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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

RECEIVED

FEB 16 2016

SC Court of Appeals

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., and Joseph Naccari, Individually and d/b/a Master Framers..... Defendants,

Of whom Builders FirstSource - Southeast Group, LLC, and Builders FirstSource, Inc., are the Respondents.

Joseph Naccari, Individually, and d/b/a Master Framers..... Third-Party Plaintiff,

v.

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

RECORD ON APPEAL
Volume II

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO. 2010-CP-10-10355
	)	
D.R. HORTON, INC. f/k/a C. RICHARD	)	
DOBSON BUILDERS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	MOTION FOR RECONSIDERATION
	)	
BUILDERS FIRSTSOURCE-SOUTHEAST)	)	
GROUP, LLC; and BUILDERS	)	
FIRSTSOURCE, INC., and JOSEPH	)	
NACCARI, Individually and d/b/a	)	
MASTER FRAMERS,	)	
	)	
Defendants.	)	
JOSEPH NACCARI, Individually, and d/b/a)	)	
MASTER FRAMERS,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
JAIME ARREGUIN d/b/a MAYA	)	
CONSTRUCTION,	)	
	)	
Third-Party Defendant.	)	

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 CLERK OF COURT

PLEASE TAKE NOTICE that, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, in ten days, or as soon thereafter as counsel may be heard, at such place, date, and time as the Court may appoint, Defendants Builders FirstSource-Southeast Group, LLC, and Builders FirstSource, Inc. (collectively "BFS"), by and through its undersigned attorneys, will move for reconsideration of this Court's October 2, 2013 Order denying BFS's Motion for Summary Judgment. BFS seeks reconsideration of this Order on the following grounds:

I. FACTUAL AND PROCEDURAL BACKGROUND

D.R. Horton, Inc. ("DRH") built a house at 403 Milner Court, Charleston, South Carolina (the "Residence"), during the summer of 2001. DRH subcontracted the framing work to BFS. BFS subcontracted the framing work to Joseph Naccari d/b/a Masterframers who, in turn, subcontracted the framing to Jaime Arreguin d/b/a Maya Construction.

In 2008, the purchaser of the Residence, Patricia Clark, filed suit in the Berkeley County Circuit Court against DRH alleging that the Residence was defective because of, among other things, improper installation of siding, improper installation of the exterior wall system, improper flashing, improper installation of a moisture barrier, improper water management system, improper installation of framing, improper installation of the slab and driveway, improper installation of the roof and shingles, and improper installation of a gas hot water heater (the "Underlying Case"). BFS had no responsibility for the roofing, siding, concrete slab and driveway, or hot water heater. (Henderson Depo., P. 18, l. 21-P. 19, l. 13)(Attached hereto as Exhibit 1).

The Underlying Case was referred to arbitration. Clark produced a repair estimate for \$269,917. DRH produced two repair estimates, one for \$27,845, and another for \$69,622. After a two day hearing, the arbitrator awarded Clark \$150,000. DRH made no transcript of the hearing and specifically requested that the arbitrator make no findings of fact or conclusions of law. Pursuant to the South Carolina Uniform Arbitration Act, the award was confirmed and made a final judgment of the Berkeley County Court of Common Pleas (hereinafter the "Judgment").

DRH has now filed suit against BFS seeking contribution and contractual indemnity. On October 2, 2013, this Court denied BFS's Motion for Summary Judgment and BFS was mailed notice of that decision on October 3, 2013. For the following reasons, BFS respectfully asks this Court to reconsider its Order denying BFS's Motion for Summary Judgment.

II. ALLOWING DRH TO PURSUE AN INDEPENDENT ACTION IN ORDER TO DETERMINE WHAT PORTION OF THE JUDGMENT IS ATTRIBUTABLE TO BFS'S SCOPE OF WORK WOULD VIOLATE THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

If DRH wanted a judgment that apportioned damages amongst the alleged defects in the Underlying Case, it was required to ask the arbitrator to make those findings. Failing that, DRH was required to request that the award be clarified or modified.

Under S.C. Code Ann. § 15-48-100, a party has 20 days after receiving the award to ask the arbitrator to clarify his findings or modify an award that is "imperfect in a matter of form." S.C. Code Ann. § 15-48-140. If no action is taken to clarify or modify the award, and the award is confirmed, the award becomes a final judgment. See S.C. Code Ann. § 15-48-150.

Having failed to ask the arbitrator to apportion the award, DRH cannot now ask this Court to apportion the Judgment. The procedure suggested by DRH would mean that any party to an arbitration can neglect to ask for a reasoned award, ignore the requirements of S.C. Code Ann. § 15-48-100, and then file a separate action to obtain a new judgment that includes omitted factual findings and legal conclusions. Rather than making arbitration a means to obtain a final resolution of an issue, DRH's proposed procedure would make arbitration the first step in a prolonged saga of litigation.

III. BECAUSE DRH REDUCED THE AWARD TO A FINAL JUDGMENT PRINCIPLES OF COLLATERAL ESTOPPEL AND RES JUDICATA PREVENT DRH FROM RELITIGATING ISSUES DECIDED IN THE UNDERLYING CASE.

"[A]n arbitration award is a final, binding award on the merits." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 494 (Ct.App. 2003). "[A]n arbitration award is conclusive and binding . . . as to all matters submitted to the arbitrators." *Id.* at 494. General principle of res judicata and collateral estoppel apply to arbitration awards. See *Palmetto Homes, Inc., supra* (giving *res judicata* effect to arbitration award); *Murakami v. Wilmington Star News, Inc.*, 137 N.C.App. 357, 360 (2000)

("collateral estoppel will bar relitigation of the issues actually decided during the arbitration proceeding").

"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. SCDOT*, 385 S.C. 550, 554 (Ct.App. 2009); *See also Crosby v. Prysmian Communications Cables and Systems USA, LLC*, 397 S.C. 101, 111 (Ct.App. 2011)(giving preclusive effect to findings of Workers Compensation Commission in subsequent retaliatory discharge litigation). "The doctrine of collateral estoppel prevents the relitigation of *issues*, not claims, necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits are the same." *Id.* at 556. (emphasis in original).

The fact that BFS was not a party to the Homeowner's Suit is irrelevant. "As far back as 1982, our supreme court held the doctrine of collateral estoppel barred the plaintiff from relitigating an issue even though the defendant was not a party, or in privity with a party, to the initial action." *Id.* at 555. "[T]he identity of the parties, and their relationship to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel." *Id.*

"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." *Carolina Renewal, supra* at 554. Here, the issue of whether the framing at the Residence was defective, and the damages caused thereby, was actually litigated in the Underling Case, it was determined by the arbitrator and was necessary to support the Judgment.

Regardless of whether the fault of BFS was considered in the Underlying Case, without question DRH has already litigated the issue of whether the framing at the Residence was defective and the damages caused by any defective framing. DRH obtained a ruling on that issue and that ruling has been reduced to a final judgment. DRH cannot now relitigate that issue and its failure to request a reasoned award is fatal to its claims against BFS.

IV. DRH's FAILURE TO MAKE A RECORD OF WHAT WAS DETERMINED IN THE UNDERLYING CASE MAKES ANY JUDGMENT ENTERED IN THIS ACTION IMPERMISSIBLY SPECULATIVE.

DRH has the burden of proving its damages. *See Jackson v. Midlands Human Resources Center*, 296 S.C. 526 (1988) "[I]n order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Groy v. Southern Facilities, Inc.*, 256 S.C. 558, 570-571 (1971).

The Judgment is for \$150,000, an amount that does not coincide with any repair estimate submitted to the arbitrator. As DRH's own 30(b)(6) representative has testified, there is no reliable way to retrospectively determine what portions of the Judgment are attributable to what alleged defects:

Q: All right. Is it fair to say that any attempt by you to assign portions of that \$150,000 arbitration award to various defects would just be a guess?

A: Again, the \$150,000 award was given. I don't have any specific information as to how it was determined.

(Henderson Dep., P. 70, ll. 16-22).

Q: Would D.R. Horton be speculating to try to assign any portion of that \$150,000, to any particular defect?

A: I think I have answered this before to the effect that I don't have sufficient information to determine what the arbitrator attributed the \$150,000 award to.

(Henderson Dep., P. 100, H. 11-15).

DRH's problem can be seen by looking at just one of the alleged defects in the Underlying Case. Ms. Clark retained Curry Engineers to prepare a scope of repair for framing problems. Ms. Clark obtained an estimate from Thomas Carlson stating that the Curry Engineering scope of work could be performed for \$28,900. In the Clark case DRH produced one estimate that did not include any amount for the Curry Engineering scope of work, and another estimate that allocated \$2,367, to the repairs specified by Curry Engineering.

Even if a jury decided that the Curry Engineering scope was part of the Judgment, it would be left with an estimate from Ms. Clark's expert for \$28,900, and an estimate from DRH for \$2,367. Other than flipping a coin, there is absolutely no basis to determine which of these two estimates was actually used by the arbitrator in making his award. DRH should not be allowed to ask a jury to guess and speculate about what was actually decided in the arbitration.

V. DRH HAS NOT BE ADJUDGED TO HAVE COMMITTED A TORT, AND DOES NOT HAVE A SETTLEMENT AGREEMENT THAT COMPLIES WITH THE REQUIREMENTS OF THE SOUTH CAROLINA UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, AND THEREFORE HAS NO CLAIM FOR CONTRIBUTION.

"The common law rule against contribution was abrogated in 1988 when our General Assembly enacted the South Carolina Uniform Contribution Among Tortfeasors Act (hereinafter the "Act"). Because the Act is in derogation of the common law, it must be strictly construed."

G & P Trucking v. Parks Auto Sales Service & Salvage, Inc., 357 S.C. 82, 86-87 (Ct. App. 2003).

The first requirement for bringing an action for contribution is a judgment for *tort liability*.¹ The portion of the Act dealing with independent actions for contribution against third-parties states “Once the issue of liability has been resolved . . . a defendant has the right to seek contribution against any judgment defendant and other persons who were not made parties to the action.” S.C. Code Ann. §15-38-40(B). The “liability” referred to in the quoted portion of the Act is tort liability.

In this case D.R. Horton was sued by Patricia Clark for negligence, breach of contract, breach of warranty, and violations of the South Carolina Unfair Trade Practices Act. DRH did not obtain any ruling or finding that the Judgment is based on tort. It is just as likely, and perhaps more likely, that the judgment is based on breach of contract or breach of warranty. In the language of the Act, DRH’s tort liability has not been resolved by the Judgment. *See* S.C. Code Ann. §15-38-40(B).

DRH’s own 30(b)(6) representative has acknowledged that there is no evidence that the Judgment is based on tort liability:

Q: And was D.R. Horton determined to be negligent in the Patricia Clark case?

A: I don’t know. Again, the award was determined by the arbitrator for \$150,000.

(Henderson Dep., P. 20, ll. 21-24)

Q: All right. Can you review this Exhibit No. 3 and then revisit my question of whether or not D.R. Horton was ever adjudged negligent in the arbitration?

A: It doesn’t indicate negligence one way or the other.

Q: All right. Do you know whether or not D.R. Horton was found to have breached its contract with Patricia Clark in the arbitration?

¹ The only exception to the requirement of a tort judgment involves a settlement expressly extinguishing a third-party’s liability. *See* S.C. Code Ann. §15-38-20(D); *Progressive Max Ins. Co. v. Floating Caps. Inc.*, 405 S.C. 25 (2013). The case before this Court involves a judgment of the Berkeley County Circuit Court, not a settlement. Therefore the portions of the Act pertaining to settlements have no applicability to this case. *See* S.C. Code Ann. §15-48-150 (arbitration award confirmed in accordance with the South Carolina Uniform Arbitration Act to “be enforced as any other judgment.”)

A: Again, it does not indicate one way or the other.

Q: Do you know whether D.R. Horton was determined to have breached its warranty with Patricia Clark in the arbitration?

A: Again, the document does not indicate.

(Henderson Dep., P. 21, l. 21- P. 22, l. 8).

The bottom line is that whether or not a judgment is based on tort or contract is not an issue to be decided by a jury in a second independent action. Having failed to ask the arbitrator to make a reasoned award, DRH cannot - for the first time - obtain the required finding of tort liability in this contribution action.

VI. THE INDEMNITY AGREEMENT DRAFTED BY DRH CONTRAVENES SC CODE ANN. § 32-2-10 AND IS UNENFORCEABLE.

Under S.C. Code Ann. § 32-2-10, it is against public policy for an agreement involving the construction of a home to require a subcontractor to indemnify a general contractor for the general contractor's own negligence. See S.C. Code Ann. § 32-2-10 ("Notwithstanding any other provision of law, a promise or agreement in connection with the . . . construction . . . of a building . . . purporting to indemnify the promisee . . . against liability for damages arising out of . . . property damage proximately caused by or resulting from the sole negligence of the promisee . . . is against public policy and unenforceable.").

The indemnification clause drafted by DRH violates S.C. Code Ann. § 32-2-10. In relevant part, the indemnification clause provides:

TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO . . . INDEMNIFY AND HOLD . . . INDEMNITEE, FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS . . . WHETHER ASSERTED BY THE HOMEOWNER, CONTRACTOR, OR ANY THIRD-PARTY . . . ON ACCOUNT OF . . . (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 . . .

Contract, ¶ 11 (Exhibit 2).

It is hard to imagine language that would more blatantly violate South Carolina law. Once the at-issue agreement is determined to violate S.C. Code Ann. § 32-2-10, the plain language of the statute provides that the “agreement . . . is unenforceable.” There is no provision whereby an indemnity agreement that runs afoul of the statute can be saved.

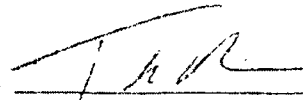
VII. CONCLUSION

Any attempt to retrospectively determine what was actually decided in the Underling Case is an exercise in impermissible guesswork and speculation. See *Jenkins v. Few*, *supra*, at 221 (“Because the verdict was a general verdict, it is impossible to determine how the jury allocated damages . . .”); *Moore v. Moore*, 360 S.C. 241, 257 (Cl.App. 2004) (“Without a special verdict form, we cannot speculate as to what portion of the award the jury attributed to lost profit as opposed to other tort damages.”); *Armstrong v. Collins*, 366 S.C. 204, 227 (Cl.App. 2005) (“Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages.”).

For all of the above reasons, and the reasons discussed more fully in the Memorandum in Support of BFS’s Motion for Summary Judgment and BFS’s Reply to Plaintiff’s Memorandum in Opposition to BFS’s Motion for Summary Judgment, BFS respectfully asks this Court to reconsider its Order denying BFS’s Motion for Summary Judgment.

[Signature on following page]

By:



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FIRSTSOURCE-SOUTHEAST GROUP,
LLC and BUILDERS FIRSTSOURCE, INC.

Charleston, South Carolina
October 15, 2013

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON C/A NO. 2010-C9-10-10355

E. R. WORTON, INC. f/k/a
RICHARD BOBSON BUILDERS,
INC.,

Plaintiff,

-vs-

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC; and
BUILDERS FIRSTSOURCE, INC.,
and JOSEPH NACCARI,
Individually and d/b/a
MASTERFRAMERS,

Defendants.

JOSEPH NACCARI,
Individually, and d/b/a
MASTERFRAMERS,

Third-Party Plaintiff,

-vs-

JAIME ARREGUIN d/b/a MAYA
CONSTRUCTION,

Third-Party Defendant.

The 30(b)(6) deposition of JAY MARSHALL
HENDERSON, taken before Julie L. Bonomo, Professional
Court Reporter and Notary Public, at Turner Sadget
Graham & Laney, PA, 40 Calhoun Street, Suite 200,
Charleston, South Carolina, on Friday, September 5,
2013, commencing at 9:44 a.m.

SOUTHEASTERN TRANSCRIPT * (843) 762-2442

1 A. It's a very, very minor issue, but, yes, we
2 conceded that it is improperly installed.

3 Q. Given that concession, is it likely that some
4 portion of the \$150,000 award entered in the Patricia
5 Clark case is associated with the gas hot water heater?

6 MR. HALDRUP: Object to the form.

7 A. Again, I don't have sufficient evidence, but it
8 would seem reasonable.

9 Q. No evidence was entered in the Clark case to
10 indicate that the gas hot water heater was fine?

11 A. Correct. Again, just the pipe. Had nothing to
12 do with the water heater, just the venting of the
13 combusted gas.

14 Q. All right. On item F, the improperly installed
15 siding allegation, did Builders FirstSource have any
16 responsibility for installing the siding at Ms. Clark's
17 residence?

18 A. They did not. However, item F also includes
19 exterior wall system, which I believe to include rough
20 openings, window openings, window installation.

21 Q. For the siding, though, Builders FirstSource
22 didn't have any responsibility to put the siding on the
23 house, did they?

24 A. That is correct.

25 Q. And with regards to the kick-out flashing, did

26 SOUTHEASTERN TRANSCRIPT * (843)762-2442

1 Builders FirstSource have any responsibility to do the
2 kick out flashing?

3 A. They did not.

4 Q. Did Builders FirstSource have any responsibility
5 with regard to the slab in the driveway?

6 A. They did not.

7 Q. All right. And did Builders FirstSource have any
8 responsibility with installing the roof and the
9 shingles?

10 A. They did not.

11 Q. Did Builders FirstSource have any responsibility
12 in installing the gas hot water heater?

13 A. They did not.

14 Q. So there is no allegation in this case by
15 D.R. Horton that Builders FirstSource is somehow jointly
16 responsible for the siding problem, or the kick-out
17 problem, or the slab problem, or the roof problem?

18 MR. HALDRUP: Object to the form.

19 A. Could you repeat that? I'm sorry.

20 Q. Builders FirstSource isn't jointly responsible
21 with the siding installer for installing the siding, are
22 they?

23 MR. HALDRUP: Object to the form.

24 A. Builders FirstSource did not install the siding,

25 SO SOUTHEASTERN TRANSCRIPT * (843) 762-2442

1 Q. And had no responsibility to do it?
2 A. They did not.
3 Q. Same with the driveway?
4 A. They did not install the driveway.
5 Q. And had no responsibility to install the
6 driveway?
7 A. They did not.
8 Q. Or the slab?
9 A. That is correct.
10 Q. Or the roof and shingles?
11 A. They did not install the roof and shingles, to
12 the extent that they installed the underlayment
13 underneath the shingles. I should clarify that.
14 Q. Do you know whether or not Builders FirstSource
15 installed -- what is it under the shingles?
16 A. Underlayment, felt.
17 Q. Do you know if Builders FirstSource installed the
18 felt under the shingles?
19 A. It's typically in their scope to do so as a
20 framer, yes.
21 Q. And was D.R. Horton determined to be negligent in
22 the Patricia Clark case?
23 A. I don't know. Again, the award was determined by
24 the arbitrator for \$150,000.
25 Q. So you don't know if there was an adjudication
26 SOUTHEASTERN TRANSCRIPT * (843) 762-2442

1 that D.R. Horton was negligent?

2 A. I'm uncertain.

3 Q. Dr. Horton does not know?

4 A. I don't have that information. I would have to
5 review the statement of the arbitrator.

6 Q. All right.

7 MR. TAYLOR: We can mark that as Exhibit

8 No. 3.

9 (Exhibit No. 3 marked for identification.)

10 Q. Okay, I'm going to hand you what has been marked
11 as Exhibit 3 to your deposition. Have you ever seen
12 that document before?

13 A. Yes.

14 Q. Okay. What is this document?

15 A. It's an arbitration order.

16 Q. Was this the arbitration order that you were
17 referencing that you would need to review in order to
18 determine whether or not D.R. Horton was determined to
19 be negligent in the arbitration?

20 A. Yes.

21 Q. All right. Can you review this Exhibit No. 3 and
22 then revisit my question of whether or not D.R. Horton
23 was ever adjudged negligent on the arbitration?

24 A. It doesn't indicate negligence one way or the
25 other.

SOUTHEASTERN TRANSCRIPT * (843) 762-2442

1 Q. All right. Do you know whether or not
2 D.R. Horton was found to have breached its contract with
3 Patricia Clark in the arbitration?

4 A. Again, it does not indicate one way or the other.

5 Q. Do you know whether D.R. Horton was determined to
6 have breached its warranty with Patricia Clark in the
7 arbitration?

8 A. Again, the document does not indicate.

9 Q. Do you know if D.R. Horton was determined to have
10 violated the South Carolina Unfair and Deceptive Trade
11 Practices Act in the arbitration?

12 A. The document does not indicate.

13 Q. Do you know if Ms. Clark was awarded her
14 attorney's fees in the arbitration?

15 A. The document does not indicate.

16 Q. Do you know if Ms. Clark -- well, let's go back
17 to Exhibit 2, which is the complaint. If you could go
18 to the very end of that?

19 A. Page?

20 Q. Page 9 of Exhibit 2, and do you see the paragraph
21 that starts "wherefore"?

22 A. Yes.

23 Q. Do you see where it says, the plaintiff prays for
24 judgment for the attorney's fees and cost of this
25 action. Do you see that?

SOUTHEASTERN TRANSCRIPT * (843) 762-

26 2442

1 A. I don't recall that she testified to that at the
2 arbitration, but that leaking toilet issue happened, as
3 I recall, from her deposition back in 2003, and I don't
4 believe it was relevant to the matter.

5 Q. Do you know one way or the other about whether
6 she testified about the leaking toilet damaging hardwood
7 floors at the arbitration?

8 A. I don't recall that she did.

9 Q. Or didn't? You just don't recall one way or the
10 other?

11 A. I don't recall that she did or didn't, but, no, I
12 do not recall.

13 Q. Did Ms. Clark testify that she had complaints
14 about the roofing at her house?

15 A. I don't recall specifics to her testimony.

16 Q. All right. Is it fair to say that any attempt by
17 you to assign portions of that \$150,000 arbitration
18 award to various defects would just be a guess?

19 MR. HALDRUP: Object to the form.

20 A. Again, the \$150,000 award was given. I don't
21 have any specific information as to how it was
22 determined.

23 Q. Okay. Were the witnesses all sworn? Did they
24 swear to take an oath to tell the truth, the whole truth
25 and nothing but the truth?

SOUTHEASTERN TRANSCRIPT * (843) 762-

26 2442

1 not what he said.

2 MR. ANDERSON: That's a question. I wasn't
3 saying that he said anything.

4 Q. Would you agree with me that you would be
5 speculating if you were to try to assign any portion of
6 the \$150,000 to any particular defect?

7 MR. HALDRUP: Are you asking what the
8 arbitrator or what D.R. Horton?

9 MR. ANDERSON: I'm asking him what
10 D.R. Horton.

11 Q. Would D.R. Horton be speculating to try to assign
12 any portion of that \$150,000 to any particular defect?

13 A. I think I have answered this before to the effect
14 that I don't have sufficient information to determine
15 what the arbitrator attributed the \$150,000 award to.

16 MR. ANDERSON: I think that is all I have
17 now.

18 EXAMINATION BY MR. COBB:

19 Q. I'm David Cobb. I'm here on the behalf of Joe
20 Naccari, who is one of the defendants that y'all brought
21 in on this case. When did BFS first learn about
22 complaints by Ms. Clark about framing difficulties or
23 framing problems with her house?

24 MR. HALDRUP: You said BFS. I assume you

25 meant -- SOUTHEASTERN TRANSCRIPT * (843)762-2442

DEFENDANT'S
EXHIBIT

2007

D-R-HORTON

2

Divide Name: HST

Area Name:

Assigned Vendor No.: FLAW

INDEPENDENT CONTRACTOR AGREEMENT

FEB - 5 2001

NAME OF CONTRACTOR BUILDERS FIRST SOURCE DBA - JAMAZ (Contractor)Sole Proprietorship Partnership ☒ Corporation L.L.C Other: ATTACH W-9Social Security No. or Tax ID No.: 57-0619425Name of Owner(s)/Officer(s): MORRIS TOLLY, SE GROUP ACCOUNTAddress for All Notices: ROUTE 1, BOX 170City: WHEELING State: SC Zip Code: 29926Telephone: (FAX) 987-0810 Fax: (843) 987-0831 E-Mail Address:

Insurance Carrier: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING

This agreement (the "Agreement") is entered into on this 31 day of JANUARY, 2001, between D-R-HORTON

(hereinafter "Owner") and Contractor

1. **Scope of Work.** All work performed by Contractor for Owner shall be subject to the terms and conditions of this Agreement. The work to be performed hereunder (the "Work") is the labor, services and/or materials, equipment, transportation, or facilities necessary to complete the construction-related activities generally described as: TURKEY

and shall include all work performed by Contractor for Owner. The applicable quantities and pricing for the Work shall be that reflected in the price sheet, proposal, bid or other documentation most recently accepted and approved by Owner (the "Pricing Schedule"). It is understood and agreed that no Pricing Schedule will modify any other terms of this Agreement other than price and quantity. It is understood and agreed that Owner is not obligated to award any work on specific property to Contractor; does not guarantee any quantity of work to be awarded, and may at its sole discretion retain others to perform work similar to the Work to be performed hereunder at any job location in addition to or in place of Contractor.

2. **Schedule of Work.** Owner it all have the right to determine the time, order and priority in which all components of the Work shall be performed and all matters relative to the timely and orderly conduct of the Work. Owner shall issue authorization (either pursuant to a written purchase order or work invoice (hereinafter the "Purchase Order") or verbal instructions from an authorized Owner representative to commence the Work, and Contractor shall not commence the Work at a job location until Contractor has received instructions to begin Work at a specific job location. Contractor shall commence no Work within three (3) days of notice to proceed from Owner, and if such work is interrupted at the direction of Owner, Contractor shall resume such work within two (2) working days from Owner's direction to resume. Contractor agrees that Owner shall have the right to make changes to the schedule of Work at Owner's discretion and agrees to comply with such changes.

3. **Performance of Work.** Contractor's acceptance/commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized Owner employee and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location and approves of the requirements to specified. Contractor acknowledges that TIME IS OF THE ESSENCE in the performance of all Work. Contractor shall coordinate with Owner all Work scheduled and coordinate with other contractors. Contractor shall perform all Work in a good and workmanlike manner, in accordance with the plans and specifications of Owner, according to industry standard practices, and warrants that the Work will meet or exceed FHA minimum property standards, VA requirements, all laws and regulations and any applicable building code requirements. Owner shall have the right to inspect the Work at any time, but inspection shall not be construed as a waiver of any obligations, representations or warranties of Contractor as to the Work. Notwithstanding anything contained herein to the contrary, all Work shall be performed and any defects shall be corrected in accordance with this Agreement to the satisfaction of Owner. Contractor acknowledges that Contractor is thoroughly familiar with the plans and specifications and that Contractor's own Work, and shall report in writing to Owner any defects prior to commencement of any Work, or Contractor shall be deemed to have accepted such work for inclusion into Contractor's Work. Contractor shall secure and maintain all permits, licenses and approvals necessary for or applicable to the performance of the Work hereunder. When Owner orders the Work in writing, Contractor shall make any and all changes in the Work as directed by Owner's authorized representative, and adjustments to the price shall be made only in accordance with a "Variation to Purchase Order" signed by Owner and Contractor prior to the commencement of such changes.

4. **Safety.** Contractor shall, at its own expense, protect its employees and all other persons from risk of death, injury or bodily harm arising from or in any way related to the Work. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations. Contractor shall provide Owner with written verification of compliance with HSA and Communication Standard, 29 C.F.R. 1926.57 et seq. and provide written notice to Owner of the contact person responsible for Contractor's safety compliance. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, permitted subcontractors or suppliers at a job location or performance by any such person under the influence of alcohol or drugs. Contractor shall prohibit and prevent the presence of children under age 18 from the work site. Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work. Contractor shall conduct inspections to determine that safe working conditions and equipment exist and safe practices are observed, and accepts sole responsibility for providing a safe place to work for its employees and the employees of all subcontractors and material suppliers. Contractor shall immediately notify Owner's construction supervisors of any unsafe condition or practice observed on the Work site. Further, Contractor shall immediately notify Owner of any accidents or injuries on the Work site.

5. **Contract Price.** The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor, and Contractor shall pay all applicable sales taxes and any other taxes resulting from such payment or retained in the Work. CONTRACTOR FURTHER AGREES THAT NO PRICE INCREASE SHALL BE BINDING UPON OWNER BEFORE CONTRACTOR GIVES OWNER (30) DAYS' WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule, the superceded Pricing Schedule shall remain in effect for Purchase Orders issued after the date of any new Pricing Schedule, until the expiration of the office period unless other prior written notice was given to Owner by Contractor.

THIS AGREEMENT CONSISTS OF THREE (3) PAGES

Prepared by: 503 Date: FEBRUARY 2001

Owner:
By: Richard Schwartz
Name: RICHARD SCHWARTZ
Title: Division Manager

Contractor:
By: Builders First Source
Name: Morris Tolly
Title: Southern Division

6. **Payment/Terms.** Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made for each stage. Contractor acknowledges and agrees that all Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order. Contractor acknowledges and agrees that no payments shall be due under this Agreement until Contractor's invoice (or Purchase Order, if applicable) for such Work has been submitted to Owner for payment, which action shall constitute a representation and confirmation that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. **CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS AGAINST OWNER OR ITS PROPERTY,** as a condition to payment. Owner may require a full and complete release of all liens for materials furnished and labor performed from Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Owner may, at any time, in its discretion, make checks payable to Contractor and one or more third parties. Such payment shall be deemed satisfaction of amounts owed by Owner to Contractor, notwithstanding the fact that such third parties may not endorse said checks. At all times during the performance of this Agreement, Owner shall be entitled to hold, for all Work in progress, any allowable retainage and any statutory sums in accordance with the laws of the State where the Work is performed. In the event that any liens are filed against Owner (relating to the Work), Contractor agrees that Owner shall be entitled to withhold all payments to Contractor until Contractor causes such lien or affidavit to be removed and released of record. Contractor agrees to INDEMNIFY and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any liens, and further agrees to Owners' request for (i) procure a bond to indemnify Owner and any home purchaser from Owner, to an amount equal to one hundred fifty percent of the bond amount, against such lien, or (ii) refund to Owner all monies, including any additional amount necessary to cover all of Owner's or home purchaser's attorneys' fees and court costs paid in discharging the lien, whichever remedy Owner elects in its sole and absolute discretion. Payment to Contractor for any Work shall not be construed as a waiver by Owner as to Work later found to be defective and shall not release Contractor from liability for warranties and warranty service and/or defective Work.

7. **Independent Contractor Status.** Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right to control the performance of the Work, except that the Work must be performed in accordance with this Agreement. Contractor shall be responsible for the performance of its employees and permitted subcontractors, and all personnel used by Contractor in the performance of Work shall be qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor acknowledges that this is a lump sum contract and that Contractor shall be solely responsible for all withholding, Social Security, state unemployment and other similar taxes for Contractor's employees, agents or permitted subcontractors, in addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work. Taxes will not be collected nor paid by Owner under this Agreement. Contractor further agrees to provide written notification to all of its present and future employees of Contractor's provision for Worker's Compensation Insurance.

8. **Contractor's Warranties.** Contractor unconditionally warrants to Owner, its successors and assigns, and to each purchaser of a house incorporating the Work from Owner, each subsequent owner, and their successors and assigns collectively referred to as the "Homeowner", that all labor performed and materials furnished by Contractor shall conform to the specifications of this Agreement and be free from any defect or deficiency in workmanship or materials when judged by the standards of accepted residential construction industry trade practices, and be in accordance with the requirements of all applicable government authorities. All Work not conforming to the aforementioned requirements shall be considered to be defective. In addition to the foregoing warranty, Contractor expressly warrants that the Work shall remain free of defects for the following warranty periods: (a) for a period of two (2) years (i) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (ii) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (iii) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; (c) all other elements for a period of one (1) year. The foregoing notwithstanding, in no event shall a warranty period for any system, element or other portion of the Work be less than the applicable warranty period for such system, element, or other portion of the Work under any residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner (a "Home Owners Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty which is longer than the Warranty Periods stated above; provided, however, failure to give such notice will not affect the expiration of the Warranty Period to the applicable warranty period under this Home Owners Warranty. Contractor agrees that the performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty obligations. Contractor's indemnity provided for herein, or the ability of Owner to request Contractor to perform warranty services in the future. Contractor shall furnish all warranties and/or guarantees by manufacturers on appliances and equipment, and shall furnish all certificates required by any municipality and/or VA and/or PHU. The foregoing is in addition to all other warranties provided by law or otherwise and not in limitation of periods of applicable statutes of limitation.

9. **Governmental Requirements.** Contractor agrees to comply with all applicable federal, state, local, and county statutes, or directives, regulations, codes, licensing requirements and standards, and the requirements of the Williams-Sterger Occupational Safety and Health Act of 1970 and amendments thereto, as well as the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., or similar laws or regulations, and the rules, regulations, or orders of all public authorities relating to performance of the Work, including without limitation, the procurement and posting of all required permits and notices. Contractor further agrees to indemnify and hold Owner harmless from the payment of any fine or penalty imposed as a result of Contractor's failure to comply with applicable laws and regulations.

10. **Subordination Rules.** Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subordination in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; and (iii) regulating trash pick-up and waste collection at the job location.

11. **CONTRACTOR'S INDEMNITY AND WAIVER.** TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER, ITS PARENT CORPORATION, SUBSIDIARIES AND AFFILIATES, AND ANY OF THEIR RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS, (HEREIN COLLECTIVELY REFERRED TO AS THE "INDEMNITEE"), 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 (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND PERMITTED SUBCONTRACTORS OF ANY KIND), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF PROPERTY (INCLUDING THE LOSS OF USE THEREOF), (HEREIN COLLECTIVELY REFERRED TO AS "LOSS"), IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH, CONTRACTOR'S WORK, 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. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, AND PERMITTED SUBCONTRACTORS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO ANY LOSS INVOLVING SUCH TOOLS OR EQUIPMENT IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH, THE WORK TO BE PERFORMED HEREUNDER.

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

13. **Insurance.** Contractor agrees to carry: (a) Broad Form Commercial General Liability Insurance on an Occurrence Form, naming the Indemnities as an additional insured with completed operations coverage and containing a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than One Million Dollars (\$1,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) pre-construction; (ii) products and completed operations including materials designed, furnished, or otherwise modified in any way by Contractor; (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) property damage resulting from explosion, collapse, or underground (i.e., c.u.) exposures; (b) Worker's Compensation Insurance that provides statutory benefits and coverage such that Owner will have no liability to Contractor's personnel, employees or agents; and (c) Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgement. Owner and Contractor collectively, the Parties intend and agree that the coverage obtained by Contractor naming Owner as an additional insured as set forth herein shall apply on a primary basis with any insurance of Owner for the same risks. Such coverage will be carried continuously during the term of this Agreement with insurance companies acceptable to Owner in its sole and absolute discretion. Such insurance shall provide for a waiver of subrogation.

