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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Case No. 2010-CP-10-10355
R. Markley Dennis, Circuit Court Judge

Appellate Case No.: 2015-001238

D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. .... Appellant,

v.

Builders FirstSource - Southeast Group, LLC, and
Builders FirstSource, Inc.. .... Respondent,

Joseph Naccari, Individually,. .... Defendant /Third-Party Plaintiff,
and d/b/a Masterframers

v.

Jaime Arreguin d/b/a Maya Construction .... Third Party Defendant

APPELLANT D.R. HORTON f/k/a RICHARD DOBSON BUILDER'S INC.'S INITIAL BRIEF

Neil S. Haldrup
Peden Brown McLeod, Jr.
WALL TEMPLETON & HALDRUP, P.A.
Post Office Box 1200
Charleston, South Carolina 29402
843.329-9500

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN READING ADDITIONAL TERMS INTO THE INDEMNIFICATION PROVISION?

II. DID THE TRIAL COURT ERR IN FINDING THAT D.R. HORTON IS EQUITABLY ESTOPPED FROM PURSUING ITS CONTRACTUAL RIGHTS?

III. DID THE TRIAL COURT ERR IN FINDING THAT D.R. HORTON IS COLLATERAL ESTOPPED FROM ASSERTING ITS RIGHTS?

IV. DID THE COURT ERRING IN FINDING THAT THE INDEMNIFICATION PROVISION VIOLATED S.C. CODE ANN. SECTION 32-2-10?

V. DID THE TRIAL COURT ERR IN FINDING THAT D.R. HORTON DID NOT SUSTAIN TORT LIABILITY?

STATEMENT OF THE CASE

This is an appeal of an order granting Respondent, Builders FirstSource-Southeast Group, LLC and Builders FirstSource, Inc. (hereinafter referred to as "Builders FirstSource"), summary judgment as to Appellant's, D.R. Horton, Inc. f/k/a Richard Dobson Builders, Inc. (hereinafter referred to as "D.R. Horton"), contractual indemnification and contribution claims arising out of a construction defect claim. On December 17, 2010, D.R. Horton, a homebuilder, filed this action against Builders FirstSource, a designer, manufacturer, supplier, and installer of structural framing, asserting claims for contractual indemnification and contribution. This lawsuit seeks to recover amounts paid to satisfy a judgment, costs, and attorney fees associated with a construction defect lawsuit ("Underlying Action") filed by a homeowner against D.R. Horton in Berkeley County.[1]

On December 11, 2012, Builders FirstSource filed a motion seeking summary judgment as to D.R. Horton's causes of action for contractual indemnification and contribution. Builders FirstSource's primary argument was that D.R. Horton cannot relitigate the issue of whether or not Builders FirstSource's work was defective and what amount of damages was caused by Builders FirstSource's defective work.

The Honorable J.C. Nicholson heard Builders FirstSource's Motion for Summary Judgment on May 15, 2013, and issued a Form Four order denying Builders FirstSource's motion on October 2, 2013.

Builders FirstSource filed a Motion to Reconsider Judge Nicholson's order, and on

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[1] The Underlying Action was compelled to arbitration, and a single arbitrator awarded homeowner $150,000. The award was entered as a judgment in Berkeley County.

May 2, 2014, Judge Nicholson filed an order granting Builders FirstSource partial summary judgment. In pertinent part, Judge Nicholson's order stated that "the plain reading of the indemnity clause is that [Builders FirstSource] is only required to indemnify [D.R. Horton] with regard to lawsuits arising out of [Builders FirstSource]' s work"[2] and "to the extent that the indemnity clause does purport to require [Builders FirstSource] to indemnify [D.R. Horton] for defects in the work of others, the clause violates the public policy of South Carolina and violates the provisions of S.C. Code Ann. Section 32-2-10." Judge Nicholson concluded that D.R. Horton "will be permitted to move forward with its claims for contribution and indemnity," and declared that D.R. Horton "will have the burden of proving what portion of the Judgment, attorney's fees, and costs, if any, are attributable to [Builders FirstSource]."

In response to Judge Nicholson's order granting Respondent partial summary judgment, Appellant filed a motion to reconsider. The primary argument in support of Appellant's motion to reconsider was that the court failed to fully consider the plain language of the indemnification provision which included language whereby Respondent "agrees to protect, indemnify, and hold harmless from against, any and all claims, demands, causes of action, suits, or other litigation of every kind . . . on account of damage to property . . . in any way occurring, incident to, arising out of, or in connection with . . . the Work performed by [Respondent] . . ." Appellant further argued that the indemnification provision did not violate public policy or S.C. Code Ann. Section 32-2-10

2 This is what D.R. Horton has maintained from the start of the matter – that the Underlying Action arose out of Builders FirstSource's work, and thus, Builders FirstSource is required to indemnify and hold D.R. Horton harmless from the Underlying Action.

because the statute does not affect those portions of the indemnification provisions which provide for indemnification liability for damages resulting from negligence "in part" of the promisor. Appellant's motion to reconsider was denied.

Builders FirstSource filed a Second Motion for Summary Judgment on July 24, 2014, arguing that: (1) D.R. Horton waived the right to seek contribution or contractual indemnity by not seeking to arbitrate the claims with Builders FirstSource prior to the filing of this action; (2) D.R. Horton is equitably estopped from bringing this action because there was not a reasoned award by the arbitrator in the Underlying Action or a settlement agreement that satisfies the requirements of the Uniform Contribution Among Tortfeasors Act; and (3) D.R. Horton is unable to prove that any portion of the arbitration award is attributable to Builders FirstSource's work because there is not a reasoned award.

On September 5, 2014, the Honorable R. Markley Dennis, Jr. issued an order granting Builders FirstSource summary judgment as to D.R. Horton's claims for contribution and contractual indemnification.

