THE STATE OF SOUTH CAROLINA
In the Court of Appeals

22405

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

Appellate Case No.: 2015-001238

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

v.

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

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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,	**MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**
JOSEPH NACCARI, INDIVIDUALLY, AND D/B/A MASTERFRAMERS, Third-Party Plaintiff, -versus- JAIME ARREGUIN D/B/A MAYA CONSTRUCTION, Third-Party Defendant.	

Plaintiff D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc., ("DRH"), by and through its undersigned attorneys, respectfully submits this memorandum of law in opposition to Defendants Builders FirstSource - Southeast Group, LLC and Builders FirstSource, Inc. motion for summary judgment. DRH hereby incorporates its motion for relief under Rule 60(b) as further support against summary judgment. The bases for this opposition is that: (1) DRH is entitled to an order providing relief from the Court's order filed on May 2, 2014, granting BFS

partial summary judgment based on new case law; (2) DRH has not waived any rights under the contract because there is no requirement that DRH includes BFS in any arbitration involving a homeowner; (3) BFS documents indicate that there were issues related with their scope of work which indicate that they were negligent in the scope of work; and (4) DRH's damages are well documented through the arbitration award and the summary of DRH's defense costs associated with the underlying action.

BACKGROUND

A. Construction of Residence

In 2001, DRH undertook contractual duties for the construction of a single family dwelling located at 403 Milner Court, Charleston, South Carolina 29492 (the "Residence"). See Exhibit A – Home Purchase Agreement. DRH contracted with BFS to perform, in compliance with the terms of its contract, certain aspects of the construction of the Residence. See Exhibit B – Independent Contractor Agreement ("Contract").

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

> 11. Contractor's Indemnity and Waiver.
>
> To the **fullest extent permitted by law**, [BFS] hereby agrees to . . . defend, **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**, [DRH], or any third party . . . on account of . . . **damage to . . . property** (including the loss of use thereof) . . . in **any way occurring**, incident

> to, **arising out of**, or **in connection** with . . . (I) a breach of the warranties, representations, obligations, and covenants provided herein by [BFS]; (II) **the Work performed or to be performed by [BFS] or [BFS]'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 [BFS] 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.

B. Underlying Lawsuit

In June 2008, DRH was named as the sole defendant in a construction defect lawsuit, captioned as Patricia Clark v. DRH, Inc., 2008-CP-08-1633 ("Underlying Action"), wherein Clark asserted and claimed DRH was negligent in the construction of the Residence. See Exhibit C. The complaint in the Underlying Action specifically plead that DRH was negligent "[i]n constructing . . . subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices;" [i]n improperly installing . . exterior wall system;" "[i]n failing to properly install rough opening flashing;" and [i]n failing to properly install the framing.;" Id. at ¶¶ 9, 14.

DRH answered the complaint in the Underlying Action, and the Underlying Action was ultimately arbitrated pursuant to the contract between Clark and DRH where in Clark was awarded $150,000 in damages. See Exhibit D – Order. The award was entered into the judgment roll of Berkeley County, and was subsequently satisfied by DRH. See Exhibit E – Satisfaction. Furthermore, DRH incurred attorney fees related to the defense of this action. The attached breakdown of attorney fees has been produced in this action. See Exhibit F – DRH's Fees and Costs.

C. Case Sub Justice

DRH filed this action seeking to recover from BFS through a claim of contractual indemnification pursuant to the Contract between DRH and BFS for the arbitration award plus costs and attorney fees associated with the defense of the Underlying Action. In the alternative, DRH further asserted a claim for contribution for the arbitration award.

BFS's 30(b)(6) witness testified that the Contract provided and set for the obligations of BFS during the construction of the Residence. Depo. of Terry Rosamond 142:25 - 143:11. BFS's 30(b)(6) witness testified that the Contract was the type of contract BFS typically signs when BFS does install work. Id. 145:8 - 145:11. BFS's 30(b)(6) witness further testified that BFS have agreements similar to the Contract with a lot of builders and "its **all handled** through our legal department." Id. 144:7 - 144:23 (emphasis added). BFS has employees that are designated by the legal department as having the authority to execute these type of contracts. Id.

BFS's 30(b)(6) witness agreed that the lawsuit, Clark v. D.R. Horton, was a lawsuit by a homeowner, and that it was a "claim, cause of action and a suit," wherein homeowner was "alleging damages connected to or arising out of Builders FirstSource's work." Id. 161:24 - 161:12.

BFS further identified Scott Coffman, P.E. in discovery responses as a witness and noting that "Mr. Coffman was Director of Engineering for BFS," and that "During 2007, Mr. Coffman performed an analysis of the roof trusses at 403 Milner Court, Daniel Island, South Carolina," and that "as a result of his analysis, Mr. Coffman produced a letter dated October 2, 2007." See Exhibit G (BFS' Answer to Plaintiff's Interrogatories, No. 1). Attach as Exhibit H is a copy of Mr. Coffman's letter that was produced by BFS which states that there are three issues which he inspected at 403 Milner Court based on communications with Gifford Shaw which includes noting

that the roof trusses were incorrectly fabricated.

BFS also identified Gifford Shaw as a witness in discovery responses and noted that he "participated in the investigation of this matter on behalf of BFS." See Exhibit G (BFS's Answers to Plaintiff's Interrogatories, No. 1).

BFS also produced was an e-mail dated September 24, 2007, from Gifford Shaw to Bill Crabtree, Larry Wozniak, Randy Thomason, and others which identifies some of the issues that were present at 403 Milner Court including notations that: (1) two sets of trusses and lateral bracing were not installed; (2) dips in the second level floor is out of code; (3) a suspicion that there is a lack of support under a beam; (4) dips in the floor on the first floor which are probably out of code and resulting from a deflected load from a beam. See Exhibit I.

BFS also identified Bill Crabtree, Larry Wozniak, and Randy Thomason as witnesses in their discovery responses. See Exhibit G (BFS' Answer to Plaintiff's Interrogatories, No. 1). BFS further indicated in discovery that Bill Crabtree was BFS Installed Sales Manager for the Charleston market, Larry Wozniak was BFS Market Manager, and that Randy Thomason "participated in the investigation of this matter on behalf of BFS." See Exhibit G (BFS's Answers to Plaintiff's Interrogatories, No. 1).

The attached e-mail from Gifford Shaw to the other BFS employees dated September 24, 2007, provides recommendations to address concerns with the roof issues, second floor issues, wall sheetrock cracks, and first floor issues at 403 Milner Court. On each of this issues, Mr. Shaw indicates there are problems with the construction and/design, and recommend each of these issues be corrected or fixed. See Exhibit I.

BFS moved for summary judgment asserting various grounds in support. One of the basis

asserted by BFS was that the indemnification provision violated S.C. Code Ann. Section 32-2-10. BFS stated in their memorandum in support that "[t]his indemnification agreement purports to require BFS to indemnify DRH for DRH's own negligence acts or omissions 'even when the loss is caused by the fault or negligence of' DRH." BFS argued that the indemnification provision was unenforceable under Section 32-2-10.

The Court issued an form 4 order denying BFS motion for summary judgment, and BFS moved to reconsider. In response to BFS's motion to reconsider, the Court issued an order filed on May 2, 2014, granting BFS partial summary judgment. Exhibit J. In this order, 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." Id. at ¶ 17. The Court also included in its conclusions of law that "[i]t is undisputed that some of the allegations in the Homeowners's Suit related to work performed by BFS and other allegations in the Homeowner's Suit were related to the work of others." Id. at ¶ 18. And, furthermore, the Court included in its conclusions of law that "[t]he plain reading of the indemnify 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 the indemnity with regard to any portion of the Judgment, attorney's fees or costs associated with the work or fault of others." Id. at ¶ 20.

BFS asserts that its entitled to summary judgment because of a lack of reasoning for the arbitration award. However, under the terms of the indemnification provision, and under South Carolina case law, DRH is not required to prove what portions of the arbitration award are associated

with BFS's work. Rather the indemnification provision provides that BFS will indemnify DRH for all suits connected with BFS's work. The underlying action is a suit filed by the homeowner. The suit includes claims associated with BFS's work and thus is connected with the BFS's work.

The Supreme Court of South Carolina issued a new opinion on July 23, 2014, which provides support for the claim for contractual indemnification being asserted by Plaintiff against Builders FirstSource. In Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 2013-001766, 2014 WL 3610951 (S.C. 2014), the Supreme Court addresses the "negligence rule," and whether it applies in a particular case involving CERCLA liability. In their opinion, the Court states that "[w]e have long recognized "that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." Id. (citing Laurens Emergency Med. Specialists, PA v. M.S. Baily & Sons Bankers, 355 S.C. 104, 111, 584 S.E 2d 375, 379 (2003). They noted that the basis for this "negligence rule" is that "barring indemnification when the indemnitee is at fault for the damages serves to deter negligent conduct in the future, for the indemnitee will know that the indemnification agreement will not save it from liability if it fails to act with due care. Id. (citing Murray v. Texas Co., 172 S.C. 399, 402, 174 S.E. 231, 232 (1934).

In their opinion the Supreme Court further noted that they "have declined to apply the negligence rule to bar indemnification, even in the context of a negligence action, when application of the rule would have no deterrent value." Id. (citing S.C. Elec. & Gas Co. v. Utils. Constr. Co., 244 S.C. 79, 82-90, 135 S.E.2d 613, 614-19 (1964) (rejecting an independent contractor's attempt to invoke the negligence rule where "the only negligence chargeable to the [indemnitee] ... was the negligence of the [indemnitor-independent contractor] itself," for the application of the negligence

bar to indemnification under the circumstances would not further the purpose of the negligence rule barring indemnification)).

The Supreme Court ultimately found that the "negligence rule" should not bar enforcement of the indemnity provision, and noted that "[s]uch a finding comports with our longstanding regard for parties' freedom to contract. Id. (citing Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) ("[P]eople should be free to contract as they choose."). "While the freedom to contract is not without limitation, '[s]trong policy considerations .. generally permit business owners to allocate risk amongst themselves as they see fit.'" Id. (citing Constable v. Northglenn, LLC, 248 P.3d 714, 718 (Colo.2011)). "An indemnity agreement is an ideal method for businesses to allocate costs and expenses that may arise in future litigation. Indeed, the parties to the 1966 agreement were sophisticated business entities that engaged in an arms-length purchase agreement and chose to include an indemnity provision in the contract." The Supreme Court ultimately state that "[w]e find no basis to invoke the negligence rule to trump the plain language of the indemnity agreement."

BFS also argues that they are entitle to summary judgment because DRH waived its rights to pursue claims for indemnification and contribution. Their argument asserts that their contract requires that DRH include BFS in arbitrations with homeowners; however, this is not an accurate. The contract does state that "[BFS] agrees to participate in, and be bound by, any arbitration proceeding between [DRH] and any third-party related to BFS's work." This does not state DRH agrees to include BFS in arbitrations with third-parties. Instead this language establishes that BFS agrees to be bound by any arbitration involving DRH and third-parties related to BFS's work. The arbitration of the Underlying Action was related to BFS's work, and

therefore, BFS is bound by the arbitration.

BFS further argues that because there is no verdict, judgment or award based on tort liability, DRH is estopped from bringing an independent action to determine the legal basis of the award in the Underlying Action. This argument is without merit. Indemnification is available regardless of the types of causes of action asserted, as long as the allegations involve BFS's work.

As noted by BFS, the South Carolina Uniform Contribution Among Tortfeasors Act must be strictly construed; however, the statute does not provide that a court cannot make a determination as to whether a defendant is a joint tortfeasor or not. In fact, one of the requirements is that the defendant in a contribution claim, must be a joint tortfeasor.

The BFS documents produced by BFS clearly indicate that BFS (or its sub) preformed negligent work. BFS identified several fact witness as employees that participated in the investigation of claims related to their work, and several of these witness prepared documents which admit that at least some of BFS's work needed repairs and/or was out of code. So, there is evidence that BFS was a joint tortfeasor.

And finally, BFS argues that the damages are speculative. However, DRH has produced a the arbitration award and satisfaction of the award, and a summary of attorneys fees and costs associated with the Underlying Action. These damages are not speculative, and are documented.

Based on the foregoing arguments and authorities, the Defendant D.R. Horton, Inc. respectfully requests that this Honorable Court deny BFS's motion for summary judgment.

Dated this 13 day of August 2014.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.

