaping, Inc.;

……Third-Party Defendants,

of which Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractor Services)[1]; and IBP Asset, LLC d/b/a Blue Ridge Building Products; ……Respondents

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**CERTIFICATE OF COMPLIANCE**

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I, Alicia N. Bolyard, Esquire, attorney for Respondent Builder Services Group, Inc. d/b/a Gale Contractor Services, certify that the Final Brief of Respondent complied with the South Carolina Supreme Court Order of August 13, 2007, and Rule 211(b) of the South Carolina Appellate Court Rules.

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

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D.R. Horton, Inc., …….Appellant,

vs

AJ Landscaping & Grading LLC, A/K/A AJ Landscaping & Grading, Inc; Allpro Textures, LCC; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc., A/K/A ACP Concrete, Inc.; A&J Framing, Inc; Alpha E.M.C; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughan Lumber Co., Inc.; BKF Builders, Inc; Builders Designhouse, LLC; BMC East, LLC D/B/A Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC,A/K/A Builders Firstsource, Inc; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc.; Caryl Mechanicals, Inc.; Cannaday Siding and Gutter, Inc; Cortes Painting, LLC; CBU Enterprises, Inc.; CPI Security Systems, Inc.; Dom Group, LLC; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc.; A/K/A Galloway-Bell, Inc. II BGET Floored, LLC; GBS Building Supply-Us LBM, LLC, A/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danler, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC. A/K/A M&L General Construction, Inc.; M&Lreyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC, NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, LLC; P&L Enterprises, LLC; Probuild Company, A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; TopBuild Home Services, Inc, A/K/A Gale Contractor Services; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc., Dupree Plumbing Company, Inc.; Willow Tree Landscaping, Inc.;

……Third-Party Defendants,

of which Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractor Services)[1]; and IBP Asset, LLC d/b/a Blue Ridge Building Products; ……Respondents

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**PROOF OF SERVICE**

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I certify that the ***Final Brief of Respondent Builder Services Group, Inc. D/B/A Gale Contractor Services*** was served on counsel of record on August 6, 2025 via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case no. 2020-000447

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