Judge Dennis found that Builders FirstSource was entitled to summary judgment as to contribution because: (1) Builders FirstSource is not required to contribute to damages attributable to others; (2) Builders FirstSource is not liable for contribution for any portion of the judgment associated with the work of others; and (3) there is no basis in the record to find that D.R. Horton sustained tort liability. Judge Dennis reasoned that because the award from the arbitrator did not specify the legal basis for his award of damages, there was no way to know if the award was based on tort liability.

Judge Dennis found that Builders FirstSource was entitled to summary judgment as to contractual indemnification because: (1) there was no evidence that any portion of the

judgment was attributable to materials supplied and/or installed by Builders FirstSource; (2) there was no apportionment of the judgment as to subcontractors involved; (3) the indemnification provision provides that Builders FirstSource has the right to defend any suit implicating its contractual indemnity obligations; (4) the indemnification provision required that Builders FirstSource receive written notice of any suit implicating its contractual indemnification obligation; (5) the implied covenant of good faith and fair dealing requires that D.R. Horton provide Builders FirstSource with notice of any suit implicating Builders FirstSource's indemnity obligations; (6) the implied covenant of good faith and fair dealing requires that D.R. Horton request a transcript of the arbitration proceeding and a factual finding with legal conclusions; (7) D.R. Horton waived its right to contractual indemnification by failing to give Builders FirstSource notice of the construction defect case, and failing to request a reasoned award; (8) D.R. Horton is equitably estopped from seeking indemnification from Builders FirstSource because D.R. Horton failed to give Builders FirstSource written notice; (9) the indemnification provision violates S.C. Code Ann. Section 32-2-10; and (10) D.R. Horton cannot re-litigate the issues that were decided in the arbitration of the construction defect case.

D.R. Horton filed a motion to reconsider which was denied by Judge Dennis. D.R. Horton timely filed this appeal.

STATEMENT OF FACTS

In 2001, D.R. Horton constructed a single family dwelling in Charleston, South Carolina (the "Residence"). Builders FirstSource designed, manufactured, supplied, and installed the structural elements, as well as installed the windows and flashing, at the Residence as a subcontractor of D.R. Horton. Builders FirstSource's work as a

subcontractor was performed under an agreement between D.R. Horton and Builders FirstSource dated January 31, 2001 ("Agreement").

The Agreement's Scope of Work clause, defined "Work" as "labor, services and/or materials, equipment, transportation, or facilities necessary to complete the construction-related activities generally described as Turnkey and shall include all work performed by [Builders FirstSource] for [D.R. Horton]." The Agreement also contained the following indemnification provision:

> 11. Contractor's Indemnity and Waiver.
>
> To the fullest extent permitted by law, Contractor hereby agrees to . . . defend, indemnify, and hold Owner . . . free and harmless from and against, any and all claims, demands, causes of actions, suits, or other litigation of every kind and character (including all costs thereof and attorneys' fees), whether asserted by the Homeowner, Contractor, or any third party . . . on account of . . . damage to . . . property (including the loss of use thereof) . . . in any way occurring, incident to, arising out of, or in connection with . . . (I) a breach of the warranties, representations, obligations, and covenants provided herein by Contractor; (II) the Work performed or to be performed by Contractor or Contractor's personnel, agents, suppliers, or permitted subcontractors; or (III) any negligent action and/or omission of the Indemnitee related in any way to the Work, even when the Loss is caused by the fault or negligence of the Indemnitee. Any payments by Contractor under this paragraph 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.[3]

In 2007, Builders FirstSource investigated construction issues at the Residence, and

3 "Many indemnity clauses used in the construction industry begin with the phrase 'to the fullest extent permitted by law.'" Bruner & O'Connor Construction Law § 10:23.10, Vol 3. "This is often known as a 'savings' clause." Id. "What this language is intended to 'save' the indemnity agreement from is the operation of any applicable 'anti-indemnity' statute." Id.

acknowledged that there were code violations with Builders FirstSource's work.[4] A key witness for Builders FirstSource, Gifford Shaw, sent an email regarding an inspection that he conducted at the Residence to other Builders FirstSource employees. In Mr. Shaw's email, he noted that he found several issues with Builders FirstSource's work which included: (1) two sets of trusses and lateral bracing were not installed; (2) dips in the second level floor were out of code; (3) a suspicion that there was a lack of support under a beam; (4) dips in the floor on the first floor which are probably out of code and resulted from a deflected load from a beam. Mr. Shaw also indicated that these were problems with Builders FirstSource's construction and design, and recommended each of these issues be corrected or fixed.

Later in 2007, Mr. Shaw requested Builders FirstSource's Director of Engineering, Scott Coffman, P.E., to address three specific issues pertaining to the roof trusses at the Residence. In response, Mr. Coffman produced a letter which noted that roof trusses were incorrectly fabricated by Builders FirstSource and developed a repair protocol to address each of the three roof truss issues.

On June 12, 2008, the homeowner of the Residence filed a construction defect lawsuit against D.R. Horton, captioned as Patricia Clark v. DRH, Inc., 2008-CP-08-1633 ("Underlying Action"), wherein homeowner asserted and claimed D.R. Horton through its agents, servants and employees was negligent in the construction of the Residence. The complaint in the Underlying Action alleges in pertinent part: (1) the construction of the

[4] "A builder may be liable to a home buyer in tort despite the fact that the buyer suffered only 'economic losses' where the builder has violated an applicable building code . . ." Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 347, 384 S.E.2d 730, 738 (1989).

Residence was "in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;" (2) "improperly installing . . exterior wall system;" (3) "failing to properly install rough opening flashing;" and (4) "failing to properly install the framing."