INITIALS:

Owner:

Contractor:

CORPORATE

Contractor shall provide evidence that such insurance is in full force by furnishing Owner with a Certificate of Insurance, or certified copies of the above policies. Each Certificate of Insurance or policy shall contain an unqualified clause to the effect that the policy shall not be subject to cancellation, non-renewal, twelve change, or reduction of amounts of coverage without thirty (30) days' prior written notice to Owner. Such insurance shall be maintained continuously from the date of commencement of the Work until expiration of the period of the Contractor's warranty provided in this Agreement. The amounts and types of insurance set forth herein are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and types of insurance which Contractor shall determine to be reasonably necessary to protect itself and the Work required to be performed under this Agreement. **NOTWITHSTANDING THE FOREGOING, IN THE EVENT THAT THE CONTRACTOR FAILS TO PROVIDE OWNER WITH EVIDENCE OF INSURANCE AS REQUIRED HEREUNDER, OWNER SHALL BE ENTITLED, BUT NOT OBLIGATED, TO: (A) WITHHOLD AN AMOUNT (ESTABLISHED BY OWNER IN ITS SOLE AND ABSOLUTE DISCRETION) FROM CONTRACTOR TO COMPENSATE OWNER FOR THE ADDITIONAL COSTS OF ITS WORKER'S COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND RISKS AND ADMINISTRATIVE COSTS TO OWNER ASSOCIATED WITH DOING BUSINESS WITH INSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. CONTRACTOR EXPRESSLY ACKNOWLEDGES THAT THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE, AND CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS CONTRACT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.**

14. Subcontractors. If Contractor subcontracts any of the Work to the extent permitted under this Agreement, Contractor guarantees that such third party shall indemnify Owner and meet all insurance requirements set forth herein. Prior to the subcontractor's commencement of the Work, Contractor shall obtain a signed agreement from such third party indemnifying Owner and provide to Owner evidence of satisfactory insurance. In addition, Contractor shall require that each supplier or subcontractor indemnify Owner from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth herein. Contractor understands and agrees that for all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for any and all the actions of any subcontractor engaged by Contractor who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed to be the obligation of such subcontractors to Owner, for which Contractor shall be fully responsible to Owner.

15. Cleanup. Contractor shall at all times keep the job site free from accumulation of waste materials or rubbish caused by its operation and shall remove all of Contractor's materials, and if materials are furnished by Owner, Contractor shall move all usable materials provided by Owner to a location designated by Owner. Contractor shall sweep out any waste material from inside the house under construction upon completion of their operation. All refuse shall be placed in receptacles provided or at locations designated by Owner. Contractor's failure to comply with this provision shall authorize Owner to undertake any necessary clean up activities and collect a One Hundred Dollar (\$100.00) fine from Contractor. The cost of such cleanup and the aforementioned fine shall be deducted from any sums owed by Owner to Contractor, or shall be immediately payable by Contractor upon demand therefor by Owner.

16. Remedies. In the event that the Work performed by Contractor pursuant to this Agreement is found by Owner to be defective or incomplete, or unknown contractor's work is damaged by an act for which Contractor, or its employees, agents or subcontractors, are responsible, Owner will have the right to elect, at its sole discretion to: (1) notify Contractor, at which time Contractor shall promptly correct such Work, replace or repair any defective material, or repair any damage. Contractor agrees to make all repairs and correct such defects under the applicable warranty within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours notice on a non-emergency basis; (2) retain a third party to perform such duties, and retain any sums otherwise due Contractor under any Purchase Order or invoice and apply such sums against such costs of completion, any related costs or damages, including transportation fees, with any excess thereafter to be paid to Contractor. In the event the cost of such remedial work exceeds the funds withheld resulting in a deficiency, Contractor shall be fully responsible for this deficiency, together with any damages and costs, including costs of court and reasonable attorneys' fees, incurred by Owner, and shall pay to Owner this amount within thirty (30) days of demand.

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

The duties and obligations imposed by this Agreement and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The prevailing party to any dispute shall have a right to collect its reasonable attorney fees and expenses.

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

18. Assignment. Contractor's rights and obligations under this Agreement are nontransferable and not assignable, and Contractor shall not subcontract all or any part of the Work contemplated by this Agreement without obtaining the prior written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Owner may assign this Agreement without Contractor's consent.

19. Notices. All notices required pursuant to this Agreement or otherwise shall be in writing and shall be delivered to the respective business address of the Parties.

20. Entire Agreement. This Agreement, and with respect to prices and quantities only, the Price Schedule and all written Purchase Orders shall constitute the entire agreement between the Parties, and there are no other agreements, oral or written, by and between the Parties. Except as otherwise provided herein, no provision of this Agreement may be amended or added to except in writing signed by both Parties.

21. Termination and Waiver. This Agreement shall remain in full force and effect until terminated in writing by mailing notice to the other Party. Owner may terminate this Agreement at any time, irrespective of whether Contractor is in default hereunder, at will. Contractor shall provide One Hundred Twenty (120) Days' notice prior to the effective date of termination, and agree to perform fully under this Agreement during such notice period. If the Agreement is terminated by Owner, the Parties agree that, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement. Anything herein contained to the contrary notwithstanding, the Work to be performed by Contractor shall only include such work as specifically authorized by an authorized representative of Owner. Any failure of Owner to enforce any of the terms and provisions of this Agreement shall not constitute a waiver of such required performance by Contractor or of any other performances in the future required by Contractor hereunder.

22. Dispute Resolution. If a dispute arises out of or relating to this Agreement or a breach thereof and if the dispute cannot be settled through negotiation, the parties agree to first try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules, before resorting to arbitration, litigation, or another dispute resolution procedure. If mediation fails, any claim, controversy or dispute of any kind among the Parties, now existing or arising in the future, whether relating to the interpretation of any provision of this Agreement or the rights and obligations of the Parties under this Agreement, any other agreements relating to, or arising from, the business of Owner or the Work, shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. The arbitration shall be conducted by the American Arbitration Association ("AAA"). The arbitration shall be conducted in accordance with the Construction Industry Arbitration, to the extent not in conflict with the Federal Arbitration Act. The Parties agree that if multiple arbitrations should be commenced, all such proceedings shall be consolidated into one arbitration. Contractor agrees to participate in, and be bound by, any arbitration proceeding between Owner and any third party relating to the Work. Notwithstanding any provision, a last sentence to the contrary, Owner shall be entitled to terminate this Agreement and/or any Purchase Order, in whole or in part, in the event any dispute arises between Contractor and Owner, whereupon Owner shall also be entitled to exercise any and all remedies, deductions, and offsets authorized pursuant to the terms and provisions of this Agreement. Notwithstanding any other provision of this paragraph, in the event that a subcontractor or material supplier of Contractor, or any other necessary third party, cannot be found to mediate or arbitrate, Owner may elect to unilaterally waive mediation or arbitration.

23. Survival. All terms of this Agreement survive its termination and shall remain in full force and effect and shall be binding upon the Parties and any successors and assigns.

24. General Contract Provisions. The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. The terms of the Agreement shall be binding on all Parties, their respective successors, representatives, heirs and assigns. In the event of a conflict between this Agreement and the terms of any Purchase Order or any other agreement or document pertaining to the subject matter hereof which cannot be reconciled by the Parties, the terms of this Agreement shall control. Unless the context requires a contrary construction, the singular shall include the plural, and the plural this singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of the paragraphs, sections or articles hereof. No delay or failure by Owner to exercise any right hereunder, and no partial or single exercise of such right, will constitute a waiver of that or any other right except by written agreement executed by Owner.

INITIALS

Owner

Contractor

CORPORATE

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C.A. NO.: 2010-CP-10-10355

D.R. HORTON, INC. f/k/a C. RICHARD
DOBSON BUILDERS, INC.,)

Plaintiff,)

-versus-)

BUILDERS FIRSTSOURCE -)
SOUTHEAST GROUP, LLC; and)
BUILDERS FIRSTSOURCE, INC; and)
JOSEPH NACCARI, INDIVIDUALLY,)
AND D/B/A MASTERFRAMERS,)

Defendants,)

**PLAINTIFF'S REPLY TO
DEFENDANT BUILDERS
FIRSTSOURCE'S MOTION
FOR RECONSIDERATION**

JOSEPH NACCARI, INDIVIDUALLY,)
AND D/B/A MASTERFRAMERS,)

Third-Party Plaintiff,)

-versus-)

JAIME ARREGUIN D/B/A MAYA)
CONSTRUCTION,)

Third-Party Defendant.)

2013 OCT 28 PM 4:07
JULIE J. REASTRONG
CLERK OF COURT

Plaintiff, D.R. Horton, Inc. f/k/a Richard Dobson Builders, Inc. ("DRH"), respectfully submits, through its undersigned attorneys, the following Reply to Defendants, Builders FirstSource-Southeast Group, LLC and Builders FirstSource, Inc.'s ("BFS") Motion for Reconsideration of the Court's Order denying BFS's Motion for Summary Judgment.

DRH submits that the Motion for Reconsideration should be denied because: (1) BFS failed to make a timely motion; (2) BFS presents several new issues that were not raised prior to

the Court Order denying BFS's Motion for Summary Judgment; and (3) BFS should not use a Rule 59(e) motion to ask the Court to rethink what the Court already thought through.

Rule 59(e) states "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." BFS's motion notes that the Court denied BFS's Motion for Summary on October 2, 2013, and that "BFS was mailed notice of that decision on October 3, 2013." BFS Motion to Reconsider is dated October 15, 2013, and was received by counsel for DRH on the same date. However, the Motion for Reconsideration was not filed until on October 16, 2013. BFS's filed motion could not have been received until after October 16, 2013.

The Rule requires that the moving party serve a Rule 59(e) "not later than 10 days after receipt of written notice." Although BFS's motion fails to identify the date of receipt of the Order, it appears that the Order would have been received on October 5th, and thus, the time for filing of the motion would have run on October 15, 2013. Based on the language of the Rule, BFS failed to timely move for the Rule 59(e) motion.

"A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." Poch v. Bayshore Concrete Products/S. Carolina, Inc., 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) *aff'd as modified*, 747 S.E.2d 757 (S.C. 2013)(citing Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59, SCRCF, motion is not preserved for review); Kiawah Prop. Owners Grp. v. Public Serv. Comm'n., 359 S.C. 105, 113, 597 S.E.2d 115, 149 (2004) (stating an issue raised for first time in petition for rehearing not preserved).

BFS's first argument in support of their Motion to Reconsider is that "allowing DRH to

pursue an independent action in order to determine what portion of the judgment is attributable to BFS's scope of work would violate the South Carolina Uniform Arbitration Act." BFS never made this argument regarding S.C. Code Ann. Section 15-48-100 in their memorandum in support of summary judgment or at the hearing. BFS cannot use a motion to reconsider to present this new argument because it could have been raised prior to the judgment.

Reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. In re Cable & Wireless, PLC, 332 F. Supp.2d 896, 899-900 (E.D. Va. 2004)(citing Clapper v. Chesapeake Conference of Seventh-Day Adventists, 1998 WL 904528 *3 (4th Cir. Dec. 29, 1998) ("The Rule 59(e) motion may not be used to re-litigate old matters")); see Thompson v. Direct Impact Co., 63 F.Supp.2d 721, 724 (E.D. Va. 1998) ("[A] Rule 59(e) motion is not a vehicle for obtaining post judgment reargument on issues already decided."), affd, 188 F.3d 503 (4th Cir. 1999); see also Hanover Ins. Co. v. Corpro Cos., 221 F.R.D. 458, 460 (E.D. Va. 2004) ("Rule 59(e) does not entitle [plaintiffs] to a second bite at the apple."). A litigant may not use Rule 59 to re-litigate issues already decided by the court. Id. It is an improper use of the motion to reconsider to ask the Court to rethink what the Court, ... already thought through - rightly or wrongly. Id. Because Plaintiff merely asks the Court to reconsider its analysis, the Motion is improper and should be summarily denied without further briefing or hearing.

BFS's second, third, fourth, and fifth argument were previously made before the Court, and BFS should not now be allowed to Rule 59(e) to ask the Court to reconsider what the Court has already ruled on. However, DRH will address these arguments individually below.

BFS argues that DRH is collaterally estopped, or that res judicata prevents DRH from

relitigating issues decided in the underlying action. DRH is not attempting to relitigate anything. DRH has filed an action for contractual indemnification and contribution. Neither of these claims were part of the underlying action. The underlying action did not address issues related to the indemnification agreements between DRH and BFS, and did not address issues related to the prorata share of joint tortfeasors. These are entirely new issues. Accordingly, DRH cannot be collaterally estopped from litigating these issues in this matter, and because these issues were not addressed in the underlying action, res judicata cannot apply - especially since none of the defendants and third-party defendant were parties to the underlying action. See McNaughton-McKay Elec. Co. of N.C., Inc. v. Andrich, 482 S.E.2d 564 (S.C. App. 1997); RIM Associates v. Blackwell, 597 S.E.2d 152 (S.C. Ct. App. 2004).

BFS's third argument is that because there was no record of the arbitration, any judgment in this action would be speculative. Under the indemnification agreements, BFS is obligated to indemnify and hold DRH "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 or loss of property** (including the loss of use thereof) . . . 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 [BFS]; or the Work performed or to be performed by [BFS] or [BFS]'s personnel, agents, suppliers, or **permitted subcontractors.**"

DRH has suffered damages in the amount of \$150,000 in a judgment awarded at arbitration, and incurred attorneys fees totally \$155,717.05 in the underlying action - a suit which

contained claims asserted by the Homeowner that the Work performed by BFS and/or its subcontractors was defective, violated building codes, and as a result caused property damage. The amount of indemnification DRH is seeking to recover from BFS through the indemnification agreement is not speculative. Damages are documented through a recorded satisfaction, and itemized billing statement, respectively.

Furthermore, DRH's claim for contribution is not speculative. The judgment against DRH was \$150,000. DRH paid the entire judgment and extinguished the liability of Defendants and Third-Party Defendant. DRH is entitled to recover that amount which DRH paid above prorata share. DRH's Contribution claim is not speculative.

BFS's fourth argument is that because the arbitrator failed to make a "reasoned" award, DRH cannot establish that it was liable based on tort. South Carolina courts have held 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.* Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 345-46, 384 S.E.2d 730, 737 (1989).

Furthermore, a violation of a building code is negligence per se. Coleman v. Shaw, 281 S.C. 107, 314 S.E.2d 154 (Ct.App.1984). BFS's employee investigating Homeowner claims admitted that he found several code violations at the residence when he was inspecting BFS's work. See Exhibit "A".

BFS's fifth and final argument in its Motion to Reconsider is that the indemnification agreement between DRH and BFS is unenforceable because it violates S.C. Code Section 32-2-10. As the Court is aware, this statute prohibits agreements "purporting to indemnify the

promisee . . . against liability for damages arising out of . . . property damage proximately caused by or resulting from the **sole negligence** of the promisee . . .” Id. (emphasis added).

The Contract between DRH and BFS contains three indemnification agreements: (1) BFS agrees to indemnify DRH for losses related to BFS’s breach of warranties, representations, obligations contained in the contract; (2) BFS agrees to indemnify DRH for losses related to BFS Work; and (3) BFS agrees to indemnify DRH for losses related to “any negligent action and/or omission of [DRH] related in any way to the Work, even when the Loss is caused by the fault or negligence of [DRH].”¹

BFS’s argument that the agreement violates public policy focuses solely on the third indemnification agreement. Under that agreement, BFS agrees to indemnify DRH for any negligent act or omission by DRH related to the Work of BFS - even when the loss “is caused by the fault or negligence of [DRH].” This indemnification agreement does not “purport” to indemnify DRH for damages “caused by or resulting from the sole negligence” of DRH as Section 32-2-10 requires.

The terms “sole negligence” are not contained in the agreement. South Carolina has long recognized the concept of joint and several liability, and that there can be two or more parties that have caused a loss. Under the third indemnification agreement, BFS agrees to indemnify DRH even if DRH also caused the loss.

Both DRH and BFS owed Homeowner the same duty, and by their common neglect of that duty, Homeowner is injured, and the tort is joint. Upon well settled principles each, any, or

¹ DRH references the three indemnification agreements contained in paragraph 11 of the contract between DRH and BFS. There are several other paragraphs in the contract which additionally contain indemnification language and/or agreements.

all of the tortfeasors may be held liable. See Pendleton v. Columbia Ry., Gas & Elec. Co., 133 S.C. 326, 131 S.E. 265, 267 (1926) ("That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, even in the absence of community of design or concert of action, to a liability which is both joint and several, is a proposition recognized and approved in this state and supported by the great weight of authority elsewhere)(citing Matthews v. Railway, 67 S. C. 499, 514, 46 S. E. 335, 65 L. R. A. 286; Steele v. Railroad Co., 95 S. C. 124, 126, 78 S. E. 705; Cooley on Torts (3d Ed.) p. 246; 38 Cyc. 488)). The third indemnification agreement addresses situations where a loss related to BFS's Work is **also** caused by an act or omission of DRH.

More importantly, the language contained in S.C. Code Section 32-2-10 is clear that even if there may be an indemnification agreement that violates public policy and is unenforceable, any other indemnification agreement that does not violate the statute **remains enforceable**. The statute's specific language states "**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 for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.**" Id.(emphasis added). Accordingly, regardless of the third indemnification agreement, the other two indemnification agreements between DRH and BFS **are enforceable**.

CONCLUSION

Based on the foregoing arguments and authorities Plaintiff, D.R. Horton, Inc. f/k/a Richard Dobson Builders, Inc., respectfully requests that this Honorable Court deny Defendant Builders FirstSource - Southeast Group, LLC and Builders FirstSource, Inc.'s Motion for

Reconsideration.

Dated this 24 day of October 2013.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.



Neil S. Haldrup
Peden Brown McLeod, Jr.
145 King Street, Ste. 300
Post Office Box 1200
Charleston, South Carolina 29402
843-329-9500
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

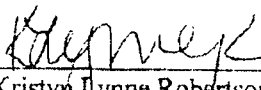
The undersigned employee of WALL TEMPLETON & HALDRUP, P.A. hereby certifies that on this 28th day of October 2013 she served a copy of **PLAINTIFF'S REPLY TO DEFENDANT BUILDERS FIRSTSOURCE'S MOTION FOR RECONSIDERATION** via electronic mail to all below-named counsel and by placing a copy in a postpaid envelope for collection and processing for mailing, following this business's ordinary practice, with which she is readily familiar to James Taylor Anderson, III. On the same day correspondence is placed for collection and mailing, it is deposited with the United States Postal Service in the ordinary course of business and addressed to James Taylor Anderson, III, at the place and address stated below, which is the last known address, in Charleston, South Carolina:

ADDRESSEE(S)

James Taylor Anderson, III
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tanderson@kernodlslaw.com
**ATTORNEYS FOR BUILDERS
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**ATTORNEYS FOR JOSEPH NACCARI,
INDIVIDUALLY AND D/B/A
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mrutland@mgclaw.com
cwells@mgclaw.com
**ATTORNEYS FOR JAIME ARREGUN
D/B/A MAYA CONSTRUCTION**



Kristyn Lynne Robertson

EXHIBIT “A”

Larry Wozniak

From: Gifford Shaw
Sent: Monday, September 24, 2007 11:56 AM
To: Bob Lanier; Larry Wozniak; Bill Crabtree; Lou Davis; Terry Rosaimond
Cc: Randy Thomason
Subject: Horton

I am recommending the following actions:

Roof: The issue is that there are 2 sets of trusses and lateral bracing is not installed. I recommend that we install the lateral bracing and get a letter from an engineer stating that there is no reason to remove the trusses.

Second Floor: The homeowner pointed out the floor has dips in it. I noted one area that is probably out of code and recommend that we fix this. It is over the kitchen below.

Wall Sheetrock Crack: The wall sheetrock is cracking on a exterior wall where a lam beam is bearing that is carrying the roof trusses. I suspect that there is not a good stud packing below the beam and this will need to be corrected.

First Floor: The homeowner pointed out numerous dips in the floor. I found two areas that are probably out of code. One area is between the dining room and the foyer and is right over the bearing below. I suspect this could be from when the owner removed the carpet in the dining room and put down oak flooring to match the foyer floor. This is where the two floors joined.

The other area is under the fireplace wall. Here I think we are getting deflected load from where a beam is carrying second floor trusses. This needs to be fixed.

0018
BFS

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
D.R. HORTON, INC. f/k/a C. RICHARD
DOBSON BUILDERS, INC.,

Plaintiff,

v.

BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, LLC; and BUILDERS
FIRSTSOURCE, INC., and JOSEPH
NACCARI, Individually and d/b/a
MASTER FRAMERS,

Defendants.

JOSEPH NACCARI, Individually, and d/b/a
MASTER FRAMERS,

Third-Party Plaintiff,

v.

JAIME ARREGUIN d/b/a MAYA
CONSTRUCTION,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2010-CP-10-10355

**ORDER GRANTING DEFENDANTS
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC, AND
BUILDERS FIRSTSOURCE, INC.
PARTIAL SUMMARY JUDGMENT,
GRANTING DEFENDANTS
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC AND
BUILDERS FIRSTSOURCE, INC.'S
MOTION TO COMPEL AND
DENYING PLAINTIFF D.R. HORTON,
INC. f/k/a RICHARD DOBSON
BUILDERS, INC.'S MOTION FOR
PROTECTIVE ORDER**

2014 MAY -2 PM 2:50
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

FILED

This matter comes before the Court on Defendants Builders FirstSource-Southeast Group, LLC, and Builders FirstSource, Inc.'s (hereinafter collectively "BFS") Motion to Reconsider this Court's September 30, 2013 Order denying BFS's Motion for Summary Judgment; BFS's Motion to Compel; and Plaintiff D.R. Horton, Inc., f/k/a Richard Dobson Builders, Inc.'s (hereinafter "DRH") Motion for Protective Order. A hearing on these motions was held on October 30, 2013. All parties appeared at the hearing through their respective counsel. After considering the motions, memoranda of law, deposition testimony submitted by

the parties, exhibits submitted by the parties, and the arguments of counsel, the Court finds that BFS's Motion to Reconsider should be, and hereby is, GRANTED; that BFS should be, and hereby is GRANTED partial summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure; that BFS's Motion to Compel should be, and hereby is GRANTED; and that DRH's Motion for Protective Order should be, and hereby is DENIED.

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

1. DRH was the general contractor for a single family residential home constructed at 403 Milner Court, Charleston, South Carolina (the "Residence"). BFS, as a subcontractor for DRH, provided and installed framing materials and windows at the Residence. BFS performed all labor at the Residence through subcontractors of its own.

2. Prior to construction of the Residence, DRH and BFS entered into an Independent Contractor Agreement (the "Contract") that contains an indemnity agreement.

3. DRH sold the Residence to Patricia Clark.



4. In 2008, Patricia Clark filed *Patricia Clark v. D.R. Horton, Inc.*, Case No. 2008-CP-08-1633, in the Circuit Court of Berkeley County, South Carolina (the "Homeowner's Suit"). The Homeowner's Suit alleged causes of action against DRH for negligence, breach of contract, breach of warranty, and violations of the South Carolina Unfair Trade Practices Act. The Homeowner's Suit alleged that the Residence was defective because of, among other things, improper installation of siding, improper installation of the exterior wall system, improper flashing, improper installation of a moisture barrier, improper water management system, improper installation of framing, improper installation of the concrete slab and driveway, improper installation of the roof and shingles, and improper installation of a gas hot water heater.

5. While the parties disagree on whether DRH gave BFS oral notice of the Homeowner's Suit, it is undisputed that DRH did not provide BFS with any written notice or tender of defense for the Homeowner's Suit.

6. DRH filed a Motion to Compel Arbitration and to Stay the Homeowner's Suit and on April 1, 2009, the Berkeley County Circuit Court entered a consent Order Referring Claims to Arbitration whereby the Homeowner's Suit was referred to binding arbitration.

7. The Homeowner's Suit was arbitrated during a two day period on December 10th and 11th 2009. There is no transcript or other formal record of the evidence presented at the arbitration.

8. The arbitrator awarded Patricia Clark \$150,000. Said award states that "Counsel for the parties have requested an Order containing a monetary award only." It does not indicate what amounts, if any, were awarded for specific defects. Nor does the award specify which of the causes of action asserted in the Homeowner's Suit were successful.

9. On February 26, 2010, the arbitration award was filed, confirmed and made a final judgment of the Berkeley County Circuit Court (the "Judgment"). No party objected to the confirmation of the arbitration award.

10. On March 24, 2010, a Satisfaction of Judgment was entered in the Berkeley County Circuit Court indicating that DRH had satisfied the Judgment.

11. On December 17, 2010, DRH filed the instant action against BFS seeking contribution pursuant to S.C. Code Ann. § 15-38-10, et seq., and contractual indemnity. DRH alleges that BFS is responsible, in whole or in part, for the Judgment and for \$155,717.05, in attorney's fees and costs associated with the defense of the Homeowner's Suit.

12. In order to support its claim for \$155,717.05 in attorney's fees and costs, DRH voluntarily, without court order, produced invoices from its attorneys in the Homeowner's Suit, Ogletree, Deakins, Nash, Smoak & Stewart, P.C. ("Ogletree"). In its Motion for Protective Order DRH states that said invoices were produced "for the purpose of proving attorney's fees in the Underling Action." Motion for Protective Order at 3.

13. For each billing entry, the invoices contain a summary of the tasks being performed by Ogletree. According to DRH, "the summary supporting each billing entry is protected by the attorney-client privilege," as the "summaries reflect legal strategy and decisions based on communications between Plaintiff and its counsel in the Underlying Action . . ." Motion for Protective Order at 3-4.

14. The 30(b)(6) deposition of DRH took place on September 6, 2013. One of the topics specified in the 30(b)(6) notice was "DRH's defense of the lawsuit filed by Patricia Clark, including any and all attorney's fees incurred by DRH in connection with that lawsuit."

15. On several occasions BFS's counsel attempted to question DRH's 30(b)(6) representative concerning his knowledge of the summaries supporting Ogletree's billing entries. Counsel for DRH instructed the witness not to answer multiple questions relating to the invoices. Eventually, DRH's counsel stated for the record that DRH's 30(b)(6) representative would not answer any questions regarding "what went into a time entry, or what he knows about the time entry, or what communications he had with the attorneys related to the time entry . . ." Pursuant to South Carolina Rule of Civil Procedure 30, DRH filed a Motion for Protective Order on September 12, 2013.

16. On October 8, 2013, BFS filed a Motion to Compel the production of all

documents related to DRH's defense of the Homeowner's Suit.

II. CONCLUSIONS OF LAW

A. BFS's Motion for Reconsideration of this Court's September 30, 2013, Order denying BFS's Motion for Summary Judgment

17. On December 11, 2012, BFS moved for summary judgment on all of DRH's claims. By order of September 30, 2013, this Court denied BFS's Motion for Summary Judgment. BFS filed a timely Motion for Reconsideration. After reconsidering its September 30, 2013, Order denying BFS's Motion for Summary Judgment, the Court concludes that BFS is not required to contribute to, or indemnify DRH for, any portion of the Judgment, attorney's fees, or defense costs, attributable to the work or fault of others.

18. It is undisputed that some of the allegations in the Homeowner's Suit related to work performed by BFS and other allegations in the Homeowner's Suit were related to the work of others.

19. The statutory right of contribution among joint tortfeasors is in derogation of the common law and thus the South Carolina Uniform Contribution Among Tortfeasors Act (the "Act") is strictly construed. *G & P Trucking v. Parks Auto Sales Service & Salvage, Inc.*, 357 S.C. 82, 87 (Ct. App. 2003). The Act provides that "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them . . ." S.C. Code Ann. § 15-38-20(A). BFS is not liable jointly, severally, or otherwise, for defects in the work of other subcontractors employed by DRH at the Residence. Moreover, portions of the Judgment attributable to the work of others, and any portion of the Judgment attributable to BFS, are for different injuries to property, not "the same injury to . . . property." See S.C. Code Ann. § 15-38-20(A). Therefore,

BFS is not liable for contribution with respect to any portion of the Judgment associated with the work or fault of others.

20. The plain reading of the indemnity clause is that BFS is only required to indemnify DRH with regard to lawsuits arising out of BFS's work. Further, to the extent that the indemnity clause does purport to require BFS to indemnify DRH 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. § 32-2-10. Therefore, BFS is not liable for indemnity with regard to any portion of the Judgment, attorney's fees or costs associated with the work or fault of others.

21. DRH will be permitted to move forward with its claims for contribution and indemnity. Moving forward, DRH, as the Plaintiff, will have the burden of proving what portion of the Judgment, attorney's fees, and costs, if any, are attributable to BFS.

 B. DRH's Motion for Protective Order and BFS's Motion to Compel

22. The question of whether a Plaintiff seeking indemnity for attorney's fees, incurred in a previous action, waives the attorney client privilege with regard to the legal services giving rise to those fees, is a novel question of law in South Carolina.

23. While no South Carolina case is directly on point it is well settled in South Carolina that the attorney-client privilege may be waived. *State v. Love*, 275 S.C. 55, 59 (1980). "Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject." *Marshall v. Marshall*, 282 S.C. 534, 538 (Ct. App. 1984).

24. Because there is no South Carolina appellate decision on point this Court may

BFS is not liable for contribution with respect to any portion of the Judgment associated with the work or fault of others.

20. The plain reading of the indemnity clause is that BFS is only required to indemnify DRH with regard to lawsuits arising out of BFS's work. Further, to the extent that the indemnity clause does purport to require BFS to indemnify DRH 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. § 32-2-10. Therefore, BFS is not liable for indemnity with regard to any portion of the Judgment, attorney's fees or costs associated with the work or fault of others.

21. DRH will be permitted to move forward with its claims for contribution and indemnity. Moving forward, DRH, as the Plaintiff, will have the burden of proving what portion of the Judgment, attorney's fees, and costs, if any, are attributable to BFS.

 B. DRH's Motion for Protective Order and BFS's Motion to Compel

22. The question of whether a Plaintiff seeking indemnity for attorney's fees, incurred in a previous action, waives the attorney client privilege with regard to the legal services giving rise to those fees, is a novel question of law in South Carolina.

23. While no South Carolina case is directly on point it is well settled in South Carolina that the attorney-client privilege may be waived. *State v. Love*, 275 S.C. 55, 59 (1980). "Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject." *Marshall v. Marshall*, 282 S.C. 534, 538 (Ct. App. 1984).

24. Because there is no South Carolina appellate decision on point this Court may

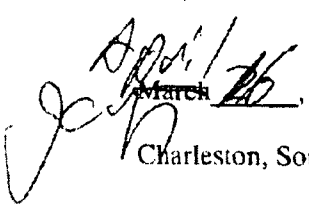
incurred defending a number of distinct construction defects. BFS is not responsible for portions of the attorney's fees attributable to defending the work of others. BFS is entitled to full discovery regarding what portions of the fees are attributable to DRH's defense of the work of others and the reasonableness of the fees. See *Ideal Electronic Security*, 129 F.3d at 146 ("Appellants are entitled to full discovery of information underling the claim for fees; only after obtaining such discovery will the appellants be in a position to . . . present to the court any legitimate challenges to the . . . claim.").

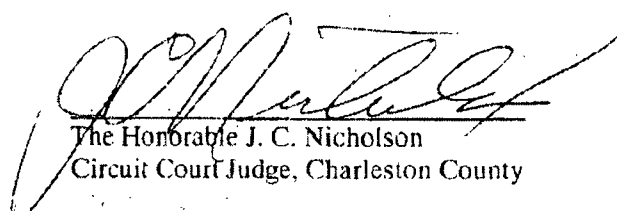
28. In light of the above, the Court finds that DRH has waived the attorney client privilege with regard to any and all communications between DRH and Ogletree related to the Homeowner's Suit. The Court grants BFS's Motion to Compel and Orders DRH to produce all documents related to the Homeowner's Suit, including any and all communications between DRH and Ogletree related to the Homeowner's Suit, within 20 days from the entry of this Order.

29. DRH's Motion for a Protective Order is denied and the 30(b)(6) deposition of DRH will be reconvened after DRH has produced the above documents.

30. This case is subject to trial 90 days after entry of this Order.

AND IT IS SO ORDERED.


April 15, 2014
Charleston, South Carolina


The Honorable J. C. Nicholson
Circuit Court Judge, Charleston County

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

D.R. HORTON, INC. f/k/a C. RICHARD
DOBSON BUILDERS, INC.,)

Plaintiff,)

-versus-)

BUILDERS FIRSTSOURCE -)
SOUTHEAST GROUP, LLC; and)
BUILDERS FIRSTSOURCE, INC; and)
JOSEPH NACCARI, INDIVIDUALLY,)
AND D/B/A MASTERFRAMERS,)

Defendants,)

JOSEPH NACCARI, INDIVIDUALLY,)
AND D/B/A MASTERFRAMERS,)

Third-Party Plaintiff,)

-versus-)

JAIME ARREGUIN D/B/A MAYA)
CONSTRUCTION,)

Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C.A. NO.: 2010-CP-10-10355

MOTION TO RECONSIDER

FILED
2014 MAY 15 PM 3:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Plaintiff, D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. ("DRH"), hereby gives notice and moves this Honorable Court, pursuant to South Carolina Rules of Civil Procedure and Rule 59 to reconsider and/or alter or amend its Order entered May 2, 2014, granting Defendant Builders FirstSource - Southeast Group, LLC and Builders FirstSource, Inc. ("BFS") partial summary judgment. DRH's grounds for this Motion are that the Court's ruling that BFS is not required to indemnify DRH for, any portion of the Judgment, attorney's fees, or defense costs,

attributable to the work or fault of others is inconsistent with South Carolina case law on rules of contract construction. Furthermore, the Court considered grounds not asserted by BFS as a basis for summary judgment, and thus DRH has not been afforded an opportunity to address those grounds for partial summary judgment.

DRH hereby incorporates by reference its Memorandum in Opposition to BFS' Motion for Summary Judgment and its Reply to BFS's Motion to Reconsider. For the reasons set forth in the above stated submissions and for the reasons set forth below, DRH's motion should be granted.

MOTION TO RECONSIDER STANDARD

"A Rule 59(e) motion is not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2204). "A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." Id. (citing Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992)). "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." Id.

The South Carolina Rules of Civil Procedure "contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an

argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Id.

ARGUMENT

I. The Court Failed to Fully Consider the Plain Language of the Indemnification Clause, and Ruled Sua Spontea.

BFS’s Motion for Summary Judgment and BFS’s Memorandum in Support of its Motion for Summary had three grounds for summary judgment as to contractual indemnity, none of which asserted that BFS should not be required to indemnify DRH for any portion of the Judgment, attorney’s fees or defense costs, attributable to the work or fault of others. However, the Court’s order awarded partial summary judgment as to DRH’s contractual indemnification claims, for that specific reason. Therefore, DRH has not had an opportunity to address these grounds, and thus, the Court has not had an opportunity to consider DRH’s position.

A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. Fed. Pac. Elec. v. Carolina Prod. Enterprises, 298 S.C. 23, 25, 378 S.E.2d 56, 57 (Ct. App. 1989). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Comm’n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). Where an agreement is clear and capable of legal construction, the court’s **only function** is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct.App.1995)(emphasis added). The

courts are **without authority** to alter an unambiguous contract by construction or to make new contracts for the parties. C.A.N. Enters., Inc., 296 S.C. at 378, 373 S.E.2d at 587 (emphasis added). A court **must enforce** an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct.App.1997)(emphasis added).

The Court did not find the indemnity clause ambiguous. Therefore, the Court must enforce the clause pursuant to its terms "regardless of its wisdom or folly, apparent unreasonableness, or BFS's failure to guard its rights carefully." Lindsay v. Lindsay, *supra*. Furthermore, the Court is without authority to alter the clause to make a new contract between DRH and BFS. C.A.N. Enters., Inc., *Supra*.

However, the Court's interpretation does alter the contract between DRH and BFS when the Court concludes that the clause "only" requires BFS to indemnify DRH "with regard to lawsuits arising out of BFS's work." The Court erred in reducing the scope of the clause when the indemnification clause is clearly more board.

The plain language of the contract states that BFS "agrees to protect, indemnify, and hold [DRH] harmless from 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) . . . on account of damage to property . . . in any way occurring, incident to, arising out of, or in connection with . . . the Work performed by . . . [BFS] . . ." In other words, BFS agrees to indemnify DRH for damages from a construction defect lawsuit in any way occurring in connection with BFS's work.