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Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

The undersigned employee of WALL TEMPLETON & HALDRUP, P.A. hereby certifies that on this 3rd day of August 2014 she served a copy of **MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** via hand delivery:

ADDRESSEE(S)

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Kristyn Lynne Robertson

FILED
2014 AUG 13 AM 10:40
JULIE J. ARMSTRONG
CLERK OF COURT
BY

EXHIBIT "A"

HOME PURCHASE AGREEMENT

GENERAL TERMS AND CONDITIONS

D. R. Horton, Inc.
Purchase Agreement

THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION
PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT

2-3-02

RTIES. D.R. Horton, Inc., ("Seller") agrees to sell to Patricia Clark ("Purchaser") and Purchaser agrees to buy that tract or parcel of land, with such improvements as are located thereon, described as follows:

tract of land being known as (Address) 463 Marble St. (MLS# __________), being more particularly ed as Lot 1 D Phase ____ of Cochran Park subdivision, as depicted in the plat recorded in Plat Book ____ in the Register of Deeds Office for Charleston/Dorchester/Berkley County, South Carolina, together with all lighting fixtures l thereto, all electrical, mechanical, plumbing, air-conditioning, and any other systems or fixtures as are attached thereto and now a reof, together with all the improvements thereon and all appurtenances thereto (the "Property"). The full legal description of the y is as stated on the Plat referenced above. The conveyance shall be subject to all easements and restrictions of record on the Date.

JRCHASE PRICE AND METHOD OF PAYMENT. The Purchase Price of the Property shall be: $149,990 to be paid as forth in subparagraph b(1) 1 below:

ll Cash at Closing (No financing contingency). Purchaser to pay all usual and customary closing costs. If an appraisal is desired, urchaser is responsible for requesting from a licensed appraiser. If this subparagraph is checked, subparagraph 2(b) shall not apply.

Vhere New Loan Is to Be Obtained:

Purchaser shall obtain a loan in the principal amount of 95 % of the Purchase Price (reduced to the next lowest hundred dollars) to be secured by a first priority mortgage on the Property; said loan to be paid in consecutive monthly installments of principal and interest of a term of not less than 30 years. This loan shall be a:

X (1) Conventional Loan, with a market interest rate, as of the Closing Date.

( ) (2) Adjustable Rate Mortgage ("ARM") Loan, with an initial interest rate of not more than market interest rate as of the Closing Date. The interest rate payable to lender by Purchaser may increase or decrease according to the terms of said loan, and as a result the monthly installments of principal and interest payable by Purchaser may increase or decrease.

( ) (3) FHA or VA Loan, see FHA/VA AMENDATORY STATEMENT, which is attached to this Agreement and the terms are incorporated into this Agreement.

( ) (4) Other: ....

Provided that Purchaser obtains a first mortgage loan through Seller's approved lender and Seller's closing agent Dodds & Hennessy, P.A., Seller shall contribute up to $7499 towards Purchaser's closing costs, including statutory recording fees, surveys, lender's attorney's fees, and any other costs required by Seller's approved lender and closing agent. Purchaser is responsible for any remaining closing costs including but not limited to prepaids, discount points, buydowns, subsidies, lock-in fees and any other fees used to control the interest rate. The total amount of closing costs paid by the seller for the buyer, which would also include any fees which buyer is prohibited from paying by the Veterans Administration, Department of Housing or Regulatory Agencies.

Private Mortgage Insurance Premiums, if required by the lender, shall be paid by Purchaser, in cash at Closing or through monthly payments, as may be required by the lender.

Purchaser shall apply for this loan within seven (7) business days from date of acceptance of this Agreement and pursue the application diligently and in good faith. Purchaser shall be presumed to have satisfied this condition and obtain loan approval unless Purchaser notifies Seller within thirty (30) days of the date of acceptance in writing that Purchaser has not been able to obtain the loan referred to in this Section. In the event Purchaser timely notifies Seller of its failure to obtain loan approval, Seller shall have the right to contact Purchaser's lender to determine the status of Purchaser's loan application and loan approval. If Seller determines, in it's sole discretion, that Purchaser failed to diligently and in good faith pursue its loan application, Seller shall terminate this Agreement following seven (7) days written notice to Purchaser, retain Purchaser's Earnest Money as full liquidated damages, and thereafter neither party shall have any further obligation to the other. If Seller determines, in its sole discretion, that Purchaser diligently and in good faith pursued its loan application, Seller shall terminate this Agreement following seven (7) days written notice to Purchaser and shall return Purchaser's Earnest Money as a condition to the termination. Within thirty (30) days, Purchaser agrees to provide Seller with a letter from Purchaser's lender confirming that Purchaser has been approved for the loan referred to in this Section. Purchaser agrees to execute all papers and perform all other actions necessary to obtain this loan and to accept such a Loan if approved by lender. Purchaser shall, in addition to the payment of principal and interest upon said loan, pay at Closing such amounts as may be required by the lender to establish or maintain an escrow for insurance, property taxes or private mortgage insurance. Unless specifically disclosed in writing in this Agreement, Purchaser warrants that this agreement is not contingent upon the sale or closing of other property owned by Purchaser and that, at the time of

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MAY 03 2002
BY

Purchaser Clark Community Camel Phase ___ Lot 1 D

Initials P P

GENERAL TERMS AND CONDITIONS

Closing, Purchaser will have sufficient cash available (together with the loan referred to above) to complete the purchase and shall immediately disclose to Listing Broker the name(s) of the lender(s) with which the Purchaser has applied.

Purchaser acknowledges that there are many different loan programs available from many different lenders which might fit the description of the loan described above. Any loan with terms consistent with those described above shall satisfy the loan requirements of this Section. If the loan obtained by Purchaser contains any contingencies, Seller may require the satisfaction of those contingencies within the thirty (30) day time period specified in this Agreement for obtaining the loan approval and terminate this Agreement if those contingencies are not waived or satisfied.

Purchaser may apply for a loan with different terms and conditions and close the transaction provided: (a) all other terms and conditions of this Agreement are fulfilled; and (b) the new loan does not increase the closing costs charged to Seller or delay the Closing. Purchaser shall be obligated to close this transaction if Purchaser qualifies for a loan with terms described in the above Section or in this Section.

The proceeds of the loan, together with the balance of the Purchase Price, shall be paid to Seller, in cash or its equivalent, by Purchaser at Closing.

We acknowledge and agree that our financial situation may affect our ability to obtain a loan and/or purchase this property. We further acknowledge and agree that it is important for the seller to know our financial situation and our ability to obtain financing. In consideration for the seller entering into this agreement, we do hereby grant permission for the seller to contact any mortgage company or financial institution to which we may apply for a loan and discuss our financial situation and the likelihood of obtaining a loan. We further authorize CH Mortgage Company, or any other mortgage company or financial institution from which we may seek a loan, to discuss our financial status with the seller and to provide the seller with any documentation supporting our financial status.

EARNEST MONEY.

Deposit. Purchaser has paid to Seller $ 5000 ("Earnest Money") by check or money order made payable to D.R. Horton receipt of which is acknowledged by Seller. The parties agree that the Earnest Money is to be deposited in Seller's trust account upon acceptance of this Agreement by Seller. The parties agree that the Earnest Money shall be applied as a credit at Closing, unless otherwise provided by this Agreement.

Disbursement. The Earnest Money shall be retained by Seller except: (1) upon failure of loan approval during the thirty (30) days following acceptance of this Agreement, the Earnest Money shall be disbursed to Purchaser, unless Seller determines that Purchaser did not diligently and in good faith pursue its loan application as set forth in Section 2; and (2) as otherwise specifically set out in this Agreement. If any dispute arises between Purchaser and Seller as to the final disposition of all or part of the Earnest Money, Seller may, but is not required to, interplead all or any disputed part of the Earnest Money into court. Purchaser and Seller agree that if Seller interpleads the Earnest Money into court, Seller shall be entitled to recover the costs of such interpleader, including reasonable attorney's fees and expenses incurred in connection with the interpleader, from the Earnest Money. If Seller decides not to interplead, Seller may make a disbursal of the Earnest Money upon a reasonable interpretation of this Agreement. It may take up to thirty (30) business days for Earnest Money to be refunded.

Liquidated Damages. The parties agree that if this transaction fails to close for any reason except for those matters specified in 3(b) above, the amount of damages suffered by Seller would be difficult to determine and Seller shall be entitled to retain the Earnest Money as a reasonable estimate of Seller's damages.

WARRANTY OF TITLE. Seller agrees to convey good and marketable fee simple title to the Property to Purchaser at Closing by special limited warranty deed, subject only to: (a) zoning ordinances affecting said Property; (b) general utility, drainage and other easements of record upon which the dwelling does not encroach; (c) subdivision easements and restrictions of record; (d) subdivision covenants, conditions and restrictions; (e) matters shown on the final plat for the subdivision where the Property is located, as of the Closing Date; and (f) any other matters specified in this Agreement. "Marketable Title" shall mean title which a title insurance company licensed to do business in South Carolina will insure at its regular rates, subject only to standard exceptions.

TITLE EXAMINATION. Purchaser shall have a reasonable time after acceptance of this Agreement to examine title and to furnish Seller with a written statement of objections affecting the marketability of said title. If Seller cannot satisfy Purchaser's valid objections within a reasonable time, Purchaser shall have the right to terminate this Agreement and receive a refund of the Earnest Money. If Seller is contributing to Purchaser's closing costs pursuant to subparagraph 2(b) above, Seller will cause a title report to be prepared and delivered to the lender making the mortgage loan to Purchaser. At Closing, Seller shall cause its closing agent to issue the lender a title insurance commitment and subsequent lender's title insurance policy.

DESTRUCTION. If the home built on the Property is either totally destroyed or substantially damaged before Closing, either party may terminate this Agreement by written notice to the other within ten (10) days of the date of such casualty.

CONDITION OF THE PROPERTY. The Property shall be completed in accordance with all applicable governmental regulations, ordinances and codes. A certificate of occupancy shall be proof of compliance with this requirement.

INSPECTION. At the appropriate stage of construction, Seller shall cause the appropriate utility services to be operational so that Purchaser may complete Purchaser's inspections under this Agreement. Purchaser or Purchaser's agents or representatives, at Purchaser's expense and at reasonable times during normal business hours, shall have the right to enter upon the Property for the

Buyer: Mark Community: Daniel Phase ___ Lot: 160 Initials

Depo Ex. #6

HOME PURCHASE AGREEMENT

Date: Page: 3 of 7

GENERAL TERMS AND CONDITIONS

purpose of inspecting, examining, testing, and surveying the Property. Such inspection shall only be with prior notice to Seller at such times, as Seller shall reasonably permit.

Purchaser shall have the privilege of inspecting the Property with Seller or Seller's representative immediately prior to Closing. Seller's obligation to complete any "punch list" items which it has agreed to complete shall survive Closing. Seller shall not be obligated to complete any items from a private inspection other than through the procedures in this Section; Seller is obligated to complete only those items it has agreed to correct in writing.

Should Purchaser choose to conduct an independent professional inspection of the Property prior to Closing, Purchaser will contact Seller at least seven (7) business days prior to that inspection for an appointment with Seller's agent who must accompany Purchaser or Purchaser's inspector. Purchaser shall cause Purchaser's inspector to furnish Seller with proof that Purchaser's inspector has a $100,000 General Liability Insurance Policy which names Seller as additional insured prior to site inspection, a copy of the inspector's business license, and if applicable, a copy of inspector's State license certificate. Seller is only required to complete items on the inspector's list that is a violation of the building code, RWC guidelines, outline specifications, or performance specifications as outlined in, "Foundations" warranty guide.

Purchaser assumes all responsibility for the acts of Purchaser, Purchaser's agents or representatives in exercising Purchaser's rights under this Section, and Purchaser hereby indemnifies Seller from any loss or expense it may suffer for any claim which arises directly or indirectly from a breach of this Section.

9. RESPONSIBILITY TO COOPERATE. Seller and Purchaser agree to sign at Closing such papers as may be necessary to carry out the terms of this Agreement.

10. REAL ESTATE BROKER AND COMMISSION. Purchaser represents there are no co-brokers or Purchaser's agents ("Co-Broker") except Mike Szews, Agent Coldwell who represents Purchaser. (Note: Commission to Broker and Co-Broker to be handled by separate document to be presented simultaneously with this Agreement).

11. DISCLAIMER. Seller and Purchaser acknowledge that they have not relied upon the advice or representations, if any, of Seller, Broker, or their associated salespersons relative to the legal and tax consequences of this Agreement, the terms and conditions of financing, and other such matters. Purchaser acknowledges that if such matters have been of concern to Purchaser, they have sought and obtained independent advice relative thereto.

12. WOOD INFESTATION REPORT. At the time of Closing, Seller shall provide Purchaser with a soil treatment report from a pest control company licensed in the South Carolina stating that the Property has been treated for subterranean termite infestation within one (1) year of the Closing. If required by Purchaser's lender, Purchaser may obtain at its expense a South Carolina Wood Infestation Report performed by a South Carolina, licensed pest-inspection company. In the event such Wood Infestation Report identifies any wood infestation, or recommends that repairs be made to the Property, Seller shall either: (1) eliminate such infestation and complete such repairs prior to Closing, or (2) escrow funds sufficient to eliminate such infestation and complete such repairs following Closing.

13. TESTING. Purchaser acknowledges that Seller has made no tests or surveys of the Property or its the improvements and makes no representation or warranty with respect to toxic waste, radon, hazardous materials or unsealable substances and specifically excludes these matters from any warranties given under this Agreement.