D.R. Horton answered the complaint in the Underlying Action, and moved to compel the matter to arbitration pursuant to the contract between homeowner and D.R. Horton.

Contrary to the trial court's findings, it is undisputed that D.R. Horton notified Builders FirstSource of the Underlying Action on at least two occasions – one in September 2009 and one in November 2009. D.R. Horton discussed with Builders FirstSource the matter in general; "reminded [them] of the circumstances and inspection that occurred by [Builders FirstSource] . . . in the fall of 2007; how the matter had proceeded; and where we were . . . with the case." D.R. Horton also discussed with Builders FirstSource that "the mediation . . . was unsuccessful and [that] we were going to end up arbitrating it and working on the date." D.R. Horton "asked [Builders FirstSource] point blank if [they] wanted to intervene and try to head this thing off before we got to that point." D.R. Horton followed up later and "asked if they had any further thoughts on it," and notified Builders FirstSource that "we were arbitrating in December." Despite Builders FirstSource's acknowledged responsibility in part, Builders FirstSource did not respond to D.R. Horton request to intervene, and did not attend the arbitration.

The matter was arbitrated in December 2009, and homeowner was awarded $150,000.00. The arbitration award was entered into the judgment roll of Berkeley County, and D.R. Horton satisfied the judgment. In addition to the satisfaction of the

judgment, D.R. Horton incurred attorney's fees and costs related to the defense of the Underlying Action as damages.

Builders FirstSource has not honored its contractual obligations to indemnify and hold D.R. Horton harmless from the Underlying Action.

STANDARD OF REVIEW

Summary judgment is proper pursuant to Rule 56, SCRCP when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Sloan v. Friends of Hunley, Inc., 369 S.C. 20630 S.E.2d 474, 477 (S.C. 2006). "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." Etheredge v. Richland School Dist. One, 341 S.C. 307, 534 S.E.2d 275, 277 (S.C. 2000). "In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." Id. "The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Richardson v. The State Record Co., Inc., 330 S.C. 562, 499 S.E.2d 824-25 (S.C. Ct. App. 1998). "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by "showing" - that is, pointing out to the [trial] court - that there is an absence of evidence to support the nonmoving party's case.'" Id. at 825. "The moving party need not 'support its motion with affidavits or other similar materials negating the opponent's claim.'" Id.; see Milligan v. Liberty Life Ins. Co., 313 S.C. 478, 443 S.E.2d 381, 382 (S.C. 1994) (noting that where record is devoid of evidence, moving party is entitled to summary judgment as a matter of law). "It is not

sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." Thompkins v. Festival Centre Group, I, 306 S.C. 193, 410 S.E.2d 593, 594 (S.C. Ct. App. 1991).

ISSUES ON APPEAL

I. THE TRIAL COURT ERRED BY READING ADDITIONAL TERMS INTO THE INDEMNIFICATION PROVISION.

The trial court erred in reading words into the indemnification provision which imports an intent wholly unexpressed when the Agreement was executed. See McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 206, 33 S.E.2d 501, 510 (1945). The trial court erred in reading into the indemnification provision a requirement that there be a judgment attributing absolute fault to Builders FirstSource, or apportioning homeowner's damages. The trial court erred in reading into the indemnification provision that Builders FirstSource had a right to defend any suits implicating its contractual indemnification obligations. The trial court erred in reading into the indemnification provision a requirement that Builders FirstSource receive written notice of any suit implicating its contractual indemnity obligations. The trial court erred in reading into the indemnification provision a requirement that D.R. Horton request a reasoned award at arbitration. These requirements added by the trial court were not contained within the indemnification provision, and therefore have no impact on whether Builders FirstSource's indemnification obligations arose.

South Carolina has a longstanding regard for parties' freedom to contract. Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 492, 763 S.E.2d 19, 22 (2014), reh'g denied (Sept. 25, 2014)(citing Huckaby v. Confederate Motor Speedway,

Inc., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) ("[P]eople should be free to contract as they choose.")). While the freedom to contract is not without limitation, "[s]trong policy considerations . . . generally permit business owners to allocate risk amongst themselves as they see fit." Id. (citing Constable v. Northglenn, LLC, 248 P.3d 714, 718 (Colo.2011)). "The Court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Jordan v. Sec. Grp., Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993)(citing McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 206, 33 S.E.2d 501, 510 (1945)).

To ascertain the intention of an agreement, the court first looks to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument. Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). The court cannot read words into a contract that import an intent wholly unexpressed when the contract was executed. McPherson v. J.E. Sirrine & Co., supra.

South Carolina courts have consistently defined indemnity as "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." Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453-54, 438 S.E.2d 271, 272 (Ct. App. 1993). "A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally." Id. (citing Federal Pacific Electric v. Carolina Production Enterprises, 298 S.C. 23, 378 S.E.2d 56 (Ct.App.1989). Courts "must look to the language of the contract, and if it is unambiguous, the language alone determines the force and effect of the agreement." Id. (citing American Bankers Life Assurance Co. v. Frederick, 315 S.C. 97, 431 S.E.2d 636

(Ct.App.1993) (Davis Adv.Sh. No. 16 at 31)). An indemnity obligation that arises out of contract is subject to strict construction. Sherlock Holmes Pub, Inc. v. City of Columbia, 389 S.C. 77, 81, 697 S.E.2d 619, 621 (Ct. App. 2010).

South Carolina Supreme Court has noted that "an indemnity agreement is an ideal method for businesses to allocate costs and expenses that may arise in future litigation." McPherson v. J.E. Sirrine & Co., supra. "Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005)(citing James C. Gray, Jr. and Lisa D. Catt,The Law of Indemnity in South Carolina, 41 S.C. L.Rev. 603, 604 (1990)). A hold harmless agreement is defined "as a contractual arrangement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility." 3 Bruner & O'Connor Construction Law § 10:25.