The Court, without the authority to do so, altered the agreement between DRH and BFS

by limiting the scope of the indemnity clause. The Court reduced the scope of the clause, and states in its Order that “the plain reading of the indemnification clause is that BFS is only required to indemnify DRH with regard to lawsuits arising out of BFS’s work.” DRH agrees that the indemnification clause includes damages from lawsuits arising out of BFS’s work. However, the indemnity clause is much more broad. It provides that BFS is to “protect, defend, . . . and hold DRH free and harmless from [lawsuits] . . . on account of damage to or loss of property . . . in any way occurring, incident to, arising out of, or in connection with the Work [of BFS] . . .” So, the clear language of the clause goes beyond solely indemnifying DRH for “lawsuits arising out of BFS’s work.” The plain language includes “indemnity” and “hold DRH free and harmless” from construction defect lawsuits “in any way occurring, incident to, arising out of, **OR** in connection with” the work of BFS.

The underlying construction defect case was a lawsuit filed by a homeowner alleging property damage in connection with BFS's work. In fact, BFS's 30(b)(6) witness acknowledged, that the underlying construction defect action was connected with the work of BFS. Exhibit “A” (Depo. of Terry Rosamond, 161:24 - 162:12 (Oct. 24, 2013)). Therefore, the clause requires BFS to indemnify for damages (judgment award, attorneys’ fees, and expenses) DRH suffered as a result of the underlying construction defect case.

Pursuant to plain reading of the indemnity clause, DRH is entitled to be protected, indemnified, and held free and harmless from any damages (judgment, attorney’s fees, and/or expenses, or otherwise) sustained by DRH as a result the underlying construction defect case because it was connected with the work of BFS. The Court mis-interpreted the clause by finding that BFS is solely required to indemnify DRH for damages associated with BFS’s work when the

clause is much more broad. Accordingly, the Court should reconsider its Order granting partial summary judgment as to DRH's contractual indemnity claims, and find that the indemnification clause covers all damages DRH sustained from the underlying construction defect case because that case was connected with BFS's work.

2. The Indemnity Clause Does Not Violate the Provisions of S.C. Code Ann. § 32-2-10 because DRH Is Not Seeking Indemnification for Its Sole Negligence.

S.C. Code Section 32-2-10 provides that "a promise or agreement in connection with . . . construction . . . purporting to indemnify the promisee . . . against liability for damages arising out of . . . property damage proximately caused by or resulting from the sole negligence of the promisee . . . is against public policy and unenforceable." S.C. Code § 32-2-10. The Section; however, notes that "[n]othing in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee . . . against liability for damages resulting from the negligence, in whole or in part, of the promisor . . ." *Id.* (emphasis added).

The Court's Order notes that "[i]t is undisputed that some of the allegations in the Homeowner's Suit related to work performed by BFS and other allegations in the Homeowner's Suit were related to the work of others." Additionally, BFS has produced evidence where BFS admits that there were construction defects related to BFS's work (a letter and/or email discussing defects in trusses, lateral bracing, lack of support for a beam, and dips in floors). Exhibit "B". Based on the Court's finding that the allegations in the underlying construction defect case involve defects in BFS's work, and based on BFS documents evidencing defects in BFS's work, DRH's indemnification claims in this action are not for damages resulting from DRH's "sole" negligence.

DRH suffered damages from the underlying construction defect case which stemmed, in part, to defects in BFS's work. DRH indemnification claims seeking to recover these damages which were related, in part, to BFS's work does not violate the statute or public policy. Accordingly, the Court should reconsider its Order granting partial summary judgment based on finding these claims violated S.C. Code Section 32-2-10, and find that the indemnity clause and DRH's claims for indemnity for all damages from the underlying construction defect case do not violate the statute or public policy.

CONCLUSION

Based on the foregoing arguments and authorities, DRH respectfully requests that this Honorable Court grant its motion to reconsider, and amend its Order to provide that BFS is required to indemnify DRH for all damages from the underlying construction defect case because the case was connected with the work of BFS.

Dated this 15 day of May 2014.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.



Neil S. Haldrup
Peden Brown McLeod, Jr.
P.O. Box 1200
Charleston, South Carolina 29402
(843) 329-9500
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned employee of WALL TEMPLETON & HALDRUP, P.A. hereby certifies that on this 15th day of May 2014 she served a copy of **MOTION TO RECONSIDER** via electronic mail and by placing a copy in a postpaid envelope for collection and processing for mailing, following this business's ordinary practice, with which she is readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited with the United States Postal Service in the ordinary course of business and addressed to the persons hereinafter named, at the places and addresses stated below, which are the last known address, in Charleston, South Carolina:

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914 Folly Road, Suite 2 (29412)
Post Office Box 13897
Charleston, South Carolina 29422
tanderson@kernodlslaw.com

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LLC AND BUILDERS FIRSTSOURCE,
INC.**

David S. Cobb
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dcobb@turnerpadgett.com

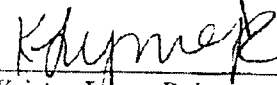
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INDIVIDUALLY AND D/B/A
MASTERFRAMERS**

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**ATTORNEYS FOR JAIME ARREGUIN
D/B/A MAYA CONSTRUCTION**

FILED
2014 MAY 15 PM 3:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY



Kristyn Lynne Robertson

EXHIBIT “A”

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON

CASE NO. 2010-CP-10-10355

D.R. HORTON, INC., f/k/a
C. RICHARD DOBSON BUILDERS,
INC.,

Plaintiff(s),

-vs-

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC; and
BUILDERS FIRSTSOURCE, INC.
And JOSEPH NACCARI, INDIVIDUALLY,
AND D/B/A MASTERFRAMERS,
Defendant(s).

JOSEPH NACCARI, INDIVIDUALLY,
AND D/B/A MASTERFRAMERS,
Third-Party Plaintiff,

-vs-

JAIME ARREGUIN D/B/A MAYA
CONSTRUCTION,
Third-Party Defendant.

THE DEPOSITION OF TERRY ROSAMOND, taken on
behalf of the Defendant on Thursday, October 24,
2013, commencing at 10:07 a.m. at the Law Offices
of Wall Templeton & Haldrup, PA, 145 King Street,
Suite 300, Charleston, South Carolina.

REPORTED BY: Nicole D. White

MAGNA LEGAL SERVICES

(866) 624-6221

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LEGAL SERVICES

1 A-P-P-E-A-R-A-N-C-E-S:

2

3 Appearances for the Plaintiff:

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 6 145 King Street, Suite 300
 7 Charleston, South Carolina 29402
 8 (843) 529-9500
 9 Krlstyn.robertson@walltempleton.com

10 Appearances for the Defendant:

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 13 914 Folly Road, Suite 2
 14 Charleston, South Carolina 29422-3897
 15 (8 3) 795-7800
 16 Janderson@kernoddelelaw.com

and

17 By: Jennie M. Smith, Esquire
 18 TURNER PADGET GRAHAM & LANEY, P.A.
 19 40 Calhoun Street, Suite 200
 20 Charleston, South Carolina 29401
 21 (843) 576-2805
 22 Jsmith@turnerpadget.com

and

23 By: Trippett Boineau, III, Esquire
 24 MCANGUS, GOUDELOCK & COURIE
 25 Meridian, 10th Floor
 1320 Main Street
 Columbia, South Carolina 29201
 (803) 227-4937
 Trippettboineau@mgclaw.com

13

19

20

21

22

23

24

25

1 You read this. You'll agree with me that
2 Builders FirstSource has agreed to indemnify D.R.
3 Horton; is that correct?

4 MR. ANDERSON: Objection.

5 MR. MCLEOD: You didn't object
6 to any of the other portions.

7 MR. ANDERSON: Well, I mean, I
8 just don't know what it means to indemnify
9 D.R. Horton. For what? I mean...

10 MR. MCLEOD: I'm asking him.
11 He's supposed to be familiar with the
12 contract.

13 A. It says in the contract, "hereby
14 agrees to protect, defend, indemnify and hold
15 owner and the parent company."

16 Q. Okay.

17 A. Says what's in the contract.

18 Q. Right.

19 A. And I'm not a lawyer, so...

20 Q. You know what -- there's a cause of
21 action, demands and claims in suits, you know
22 what those terms mean?

23 A. Uh-huh.

24 Q. Okay. Is the homeowners lawsuit,
25 Clark versus D.R. Horton, you'd agree with me

1 that's a claim, cause of action and a suit,
2 correct?

3 A. Correct.

4 Q. And you agreed with me before we went
5 through -- when we went through earlier about the
6 complaint that the homeowner was alleging
7 damages, correct?

8 A. Correct.

9 Q. And that the homeowner was alleging
10 damages connected to or arising out of Builders
11 FirstSource's work, correct?

12 A. Allegations, yes.

13 Q. And you'll agree with me, part of the
14 indemnification is for attorney fees and expenses
15 related to claims, correct?

16 MR. ANDERSON: Object to form.

17 A. Not if we haven't been given written
18 notice.

19 Q. Where do you see that? Where's that
20 in the indemnification paragraph?

21 A. Any notice is to be written notice of
22 a claim or an action.

23 Q. But point me to that document which --
24 you did review the contract before today,
25 correct?

1 A. I said I looked at it briefly, yes.

2 Q. Tell me where it says notification is
3 required for indemnification?

4 A. In 19 under notices.

5 Q. Okay. That says all notices required
6 pursuant to this agreement. That doesn't say any
7 notice is required?

8 MR. ANDERSON: By this agreement
9 or otherwise I believe is the wording.

10 A. Will be in writing.

11 Q. Says -- well, we can argue about what
12 it says, but that's the sole notice that you've
13 seen in the contract?

14 A. Yes.

15 Q. And then now, show me where it's
16 required in the indemnification paragraph?

17 A. I don't see it in the indemnification
18 section.

19 Q. You know, there's a section on there
20 about insurance. We didn't talk about it, but
21 are you aware that D.R. Horton is an additional
22 insured or was at the time of construction of
23 this house, was an additional insured under the
24 policy for Builders FirstSource?

25 A. I'm not.

EXHIBIT “B”



114 & 118 Myrtle Beach Hwy.
P.O. Box 1548
Sumter, SC 29153
TEL 803-778-1921
FAX 803-694-0681

October 2, 2007

Builders FirstSource - Charleston
4450 Arco Lane
North Charleston, South Carolina 29418

Attn: Mr. Larry Wozniak

Re: Builders FirstSource Job #69420 & 70009

Larry,

At Gifford Shaw's request, I am formally addressing three specific items pertaining to the roof truss components provided to the referenced job numbers. This project is also identified as Lot 6D Daniel Island in the Builders FirstSource (BLDR) files. My findings are based on conversations with Gifford and reviewing the above referenced files.

Background:

It is my understanding roof truss components identified in file number 69420 (Exhibit 2) were placed onto the residential building per the placement plan provided (Exhibit 1). Because these "A" type trusses were fabricated with an incorrect 5'- $\frac{1}{4}$ " heel height at each end, additional truss components were fabricated and installed immediately adjacent to the originally erected truss components. File number 70009 (Exhibit 3) details these revised members with 3'- $2\frac{7}{16}$ " and 4'-6" heel heights. The bigger heel heights increased the overall truss height which necessitated installing a "piggy back" member to create the desired roof appearance.

Item 1:

The A1_2 gable frame may be installed to one side of the original A1 provided the A1_2 is located to the exterior wall edge. The A2_2 may be installed to either side of the A2 and A3. Since the larger heel heights dictate roof sheathing must be fastened to the top chord of the A1_2 and A2_2 truss components, it is reasonable to assign all loads to these members. Therefore, the original A1, A2, and A3 trusses can be viewed as non structural members. These trusses can remain within the roof system and I suggest fastening them to the A1_2 and A2_2 with 10d nails (0.131" dia. by 3" long) 24" on center or with two nails at crossing locations.



174 & 116 Myrtle Beach Hwy.
P.O. Box 1548
Myrtle Beach, SC 29577
TEL: 803-778-1921
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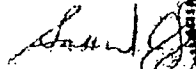
Item 2:

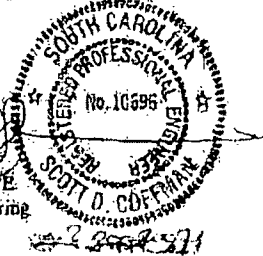
The 4' - 11 1/2" horizontal top chord members in A1-2 (P-G-H) and A2-2 (C-D) do not require any lateral bracing. This can be verified on each truss design drawing which indicates a maximum 6' on center purlin spacing. The PB2 "piggy back" must be connected to the A1-2 and A2-2 base truss with a 2x4x24" lumber scab on one face centered about the joint location. The scab may be Spruce-Pine-Fir lumber #2 grade or better fastened with three (3) 10d nails (0.131" dia. by 3" long) each side of the joint (6 nails total per joint; 3 in base truss and 3 in piggy back). A prefabricated metal plate may be used in lieu of the 2x4 scab provided design values are equal to or exceed the calculated reactions shown on the PB2 truss design drawing.

Item 3:

All members must be braced as detailed on each truss design drawing. Bracing procedures outlined in the Building Components Safety Information (BCSI) manual may be used in the absence of specific bracing guidelines by the project building designer. The BCSI information is available through the Wood Truss Council of America (WTCA).

Sincerely,


Scott D. Coffman, PE
Director of Engineering



Document# 69420 Issued Job.

Larry Wozniak

From: Gifford Shaw
Sent: Monday, September 24, 2007 11:56 AM
To: Bob Lanier, Larry Wozniak, Bill Crabtree, Lou Davis, Terry Rosamond
Cc: Randy Thomason
Subject: Horton

I am recommending the following actions:

Roof: The issue is that there are 2 sets of trusses and lateral bracing is not installed. I recommend that we install the lateral bracing and get a letter from an engineer stating that there is no reason to remove the trusses.

Second Floor: The homeowner pointed out the floor has dips in it. I noted one area that is probably out of code and recommend that we fix this. It is over the kitchen below.

Wall Sheetrock Crack: The wall sheetrock is cracking on a exterior wall where a lam beam is bearing that is carrying the roof trusses. I suspect that there is not a good stud packing below the beam and this will need to be corrected.

First Floor: The homeowner pointed out numerous dips in the floor. I found two areas that are probably out of code. One area is between the dining room and the foyer and is right over the bearing below. I suspect this could be from when the owner removed the carpet in the dining room and put down oak flooring to match the foyer floor. This is where the two floors joined.

The other area is under the fireplace wall. Here I think we are getting deflected load from where a beam is carrying second floor trusses. This needs to be fixed.

0018
BFS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO. 2010-CP-10-10355
	)	
D.R. HORTON, INC. f/k/a C. RICHARD	)	
DOBSON BUILDERS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	BUILDERS FIRSTSOURCE-
	)	SOUTHEAST GROUP, LLC and
BUILDERS FIRSTSOURCE-SOUTHEAST)	)	BUILDERS FIRSTSOURCE, INC.'s
GROUP, LLC; and BUILDERS	)	RESPONSE TO D.R. HORTON, INC.'s
FIRSTSOURCE, INC., and JOSEPH	)	MOTION TO RECONSIDER
NACCARI, Individually and d/b/a	)	
MASTER FRAMERS,	)	
	)	
Defendants.	)	
	)	
JOSEPH NACCARI, Individually, and d/b/a)	)	
MASTER FRAMERS,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
JAIME ARREGUIN d/b/a MAYA	)	
CONSTRUCTION,	)	
	)	
Third-Party Defendant.	)	

FILED
2014 JUN -9 PM 1:46
JULIE J. ALSTRONG
CLERK OF COURT
BY [Signature]

Defendants Builders FirstSource-Southeast Group, LLC; and Builders FirstSource, Inc. (collectively "BFS") respectfully submit by their undersigned attorneys the following Response to D.R. Horton, Inc.'s ("DRH") Motion to Reconsider:

DRH's Motion to Reconsider should be denied for the following reasons:

1. DRH did not provide Judge J. C. Nicholson, Jr. with a copy of its Motion to Reconsider within ten days of filing and therefore has failed to comply with SCRCP 59(g). DRH's Motion to Reconsider is due to be denied on that basis.

2. BFS incorporates the arguments made in its Motion for Summary Judgment (See Charleston County Docket, filed 12.11.12), Memorandum in Support of BFS's Motion for Summary Judgment (See Charleston County Docket, filed 04.10.13), Motion for Reconsideration (See Charleston County Docket, filed 10.16.13), Notice of Motion and Motion to Compel (See Charleston County Docket, filed 10.08.13), BFS's Response to DRH's Motion for Protective Order (See Charleston County Docket, filed 10.23.13) and all arguments made in the extensive letter briefs addressed to the Honorable J. C. Nicholson, Jr. Said letter briefs are being filed as Exhibits 1-5 to this Response to DRH's Motion to Reconsider.

3. DRH's Argument that "The Court Failed to Fully Consider the Plain Language of the Indemnification Clause, and Ruled *Sua Sponta*.":

DRH misses the basic point that the contract between DRH and BFS, drafted by DRH, simply does not say that BFS will indemnify DRH for claims and causes of action "occurring, incident to, arising out of, or in connection with," the work of other independent subcontractors working for DRH. It is undisputed that there were multiple claims and causes of action asserted in *Patricia Clark v. D.R. Horton, Inc.*, Berkeley County Case No. 2008-CP-08-1633 (the "Clark Case."), that were wholly unrelated to BFS's work. The Court correctly ruled that those claims are not the responsibility of BFS.

With regard to DRH's argument that the Court ruled *sua sponte*, the interpretation of the Contract, and whether it violated S.C. Code Ann. § 32-2-10, was extensively briefed and argued. The Court obviously did not rule *sua sponte*.

4. DRH's Argument that "The Indemnity Clause Does Not Violate the Provisions of S.C. Code Ann. § 32-2-10 Because DRH is Not Seeking Indemnification for Its Sole Negligence.":

The Court correctly ruled that requiring BFS to indemnify DRH for damages related to the work of DRH's other independent contractors would violate S.C. Code Ann. § 32-2-10. In relevant part, the statute says:

Notwithstanding any other provision of law, a promise or agreement . . . purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of . . . 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 . . .

The plain language of the statute states that the promisor (BFS) cannot indemnify the promisee (DRH), for damages arising out of property damage proximately caused by the sole negligence of the **promisee or its independent contractors**. Any claims in the Clark Suit, relating to work performed by DRH's other independent contractors, are claims for the sole negligence of DRH and those independent contractors. Requiring BFS to indemnify DRH for those claims would unequivocally violate S.C. Code Ann. § 32-2-10.

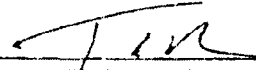
The only caveat to the above rule, that a promisor (BFS), may agree to indemnify the promisee (DRH), in connection with "liability for damages resulting from the negligence, in whole or in part, **of the promisor**," has no application to DRH's attempt to require BFS to indemnify it for "liability for damages resulting from the negligence" **of DRH's other independent contractors**. Many of the claims asserted by the homeowner in the Clark Case are for defects completely unrelated to BFS's work and therefore have nothing whatsoever to do with "the negligence, in whole or in part, of the promisor," BFS.

For all of the above reasons, this Court should DENY DRH's Motion to Reconsider.

[SIGNATURE ON FOLLOWING PAGE]

KERNODLE ROOT + COLEMAN

By:


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tanderson@kernodlelaw.com

ATTORNEYS FOR BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP,
LLC and BUILDERS FIRSTSOURCE, INC.

Charleston, South Carolina
June 10, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of ***Builders FirstSource-Southeast Group, LLC's Response to D.R. Horton's Motion for Reconsideration*** was sent via email, facsimile, hand delivery and/or by depositing a copy in the United States Mail, First Class, to:

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Individually and d/b/a
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**Attorney for Jaime Arreguin
d/b/a Maya Construction**

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June 5, 2014

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**KERNODLE
ROOT &
COLEMAN**
ATTORNEYS AT LAW

James Taylor Anderson, III, Esquire
janderson@kernodlelaw.com

May 15, 2013

VIA EMAIL ONLY

The Honorable J. C. Nicholson, Jr.
100 Broad Street, Suite 10
Charleston, SC 29401

RE: *D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. v. Builders FirstSource-Southeast Group, LLC and Joseph Naccari, Individually and d/b/a Masterframers // Naccari v. Jaime Arreguin d/b/a Maya Construction*
Charleston County / Case No. 10-CP-10-10355

Dear Judge Nicholson:

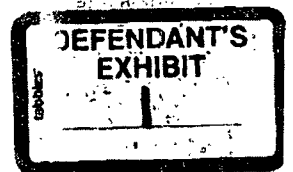
It was a pleasure to appear before you this morning. As you know, I represent Builders FirstSource-Southeast Group, LLC, and Builders Firstsource, Inc., (collectively "BFS") in this case brought by D.R. Horton, Inc. ("DRH"). At the end of today's hearing you mentioned providing a letter brief regard the dispute resolution procedure set forth in the contract between BFS and DRH. (the "Contract") (attached hereto as Exhibit "A").

The contract in question was drafted by D.R. Horton. Any ambiguous portions of the contract must, therefore, be strictly construed against D.R. Horton. *See Southern Atlantic Financial Services, Inc. v. Middleton*, 356 S.C. 444, 447 (2003). "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." *Id.*¹

Paragraph 22 of the Contract, "Dispute Resolution," clearly provides that all disputes between BFS and DRH regarding the "business of the owner or the Work, shall be submitted to binding arbitration . . ." Further, the Contract provides that *"The parties agree that if multiple arbitrations should be commenced, all such proceedings shall be consolidated into one arbitration. [BFS] agrees to participate in, and be bound by, any arbitration proceeding between Owner and any third party relating to the Work . . ."* Contract at ¶ 22.

The above is the contractually agreed upon dispute resolution procedure. DRH did not follow it. The only exception to the requirement that all claims relating to the Work be submitted to a single binding arbitration involves the inability to force a "necessary third party" into arbitration and is not implicated by this case.

¹Remarkably, the Contract does not contain any clause saying that it shall not be construed against the drafter.



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DRH failed to follow its own dispute resolution procedures. Instead, DRH decided not to add BFS as a party to the Clark arbitration, not make any transcript of the two day arbitration proceeding, and not ask the arbitrator to allocate damages among Clark's various allegations. DRH is now equitably estopped from bringing this lawsuit. "Equitable 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." *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290 (Ct.App. 2012).

Additionally, contacts must be interpreted as a whole. DRH's failure to follow the dispute resolution procedure outlined in the Contract also estops DRH from relying on its indemnification agreement which provides that BFS will indemnify DRH for "any negligent action or omission of [DRH] related in any way to the work, *even when the loss is caused by the fault or negligence of [DRH]*." Not only does this agreement violate S.C. Code Ann. §32-2-10, because it purports to require BFS to indemnify DRH "against liability for damages arising out of . . . property damage proximately caused by or resulting from the sole negligence of" DRH, but the indemnity agreement is part and parcel of an agreed upon dispute resolution procedure that was not followed by DRH. *See Pearson v. Hilton Head Hospital*, 400 S.C. at 290 (applying equitable estoppel because "To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act."); *See also* S.C. Code Ann. § 15-38-30 ("principles of equity . . . generally shall apply" to actions for contribution.).

Paragraph 22, of the Contract also dispenses with any argument that DRH's contribution claim was not "ripe" or could not have been brought in the Clark arbitration. BFS contractually agreed to participate in, and be bound by, the arbitration. Had the contractual procedure been followed, DRH's indemnity claim would have been addressed in the Clark arbitration and there would have been no need for a later contribution action. *See* S.C. Code Ann. § 15-38-20 ("Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and **not contribution**").

DHR is now in essentially the same position as the Plaintiff in *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53 (Ct.App. 1999).² Having failed to add BFS to the

Importantly, the *Vermeer* Court held that the failure to allocate damages in the settlement ended the case. The Court did not allow Vermeer to litigate how much of the settlement was attributable to claims subject to contribution. The Contribution Act does not allow a party to try a case, when some claims are subject to contribution, and others are not, and then bring a separate action to litigate how much of the underlying judgment is attributable to the negligence of a nonparty. Allowing DRH to maintain a separate action to decide how much of the judgment entered in the Clark case is subject to contribution would lead to duplicate litigation and violate the Act's prohibition against litigating "relative degrees of fault" in a contribution action. *See* S.C. Code. Ann. § 15-38-30.

arbitration, failed to make a transcript of what testimony was given at the arbitration, and failed to ask the arbitrator to apportion his award between Clark's various allegations, DRH is stuck with an award that "gives no indication as to how the amount paid . . . relates to any present or future damage" associated with BFS's framing work. See *Vermeer* at 70. "In this case lack of apportionment may work a hardship on [DRH], but it is one which he could have avoided by a properly drawn [award]." *Id.*; See Also *Jenkins v. Few*, 391 S.C. 209, 221 (Ct.App. 2010)(refusing to speculate as to how jury allocated damages among various causes of action when defendant "contributed to drafting and agreed to use a general verdict form that did not include a separate damages award for each cause of action.").

Finally, at the hearing this morning, Your Honor mentioned the possibility that the doctrine of judicial estoppel may preclude DRH from maintaining this action. BFS agrees that the doctrine of judicial estoppel should preclude DRH's attempt to relitigate the issue of whether BFS's framing work was defective and the amount of damages caused thereby.

Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. Judicial estoppel generally applies only to inconsistent statements of fact.

Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 251 (1997). In the Clark arbitration DRH introduced sworn testimony from expert witnesses regarding the scope and cost of repairs needed to fix Ms. Clark's house. Having partially prevailed in the Clark arbitration³, DRH now proposes to call Clark's witnesses to testify, under oath, to an entirely different scope and cost of repair. Indeed, the only expert witnesses DRH has identified in this case are Clark's witnesses. See Plaintiff's Second Supplemental Answers to Interrogatories of Defendants Builders FirstSource Southeast Group, LLC, and Builders FirstSource, Inc. (Attached hereto as Exhibit "B").

DRH cannot be permitted to offer sworn testimony in this case that is directly contrary to the sworn testimony it offered in the Clark arbitration. As the S.C. Supreme Court has held:

When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory. However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case . . .

Hayne Federal Credit Union, supra at 252.

³Clark provided a repair estimate totaling \$269,917, and was actually awarded \$150,000.

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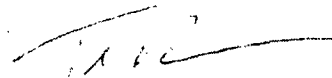
For all of the above reasons, and the reasons set forth in BFS's Memorandum and Reply briefs, BFS respectfully asks this Court for summary judgment.

By copy of this correspondence to opposing counsel, I am serving them with a copy of same.

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

Sincerely,

KERNODLE ROOT + COLEMAN



James Taylor Anderson, III

JTA/ads
Enclosures

cc: **VIA EMAIL ONLY (W/ ENCL.)**
Peden Brown McLeod, Jr., Esquire and Neil S. Haldrup, Esquire
David S. Cobb, Esquire
R. Trippett Boineau, III, Esquire

D-R-HORTON

Division Name: HIT
 Area Name: _____
 Assigned Vendor No: 81AW

INDEPENDENT CONTRACTOR AGREEMENT

FEB - 6 2001

NAME OF CONTRACTOR BUILDERS FIRST SOURCE DBA - JAMES ("Contractor")Sole Proprietorship Partnership ☒ Corporation L.L.C. Other (ATTACH W-9)Social Security No. or Tax ID No: 57-0618425Name of Owner(s)/Officer(s): MORRIS TOLLY, SE GRANT PRESIDENTAddress for All Notices: ROUTE 1, BOX 170City: KIRKELAND State: SC Zip Code: 29956Telephone: (843) 987-0810 Fax: (843) 987-0831

E-Mail Address: _____

Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITHHOLDING

This agreement (the "Agreement") is entered into on this 31 day of JANUARY, 2001, between D-R-HORTON

(hereinafter "Owner") and Contractor

1. **Scope of Work.** All work performed by Contractor for Owner shall be subject to the terms and conditions of this Agreement. The work to be performed hereunder (the "Work") is the labor, services and/or materials, equipment, transportation, or facilities necessary to complete the construction-related activities generally described as: TURKEY

and shall include all work performed by Contractor for Owner. The applicable quantities and pricing for the Work shall be that reflected in the price sheet, proposal, bid or other documentation most recently accepted and approved by Owner (the "Pricing Schedule"). It is understood and agreed that no Pricing Schedule will modify any other terms of this Agreement other than price and quantity. It is understood and agreed that Owner is not obligated to award any work on specific property to Contractor, does not guarantee any quantity of work to Contractor, and may at its sole option retain others to perform work similar to the Work to be performed hereunder at any job location in addition to or in place of Contractor.

2. **Schedule of Work.** Owner shall have the right to determine the time, order and priority in which all components of the Work shall be performed and all matters relative to the timely and orderly conduct of the Work. Owner shall issue authorization (either pursuant to a written purchase order or work invoice (hereinafter the "Purchase Order") or verbal instructions from an authorized Owner representative to commence the Work, and Contractor shall not commence the Work at a job location until Contractor has received instructions to begin Work at a specific job location. Contractor shall commence its Work within three (3) days of notice to proceed from Owner, and if such work is interrupted at the direction of Owner, Contractor shall resume such work within two (2) working days from Owner's direction to resume. Contractor agrees that Owner shall have the right to make changes to the schedule of Work at Owner's discretion and agrees to comply with such changes.

3. **Performance of Work.** Contractor's acceptance/commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized Owner employee and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location and approves of the requirements to be specified. Contractor acknowledges that TIMELY OF THE ESSENCE in the performance of all Work. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors. Contractor shall perform all Work in a good and workmanlike manner, in accordance with the plans and specifications of Owner, according to industry standard practices, and warrants that the Work will meet or exceed FHA minimum property standards, VA requirements, all laws and regulations and any applicable building code requirements. Owner shall have the right to inspect the Work at any time, but inspection shall not be construed as a waiver of any obligations, representations or warranties of Contractor as to the Work. Notwithstanding anything contained herein to the contrary, all Work shall be performed and any defects shall be corrected in accordance with this Agreement to the satisfaction of Owner. Contractor acknowledges that Contractor is thoroughly familiar with the plans and specifications as such plans and specifications affect the Work and materials incorporated therein. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work, and shall report in writing to Owner any defects prior to commencement of any Work, or Contractor shall be deemed to have accepted such work for inclusion into Contractor's Work. Contractor shall secure and maintain all permits, licenses and approvals necessary for or applicable to the performance of the Work hereunder. When Owner orders the Work in writing, Contractor shall make any and all changes in the Work as directed by Owner's authorized representative, and adjustments to the price shall be made only in accordance with a "Variance to Purchase Order" signed by Owner and Contractor prior to the commencement of such changes.

4. **Safety.** Contractor shall, at its own expense, protect its employees and all other persons from risk of death, injury or bodily harm arising from or in any way related to the Work. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq. and provide written notice to Owner of the contact person responsible for Contractor's safety compliance. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, permitted subcontractors or suppliers at a job location or performance by any such person under the influence of alcohol or drugs. Contractor shall prohibit and prevent the presence of children under age 18 from the work site. Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work. Contractor shall conduct inspections to determine that safe working conditions and equipment exist and safe practices are observed, and accepts sole responsibility for providing a safe place to work for its employees and the employees of all subcontractors and material suppliers. Contractor shall immediately notify Owner of any unsafe condition or practice observed on the Work site. Further, Contractor shall immediately notify Owner of any accidents or injuries on the Work site.

5. **Contract Price.** The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor, and Contractor shall pay all applicable sales taxes and any other taxes resulting from such payment or related to the Work. CONTRACTOR FURTHER AGREES THAT NO PRICE INCREASE SHALL BE BINDING UPON OWNER BEFORE CONTRACTOR GIVES OWNER (120) DAYS' WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule, the superceded Pricing Schedule shall remain in effect for Purchase Orders issued after the date of any new Pricing Schedule until the expiration of the notice period unless other prior written notice was given to Owner by Contractor.

THIS AGREEMENT CONSISTS OF THREE (3) PAGES

Executed this 5th day of FEBRUARY, 2001

Owner

By: [Signature]
Name: RICHARD SCHWARTZ

Title: Division Manager

Contractor

By: [Signature]
Name: Morris TollyTitle: Southeast Div. Mgr.

6. **Payment/Terms.** Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made at each stage. Contractor acknowledges and agrees that all Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order. Contractor acknowledges and agrees that no payments shall be due under this Agreement until Contractor's invoice (or Purchase Order, if applicable) for such Work has been submitted to Owner for payment, which action shall constitute a representation and confirmation that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. **CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS AGAINST OWNER OR ITS PROPERTY.** As a condition to payment, Owner may require a full and complete release of all liens for materials furnished and labor performed from Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Owner may, at any time, in its discretion, make checks payable to Contractor and one or more third parties. Such payment at all be deemed satisfaction of amounts owed by Owner to Contractor, notwithstanding the fact that such third parties may not endorse said checks. At all times during the performance of this Agreement, Owner shall be entitled to hold, for all Work in progress, any allowable retainage and any statutory sums in accordance with the laws of the State where the Work is performed. In the event that any liens are filed against Owner relating to the Work, Contractor agrees that Owner shall be entitled to withhold all payments to Contractor or until Contractor causes such lien or affidavit to be removed and released of record. Contractor agrees to INDEMNIFY and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any liens, and further agrees at Owner's request to: (i) procure a bond to indemnify Owner and any home purchaser from Owner, in an amount equal to one hundred fifty percent of the lien amount, against such lien, or (ii) refund to Owner all monies, including any additional amount necessary to cover all of Owner's or home purchaser's attorneys' fees and court costs paid in discharging the lien, whichever remedy Owner elects in its sole and absolute discretion. Payment to Contractor for any Work shall not be construed as a waiver by Owner as to Work later found to be defective and shall not release Contractor from liability for warranties and warranty service and/or defective Work.

7. **Independent Contractor Status.** Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right to control the performance of the Work, except that the Work must be performed in accordance with this Agreement. Contractor shall be responsible for the performance of its employees and permitted subcontractors, and all personnel used by Contractor in the performance of Work shall be qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor acknowledges that this is a lump sum contract and that Contractor shall be solely responsible for all withholding, Social Security, state unemployment and other similar taxes for Contractor's employees, agents or permitted subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work. Taxes will not be collected nor paid by Owner under this Agreement. Contractor further agrees to provide written notification to all of its present and future employees of Contractor's provision for Worker's Compensation Insurance.

8. **Contractor's Warranties.** Contractor unconditionally warrants to Owner, its successors and assigns, and to each purchaser of a house incorporating the Work from Owner, each subsequent owner, and their successors and assigns (collectively referred to as the "Homeowner"), that all labor performed and materials furnished by Contractor shall conform to the specifications of this Agreement, are free from any defects or deficiencies in workmanship or materials when judged by the standards of accepted residential construction industry trade practices, and be in accordance with the requirements of all applicable government authorities. All Work not conforming to the aforementioned requirements shall be considered to be defective. In addition to the foregoing warranty, Contractor expressly warrants that the Work shall remain free of defects for the following warranty periods: (a) for a period of ten (10) years all structural elements, including, but not limited to, roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (b) for a period of two (2) years all (i) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (ii) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (iii) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; (c) all other elements for a period of one (1) year. The foregoing notwithstanding, in no event shall a warranty period for any system, element or other portion of the Work be less than the applicable warranty period for such system, element, or other portion of the Work under any residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner (a "Homeowner Warranty"). Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Homeowner Warranty which is longer than the Warranty Periods stated above; provided, however, failure to give such notice will not affect the extension of the Warranty Period to the applicable warranty period under the Homeowner Warranty. Contractor agrees that the performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty obligations. Contractor's limited liability provided for herein, or the ability of Owner to request Contractor to perform warranty services in the future. Contractor shall furnish all warranties and/or guarantees by manufacturers on appliances and equipment, and shall furnish all certificates required by any municipality and/or VA and/or FHU. The foregoing is in addition to all other warranties provided by law or otherwise and not in limitation of periods of applicable statutes of limitation.