14. WARRANTIES AND DISPUTE RESOLUTION.

a. Structural Warranty. At Closing, Seller shall execute and deliver to Purchaser at no additional cost a warranty from Residential Warranty Corporation ("RWC") or such other national warranty provider as Seller may reasonably elect (the "RWC Warranty"). This RWC Warranty will provide, at a minimum, a ten (10) year structural warranty. The RWC Warranty referred to in this paragraph is the only warranty being made by Seller, except for such warranties which may not be disclaimed by State or Federal law. In addition, Seller hereby assigns to Purchaser all warranties, expressed or implied, which arise or are given by the manufacturer of any product installed in the home built on the Property.

b. RWC Warranty. Purchaser has been, or will be prior to Closing, provided with a copy of the RWC Warranty book on the Ten Year Limited Warranty which is administered by Residential Warranty Corporation. Validation of the RWC Warranty is conditioned upon Seller's compliance with all RWC's enrollment procedures and upon Seller remaining in good standing in the RWC Program.

c. Purchaser understands and agrees that if this RWC Warranty is validated, it is provided by Seller in lieu of all other warranties, verbal agreements or representations; and Seller makes no warranty, express or implied, as to quality, fitness for a particular purpose, merchantability, habitability or otherwise, except as is expressly set forth in the Program or as otherwise required by Federal or State law. Purchaser understands and agrees that the warranties of all appliances and other consumer products installed in the home are those of the manufacturer or supplier and same are assigned to Purchaser, effective on the date of Closing. In any event, Seller shall not be liable for any personal injury or other consequential or secondary damages and/or losses which may arise from or out of any and all defects. Except for purchasers of FHA or VA financed homes, Purchaser acknowledges and understands that the RWC Warranty includes a provision requiring all disputes that arise under the RWC Warranty to be submitted to binding arbitration. Purchaser has been, or will be given prior to Closing, provided with a copy of the D. R. Horton Warranty manual, "Foundations". Purchaser understands and agrees to all warranties to their extent as outlined in said manual.

d. Exclusions. The following are excluded from all warranties provided by Seller: (i) those matters excluded in the RWC Warranty documents; (ii) those matters excluded in sub-paragraph (f) below, and (iii) the following matters:

Purchaser: Clark Community: David Phase 1e Dr. Initials

GENERAL TERMS AND CONDITIONS

Landscaping, including trees, shrubs, grass and flowers are not covered by any warranty. All grading, fill, landscaping, disposition of trees and control of water flow shall be constructed and maintained at the sole discretion of Seller prior to Closing. Many areas will be left in their natural state and will not be landscaped in any way. As of the date and time of the Closing, Seller shall have no further responsibility for soil erosion, the growth of grass, death of trees, grass or shrubbery, or soil conditions. Seller is not liable for trees or shrubs, or damage or destruction to same. Seller makes no warranty whatsoever as to the type, location or amount of trees which will exist on the Property after construction. Seller will plant grass seeds or install sod, as the case may be, as part of its construction. Because the growth of grass seeds and the health of sod is dependent on Purchaser's care and maintenance, no warranty is provided and all grass is installed "as-is". Because prevention of erosion is dependent on Purchaser's proper maintenance of the grass and sod, Seller provides no warranty for erosion. Purchaser's closing of the sale constitutes an acceptance of Seller's drainage and erosion controls for the Property, except for matters noted on Purchaser's "Punch list". Seller shall not be responsible for the correction of any leakage or seepage caused by (i) damaged water pipes or mains, (ii) alteration of the landscaping by a party other than Seller (specifically including, without limitation, any changes which cause water to flow toward the dwelling), or (iii) prolonged direction of water against the outside foundation wall from a spigot, sprinkler, hose or improperly maintained gutters or down spouts. Seller will not warrant any cosmetic defect post-closing unless this condition is listed on the "punch list" prior to Closing. Examples of "cosmetic defects" include sheetrock dings, dimples and nail pops, paint discoloration, chips or irregularities in marble, Formica, or tile. Unless a defect is noted on the "punch list", Seller does not warrant the installation or the quality of any carpet or flooring product (however, note that Seller assigns the manufacturer warranties to Purchaser at Closing).

Mandatory Binding Arbitration. Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement; (3) Seller's performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which Purchaser and Seller agree to arbitrate.

1) If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to Purchaser shall control.

2) If the arbitration arises out of any claim other than a claim under the RWC Warranty, then the arbitration shall be conducted in Charleston/Dorchester/Berkley County, South Carolina. The arbitration shall be conducted by the American Arbitration Association, and to the extent possible, the proceeding shall be conducted under rules which provide for an expedited hearing. The filing fee for such arbitration shall be paid by the party filing the arbitration demand, but the arbitrator shall have the right to assess or allocate the filing fees and any other costs of the arbitration as a part of the arbitrator's final order. The arbitration referred to in this paragraph shall be binding and any party shall have the right to seek judicial enforcement of the arbitration award.

Purchaser Initial(s): N ____________ Seller Initial: P

In addition to the rights and obligations of each party specified in subparagraphs (a) - (d) above, in the event that a bona fide dispute should arise between Purchaser and Seller prior to the Closing Date, and such dispute cannot in good faith be resolved completely and to the mutual satisfaction of all parties within ten (10) days after the beginning of the dispute, then Seller shall have the right, upon written notice to Purchaser, to terminate this Agreement and return the Earnest Money to Purchaser, and no cause of action shall accrue on behalf of Purchaser because of such termination.

Limitation of Liability. EXCEPT FOR THE RWC WARRANTY, AND EXCEPT FOR THE TITLE WARRANTIES SPECIFIED IN PARAGRAPH 4 ABOVE, AND EXCEPT FOR ANY WARRANTIES IMPOSED BY LAW WHICH CANNOT BE DISCLAIMED, SELLER MAKES NO OTHER WARRANTY OF ANY KIND, ALL SUCH OTHER WARRANTIES ARE HEREBY DISCLAIMED BY SELLER. SELLER MAKES NO WARRANTY AS TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, EITHER EXPRESSED OR IMPLIED. THE EXCLUSIVE REMEDY FOR ANY DEFECT OR ANY ITEM OR CLAIMED DEFECT IN THE HOME IS BY WRITTEN NOTIFICATION PRIOR TO THE EXPIRATION OF THE WARRANTY PERIOD. SELLER'S OBLIGATION SHALL BE THE CORRECTION OF SUCH DEFECT BY REPAIR OR REPLACEMENT, IN ITS DISCRETION. NO SUCH ACTIONS TAKEN BY SELLER TO REPAIR OR REPLACE A DEFECT SHALL EXTEND THE WARRANTY PERIOD. SELLER SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.

Requests for warranty service must be in writing and faxed, mailed, or delivered to Seller at Seller's address as indicated below Seller's signature on this Agreement. Verbal requests to Seller's staff are not acceptable.

RVIVAL OF AGREEMENT. Any condition or stipulation not fulfilled at time of Closing shall survive the Closing, execution and livery of the Warranty Deed until such conditions or stipulations are fulfilled. (Closing Attorney is directed to transfer this paragraph the closing statement.)

OSING. Seller shall set closing date and notify Purchaser a minimum of (30) thirty days prior to that date. If Purchaser es not close on the set closing date, Seller at its sole discretion shall have the right to fine Purchaser up to $250 per day.

ller shall grant possession of the Property to Purchaser at time of Closing. Purchaser agrees to transfer utilities into Purchaser's name thin three (3) business days after Closing. Punch List items shall not delay the Closing. Purchaser shall not move its goods or operty onto the Property prior to Closing. Real estate taxes on the Property for the calendar year in which the sale is closed shall be

HOME PURCHASE AGREEMENT

GENERAL TERMS AND CONDITIONS

ated as of the date of Closing. Seller shall pay the State property transfer tax. To the maximum extent allowed by state law, Seller l have the right to approve the place of Closing.

inspection and approval of the subject land and improvements theron by the lender's agent, the FHA or the VA, whichever is icable, or final inspection of approval for occupancy by the appropriate governmental inspector, shall constitute complete ormance by Seller of its obligations under this paragraph. Buyer understands and agrees that all agreements or representations, ther oral or written, or relating to the date of completion of construction shall not be relied upon by Buyer or shall not be binding seller. Seller does not guarantee completion by any given date.

Purchaser Initial(s): N/ ________ Seller Initial: ________

NEW CONSTRUCTION. (Check box to left and initial below if applicable) If this Agreement is for the construction of a new e (i.e., a presale or a home which is to be built), in addition to the above provisions, Seller shall not be obligated to start home truction (the "Construction Start Date") until the following conditions are met: (1) mortgage approval has been obtained to Seller's sfaction; (2) Purchaser has paid all amounts due; (3) Purchaser selections have been completed; and (4) all contingencies have been oved by Purchaser to Seller's satisfaction. The transaction contemplated in this Agreement shall be consummated (Closing) at the ces of Dodds & Hennessy, P.A. at a time designated by Seller, on or about five (5) business days after completion of the home to be t and issuance of a certificate of occupancy on that home (the "Closing Date"), which said date shall be approximately s after the Construction Start Date.

ause of these factors, the "Closing Date" listed above is only an estimate of the actual Closing Date and Seller shall establish Closing Date by written notice to Purchaser reasonably in advance of Closing.

Purchaser Initial(s): ________ ________ Seller Initial: ________

BLIC SEWER AND WATER. Seller warrants that the main dwelling on the above described Property is served by:

A. Public sewer N/ (Seller Initial) ________ ________ (Purchaser Initial)

and,

B. Public water N/ (Seller Initial) ________ ________ (Purchaser Initial)

(SELLER AND PURCHASER MUST INITIAL ON SAME APPLICABLE LINE.)

TENTION POND. A detention or retention pond ( ) does or (✓) does not exist on the Property.

OOD PLAIN. A portion of the Property (✓) is, or ( ) is not within an area designated as a 100 year flood plain. If flood rance is desired by Purchaser's lender, Purchaser shall pay for that flood insurance.

USE PLAN. The Purchase Price is for the Fairfax ____ to be built on a ( ) slab, or ( ) basement, ✓ crawl space. Purchaser acknowledges that each home is handmade and unique, and although this home is based on the plans icated above, variations in layout will occur. Closing the sale of this home waives any objection to conformance with the plans. ler shall not be responsible for any variation from the plans unless that variation causes a failure of the structural integrity in the ne as constructed. Seller agrees to complete the construction of this home in accordance with the quality standards, materials and h as are otherwise being used by Seller in construction of new homes in this subdivision. If this Agreement is for a home for which struction has not started, this Agreement: (a) is subject to Seller's ability to place that home on the designated lot; (b) is subject to ler's ability to build that home on the designated lot without obtaining variances for setback rules; (c) is subject to Seller's ability to ld that home on the designated lot without incurring special costs for foundation, slab or structural support walls; and (d) is subject Seller's discretion as to the orientation and placement of that home on the designated lot. In the event Seller determines that it not build the home within those conditions, Seller shall have the right to terminate this Agreement by written notice to Purchaser l in that event Seller shall return Purchaser's Earnest Money.

TIONS. Seller will include options ("Options") at the prices indicated. Level 1 Options do not require Option Money payment h this Agreement, Level 2 Options require payment for those options (the "Option Money") simultaneously with the execution of s Agreement. In the event Seller omits the installation of any optional item, Seller's responsibility shall be limited to a refund of the ed price or allowance. Any such omission shall not invalidate this Agreement, constitute a breach of its terms, nor give rise to any im for damages against Seller. Purchaser agrees that the Option Money shall be delivered to Seller simultaneously with the ecution of this Agreement. The Option Money shall not be held in escrow, shall be non-refundable and, in the event of Purchaser's fault under the Agreement, Seller may retain the Option Money, together with the Earnest Money (as specified in the Agreement) as ller's liquidated damages. The parties acknowledge that it is impossible to estimate more precisely the damages Seller might incur in event of Purchaser's default, and the Option Money, together with the Earnest Money, are a reasonable estimate of the damages ller may incur. The Option Money paid to Seller shall be credited against the Purchase Price at Closing. See Exhibit A for Options.

ISCELLANEOUS.

Inquiries. Purchaser agrees to direct all inquiries and questions to the closing coordinator who will provide Purchaser with a timely response; however, the closing coordinator does not have the authority to change the terms of this Agreement. Changes

N/	

Initials

Model ____ Community David Phase ____ Lot 15 D

HOME PURCHASE AGREEMENT

GENERAL TERMS AND CONDITIONS

may only be made by a written amendment, within 14 days of the original contract signed by Purchaser and an appropriate officer of Seller. Purchaser acknowledges that Seller's sales associates, superintendents, closing staff, warranty staff and other employees do not have authority to modify this Agreement. Only a corporate officer of Seller has authority to modify this Agreement.

Color Selection Meeting. The color selection meeting is for the purpose of ensuring that a mutual understanding exists between Seller and Purchaser of all relevant details as regards the finishes and completion of the construction of the home. This meeting must be held within seven days of acceptance of this Agreement or the Agreement may be terminated at the option of Seller. All requests for options and upgrades should be included in this Agreement and will be determined with the selections coordinator in the number of days stated above.