In this action, the trial court found that there was an agreement between D.R. Horton and Builders FirstSource which contained an indemnification provision, and described the indemnification provision as consisting of "plain language." The trial court never found the indemnification provision between D.R. Horton and Builders FirstSource to be ambiguous. "When there is no ambiguity in the language, a contract will be deemed to express the entire and exact meaning of the parties, and every material part of the agreement will be presumed to have been expressed therein." Suttles v. Wood, 280 S.C. 272, 312 S.E.2d 574 (Ct. App. 1984).

The indemnification provision is clear and contains specific terms, yet the trial court added terms and conditions into the agreement, which imports an intent wholly

unexpressed at the time the parties executed the Agreement. The trial court erred in doing so.

A. The Indemnification Clause does not require a judgment attributing absolute fault to Builders FirstSource, or apportioning homeowner's damages. Furthermore, D.R. Horton could not waive any rights for failing to request a reasoned award.

Pursuant to the "plain" language of the indemnification clause, Builders FirstSource will indemnify and hold D.R. Horton free and harmless from claims, causes of action and/or lawsuits asserted by a homeowner on account of property damage in any way occurring, arising out of, or connected with Builders FirstSource's work. The indemnification provision only requires a claim by a homeowner on account of damage to property arising out of the work of D.R. Horton's subcontractor.

The trial court erred in finding that a judgment attributing absolute fault to Builders FirstSource or apportionment of homeowner's damages was required for Builders FirstSource's indemnification obligations to be triggered. The indemnification provision does not require proof of fault or proof of apportionment of homeowner's damages. The indemnification provision's express terms provide that Builders FirstSource's indemnification obligation is triggered when the homeowner filed the Underlying Action asserting property damage resulting "in part" to Builders FirstSource's work.

The trial court found that "[i]t is undisputed that some of the allegations in the complaint filed in the Homeowner's Suit related to materials supplied and installed by [Builders FirstSource]." Therefore, the trial court's own finding of fact implicates Builders FirstSource's indemnification obligations under this language because the trial court acknowledges that there was a lawsuit on account of property damage occurring,

arising out of, or connected with Builders FirstSource's work. However, the trial court failed to enforce the plain language of the indemnification provision.

Instead, the trial court erred by granting Builders FirstSource summary judgment because the trial court misinterpreted the indemnification provision to require a judgment allocating fault to Builders FirstSource and/or or apportionment of homeowner's damages in the Underlying Action.

South Carolina case law permits this type of indemnification provision. The South Carolina Court of Appeals in Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993) provides guidance as to whether an indemnitor can be fully responsible for all indemnitee's damages even when someone else's negligence was a concurring cause of the damages.

Beacon Mfg. Co. involved a contract claim for indemnification where by the Campbells sued Beacon Manufacturing Company and Spartan Security, Inc. for damages resulting from a fire that destroyed a warehouse owned by the Campbells and leased by Beacon. Id. Spartan was hired by Beacon to provide security at the warehouse and the contract between them contained the following language:

> Contractor agrees to indemnify and hold harmless the Client against any and all judgments, damages, vehicle accidents and expenses, including without limitation, legal and other expenses the Contractor [sic] may incur defending any claims or legal actions, in whole or in part arising out of work done pursuant to this agreement or the acts of any of the Contractor's agents or employees.
>
> Id.

An employee of Spartan admitted setting the fire that destroyed the warehouse. Id. However, Spartan argued that the employee's actions were outside the scope of

employment, and that Beacon's own negligence proximately caused the damages from the fire because Beacon failed to install a fire protection system in the warehouse. Id.

The Court in Beacon Mfg. Co. stated that "this case does not raise a question of Spartan's tort liability for the wrongful acts of its employee," but rather, "the question here is whether Spartan obligated itself by Contract to indemnify Beacon." Id. The Court concluded that "by the express terms of the contract, Spartan obligated itself to hold Beacon harmless against all judgment, damages, and expenses 'arising out of' the acts of any of Spartan's employees." Id. The Court noted that the language is "comprehensive and unconditional." Id.

The Court found that "Spartan agreed to indemnify Beacon for damages arising 'in whole or in part' from the acts of its employees," and that "even if it is conceded Beacon's own negligence was concurring cause of the damage, it remains undisputed that the damage arose 'in whole or in part' from the employee's act of setting the fire." The Court concluded that "under the clear terms of the contract, Spartan is obligated to indemnify Beacon." Id.

As in Beacon Mfg. Co., the question in this action is whether Builders FirstSource obligated itself by contract to indemnify D.R. Horton. The indemnification provision contained in the Agreement is "comprehensive and unconditional," just as the language in Beacon Mfg. Co. Under the "plain language" of the indemnification provision at issue, Builders FirstSource "agrees to . . . indemnify, and hold [D.R. Horton] . . . free and harmless from and against, any and all claims, demands, causes of action, suits, or other litigation of every kind and character (including attorneys' fees), whether asserted by the Homeowner, . . . or any third party . . . on account of . . . damage to . . . property (including

loss of use thereof) . . . in any way occurring, incident to, arising out of, or in connection with . . . the Work performed by [Builders FirstSource] or [Builders FirstSource]'s . . . permitted subcontractors . . ."

Pursuant to the terms of the indemnification provision, all that is required to trigger Builders FirstSource's indemnification obligations to D.R. Horton is the filing of the Underlying Action by homeowner asserting property damage any way occurring, arising out of, or connected with Builders FirstSource's work. As acknowledged by the trial court and by Builders FirstSource's own admissions, the Underlying Action did just that. Therefore, Builders FirstSource's indemnification obligations were triggered, and D.R. Horton is entitled to be indemnified and held harmless from the Underlying Action.