9. **Governmental Requirements.** Contractor agrees to comply with all applicable federal, state, local, and county statutes, ordinances, regulations, codes, licensing requirements and standards, and the requirements of the Williams-Stelger Occupational Safety and Health Act of 1977 and amendments thereto, as well as the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., or similar law or regulations, and the rules, regulations, or orders of all public authorities relating to performance of the Work, including without limitation, the procurement and posting of all required permits and notices. Contractor further agrees to indemnify and hold Owner harmless from the payment of any fine or penalty imposed as a result of Contractor's failure to comply with applicable laws and regulations.

10. **Subdivision Rules.** Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; and (iii) regulating trash pick-up and waste collection at the job location.

11. **CONTRACTOR'S INDEMNITY AND WAIVER TO THE FULLEST EXTENT PERMITTED BY LAW.** CONTRACTOR HEREBY AGREES TO PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER, ITS PARENT CORPORATION, SUBSIDIARIES AND AFFILIATES, AND ANY OF THEIR RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS, (HEREIN COLLECTIVELY REFERRED TO AS THE "INDEMNITEE"), 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 (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND PERMITTED SUBCONTRACTORS OF ANY TYPE), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF PROPERTY (INCLUDING THE LOSS OF USE THEREOF), (HEREIN COLLECTIVELY REFERRED TO AS "LOSS"), 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. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, AND PERMITTED SUBCONTRACTORS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO ANY LOSS INVOLVING SUCH TOOLS OR EQUIPMENT IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH, THE WORK TO BE PERFORMED HEREUNDER.

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

13. **Insurance.** Contractor agrees to carry: (a) Broad Form Commercial General Liability Insurance on an Occurrence Form, naming the Indemnitee as an additional insured with completed operations coverage and containing a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than One Million Dollars (\$1,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises operations; (ii) products and completed operations including materials designed, furnished, and/or modified in any way by Contractor; (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) property damage resulting from explosion, collapse, or underground (i.e., t, u) exposures; (b) Worker's Compensation Insurance that provides statutory benefits and coverage such that Owner will have no liability to Contractor's personnel, employees or agents; and (c) Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgement. Owner and Contractor (collectively, the Parties) intend and agree that the coverage obtained by Contractor naming Owner as an additional insured as set forth herein shall apply on a primary basis with any insurance of Owner being at all times coverage. Such coverages will be carried continuously during the term of this Agreement with insurance companies acceptable to Owner in its sole and absolute discretion. Such insurance shall provide for a waiver of subrogation.

INITIALS:

Owner:

Contractor:

CORPORATE

Contractor shall provide evidence that such insurance is in full force by furnishing Owner with a Certificate of Insurance, or certified copies of the above policies. Each Certificate of Insurance or policy shall contain an unqualified clause to the effect that the policy shall not be subject to cancellation, nonrenewal, adverse change, or reduction of amounts of coverage without thirty (30) days' prior written notice to Owner. Such insurance shall be certified continuously from the date of commencement of the Work until expiration of the period of the Contractor's warranty provided in this Agreement. The amounts and types of insurance set forth herein are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and types of insurance which Contractor shall determine to be reasonably necessary to protect itself and the Work required to be performed under this Agreement. NOTWITHSTANDING THE FOREGOING, IN THE EVENT THAT THE CONTRACTOR FAILS TO PROVIDE OWNER WITH EVIDENCE OF INSURANCE AS REQUIRED HEREUNDER, OWNER SHALL BE ENTITLED, BUT SHALL NOT BE OBLIGATED, TO: (A) WITHHOLD AN AMOUNT (ESTABLISHED BY OWNER IN ITS SOLE AND ABSOLUTE DISCRETION) FROM CONTRACTOR TO COMPENSATE OWNER FOR THE ADDITIONAL COSTS OF ITS WORKER'S COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND RISKS AND ADMINISTRATIVE COSTS TO OWNER ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS; CONTRACTOR EXPRESSLY ACKNOWLEDGES THAT THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE, AND CONTRACTOR REMAINS OBLIGATED TO PROVIDE THE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS CONTRACT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.

14. **Subcontractors.** If Contractor subcontracts any of the Work to the extent permitted under this Agreement, Contractor guarantees that each third party shall indemnify Owner and meet all insurance requirements set forth herein. Prior to the subcontractor's commencement of the Work, Contractor shall obtain a signed agreement from such third party indemnifying Owner and provide to Owner evidence of satisfactory insurance. In addition, Contractor shall require that each supplier or subcontractor indemnify Owner from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to binding arbitration on the terms set forth herein. Contractor understands and agrees that for all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for any and all of the actions of any subcontractor engaged by Contractor or who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed to be the obligation of such subcontractor to Owner, for which Contractor shall be fully responsible to Owner.

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

16. **Remedies.** In the event that the Work performed by Contractor pursuant to this Agreement is found by Owner to be defective or incomplete, or another contractor's work is damaged by an act for which Contractor, or its employees, agents or subcontractors, are responsible, Owner shall have the right to elect, at its sole discretion to: (1) notify Contractor, at which time Contractor shall promptly correct such Work, replace or repair any defective material, or repair any damage. Contractor agrees to make all repairs and correct such defects under the applicable warranty within twenty-four (24) hours of notice in an emergency (as determined by Owner in its sole discretion) and within forty-eight (48) hours notice on a non-emergency basis; (2) retain a third party to perform such duties, and retain any sums otherwise due Contractor under any Purchase Order or invoice and apply such sums against such costs of completion, any related costs or damage, including reinspection fees, with any excess thereafter to be paid to Contractor. In the event the cost of such remedial work exceeds the funds withheld resulting in a deficiency, Contractor shall be fully responsible for the deficiency, together with any damages and costs, including costs of court and reasonable attorneys' fees, incurred by Owner, and shall pay to Owner this amount within thirty (30) days of demand.

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

The duties and obligations imposed by this Agreement and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The prevailing party in any dispute shall have a right to collect its reasonable attorney's fees and expenses.

17. **Confidentiality.** Contractor shall treat all information obtained by Contractor relating to the project to which the Work relates and all information and documents provided to Contractor by or on behalf of Owner as confidential and proprietary information of Owner, and shall not disclose or permit the release of the contents thereof. Contractor shall provide any and all samples and/or shop drawings requested by Owner.

18. **Assignment.** Contractor's rights and obligations under this Agreement are nontransferable and not assignable, and Contractor shall not subcontract all or any part of the Work contemplated by this Agreement without obtaining the prior written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Owner may assign this Agreement without Contractor's consent.

19. **Notices.** All notices required pursuant to this Agreement or otherwise shall be in writing and shall be delivered to the respective business address of the Parties.

20. **Entire Agreement.** This Agreement, and with respect to prices and quantities only, the Price Schedule and all written Purchase Orders shall constitute the entire agreement between the Parties, and there are no other agreements, oral or written, by and between the Parties. Except as otherwise provided herein, no provision of this Agreement may be amended or added to except in writing signed by both Parties.

21. **Termination and Waiver.** This Agreement shall remain in full force and effect until terminated in writing by mailing notice to the other Party. Owner may terminate this Agreement at any time, irrespective of whether Contractor is in default or breach hereunder, at will. Contractor shall provide One Hundred Twenty (120) Days' notice prior to the effective date of termination, and agrees to perform fully under this Agreement during such notice period. If the Agreement is terminated by Owner, the Parties agree that, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement. Anything herein contained to the contrary notwithstanding, the Work to be performed by Contractor shall only include such work as specifically authorized by an authorized representative of Owner. Any failure of Owner to enforce any of the terms and provisions of this Agreement shall not constitute a waiver of such required performance by Contractor or of any other performances in the future required by Contractor hereunder.

22. **Dispute Resolution.** If a dispute arises out of or relating to this Agreement or a breach thereof and if the dispute cannot be settled through negotiation, the parties agree to first try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules, before resorting to arbitration, litigation, or another dispute resolution procedure. If mediation fails, any claim, controversy or dispute of any kind among the Parties, now existing or arising in the future, whether relating to the interpretation of any provision of this Agreement, the rights and obligations of the Parties under this Agreement, any other agreement relating to, or arising from, the business of Owner or the Work, shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. The arbitration shall be conducted by the American Arbitration Association ("AAA"). The arbitration shall be conducted in accordance with the Construction Industry Arbitration, to the extent not in conflict with the Federal Arbitration Act. The Parties agree that if multiple arbitrations should be commenced, all such proceedings shall be consolidated into one arbitration. Contractor agrees to participate in, and be bound by, any arbitration proceeding between Owner and any third party relating to the Work. Notwithstanding any provision in this section to the contrary, Owner shall be entitled to terminate this Agreement and/or any Purchase Order, in whole or in part, in the event any dispute arises between Contractor and Owner, whereupon Owner shall also be entitled to exercise any and all remedies, deductions, and offsets authorized pursuant to the terms and provisions of this Agreement. Notwithstanding any other provision of this paragraph, in the event that a subcontractor or material supplier of Contractor, or any other necessary third party, cannot be forced to mediate or arbitrate, Owner may elect to unilaterally waive mediation or arbitration.

23. **Survival.** All terms of this Agreement survive its termination and shall remain in full force and effect and shall be binding upon the Parties and any successors and assigns.

24. **General Contract Provisions.** The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. The terms of the Agreement shall be binding on all Parties, their respective successors, representatives, heirs and assigns. In the event of a conflict between this Agreement and the terms of any Purchase Order or any other agreement or document pertaining to the subject matter hereof which cannot be reconciled by the Parties, the terms of this Agreement shall control. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of the paragraphs, sections or articles hereof. No delay or failure by Owner to exercise any right hereunder, and no partial or single exercise of such right, will constitute a waiver of that or any other right except by written agreement executed by Owner.

INITIALS:

Owner:

Contractor:

CORPORATE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	:	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C.A. NO.: 2010-CP-10-10355
D.R. HORTON, INC. f/k/a C. RICHARD	)	
DOBSON BUILDERS, INC.,	)	
	)	
Plaintiff,	)	PLAINTIFF'S SECOND
	)	SUPPLEMENTAL ANSWERS TO
-versus-	)	INTERROGATORIES OF
	)	DEFENDANTS BUILDERS
BUILDERS FIRSTSOURCE -	)	FIRSTSOURCE SOUTHEAST
SOUTHEAST GROUP, LLC; and	)	GROUP, LLC AND BUILDERS
BUILDERS FIRSTSOURCE, INC; and	)	FIRSTSOURCE, INC.
JOSEPH NACCARI, INDIVIDUALLY,	)	
and d/b/a MASTERFRAMERS,	)	
	)	
Defendants.	)	

TO: DAVID ROOT, ESQUIRE, ATTORNEYS FOR DEFENDANTS BUILDERS
FIRSTSOURCE SOUTHEAST GROUP, LLC AND BUILDERS FIRSTSOURCE, INC.:

Plaintiff hereby answers the First Set of Interrogatories of the Defendants, Builders
FirstSource Southeast Group, LLC and Builders Firstsource, Inc. (hereinafter collectively
referred to as "BFS"), states as follows:

GENERAL OBJECTIONS

In setting forth answers thereto, Plaintiff does not waive the attorney-client, work-product
or any other privilege or immunity from disclosure which may attach to information called for
herein or responsive to the Interrogatories. Plaintiff does not concede the relevance or materiality
of the Interrogatories, or the subject matters to which the Interrogatories refer. Plaintiff does not
waive any rights and do not intend to waive any rights by answering these interrogatories. These
answers are submitted by the Plaintiff to preserve and do hereby reserve:

1. All questions as to competency, relevancy, materiality, privilege and admissibility

as evidence for any purpose of any of the documents referred to or answers given, or the subject matter thereof in any subsequent proceeding in, or the trial of this action or any other action or proceeding;

2. The right to object to other discovery procedures involving or relating to the subject matters of the Interrogatories herein responded to; and

3. The right at any time to revise, correct, add to or clarify any of the answers set forth herein or documents referred to herein.

SUPPLEMENTAL INTERROGATORIES

4. Please list the names, addresses and telephone numbers of any expert witnesses whom you propose to use in the trial of this case and provide the following information:

- a. The subject matter as to which each such person has been retained or specially employed by you;
- b. His profession, occupation, employer, and field of expertise;
- c. The substance of the facts and opinions about which each alleged expert is expected to testify and a summary of the grounds for each opinion (attach to your answers to these Interrogatories a report of the experts listed above which contains the information sought by this request);
- d. The dates and location of each test, analysis or examination relating to this litigation conducted by each person or persons listed above and the examiner's conclusion as to the results of the test, analysis, or examination; and
- e. Whether you have ever employed the alleged expert or experts listed above as expert witnesses or as litigation consultants in other matters. If so, indicate the dates, the name of each case, the court, and the term number where appropriate.

ANSWER:

Robert G. Sisnroy, P.E.
Sisnroy Engineering, LLC
Post Office Box 12806
Charleston, South Carolina 29422

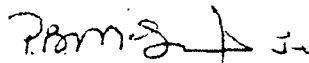
Howard Althen
Curry Engineers
401E Seacoast Parkway
Mount Pleasant, South Carolina 29464

Plaintiffs reserve the right to call and question any and all witness(es) named by any other party in this litigation.

Dated this 13 day of November 2012.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.



Neil S. Haldrup
Peden Brown McLeod, Jr.
145 King Street, Suite 300
Charleston, South Carolina 29402
(843) 329-9500
Attorneys for Plaintiff

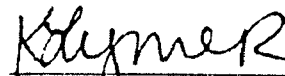
CERTIFICATE OF SERVICE

The undersigned employee of WALL TEMPLETON & HALDRUP, P.A. hereby certifies that on this 13 day of November 2012 she served a copy of **PLAINTIFF'S SECOND SUPPLEMENTAL ANSWERS TO INTERROGATORIES OF DEFENDANTS BUILDERS FIRSTSOURCE SOUTHEAST GROUP, LLC AND BUILDERS FIRSTSOURCE, INC.** by placing a copy in a postpaid envelope for collection and processing for mailing, following this business's ordinary practice, with which she is readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited with the United States Postal Service in the ordinary course of business and addressed to the persons hereinafter named, at the places and addresses stated below, which are the last known address, in Charleston, South Carolina:

ADDRESSEE(S)

David Root
Kernodle, Root & Coleman
914 Folly Road, Suite 2 (29412)
Post Office Box 13897
Charleston, South Carolina 29422
**ATTORNEYS FOR BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP,
LLC AND BUILDERS FIRSTSOURCE,
INC.**

David S. Cobb
Turner Padgett Graham & Laney P.A.
Post Office Box 22129
Charleston, South Carolina 29413
**ATTORNEYS FOR JOSEPH NACCARI,
INDIVIDUALLY AND D/B/A
MASTERFRAMERS**



Kristyn Lynne Robertson

KERNODLE
ROOT
COLEMAN

James Taylor Anderson, III, Esquire
tanderson@kernodelaw.com

September 13, 2013

VIA EMAIL AND U.S. MAIL

The Honorable J. C. Nicholson, Jr.
100 Broad Street, Suite 106
Charleston, SC 29401

RE: *D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. v. Builders FirstSource-Southeast Group, LLC and Joseph Naccari, Individually and d/b/a Masterframers // Naccari v. Jaime Arreguin d/b/a Maya Construction*
Charleston County / Case No. 10-CP-10-10355

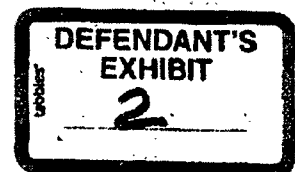
Dear Judge Nicholson:

I represent Builders FirstSource-Southeast Group, LLC and Builders Firstsource, Inc. (collectively "BFS") in this case brought by D.R. Horton, Inc. ("DRH"). DRH asserts claims against BFS for contribution and contractual indemnity. BFS filed a Motion for Summary Judgment in this matter and the Court heard arguments on that motion on May 15, 2013. After the hearing the parties submitted letters to the Court and Your Honor took the motion under advisement.

Since the hearing several matters have arisen that impact the Motion for Summary Judgment and I am writing to inform the Court of these matters. As Your Honor will recall, this case involves DRH's attempt to require BFS to indemnify it for an arbitration award entered, and attorneys' fees incurred, in relation to a lawsuit filed in Berkeley County by Patricia Clark against DRH. *Patricia Clark v. D.R. Horton, Inc.*, Berkeley County Case No. 2008-CP-08-1633. (the "Clark Case").

In the Clark Case, a homeowner, Ms. Clark, sued DRH alleging various construction defects including improper siding, flashing, framing, roofing, slab and driveway defects, and defects with the hot water heater. (See Clark Complaint, ¶ 9). The Clark Case was referred to arbitration, a two day arbitration was conducted, and award of \$150,000, was entered. The parties to the Clark Case did not make a transcript of the hearing and did not obtain an award that included findings of fact or conclusions of law. The arbitration award was confirmed and made a final judgment of the Berkeley County Circuit Court.

At the hearing of May 15th, DRH's counsel was unable to articulate any legitimate reason for its failing to request a reasoned award. Since the hearing the attorneys' bills incurred by DRH have been produced. Those bills make it very clear that DRH's failure to make a record of what was determined in the arbitration was a calculated decision.



The Honorable J. C. Nicholson, Jr.
September 13, 2013
Page 2

Even before it had the Clark Case referred to arbitration, DRH was reviewing "client file materials regarding information on vendors for potential third-party claims" and advising on "third party issues." (See Exhibit 1, Entries for 07/22/08). In advance of the arbitration DRH was evaluating "arbitration, choice of arbitrator, [and] third-party contribution claims." (See Exhibit 1, Entry for 02/25/09). Most importantly, prior to the arbitration, DRH was already strategically planning the "form of award as reasoned or monetary award only." (See Exhibit 1, Entry for 12/07/09).

The 30(b)(6) deposition of DRH has also been conducted since the hearing. That deposition demonstrates that DRH's absolute failure to make a record of the arbitration has left it unable to prove what portion of the award is attributable to BFS.

DRH's 30(b)(6) representative testified that evidence was presented during the arbitration showing defects in Ms. Clark's siding (Jay Henderson Dep., P. 8, l. 16- P. 9, l. 6) (attached hereto as Exhibit 2), kickout flashing (Henderson Dep., P. 11, l. 9- P. 12, l. 11), framing (Henderson Dep., P. 12, ll. 19-24), slab and driveway (Henderson Dep., P. 14, l. 21- P. 16, l. 3), roof and shingles (Henderson Dep., P. 16, l. 4- P. 17, l. 3), and hot water heater (Henderson Dep., P. 17, l. 4- P. 18, l. 8). DRH admitted that, with the exception of framing, BFS has no responsibility for the above issues (Henderson Dep., P. 18, l. 21- P. 20, l. 13). Ultimately, DRH's 30(b)(6) representative testified:

Q: All right. Is it fair to say that any attempt by you to assign portions of that \$150,000 arbitration award to various defects would just be a guess?

A: Again, the \$150,000 award was given. I don't have any specific information as to how it was determined.

(Henderson Dep., P. 70, ll. 16-22).

Q: Would D.R. Horton be speculating to try to assign any portion of that \$150,000, to any particular defect?

A: I think I have answered this before to the effect that I don't have sufficient information to determine what the arbitrator attributed the \$150,000 award to.

(Henderson Dep., P. 100, ll. 11- 15).

Because DRH failed to make a record, and failed to ask for an award with factual findings, DRH does not "have any specific information as to how [the award] was determined." That admission effectively ends this matter. DRH cannot ask a jury to guess and speculate as to what was decided by a fact finder in a previous action. See *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 570-571 (1971) ("Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.").

DRH's 30(b)(6) representative also testified that DRH drafted the indemnity agreement at issue in this lawsuit. (Henderson Dep., P. 31, ll. 21-23). That indemnity agreement purports to require BFS to indemnify DRH for "any negligent action and/or omission of [DRH] related in any way to the work, even when the loss is caused by the fault or negligence of [DRH]." BFS contends that this agreement unambiguously violates S.C. Code Ann. § 32-2-10.

Finally, DRH's 30(b)(6) witness gave testimony which confirms that DRH's efforts at contribution are doomed to failure. It is axiomatic that a party who pays a judgment can only sue a third-party under the Contribution Among Tortfeasors Act (the "Act"), if the judgment in question is based on tort. DRH's 30(b)(6) representative testified that he had no idea whether, in fact, the arbitration award is based on tort liability:

Q: And was D.R. Horton determined to be negligent in the Patricia Clark case?

A: I don't know. Again, the award was determined by the arbitrator for \$150,000.

Q: So you don't know if there was an adjudication that D.R. Horton was negligent?

A: I'm uncertain.

(Henderson Dep., P. 20, l. 21-P. 21, l. 2).

Q: All right. Do you know whether or not D.R. Horton was found to have breached its contract with Patricia Clark in the arbitration?

A: Again, it does not indicate one way or the other.

Q: Do you know whether D.R. Horton was determined to have breached its warranty with Patricia Clark in the arbitration?

A: Again, the document does not indicate.

(Henderson Dep., P. 22, ll. 1-8).

The inescapable fact is that D.R. Horton did not obtain a ruling regarding whether or not it committed a tort. Without an adjudication of tort liability, or a settlement agreement meeting the strict requirements of the Act, DRH cannot have a claim for contribution. As recently as last month the South Carolina Supreme Court reiterated that "the right to contribution" is "not unlimited." See *Progressive Max Ins. Co. v. Floating Caps, Inc.*, Opinion No. 27293, August 7, 2013 (upholding trial court's grant of summary judgment to defendant when plaintiff failed to comply with the requirements of the Act).

The Honorable J. C. Nicholson, Jr.
September 13, 2013
Page 4

The above testimony conclusively shows that it is time to put an end to DRH's unorthodox attempt to obtain indemnity and contribution against BFS. In light of the above developments, BFS respectfully asks that this Court grant BFS's Motion for Summary Judgment.

Sincerely,

KERNODLE ROOT + COLEMAN



James Taylor Anderson, III

JTA/ads
Encls.

cc: VIA EMAIL ONLY
Peden Brown McLeod, Jr., Esquire and Neil S. Haldrup, Esquire
David S. Cobb, Esquire
R. Trippett Boineau, III, Esquire

EXHIBIT 1

**Ogletree
Deakins**

December 31, 2009

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Attorneys at Law

Administrative Office
918 South Pleasantburg Drive (29607)
P.O. Box 167
Greenville, South Carolina 29602
Telephone: 864.241.1900
Facsimile: 864.235.4649
www.ogletreedeakins.com

PERSONAL AND CONFIDENTIAL

Invoice # 683321
Matter # 005641-000215

Re: Mrs. Pat Clark
(Charleston Division / CD)

For professional services rendered through December 31, 2009, in connection with the above-referenced matter as outlined on the attached detailed billing sheets:

Fees	\$29,052.50
Less 10% Discount	(\$5,229.45)
Total Fees	\$23,823.05
Expenses	\$7,424.23
Total Due This Invoice.....	\$31,247.28

Year-to-Date Fees	\$97,624.33
Year-to-Date Expenses	\$21,414.61
Life-to-Date Fees	\$106,192.26
Life-to-Date Expenses	\$28,550.61

PLEASE REMIT TO: Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Post Office Box 89
Columbia, SC 29202
Federal ID # 57-1944820

Payable upon receipt.

Direct inquiries to the billing attorney or the Account Services Department (864) 241-1900.

Atlanta • Austin • Birmingham • Bloomfield Hills • Irvine • Charleston • Charlotte • Chicago • Cleveland • Columbia • Dallas • Greensboro • Greenville • Houston • Indianapolis • Jackson • Kansas City
Los Angeles • Memphis • Miami • Northbrook • Nashville • New Orleans • Philadelphia • Phoenix • Pittsburgh • Raleigh • St. Louis • St. Thomas • San Antonio • San Francisco • Tampa • Toronto • Washington

Re: Mrs. Pat Clark
(Charleston Division / CD)

For professional services rendered through December 31, 2009:

Date	Initials	Description	Hours	Amount
12/01/09		Additional review of depositions in preparation of witness outlines for arbitration; preparation of witness outlines; preparation of exhibits.	6.70	2,345.00
12/03/09		Additional review of depositions in preparation of witness outlines for arbitration; conference with Randy Still regarding arbitration preparation; additional preparation of witness outlines; additional preparation of exhibits.	7.70	2,695.00
12/03/09		Interoffice conference with [REDACTED] concerning preparations for arbitration and expert testimony.	0.70	206.50
12/04/09		Additional review of depositions in preparation of witness outlines for arbitration; additional preparation of witness outlines; additional preparation of exhibits.	5.90	2,065.00
12/06/09		Additional review of depositions in preparation of witness outlines for arbitration; additional preparation of witness outlines; additional preparation of exhibits.	1.70	595.00
12/07/09		E-mail to and from [REDACTED] and [REDACTED] regarding form of award as reasoned or monetary award; several e-mails with Randy Still regarding additional file materials and arbitration preparation.	0.50	175.00

Date	Initials	Description	Hours	Amount
12/08/09		Additional review of depositions in preparation of witness outlines for arbitration; additional preparation of witness outlines; several e-mails with Randy Still regarding preparation for arbitration; additional preparation of exhibits; travel to Charleston, SC, for arbitration.	7.30	2,555.00
12/09/09		Additional review of depositions in preparation of witness outlines for arbitration; additional preparation of witness outlines; additional preparation of exhibits; conference with [REDACTED] regarding preparation for arbitration.	9.80	3,430.00
12/10/09		Attendance at arbitration (first day); review of testimony and preparation of additional examination and cross-examination of witnesses; conference with Randy Still regarding same.	9.70	3,395.00
12/10/09		Telephone call with [REDACTED] concerning first day of arbitration.	0.30	88.50
12/11/09		Conference with [REDACTED] and Randy Still regarding arbitration preparation; attendance at arbitration (second day); travel from Charleston, SC, for arbitration.	11.40	3,990.00
12/11/09		Conference with [REDACTED] concerning results of arbitration.	0.50	147.50
12/14/09		Initial preparation of arbitration summary.	1.30	455.00
12/15/09		Conference with [REDACTED] concerning closing statement submission.	0.70	206.50
12/16/09		Review of arbitration exhibits and notes in preparation for evidentiary summary to arbitrator Tom Wills; initial preparation of evidentiary summary to arbitrator Tom Wills.	2.10	735.00
12/18/09		Email to arbitrator and all counsel concerning submission of closing statement brief.	0.10	29.50
12/21/09		Telephone call with Randy Still regarding evidentiary summary; additional preparation of evidentiary summary to arbitrator Tom Wills.	7.30	2,730.00

Date	Initials	Description	Hours	Amount
12/21/09	[REDACTED]	Conference with [REDACTED] concerning preparation of closing brief.	0.20	59.00
12/22/09	[REDACTED]	Additional preparation of evidentiary summary to arbitrator Tom Wills.	6.60	2,310.00
12/23/09	[REDACTED]	Final preparation of evidentiary summary to arbitrator Tom Wills; e-mail to Tom Wills and opposing counsel regarding same and monetary award; e-mail to [REDACTED] and [REDACTED] regarding same.	2.40	840.00
Total Services			83.40	\$29,052.50

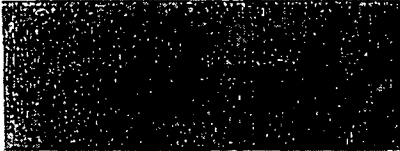
Timekeeper		Timekeeper Summary		
		Title	Rate	Hours
[REDACTED]		Shareholder	350.00	80.90
[REDACTED]		Associate	295.00	2.50
				Amount
				28,315.00
				737.50

Expenses			Amount
Description			
Copies	1,199 @	0.10 ea.	119.90
Color Copies			18.75
Professional Fees - Hendrix LeBlanc Lewis, Inc. Bank ID: PCOPER Check Number: 70006700			3,716.25
Travel - [REDACTED] - Travel to Charleston to take depositions			686.44
Business Meetings - [REDACTED] - Travel to Charleston to take deposition			22.89
Professional Fees - Hendrix LeBlanc Lewis, Inc. Bank ID: PCOPER Check Number: 70008426			2,860.00
Total Expenses			\$7,424.23

TOTAL FEES	\$29,052.50
LESS 10% DISCOUNT	(\$5,229.45)
TOTAL EXPENSES	\$7,424.23
TOTAL THIS INVOICE	\$31,247.28

Ogletree Deakins

February 28, 2009



PERSONAL AND CONFIDENTIAL

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Attorneys at Law

Administrative Office
918 South Pleasantburg Drive (29607)
P.O. Box 167
Greenville, South Carolina 29602
Telephone: 864.241.1900
Facsimile: 864.235.4649
www.ogletreedeakins.com

Invoice # 615337
Matter # 005641-000215

Re: Mrs. Pat Clark
(Charleston Division / CD)

For professional services rendered through February 28, 2009, in connection with the above-referenced matter as outlined on the attached detailed billing sheets:

Fees	\$280.00
Less 10% Discount	(\$28.00)
Total Fees	\$252.00
Expenses	\$0.00
Total Due This Invoice.....	\$252.00

Year-to-Date Fees	\$1,039.50
Year-to-Date Expenses	\$0.00
Life-to-Date Fees	\$9,607.43
Life-to-Date Expenses	\$7,136.00

PLEASE REMIT TO Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Post Office Box 89
Columbia, SC 29202
Federal ID # 57-1044820

Payable upon receipt.

Direct inquiries to the billing attorney or the Account Services Department (864) 241-1900.

Atlanta • Austin • Birmingham • Bloomfield Hills • Boston • Charleston • Charlotte • Chicago • Cleveland • Columbia • Dallas • Greenville • Greenville • Houston • Indianapolis • Jackson • Kansas City
Los Angeles • Memphis • Miami • Minneapolis • Nashville • Philadelphia • Phoenix • Pittsburgh • Raleigh • St. Louis • St. Thomas • San Antonio • San Francisco • Tampa • Toronto • Tucson • Washington

Re: Mrs. Pat Clark
(Charleston Division / CD)

For professional services rendered through February 28, 2009:

Date	Initials	Description	Hours	Amount
02/02/09	[REDACTED]	E-mail from John Chakeris regarding status of arbitration	0.10	35.00
02/24/09	[REDACTED]	Telephone call from John Chakeris regarding arbitration and further handling.	0.20	70.00
02/25/09	[REDACTED]	E-mail to [REDACTED] regarding arbitration, choice of arbitrator, third-party contribution claims, and further handling; telephone call with John Chakeris regarding same.	0.50	175.00
Total Services			0.80	\$280.00

Timekeeper

[REDACTED]

Timekeeper Summary

Title	Rate	Hours	Amount
Shareholder	350.00	0.80	280.00

TOTAL FEES	\$280.00
LESS 10% DISCOUNT	(\$28.00)
TOTAL EXPENSES	\$0.00
TOTAL THIS INVOICE	\$252.00

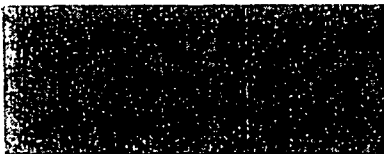
Ogletree Deakins

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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www.ogletreedeakins.com

July 31, 2008



PERSONAL AND CONFIDENTIAL

Invoice # 572589
Matter # 005641-000215

Re: Mrs. Pat Clark
(Charleston Division / CD)

For professional services rendered through July 31, 2008, in connection with the above-referenced matter as outlined on the attached detailed billing sheets:

Fees	\$2,850.00
Less 18% Discount	(\$513.00)
Total Fees	\$2,337.00
Expenses	\$141.70
Total Due This Invoice.....	\$2,478.70

Year-to-Date Fees	\$5,114.50
Year-to-Date Expenses	\$3,469.25
Life-to-Date Fees	\$5,732.78
Life-to-Date Expenses	\$3,472.15

PLEASE REMIT TO: Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Post Office Box 89
Columbia, SC 29202
Federal ID # 57-1044820

Payable upon receipt.

Direct inquiries to the billing attorney or the Account Services Department (864) 241-1900.

Atlanta • Austin • Birmingham • Bloomfield Hills • Charleston • Charlotte • Chicago • Cleveland • Columbia • Dallas • Greensboro • Greenville • Houston • Indianapolis • Jackson • Kansas City
Los Angeles • Memphis • Miami • Minneapolis • Nashville • Philadelphia • Phoenix • Pittsburgh • Raleigh • St. Louis • St. Thomas • San Antonio • San Francisco • Tampa • Terrence • Tucson • Washington

**Re: Mrs. Pat Clark
(Charleston Division / CD)**

For professional services rendered through July 31, 2008:

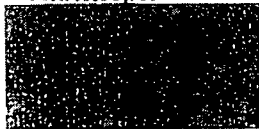
Date	Initials	Description	Hours	Amount
07/07/08		Conduct research and prepared memorandum regarding Unfair Trade Practices Act and Economic Loss Rule.	3.20	560.00
07/08/08		E-mail from John Chakeris' office concerning Home Purchase Agreement; coordination of additional investigation into missing portions of Home Purchase Agreement.	0.40	130.00
07/14/08		Several e-mails with John Chakeris' office regarding missing portion of Home Purchase Agreement.	0.20	55.00
07/16/08		Address contract form issues.	0.30	82.50
07/22/08		Review of client file materials regarding information on vendors for potential third-party claims; revision of Answer to include potential third-party claims against vendors; preparation of Motion to Compel Arbitration; preparation of Motion Information Form and Cover Sheet; letter to Clerk of Court regarding filing of Motion to Compel Arbitration and Answer; letter to John Chakeris and Philip Segui regarding filing and service of Motion to Compel Arbitration and Answer.	4.60	1,495.00
07/22/08		Advise on pleadings and third party issues.	0.50	137.50
07/23/08		Telephone call with Randy Still regarding status of report and additional information needed to complete; preparation of truss information for Randy Still; letter to Randy Still regarding same.	0.60	195.00

**Ogletree
Deakins**

Page 3
07/31/08
Invoice No. 572589
005641-000215-LTS

Date	Initials	Description	Hours	Amount
07/23/08		Address documents for forwarding to Randy Stull.	0.20	55.00
07/31/08		Review of roof truss information from Builders FirstSource.	0.40	130.00
Total Services			10.40	\$2,850.00

Timekeeper



Timekeeper Summary

Title	Rate	Hours	Amount
Shareholder	325.00	6.20	2,015.00
Associate	275.00	1.00	275.00
Law Clerk	175.00	3.20	560.00

Expenses

Description	Amount
Copies 227 @ 0.10 ea.	22.70
Color Copies	84.00
Messenger	10.00
Service/ Filing Fee - Clerk of Court Motion filing fee Bank ID: GVLCF Check Number: 81002117	25.00
Total Expenses	\$141.70

TOTAL FEES	\$2,850.00
LESS 18% DISCOUNT	(\$513.00)
TOTAL EXPENSES	\$141.70
TOTAL THIS INVOICE	\$2,478.70

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT
C/A NO. 2010-CP-10-10355

D.R. HORTON, INC. f/k/a)
C. RICHARD DOBSON BUILDERS,)
INC.,)

Plaintiff,)

-vs-)

BUILDERS FIRSTSOURCE-)
SOUTHEAST GROUP, LLC; and)
BUILDERS FIRSTSOURCE, INC.,)
and JOSEPH NACCARI,)
Individually and d/b/a)
MASTERFRAMERS,)

Defendants.)

JOSEPH NACCARI,)
Individually, and d/b/a)
MASTERFRAMERS,)

Third-Party Plaintiff,)

-vs-)

JAIME ARREGUIN d/b/a MAYA)
CONSTRUCTION,)

Third-Party Defendant.)

) 30(b)(6)
) DEPOSITION OF:
) JAY MARSHALL HENDERSON

The 30(b)(6) deposition of JAY MARSHALL
HENDERSON, taken before Julie L. Bonomo, Professional
Court Reporter and Notary Public, at Turner Fadget
Graham & Laney, PA, 40 Calhoun Street, Suite 200,
Charleston, South Carolina, on Friday, September 6,
2013, commencing at 9:44 a.m.