Inspection Policy. Seller will provide for three pre-closing meetings, the date of which will be set by Seller's Customer Service Representative, closing coordinator or superintendent. Seller's associate and Purchaser will be present at these meetings to thoroughly review the home, noting any items that require attention and/or repairs. It is Purchaser's responsibility to notify Purchaser's Broker, if Purchaser desires Broker to attend these meetings. It is understood that Purchaser's input will be addressed specifically at these meetings, not at contract or on an unscheduled basis during the construction process.

Substitutions. Seller reserves the right to make substitutions of construction materials used in the construction of the home with materials which are of equal or comparable value. Purchaser acknowledges that any delay as a result of back order or out-of-stock selections must be promptly remedied; Seller may make substitutions as may be necessary; Purchaser acknowledges that, in some instances, installations shall occur subsequent to Closing.

Promotions. Purchaser agrees that Seller may photograph the interior and exterior of the home and the Property, and may use those photographs for advertising and marketing purposes without restriction for up to two (2) years from the Closing Date. Seller shall have the right, from time to time, to place marketing and directional signs along a five (5') foot strip of land adjacent to the street on the Property for a period of two (2) years from the Closing Date.

Contractors. All work and materials shall be provided or performed by Seller's personnel and vendors. Purchaser shall not have the right to have any work performed on the Property or supplies delivered to the Property prior to Closing.

COVENANTS AND HOMEOWNER'S ASSOCIATION. Purchaser acknowledges that a copy of the Daniel Island Declaration of Covenants, Conditions and Restrictions (the "Covenants") has been made available to Purchaser, and Purchaser agrees that the Covenants may be amended or updated by the Declarant or Seller from time to time. Purchaser acknowledges that the restrictive covenants governing this subdivision require the payment of an initiation fee in the amount of $ 79.17 at Closing, as well as annual dues (presently, $ 475.00), payable annually, prorated at Closing for the year of the Closing.

SURVEY & PROPERTY BOUNDARIES. Purchaser shall be responsible for reviewing the survey and determining the boundaries of the Property. Neither Seller, nor Broker, nor their agents and employees are authorized to make any representation to Purchaser on such matters.

COMPLETION. Seller shall complete the construction of the home located on the Property by the Closing Date (as that date may be extended pursuant to the terms of this Agreement) in a good, substantial and workman-like manner, and shall deliver the home in "broom-clean" condition complete and ready to occupy. The home structure shall be free of all trash and debris. Seller shall deliver to Purchaser at Closing a certificate of occupancy, or the appropriate equivalent or substitute.

HEATING AND AIR-CONDITIONING. The Property shall be adequately and efficiently heated and air-conditioned with equipment having at least the minimum specifications for the Property as established by Load Calculations, Manual J, of the Air-Conditioning Contractors of America, current edition. The Property ( ) will, or ( ) will not, contain a dual HVAC system. The clothes dryer vent shall be installed to the outside.

LOT PREMIUM. Purchaser acknowledges that certain of Seller's lots in the subdivision are believed by Seller to have more value than others, or may have higher construction or development costs than others and accordingly a "Lot Premium" or price adjustment has been incorporated into the Purchase Price on these lots. Purchaser acknowledges that Seller's inclusion of a lot premium in the Purchase Price does not make any warranty or promise to Purchaser about any particular feature of the lot.

DELAYS. Seller shall have no liability for any delays in construction caused by strikes or acts of God, delays in the delivery of materials, delays caused by Seller's inability to obtain a building permit or architectural approval, delays which are the result of matters which are beyond Seller's control, or delays caused by Purchaser's change orders or selection of materials. In the event of such delays, Seller may extend the dates in this Agreement by the number of days resulting from such delays upon notice to Purchaser.

INSULATION. Insulation has been installed (or will be installed prior to Closing) in at least the following minimum standards: (a) exterior walls, excluding exterior garage walls with BATT insulation to a thickness of 3 5/8 inches which will, according to the manufacturer, yield an R-value of 13; (b) ceilings below attic areas are insulated with BLOWN insulation to a thickness of 12 inches which will, according to the manufacturer, yield an R-value of 30; (c) vaulted ceilings are insulated with BATT insulation to a thickness of 6 1/4 inches which will, according to the manufacturer, yield an R-value of 19; and (d) floor overhangs are insulated with BATT insulation to a thickness of 3 5/8 inches which will, according to the manufacturer, yield an R-value of 13.

TIME IS OF THE ESSENCE. Time is of the essence as to this Agreement.

Initials

Model Community Daniel Phase Lot 160

HOME PURCHASE AGREEMENT

GENERAL TERMS AND CONDITIONS

CCESSORS AND ASSIGNS. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto, their heirs, nesors, administrators, executors and assigns. Purchaser shall not have the right to assign Purchaser's interest in this Agreement.

TIRE AGREEMENT. This document contains the sole and entire agreement between the parties hereto and no modification of Agreement shall be binding unless attached hereto and signed by all parties to this Agreement. All prior discussions have been ged into this Agreement. No representation, promise, or inducement not included in this Agreement shall be binding upon any y hereto.

DENDUMS. The following Addendums, Special Stipulations or Exhibits are attached to this Agreement and are made a part of Agreement by reference:

Exhibit B, Copy of Plat showing specific lot, house plan and orientation, if shown, are approximations.

rint parties name below signature line.

ser:

Patricia Clark
er's Signature:

Patricia Clark
er's Name

er's Signature:

er's Name

er's Current Mailing Address:

23 Mayfield Court
arleston SC 29406

er's Phone: 843 569 1543

er's Fax: 843 824 6215

Seller:
D.R. Horton, Inc.

By:

Date: 5-3-02

Seller's Address: 841 Savage Rd
Suite 100G
Charleston, SC 29407

Seller's Phone: 843-573-2060

Seller's Fax: 843-573-2011

Seller's FMLS/MLS Code:

Co-Broker: AGENT OWNED PREMIERE

By: MIKE SIEWS

Co-Broker or Co-Broker's Associated Salesperson

Co-Broker's Phone: 572-0004/572-5777

Co-Broker's Fax: 572-6641

Co-Broker's FMLS/MLS Code:

* Adjustable shelves on each side of fireplace with 4 shelves in each side.

Phase ___ Lot 60

Initials

EXHIBIT "B"

D·R·HORTON

Division Name: HH
Area Name:
Assigned Vendor No.: 8IAW

RECEIVED
FEB - 6 2001

INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR Builders First Source DBA -SAME- ("Contractor")

___ Sole Proprietorship ___ Partnership X Corporation ___ L.L.C ___ Other (ATTACH W-9)

Social Security No. or Tax ID No.: 57-0618425

Name of Owner(s)/Officer(s): Morris Tolly, SE Group President

Address for All Notices: Route 1, Box 170

City: Kingstree State: SC Zip Code: 29556

Telephone: (843) 387-0810 Fax: (843) 387-0833 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: TURNKEY 7

___ 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 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 as 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 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 materials 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 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: Richard Schwartz
Name: RICHARD SCHWARTZ
Title: Division Manager

Contractor
By: Builders First Source
Name: Morris Tolly
Title: Southeast Div. VP

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 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 Orders, 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 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 governmental 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 "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 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 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 FHA. 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 TIER), 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 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, 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 (x, 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 being excess 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 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 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 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 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 his 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 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

EXHIBIT "C"

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

PATRICIA CLARK,

Plaintiff,

v.

D.R. HORTON, INC.,

Defendants.

IN THE COURT OF
COMMON PLEAS

CASE NO.: 2008-CP-08-1633

2008 JUN 12 PM 4:16

CLERK OF COURT
BERKELEY CO., SC

SUMMONS

(Jury Trial Demanded)

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at 864 Lowcountry Blvd., Ste. A, Mt. Pleasant, South Carolina, 29465, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Segui Law Firm, LLC

By: _____

Phillip W. Segui, Jr.
864 Lowcountry Blvd., Ste. A
Mt. Pleasant, SC 29465
(843) 884-1865
psegui@seguilawfirm.com

THE CHAKERIS LAW FIRM

By: _____

John T. Chakeris
P. O. Box 397
Charleston, SC 29402
(843) 853-5678
john@chakerislawfirm.com
Attorneys for Plaintiffs

Charleston, South Carolina

Dated: 6/4 2008

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY PATRICIA CLARK, Plaintiff, v. D.R. HORTON, INC., Defendants.	IN THE COURT OF COMMON PLEAS CASE NO.: 2008-CP-08-1633 COMPLAINT (Jury Trial Demanded)

2008 JUN 12 PM 4:16
MARY B. SIMMONS
CLERK OF COURT
BERKELEY COUNTY, SC

The Plaintiffs above named, complaining of the Defendants above named, would allege and show as follows:

PARTIES

1. The Plaintiff is a citizen and resident of the County of Berkeley, State of South Carolina and at all times hereinafter mentioned, own the residence located at 403 Milner Court on Daniel Island, South Carolina.

2. That, upon information and belief, Defendant, D.R. Horton, Inc., is a corporation organized in the State of South Carolina conducting business in Berkeley County, State of South Carolina and at all times relevant hereto was engaged in the design, development, construction and/or repair of residential housing and specifically, constructed and/or repaired the Plaintiff's residence located at 403 Milner Court on Daniel Island, South Carolina.

JURISDICTION

3. The Court has jurisdiction over the parties and subject matters hereto and that the allegations out of which this action arises all involve the residence of the Plaintiff located in the County of Berkeley, State of South Carolina.

FACTUAL BACKGROUND

4. That the Defendant, D.R. Horton, Inc., designed, developed and constructed the residence located at 403 Milner Court on Daniel Island, South Carolina.

5. That the Plaintiff purchased the home from the Defendant, D.R. Horton, Inc., on or about July 2002, and became aware of defects and deficiencies that include but are not limited to the installation of the siding and other construction deficiencies that D.R. Horton, Inc., has attempted to repair on numerous occasions.

6. That as a result of the various defects and deficiencies relative to the construction of this home, the Plaintiff has been damaged and will be required to expend large sums of money to repair, correct and replace various parts and components of the residence and reconstruct major portions of the residence; have been exposed to and will be subject to loss of use, enjoyment and depreciation of the value of her property.

FOR A FIRST CAUSE OF ACTION
(Negligence)
(As To D.R. Horton, Inc.)

7. Each and every allegation contained in Paragraphs 1 through 6 above are incorporated herein by express reference as though fully set forth.

8. At all times material hereto, the Defendant, D.R. Horton, Inc., by and through its agents, servants and employees undertook and were under a duty to design, develop, construct and/or repair the residence and to provide materials and services in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards.

9. The Defendant, D.R. Horton, Inc., was negligent, grossly negligent, careless, reckless, willful and wanton in constructing, repairing, remodeling, developing, designing, supervising and inspecting the subject residence and in failing to construct and/or repair said residence in accordance with applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence, which will need to be or have been corrected, repaired and/or replaced. Such negligence, gross negligence, carelessness, recklessness, willfulness and wantonness include but are not limited to the following particulars, to wit:

a. In failing to use due care in the design, development, construction, repair and remodeling of the subject residence;
b. In failing to adequately supervise the work and construction, repair and remodeling of the subject residence;
c. In failing to hire competent subcontractors or specialty contractors;
d. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
e. In constructing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices.
f. In improperly installing siding and exterior wall system;
g. In failing to properly install the rough opening flashing and other flashing;
h. In failing to properly install the moisture barrier;
i. In installing a home exterior which fails to provide a sufficient barrier against the intrusion of water into the wall system and adequate avenue for exit of water that gets into the wall system;
j. In constructing the subject residence in such a manner that water entered the dwelling;
k. In improperly installing kick-out flashings;
l. In failing to properly install the framing;
m. In improperly installing the slab and driveway;
n. In improperly installing the roof and shingles;
o. In improperly installing the gas hot water heater;
p. Other deficiencies or failures as will be proven at trial.

10. That as a direct and proximate result of the negligence, gross negligence, carelessness, willfulness and wantonness of the Defendant, D.R. Horton, Inc., the Plaintiff has suffered actual, direct, incidental, consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the residence to make it safe and habitable. Additionally, Plaintiff has been injured and otherwise damaged in that structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiff's home. All of which will require the Plaintiff to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of the property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)
(As to D.R. Horton, Inc.)

11. Each and every allegation contained in Paragraphs 1 through 10 above are incorporated herein by express reference as though fully set forth.

12. That at all times herein, the Plaintiffs entered into a contract with the Defendant D.R. Horton, Inc., for the design, development, construction and purchase of her residence located at 403 Milner Court on Daniel Island, South Carolina.

13. That at all relevant times herein, the Defendant, D.R. Horton, Inc., by and through its agents, servants and employees had an obligation and duty to construct

and/or repair the residence and to provide materials and services in accordance with the terms and conditions of the contract, applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards.