Additionally, the trial court erred by finding that D.R. Horton waived its right to contractual indemnification for failing to request a reasoned award. "Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive." Freeman v. McBee, 280 S.C. 490, 493, 313 S.E.2d 325, 326 (Ct. App. 1984). "Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute a waiver." Id. (citing Bonnette v. State, 277 S.C. 17, 282 S.E.2d 597 at 598 (1981)). "The determination of whether one's actions constitutes waiver is a question of fact." Laser Supply & Servs., Inc. v. Orchard Park Associates, 382 S.C. 326, 337, 676 S.E.2d 139, 145 (Ct. App. 2009)(citing Madren v. Bradford, 378 S.C. 187, 194, 661 S.E.2d 390, 394 (Ct.App.2008).

The indemnification clause does not have any award requirement, reasoned or otherwise, so, D.R. Horton has not acted inconsistent with the terms of the indemnification

provision, and could not have waived any rights. Accordingly, D.R. Horton did not waive its rights to contractual indemnification because there was no reasoned award.

B. The Indemnification Provision does not provide Builders FirstSource a right to defend any action.

The indemnification provision provides that Builders FirstSource only agree to defend D.R. Horton. The trial court erred by finding that the indemnification provision gave Builders FirstSource a right to defend any suits implicating Builders FirstSource's contractual indemnification obligations. The indemnification provision contains an agreement by Builders FirstSource to protect, defend, indemnify, and hold Appellant harmless in several situations. This language does not state that D.R. Horton agreed to give up D.R. Horton's right to defend any lawsuit filed against D.R. Horton alleging property damage caused by Builders FirstSource's work. This language simply gives D.R. Horton the option to tender the defense to Builders FirstSource who already agreed to defend D.R. Horton. This language does not require D.R. Horton to tender a defense to Builders FirstSource.

In the Underlying Action, D.R. Horton put Builders FirstSource on notice and asked Builders FirstSource to intervene if they wanted. D.R. Horton elected to defend itself, instead of tendering the defense to Builders FirstSource.

C. The Indemnification Provision does not require D.R. Horton to provide Builders FirstSource notice. Furthermore, D.R. Horton could not waive any rights for failing to provide written notice.

The plain language of indemnification provision does not require notice. Therefore, the trial court erred in in finding that notice was required. Pursuant to its terms, the indemnification provision does not contain any notice requirement, written or

otherwise. Nevertheless, the trial court found D.R. Horton's failure to provide notice invalidates the indemnification clause.

Furthermore, the trial court's order indicates that the trial court looked beyond the four corners of the indemnification provision when the trial court found that "it is implied in the Contract that [D.R. Horton] will provide [Builders FirstSource] with notice of any suit implicating its indemnity obligations," and that "the Contract demonstrates that the parties intended that [Builders FirstSource] should get notice of homeowner lawsuits implicating [Builders FirstSource]'s indemnity obligations." (emphasis added). Both of these statements shows the trial court looked beyond the four corners of the indemnification provision to find a requirement of written notice. The fact that the trial court had to look beyond the indemnification clause, shows that the trial court could not find any specific notice requirement within the indemnification provision.

The trial court continued to look beyond the indemnification clause, and found that the implied covenant of good faith and fair dealing required notice. Even though there may be an implied covenant of good faith and fair dealing, there is no breach of the implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him or her the right to do. Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995). A notice requirement is not contained in the indemnification provision, and therefore, notice was not required.[5]

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[5] Even though notice was not required under the indemnification provision, the trial court's finding indicates that oral notice is a factual issue. However, D.R. Horton submits that it is undisputed that D.R. Horton provided oral notice to Builders FirstSource via two telephone calls from Jay Henderson to Morris Tolly. The 30(b)(6) witness for Builders FirstSource stated that Morris Tolly could not recall the specifics of the telephone call and therefore, Builders FirstSource cannot refute the testimony from Jay Henderson that oral

Additionally, the trial court erred in finding that D.R. Horton waived its rights because of a lack of notice. Since there is no notice requirement contained within the indemnification clause, D.R. Horton cannot be found to have waived its rights because D.R. Horton has not acted inconsistent with the terms of the indemnification provision. see Freeman v. McBee, supra.

Although the trial court found that D.R. Horton waived its rights because of a lack of notice, the trial court stated in its order that oral notice was an issue of fact. If there is an issue as to whether oral notice was given, the trial court erred in granting summary judgment based on waiver for failing to give notice. It should be further noted that D.R. Horton submits that the record is clear that D.R. Horton provided oral notice via two telephone calls, and Builders FirstSource has acknowledged that they cannot refute that oral notice was provided. Accordingly, D.R. Horton did not waive its rights because notice was not required, and because the trial court found that there is a question of fact as to oral notice.

D. The Indemnification Clause does not require D.R. Horton to request a reasoned award and a reasoned award is not necessary to prove D.R. Horton's damages to reasonable certainty.

The indemnification provision only requires there be claims, causes of action or suits by a homeowner on account of damage to property arising out of the work of Builders FirstSource or its subcontractors in order for Builders FirstSource's indemnification obligations to be triggered. The trial court erred by finding that D.R. Horton waived its right to contractual indemnification by failing to request a reasoned award, and that D.R. Horton's damages are not reasonably certain.

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notice was given to Builders FirstSource.

As noted above, "indemnity is that 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., supra. D.R. Horton was liable to homeowner in the amount of $150,000 in the Underlying Action. D.R. Horton satisfied this judgment and incurred attorney's fees and costs in defending the Underlying Action. D.R. Horton is seeking to recover these damages under a claim for contractual indemnification and contribution. D.R. Horton's damages cannot be more certain - $150,000 paid to homeowner, and the costs of D.R. Horton's defense. The arbitrator's rationale in finding for the homeowner in the amount of the award is not relevant to D.R. Horton's claims against Builders FirstSource so long as there was a claim by the homeowner on account of property damage arising out of or anyway connected with Builders FirstSource's work. The trial court erred in finding that a reasoned award was necessary and finding that D.R. Horton's damages were not reasonably certain.