SOUTHEASTERN TRANSCRIPT * (843)762-2442

1 negligent, careless, reckless, willful and wanton in
2 constructing, repairing, remodeling, developing,
3 designing, supervising and inspecting the subject
4 residence and in failing to conduct and/or repair said
5 residence in accordance with the applicable building
6 codes, manufacturers' recommendations and in conformance
7 with accepted construction and industry standards."

8 And then it goes down and says, "F: In
9 improperly installing siding and exterior wall system."
10 Is that fair?

11 A. I'll agree that paragraph 9, in part, states what
12 you indicated.

13 Q. Okay.

14 A. Subparagraph F or item F indicates what I
15 indicated previously.

16 Q. Can we agree that Patricia Clark, in the lawsuit
17 that she brought against D.R. Horton, alleged negligence
18 in the installation of the siding on her home?

19 A. It appears so, yes.

20 Q. And was evidence introduced in the Patricia Clark
21 lawsuit to substantiate her allegation that the siding
22 of the home was negligently installed?

23 A. Yes.

24 Q. Would you agree with me that in the Patricia
25 Clark lawsuit, in arbitration, the issue of whether or
SOUTHEASTERN TRANSCRIPT * (843)762-2442

SOUTHEASTERN TRANSCRIPT * (843)762-2442

1 not the siding at the residence was negligently
2 installed, that issue was litigated?

3 A. It was part of the arbitration process, yes.

4 Q. Okay. Did the arbitrator award damages for
5 negligent installation of siding by D.R. Horton?

6 A. The arbitrator awarded \$150,000.

7 Q. Okay. Did the arbitrator decide the issue of
8 whether or not the siding at Ms. Clark's home was
9 negligently installed?

10 MR. HALDRUP: Object to the form.

11 A. I can't speak to the arbitrator's thought
12 process. I don't have the information as it relates to
13 how the number was comprised by the arbitrator.
14 However, I can tell you that what was alleged was
15 connections that were never really adequately proven out
16 in the arbitration.

17 Q. Is it fair to say that D.R. Horton does not know
18 whether or not any damages were awarded to Ms. Clark for
19 negligent installation of siding?

20 MR. HALDRUP: Object to the form.

21 A. Could you repeat that, please?

22 Q. Is it fair to say that D.R. Horton does not know
23 whether or not damages were awarded to Ms. Clark for the
24 negligent installation of siding?

25 A. We have insufficient information to determine how
SOUTHEASTERN TRANSCRIPT * (843)762-2442

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1 Q. It's your position, it's D.R. Horton's position
2 that there was no evidence produced by Ms. Clark that
3 there was improperly installed kick-out flashing at the
4 residence?

5 A. They alleged that it was improperly installed.
6 But again, the manufacturer's installation instructions
7 for Hardie did not require it and code did not require
8 it at the time.

9 Q. Did anybody testify in the Clark case that the
10 kick-out flashings were improperly installed?

11 A. Yes, they alleged that.

12 Q. And did they produce evidence? Was there
13 testimony given in the Clark case that the kick-out
14 flashings were improperly installed?

15 A. There was an opinion rendered by an engineer, an
16 expert. And we certainly have an opinion that is to the
17 contrary to that.

18 Q. Ms. Clark's expert, who was an engineer, gave
19 testimony in the Clark case that the kick-out flashings
20 were improperly installed.

21 MR. HALDRUP: Object to the form.

22 A. Again, it was alleged. They gave testimony to
23 that end.

24 Q. An engineer?

25 A. We gave testimony to the contrary. Our engineer
SOUTHEASTERN TRANSCRIPT * (843)762-2442

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1 gave testimony to the contrary. Two differing opinions.

2 Q. Is it fair to say that the issue of whether or
3 not there was improperly installed kick-out flashings
4 was litigated in the Patricia Clark case?

5 MR. HALDRUP: Object to the form.

6 A. I don't really understand the term "litigated."
7 I mean, it was argued in the arbitration proceedings.

8 Q. There was sworn testimony given on both sides of
9 the issue of whether or not there was improperly
10 installed kick-out flashings; is that correct?

11 A. That's correct.

12 Q. The next item there, L, would you agree with me
13 that in the Clark case, Ms. Clark alleged that
14 D.R. Horton was negligent in failing to properly install
15 the framing?

16 A. Item L indicates in failing to properly install
17 the framing, yes. Which, by the way, was performed by
18 Builders FirstSource.

19 Q. Was the issue of whether or not the framing was
20 defective litigated in the Patricia Clark case?

21 A. Yes.

22 Q. Okay.

23 A. Well, to the extent that arguments were produced
24 on both sides, yes.

25 Q. Did the arbitrator make a finding in terms of
SOUTHEASTERN TRANSCRIPT * (843)762-2442

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1 defective in the Clark case?

2 A. It's our contention the framing was defective and
3 that was the brunt of the award. However, I don't have
4 specific knowledge of the arbitrator's findings. I was
5 not privy to his mind when he made the award.

6 Q. Okay. Have you been involved in other
7 arbitrations besides the Patricia Clark arbitration?

8 A. In general?

9 Q. Yes, sir.

10 A. Yes.

11 Q. All right. In those other arbitrations, has
12 D.R. Horton ever requested an award that broke down the
13 damages between the various allegations that were made
14 by the plaintiff?

15 A. Not to my recollection, no.

16 Q. Okay. Let's go to M, on paragraph 9, in Exhibit
17 2. Would you agree with me, based on paragraph N, that
18 Ms. Clark, in her lawsuit, alleged D.R. Horton was
19 negligent in properly installing the slab in the
20 driveway at her residence?

21 A. Paragraph M, as in Mary, or line item M, as in
22 Mary indicates improperly installed slab in the
23 driveway.

24 Q. Was evidence introduced by Ms. Clark in the Clark
25 proceeding to substantiate her allegation that the slab
SOUTHEASTERN TRANSCRIPT * (843)762-2442

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1 and driveway at her home were negligently installed?

2 MR. HALDRUP: Object to the form.

3 A. Ms. Clark did not introduce evidence to the
4 extent that she indicated that -- she may have indicated
5 they existed. Her experts introduced evidence to the
6 effect of a crack that was less than 1/64th of an inch
7 existed in the slab and a crack of 1/8th of an inch
8 existed in the driveway. Both of which are extremely
9 minor and to be expected in concrete construction. They
10 were not warrantable and they do not exceed ACI
11 standards in any way, shape or form.

12 Q. Is the answer to my question, yes, that
13 Ms. Clark's experts gave testimony to support her
14 allegation that the slab and driveway were improperly
15 installed at the home?

16 A. They made that allegation and produced testimony
17 and we strongly disagreed with it because it's something
18 that's to be expected.

19 Q. It was a contested issue in the arbitration, the
20 slab in the driveway?

21 A. Absolutely. I feel strongly they did not prove
22 anything as it relates to the failure of either.

23 Q. Ultimately, it was up to the arbitrator to
24 determine whether or not Ms. Clark proved her
25 allegation?

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1 A. True.

2 Q. Correct?

3 A. Yes, yes.

4 Q. All right. Can we look at subparagraph N, in
5 paragraph 9. And based on subparagraph N, as in Nancy,
6 is it fair to say or would D.R. Horton agree with me
7 that Ms. Clark alleged that D.R. Horton was negligent in
8 improperly installing the roof and the shingles at her
9 residence?

10 A. Paragraph N, as in Nancy, indicates in improperly
11 installing the roof and shingles.

12 Q. So is that, yes, that D.R. Horton would agree
13 that Patricia Clark alleged that D.R. Horton negligently
14 installed the roof and the shingles at her residence?

15 A. It was alleged, yes.

16 Q. Was there evidence introduced by Ms. Clark to
17 support her allegation that the roof and the shingles
18 were improperly installed?

19 A. Some evidence was introduced by their experts to
20 the extent of an issue with nailing, and an issue with
21 the shingle overhang. Both of which were contested on
22 our part, and we believe that the roof did not have a
23 failing condition, was not improperly installed.

24 Q. Does D.R. Horton know if the arbitrator found
25 that the roof and the shingles at Ms. Clark's residence

SOUTHEASTERN TRANSCRIPT * (843)762-2442

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1 were improperly installed?

2 A. Again, we have insufficient evidence to determine
3 how the award was compiled.

4 Q. In subparagraph O, on paragraph 9, of Exhibit 2,
5 in looking at subparagraph O, would D.R. Horton agree
6 that Ms. Clark alleged that D.R. Horton improperly
7 installed the gas hot water heater at her home?

8 A. Yes. Paragraph -- subparagraph O indicates,
9 improperly installing gas water heater.

10 Q. Did Ms. Clark produce evidence to support her
11 allegation that the gas water heater at her home was
12 improperly installed?

13 A. Yes. They produced expert testimony indicating
14 that the gas flue pipe was installed improperly and we
15 agreed that the gas flue pipe was installed improperly,
16 and the fix for that is less than 500 bucks.

17 Q. D.R. Horton actually conceded in the arbitration
18 that the gas hot water heater was improperly installed?

19 A. Yes. We conceded it before it started. We were
20 attempting to fix it when Ms. Clark no longer allowed us
21 on the property. But again, that fix is 500 bucks or
22 less, on the worst days. I mean, you're talking about
23 taking a section of 4-foot pipe and turning it the other
24 way.

25 Q. Yes, sir.

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1 A. It's a very, very minor issue, but, yes, we
2 conceded that it is improperly installed:

3 Q. Given that concession, is it likely that some
4 portion of the \$150,000 award entered in the Patricia
5 Clark case is associated with the gas hot water heater?

6 MR. HALDRUP: Object to the form.

7 A. Again, I don't have sufficient evidence, but it
8 would seem reasonable.

9 Q. No evidence was entered in the Clark case to
10 indicate that the gas hot water heater was fine?

11 A. Correct. Again, just the pipe. Had nothing to
12 do with the water heater, just the venting of the
13 combusted gas.

14 Q. All right. On item F, the improperly installed
15 siding allegation, did Builders FirstSource have any
16 responsibility for installing the siding at Ms. Clark's
17 residence?

18 A. They did not. However, item F also includes
19 exterior wall system, which I believe to include rough
20 openings, window openings, window installation.

21 Q. For the siding, though, Builders FirstSource
22 didn't have any responsibility to put the siding on the
23 house, did they?

24 A. That is correct.

25 Q. And with regards to the kick-out flashing, did
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1 Builders FirstSource have any responsibility to do the
2 kick-out flashing?

3 A. They did not.

4 Q. Did Builders FirstSource have any responsibility
5 with regard to the slab in the driveway?

6 A. They did not.

7 Q. All right. And did Builders FirstSource have any
8 responsibility with installing the roof and the
9 shingles?

10 A. They did not.

11 Q. Did Builders FirstSource have any responsibility
12 in installing the gas hot water heater?

13 A. They did not.

14 Q. So there is no allegation in this case by
15 D.R. Horton that Builders FirstSource is somehow jointly
16 responsible for the siding problem, or the kick-out
17 problem, or the slab problem, or the roof problem?

18 MR. HALDRUP: Object to the form.

19 A. Could you repeat that? I'm sorry.

20 Q. Builders FirstSource isn't jointly responsible
21 with the siding installer for installing the siding, are
22 they?

23 MR. HALDRUP: Object to the form.

24 A. Builders FirstSource did not install the siding,
25 no.

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1 Q. And had no responsibility to do it?

2 A. They did not.

3 Q. Same with the driveway?

4 A. They did not install the driveway.

5 Q. And had no responsibility to install the
6 driveway?

7 A. They did not.

8 Q. Or the slab?

9 A. That is correct.

10 Q. Or the roof and shingles?

11 A. They did not install the roof and shingles, to
12 the extent that they installed the underlayment
13 underneath the shingles. I should clarify that.

14 Q. Do you know whether or not Builders FirstSource
15 installed -- what is it under the shingles?

16 A. Underlayment, felt.

17 Q. Do you know if Builders FirstSource installed the
18 felt under the shingles?

19 A. It's typically in their scope to do so as a
20 framer, yes.

21 Q. And was D.R. Horton determined to be negligent in
22 the Patricia Clark case?

23 A. I don't know. Again, the award was determined by
24 the arbitrator for \$150,000.

25 Q. So you don't know if there was an adjudication
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1 that D.R. Horton was negligent?

2 A. I'm uncertain.

3 Q. Dr. Horton does not know?

4 A. I don't have that information. I would have to
5 review the statement of the arbitrator.

6 Q. All right.

7 MR. TAYLOR: We can mark that as Exhibit
8 No. 3.

9 (Exhibit No. 3 marked for identification.)

10 Q. Jay, I'm going to hand you what has been marked
11 as Exhibit 3 to your deposition. Have you ever seen
12 that document before?

13 A. Yes.

14 Q. Okay. What is this document?

15 A. It's an arbitration order.

16 Q. Was this the arbitration order that you were
17 referencing that you would need to review in order to
18 determine whether or not D.R. Horton was determined to
19 be negligent in the arbitration?

20 A. Yes.

21 Q. All right. Can you review this Exhibit No. 3 and
22 then revisit my question of whether or not D.R. Horton
23 was ever adjudged negligent in the arbitration?

24 A. It doesn't indicate negligence one way or the
25 other.

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Electronically signed by Julie Bonomo (001-335-018-0021)

0406515d-81bb-4a29-8e02-6d0a3c485fa8

1 Q. All right. Do you know whether or not
2 D.R. Horton was found to have breached its contract with
3 Patricia Clark in the arbitration?

4 A. Again, it does not indicate one way or the other.

5 Q. Do you know whether D.R. Horton was determined to
6 have breached it's warranty with Patricia Clark in the
7 arbitration?

8 A. Again, the document does not indicate.

9 Q. Do you know if D.R. Horton was determined to have
10 violated the South Carolina Unfair and Deceptive Trade
11 Practices Act in the arbitration?

12 A. The document does not indicate.

13 Q. Do you know if Ms. Clark was awarded her
14 attorney's fees in the arbitration?

15 A. The document does not indicate.

16 Q. Do you know if Ms. Clark -- well, let's go back
17 to Exhibit 2, which is the complaint. If you could go
18 to the very end of that?

19 A. Page?

20 Q. Page 9 of Exhibit 2, and do you see the paragraph
21 that starts "wherefore"?

22 A. Yes.

23 Q. Do you see where it says, the plaintiff prays for
24 judgment for the attorney's fees and cost of this
25 action. Do you see that?

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1 any of them have been produced.

2 Q. You don't have them from the original
3 construction?

4 A. We do not. Well, to the extent they exist, we
5 have not been able to find them.

6 Q. Okay. Going back to Exhibit 4, which is the
7 contract, do you see item 22?

8 A. I do.

9 Q. All right. What is the title of that paragraph?

10 A. Dispute resolution.

11 Q. Can you read to me the first sentence of
12 paragraph 22?

13 A. "If a dispute arises out of or relating to this
14 agreement or breach thereof, and if the dispute cannot
15 be settled through negotiation, the parties agree to
16 first try in good faith to settle the dispute by
17 mediation administered by the American Arbitration
18 Association under its commercial mediation rules, before
19 resorting to arbitration, litigation or other dispute
20 resolution procedure."

21 Q. Is this a document, Exhibit 4, that was drafted
22 by D.R. Horton?

23 A. I believe it was, yes.

24 Q. In the Patricia Clark case, does D.R. Horton
25 consider that a dispute that relates to the agreement
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1 A. I don't recall that she testified to that at the
2 arbitration, but that leaking toilet issue happened, as
3 I recall, from her deposition back in 2003, and I don't
4 believe it was relevant to the matter.

5 Q. Do you know one way or the other about whether
6 she testified about the leaking toilet damaging hardwood
7 floors at the arbitration?

8 A. I don't recall that she did.

9 Q. Or didn't? You just don't recall one way or the
10 other?

11 A. I don't recall that she did or didn't, but, no, I
12 do not recall.

13 Q. Did Ms. Clark testify that she had complaints
14 about the roofing at her house?

15 A. I don't recall specifics to her testimony.

16 Q. All right. Is it fair to say that any attempt by
17 you to assign portions of that \$150,000 arbitration
18 award to various defects would just be a guess?

19 MR. HALDRUP: Object to the form.

20 A. Again, the \$150,000 award was given. I don't
21 have any specific information as to how it was
22 determined.

23 ---Q. --Okay. -- Were the witnesses all sworn? -- Did they
24 swear to take an oath to tell the truth, the whole truth
25 and nothing but the truth?

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1 not what he said.

2 MR. ANDERSON: That's a question. I wasn't
3 saying that he said anything.

4 Q. Would you agree with me that you would be
5 speculating if you were to try to assign any portion of
6 the \$150,000 to any particular defect?

7 MR. HALDRUP: Are you asking what the
8 arbitrator or what D.R. Horton?

9 MR. ANDERSON: I'm asking him what
10 D.R. Horton.

11 Q. Would D.R. Horton be speculating to try to assign
12 any portion of that \$150,000 to any particular defect?

13 A. I think I have answered this before to the effect
14 that I don't have sufficient information to determine
15 what the arbitrator attributed the \$150,000 award to.

16 MR. ANDERSON: I think that is all I have
17 now.

18 EXAMINATION BY MR. COBB:

19 Q. I'm David Cobb. I'm here on the behalf of Joe
20 Naccari, who is one of the defendants that y'all brought
21 in on this case. When did BFS first learn about
22 complaints by Ms. Clark about framing difficulties or
23 framing problems with her house?

24 MR. HALDRUP: You said BFS. I assume you
25 meant --

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SOUTHEASTERN TRANSCRIPT * (843)762-2442

100 Broad Street, Suite 106
Charleston, SC 29401
Phone (843) 732-1111
Fax (843) 732-1112

**KERNODLE
ROOT
COLEMAN**

ATTORNEYS AT LAW

James Taylor Anderson, III, Esquire
janderson@kernodlelaw.com

November 1, 2013

VIA EMAIL AND U.S. MAIL

The Honorable J. C. Nicholson, Jr.
100 Broad Street, Suite 106
Charleston, SC 29401

RE: *D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. v. Builders FirstSource-Southeast Group, LLC and Joseph Naccari, Individually and d/b/a Masterframers // Naccari v. Jaime Arreguin d/b/a Maya Construction*
Charleston County / Case No. 10-CP-10-10355
KR+C File No.: 6002-167

Dear Judge Nicholson:

It was a pleasure to appear before you at the hearing on Wednesday. One of the primary issues at that hearing was D.R. Horton's ("DRH") motion for summary judgment on its claim against Defendants Builders FirstSource-Southeast Group, LLC and Builders FirstSource, Inc. (Collectively "BFS") for contractual indemnity.¹ I appreciate the opportunity to submit a letter brief on the issue of whether DRH was required to give BFS notice of *Patricia Clark v. D.R. Horton, Inc.*, Berkeley County Case No. 2008-CP-08-1633 (the "Clark Case."), in order for BFS to be bound by any findings made in that case. The answer is that without notice, BFS, as a nonparty, cannot be bound by any findings made in the Clark Case.

I. Judgments are not conclusive as to nonparties.

The determinations made in the Clark Case are not res judicata as to BFS. "The doctrine of res judicata does not operate to affect the rights and interests of one who was not a party nor in privity with a party in a prior proceeding." *Airco, Inc. v. Hollington*, 269 S.C. 152, 158 (1977). That both actions be between the same parties is an elementary requirement of res judicata. *Jordan v. Jordan*, 284 S.C. 342, (Ct. App. 1985).

Nor is BFS, as a nonparty, in any way estopped by the judgment or findings made in the Clark Case. "Collateral estoppel or issue preclusion prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action." *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 251 (1997)(emphasis added). Only a party or its privy

¹The Contract is actually between DRH and Builders FirstSource-Southeast Group, LLC. Builders FirstSource, Inc., is not a party to the contract and is not a proper party to this lawsuit.



The Honorable J. C. Nicholson, Jr.
November 1, 2013
Page 2

may be precluded from relitigating an issue. *Carrigg v. Cannon*, 347 S.C. 75, 80 (Ct. App. 2001). "Due process concerns prohibit estopping litigants who never had a chance to present their evidence and arguments on a claim, despite one or more existing adjudications of the identical issue which stand squarely against their position." *Id.* at 81.

Therefore, even if it can be determined what portion of the Judgment is attributable to BFS, BFS is not bound by the findings in the Clark Case. See *Robins v. First Federal Sav. Bank*, 294 S.C. 219, 223 (Ct. App. 1987) ("absent party's interests can rarely be legally bound by principles of res judicata in proceedings to which he was not a party.").

2. In this case there is only one potentially applicable exception to the general rule that judgments are not binding against nonparties.

The only potential exception to the above rule is that a nonparty indemnitor - given notice and an opportunity to defend an action - may be bound by the findings made in that action. See *Bluck v. Patel*, 353 S.C. 76, fn 2 (Ct. App. 2002) ("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.' The device has been largely replaced by third-party practice."² The rule was stated by the United States Supreme Court as follows:

When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not.

Washington Gaslight Co. v. District of Columbia, 161 U.S. 316, 330, 16 S.Ct. 564, 569 (1896).

The principle applies equally to suits for contractual indemnity and claims for implied indemnity. See *General Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, fn 15 (3rd Cir. 2007) (vouching principles apply to cases involving indemnity "by contract or by implication of law").

A case on point is *International Fidelity Insurance Co. v. Goltra Corporation*, 149

²Because of third-party practice nearly every indemnitee brings its alleged indemnitors into the underling case and the "vouching in" rule thus rarely comes into play. See *Robins v. First Federal Sav. Bank*, 294 S.C. 219, 223-224 (Ct. App. 1987) (If defendant seeks to hold third-party liable in the event of judgment proper procedure is to implead third-party as third-party defendant.).

The Honorable J. C. Nicholson, Jr.
November 1, 2013
Page 3

N.J.Super. 574, 374 A.2d 481 (1977)(attached hereto as Exhibit 1). In that case a surety, International Fidelity Insurance Co. ("International"), was sued based on a payment bond it issued to Goltra Corporation ("Goltra"), and a judgment was entered against International. Goltra had entered into an "all embracing indemnity agreement," whereby it agreed to indemnify International against any liability incurred by International on the payment bond. *Id* at 576, * 482. The Court held that, unless International had given Goltra proper notice, and an opportunity to defend the underlying action:

[International] will not be able to rely upon the prior judgment as conclusive proof of the propriety of the claim underlying the bond liability. Under such circumstances it will be required to introduce evidence anew which will demonstrate that the indebtedness was rightfully due to the claimant for labor or materials furnished for the job encompassed by the bond; and the indemnitor may contest the validity of the supplier's claim in toto or as to quantum of damages.

International Fidelity Insurance Co. v. Goltra Corporation, 149 N.J.Super. 574, 577-578, 374 A.2d 481, 483 (1977).

3. South Carolina recognizes the requirement of "vouching in" a nonparty indemnitor in order to bind the nonparty indemnitor.³

With regard to the sale of products, the rule that a nonparty indemnitor can only be bound to a judgment if he is given notice and an opportunity to defend is statutory:

Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after reasonable receipt of the notice does come in and defend he is so bound.

S.C. Code Ann. § 36-2-607(5).

As stated above, BFS provided framing materials, on an installed basis, at the Residence. In determining whether a contract is for the "sale of goods," and subject to the U.C.C., the courts generally use the "predominant factor test." *Trident Const. Co., Inc. v. Austin Co.*, 272 F.Supp.2d 566, 572 (D.S.C. 2003). In the *Trident* case the South Carolina District Court held that "a 'lump-sum' hybrid contract for '[t]he design, fabrication, and erection' of 'a steel airplane hangar"

It should be remembered that "vouching in" a third party indemnitor is an exception to the general rule that nonparties are not bound by issues determined in a lawsuit. If South Carolina had not adopted the practice, the general rule that nonparties are not bound would remain in full force and nonparties, even with notice, would not be bound by judgments

The Honorable J. C. Nicholson, Jr.
November 1, 2013
Page 4

facility was predominantly a contract for the sale of goods. *Id.* Here, the contract between BFS and DRH, for the installed sales of building components, may be "predominantly" for the sale of goods.

At this juncture, however, it is unnecessary to reach the issue of whether the U.C.C. governs the agreement between BFS and DRH. As stated in the South Carolina Reporter's Comments to S.C. Code Ann. § 36-2-607(5), the statute merely codifies the common law of South Carolina.⁴

The South Carolina Supreme Court recognized the doctrine requiring notice and an opportunity to defend, in order to bind a nonparty indemnitor, in *Newell Contracting Co. v. J.F. & J.D. Blankenship*, 130 S.C. 131, 125 S.E. 420 (1924). In that case a general contractor brought an indemnity action against its subcontractor based, in part, on a judgment entered against the general contractor in a Tennessee action. The judge charged the jury that the judgment in the Tennessee action was not binding on the subcontractor. The South Carolina Supreme Court agreed that the judgment in the action against the contractor was not binding on the subcontractor and explained the rule as follows:

The logical and just general rule is that one should not be concluded by a judgment in a proceeding to which he is not a party. . . in order to invoke the principle of res adjudicata against one not a party to the action in which the judgment was obtained, it must appear, in the action in which that principle is invoked: (1) That such person was legally bound to, at least partially, indemnify the defendant in the first action against the recovery suffered by him therein. (2) That he was seasonably notified of the nature and pendency of the action, and of the time and place of trial.

Newell Contracting Co., 125 S.E. 420, 425-426.

The South Carolina Supreme Court has reaffirmed the doctrine of requiring notice and an opportunity to defend in order to bind a nonparty indemnitor on several occasions. In *Aetna Cas. & Sur. Co. v. Golightly*, 289 S.C. 408 (1985), Aetna had issued Golightly a "license bond" required by the South Carolina Residential Homebuilders Commission ("RHBC"). *Id.* at 409. The bond required Golightly to indemnify Aetna for any losses incurred on the bond. *Id.*

In a proceeding before the RHBC, Golightly was adjudicated liable to the homeowner. As a result of Golightly's liability, Aetna incurred a loss under the bond and sued Golightly for contractual indemnity. *Id.* at 409. The Court held that Golightly was collaterally estopped, in the indemnity action, from denying its liability to the homeowner. The Court held:

Where an indemnitor has notice of the suit in which he is to be bound and has an

⁴"Subsection (5) recognizes and prescribes a more certain rule for the common law procedural device of "vouching in" a seller who is answerable over to a buyer for a breach of warranty or other obligation on which the buyer is being sued." (Citing *Mauldin v. Milford*, 127 S.C. 508, (1923); *Newell Contracting Co. v. Blankenship*, 130 S.C. 131 (1924)).

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010- CP-10-10355

D.R. Horton, Inc., et al.

Builders Firstsource- Southeast Group,
LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment:
by the Court: **Plaintiff's Motion to Reconsider, filed on May 15, 2014, is respectfully DENIED without a rehearing.**

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk : _____

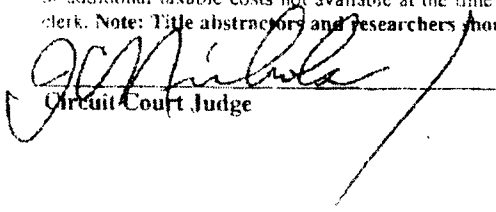
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

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


Circuit Court Judge

2117
Judge Code

6/23/14
Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) C/A NO. 2010-CP-10-10355

D.R. HORTON, INC. f/k/a C. RICHARD
DOBSON BUILDERS, INC.,

Plaintiff,

v.

BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, LLC; and BUILDERS
FIRSTSOURCE, INC., and JOSEPH
NACCARI, Individually and d/b/a
MASTERFRAMERS,

Defendants.

JOSEPH NACCARI, Individually, and d/b/a
MASTERFRAMERS,

Third-Party Plaintiff,

v.

JAIME ARREGUIN d/b/a MAYA
CONSTRUCTION,

Third-Party Defendant.

) **BUILDERS FIRSTSOURCE-SOUTHEAST**
) **GROUP, LLC and BUILDERS**
) **FIRSTSOURCE, INC.'S SECOND**
) **MOTION FOR SUMMARY JUDGMENT**

FILED
2014 JUL 24 PM 3:03
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

PLEASE TAKE NOTICE that within ten (10) days after service hereof, or as soon thereafter as counsel may be heard, Defendants Builders FirstSource-Southeast Group, LLC and Builders Firstsource, Inc. ("BFS") by and through their undersigned attorneys, will move before the presiding judge of the Court of Common Pleas of the Ninth Judicial Circuit for an order pursuant to Rule 56 of the South Carolina Rules of Civil Procedure finding that there is no genuine dispute of material fact and that BFS is entitled to judgment and dismissal of D.R. Horton, Inc.'s ("DRH") claims against BFS on the following grounds:

In this action DRH seeks indemnification and contribution from BFS in connection with an unreasoned “monetary” arbitration award entered in *Clark v. D.R. Horton, Inc.*, Berkeley County Case No. 2008-CP-08-1633 (the “Clark Case”). By Order of May 2, 2014, BFS was granted partial summary judgment with regard to DRH’s claims for contribution and contractual indemnity. The May 2, 2014, Order also required that DRH produce certain documents and allowed BFS to reopen the deposition of DRH’s 30(b)(6) representative.

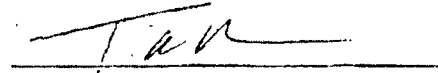
The discovery conducted since the May 2, 2014, Order shows that DRH made a strategic decision to obtain an unreasoned “monetary” arbitration award in the Clark Case. The reason for this decision was that DRH did not want to make a record of what was determined in the Clark Case. DRH’s decision not to make a record of the results in the Clark Case was made after being advised by counsel that the failure to make a record would make any future claim for contribution or indemnity against BFS “uncertain.” BFS is entitled to summary judgment on the basis of waiver, equitable estoppel, and on the basis that any award of damages would be unreasonably speculative.

This motion is based on the foregoing, a memorandum of law to be filed, the pleadings and discovery in this case, and the statutory and common law of the State of South Carolina, and any such other materials the Court may choose to consider.

SIGNATURE ON FOLLOWING PAGE

KERNODLE ROOT + COLEMAN

By:



James Taylor Anderson, III
914 Folly Road, Suite 2 (29412)
P. O. Box 13897
Charleston, SC 29422
(843) 795-7800
(843) 795-3032 Fax
janderson@kernodlelaw.com

ATTORNEYS FOR BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP,
LLC and BUILDERS FIRSTSOURCE, INC.

July 22, 2014

Charleston, South Carolina

2010-CP-1010355

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of ***Builders FirstSource-Southeast Group, LLC and Builders Firstsource, Inc.'s Second Motion for Summary Judgment*** was sent via email, facsimile, hand delivery and/or by depositing a copy in the United States Mail, First Class, to:

Peden Brown McLeod, Jr., Esquire
Neil S. Haldrup, Esquire
Wall Templeton & Haldrup, PA
P. O. Box 1200
Charleston, SC 29402

Attorneys for Plaintiff

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Charleston, SC 29413

**Attorney for Joseph Naccari,
Individually and d/b/a
Masterframers**

R. Trippett Boineau, III, Esquire
McAngus Goudelock & Courie, LLC
P. O. Box 12519
Columbia, SC 29211

**Attorney for Jaime Arreguin
d/b/a Maya Construction**

July 22, 2014

Alison D. Sessoms
Alison D. Sessoms

FILED
JUL 24 PM 3:03
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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Charleston, SC 29422-3897
Phone (843) 795-7800
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**KERNODLE
ROOT +
COLEMAN**
ATTORNEYS AT LAW

James Taylor Anderson, III, Esquire
janderson@kernodlelaw.com

July 22, 2014

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

RE: *D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. v. Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc., and Joseph Naccari, Individually and d/b/a Masterframers Masterframers // Joseph Naccari, Individually and d/b/a Masterframers v. Jaime Arreguin d/b/a Maya Construction*
Charleston County / Case No. 10-CP-10-10355
Our File No. 6002-167

Dear Ms. Armstrong:

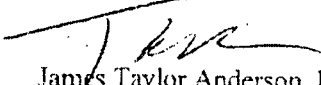
Enclosed for filing please find an original and one copy of Defendants Builders FirstSource-Southeast Group, LLC and Builders FirstSource, Inc.'s Second Motion for Summary Judgment, together with a Motion Cover Sheet and the required \$25.00 filing fee. Also enclosed is an original and one copy of a Memorandum in Support Defendants' Second Motion for Summary Judgment in the above-referenced matter. Upon filing, please return date-stamped copies of the Motion and Supporting Memorandum to me in the envelope provided for your convenience.

By copy of this correspondence to opposing counsel, I am serving them with a copy of same.

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

Sincerely,

KERNODLE ROOT + COLEMAN


James Taylor Anderson, III

JTA/ads
Enclosures

cc: VIA EMAIL and U.S. MAIL (w/ ENCL.)
Peden Brown McLeod, Jr., Esquire and Neil S. Haldrup, Esquire

cc: VIA EMAIL ONLY (w/ ENCL.)
David S. Cobb, Esquire
R. Trippett Boineau, III, Esquire

kernodlelaw.com

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
D.R. HORTON, INC. f/k/a C. RICHARD)
DOBSON BUILDERS, INC.,)
Plaintiff,)
v.)
BUILDERS FIRSTSOURCE-SOUTHEAST)
GROUP, LLC; and BUILDERS)
FIRSTSOURCE, INC., and JOSEPH)
NACCARI, Individually and d/b/a)
MASTERFRAMERS,)
Defendants.)
JOSEPH NACCARI, Individually, and d/b/a)
MASTERFRAMERS,)
Third-Party Plaintiff,)
v.)
JAIME ARREGUIN d/b/a MAYA)
CONSTRUCTION.)
Third-Party Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2010-CP-10-10355

**MEMORANDUM IN SUPPORT OF
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC, AND
BUILDERS FIRSTSOURCE, INC.'S
SECOND MOTION FOR SUMMARY
JUDGMENT**

FILED
2014 JUL 24 PM 3:03
JULIE J ARMSTRONG
CLERK OF COURT
BY _____

I. FACTUAL AND PROCEDURAL BACKGROUND:

The factual and procedural background of this case is set forth in the attached Order Granting Defendants Builders FirstSource-Southeast Group, LLC and Builders FirstSource, Inc., Partial Summary Judgment, Granting Defendants Builders FirstSource-Southeast Group, LLC and Builders FirstSource, Inc.'s Motion to Compel and Denying Plaintiff D.R. Horton, Inc., f/k/a Richard Dobson Builders, Inc.'s Motion for Protective Order, filed May 2, 2014. ("Order Granting BFS Partial

Summary Judgment”) (Attached hereto as Exhibit 1).

II. DEVELOPMENTS SINCE THE ORDER GRANTING BFS PARTIAL SUMMARY JUDGMENT:

Pursuant to the Order Granting BFS Partial Summary Judgment, DRH’s attorneys in *Patricia Clark v. D.R. Horton, Inc.*, Berkeley County Case No. 2008-CP-08-1633 (the “Clark Case”), have produced their entire defense file related to the Clark Case. Additionally, the deposition of DRH’s 30(b)(6) designee, Jay Marshall Henderson, was reopened on June 27, 2014.

It is now clear that, prior to initiating the instant action, DRH was advised by its own attorneys that *“[t]here is no reasoning behind the award to show that the award is related to cladding issues, structural issues, or some combination thereof. As such, I doubt a reasonable judge would accept this as sufficient evidence to support such a claim.”* (Henderson Dep. of 06/27/14, Ex. 14) (Relevant portions of Henderson’s Deposition taken on 06/27/14 and on 09/06/13 are attached hereto as Exhibit 2 and Exhibit 3, respectively.) Further, DRH was advised prior to the arbitration that requesting or agreeing to an unreasoned award would jeopardize any claim it may have against BFS:

Q: Okay. And Horton agreed to the monetary award with full knowledge that it would jeopardize a future case against Builders FirstSource, correct?