14. That the Defendant, D.R. Horton, Inc., breached the contract with the Plaintiff by failing to develop, construct and/or repair said residence in accordance with the terms and conditions of the contract, applicable building codes, manufacturers' recommendations and in conformance with accepted construction and industry standards, all of which have directly and proximately caused defects and deficiencies in the residence which will need to be or have been corrected, repaired and/or replaced and are in breach of the aforesaid contract. Such breach includes but is not limited to the following particulars, to wit:

a. In failing to use due care in the design, development, construction, repair and remodeling of the subject residence;
b. In failing to adequately supervise the work and construction, repair and remodeling of the subject residence;
c. In failing to hire competent subcontractors or specialty contractors;
d. In failing to adequately and competently supervise and/or train said subcontractors or specialty contractors;
e. In constructing, repairing and remodeling subject residence in violation of applicable building codes, standard building practices, relevant product specifications and accepted construction industry standards and practices.
f. In improperly installing siding and exterior wall system;
g. In failing to properly install the rough opening flashing and other flashing;
h. In failing to properly install the moisture barrier;
i. In installing a home exterior which fails to provide a sufficient barrier against the intrusion of water into the wall system and adequate avenue for exit of water that gets into the wall system;
j. In constructing the subject residence in such a manner that water entered the dwelling;
k. In improperly installing kick-out flashings;
l. In failing to properly install the framing;
m. In improperly installing the slab and driveway;
n. In improperly installing the roof and shingles;

o. In improperly installing the gas hot water heater;
p. Other deficiencies or failures as will be proven at trial.

15. That as a direct and proximate result of the Defendant, D. R. Horton, Inc.'s, breach of contract with the Plaintiff, the Plaintiff has suffered actual, direct, incidental; consequential and special damages including, but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and her having to spend substantial sums of money in order to renovate, correct, repair and restore her residence to make it safe and habitable. Additionally, Plaintiff has been injured and otherwise damaged in that structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiff's home. All of which has or will require the Plaintiff to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of her property as well as loss of value in depreciation by virtue of the defects and damages aforesaid

FOR A THIRD CAUSE OF ACTION
(Breach of Warranty of Habitability, Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness for a Particular Purpose, Breach of Warranty of Merchantability and Breach of Warranty Against Latent Defects)
(As To D.R. Horton, Inc.)

16. Each and every allegation contained in Paragraphs 1 through 15 above are incorporated herein by express reference as though fully set forth.

17. That Defendants, D.R. Horton, Inc., implicitly and/or expressly warranted that the subject residence and its components would be habitable and fit for its intended uses as a single family residence and home, that said residence and its

components would be sold, designed, manufactured, constructed, installed, repaired and remodeled in a fit, serviceable, good and workmanlike fashion in accordance with the applicable building codes, product specifications, accepted building component manufacturing standards and accepted construction industry standards applicable thereto and that the subject residence and/or the manufactured components installed into and/or onto said residence would be merchantable, free from latent defects and fit for the particular purpose for which it was sold.

18. That Defendant, D.R. Horton, Inc., breached said warranties by designing, developing, manufacturing, selling, constructing, remodeling or repairing subject residence and/or the manufactured components installed into and/or onto said residence in such manner as to be in violation of applicable building codes, standard building practices, relevant product specifications, accepted building component manufacturing standards and accepted construction industry standards and practices.

19. As a direct and proximate result of the Defendants, D.R. Horton, Inc.'s, breach of these warranties, the Plaintiff has suffered actual, direct, incidental, consequential and special damages, including but not limited to, the expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the residence to make it safe and habitable. Additionally, Plaintiff has been injured and otherwise damaged in that structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot,

deterioration and other damages to the finish and structural elements of Plaintiff's home. All of which has or will require the Plaintiff to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of the property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

FOR A FOURTH CAUSE OF ACTION
(Unfair Trade Practices)
(As To D.R. Horton, Inc.)

20. Each and every allegation contained in Paragraphs 1 through 19 above are incorporated herein by express reference as though fully set forth.

21. The Defendant, D.R. Horton, Inc., is a "person" within the meaning of South Carolina Code § 39-5-10(a), and the Defendant by its actions in designing, developing, manufacturing, selling, constructing, remodeling or repairing subject residence and/or the manufactured components installed into and/or onto said residence are engaged in commerce within the meaning of South Carolina Code §29-5-10(b).

22. The Defendant by its action(s) described herein above, constitute unfair and deceptive practices within the meaning of South Carolina Code §39-5-20(a).

23. The Defendant's act(s) is capable of repetition and, upon information and belief, have been repeated.

24. The Defendant's conduct affects the public interest of the people of South Carolina.

25. The Defendant knew or should have reasonably known, that its conduct violated the Unfair Trade Practices Act. As a direct, foreseeable and proximate result of the Defendants' unfair and deceptive practices, the Plaintiff has suffered actual, direct, incidental, consequential and special damages, including but not limited to, the

expenses associated with having to hire experts to investigate the causes of the defects set forth above and having to spend substantial sums of money in order to renovate, correct, repair and restore the residence to make it safe and habitable. Additionally, Plaintiff has been injured and otherwise damaged in that structural and framing deficiencies have caused damage to the components of the home and excessive water and moisture exists and continues to exist and excessive water and moisture exists and continues to exist and moisture has intruded and continues to intrude into the subject residence causing rot, deterioration and other damages to the finish and structural elements of Plaintiff's home. All of which will require the Plaintiff to expend great amounts of money to correct and repair as well as to suffer the loss, use and enjoyment of the property as well as loss of value in depreciation by virtue of the defects and damages aforesaid.

WHEREFORE, the Plaintiff prays for judgment against the Defendant, D.R. Horton, Inc., in a reasonable amount of actual, punitive and treble damages to be determined by the jury; for the attorneys fees and cost of this action; for a prejudgment or post-judgment interest on Plaintiff's damages; and for such other and further relief as this Court may deem just and proper.

THE CHAKERIS LAW FIRM

By: _____

John T. Chakeris
231 Calhoun Street
P. O. Box 397
Charleston, SC 29402
(843) 853-5678

SEGUI LAW FIRM, LLC

By: _____
Phillip W. Segui, Jr.
864 Lowcountry Blvd., Ste. A
Mt. Pleasant, SC 29464
(843) 884-1865
psegui@seguilawfirm.com
Attorneys for Plaintiff

Charleston, South Carolina
Dated: 6/9, 2008

EXHIBIT "D"

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF BERKELEY) CASE NO.: 08-CO-08-1633
)
PATRICIA CLARK,)
)
Plaintiff,)
)
vs.) ARBITRATION ORDER
)
D.R. HORTON, INC.,)
)
Defendant.)

This matter is before me pursuant to Consent Order Referring Claims to Arbitration dated April 1, 2009. The Arbitration in this matter was held on December 10 and 11, 2009. Counsel for the parties have requested an Order containing a monetary award only. Based upon the testimony presented at trial and a thorough review of the documentary evidence and applicable authorities, I find in favor of the Plaintiff in the amount of One Hundred Fifty Thousand Dollars ($150,000.00).

Thomas J. Wills, IV, Esquire, Arbitrator
Wills & Massalon, LLC
P.O. Box 859
Charleston, SC 29402

January 5, 2010

EXHIBIT "E"

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
Patricia Clark,	)	
Plaintiff,	)	SATISFACTION OF JUDGMENT
v.	)	C.A. No.: 2008-CP-08-1633
D.R. Horton, Inc.,	)	
Defendant.	)	

FILED
2010 MAR 24 AM 9:59
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

TO: BERKELEY COUNTY CLERK OF COURT

WHEREAS, on June 12, 2008, Plaintiff Patricia Clark ("Plaintiff") instituted an action against Defendant D.R. Horton, Inc. ("Defendant"), bearing Civil Action No. 2008-CP-08-1633; and,

WHEREAS, on February 26, 2010, judgment was filed with the Berkeley County Clerk of Court and entered on Plaintiff's behalf against Defendant in the amount of One Hundred Fifty Thousand and No/100ths ($150,000.00) Dollars; and,

WHEREAS, this judgment was SATISFIED AND PAID IN FULL on this 5 day of March, 2010.

NOW, THEREFORE, **Plaintiff instructs the Office of the Clerk of Court for Berkeley County to mark the aforesaid judgment "SATISFIED" and cancelled of record.** This Satisfaction of Judgment completely releases the aforesaid judgment, including all principal, interest, post-judgment interest, and court costs arising thereby.

John T. Chakeris, Esq.
THE CHAKERIS LAW FIRM
231 Calhoun Street

PO Box 397
Charleston, SC 29402
Tel.: (843) 853-5678
Fax: (843) 853-5677
john@chakerislawfirm.com

Date: 3/15/10

Phillip W. Segui, Jr., Esq.
SEGUI LAW FIRM, LLC
864 Lowcountry Blvd., Suite A
PO Box 1450
Mt. Pleasant, SC 29465
Tel.: (843) 884-1865
psegui@seguilawfirm.com

Date: 3/15/10

Attorneys for Plaintiff,
Patricia Clark

8127830.1 (OGLETREE)

EXHIBIT "F"

Patricia Clark
Defense Costs Paid by D.R. Horton, Inc.

Vendor	Invoice No.	Invoice Date	Period Ending	Date Paid	Amount Paid
Ogletree, Deakins, Nash, Smoak & Stewart	516771	10/31/2007	10/31/2007	11/30/2007	$621.18
Ogletree, Deakins, Nash, Smoak & Stewart	546718	3/31/2008	3/31/2008	4/30/2008	$387.20
Ogletree, Deakins, Nash, Smoak & Stewart	553105	4/30/2008	4/30/2008	5/30/2008	$202.95
Ogletree, Deakins, Nash, Smoak & Stewart	565241	6/30/2008	6/30/2008	7/20/2008	$5,514.90
Ogletree, Deakins, Nash, Smoak & Stewart	572589	7/31/2008	7/31/2008	8/24/2008	$2,478.70
Ogletree, Deakins, Nash, Smoak & Stewart	578789	8/31/2008	8/31/2008	9/16/2008	$6,314.50
Ogletree, Deakins, Nash, Smoak & Stewart	591691	10/31/2008	10/31/2008	11/30/2008	$116.85
Ogletree, Deakins, Nash, Smoak & Stewart	597823	11/30/2008	11/30/2008	12/20/2008	$67.65
Ogletree, Deakins, Nash, Smoak & Stewart	610144	1/31/2009	1/31/2009	2/25/2009	$787.50
Ogletree, Deakins, Nash, Smoak & Stewart	615337	2/28/2009	2/28/2009	3/17/2009	$252.00
Ogletree, Deakins, Nash, Smoak & Stewart	623136	3/31/2009	3/31/2009	5/1/2009	$4,041.10
Ogletree, Deakins, Nash, Smoak & Stewart	629877	4/30/2009	4/30/2009	5/15/2009	$1,426.92
Ogletree, Deakins, Nash, Smoak & Stewart	636419	5/31/2009	5/31/2009	6/25/2009	$351.74
Ogletree, Deakins, Nash, Smoak & Stewart	642840	6/30/2009	6/30/2009	8/3/2009	$4,730.36
Ogletree, Deakins, Nash, Smoak & Stewart	650249	7/31/2009	7/31/2009	8/31/2009	$11,384.98
Ogletree, Deakins, Nash, Smoak & Stewart	657137	8/31/2009	8/31/2009	9/24/2009	$26,807.56
Ogletree, Deakins, Nash, Smoak & Stewart	663646	9/30/2009	9/30/2009	10/20/2009	$11,319.94
Ogletree, Deakins, Nash, Smoak & Stewart	668921	10/31/2009	10/31/2009	11/23/2009	$17,985.69
Ogletree, Deakins, Nash, Smoak & Stewart	676715	11/30/2009	11/30/2009	12/20/2009	$8,703.89
Ogletree, Deakins, Nash, Smoak & Stewart	683321	12/31/2009	12/31/2009	1/25/2010	$31,247.28
Ogletree, Deakins, Nash, Smoak & Stewart	689732	1/31/2010	12/31/2009	2/26/2009	$14,676.48
Ogletree, Deakins, Nash, Smoak & Stewart	704799	3/31/2010	3/31/2010	4/28/2010	$5,244.25
Ogletree, Deakins, Nash, Smoak & Stewart	712112	4/30/2010	4/30/2010	5/30/2010	$66.96
Ogletree, Deakins, Nash, Smoak & Stewart	717413	5/31/2010	5/31/2010	6/15/2010	$433.44
Ogletree, Deakins, Nash, Smoak & Stewart	726783	6/30/2010	6/30/2010	7/21/2010	$553.05
					$155,717.05

EXHIBIT "G"

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., Defendant.	)	**DEFENDANTS' ANSWERS TO PLAINTIFF'S INTERROGATORIES**

TO: NEIL S. HALDRUP, ESQUIRE AND PEDEN BROWN McLEOD, JR., ESQUIRE, ATTORNEYS FOR PLAINTIFF:

Builders FirstSource-Southeast Group, LLC and Builders FirstSource, Inc. (hereinafter collectively "BFS") answering Plaintiff's Interrogatories to Defendants, states as follows: In setting forth answers hereto, BFS 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 that is responsive to these Interrogatories. BFS does not concede the relevance or materiality of the Interrogatories or the matters to which these Interrogatories refer. These answers are submitted by BFS subject to, and without in any way waiving or intending to waive, but on the contrary intended to reserve and reserving:

A. 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;

B. the right to object to other discovery procedures involving or relating to the subject

matters of the Interrogatories herein responded to; and

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

GENERAL OBJECTIONS

1. BFS objects to the extent that these Interrogatories intend to impose upon it a duty of disclosure or other obligation not required by the South Carolina Rules of Civil Procedure.