The trial court erred in reading numerous additional requirements into the indemnification provision which imports an intent wholly unexpressed when the contract was executed by D.R. Horton and Builders FirstSource. Accordingly, the trial court's order granting Builders FirstSource summary judgment should be reversed.

II. THE TRIAL COURT ERRED IN FINDING THAT D.R. HORTON IS EQUITABLY ESTOPPED FROM PURSUING ITS CONTRACTUAL RIGHTS.

D.R. Horton cannot be deemed by the trial court as "silent" so as to apply equitable estoppel. The trial court noted in its Order that "[e]quitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." (quoting Pearson v. Hilton Head

Hospital, 400 S.C. 281 (Ct. App. 2012)). The trial court also noted that "[s]ilence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." (quoting Southern Development Land and Golf Co., Ltd v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33 (1993)). The trial court then concluded that by failing to provide "written" notice, "[D.R. Horton]'s silence deprived [Builders FirstSource] of their right to participate" in the Underlying Suit. As noted above, the indemnification provision does not require written notice.

Furthermore, the trial court acknowledged that there was a factual dispute as to "oral notice,"[6] and thus, the trial court acknowledged that there is a question of fact as to whether D.R. Horton was considered "silent," in order to apply equitable estoppel.

Because there was no requirement of written notice, and because the trial court acknowledges that there is an issue of fact regarding D.R. Horton's oral notice of the Underlying Action, the trial court erred in finding that D.R. Horton is equitably estopped from seeking contractual indemnification. Accordingly, the trial court's order granting summary judgment should be reversed.

III. THE TRIAL COURT ERRED IN FINDING THAT D.R. HORTON IS COLLATERAL ESTOPPED FROM ASSERTING ITS RIGHTS.

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6 As the trial court indicated in footnote 1, "there is a well-established procedure whereby an indemnitee may bind a nonparty indemnitor to the findings made in a suit against the indemnitee by a third-party." Citing Robins v. First Fed. Sav. Bank, 294 S.C. 219 (Ct. App. 1987). "Vouching in is a common law 'procedural device by which a defendant may give notice of suit to a third party who is liable over to the defendant on the subject matter of the suit, so that the third party will be bound by the court's decision.'" Citing Black v. Patel, 353 S.C. 76, fn 2 (Ct. App. 2002). The trial court found that "oral notice" was a factual issue. If D.R.Horton proves that it provided notice, then Builders FirstSource will be bound by the arbitrator's decision.

D.R. Horton is not collaterally estopped from pursuing its claims against Builders FirstSource. "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." Carolina Renewal, Inc. v. S. Carolina Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009)(citing Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App.2009)). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Id. (citing Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct.App.1984)).

The homeowner in the Underlying Action filed claims against D.R. Horton for negligence, breach of contract, breach of warranties, and violation of the Unfair Trade Practices Act. The homeowner's allegations as to negligence, breach of contract and breach of warranties all were related to an allegation that D.R. Horton failed to construct the Residence in accordance with the applicable building codes, manufacturer's recommendations, and industry standards. The homeowner claimed that the allegations related to negligence, breach of contract, and breach of warranties constituted unfair and deceptive practices, and violated the Unfair Trade Practices Act.

The essential issues in the Underlying Action were whether or not D.R. Horton failed to construct the Residence in accordance with the applicable building code, manufacturer's recommendations and industry standards, and if so, what were homeowners' damages resulting from this failure. Which of D.R. Horton's subcontractors was responsible for violations of the building code, manufacturer's

recommendation, and industry standards was not at issue in the Underlying Action. The issues in the Underlying Action were related to D.R. Horton's actions or in actions, and were the issues actually and necessarily litigated and determined in the Underlying Action and would be precluded under collateral estoppel. The issues in the Underlying Action were issues that are totally different from the issues in this matter.

In this action, the issues involve D.R. Horton's claim for contribution and D.R. Horton's claims for contractual indemnification. The South Carolina Uniform Act provides for contribution when two or more persons become jointly and severally liable in tort for the same injury to person or property, "even though judgment has not been recovered against all or any of them." S.C. Code Ann. § 15-38-20(A). "The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share." First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 443-44, 445 S.E.2d 446, 448 (1994)

The issues related to D.R. Horton's contribution claim are whether Builders FirstSource was jointly and severally liable in tort for same injury to property from the Underlying Action; and whether D.R. Horton paid more than its pro rata share of the common liability.

With regard to D.R. Horton's claim for contractual indemnification, courts "must look to the language of the contract, and if it is unambiguous, the language alone determines the force and effect of the agreement." Beacon Mfg., supra. The issues related to D.R. Horton's claim for contractual indemnification are whether the indemnification provision covers D.R. Horton's damages from the Underlying Action.

In this action, D.R. Horton's failures to comply with the building codes, manufacturer's recommendations, or industry standards are not at issue. The trial court erred in finding that D.R. Horton is collaterally estopped from asserting its right for contribution and contractual indemnification because the issues in the Underlying Action are unrelated to the issues in this action.

The trial court misapplied the legal doctrine of waiver as to notice and reasoned award, and misapplied the equitable doctrine of collateral estoppel as to contribution and contractual indemnification. Accordingly, the trial court's order granting Builders FirstSource summary judgment should be reversed.