A: With full knowledge that it may be less certain.

(Henderson Dep. of 06/27/14, P. 139, ll. 15-19).

At the time that the Clark Case was litigated, there were multiple lawsuits pending against DRH alleging moisture intrusion issues at Daniel Island homes. (Henderson Dep. of 06/27/14, P. 115, l. 22- P. 120, l. 7). DRH was concerned that a reasoned award could be used as proof of a

defect in other Daniel Island cases. (Henderson Dep. of 06/27/14, P. 130, ll. 12-19). Prior to the arbitration, DRH was advised by its attorneys that it could ask for an unreasoned "monetary award" and that "[a] monetary award would not include any explanation as to the basis for the award . . . a monetary award would not subject DR Horton to any negative precedent, which is a consideration given that this is a Daniel Island house . . ." (Henderson Dep. of 06/27/14, Ex. 12).

DRH weighed the pros and cons of getting an unreasoned "monetary only" award. On the positive side:

Q: What did D.R. Horton see as the pros to asking for a monetary award only?

A: As stated by Mr. Johnson, a monetary award would not subject D.R. Horton to negative precedent.

(Henderson Dep. of 06/27/14, P. 136, ll. 11-14).

On the negative side, DRH was explicitly advised by its attorneys that "[a] monetary award would not include any explanation as to the basis for the award," and it would "make matters less certain with respect to a subsequent action against a sub, in this case most likely Builders FirstSource." (Henderson Dep. of 06/27/14, Ex. 12). DRH agreed to an unreasoned award with "full knowledge" that it would make any future claim against BFS "less certain." (Henderson Dep. of 06/27/14, P. 139, ll. 15-19).

DRH cannot have its cake and eat it too. As DRH's 30(b)(6) representative testified:

Q: Horton agreed to a monetary award, at least partially, because Horton didn't want attorneys for homeowners to be able to figure out exactly what was determined in the arbitration?

A: I believe that was a consideration.

(Henderson Dep. of 06/27/14, P. 147, ll. 8-13).

Having agreed to an award with no reasoning to "*show that [it] is related to cladding issues, structural issues, or some combination thereof,*" with the specific purpose of making it impossible to figure out what, exactly, was determined in the arbitration, DRH cannot now use that very same award to pursue contribution and indemnity claims against BFS. (See Henderson Dep. of 06/27/14, Ex. 14).

III. DRH HAS WAIVED THE RIGHT TO SEEK CONTRIBUTION OR CONTRACTUAL INDEMNITY FROM BFS.

"Waiver is an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive. Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute a waiver." *Freeman v. McBee*, 280 S.C. 490, 493 (Ct.App. 1984).

The applicable contract between DRH and BFS provides that BFS agrees to participate in any arbitration between DRH and a homeowner. Rather than following the agreed upon dispute resolution procedure DRH chose to arbitrate the Homeowner's Suit without joining BFS, without making any transcript of the hearing, and without having the arbitrator make findings of fact and conclusions of law relating to the portion of the award attributable to the framing performed by BFS. DRH made the decision to ask for an unreasoned award with the express purpose of making it difficult or impossible for any future litigant to determine what was decided in the arbitration. Further, DRH made the decision to agree to an unreasoned award after its own lawyers had advised it that an unreasoned award would make any case against BFS uncertain. (See Henderson Dep. of 06/27/14, P. 139, ll. 15-19).

DRH's actions are inconsistent with the assertion of a right to indemnification or contribution from BFS and have resulted in DRH's waiver of any right to seek indemnification or contribution from BFS. See *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 428 (2009)(finding plaintiff waived its right to an accounting by "refusing to effectively communicate and cooperate . . . and further failing to independently resolve the matter when [plaintiff] had access . . . to bank records.").

DRH agreed to an unreasoned award that was, without objection, made a final judgment of the Berkeley County Circuit Court. DRH is in the same position as a litigant who tries a case and does not ask for a special verdict form or special interrogatories. There is no reported case in the State of South Carolina allowing an independent action to determine the basis for a general verdict entered in a previous action. To the contrary, it is absolutely clear that the failure to request findings of fact in an action constitutes a waiver of a judicial ruling on those omitted factual issues. See *Jenkins v. Few*, 391 S.C. 209, 221 (Ct.App. 2010)(refusing to speculate as to how jury allocated damages among various causes of action when defendant "contributed to drafting and agreed to use a general verdict form that did not include a separate damages award for each cause of action."); *Moore v. Moore*, 360 S.C. 241, 257 (Ct.App. 2004)("Without a special verdict form, we cannot speculate at to what portion of the award the jury attributed to lost profit as opposed to other tort damages."); *Armstrong v. Collins*, 366 S.C. 204, 227 (Ct.App. 2005) ("Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages.").

IV. DRH IS EQUITABLY ESTOPPED FROM BRINGING ITS CLAIMS FOR CONTRACTUAL INDEMNITY AND CONTRIBUTION.

"Equitable 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.” *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290 (Ct. App. 2012). Here, DRH’s actions in failing to join BFS as a party to the Clark Case, failing to make a transcript, and failing to give BFS notice of the arbitration, preclude DRH from now bringing actions for contractual indemnity and contribution.

With specific regard to the contribution claim, the statutory right of contribution among joint tortfeasors is in derogation of the common law and thus the South Carolina Uniform Contribution Among Tortfeasors Act (the “Act”) must be strictly construed. *G & P Trucking v. Parks Auto Sales Service & Salvage, Inc.* 357 S.C. 82, 87 (Ct.App. 2003). Additionally, “principles of equity . . . generally shall apply” to actions under the Act. S.C. Code Ann. § 15-38-30. Here, for strategic reasons, DRH failed to request a reasoned award and now does not have a judgment, verdict or award that specifies the legal theory upon which it is based.

As DRH has itself recognized, the judgment “obviously doesn’t specify what” it “is for.” (Henderson Dep. of 06/27/14, Ex. 14).¹ Just as DRH planned, it is impossible to determine whether the judgment is based on tort liability or contract liability:

Q: And was D.R. Horton determined to be negligent in the Patricia Clark case?

A: I don’t know. Again, the award was determined by the arbitrator for \$150,000.

Q: So you don’t know if there was an adjudication that D.R. Horton was negligent?

A: I’m uncertain.

¹It is worth noting that if, somehow, DRH is allowed to try this case, it will be in the nearly impossible situation of having to prove that (1) it was negligent in constructing Ms. Clark’s home, (2) it was adjudicated to be negligent by the arbitrator in the Clark Case, and (3) it was not guilty of being reckless or grossly negligent. See S.C. Code Ann. § 15-38-15(F). The procedural nightmares that will be created by allowing an independent action to determine the basis for an unreasoned award, that has been confirmed and reduced to a final judgment, are without end.

(Henderson Dep. of 09/06/13, P. 20, l. 21-P. 21, l. 2).

Q: All right. Do you know whether or not D.R. Horton was found to have breached its contract with Patricia Clark in the arbitration?

A: Again, it does not indicate one way or the other.

Q: Do you know whether D.R. Horton was determined to have breached its warranty with Patricia Clark in the arbitration?

A: Again, the document does not indicate.

(Henderson Dep. of 09/06/13 , P. 22, ll. 1-8).

When addressing the possibility of Ms. Clark's attorneys using the award to support a future Unfair Trade Practices Act claim, counsel for DRH stated "[i]f their intent from the outset had been to get an award and use it later to support an unfair trade practices claim, it seems they would have requested a reasoned award." (Henderson Dep. of 06/27/14, Ex. 14). The same can be said of DRH's attempt to bring an action pursuant to the Act without a reasoned award. "If their intent from the outset had been to get an award and use it later to support [a South Carolina Uniform Contribution Among Tortfeasors Act] claim, it seems they would have requested a reasoned award."

As it is, DRH does not have a verdict, judgment or award based on tort liability, nor does it have a settlement agreement that meets the strict requirements of the Act. Having failed to ask the finder of fact in the Clark Case to issue a reasoned award, DRH is equitably estopped from bringing an independent action to determine the legal basis for the award in the Clark Case.

V. SINCE THE OCTOBER 30, 2013, HEARING ON BFS'S MOTION FOR RECONSIDERATION, THE SOUTH CAROLINA SUPREME COURT HAS REAFFIRMED THAT A PLAINTIFF MUST BE ABLE TO PROVE ITS DAMAGES WITH REASONABLE CERTAINTY IN ORDER TO DEFEAT SUMMARY JUDGMENT.

On January 8, 2014, the South Carolina Supreme Court decided *Woodson v. DLI Properties, LLC*, 406 S.C. 517 (2014). In that case the plaintiffs were potential real estate purchasers who alleged that their offer to purchase real estate should have been accepted. The plaintiffs/potential purchasers sought \$3,000, in actual damages for the gas spent pursuing the real estate deal. However, one of the plaintiffs/potential purchasers also testified that “he ‘had no clue’ of the actual amount of hours or gas,” spent pursuing the real estate deal. See *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 531 (2014).

The South Carolina Supreme Court held that, in light of the plaintiff/potential purchaser’s testimony that he “‘had no clue,’ of the actual amount of hours or gas” spent pursuing the real estate deal, the potential purchasers could not prove their damages and the defendants were entitled to summary judgment. *Woodson*, 406 S.C. at 531 (“In order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.”).

Just like the potential purchaser in *Woodson*, DRH has admitted that it has no idea what damages it has sustained as a result of any act or omission on the part of BFS:

Q: All right. Is it fair to say that any attempt by you to assign portions of that \$150,000 arbitration award to various defects would just be a guess?

A: Again, the \$150,000 award was given. I don't have any specific information as to how it was determined.

(Henderson Dep. of 09/06/13, P. 70, ll. 16-22).

Q: Would D.R. Horton be speculating to try to assign any portion of that \$150,000,

to any particular defect?

A: I think I have answered this before to the effect that I don't have sufficient information to determine what the arbitrator attributed the \$150,000 award to.

(Henderson Dep. of 09/06/13, P. 100, ll. 11- 15).

Additionally, with regard to its claim for attorney's fees, DRH has now testified that it cannot prove its damages with reasonable certainty. DRH's 30(b)(6) witness repeatedly testified that he could not determine what portion of various billing entries for the defense of the Clark Case were attributable to defending work performed by BFS:

Q: But again, Horton doesn't know how much of that review of the Sisnroy report the attorney dedicated to looking at the siding issue versus the concrete issues versus the structural issues?

A: I don't have that information to be able to attribute that, no.

Q: And you're Horton's 30(b)(6) representative on attorney's fees, correct?

A: Yes.

(Henderson Dep. of 06/27/14, P. 182, ll. 8-16).

Q: I guess just look at Ogletree 1345 and tell me, do you agree that Horton cannot separate out what portion of the charges that appear on Ogletree 1345, are related to Builders FirstSource?

A: Again, I don't have any additional information that I can add as it relates to the individual line items.

Q: Is that a no, that Horton cannot determine –

A: Based on this document, I can't determine that, no.

(Henderson Dep. of 06/27/14, P. 186, ll. 6-16).

Q: All right. And D.R. Horton doesn't have any idea how much of that is attributable to the defense of work performed by Builders FirstSource, does it?

A: I don't have any additional information to parse out any of the individual line items that are shown on Ogletree 1338 and Ogletree 1339, which comprised the total shown on 1337. It could be part, it could be all.

(Henderson Dep. of 06/27/14, P. 195, ll. 3-11).

"It could be part, it could be all," does not suffice to prove damages to a reasonable certainty. DRH cannot give a jury an unreasoned award with "no reasoning behind the award to show that the award is related to cladding issues, structural issues, or some combination thereof," and a stack of bills that "could be part," or "could be all" related to defending BFS's work, and then ask the jury to guess at what to award DRH. *See Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 570-571 (1971)("Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.").

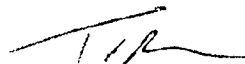
VI. BFS CONTINUES TO ASSERT THAT IT IS ENTITLED TO SUMMARY JUDGMENT BASED ON ALL GROUNDS ARGUED IN ITS PREVIOUS MOTION FOR SUMMARY JUDGMENT, INCLUDING COLLATERAL ESTOPPEL, NO EVIDENCE THAT THE AWARD IS BASED ON TORT LIABILITY, NO EVIDENCE THAT THE AWARD IS BASED ON WORK PERFORMED BY BFS, WAIVER, AND SPECULATIVE DAMAGES.

VII. CONCLUSION

DRH filed this lawsuit in an attempt to obtain the factual findings it neglected to obtain in a previous lawsuit. There is no precedent for allowing such a procedure. Rather than obtaining an award with factual findings and legal conclusions, DRH made a calculated decision to forego those

finding, obtain an unreasoned award, and confirm that unreasoned award as a final judgment of the Berkeley County Circuit Court. DRH's claims must fail.

KERNODLE ROOT + COLEMAN

By: 

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ATTORNEYS FOR DEFENDANTS BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP, LLC and
BUILDERS FIRSTSOURCE, INC.

July 22, 2014

Charleston, South Carolina

2010-CP-10-10 355

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of the Attached *Memorandum in Support of Builders FirstSource- Southeast Group LLC and Builders FirstSource, Inc.'s Second Motion for Summary Judgment* was sent via email, facsimile, hand delivery and/or by depositing a copy in the United States Mail, First Class, to:

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Neil S. Haldrup, Esquire
Wall Templeton & Haldrup, PA
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Attorneys for Plaintiff

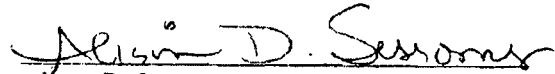
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July 22, 2014


Alison D. Sessoms

FILED
2014 JUL 24 PM 3:04
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
D.R. HORTON, INC. f/k/a C. RICHARD
DOBSON BUILDERS, INC.,

Plaintiff,

v.

BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, LLC; and BUILDERS
FIRSTSOURCE, INC., and JOSEPH
NACCARI, Individually and d/b/a
MASTER FRAMERS,

Defendants.

JOSEPH NACCARI, Individually, and d/b/a
MASTER FRAMERS,

Third-Party Plaintiff,

v.

JAIME ARREGUIN d/b/a MAYA
CONSTRUCTION,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2010-CP-10-10355

**ORDER GRANTING DEFENDANTS
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC, AND
BUILDERS FIRSTSOURCE, INC.
PARTIAL SUMMARY JUDGMENT,
GRANTING DEFENDANTS
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC AND
BUILDERS FIRSTSOURCE, INC.'S
MOTION TO COMPEL AND
DENYING PLAINTIFF D.R. HORTON,
INC. f/k/a RICHARD DOBSON
BUILDERS, INC.'S MOTION FOR
PROTECTIVE ORDER**

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2014 MAY -2 PM 2:56

FILED

This matter comes before the Court on Defendants Builders FirstSource-Southeast Group, LLC, and Builders FirstSource, Inc.'s (hereinafter collectively "BFS") Motion to Reconsider this Court's September 30, 2013 Order denying BFS's Motion for Summary Judgment; BFS's Motion to Compel; and Plaintiff D.R. Horton, Inc., f/k/a Richard Dobson Builders, Inc.'s (hereinafter "DRH") Motion for Protective Order. A hearing on these motions was held on October 30, 2013. All parties appeared at the hearing through their respective counsel. After considering the motions, memoranda of law, deposition testimony submitted by

the parties, exhibits submitted by the parties, and the arguments of counsel, the Court finds that BFS's Motion to Reconsider should be, and hereby is, GRANTED; that BFS should be, and hereby is GRANTED partial summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure; that BFS's Motion to Compel should be, and hereby is GRANTED; and that DRH's Motion for Protective Order should be, and hereby is DENIED.

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

1. DRH was the general contractor for a single family residential home constructed at 403 Milner Court, Charleston, South Carolina (the "Residence"). BFS, as a subcontractor for DRH, provided and installed framing materials and windows at the Residence. BFS performed all labor at the Residence through subcontractors of its own.

2. Prior to construction of the Residence, DRH and BFS entered into an Independent Contractor Agreement (the "Contract") that contains an indemnity agreement.

3. DRH sold the Residence to Patricia Clark.



4. In 2008, Patricia Clark filed *Patricia Clark v. D.R. Horton, Inc.*, Case No. 2008-CP-08-1633, in the Circuit Court of Berkeley County, South Carolina (the "Homeowner's Suit"). The Homeowner's Suit alleged causes of action against DRH for negligence, breach of contract, breach of warranty, and violations of the South Carolina Unfair Trade Practices Act. The Homeowner's Suit alleged that the Residence was defective because of, among other things, improper installation of siding, improper installation of the exterior wall system, improper flashing, improper installation of a moisture barrier, improper water management system, improper installation of framing, improper installation of the concrete slab and driveway, improper installation of the roof and shingles, and improper installation of a gas hot water heater.

5. While the parties disagree on whether DRH gave BFS oral notice of the Homeowner's Suit, it is undisputed that DRH did not provide BFS with any written notice or tender of defense for the Homeowner's Suit.

6. DRH filed a Motion to Compel Arbitration and to Stay the Homeowner's Suit and on April 1, 2009, the Berkeley County Circuit Court entered a consent Order Referring Claims to Arbitration whereby the Homeowner's Suit was referred to binding arbitration.

7. The Homeowner's Suit was arbitrated during a two day period on December 10th and 11th 2009. There is no transcript or other formal record of the evidence presented at the arbitration.

8. The arbitrator awarded Patricia Clark \$150,000. Said award states that "Counsel for the parties have requested an Order containing a monetary award only." It does not indicate what amounts, if any, were awarded for specific defects. Nor does the award specify which of the causes of action asserted in the Homeowner's Suit were successful.

9. On February 26, 2010, the arbitration award was filed, confirmed and made a final judgment of the Berkeley County Circuit Court. (the "Judgment"). No party objected to the confirmation of the arbitration award.

10. On March 24, 2010, a Satisfaction of Judgment was entered in the Berkeley County Circuit Court indicating that DRH had satisfied the Judgment.

11. On December 17, 2010, DRH filed the instant action against BFS seeking contribution pursuant to S.C. Code Ann. § 15-38-10, et seq., and contractual indemnity. DRH alleges that BFS is responsible, in whole or in part, for the Judgment and for \$155,717.05, in attorney's fees and costs associated with the defense of the Homeowner's Suit.

12. In order to support its claim for \$155,717.05 in attorney's fees and costs, DRH voluntarily, without court order, produced invoices from its attorneys in the Homeowner's Suit, Ogletree, Deakins, Nash, Smoak & Stewart, P.C. ("Ogletree"). In its Motion for Protective Order DRH states that said invoices were produced "for the purpose of proving attorney's fees in the Underling Action." Motion for Protective Order at 3.

13. For each billing entry, the invoices contain a summary of the tasks being performed by Ogletree. According to DRH, "the summary supporting each billing entry is protected by the attorney-client privilege," as the "summaries reflect legal strategy and decisions based on communications between Plaintiff and its counsel in the Underlying Action . . ." Motion for Protective Order at 3-4.

14. The 30(b)(6) deposition of DRH took place on September 6, 2013. One of the topics specified in the 30(b)(6) notice was "DRH's defense of the lawsuit filed by Patricia Clark, including any and all attorney's fees incurred by DRH in connection with that lawsuit."

15. On several occasions BFS's counsel attempted to question DRH's 30(b)(6) representative concerning his knowledge of the summaries supporting Ogletree's billing entries. Counsel for DRH instructed the witness not to answer multiple questions relating to the invoices. Eventually, DRH's counsel stated for the record that DRH's 30(b)(6) representative would not answer any questions regarding "what went into a time entry, or what he knows about the time entry, or what communications he had with the attorneys related to the time entry . . ." Pursuant to South Carolina Rule of Civil Procedure 30, DRH filed a Motion for Protective Order on September 12, 2013.

16. On October 8, 2013, BFS filed a Motion to Compel the production of all

documents related to DRH's defense of the Homeowner's Suit.

II. CONCLUSIONS OF LAW

A. BFS's Motion for Reconsideration of this Court's September 30, 2013, Order denying BFS's Motion for Summary Judgment

17. On December 11, 2012, BFS moved for summary judgment on all of DRH's claims. By order of September 30, 2013, this Court denied BFS's Motion for Summary Judgment. BFS filed a timely Motion for Reconsideration. After reconsidering its September 30, 2013, Order denying BFS's Motion for Summary Judgment, the Court concludes that BFS is not required to contribute to, or indemnify DRH for, any portion of the Judgment, attorney's fees, or defense costs, attributable to the work or fault of others.

18. It is undisputed that some of the allegations in the Homeowner's Suit related to work performed by BFS and other allegations in the Homeowner's Suit were related to the work of others.

19. The statutory right of contribution among joint tortfeasors is in derogation of the common law and thus the South Carolina Uniform Contribution Among Tortfeasors Act (the "Act") is strictly construed. *G & P Trucking v. Parks Auto Sales Service & Salvage, Inc.*, 357 S.C. 82, 87 (Ct. App. 2003). The Act provides that "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them . . ." S.C. Code Ann. § 15-38-20(A). BFS is not liable; jointly, severally, or otherwise, for defects in the work of other subcontractors employed by DRH at the Residence. Moreover, portions of the Judgment attributable to the work of others, and any portion of the Judgment attributable to BFS, are for different injuries to property, not "the same injury to . . . property." See S.C. Code Ann. § 15-38-20(A). Therefore,

BFS is not liable for contribution with respect to any portion of the Judgment associated with the work or fault of others.

20. The plain reading of the indemnity clause is that BFS is only required to indemnify DRH with regard to lawsuits arising out of BFS's work. Further, to the extent that the indemnity clause does purport to require BFS to indemnify DRH 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. § 32-2-10. Therefore, BFS is not liable for indemnity with regard to any portion of the Judgment, attorney's fees or costs associated with the work or fault of others.

21. DRH will be permitted to move forward with its claims for contribution and indemnity. Moving forward, DRH, as the Plaintiff, will have the burden of proving what portion of the Judgment, attorney's fees, and costs, if any, are attributable to BFS.

 B. DRH's Motion for Protective Order and BFS's Motion to Compel

22. The question of whether a Plaintiff seeking indemnity for attorney's fees, incurred in a previous action, waives the attorney client privilege with regard to the legal services giving rise to those fees, is a novel question of law in South Carolina.

23. While no South Carolina case is directly on point it is well settled in South Carolina that the attorney-client privilege may be waived. *Stare v. Love*, 275 S.C. 55, 59 (1980). "Any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject." *Marshall v. Marshall*, 282 S.C. 534, 538 (Ct. App. 1984).

24. Because there is no South Carolina appellate decision on point this Court may

look to the law of other jurisdictions for guidance. In doing so, the Court is persuaded by the reasoning of *Ideal Electronic Security Co., Inc., v. International Fidelity Insurance Company*, 129 F.3d 143 (D.C. Cir. 1997).

25. In *Ideal Electronic Security*, a surety sought indemnification against a contractor for attorney's fees incurred in the defense of a claim alleging that the contractor failed to pay a subcontractor. *Ideal Electronic Security Co., Inc.*, at 146. As is the case with DRH, the surety produced billing statements from its attorneys to support its claim for indemnity. The United States Court of Appeals for the District of Columbia held that a party seeking indemnification for attorney's fees waives the attorney-client privilege with respect to communications going to the reasonableness of the fees. See *Ideal Electronic Security Co., Inc.*, at 152 ("By claiming indemnification of attorney's fees from Ideal and offering the billing statements as evidence of the same, IFIC waived its attorney-client privilege with respect to the redacted portions of the billing statements and any other communications going to the reasonableness of the amount of the fee award.").

26. In *Ideal Electronic Security* the court reasoned that the doctrine of waiver is particularly appropriate when a party offers a portion of the allegedly privileged materials as proof of its claim for attorney's fees, and then withholds the remainder of the materials:

A party asserting the attorney-client privilege cannot be allowed, after disclosing as much as he pleases, to withhold the remainder . . . This is particularly true where, as here, a party partially discloses the allegedly privileged information in support of its claim against another, but then asserts the privilege as a basis for withholding from its opponents the remainder of the information which is necessary to defend against the claim.

Ideal Electronic Security, 129 F.3d at 151.

27. The case before this Court involves DRH seeking indemnity for attorney's fees

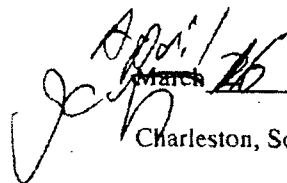
incurred defending a number of distinct construction defects. BFS is not responsible for portions of the attorney's fees attributable to defending the work of others. BFS is entitled to full discovery regarding what portions of the fees are attributable to DRH's defense of the work of others and the reasonableness of the fees. See *Ideal Electronic Security*, 129 F.3d at 146 ("Appellants are entitled to full discovery of information underling the claim for fees; only after obtaining such discovery will the appellants be in a position to . . . present to the court any legitimate challenges to the . . . claim.").

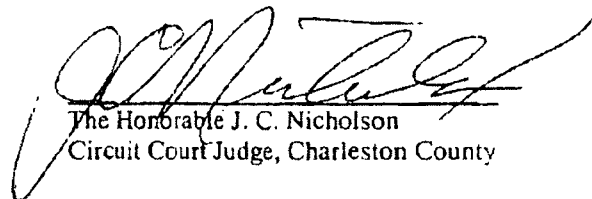
28. In light of the above, the Court finds that DRH has waived the attorney client privilege with regard to any and all communications between DRH and Ogletree related to the Homeowner's Suit. The Court grants BFS's Motion to Compel and Orders DRH to produce all documents related to the Homeowner's Suit, including any and all communications between DRH and Ogletree related to the Homeowner's Suit, within 20 days from the entry of this Order.

29. DRH's Motion for a Protective Order is denied and the 30(b)(6) deposition of DRH will be reconvened after DRH has produced the above documents.

30. This case is subject to trial 90 days after entry of this Order.

AND IT IS SO ORDERED.


April 16, 2014
March 26, 2014
Charleston, South Carolina


The Honorable J. C. Nicholson
Circuit Court Judge, Charleston County

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON CASE NO. 2012-CP-10-10355

D.P. HORTON, INC. F/K/A.C.
RICHARD DOBSON BUILDERS, INC..

PLAINTIFF.

79

BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC; AND JOSEPH NACCARI, INDIVIDUALLY, AND D/B/A MASTERFRAMERS.

DEFENDANTS

JOSEPH NACCARI, INDIVIDUALLY, AND
E/B/A MASTERFRAMERS.

THIRD-PARTY PLAINTIFF,

75.

JATME ARREGUIN D/E/A MAYA
CONSTRUCTION.

THIRD-PARTY DEFENDANT.

) The continued
) deposition of:
) Jay Marshall
) Henderson
)
) June 27th 2014

The continued 30(b)(6) deposition of JAY MARSHALL
RENDERSON, taken before Amanda Barbao, Court Reporter
and Notary Public, at the law offices of Wall Templeton
& Waldrup, 145 King Street, Charleston, South Carolina,
to June 27th, 2014, commencing at 10:00 a.m.

1 letter that D.R. Horton received from Ms. Clark's
2 attorneys?

3 A I believe so, yes.

4 Q All right. And it talks about, in addition to
5 structural issues, it talks about roofing issues; is
6 that right?

7 A Item number one indicates roofing issues.

8 Q And some excess water and moisture, correct?

9 A It indicates excess water and moisture in terms of
10 the final sentence in item one.

11 Q Okay. And the e-mail, which is the last page of
12 Exhibit 11, Ogletree 159, is from Kyle Dillard to you,
13 correct?

14 A Correct.

15 Q And it first says, "As you know, Attorney Patrick
16 McDonald is now unfortunately involved in the case." Do
17 you see that?

18 A I do see that.

19 Q At the time you received this e-mail, did you know
20 who Patrick McDonald was?

21 A Yes.

22 Q Okay. And that was because Patrick McDonald had
23 been filing multiple lawsuits or representing multiple
24 homeowners on Daniel Island against D.R. Horton,
25 correct?

1 A Well, he was my neighbor first and foremost, so I
2 knew him from that standpoint in advance of all of
3 that, but Mr. McDonald did attempt to represent several
4 owners in Daniel Island, yes.

5 Q The Crawfords (ph), did Mr. McDonald represent the
6 Crawfords? Do you recall that lawsuit?

7 A I believe he did at the beginning of the Crawford
8 suit. I don't know if he carried it all the way
9 through. There were a number of cases where he was
10 initially representing someone, and they asked him to
11 relieve himself.

12 Q Okay. At the time that you received this e-mail,
13 that's the last page of Exhibit 11, D.R. Horton was
14 getting a lot of complaints about moisture issues on
15 homes on Daniel Island, correct?

16 MR. HALDRUP: Object to the form.

17 A I don't know how to define "a lot."

18 Q Okay. Well, are you familiar with the Crawford
19 house?

20 A I am.

21 Q And did that issue come about sometime in 2007 or
22 2008?

23 A I don't recall a specific timeframe.

24 Q All right. What about the Allen (ph) lawsuit, do
25 you recall that one?

1 A I do.

2 Q Was that also a Daniel Island house?

3 A It was, yes.

4 Q Did it involve moisture issues?

5 A It did.

6 Q Okay. And do you recall the Moores [ph] filing
7 suit against D.R. Horton in February of 2008?

8 A I would need something more specific. Do you have
9 a reference address or anything of that nature?

10 Q I got the caption of the case, Elizabeth Schiffler
11 Moore versus D.R. Horton, filed --

12 A Oh, Elizabeth Schiffler, yes. That case was
13 related to termites.

14 Q The Moore case?

15 A Uh-huh (indicating an affirmative response).

16 Q Yes?

17 A Correct.

18 Q And it also included, as defendants in the Moore
19 case, David Humphries, correct?

20 A I don't recall specifically. I thought we were
21 here to discuss this case, not a whole bunch of other
22 cases.

23 Q Well, we're going to discuss --

24 A I didn't prepare myself with the history of things
25 that I've worked on in the past.

1 Q Do you don't know whether the Moore case involved
2 the same roofing subcontractor that was used on
3 Ms. Clark's house?

4 A I don't recall specifically, no. It may have, but
5 I don't remember specifically.

6 Q Okay. Did it involve moisture intrusion issues,
7 the Moore case?

8 A I recall it specifically related to termite damage
9 and the failure of the termite bonding company. That
10 was the biggest issue that I recall on that particular
11 job.

12 Q Do you recall if Tom's Vinyl Siding was a defendant
13 in the Moore case?

14 A I don't recall.

15 Q What about the Rosenberg (ph) case filed March 27th
16 of 2008, do you remember anything about that case?

17 A Again, I recognize the name, but I don't remember
18 the specifics of it. I would have to go back and look
19 at the history to be able to speak to it clearly.

20 Q Was it a Channel Island case, do you think, the
21 Rosenberg case?

22 A It may have been. I don't recall specifically.
23 Again, do you have a reference address?

24 Q I do not.

25 A Then I can't speak to it more clearly than that.

1 Q Crozuzeski [ph], do you know what I'm talking about
2 there?

3 A Crozuzeski.

4 Q Do you remember that case?

5 A I do.

6 Q And it was also filed in early 2008?

7 A I don't know when it was filed.

8 Q Was it a Daniel Island case?

9 A Yes.

10 Q Did it involve moisture issues?

11 A I believe it did, yes.

12 Q What about the Banoff [ph] case, do you remember
13 that case?

14 A I remember the name, but I don't remember where
15 that was. I don't believe that was a Daniel Island
16 case.

17 Q All right. Do you recall the Post and Courier
18 publishing an article in July of 2008 about people
19 moving out of D.R. Horton homes on Daniel Island because
20 of mold issues?

21 MR. HALDRUP: Object to the form. This is
22 way beyond anything the Court directed or was a reason
23 for leaving this deposition open.

24 Q Do you recall the Post and Courier writing an
25 article about people abandoning their homes on Daniel

1 Island because of mold issues?

3 MR. HALDRUP: Object to the form for the same
4 reason.

6 Q You can answer.

8 A I recall an article written in the Post and
9 Courier. I don't recall the specifics of it or what it
10 was related to or the accuracy of the story.

12 Q Would it be fair to say that around the same time
13 that Ms. Clark filed her lawsuit, D.R. Horton had an
14 issue with multiple lawsuits being filed regarding
15 houses on Daniel Island and moisture intrusion issues?

17 MR. HALDRUP: Object to the form. Beyond the
18 scope.

20 A It may be some opinion that that's the case, but I
21 don't believe that one is related to another.

23 Q Were you concerned, as a D.R. Horton
24 representative, about the fact that multiple lawsuits
25 were being filed against D.R. Horton on Daniel Island
26 houses in 2008?

28 MR. HALDRUP: Object to the form.

30 A I'm always concerned about any lawsuit.

32 Q Okay.

34 A It doesn't matter where it's at or what it's
35 pertaining to.

37 Q Was there a disproportionate amount of lawsuits

1 award was being requested. A question was raised by
2 Ms. Clark as to the timing because it was her
3 understanding that the decision would be made that day.
4 And as I understood it, she thought she was walking
5 away with a check. A response was given by Mr. Wills
6 that it would take several extra weeks to provide the
7 reasoned award, and she objected to that and demanded
8 that a monetary award only be given. There was no
9 objection from Mr. Chakeris and Mr. Segui and no
10 objection on our part, and that's how it went down. I
11 believe I testified to that previously.

12 Q Well, Exhibit 12 was dated before the arbitration,
13 correct?

14 A That is correct.

15 Q And at that point in time, D.R. Horton's lawyers
16 were telling it that a reasoned award could lead to
17 negative precedent on Daniel Island houses, correct?

18 MR. HALDRUP: Object to the form.

19 A It does state that.

20 Q And so in response, D.R. Horton said it probably
21 did not need a reasoned award, correct?

22 A Probably. It indicated probably, yes.

23 Q That's the bottom line, right? You didn't get a
24 reasoned award because you didn't want an award out
25 there that specified that there were particular defects

1 A I think they were stated by Mr. Johnson and
2 Mr. Morice in the previous e-mail.

3 Q Okay. Well, I'm asking you for your testimony as
4 D.R. Horton's 30(b)(6) representative as to what the
5 considerations were in asking for a monetary award only?

6 A Again we did not ask for a monetary award.
7 Ms. Clark asked for a monetary award, and we did not
8 object to it, based on our previous evaluation where we
9 could go either way with it. There were pros and cons
10 with both sides. We did not object to her request.

11 Q What did D.R. Horton see as the pros to asking for
12 a monetary award only?

13 A As stated by Mr. Johnson, a monetary award would
14 not subject D.R. Horton to negative precedent.

15 Q And did D.R. Horton consider that a plus factor in
16 asking for a monetary award only?

17 A Again, I'm going to tell you every time you try to
18 pin me on that that we never asked for a monetary
19 award.

20 Q Okay.

21 A And I'd appreciate you not try to do that again.

22 Q Well, did D.R. Horton believe that a monetary award
23 only offered the benefit of not being precedent for
24 future cases against D.R. Horton?

25 A I think that's a benefit to anyone who is in a

1 understand Mr. Johnson to mean in his December 6, 2009,
2 e-mail when he said that a monetary award would make
3 matters less certain with respect to a subsequent action
4 against a sub. in this case, most likely Builders
5 FirstSource?

6 A Again, he's stating his opinion as it relates to a
7 monetary award with respect to subsequent actions. His
8 opinion, it would be less certain.

9 Q What did Horton understand that to mean, "less
10 certain"?

11 A That it would be less certain.

12 Q Okay. So Horton agreed to the monetary award only,
13 right?

14 A We agreed to it.

15 Q Okay. And Horton agreed to the monetary award with
16 full knowledge that it would jeopardize a future case
17 against Builders FirstSource, correct?