2. BFS objects to each Interrogatory to the extent that it pertains to circumstances beyond the time period relevant to this action. Such information and/or documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Also, requests for such information or documents pertaining to such extraneous subject matters are overly broad as to time, scope and subject matter, and would be unduly burdensome to produce.

3. BFS objects to each Interrogatory to the extent it calls for answers that would disclose privileged information, including information protected by the attorney-client privilege, attorney work product doctrine, confidential business information, trade secret privilege information, or any other applicable privileges.

4. BFS objects to each Interrogatory to the extent that it seeks documents protected by the South Carolina Trade Secrets Act, §39-8-10, et seq. of the South Carolina Code of Laws.

5. BFS objects to each Interrogatory to the extent that it requires information, documents, things, facts, opinions, or any other matter prepared in anticipation of litigation or for trial which is outside the scope of discovery permitted by Rule 26(b)(3) of the South Carolina Rules of Civil Procedure.

6. BFS incorporates these General Objections by reference as though fully set forth into

its specific answers to each and every Interrogatory herein.

7. BFS reserves the right to supplement its answers to these Interrogatories as additional information or documents become known.

ANSWERS TO INTERROGATORIES

1. Give the names and addresses of persons known to the Defendants or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER: BFS identifies the following:

Bill Crabtree
BFS
Installed Sales Manager- Charleston/Hilton Head Markets
(May be contacted only through counsel)

No written or recorded statement has been taken

Larry Wozniak
BFS
Market Manager
(May be contacted only through counsel)

No written or recorded statement has been taken.

Gifford Shaw
Formerly of BFS

Upon information and belief, Mr. Shaw is now employed with Thompson Industrial Supply, 87 Shaw Street, Sumter, South Carolina. Mr. Shaw participated in the investigation of this matter on behalf of BFS. No written or recorded statement has been taken.

Randy Thomason
Formerly of BFS

Upon information and belief, Mr. Thomason is now employed with Atlantic Building Components. Mr. Thomason participated in the investigation of this matter on behalf of BFS No written or recorded statement has been taken.

Scott Coffman, P.E.
Formerly of BFS

Mr. Coffman's current location is unknown at this time. Mr. Coffman was a Director of Engineering for BFS. During 2007, Mr. Coffman performed an analysis of the roof trusses at 403 Milner Court, Daniel Island, South Carolina 29492 (hereinafter the "Residence"). As a result of his analysis, Mr. Coffman produced a letter dated October 2, 2007. Said letter is available for inspection upon request. No written or recorded statement has been taken.

Craig Platt
Formerly of BFS

Mr. Platt's current location is unknown at this time. Mr. Platt was the BFS salesperson who would have initially sold the trusses involved in this matter. No written or recorded statement has been taken.

Various other BFS employees may have been involved, at some point, in the sale of materials to Plaintiff or some other entity involved with the construction of the Residence. BFS is in the process of conducting a reasonable investigation into this matter and reserves the right to supplement its Answer to this Interrogatory accordingly.

Chris Pelletier
Formerly of D.R. Horton

Mr. Pelletier was D.R. Horton's project manager for the Residence. No written or recorded statement has been taken.

Jerry Courtney
Formerly of D.R. Horton

Mr. Courtney is a former D.R. Horton purchasing manager who was involved in the investigation of the complaints made by Patricia Clark. No written or recorded statement has been taken

Patricia Clark
Current whereabouts unknown.

Ms. Clark, at one time, owned the Residence. No written or recorded statement has been taken.

Additionally, BFS states that all parties to this matter are witnesses to the facts of this case. BFS has no knowledge of any written statements from any party to this action.

BFS is continuing the process of a reasonable search of records in an effort to identify any and all other witnesses who may be able to address any of the claims and defenses alleged in the subject action. In addition, BFS expressly reserves the right to call the following persons as witnesses without further notice to the other parties:

a. All persons identified by any other party through written discovery responses to be a witness in this case.

b. All persons deposed as witnesses in this case by any party.

c. Rule 30(b)(6) witnesses for any corporate party in this case.

d. Records custodian witnesses for any corporate party in this case.

e. Such additional witnesses as are identifiable through documents exchanged between the parties or otherwise, and will make every effort to specifically identify such witnesses as they become apparent.

2. For each person known to the Defendants or counsel to be a witness concerning the facts of the case, set forth a summary sufficient to accurately state the important facts known to or observed by such witnesses or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: See Answer to Interrogatory No. 1.

3. If the Defendants have ever been involved in any civil action (other than the present case) where damages were sought, either as a plaintiff or defendant, state the caption, date and place each action was filed and the result of each action.

EXHIBIT "H"

Builders FirstSource

114 & 116 Myrtle Beach Hwy.
P.O. Box 1546
Sumter, SC 29153
TEL 803 778-1921
FAX 803-934-8881

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- $^{1}/_{16}$" 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 $^{9}/_{16}$" and 1'-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.

0003
BFS

Builders FirstSource

114 & 116 Myrtle Beach Hwy.
P.O. Box 1548
Sumter, SC 29153
TEL 803-778-1921
FAX 803-934-9881

Item 2:
The 4' – $^{11}/_{16}$" horizontal top chord members in A1-2 (F-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 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 use 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,

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No. 10696 SCOTT D. COFFMAN

Scott D. Coffman, PE
Director of Engineering

Documents/09420 letter.doc

2004
RFS

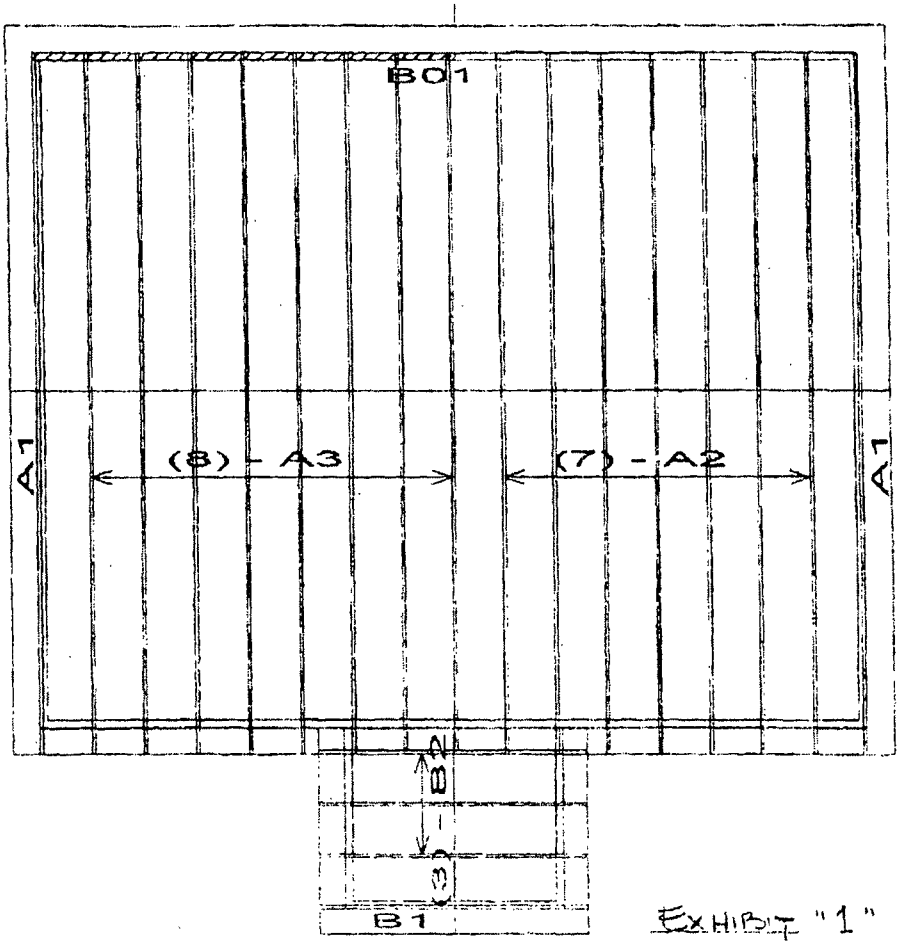

EXHIBIT "1"

BFS/SUMTER/COMPNENTS

Name:
Address:

Telephone:
Fax:

Telephone:

Job: Lot6D_rf

Scale: 1" = 64 Date: 07/09/2001 Drawn By: Craig Platt

0005
BFS

GENERAL NOTES FOR CONSTRUCTION

JOB NAME Daniel Mo. LaDer

JOB NUMBER 69420

EXHIBIT "2"

1. Builders FirstSource-Shaw, Inc. supplies individual building components that may be incorporated into the building design at the specification of the building designer. The attached design drawings have been developed from general design criteria provided to us or from signed approval drawings returned to our office. The seal on the truss design drawings indicates acceptance of professional engineering responsibility solely for the truss component shown. The suitability and use of this component for any particular building is the responsibility of the building designer, per ANSI/TPI 1995 Section 2.

2. Sealed or unsealed documents provided by Builder's FirstSource-Shaw, Inc. does not replace the contractor's need of a structural engineer to determine if the designed components will properly perform as intended within the total structure.

3. Each individual building component is designed to perform in a specific location. Do not deviate from the intended application or alter from the truss placement plan location without approval from Builder's FirstSource-Shaw, Inc.

4. Product installation, erection, banding, safety precautions, and temporary and permanent bracing of trusses is the responsibility of the building designer and are not part of the truss design documents. All lateral bracing specified on each truss design drawing is intended to provide lateral restraint for the individual truss members only. It is the responsibility of the building designer to specify permanent building bracing and integrate the truss bracing into the designed system. The truss installer or contractor should obtain competent, professional advice for permanent bracing design, amount, and proper installation. See HIB-91

5. Do not cut or modify any truss, beams, or hanger component supplied by Builder's FirstSource-Shaw, Inc. It is the contractor's responsibility to coordinate between trades and ensure each component is clear from all pipes, drains, chases, stairs, fireplaces, and other items that may result in the individual building component supplied to be cut or altered. Any drilling of holes, notching, cutting or removing any cross sectional area of wood will void the structural member. The contractor is the responsible for securing the engineering required for any repair and the subsequent cost.

6. Nail or bolt schedules for girder trusses or scabs are indicated on the individual design drawing.

7. The building components supplied are designed to only support the listed loads at the spacing indicated.

8. Truss to bearing connection to be designed and specified by the building designer. Truss to truss connections to be specified by Builder's FirstSource-Shaw, Inc.

9. The contractor should inspect trusses after installation for any damage, such as, cracks, breaks, plates, etc., and secure engineered repairs. The contractor should inspect truss installation for bow, variation from plumb, etc., and ensure tolerances are not exceeded. See HIB-91.

10. The contractor should contact Builder's FirstSource-Shaw, Inc. should there be questions understanding the documents supplied.