IV. THE TRIAL COURT ERRED IN FINDING THAT THE INDEMNIFICATION CLAUSE VIOLATED S.C. CODE ANN. SECTION 32-2-10.

The trial court found that "[t]he clause violates S.C. Code Ann. § 32-2-10 and thus the 'agreement' is 'unenforceable.'"[7] In this section of the Order, the Court discusses S.C. Code Ann. Section 32-2-10, which states:

> 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. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability

[7] However, the trial court acknowledges the enforceability of the indemnification agreement by stating in its order that "[t]he plain language of the indemnification agreement provides that [Builders FirstSource] 'agrees to protect, defend, indemnify and old owner harmless . . . free and harmless from and against any and all claims, demands, causes of actions, suits, or other litigation . . ."

> for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

The indemnification provision contains three separate promises and/or agreements whereby Builders FirstSource agrees to indemnify and hold D.R. Horton harmless. Each promise and/or agreement by Builders FirstSource is identified in the indemnification provision by Roman numerals.

In Roman numeral I of the indemnification provision, Builders FirstSource:

> agrees to . . . indemnify, and hold [D.R. Horton] harmless from and against, any and all claims, demands, causes of actions, suits, or other litigation of every kind and character whether asserted by [a] homeowner . . . on account of . . . damage to . . . property . . . in any way occurring, incident to, arising out of, or in connection with . . . a breach of the warranties, representations, obligations, and covenants provided herein by [Builders FirstSource].

In Roman numeral II, Builders FirstSource:

> agrees to . . . indemnify, and hold [D.R. Horton] harmless from and against, any and all claims, demands, causes of actions, suits, or other litigation of every kind and character whether asserted by [a] homeowner . . . on account of . . . damage to . . . property . . . in any way occurring, incident to, arising out of, or in connection with . . . the work performed or to be performed by [Builders FirstSource] or [Builders FirstSource]'s personnel, agents, suppliers, or permitted subcontractors.

And, in Roman number III, Builders FirstSource:

> agrees to . . . indemnify, and hold [D.R. Horton] harmless from and against, any and all claims, demands, causes of actions, suits, or other litigation of every kind and character whether asserted by [a] homeowner . . . on account of . . . damage to . . . property . . . in any way occurring, incident to, arising out of, or in connection with . . . any negligent action and/or omission of [D.R. Horton] related in any way to the Work, even when the Loss is caused by the fault or negligence of [D.R. Horton].

The trial court only found that the promise and/or agreement by Builders FirstSource under number III was unenforceable. Therefore, pursuant to S.C. Code Ann. 32-2-10 (2007), numbers I and II remain enforceable. The trial court's Order notes that the "relevant part" of the indemnity provision was "ANY NEGLIGENT ACTION AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK, EVEN WHEN THE LOSS IS CAUSED BY THE FAULT OR NEGLIGENCE OF THE INDEMNITEE . . ." The trial court's Order states that this language "purports to require [Builders FirstSource] to indemnify [D.R. Horton] for [Builders FirstSource]'s own negligent acts or omissions even when the loss is caused by the fault or negligence of [D.R. Horton]."

Assuming the trial court's finding that this "relevant part" of the indemnification provision was unenforceable under Section 32-2-10, the statute specifically provides that "[n]othing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or <u>in part</u>, of the promisor, its agents or employees." (emphasis added). Accordingly, the other portions of the indemnification provision, which were not found to violate Section 32-2-10, would remain enforceable.

D.R. Horton has always maintained that it was entitled to contractual indemnification under the second (Roman numeral number II in the provision) of the three portions which states:

> <u>[t]o the fullest extent permitted by law, [Builders FirstSource] hereby agrees to . . . defend, indemnify, and hold [D.R. Horton] . . . free and harmless from and against, any and all claims</u>, demands, causes of actions,

> suits, or other litigation of every kind and character (including all costs thereof and attorneys' fees), whether asserted by the Homeowner, [D.R. Horton], or any third party . . . on account of . . . damage to . . . property (including the loss of use thereof) . . . in any way occurring, incident to, arising out of, or in connection with . . .(II) the Work performed or to be performed by [Builders FirstSource] or [Builders FirstSource]'s personnel, agents, suppliers, or permitted subcontractors . . .

Since the trial court did not find the other two portions unenforceable under Section 32-2-10, the two other promises or agreements remain in effect and enforceable.

Based on the foregoing, the trial court erred in finding that the indemnification provision violated S.C. Code Ann. 32-2-10 (2007). Therefore, the trial court's order granting Builders FirstSource summary judgment should be reversed.

V. THE TRIAL COURT ERRED IN FINDING THAT D.R. HORTON DID NOT SUSTAIN TORT LIABILITY.

The trial court states in its Order that "there is no basis in the record to find that D.R. Horton has sustained tort liability." This is an error because the claims in the Underlying Action are based, in part, on code violations. Moreover, as explained below, Builders FirstSource's admission of building code violations alleged in the Underlying Action are considered by our courts as negligence per se.

The South Carolina Supreme Court in Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 345-46, 384 S.E.2d 730, 736-37 (1989), addressed the issue of whether an action against a builder for violating a legal duty is an action in contract or an action in tort. In Kennedy, the Supreme Court stated that "[t]he Court of Appeals itself correctly recognized in Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct.App.1986), that a violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses." Id. The Court continued in its opinion and

stated "Terlinde, 275 S.C. at 399, 271 S.E.2d at 770, imposes a legal duty on builders to undertake construction commensurate with industry standards." Id. "Where a building code or industry standard does not apply, public policy further demands the imposition of a legal duty on a builder to refrain from constructing housing that he knows or should know will pose serious risks of physical harm." Id.

In Columbia Lumber, the Court noted that the prior legal framework regarding the "economic loss" rule as it relates to the purchase of a residence generates difficulties because the framework's focus is on consequence, not action. Id. The court noted that "Builder 'A' and Builder 'B' can be equally blameworthy, and build equally shoddy housing, but because Builder 'A''s negligence happened to be discovered early enough, no one was harmed." Id. The court continued and noted that "[i]t hardly seems fair that Builder 'A' should profit from a diligent buyer's discovery, or because he was fortunate," and that the new "framework we adopt focuses on activity, not consequence." Id.