18 MR. HALDRUP: Object to the form.

19 A With full knowledge that it may be less certain.

20 Q Okay. And one of the reasons that Horton did that
21 was so that there would not be a reasoned award that
22 could be used as negative precedent against Horton; is
23 that right?

24 MR. HALDRUP: Object to the form.

25 A Again, in Mr. Johnson's opinion, a monetary award

1 A It has nothing to do with future homeowners. It
2 has to do with the legal side and attorneys.

3 Q Attorneys for future -- Horton didn't want
4 attorneys for homeowners to be able to determine what
5 exactly was decided in the arbitration, correct?

6 MR. BALDRUP: Object to the form.

7 A Can you restate that, please?

8 Q Horton agreed to a monetary award, at least
9 partially, because Horton didn't want attorneys for
10 homeowners to be able to figure out exactly what was
11 determined in the arbitration?

12 MR. BALDRUP: Object to the form.

13 A I believe that was a consideration.

14 Q Okay. I mean, and Horton kind of -- I mean, you
15 kind of want to have your cake and eat it too? You
16 don't want homeowners to be able to use it -- you agreed
17 to an award that Horton believed could not be used
18 against it by future homeowners, but Horton wants to use
19 it against Builders FirstSource in this case, correct?

20 MR. BALDRUP: Object to the form.

21 A Well, again, Builders FirstSource had a duty to
22 defend based on their contract. All we're asking
23 Builders FirstSource to do is step up to the contract.

24 Q If the Clark case primarily involved Builders
25 FirstSource's work, why didn't you just give it to

1 focused on structural issues.

2 Q The very first item noted by Mr. Sisnroy is
3 defective siding, correct?

4 A It usually starts with the exterior, and
5 Mr. Sisnroy alleges defective siding on every single
6 report that he's ever produced that I've ever seen.
7 And if he were here, he'd say the same.

8 Q But again, Horton doesn't know how much of that
9 review of the Sisnroy report the attorney dedicated to
10 looking at the siding issue versus the concrete issues
11 versus the structural issues?

12 A I don't have that information to be able to
13 attribute that, no.

14 Q And you're Horton's 30(b)(6) representative on
15 attorneys' fees, correct?

16 A Yes.

17 Q Would the same be true to the entire Ogletree 1350,
18 you don't have any way of going in and determining what
19 portion of those fees are attributable to any particular
20 subcontractor's work, do you?

21 MR. HALDRUP: Object to the form.

22 A Are you talking about Exhibit 20 or just here on
23 1350?

24 Q Just on 1350.

25 MR. HALDRUP: Object to the form.

1 you as an attorney can determine what you're going to
2 defend and what you're not, can you? I'm not an
3 attorney. You can probably answer that question better
4 than me. Can you pick out what you want to defend and
5 what you don't want to defend?

6 Q I guess just look at Ogletree 1345 and tell me, do
7 you agree that Horton cannot separate out what portion
8 of the charges that appear on Ogletree 1345 are related
9 to Builders FirstSource?

10 MR. HALDRUP: Object to the form.

11 A Again, I don't have any additional information
12 that I can add as it relates to the individual line
13 items.

14 Q Is that a no. that Horton cannot determine --

15 A Based on this document, I can't determine that,
16 no.

17 Q Okay. And there's no other way, besides this
18 document, that Horton -- that you're aware of, that
19 Horton can separate out what portion of the fees that
20 appear on Ogletree 1345 are related to the defense of
21 work performed by Builders FirstSource?

22 A To the extent that it's necessary, I don't have
23 the information to do that. It doesn't mean it doesn't
24 exist.

25 Q You're not aware of --

1 that?

2 A I do.

3 Q All right. And D.R. Horton doesn't have any idea
4 how much of that is attributable to the defense of work
5 performed by Builders FirstSource, does it?

6 MR. HALDRUP: Object to the form.

7 A I don't have any additional information to parse
8 out any of the individual line items that are shown on
9 Ogletree 1338 and Ogletree 1339, which comprised the
10 total shown on 1337. It could be a part, it could be
11 all.

12 Q All right. If you go to the entry on 08/18/08 for
13 1.8 hours for \$585. Do you see that?

14 A Yes.

15 Q It says, "Review materials regarding vendors for
16 consideration as potential third-party defendants.
17 Telephone call to Jay Henderson regarding additional
18 vendor information needed to amend complaint to add
19 third-party claims." Do you see that?

20 A I do.

21 Q That's still talking about third-party claims that
22 were never even filed because of a conflict between
23 Ogletree and BFS; is that correct?

24 MR. HALDRUP: Object to the form.

25 A It's referencing third-party claims.

Johnson, Matthew K.

From: David Morice <d.morice@drhorton.com>
Sent: Monday, December 07, 2009 2:20 PM
To: Johnson, Matthew K.; Jay M Henderson
Subject: RE: DR Horton/Clark - Arbitration award - monetary or reasoned?

I could go either way on it, but I suspect that there is a higher likelihood that a "bad" reasoned award could be used against us whereas as it is less likely that we could use a "good" reasoned award in our favor. So I probably do need to request a reasoned award.

Thank you,

David T. Morice
Vice President & Legal Counsel
DR Horton, Inc.
2411 Commerce Street, Suite 500
Fort Worth, Texas 76102
Phone: (817) 390-8200
Fax: (817) 390-1713

DR HORTON
America's Builder

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From: Johnson, Matthew K. [mailto:Matthew.Johnson@ogletreedeakins.com]
Sent: Sunday, December 06, 2009 2:29 PM
To: David Morice; Jay M Henderson
Subject: DR Horton/Clark - Arbitration award - monetary or reasoned?

David,

The Patricia Clark arbitration is still scheduled to move forward on Thursday and Friday (December 10th and 11th). I need some guidance from you and/or Jay regarding the award. We will need to decide whether we want the arbitrator to render a monetary award or a reasoned award. Either one could be appropriate. A monetary award would not include any explanation as to the basis for the award. This would be bad for us if we appealed, which we almost certainly would not do. It would also make matters less certain with respect to a subsequent action against a sub, in this case most likely Builders FirstSource. However, a monetary award would not subject DR Horton to any negative precedent, which is a consideration given that this is a Daniel Island house. Regardless, despite being a Daniel Island house, this situation involves issues related more to framing and structural matters than to cladding and moisture issues, although they do have a claim that the siding, plank and OSB sheathing need to be redone. There are competing interests here and I am not sure how best to weigh them. I might be more inclined to request a reasoned award if I thought the arbitrator was less likely to give full consideration or if this was a case where I thought that an award fully in DR Horton's favor were likely, but in this case our expert agrees that there are \$27,845 in necessary repairs. (Oddly enough, this repair estimate is even somewhat lower than Jay's rough calculations at mediation that served as the basis for our offer at mediation. We offered \$70,000 at the end of the day, whereas their final demand was \$395,000.) Tom Willis is the arbitrator in this case and we have full confidence in him and, therefore, would be



Ogletree 1080

comfortable that he will fully analyze the issues and make the best decision he can, thereby negating the need for a reasoned award in that respect.

Let me know if you have any preferences or want to discuss further.

Matthew K. Johnson, Esq. | Ogletree, Deakins, Nash, Sinoak & Stewart, P.C. | 300 N. Main Street (29601) | PO Box 2757 | Greenville, SC 29602 | (864) 271-1300 (office main) | (864) 235-8806 (fax) | matthew.johnson@ogletreedeakins.com | www.ogletreedeakins.com

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Ogletree 1081

Johnson, Matthew K.

From: David Morice <dmorice@drhorton.com>
Sent: Tuesday, January 19, 2010 5:55 PM
To: Johnson, Matthew K.
Cc: Jay M Henderson, Dillard, W. Kyle
Subject: RE: DR Horton/Clark - arbitration award and check

I think they want to have a judgment against us of record. It obviously doesn't specify what the judgment is for but they can say they got a "satisfaction of judgment" against DRH. Obviously they won't follow that up with the rest of the story explaining that was technically a loss for the firm and their client. I guess it is possible they just want to make sure we will pay it, but I think the former is the more likely explanation.

Let's just make sure that we get it paid and a satisfaction of judgment right away so that they don't try to exorcise on it. We have the check tomorrow.

David

David T. Morice
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From: Johnson, Matthew K. [mailto:Matthew.Johnson@ogletreedeakins.com]
Sent: Tuesday, January 19, 2010 5:43 PM
To: David Morice
Cc: Jay M Henderson, Dillard, W. Kyle
Subject: RE: DR Horton/Clark - arbitration award and check

David:

Cliffers filed stipulation of dismissal as opposed to the entry and enrollment of the judgment course to Clark's attorney and they prefer to enter and enroll the judgment. I called to see why and got little other than that when they try/arbitrate a case they prefer to have the judgment enrolled. He indicated they would keep us informed as I would work with us to ensure that we get an appropriate satisfaction of judgment. They believe it won't create any significant delay.

Kyle and I have considered whether they may have some ulterior motive in so doing. It isn't for purposes of appealing since they have stated they will give us a satisfaction of judgment. It could simply be a marketing ploy to show that they have judgments in construction defect cases. My best guess is that it could have



OgleTree 1073

something to do with establishing a prior judgment for future cases, particularly as they relate to unfair trade practices claims we commonly see in construction defect cases. However, because they agreed to a monetary award, any benefit in this regard is significantly reduced. There is no reasoning behind the award to show that the award is related to cladding issues, structural issues, or some combination thereof. As such, I doubt a reasonable judge would accept this as sufficient evidence to support such a claim. If their intent from the outset had been to get an award and use it later to support an unfair trade practices claim, it seems they would have requested a reasoned award.

Regardless, this should not have a significant impact on us in terms of our winding up this case, and it shouldn't have any impact on future unfair trade practices claims.

Matthew K. Johnson | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
P.O. Box 2757 | Greenville, SC 29602 | Telephone: 864-271-1300 | Fax: 864-235-8806
matthew.johnson@ogletreedekins.com | www.ogletreedekins.com

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From: David Morice [mailto:dmorice@drhorton.com]
Sent: Tuesday, January 19, 2010 4:18 PM
To: Johnson, Matthew K.
Cc: Jay M Henderson; Dillard, W. Kyle
Subject: RE: DR Horton/Clark - arbitration award and check

Very good. I should be able to get the check with that one W-9.

I would prefer just a dismissal rather than filing the award.

Thank you,

David T. Morice
Vice President & Legal Counsel
D.R. Horton, Inc.
301 Commerce Street, Suite 500
Fort Worth, Texas 76102
Phone: (817) 390-8200
Fax: (817) 390-1713

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Ogletree 1074

From: Johnson, Matthew K. [mailto:Matthew.Johnson@ogletreedeakins.com]
Sent: Tuesday, January 19, 2010 3:14 PM
To: David Morice
Cc: Jay M. Henderson; Howard, W. Kyle
Subject: DR Horton/Clark - Arbitration award and check

David:

Per our discussion earlier today, attached is a copy of the Arbitration Order received from Tom Whits and the Form W-9 received from Clark's attorneys. They have asked for a single check made payable to "Chakeris Law Firm as attorney for Pat Clark" in the amount of \$150,000. Please let me know if you need anything further to get these check processed or if you have any further questions or concerns.

We reviewed the file and it appears that this case was originally referred to arbitration, but the court retained jurisdiction for purposes of enforcing the award. In theory, we could go through the process of having the award entered as a judgment and then submit a satisfaction of award. However, I am going to ask Clark's attorneys whether they would prefer to simply sign a stipulation of dismissal with prejudice stating all matters contained therein are res judicata. This would be quicker for all involved and would protect you going forward when filed.

Thank you.

Matthew K. Johnson | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
P.O. Box 2757 | Greenville, SC 29602 | Telephone: 864-271-1300 | Fax: 864-235-8806
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Ogletree 1075

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT
C/A NO. 2010-CP-10-10355

D.R. HORTON, INC. f/k/a)
C. RICHARD DOBSON BUILDERS,)
INC.,)
Plaintiff,)
- vs-) 30(b)(6)
DEPOSITION OF:
JAY MARSHALL HENDERSON
BUILDERS FIRSTSOURCE-)
SOUTHEAST GROUP, LLC; and)
BUILDERS FIRSTSOURCE, INC.,)
and JOSEPH NACCARI,)
Individually and d/b/a)
MASTERFRAMERS,)
Defendants.)
JOSEPH NACCARI,)
Individually, and d/b/a)
MASTERFRAMERS,)
Third-Party Plaintiff,)
- vs-)
JAIME ARREGUIN d/b/a MAYA)
CONSTRUCTION,)
Third-Party Defendant.)

The 30(b)(6) deposition of JAY MARSHALL
HENDERSON, taken before Julie L. Bonomo, Professional
Court Reporter and Notary Public, at Turner Padgett
Graham & Laney, PA, 40 Calhoun Street, Suite 200,
Charleston, South Carolina, on Friday, September 6,
2013, commencing at 9:44 a.m.

SOUTHEASTERN TRANSCRIPT * (843) 762-2442

1 Q. And had no responsibility to do it?

2 A. They did not.

3 Q. Same with the driveway?

4 A. They did not install the driveway.

5 Q. And had no responsibility to install the
6 driveway?

7 A. They did not.

8 Q. In the slab?

9 A. That is correct.

10 Q. Or the roof and shingles?

11 A. They did not install the roof and shingles, to
12 the extent that they installed the underlayment
13 underneath the shingles. I should clarify that.

14 Q. Do you know whether or not Builders FirstSource
15 installed -- what is it under the shingles?

16 A. Underlayment, felt.

17 Q. Do you know if Builders FirstSource installed the
18 felt under the shingles?

19 A. It's typically in their scope to do so as a
20 framer, yes.

21 Q. And was D.R. Horton determined to be negligent in
22 the Patricia Clark case?

23 A. I don't know. Again, the award was determined by
24 the arbitrator for \$150,000.

25 Q. So you don't know if there was an adjudication
SOUTHEASTERN TRANSCRIPT * (843) 762-2442

1 that D.R. Horton was negligent?

2 A. I'm uncertain.

3 Q. Dr. Horton does not know?

4 A. I don't have that information. I would have to
5 review the statement of the arbitrator.

6 Q. All right.

7 MR. TAYLOR: We can mark that as Exhibit
8 No. 3.

9 (Exhibit No. 3 marked for identification.)

10 Q. Jay, I'm going to hand you what has been marked
11 as Exhibit 3 to your deposition. Have you ever seen
12 that document before?

13 A. Yes.

14 Q. Okay. What is this document?

15 A. It's an arbitration order.

16 Q. Was this the arbitration order that you were
17 referencing that you would need to review in order to
18 determine whether or not D.R. Horton was determined to
19 be negligent in the arbitration?

20 A. Yes.

21 Q. All right. Can you review this Exhibit No. 3 and
22 then revisit my question of whether or not D.R. Horton
23 was ever adjudged negligent in the arbitration?

24 A. It doesn't indicate negligence one way or the
25 other.

SOUTHEASTERN TRANSCRIPT * (843)762-2442

1 Q. All right. Do you know whether or not
2 D.R. Horton was found to have breached its contract with
3 Patricia Clark in the arbitration?

4 A. Again, it does not indicate one way or the other.

5 Q. Do you know whether D.R. Horton was determined to
6 have breached its warranty with Patricia Clark in the
7 arbitration?

8 A. Again, the document does not indicate.

9 Q. Do you know if D.R. Horton was determined to have
10 violated the South Carolina Unfair and Deceptive Trade
11 Practices Act in the arbitration?

12 A. The document does not indicate.

13 Q. Do you know if Ms. Clark was awarded her
14 attorney's fees in the arbitration?

15 A. The document does not indicate.

16 Q. Do you know if Ms. Clark -- well, let's go back
17 to Exhibit 2, which is the complaint. If you could go
18 to the very end of that?

19 A. Page?

20 Q. Page 9 of Exhibit 2, and do you see the paragraph
21 that starts "wherefore"?

22 A. Yes.

23 Q. Do you see where it says, the plaintiff prays for
24 judgment for the attorney's fees and cost of this
25 action. Do you see that?

SOUTHEASTERN TRANSCRIPT • (843) 762-2442

1 A. I don't recall that she testified to that at the
2 arbitration, but that leaking toilet issue happened, as
3 I recall, from her deposition back in 2003, and I don't
4 believe it was relevant to the matter.

5 Q. Do you know one way or the other about whether
6 she testified about the leaking toilet damaging hardwood
7 floors at the arbitration?

8 A. I don't recall that she did.

9 Q. Or didn't? You just don't recall one way or the
10 other?

11 A. I don't recall that she did or didn't, but, no, I
12 do not recall.

13 Q. Did Ms. Clark testify that she had complaints
14 about the roofing at her house?

15 A. I don't recall specifics to her testimony.

16 Q. All right. Is it fair to say that any attempt by
17 you to assign portions of that \$150,000 arbitration
18 award to various defects would just be a guess?

19 MR. HALDRUP: Object to the form.

20 A. Again, the \$150,000 award was given. I don't
21 have any specific information as to how it was
22 determined.

23 Q. Okay. Were the witnesses all sworn? Did they
24 swear to take an oath to tell the truth, the whole truth
25 and nothing but the truth?

SOUTHEASTERN TRANSCRIPT * (843) 762-2442

1 not what he said.

2 MR. ANDERSON: That's a question. I wasn't
3 saying that he said anything.

4 Q. Would you agree with me that you would be
5 speculating if you were to try to assign any portion of
6 the \$150,000 to any particular defect?

7 MR. HALDRUP: Are you asking what the
8 arbitrator or what D.R. Horton?

9 MR. ANDERSON: I'm asking him what
10 D.R. Horton.

11 Q. Would D.R. Horton be speculating to try to assign
12 any portion of that \$150,000 to any particular defect?

13 A. I think I have answered this before to the effect
14 that I don't have sufficient information to determine
15 what the arbitrator attributed the \$150,000 award to.

16 MR. ANDERSON: I think that is all I have
17 now.

18 EXAMINATION BY MR. COBB:

19 Q. I'm David Cobb. I'm here on the behalf of Joe
20 Naccari, who is one of the defendants that y'all brought
21 in on this case. When did BFS first learn about
22 complaints by Ms. Clark about framing difficulties or
23 framing problems with her house?

24 MR. HALDRUP: You said BFS. I assume you
25 meant --

SOUTHEASTERN TRANSCRIPT * (843) 762-2442

SOUTHEASTERN TRANSCRIPT * (843) 762-2442

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO. 2010-CP-10-10355
D.R. HORTON, INC. f/k/a C. RICHARD	)	
DOBSON BUILDERS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BUILDERS FIRSTSOURCE-SOUTHEAST	)	
GROUP, LLC; and BUILDERS	)	
FIRSTSOURCE, INC., and JOSEPH	)	
NACCARI, Individually and d/b/a	)	
MASTERFRAMERS,	)	
	)	
Defendants.	)	
	)	

**MOTION *IN LIMINE* TO
PROHIBIT THE INTRODUCTION
OF ANY EVIDENCE REGARDING
ATTORNEY'S FEES OR DEFENSE
COSTS INCURRED BY DEFENDANT
D.R. HORTON, INC., IN THE
DEFENSE OF PATRICIA CLARK V.
D.R. HORTON, INC., Berkeley
County Case NO. 2008-CP-08-1633 OR
ALTERNATIVELY FOR SUMMARY
JUDGMENT**

FILED
2011 JUL 30 AM 11:42
JULIE J. ARMSTRONG
CLERK OF COURT

PLEASE TAKE NOTICE that Defendants Builders FirstSource-Southeast Group, LLC; and Builders FirstSource, Inc., by and through their undersigned attorneys, will move *in limine*, before the Court, for an Order to exclude at the trial of this action any testimony, oral argument, entry of evidence, or publication to the jury, of any matters relating to attorney's fees or costs of litigation incurred by Plaintiff D.R. Horton, Inc. ("DRH"), in the defense of *Patricia Clark v. D.R. Horton, Inc.*, Berkeley County Case No. 2008-CP-08-1633 (the "Clark Case"). Alternatively, Defendants Builders FirstSource-Southeast Group, LLC; and Builders FirstSource, Inc., move for summary judgment with respect to DRH's claims for attorney's fees and defense costs incurred in the Clark Case.

The basis for this Motion is that (1) the plain language of the contract between DRH and Builders FirstSource-Southeast Group, LLC ("BFS") gives BFS the right control the defense of any third-party claims implicating BFS's indemnity obligations, and (2) it is implied in the contract

between DRH and BFS, and in law, that BFS will receive notice of any third-party claims implicating BFS's indemnity obligations.

I. FACTUAL AND PROCEDURAL BACKGROUND:

In February of 2001, DRH and BFS, entered into an Independent Contractor Agreement (the "Contract") (attached hereto as Exhibit 1). The Contract, which was drafted by DRH, contains an indemnification clause which provides, in relevant part, that BFS will:

PROTECT, DEFEND, INDEMNIFY AND HOLD [DRH] HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION, SUITS OR OTHER LITIGATION . . . INCLUDING ALL COSTS AND ATTORNEY'S FEES, WHETHER ASSERTED BY THE HOMEOWNER, CONTRACTOR OR ANY OTHER THIRD PARTY . . . ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH OR DAMAGE TO OR LOSS OF PROPERTY . . . IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (I) BREACH OF THE WARRANTIES . . . (II) THE WORK . . ."

During the summer of 2001, BFS provided various building materials to DRH, on an installed basis, at 403 Milner Court, Charleston, South Carolina (the "Residence"). In 2008, the purchaser of the Residence, Patricia Clark, filed suit in the Berkeley County Circuit Court against DRH alleging negligence, breach of contract, breach of warranty and Unfair Trade Practices. It is undisputed that some of the claims in the Clark Case related to work performed by BFS and other claims in the Clark Case were wholly unrelated to any work performed by BFS.

DRH did not provide BFS with notice of the Clark Case.¹ Nor did DRH tender the defense of the Clark Case to BFS or its insurer. Instead, DRH selected its own attorneys, controlled the

¹D.R. Horton's 30(b)(6) representative testified that he called BFS and told a BFS representative about the Clark Case. BFS denies being informed of the Clark Case via telephone. Regardless, Paragraph 19 of the Contract provides "**Notices.** All notices pursuant to this Agreement or otherwise shall be in writing and shall be delivered to the respective business address of the Parties." Therefore, notice via telephone is irrelevant.

defense of the Clark Case, had the Clark Case referred to arbitration, conducted multiple depositions and a 2 day arbitration, had the arbitration award confirmed as a final judgment of the Berkeley County Circuit Court, and allegedly paid over \$157,000, to defend the Clark Case.

DRH did not give BFS written notice of the Clark Case until it filed this lawsuit, nearly one year after the case was over. This is despite the fact that DRH was instructed, by its own attorneys, that it should provide BFS with notice of the Clark Case. (Henderson Dep. of 06/27/14, Ex. 15-16)(attached hereto as Exhibit 2). DRH's failure to give BFS notice of the Clark Case is inexplicable.

II. THE PLAIN LANGUAGE OF THE CONTRACT SHOWS THAT BFS HAS THE RIGHT TO DEFEND ANY THIRD-PARTY LAWSUIT THAT DRH ASSERTS IS ATTRIBUTABLE TO BFS'S WORK.

The indemnification clause itself says that BFS will “**protect, defend, indemnify and hold [DRH] harmless . . .**”² Thus, the parties agreed that BFS would “protect” and “defend” DRH from third-party suits caused by BFS’s defective work. Pursuant to the plain language of the clause, DRH and BFS agreed that it would be BFS, not DRH, who would control the defense of any third-party suit implicating BFS’s indemnity obligations. The indemnity clause not only obligates BFS to defend third-party suits related to its work, it also give BFS the *right* to do so. The indemnification clause does not give DRH the right to control the defense of the third-party suit and nonetheless require BFS to indemnify it for attorney’s fees and costs incurred.

² The parties used the word “and,” a conjunctive, as opposed to “or,” a disjunctive, when describing the obligations of BFS under the indemnity clause. *See Plunkett v. Adkinson*, 290 S.C. 363, 365-366 (Cl. App. 1986) (use of the word “and” is “clearly conjunctive” and should be “construed literally.”); *State v. Beckroge*, 49 S.C. 484 (1987)(“and” is conjunctive while “or” is disjunctive.). This language creates not only a duty on the part of BFS to defend third-party suits alleging defects in its work, but also gives BFS the *right* to defend any such suit.

III. IT IS IMPLIED THAT DRH MUST GIVE BFS REASONABLE NOTICE OF ANY THIRD-PARTY SUIT THAT DRH ASSERTS IS ATTRIBUTABLE TO BFS'S WORK.

Even if a contract is silent as to notice, courts have consistently implied a notice requirement when an indemnitee seeks to recover attorney's fees and expenses incurred in defending a third-party action. "Fairness requires prompt notice so that an indemnitor may not only respond to a claim, but also protect its interests as the party ultimately paying the bill." *West Bend Co. v. Chiaphua Industries, Inc.*, 112 F.Supp.2d 816, 827 (E.D. Wisc. 2000); *See also Town of Fairfield v. D'Addario*, 149 Conn. 358, 362-363, 179 A.2d 826, 829 (1962) ("It can be fairly implied that the giving of reasonable notice was a condition precedent to [Defendant's] duty to defend and indemnify"). Furthermore, when a party to a contract assumes an express obligation to do certain things- in this case, to defend and indemnify the plaintiff - the law implies a corresponding obligation on the other party to allow him all reasonable opportunity to perform."); *Cochrane Roofing & Metal Co., Inc. v. Callahan*, 472 So.2d 1005, 1007 (1985) ("the law would imply an obligation to notify the indemnitor within a reasonable time of a claim against the indemnitee, and certainly it would require the prompt forwarding of the complaint if the indemnitor is to be required to furnish a defense of it."); *Valloric v. Dravo Corp.*, 178 W. Va. 14, 21-22, 357 S.E.2d 207, 214-215 (1987) ("In most cases, if an indemnitor does not assume control of the indemnitee's defense, he will be held liable for the attorney fees and costs incurred by the indemnitee in the defense of the original action. This rule is, of course, predicated on the fact that the indemnitor has originally been notified of the underlying action, has been requested to assume the defense, and has refused to do so.") (emphasis added).³

³It is not surprising that there is no South Carolina case on point. Given the availability of third-party complaints, as well as the obvious step of tendering the defense to any alleged

The case of *Cochrane Roofing & Metal Co., Inc., v. Callahan*, 472 So.2d 1005, (1985)(attached hereto as Exhibit 3), is instructive. In the *Cochrane* case, Cochrane Roofing, as a subcontractor for Mark Construction, put a roof on a building. *Cochrane*, 472 So.2d at 1006. The contract between Cochrane Roofing and Mark Construction contained an indemnity clause. The indemnity clause was silent as to notice requirements. *Id* at 1007. During the warranty period, Mark Construction notified Cochrane Roofing that the building owner had some complaints regarding the roof. *Id* at 1006. Later, the building owner sued Mark Construction claiming the roof was defective. *Id* at 1007.

Mark Construction undertook the defense of the roof lawsuit, using two law firms and regularly paying their bills. Mark Construction did not give Cochrane Roofing notice of the lawsuit until over two years later when its attorney wrote to Cochrane Roofing demanding a defense and indemnification. *Cochrane*, 472 So.2d at 1007.

The Cochrane Court held that:

Although the contract here does not contain a specific requirement that the contractor give notice to the subcontractor of a suit which the subcontractor agrees to defend and as to which the subcontractor agrees to save harmless the contractor, it goes without saying that notice is a prerequisite to performance by the subcontractor . . . Under the facts of this case, the law would imply an obligation to notify the indemnitor within a reasonable time of a claim against the indemnitee, and certainly would require the prompt forwarding of the complaint if the indemnitor is to be required to furnish a defense of it.

Cochrane, 472 So.2d at 1007.

Here, DRH's failure to give BFS notice of the Clark Case is even more inexplicable than the general contractor's failure to give notice in the *Cochrane* case. In *Cochrane* notice was at least

indemnitor, its unclear why any party would proceed to defend a case without giving an alleged indemnitor notice.

given before a judgment was entered. Here, the Clark Case was filed on June 12, 2008. DRH did not give BFS notice of the Clark Case until December of 2010, after it had litigated the case, obtained an award, and had the award confirmed and made a final judgment of the Berkeley County Circuit Court. As the Cochrane Court stated:

The contractor retained counsel of its choice, who prepared a defense without consulting with the indemnitor/subcontractor. Now, at this late date, it calls upon the indemnitor to pay the lawyer of the contractor's choice and to save harmless the contractor. Having failed to perform its part of the bargain, the contractor cannot now compel performance by the subcontractor.

Cochrane, 172 So 2d at 1008.

IV. THE CONTRACT AS A WHOLE DEMONSTRATES THE PARTIES' INTENTION THAT BFS BE GIVEN NOTICE OF ANY THIRD-PARTY SUIT THAT DRH ASSERTS IS ATTRIBUTABLE TO BFS'S WORK.

"As a rule of construction, the Court must consider the entire contract between the parties to determine the meaning of its provisions. That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so." *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592 (1976). Here, the various provisions of the Contract evidence the parties' intention that BFS should be given notice of any third-party suit that DRH contends implicates BFS's indemnity obligations.

As stated above, the Contract contains a notice provision:

Notices. All notices pursuant to this Agreement or otherwise shall be in writing and shall be delivered to the respective business address of the Parties.

Contract, ¶ 19.

Additionally, the Contract contains detailed provisions related to BFS's insurance obligations. BFS is required to carry "Broad Form Commercial General Liability Insurance on an

Occurrence Form, naming the indemnitee as an additional insured. . .” Contract at ¶ 13. Notice is, of course, a necessary prerequisite to DRH’s seeking coverage as an additional insured.

Indeed the Contract provides for exactly the situation which occurred in this case. Paragraph 22 of the Contract provides that BFS “agrees to participate in, and be bound by, any arbitration proceeding between [DRH] and any third party relating to the Work . . .” See Contract at ¶ 22. Clearly, BFS would have to be given notice of the arbitration in order to “participate.”

The risk management scheme created by the Contract provides that BFS will defend any third-party suits alleging defects in BFS’s work, carry insurance coverage naming DRH as an additional insured with regard to such allegations, and that BFS will participate in any arbitration between DRH and a homeowner. It is obvious that notice of the suit is required for each of these provisions to work as intended.

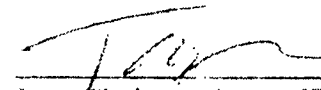
V. CONCLUSION

For all of the above reasons, BFS respectfully asks this Court to enter an Order prohibiting DRH from introducing any evidence related to the attorney’s fees or defense costs it incurred in the defense of the Clark Case or, alternatively, for summary judgment on DRH’s claims for attorney’s fees and defense costs.

SIGNATURE ON FOLLOWING PAGE

KERNODLE ROOT + COLEMAN

By:



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ATTORNEYS FOR BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP,
LLC and BUILDERS FIRSTSOURCE, INC.

July 21, 2014

Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of *Builders FirstSource-Southeast Group, LLC and Builders Firstsource, Inc.'s Motion in Limine to Prohibit the Introduction of any Evidence Regarding Attorney's Fees or Defense Costs Incurred by Defendant D.R. Horton, Inc., in the Defense of Patricia Clark v. D.R. Horton, Inc., Berkeley County Case No. 2008-cp-08-1633 or Alternatively for Summary Judgment* was sent via email, facsimile, hand delivery and/or by depositing a copy in the United States Mail, First Class, to:

Peden Brown McLeod, Jr., Esquire
Neil S. Haldrup, Esquire
Wall Templeton & Haldrup, PA
P. O. Box 1200
Charleston, SC 29402

Attorneys for Plaintiff

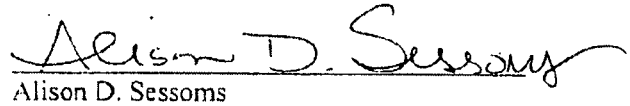
David S. Cobb, Esquire
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**Attorney for Joseph Naccari,
Individually and d/b/a
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Columbia, SC 29211

**Attorney for Jaime Arreguin
d/b/a Maya Construction**

July 29, 2014


Alison D. Sessoms

FILED
2014 JUL 30 AM 11:42
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

D·R·HORTON
 Division Name: H/H
 Area Name: _____
 Assigned Vendor No.: Y/AW

INDEPENDENT CONTRACTOR AGREEMENT

FEB - 6 2001

NAME OF CONTRACTOR BUILDERS FIRST SOURCE DBA - SAME - ("Contractor")Sole Proprietorship ☐ Partnership ☐ ☒ Corporation ☐ LLC ☐ Other (ATTACH W-9)Social Security No. or Tax ID No.: 57-0618425Name of Owner(s)/Officer(s): MORRIS TOLLY, SE GRANT PRESIDENTAddress for All Notices: Route 1, Box 170City: KINGSLAKE State: SC Zip Code: 29936Telephone: (P43) 987-0810 Fax: (P43) 987-0833 E-Mail Address: _____

Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITH HOLDING

This agreement (the "Agreement") is entered into on this 31 day of JANUARY, 2001, between D·R·HORTON

(hereinafter "Owner") and Contractor

1. **Scope of Work.** All work performed by Contractor for Owner shall be subject to the terms and conditions of this Agreement. The work to be performed hereunder (the "Work") is the labor, services and/or materials, equipment, transportation, or facilities necessary to complete the construction-related activities generally described as: TURKEY ?

and shall include all work performed by Contractor for Owner. The applicable quantities and pricing for the Work shall be that reflected in the price sheet, proposal, bid or other documentation most recently accepted and approved by Owner (the "Pricing Schedule"). It is understood and agreed that no Pricing Schedule will modify any other terms of this Agreement other than price and quantity. It is understood and agreed that Owner is not obligated to award any work on specific property to Contractor, does not guarantee any quantity of work to Contractor, and may at its sole discretion retain others to perform work similar to the Work to be performed hereunder at any job location in addition to or in place of Contractor.

2. **Schedule of Work.** Owner shall have the right to determine the time, order and priority in which all components of the Work shall be performed and all matters relative to the timely and orderly conduct of the Work. Owner shall issue authorization (either pursuant to a written purchase order or work invoice (hereinafter the "Purchase Order") or verbal instructions from an authorized Owner representative to commence the Work, and Contractor shall not commence the Work at a job location until Contractor has received instructions to begin Work at a specific job location. Contractor shall commence the Work within three (3) days of notice to proceed from Owner, and if such work is interrupted at the direction of Owner, Contractor shall resume such work within two (2) working days from Owner's direction to resume. Contractor agrees that Owner shall have the right to make changes to the schedule of Work at Owner's discretion and agrees to comply with such changes.

3. **Performance of Work.** Contractor's acceptance/commencement of the Work shall be deemed as Contractor's agreement to complete the Work by the completion date specified by an authorized Owner employee and shall be deemed as Contractor's acknowledgment that Contractor has inspected the job location and approves of the requirements so specified. Contractor acknowledges that TIME IS OF THE ESSENCE in the performance of all Work. Contractor shall coordinate with Owner all Work scheduled and cooperate with other contractors. Contractor shall perform all Work in a good and workmanlike manner, in accordance with the plans and specifications of Owner, according to industry standard practices, and warrants that the Work will meet or exceed FHA minimum property standards, VA requirements, all laws and regulations and any applicable building code requirements. Owner at all times has the right to inspect the Work at any time, but inspection shall not be construed as a waiver of any obligations, representations or warranties of Contractor as to the Work. Notwithstanding anything contained herein to the contrary, all Work shall be performed and any defects shall be corrected in accordance with this Agreement to the satisfaction of Owner. Contractor acknowledges that Contractor is thoroughly familiar with the plans and specifications; such plans and specifications affect the Work and materials incorporated therein. Contractor shall be responsible for inspecting any work of another contractor that may affect Contractor's own Work, and shall report in writing to Owner any defects prior to commencement of any Work, or Contractor shall be deemed to have accepted such work for inclusion into Contractor's Work. Contractor shall secure and maintain all permits, licenses and approvals necessary for or applicable to the performance of the Work hereunder. When Owner orders the Work in writing, Contractor shall make any and all changes in the Work as directed by Owner's authorized representative, and adjustments to the price shall be made only in accordance with a "Variation to Purchase Order" signed by Owner and Contractor prior to the commencement of such changes.