0006
BFS

Job	Truss	Truss Type	Qty	Ply	DR HORTON - LOT 60 - DANIEL IS. ROOF
69420	A1	ROOF TRUSS	2	1	(optional)

Builders FirstSource, Sumter, SC 29150 — 4.201 S Nov 16 2000 MiTek Industries, Inc. Wed Jul 11 09:18:53 2001 Page 1

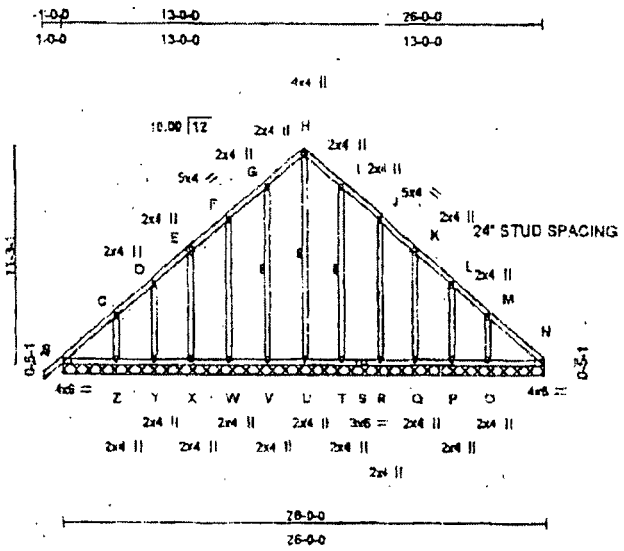

Plate Offsets (X,Y): [E:0-2-0,0-3-0], [K:0-2-0,0-3-0]

LOADING (psf)		SPACING 2-0-0	CSI		DEFL	in (loc)	l/defl	PLATES	GRIP
TCLL	20.0	Plates Increase 1.15	TC 0.18		Vert(LL)	n/a -	n/a	MII20	249/180
TCDL	10.0	Lumber Increase 1.15	BC 0.18		Vert(TL)	0.00 A-B	>999		
BCLL	0.0 *	Rep Stress Incr NO	WB 0.40		Horz(TL)	0.02 N	n/a		
BCDL	10.0	Code SBC/ANSI95	(Matrix)		1st LC LL Min Rdef = 240			Weight: 192 lb	

LUMBER
TOP CHORD 2 X 4 SYP No.1
BOT CHORD 2 X 4 SYP No.1
OTHERS 2 X 4 SYP No.2 *Except*
D-Y 2 X 4 SYP No.3, C-Z 2 X 4 SYP No.3
L-P 2 X 4 SYP No.3, M-O 2 X 4 SYP No.3

BRACING
TOP CHORD
Sheathed or 6-0-0 oc purlins.
BOT CHORD
Rigid ceiling directly applied or 10-0-0 oc bracing.
WEBS
1 Row at midpt H-U, G-V, I-T

REACTIONS (lb/size)
B = 189/26-0-0
S = 10/26-0-0
U = 130/26-0-0
V = 158/26-0-0
W = 162/26-0-0
X = 165/26-0-0
Y = 134/26-0-0
Z = 228/26-0-0
T = 152/26-0-0
R = 155/26-0-0
Q = 168/26-0-0
P = 126/26-0-0
O = 247/26-0-0
N = 116/26-0-0
Max Horz
S = 747(load case 3)
Max Uplift
S = -247(load case 3)
V = -258(load case 4)
W = -318(load case 4)
X = -302(load case 4)
Y = -256(load case 4)
Z = -418(load case 4)
T = -248(load case 5)
R = -324(load case 5)
O = -308(load case 5)

Max Uplift
P = -232(load case 5)
O = -481(load case 5)
N = -77(load case 3)
Max Grav
B = 356(load case 3)
S = 10(load case 7)
U = 565(load case 5)
V = 182(load case 5)
W = 162(load case 1)
X = 165(load case 6)
Y = 134(load case 1)
Z = 228(load case 6)
T = 167(load case 7)
R = 155(load case 1)
Q = 168(load case 7)
P = 126(load case 1)
O = 247(load case 7)
N = 320(load case 5)

FORCES (lb) - First Load Case Only
TOP CHORD

A-B	=	36	B-C	=	32
C-C	=	-74	D-E	=	-53
E-F	=	-66	F-G	=	-65
G-H	=	13	H-I	=	-64
I-J	=	-65	J-K	=	-66
K-L	=	-63	L-M	=	-75
M-N	=	-82			

BOT CHORD

S-Z	=	21	Y-Z	=	21
X-Y	=	21	W-X	=	20
V-W	=	20	U-V	=	20
T-U	=	20	S-T	=	20
R-S	=	20	Q-R	=	20
P-Q	=	21	O-P	=	21
N-O	=	21			

WEBS

H-U	=	-89	G-V	=	-118
F-W	=	-122	E-X	=	-123
D-Y	=	-103			

WEBS

C-Z	=	-163	I-T	=	-118
J-R	=	-122	K-Q	=	-123
L-P	=	-100	M-O	=	-171

NOTES (9)
1) This truss has been checked for unbalanced loading conditions.
2) This truss has been designed for the wind loads generated by 130 mph winds at 25 ft above ground level, using 7.0 psf top chord dead load and 5.0 psf bottom chord dead load, in the gable end roof zone on an occupancy category II, condition I enclosed building, with exposure C ASCE 7-98 per SBC/ANSI95 if and verticals or cantilevers exist, they are exposed to wind. If porches exist, they are not exposed to wind. The lumber DOL increase is 1.60, and the plate grip increase is 1.60
3) Truss designed for wind loads in the plane of the truss only. For studs exposed to wind (normal to the face), see MiTek "Standard Gable End Detail"
4) Gable requires continuous bottom chord bearing.
5) Gable studs spaced at 2-0-0 oc.
6) * This truss has been designed for a live load of 20.0psf on the bottom chord in all areas with a clearance greater than 3-6-0 between the bottom chord and any other members.
7) Provide mechanical connection (by others) of truss to bearing plate capable of withstanding 247 lb uplift at joint B, 258 lb uplift at joint V, 318 lb uplift at joint W, 302 lb uplift at joint X, 256 lb uplift at joint Y, 418 lb uplift at joint Z, 248 lb uplift at joint T, 324 lb uplift at joint R, 308 lb uplift at joint Q, 232 lb uplift at joint P, 481 lb uplift at joint O and 77 lb uplift at joint N.
8) This truss has been designed with ANSI/TPI 1-1995 criteria.
9) This manufactured truss is designed as an individual building component. The suitability and use of this component for any particular building is the responsibility of the building designer per ANSI / TPI 1 as referenced by the building code

Continued on page 2

0007
BFS

Job	Truss	Truss Type	Qty	Ply	DR HORTON - LOT 65 - CAMEL IS. ROOF
[illegible]9470	A1	ROOF TRUSS	2	1	(optional)

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LOAD CASE(S)
Standard

2008
DAS

Job	Truss	Truss Type	Qty	Ply	DR HORTON - LOT 60 - DANIEL IS. ROOF
69420	A2	ROOF TRUSS	7	1	(optional)

Builders FirstSource, Sumter, SC 29150 — 4.20f — SR1 s Nov 15 2000 MiTek Industries, Inc. Wed Jul 11 09:19:14 2001 Page 1

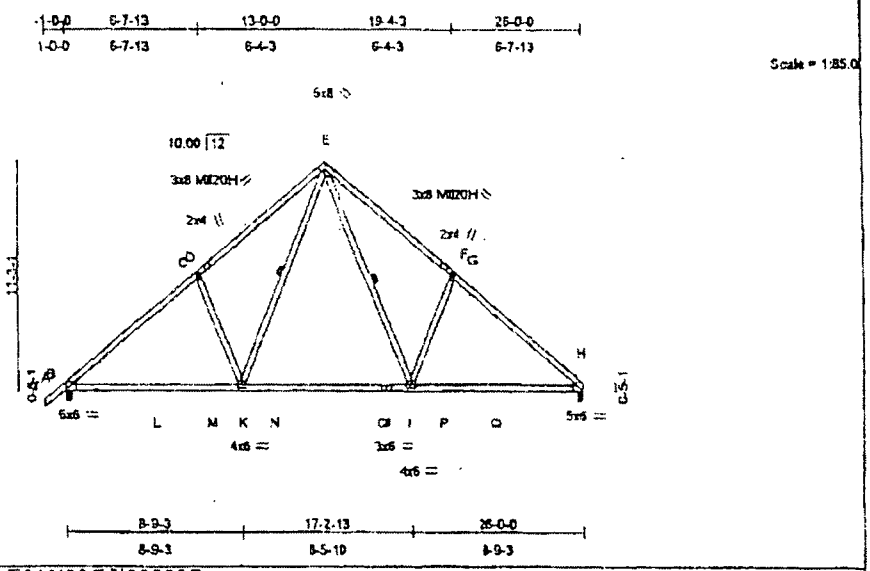


Plate Offsets (X,Y): [B:0-0-0,0-0-8], [E:0-4-14,0-2-8], [N:0-0-0,0-0-8]

LOADING (psf)	SPACING	2-0-0	CSI	DEFL	in	(loc)	l/defl	PLATES	GRIP
TCLL 20.0	Plates Increase	1.15	TC 0.67	Vert(LL)	0.25	H-I	>999	MII20	249/190
TCDL 10.0	Lumber Increase	1.15	BC 0.71	Vert(TL)	-0.26	H-I	>999	MII20H	187/143
BCLL 0.0 *	Rep Stress Incr	YES	WB 0.93	Horz(TL)	0.04	N	n/a		
BCDL 10.0	Code	SBC/ANSI95	(Matrix)	1st LC LL Min l/defl = 240				Weight: 143 lb	

LUMBER
TOP CHORD 2 X 4 SYP No.1
BOT CHORD 2 X 4 SYP No.1
WEBS 2 X 4 SYP No.2

BRACING
TOP CHORD
Sheathed or 4-9-3 oc purlins.
BOT CHORD
Rigid ceiling directly applied or 6-5-2 oc bracing.
WEBS
1 Row at midpt E-K, E-I

REACTIONS (lb/size)
B = 1314/0-3-8
N = 1242/0-3-8
Max Horz
B = 747(load case 3)
Max Uplift
B = -914(load case 4)
N = -760(load case 5)

FORCES (lb) - First Load Case Only
TOP CHORD
A-B = 38 B-C = -1605 C-D = -1481
D-E = -1467 E-F = -1472 F-G = -1485
G-H = -1609
BOT CHORD
B-L = 1153 L-M = 1153 K-M = 1153
K-N = 775 N-O = 775 J-O = 775
I-J = 775 I-P = 1158 P-Q = 1158
H-Q = 1158
WEBS
C-K = -316 E-K = 729 E-I = 737
G-I = -319

NOTES (7)
1) This truss has been checked for unbalanced loading conditions

2) This truss has been designed for the wind loads generated by 130 mph winds at 25 ft above ground level, using 7.0 psf top chord dead load and 5.0 psf bottom chord dead load, in the gable end roof zone on an occupancy category II, condition I enclosed building, with exposure C ASCE 7-98 per SBC/ANSI95. If end verticals or cantilevers exist, they are exposed to wind. If porches exist, they are not exposed to wind. The lumber DOL increase is 1.60, and the plate grip increase is 1.60
3) All plates are MII20 plates unless otherwise indicated.
4) * This truss has been designed for a live load of 20.0psf on the bottom chord in all areas with a clearance greater than 3-6-0 between the bottom chord and any other members.
5) Provide mechanical connection (by others) of truss to bearing plate capable of withstanding 914 lb uplift at joint B and 760 lb uplift at joint N.
6) This truss has been designed with ANSI/TPI 1-1995 criteria.
7) This manufactured truss is designed as an individual building component. The suitability and use of this component for any particular building is the responsibility of the building designer per ANSI / TPI 1 as referenced by the building code.

LOAD CASE(S)
Standard

0009
BFS

Job	Truss	Truss Type	Qty	Ply	DR HORTON - LOT 9D - DANIELS, ROOF
69420	A3	ROOF TRUSS	8	1	(Original)

Builders FirstSource, Sumter, SC 29150 — 4.701 S R1 s Nov 15 2000 MiTek Industries, Inc. Wed Jul 11 09:19:33 2001 Page 1

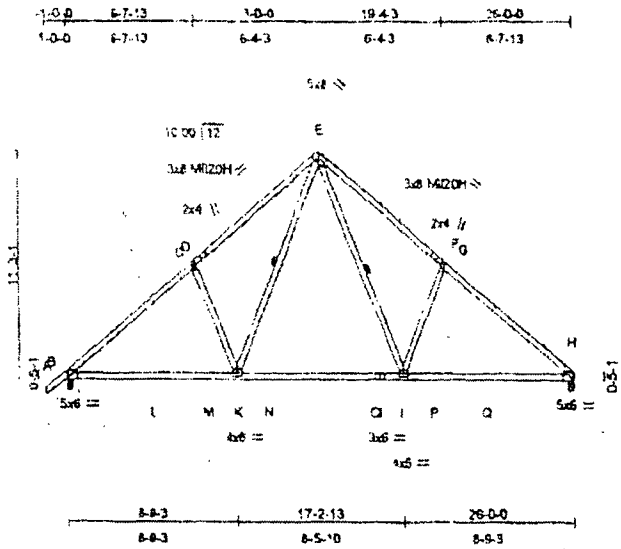


Plate Offsets (X,Y): [B:0-0-0,0-0-8], [E:0-4-14,0-2-8], [H:0-0-0,0-0-8]

LOADING (psf)	SPACING 2-0-0	CSI	DEFL In (loc) l/defl	PLATES	GRIP
TCLL 20.0	Plates Increase 1.15	TC 0.57	Vert(LL) 0.25 H-I >999	MI20	246/190
TCDL 10.0	Lumber Increase 1.15	BC 0.71	Vert(TL) -0.25 H-I >999	MI20H	187/143
BCLL 0.0 *	Rep Stress Incr YES	WB 0.93	Horz(TL) 0.04 H n/a		
BCDL 10.0	Code SBC/ANSI95	(Matrix)	1st LC LL Min l/defl = 240	Weight: 143 lb	

LUMBER
TOP CHORD 2 X 4 SYP No.1
BOT CHORD 2 X 4 SYP No.1
WEBS 2 X 4 SYP No.2

BRACING
TOP CHORD
Sheathed or 6-9-3 oc purlins.
BOT CHORD
Rigid ceiling directly applied or 6-5-2 oc bracing.
WEBS
1 Row at midpt E-K, E-I

REACTIONS (lb/size)
H = 1242/0-3-8
B = 1314/0-3-8
Max Horz
B = 747(load case 7)
Max Uplift
H = -760(load case 5)
B = -914(load case 4)

FORCES (lb) - First Load Case Only
TOP CHORD
A-B = 36 B-C = -1805 C-D = -1481
D-E = -1467 E-F = -1472 F-G = -1485
G-H = -1699
BOT CHORD
B-L = 1153 L-M = 1153 K-M = 1153
K-N = 775 N-O = 775 J-O = 775
I-J = 775 J-P = 1158 P-Q = 1158
H-Q = 1158
WEBS
D-K = -316 E-K = 729 E-I = 737
G-I = 919

NOTES (7)
1) This truss has been checked for unbalanced loading conditions.
2) This truss has been designed for the wind loads generated by 130 mph winds at 25 ft above ground level, using 7.0 psf top chord dead load and 5.0 psf bottom chord dead load, in the gable end roof zone on an occupancy category II, condition I enclosed building, with exposure C ASCE 7-98 per SBC/ANSI95. If end verticals or cantilevers exist, they are exposed to wind. If porches exist, they are not exposed to wind. The lumber DOL increase is 1.60, and the plate grip increase is 1.60.
3) All plates are MI20 plates unless otherwise indicated.
4) * This truss has been designed for a live load of 20.0psf on the bottom chord in all areas with a clearance greater than 3-6-0 between the bottom chord and any other members.
5) Provide mechanical connection (by others) of truss to bearing plate capable of withstanding 760 lb uplift at joint H and 914 lb uplift at joint B.
6) This truss has been designed with ANSI/TPI 1-1995 criteria.
7) This manufactured truss is designed as an individual building component. The suitability and use of this component for any particular building is the responsibility of the building designer per ANSI/TPI 1 as referenced by the building code.