The court stated that "[i]f a builder performs construction in such a way that he violates a contractual duty only, then his liability is only contractual," and "[i]f he acts in a way as to violate a legal duty, however, his liability is both in contract and in tort." Id. The court in adopting this new frame work states "a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage." Id.

In the Underlying Action, the homeowner asserts violations of the building code, and Builders FirstSource admitted violations of the building code in the construction of the Residence. Builders FirstSource's own employees that were involved in the investigation of the conditions of the Residence in 2007 acknowledged that there were building code

violations. Adherence to the building code is a duty that arises outside of the contractual duties included in the contract between homeowners and D.R. Horton. These are the types of legal duties, when violated by a builder, give rise to liability "both in contract and in tort." Kennedy, supra. Accordingly, D.R. Horton's damages were based on liability arising both in contract and tort, and were attributed to Builders FirstSource by its own admission.

Based on the foregoing, the trial court erred when it held that there was no basis in the record to find that D.R. Horton sustained tort liability. Accordingly, the trial court's order granting Builders FirstSource summary judgment should be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the trial court's order granting Builders FirstSource summary judgment.

This 12th day of October 2015

Respectfully submitted,

Neil S. Haldrup
Peden Brown McLeod, Jr.
Wall Templeton & Haldrup, P.A.
Post Office Box 1200
Charleston, South Carolina
(843) 329-9500
Attorney for D.R. Horton

Other Counsel of Record:

James Taylor Anderson, III
Kernodle, Root & Coleman
Post Office Box 13897
Charleston, South Carolina 29422
Attorney for Builders FirstSource

David S. Cobb
Turner Padget Graham & Laney P.A.
Post Office Box 22129
Charleston, South Carolina 29413
Attorney for Joseph Naccari, Individually and d/b/a Masterframers

R. Trippett Boineau, III
McAngus Goudelock & Courie, LLC
Post Office Box 12519, Capitol Station
Columbia, South Carolina 29211
Attorney for Jaime Arreguin d/b/a Maya Construction

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
OCT 15 2015
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Case No. 2010-CP-10-10355
R. Markley Dennis, Circuit Court Judge

Appellate Case No.: 2015-001238

D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. . . . . Appellant,

v.

Builders FirstSource - Southeast Group, LLC, and
Builders FirstSource, Inc.. . . . . Respondent,

Joseph Naccari, Individually, and d/b/a Masterframers. . . . . Defendant /Third-Party Plaintiff,

v.

Jaime Arreguin d/b/a Maya Construction . . . . Third Party Defendant

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PROOF OF SERVICE

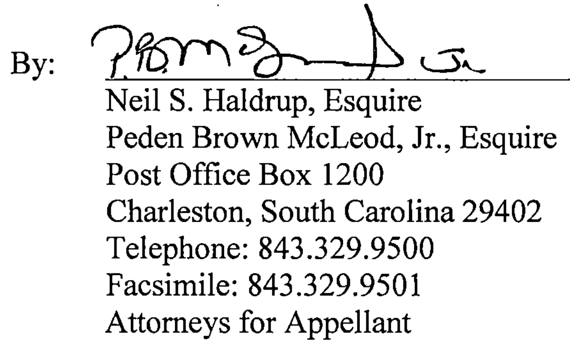
I, Peden Brown McLeod, Jr. of Wall Templeton & Haldrup, do hereby certify that I have served Appellant's Initial Brief on counsel for Respondents, as well as other parties' counsel, by depositing the same in the United States Mail, properly posted on October 12, 2015, addressed as follows to counsel of record:

James Taylor Anderson, III
Kernodle, Root & Coleman
Post Office Box 13897
Charleston, South Carolina 29422

David S. Cobb
Turner Padget Graham & Laney P.A.
Post Office Box 22129
Charleston, South Carolina 29413

R. Trippett Boineau, III
McAngus Goudelock & Courie, LLC
Post Office Box 12519, Capitol Station
Columbia, South Carolina 29211

WALL TEMPLETON & HALDRUP, P.A.

By: 

Neil S. Haldrup, Esquire
Peden Brown McLeod, Jr., Esquire
Post Office Box 1200
Charleston, South Carolina 29402
Telephone: 843.329.9500
Facsimile: 843.329.9501
Attorneys for Appellant

Wall Templeton
ATTORNEYS

Peden Brown McLeod, Jr.
Telephone: 843.329.9500 Ext. 201
Facsimile: 843.329.9501
Brown.McLeod@WallTempleton.com

October 12, 2015

RECEIVED
OCT 15 2015
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *D.R. Horton, Inc. vs. Builders FirstSource-Southeast Group, et al.*
Appellate Case No. 2015-001238

Dear Ms. Kitchings:

Please find enclosed an original and one copy of Appellant's Initial Brief, Designation of Matter and Proof of Service in the above referenced matter. Please file the original and return a filed-stamped copy to me in the envelope provided for your convenience.

By copy of this letter to all counsel of record, I am serving them with the enclosed brief.

Thank you for your time and attention to this matter.

Sincerely,

WALL TEMPLETON & HALDRUP, P.A.

Peden Brown McLeod, Jr.

PBMjr:are
Enclosures

cc: James Taylor Anderson, III, Esquire (*w/ encl*)
David S. Cobb, Esquire (*w/ encl*)
R. Trippett Boineau, III, Esquire (*w/ encl*)

FIRST CLASS MAIL

Wall Templeton
ATTORNEYS
145 King Street, Suite 300
Charleston, South Carolina 29401

RECEIVED
OCT 15 2015
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211