4. **Safety.** Contractor shall, at its own expense, protect its employees and all other persons from risk of death, injury or bodily harm arising from or in any way related to the Work. Contractor shall fully comply with all laws, orders, citations, rules, regulations, standards and statutes concerning occupational health and safety, accident prevention, safety equipment and practices, including but not limited to federal and state OSHA regulations. Contractor shall provide Owner with written verification of compliance with Hazard Communication Standard, 29 C.F.R. §1926.59 et seq. and provide written notice to Owner of the contact person responsible for Contractor's safety compliance. Contractor shall prohibit and prevent the presence or use of alcohol or drugs by its employees, permitted subcontractors or suppliers at a job location or performance by any such person under the influence of alcohol or drugs. Contractor shall prohibit and prevent the presence of children under age 18 from the work site. Contractor shall immediately pay all fines or penalties assessed upon Contractor or Owner relating to the Work. Contractor shall conduct inspections to determine that safe working conditions and equipment exist and safe practices are observed, and accepts sole responsibility for providing a safe place to work for its employees and the employees of all subcontractors and material suppliers. Contractor shall immediately notify Owner's construction supervisors of any unsafe condition or practice observed on the Work site. Further, Contractor shall immediately notify Owner of any accidents or injuries on the Work site.

5. **Contract Price.** The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor, and Contractor shall pay all applicable sales taxes and any other taxes resulting from such payment or refusal to the Work. CONTRACTOR FURTHER AGREES THAT NO PRICE INCREASES SHALL BE BINDING UPON OWNER BEFORE CONTRACTOR GIVES OWNER (20) DAYS' WRITTEN NOTICE BEFORE ANY PRICE INCREASE IS IMPLEMENTED. Notwithstanding anything contained on any new Pricing Schedule, the superseded Pricing Schedule shall remain in effect for Purchase Orders issued after the date of any new Pricing Schedule until the expiration of the notice period unless other prior written notice was given to Owner by Contractor.

THIS AGREEMENT CONSISTS OF THREE (3) PAGES

Executed this 31 day of FEBRUARY, 2001

Owner

By: Richard SchwartzName: RICHARD SCHWARTZ

Title: Division Manager

Contractor

By: Morris TollyName: MORRIS TOLLYTitle: Southwest Division

6. **Payment/Liens.** Owner shall timely pay Contractor for completed Work, provided that Contractor has performed in accordance with and has fully complied with all terms and conditions of this Agreement. If the Work is to be performed in stages, payments may be made on each stage. Contractor acknowledges and agrees that all Work described on a Purchase Order shall be considered separate and distinct from Work described on any other Purchase Order. Contractor acknowledges and agrees that no payments shall be due under this Agreement until Contractor's invoice (or Purchase Order, if applicable) for each Work has been submitted to Owner for payment, which action shall constitute a representation and confirmation that all Work (or a specified portion of the Work) to be performed on a specific job location has been completed satisfactorily and that all material suppliers, laborers and subcontractors have been paid in full. **CONTRACTOR, FOR ITSELF, ITS EMPLOYEES, SUBCONTRACTORS AND SUPPLIERS, HEREBY WAIVES ITS STATUTORY, CONSTITUTIONAL AND COMMON LAW RIGHTS TO ASSERT LIENS AGAINST OWNER OR ITS PROPERTY.** As a condition to payment, Owner may require a full and complete release of all liens for materials furnished and labor performed from Contractor, its employees and agents and all third parties furnishing labor or materials in connection with the Work so performed, and an affidavit that no person has a right to any lien for materials or labor. Owner may, at any time, in its discretion, make checks payable to Contractor and one or more third parties. Such payment shall be deemed satisfaction of amounts owed by Owner to Contractor, notwithstanding the fact that such third parties may not endorse said checks. At all times during the performance of this Agreement, Owner shall be entitled to hold, for all Work in progress, any allowable retainage and any statutory sums in accordance with the laws of the State where the Work is performed. In the event that any liens are filed against Owner relating to the Work, Contractor agrees that Owner shall be entitled to withhold all payments to Contractor or until Contractor causes such lien or affidavit to be removed and released of record. Contractor agrees to INDEMNIFY and HOLD OWNER HARMLESS from any loss, expense, including legal fees and disbursements, damage or injury caused or occasioned, directly or indirectly, by any liens, and further agrees at Owner's request to: (i) procure a bond to indemnify Owner and any home purchaser from Owner, in an amount equal to one hundred fifty percent of the lien amount, against such lien, or (ii) refund to Owner all monies, including any additional amount necessary to cover all of Owner's or home purchaser's attorneys' fees and court costs paid in discharging the lien, whichever remedy Owner elects in its sole and absolute discretion. Payment to Contractor for any Work shall not be construed as a waiver by Owner as to Work later found to be defective and shall not release Contractor from liability for warranties and warranty service and/or defective Work.

7. **Independent Contractor Status.** Contractor, in performing the Work, shall do so as an independent contractor and shall have the sole right to control the performance of the Work, except that the Work must be performed in accordance with this Agreement. Contractor shall be responsible for the performance of its employees and permitted subcontractors, and all personnel used by Contractor in the performance of Work shall be qualified and competent to perform their assigned tasks and have all necessary licenses. Contractor acknowledges that this is a lump sum contract and that Contractor shall be solely responsible for all withholding, Social Security, state unemployment and other similar taxes for Contractor's employees, agents or permitted subcontractors. In addition, Contractor shall pay all applicable sales or use taxes on labor provided and materials furnished or otherwise required by law in connection with the Work. Taxes will not be collected nor paid by Owner under this Agreement. Contractor further agrees to provide written notification to all of its present and future employees of Contractor's provision for Worker's Compensation Insurance.

8. **Contractor's Warranties.** Contractor unconditionally warrants to Owner, its successors and assigns, and to each purchaser of a home incorporating the Work from Owner, each subsequent owner, and their successors and assigns (collectively referred to as the "Homeowner"), that all labor performed and materials furnished by Contractor shall conform to the specifications of this Agreement, are free from any defects or deficiencies in workmanship or materials when judged by the standards of accepted residential construction industry trade practices, and be in accordance with the requirements of all applicable government authorities. All Work not conforming to the aforementioned requirements shall be considered to be defective. In addition to the foregoing warranty, Contractor expressly warrants that the Work shall remain free of defects for the following warranty periods: (a) for a period of ten (10) years all structural elements, including, but not limited to, roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (b) for a period of two (2) years all (i) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (ii) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (iii) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; (c) all other elements for a period of one (1) year. The foregoing notwithstanding, in no event shall a warranty period for any system, element or other portion of the Work be less than the applicable warranty period for such system, element, or other portion of the Work under any residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner in any Homeowner's "Home Owners Warranty". Owner shall use its best efforts to provide Contractor with notice of any warranty period under any Home Owners Warranty which is longer than the Warranty Period stated above; provided, however, failure to give such notice will not affect the extension of the Warranty Period to the applicable warranty period under the Home Owners Warranty. Contractor agrees that the performance/fulfillment of any warranty repair responsibilities by Owner or any other third party will not affect, minimize, or in any way obviate Contractor's warranty obligations. Contractor's liability provided for herein, or the ability of Owner to request Contractor to perform warranty services in the future. Contractor shall furnish all warranties and/or guarantees by manufacturers on appliances and equipment, and shall furnish all certificates required by any municipality and/or VA and/or PHA. The foregoing is in addition to all other warranties provided by law or otherwise and not in limitation of periods of applicable statutes of limitation.

9. **Governmental Requirements.** Contractor agrees to comply with all applicable federal, state, local, and county statutes, ordinances, regulations, codes, licensing requirements and standards, and the requirements of the Williams-Steiger Occupational Safety and Health Act of 1970 and amendments thereto, as well as the training and record-keeping requirements of the Hazard Communication Standard, 29 C.F.R. §1926.59 et seq., or similar laws or regulations, and the rules, regulations, or orders of all public authorities relating to performance of the Work, including without limitation, the procurement and posting of all required permits and notices. Contractor further agrees to indemnify and hold Owner harmless from the payment of any fine or penalty imposed as a result of Contractor's failure to comply with applicable laws and regulations.

10. **Subdivision Rules.** Contractor shall comply fully with all rules, regulations, and restrictive covenants governing the subdivision in which the Work is performed, including without limitation, rules, regulations and restrictions (i) establishing hours and/or days that Work may be performed; (ii) governing storage of materials on the job location; and (iii) regulating trash pick-up and waste collection at the job location.

11. **CONTRACTOR'S INDEMNITY AND WAIVER TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER, ITS PARENT CORPORATION, SUBSIDIARIES AND AFFILIATES, AND ANY OF THEIR RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS, (HEREIN COLLECTIVELY REFERRED TO AS THE "INDEMNITEE"), 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 (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND PERMITTED SUBCONTRACTORS OF ANY TYPE), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF PROPERTY (INCLUDING THE LOSS OF USE THEREOF), (HEREIN COLLECTIVELY REFERRED TO AS "LOSS"), 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 RELATING 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. CONTRACTOR AND CONTRACTOR'S EMPLOYEES, PERSONNEL, AGENTS, AND PERMITTED SUBCONTRACTORS SHALL BE SOLELY RESPONSIBLE FOR THEIR RESPECTIVE TOOLS AND EQUIPMENT, AND HEREBY WAIVE ANY RIGHT OF RECOVERY AGAINST THE INDEMNITEE WITH RESPECT TO ANY LOSS INVOLVING SUCH TOOLS OR EQUIPMENT IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH, THE WORK TO BE PERFORMED THEREUNDER.**

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

13. **Insurance.** Contractor agrees to carry: (a) Broad Form Commercial General Liability Insurance on an Occurrence Form, naming the Indemnitee as an additional insured with completed operations coverage and containing a per occurrence limit of no less than One Million Dollars (\$1,000,000.00), and an aggregate limit of no less than One Million Dollars (\$1,000,000.00) protecting against bodily injury, broad form property damage, and personal injury claims arising from the exposures of: (i) premises operations; (ii) products and completed operations including materials designed, furnished, or modified in any way by Contractor; (iii) independent subcontractors; (iv) contractual liability risk covering the indemnity obligations set forth in this Agreement; and (v) property damage resulting from explosion, collapse, or underground (e.g., u) exposures; (b) Worker's Compensation Insurance that provides statutory benefits and coverage such that Owner will have no liability to Contractor's personnel, employees or agents; and (c) Professional Liability Insurance for Architects, Engineers, Surveyors, and other Professional Service Organizations, that provides a per claim limit of no less than One Million Dollars (\$1,000,000.00) and an aggregate of no less than One Million Dollars (\$1,000,000.00) protecting against faulty design and faulty professional judgment. Owner and Contractor (collectively, the Parties) intend and agree that the coverage obtained by Contractor naming Owner as an additional insured as set forth herein shall apply on a primary basis with any insurance of Owner being otherwise coverage. Such coverages will be carried continuously during the term of this Agreement with insurance companies acceptable to Owner in its sole and absolute discretion. Such insurance shall provide for a waiver of subrogation.

INITIALS:

Owner:

Contractor:

CORPORATE

Contractor shall provide evidence that such insurance is in full force by furnishing Owner with a Certificate of Insurance, or certified copies of the above policies. Each Certificate of Insurance or policy shall contain an unqualified clause to the effect that the policy shall not be subject to cancellation, nonrenewal, adverse change, or reduction of amounts of coverage without thirty (30) days' prior written notice to Owner. Such insurance shall be carried continuously from the date of commencement of the Work until expiration of the period of the Contractor's warranty provided in this Agreement. The amounts and types of insurance set forth herein are the minimums required by Owner and shall not be substituted for an independent determination by Contractor of the amounts and types of insurance which Contractor shall determine to be reasonably necessary to protect itself and the Work required to be performed under this Agreement. **NOTWITHSTANDING THE FOREGOING, IN THE EVENT THAT THE CONTRACTOR FAILS TO PROVIDE OWNER WITH EVIDENCE OF INSURANCE AS REQUIRED HEREUNDER, OWNER SHALL BE ENTITLED, BUT SHALL NOT BE OBLIGATED, TO: (A) WITHHOLD AN AMOUNT (ESTABLISHED BY OWNER IN ITS SOLE AND ABSOLUTE DISCRETION) FROM CONTRACTOR TO COMPENSATE OWNER FOR THE ADDITIONAL COSTS OF ITS WORKER'S COMPENSATION AND GENERAL LIABILITY INSURANCE PREMIUMS AND RISKS AND ADMINISTRATIVE COSTS TO OWNER ASSOCIATED WITH DOING BUSINESS WITH UNINSURED CONTRACTORS, THEIR EMPLOYEES OR AGENTS. CONTRACTOR EXPRESSLY ACKNOWLEDGES THAT THIS WITHHOLDING IS NOT PAYMENT FOR INSURANCE, AND CONTRACTOR REMAINS OBLIGATED TO PROVIDE INSURANCE FOR ITSELF AND ITS EMPLOYEES UNDER THIS CONTRACT AND THE AMOUNT WITHHELD MAY EXCEED THE ACTUAL COSTS INCURRED BY OWNER; OR (B) ACCEPT FROM CONTRACTOR A WAIVER OF INSURANCE TO THE EXTENT PERMITTED AND MADE IN ACCORDANCE WITH THE REQUIREMENTS OF ANY APPLICABLE STATUTES OR REGULATIONS.**

14. Subcontractors. If Contractor subcontracts any of the Work to the extent permitted under this Agreement, Contractor guarantees that each third party shall indemnify Owner and meet all insurance requirements set forth herein. Prior to the subcontractor's commencement of the Work, Contractor shall obtain a signed agreement from each third party indemnifying Owner and provide to Owner evidence of satisfactory insurance. In addition, Contractor shall require that each supplier or subcontractor indemnify Owner from all losses arising from any materials or labor incorporated into the Work. Contractor shall require subcontractors and material suppliers to agree to submit to binding arbitration on the terms set forth herein. Contractor understands and agrees that for all purposes, including the purposes of this Agreement, Contractor shall be fully responsible for any and all of the actions of any subcontractor engaged by Contractor or who performs any part of the Work, and all obligations of Contractor under this Agreement shall be deemed to be the obligation of such subcontractors to Owner, for which Contractor shall be fully responsible to Owner.

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

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

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

The duties and obligations imposed by this Agreement and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The prevailing party to any dispute shall have a right to collect his reasonable attorney's fees and expenses.

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

18. Assignment. Contractor's rights and obligations under this Agreement are nontransferable and not assignable, and Contractor shall not subcontract all or any part of the Work contemplated by this Agreement without obtaining the prior written consent of Owner, which consent may be withheld in Owner's sole and absolute discretion. Owner may assign this Agreement without Contractor's consent.

19. Notices. All notices required pursuant to this Agreement or otherwise shall be in writing and shall be delivered to the respective business address of the Parties.

20. Entire Agreement. This Agreement, and with respect to prices and quantities only, the Price Schedule and all written Purchase Orders shall constitute the entire agreement between the Parties, and there are no other agreements, oral or written, by and between the Parties. Except as otherwise provided herein, no provision of this Agreement may be amended or added to except in writing signed by both Parties.

21. Termination and Waiver. This Agreement shall remain in full force and effect until terminated in writing by mailing notices to the other Party. Owner may terminate this Agreement at any time, irrespective of whether Contractor is in default or breach hereunder, at will. Contractor shall provide One Hundred Twenty (120) Days' notice prior to the effective date of termination, and agrees to perform fully under this Agreement during such notice period. If the Agreement is terminated by Owner, the Parties agree that, notwithstanding any other agreement to the contrary, the sole amount due to Contractor shall be that due for all authorized Work performed and materials supplied before termination, subject to deductions and charges authorized by this Agreement. Anything herein contained to the contrary notwithstanding, the Work to be performed by Contractor shall only include such work as specifically authorized by an authorized representative of Owner. Any failure of Owner to enforce any of the terms and provisions of this Agreement shall not constitute a waiver of such required performance by Contractor or of any other performances in the future required by Contractor hereunder.

22. Dispute Resolution. If a dispute arises out of or relating to this Agreement or a breach thereof and if the dispute cannot be settled through negotiation, the parties agree to first try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules, before resorting to arbitration, litigation, or another dispute resolution procedure. If mediation fails, any claim, controversy or dispute of any kind among the Parties, now existing or arising in the future, whether relating to the interpretation of any provision of this Agreement, the rights and obligations of the Parties under this Agreement, any other agreement relating to, or arising from, the business of Owner or the Work, shall be submitted to binding arbitration under the Federal Arbitration Act, 9 U.S.C. 1 et seq. The arbitration shall be conducted by the American Arbitration Association ("AAA"). The arbitration shall be conducted in accordance with the Construction Industry Arbitration, to the extent not in conflict with the Federal Arbitration Act. The Parties agree that if multiple arbitrations should be commenced, all such proceedings shall be consolidated into one arbitration. Contractor agrees to participate in, and be bound by, any arbitration proceeding between Owner and any third party relating to the Work. Notwithstanding any provision to the contrary, Owner shall be entitled to terminate this Agreement and/or any Purchase Order, in whole or in part, in the event any dispute arises between Contractor and Owner, whereupon Owner shall also be entitled to exercise any and all remedies, deductions, and offsets authorized pursuant to the terms and provisions of this Agreement. Notwithstanding any other provision of this paragraph, in the event that a subcontractor or material supplier of Contractor, or any other necessary third party, cannot be forced to mediate or arbitrate, Owner may elect to unilaterally waive mediation or arbitration.

23. Survival. All terms of this Agreement survive its termination and shall remain in full force and effect and shall be binding upon the Parties and any successors and assigns.

24. General Contract Provisions. The provisions of this Agreement shall be deemed independent and severable, and the invalidity of partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. The terms of the Agreement shall be binding on all Parties, their respective successors, representatives, heirs and assigns. In the event of a conflict between this Agreement and the terms of any Purchase Order or any other agreement or document pertaining to the subject matter hereof which cannot be reconciled by the Parties, the terms of this Agreement shall control. Unless the context requires a contrary construction, the singular shall include the plural, and the plural the singular. Any reference to gender shall include the masculine, feminine, and neuter. All captions and titles used in this Agreement are intended solely for convenience of reference and shall not enlarge, limit, or otherwise affect that which is set forth in any of the paragraphs, sections or articles hereof. No delay or failure by Owner to exercise any right hereunder, and no partial or single exercise of such right, will constitute a waiver of that or any other right except by written agreement executed by Owner.

INITIALS:

Owner:

Contractor:

CORPORATE

EXHIBIT 2

Page 110

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-10-10355

D.R. HORTON, INC. F/K/A C.
RICHARD DOBSON BUILDERS, INC.,

PLAINTIFF,

vs.

BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, LLC; AND JOSEPH NACCARI,
INDIVIDUALLY, AND D/B/A
MASTERFRAMERS.

DEPENDANTS.

JOSEPH NACCARI, INDIVIDUALLY, AND
D/B/A MASTERFRAMERS,

THIRD-PARTY PLAINTIFF,

vs.

JAIME ARREGUIN D/B/A MAYA
CONSTRUCTION,

THIRD-PARTY DEFENDANT.

) The continued
) deposition of:
) Jay Marshall
) Henderson
)
) June 27th, 2014

The continued 30(b)(6) deposition of JAY MARSHALL
HENDERSON, taken before Amanda Barbao, Court Reporter
and Notary Public, at the law offices of Wall Templeton
& Haldrup, 145 King Street, Charleston, South Carolina,
on June 27th, 2014, commencing at 10:00 a.m.

Johnson, Matthew K.

From: Johnson, Matthew K.
Sent: Wednesday, February 25, 2009 4:14 PM
To: 'Ray M Henderson'
Subject: D.R. Horton/Clark - status and request from Clark's attorney

Jay:

I hope you are doing well. This is to provide a very brief status report and to request your feedback on two items.

We have little to report in the way of progress on this case. Our Answer was filed, as was our motion to compel arbitration. It was initially scheduled to be heard, but was postponed due to a conflict on the part of Clark's attorneys. It is unclear when it will be heard. They rarely have motions hearings in Beaufort County, so it could be a while.

However, Clark's attorney wants to get moving and has suggested that if we will move forward with discovery, they will agree to arbitrate subject to agreement on a suitable arbitrator. I believe that Tom Wills in Charleston will be a good choice, and should be acceptable to Clark's attorneys. I think if they are willing to move forward along these lines we are getting essentially what we want, and won't incur the time or expense of arguing our motion at some point in the future. The downside is that this case becomes active, but I don't think we can avoid it forever. Let me know if you agree to proceed as outlined.

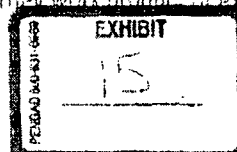
Also, Kyle Dillard had some communications with David Morice regarding a potential conflict issue related to our sub-contractors. Please remember that Builders FirstSource was involved and that our firm also represents BFS. We can proceed without bringing in the third-parties, which would allow us to proceed to arbitration and get a decision. We would then have the opportunity to seek contribution from BFS and others, although we would suggest that you provide them with notice of the pending arbitration and your potential contribution claim. On the other hand, if you prefer to bring in the sub-contractors at this time, we could understand but would not be able to handle the matter for you. Kyle and I would like to simply provide notice to the sub-contractors of your potential contribution claim and proceed without them. Kyle had suggested this to David Morice and he did not voice opposition, but we would like something definitive if we proceed in this fashion.

Let me know if you need any additional information to get back to me regarding either of these requests.

Matthew K. Johnson, Esq. | Ogletree, Deakins, Nash, Smoak & Stewart, P.C. | 300 N. Main Street (29601) |
PO Box 2757 | Greenville, SC 29602 | (864) 271-1300 (office main) | (864) 255-8806 (fax) |
matthew.johnson@ogletreedeakins.com | www.ogletreedeakins.com

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Ogletree 917

Johnson, Matthew K.

From: Dillard, W. Kyle
Sent: Monday, November 17, 2008 5:41 PM
To: 'David Morice'; 'Jay M Henderson'
Subject: RE: Pat Clark v DRH

David,

I've checked into it. Unfortunately, it appears that this would present a conflict for us as well.

From: David Morice (<mailto:dmorice@delhorson.com>)
Sent: Friday, September 12, 2008 10:31 AM
To: Dillard, W. Kyle; Jay M Henderson
Subject: RE: Pat Clark v DRH

Kyle,

What about coverage from Builders FirstSource's carrier for us as an additional insured?

Thanks,

David T. Morice
Vice President & Legal Counsel
DRH Horton, Inc.

From: Dillard, W. Kyle (kyle@kyle-dillard@ogletreedeakins.com)
Sent: Friday, September 12, 2008 8:42 AM
To: David Morice; Jay M Henderson
Subject: Pat Clark v DRH

David and Jay,

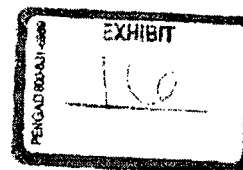
We have been in the process of identifying subcontractors who may be properly named as third parties to this case. David, for your reference, this is yet another Daniel Island construction defect case (we are presently unaware of any third allegations). Among the issues complained of (meaning identified by the homeowner's "expert") are alleged deficiencies in the roof truss design. The supplier for the roof truss package is Builders FirstSource, with which we unfortunately have a conflict due to representation in employment related matters.

In terms of case posture, we have answered and presently have pending a motion to compel arbitration.

If DRH elects to proceed with impleading Builders FirstSource, it will require that we refer the defense of this claim to another firm. Alternatively, we can certainly proceed with the defense with DRH independently placing Builders FirstSource on notice of its potential liability, and if necessary, bringing a separate action against it for contribution at the conclusion of this case, through other counsel.

We will of course be happy to proceed as instructed. Please let us know your preference for addressing this issue.

Thanks,



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M. Kyle Dillard
Ogletree, Deakins, Nash, Smoak
& Stewart, PC
The Ogletree Building
300 North Main Street (29601)
P.O. Box 2757
Greenville, SC 29602
864/271-1300
Fax: 864/235-8806
kyle.dillard@odnss.com

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472 So.2d 1005
Supreme Court of Alabama.

COCHRANE ROOFING &
METAL COMPANY, INC.

v.

H.S. (Sonny) CALLAHAN; Steven M.
Priola, d/b/a Mark Construction Co., Inc.

83-1254. | June 7, 1985.

Indemnitor subcontractor sought declaratory judgment that subcontractor had no obligation to defend and indemnify indemnitee contractor from claim arising from subcontractor's roofing work. The Circuit Court of Jefferson County, William A. Thompson J., held that subcontractor was obligated to defend and indemnify, and subcontractor appealed. The Supreme Court, Shores, J. held that contractor could not enforce contractual provision requiring subcontractor to defend and indemnify because contractor had not met implied obligations to send subcontractor timely notice of claim and copy of complaint.

Reversed and remanded.

West Headnotes (7)

[1] Indemnity

— Notice in General

Indemnitee contractor had implied obligation to notify within a reasonable time indemnitor subcontractor of claim arising from subcontractor's roofing work, even absent express contractual provision requiring such notice.

6 Cases that cite this headnote

[2] Indemnity

— Notice in General

Indemnitee contractor had implied obligation to forward promptly to indemnitor subcontractor complaint in action arising from subcontractor's

roofing work, even absent an express contractual provision requiring such action.

2 Cases that cite this headnote

[3] Indemnity

— Notice in General

Indemnitee has implied obligation to allow indemnitor all reasonable opportunity to defend and indemnify, which may include giving timely notice of claim to indemnitor.

4 Cases that cite this headnote

[4] Indemnity

— Notice in General

Whether indemnitee has given indemnitor reasonable notice of claim against indemnitee depends upon circumstances of case.

3 Cases that cite this headnote

[5] Indemnity

— Requisites and Validity of Contracts

Indemnity provisions in construction contracts are valid.

1 Cases that cite this headnote

[6] Indemnity

— Notice in General

Indemnity

— Accrual of Liability

Indemnity

— Accrual of Duty to Defend

Indemnitor's obligations to defend and indemnify indemnitee are binding only if indemnitor receives reasonably timely notice of claim to be defended and indemnitee promptly forwards complaint to indemnitor

1 Cases that cite this headnote

[7] Indemnity

-- Notice in General

Indemnitee contractor could not enforce contractual provision requiring subcontractor to defend and indemnify contractor against claim arising from subcontractor's roofing work, where contractor gave subcontractor oral notice of the possibility of claim but subsequently failed to forward complaint to subcontractor until more than two years after actual service on contractor, during which time roofing in dispute had been redone by another contractor, preventing investigation by subcontractor, even though contract contained no express provision requiring notice.

3 Cases that cite this headnote

Attorneys and Law Firms

*1006 W. Eugene Rutledge and Kay S. Kelly of Rutledge, Fay & Kelly, Birmingham, for appellants.

Jerry O. Lorant and Charles J. Lorant of Jerry O. Lorant & Associates, Birmingham, for appellee

Opinion

SHORES, Justice.

This is an appeal from a judgment entered in a declaratory judgment action.

The single issue presented is whether a contractual undertaking to indemnify another requires that notice of a claim and notice of suit be given to the indemnifying party within a reasonable time where the contract is silent in this regard, and, if so, whether it was given in this case.

The material facts as found by the trial court follow:

Cochrane Roofing and Metal Co., Inc. (subcontractor), sought a declaratory judgment against Steven M. Priola, d/b/a Mark Construction Co., Inc. (contractor), H.S. Callahan (owner), and other defendants.

The contractor built a warehouse complex for the owner in 1970-71. The subcontractor by written contract agreed to furnish the materials and labor to install a twenty-year bond type built up roof. The subcontract contained the following indemnity provision:

"Indemnity Agreement: The Subcontractor covenants to indemnify and save harmless and exonerate the Contractor and the Owner of and from all liability, claims and demands for bodily injury and property damage arising out of the work undertaken by the Subcontractor, its Employees, Agents or its subcontractors, and arising out of any other operation no matter by whom performed for and on behalf of the subcontractor, whether or not due in whole or in part to conditions, acts, or omissions done or permitted by the Contractor or owner."

The subcontractor completed the roofing work under the contract in or about July 1971. Thereafter, between 1971 and 1973, under its two-year warranty, the subcontractor responded to complaints by the owner concerning the roof three or four times, at the request of the contractor. The contractor no longer called upon the subcontractor thereafter.

On July 21, 1980, the contractor telephoned W.M. Cochrane, president of Cochrane Roofing. Mr. Cochrane made a memorandum of the case, which was admitted in evidence. The subject matter of the conversation was the roof which Cochrane had completed nine years before:

"July 21, 1980, Steve Priola (Mark Const.) 324-6531. Called to say that he had been called by his bonding company. They said he was being sued by Finch Warehouse for one million dollars plus a hundred and fifty thousand dollars. They are claiming fraud, claiming that the roof was not a 20-year roof and was not installed properly.

Next

"Steve said he had been out several years ago to inspect the roof and found that some roof work was in progress. He said pouring tar over the gravel. He said he told whoever he was with that they should have called Cochrane Roofing-see M.C., (it says, I assume that means Cochrane Roofing) if they were having problems. Steve said he had not received anything formal about a suit, but that he would forward whatever he got

"He also asked that I go out and look at the roof. I said I would try to go out tomorrow. (22 July/Tuesday)"

It is undisputed that this conversation took place before the contractor was served with a complaint in a lawsuit filed against *1007 it by Callahan and others, the owners of the warehouse complex. That lawsuit was filed on July 9, 1980, against the contractor, USF & G (as surety on its construction bond), and two architects, claiming damages for breach of contract. The suit alleged that the roof of the building was improperly constructed. The contractor was served with the complaint on August 21, 1980.

Over two years later, on November 4, 1982, the attorney for the contractor, by letter, demanded that the subcontractor indemnify the contractor against any loss and assume the defense of the litigation, although the contractor had retained two separate law firms to represent it and had regularly paid bills submitted by those firms.

The subcontractor then filed this action for declaratory judgment, contending that it had no obligation to indemnify the contractor because the contractor had not given it notice of the suit in a timely manner, and contending that laches prevented the contractor from prevailing under the indemnity agreement. Alternatively, the subcontractor contended that the contractor had waived its rights under the indemnity provision of the contract by not notifying the subcontractor and by assuming the defense of the litigation and not forwarding a copy of the complaint to the subcontractor until more than two years had passed and the roof, the subject of the suit, had been re-covered by another contractor, preventing the subcontractor from investigating the problem.

The trial court held that even though the contractor never provided the subcontractor with a copy of the complaint until the letter of November 4, 1982, the indemnity provision required the subcontractor to assume defense of the litigation and to indemnify and save harmless the contractor. Because this holding is contrary to the law applicable to these facts, we reverse and remand.

[1] [2] Although the contract here does not contain a specific requirement that the contractor give notice to the subcontractor of a suit which the subcontractor agrees to defend and as to which the subcontractor agrees to save harmless the contractor, it goes without saying that notice is a prerequisite to performance by the subcontractor. The law implies an obligation on each party to a contract to allow the opposite party all reasonable opportunity to perform his undertaking. 3 S. Williston, *A Treatise on the Law of Contracts*, § 887B (rev. ed. 1936). Under the facts in this case, the law would imply an obligation to notify the indemnitor within a reasonable time of a claim against the indemnitee, and certainly it would require the prompt forwarding of the complaint if the indemnitor is to be required to furnish a defense of it.

[3] [4] A case from the Supreme Court of Connecticut is persuasive on very similar facts, and its holding is consistent with Alabama law. We, therefore, adopt the reasoning of that Court as expressed in *Town of Fairfield v. D'Addario*, 149 Conn. 358, 179 A.2d 826 (1962):

"The agreement contains no specific language requiring the town [indemnitee] to give D'Addario [indemnitor] notice of any action brought against it which it might claim arose out of the contract. But the parties could not have contemplated otherwise than that such notice would be given. The construction of the sewerage system was a broad undertaking necessitating the disturbance of highways for which the town was responsible. If the town was to have the full measure of protection which the indemnity provision afforded and D'Addario was to have the opportunity of effectively discharging his part of the obligation, notice to him was indispensable. Conditions upon which the right to require performance of a contract obligation depends may often be implied where not to do so would defeat the clear intention of the parties and the object of the

contract.' *Rifkin v. Safenovitz*, 131 Conn. 411, 415, 40 A.2d 188 [190]; *Leventhal v. [town of] Stratford*, 121 Conn. 290, 295, 184 A. 587; *1008 *Rockwell v. New Departure Mfg. Co.*, 102 Conn. 255, 286, 128 A. 302. The circumstances under which the contract was made, as well as all the other provisions of the contract, are determinative factors in ascertaining intent. *Avco Mfg. Corporation v. Connelly*, 145 Conn. 161, 169, 140 A.2d 479; *United Aircraft Corporation v. O'Connor*, 141 Conn. 530, 538, 107 A.2d 398; *Colonial Discount Co. v. Avon Motors, Inc.*, 137 Conn. 196, 200, 75 A.2d 507. The indemnity provision of this contract contemplated that suits might be brought against the town for highway defects which it could claim were caused by D'Addario. The town would have peculiar knowledge of these suits and therefore was obligated to notify D'Addario of them. It can be fairly implied that the giving of reasonable notice was a condition precedent to D'Addario's duty to defend and indemnify. 3 Williston, Contracts (Rev.Ed.) § 887B. Furthermore, when a party to a contract assumes an express obligation to do certain things in this case, to defend and indemnify the plaintiff—the law implies a corresponding obligation on the other party to allow him all reasonable opportunity to perform. *Rockwell v. New Departure Mfg. Co.*, supra; 3 Williston, op. cit., p. 1956; Restatement, 2 Contracts § 395, comment c. The cooperation required may be, as in the instant case, the giving of timely notice. 3A Corbin, Contracts, p. 386; 3 Williston, op. cit. § 887B.

"Kant sued the town on May 12, 1953. The town failed to inform D'Addario of the suit until January 22, 1956. He was entitled to employ his own counsel to investigate the facts and prepare his defense. He was not, as the town claims, required to accept a report, made to it three years before, of an investigation by its police department. An independent investigation by D'Addario three years after the occurrence would have been of little, if any, use in the defense against Kant's claims as to either liability or damages. The notice

of Kant's action came altogether too late to be called reasonable. That term is a relative one. Its meaning is affected by the circumstances under which it is called into use. *E.M. Loew's Enterprises, Inc. v. Surabian*, 146 Conn. 608, 612, 153 A.2d 463. The notice was not timely in this case. The court did not err in rendering judgment for D'Addario." (Emphasis added.)

149 Conn. at 361-63, 179 A.2d at 828-29.

[5] [6] [7] We have held that indemnity provisions in construction contracts are valid in Alabama, *Industrial File, Inc. v. Stewart*, 388 So.2d 171 (Ala.1980), and we do not retreat from that holding. However, we also hold that to be binding on the party agreeing to indemnify and save harmless the other party, he must receive notice of a claim which he must defend, for only in this way can he investigate the claim and prepare his defense. He must also be promptly forwarded a copy of the complaint once it is served upon the indemnitee. Here the complaint was not forwarded to the subcontractor for over two years. The contractor retained counsel of its choice, who prepared a defense without consulting with the indemnitor/subcontractor. Now, at this late date, it calls upon the indemnitor to pay the lawyer of the contractor's choice and to save harmless the contractor. Having failed to perform its part of the bargain, the contractor cannot now compel performance by the subcontractor.

The judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

TORBERT, C.J., and MADDOX, JONES and BEATTY, JJ., concur.

End of Document

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