LOAD CASE(S)
Standard

0010
BFS

Job	Truss	Truss Type	Qty	Ply	DR HORTON - LOT 50 - DANIEL IS. ROOF
69420	B1	ROOF TRUSS	1	1	(optional)

Builders FirstSource, Sumter, SC 29150 — 4.201 S Nov 16 2000 MiTek Industries, Inc. Wed Jul 11 09:14:51 2001 Page 1

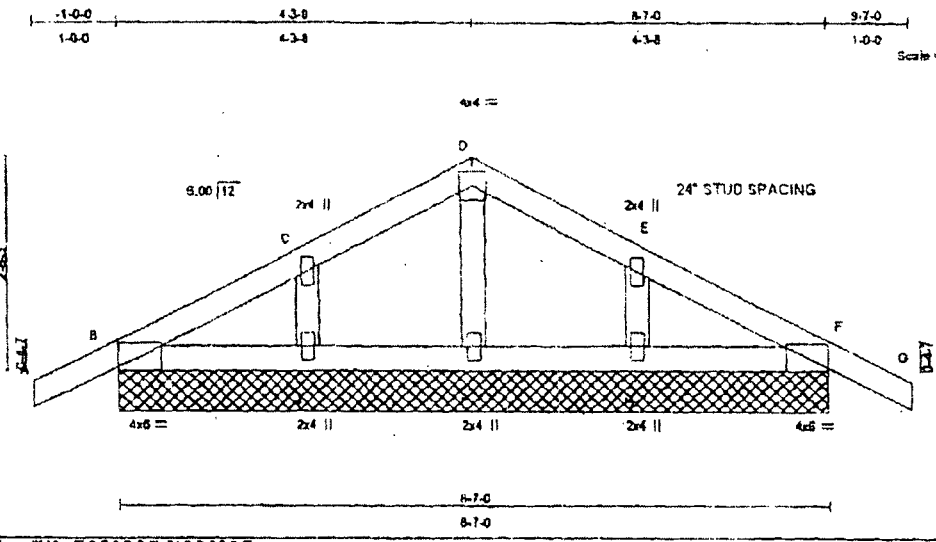


Plate Offsets (X,Y): [C:0-0-0,0-0-0], [H:0-0-0,0-0-0]

LOADING (psf)		SPACING	2-0-0	CSI		DEFL	in	(loc)	l/defl	PLATES	GRIP
TCLL	20.0	Plates Increase	1.15	TC	0.10	Vert(LL)	n/a	-	n/a	MI20	249/190
TCDL	10.0	Lumber Increase	1.15	BC	0.02	Vert(TL)	0.01	A	>999		
BCLL	0.0 *	Rep Stress Incr	NO	WB	0.06	Horz(TL)	0.00	F	n/a		
BCDL	10.0	Code	SBC/ANSI95	(Matrix)		1st LC LL Min l/defl = 240				Weight: 36 lb	

LUMBER
TOP CHORD 2 X 4 SYP No.1
BOT CHORD 2 X 4 SYP No.1
OTHERS 2 X 4 SYP No.3

BRACING
TOP CHORD
Sheathed or 6-0-0 oc purlins.
BOT CHORD
Rigid ceiling directly applied or 10-0-0 oc bracing.

REACTIONS (lb/size)
B = 154/8-7-0
F = 154/8-7-0
I = 118/8-7-0
J = 191/8-7-0
H = 191/8-7-0
Max Horz
B = -141(load case 5)
Max Uplift
B = -209(load case 4)
F = -237(load case 5)
I = -5(load case 4)
J = -229(load case 4)
H = -228(load case 5)

FORCES (lb) - First Load Case Only
TOP CHORD
A-B = 24 B-C = -44 C-D = -44
D-E = -44 E-F = -44 F-G = 24
BOT CHORD
B-J = 10 I-J = 10 H-I = 10
F-H = 10
WEBS
D-H = -84 C-J = -140 E-H = -140

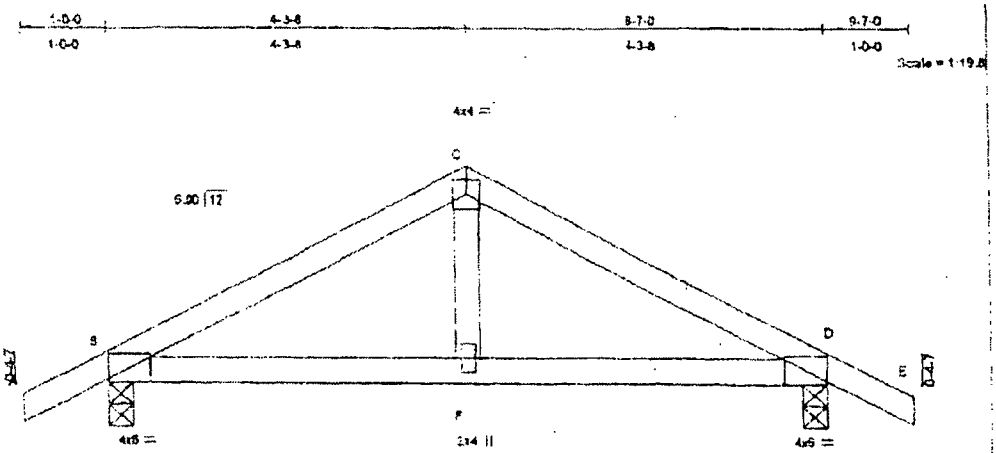
NOTES (9)
1) This truss has been checked for unbalanced loading conditions.
2) This truss has been designed for the wind loads generated by 130 mph winds at 25 ft above ground level, using 7.0 psf top chord dead load and 5.0 psf bottom chord dead load, in the gable end roof zone on an occupancy category II, condition I enclosed building, with exposure C ASCE 7-98 per SBC/ANSI95 if and verticals or cantilevers exist, they are exposed to wind. If porches exist, they are not exposed to wind. The lumber DOL increase is 1.60, and the plate grip increase is 1.60
3) Truss designed for wind loads in the plane of the truss only. For studs exposed to wind (normal to the face), see MiTek "Standard Gable End Detail"
4) Gable requires continuous bottom chord bearing.
5) Gable studs spaced at 2-0-0 oc.
6) * This truss has been designed for a live load of 20.0psf on the bottom chord in all areas with a clearance greater than 3-6-0 between the bottom chord and any other members.
7) Provide mechanical connection (by others) of truss to bearing plate capable of withstanding 209 lb uplift at joint B, 237 lb uplift at joint F, 5 lb uplift at joint I, 229 lb uplift at joint J and 228 lb uplift at joint H.
8) This truss has been designed with ANSI/TPI 1-1995 criteria.
9) This manufactured truss is designed as an individual building component. The suitability and use of this component for any particular building is the responsibility of the building designer per ANSI / TPI 1 as referenced by the building code.

LOAD CASE(S)
Standard

0011
BFS

Job	Truss	Truss Type	Qty	Ply	DR HORTON - LOT 60 - DANIEL IS ROOF
69420	B2	ROOF TRUSS	3	1	(optional)

Builders FirstSource, Sumter, SC 29150 — 4.701 S R1 s Nov 16 2000 MiTek Industries, Inc. Wed Jul 11 09:14:52 2001 Page 1



LOADING (psf)	SPACING 2-0-0	CSI	DEFL in (loc) l/defl	PLATES GRIP
TCLL 20.0	Plates Increase 1.15	TC 0.26	Vert(LL) 0.01 F >999	MII20 245/190
TCDL 10.0	Lumber Increase 1.15	BC 0.11	Vert(TL) 0.04 A-B >317	
BCLL 0.0 *	Rep Stress Incr YES	WB 0.04	Horz(TL) 0.00 D n/a	
BCDL 10.0	Code SBC/ANSI95	(Matrix)	*Ind LC LL Min l/defl = 240	Weight: 34 lb

LUMBER
TOP CHORD 2 X 4 SYP No.1
BOT CHORD 2 X 4 SYP No.1
WEBS 2 X 4 SYP No.3

BRACING
TOP CHORD
Sheathed or 6-0-0 oc purlins.
BOT CHORD
Rigid ceiling directly applied or 10-0-0 oc bracing.

REACTIONS (lb/size)
B = 400/0-3-8
D = 400/0-3-8
Max Horz
B = -141(load case 5)
Max Uplift
B = -423(load case 4)
D = -423(load case 5)

FORCES (lb) - First Load Case Only
TOP CHORD
A-B = 25 B-C = -414 C-D = -414
D-E = 25
BOT CHORD
B-F = 310 D-F = 310
WEBS
C-F = 100

NOTES (6)
1) This truss has been checked for unbalanced loading conditions.
2) This truss has been designed for the wind loads generated by 130 mph winds at 25 ft above ground level, using 7.0 psf top chord dead load and 5.0 psf bottom chord dead load, in the gable end roof zone on an occupancy category II, condition I enclosed building, with exposure C ASCE 7-98 per SBC/ANSI95 If end verticals or cantilevers exist, they are exposed to wind. If porches exist, they are not exposed to wind. The lumber DOL increase is 1.60 and the plate grip increase is 1.60
3) * This truss has been designed for a live load of 20.0psf on the bottom chord in all areas with a clearance greater than 3-6-0 between the bottom chord and any other members.
4) Provide mechanical connection (by others) of truss to bearing plate capable of withstanding 423 lb uplift at joint B and 423 lb uplift at joint D.
5) This truss has been designed with ANSI/TPI 1-1995 criteria.
6) This manufactured truss is designed as an individual building component. The suitability and use of this component for any particular building is the responsibility of the building designer per ANSI / TPI 1 as referenced by the building code.

LOAD CASE(S)
Standard

0012
BFS

GENERAL NOTES FOR CONSTRUCTION

JOB NAME Dinel to LOD Rbld

JOB NUMBER 70009

EXHIBIT "3"

1. Builders FirstSource-Shaw, Inc. supplies individual building components that may be incorporated into the building design at the specification of the building designer. The attached design drawings have been developed from general design criteria provided to us or from signed approval drawings returned to our office. The seal on the truss design drawings indicates acceptance of professional engineering responsibility solely for the truss component shown. The suitability and use of this component for any particular building is the responsibility of the building designer, per ANSI/TPI 1995 Section 2.

2. Sealed or unsealed documents provided by Builder's FirstSource-Shaw, Inc. does not replace the contractor's need of a structural engineer to determine if the designed components will property perform as intended within the total structure.

3. Each individual building component is designed to perform in a specific location. Do not deviate from the intended application or alter from the truss placement plan location without approval from Builder's FirstSource-Shaw, Inc.

4. Product installation, erection, handing, safety precautions, and temporary and permanent bracing of trusses is the responsibility of the building designer and are not part of the truss design documents. All lateral bracing specified on each truss design drawing is intended to provide lateral restraint for the individual truss members only. It is the responsibility of the building designer to specify permanent building bracing and integrate the truss bracing into the designed system. The truss installer or contractor should obtain competent, professional advice for permanent bracing design, amount, and proper installation. See HIB-91

5. Do not cut or modify any truss, beams, or hanger component supplied by Builder's FirstSource-Shaw, Inc. It is the contractor's responsibility to coordinate between trades and ensure each component is clear from all pipes, drains, chases, stairs, fireplaces, and other items that may result in the individual building component supplied to be cut or altered. Any drilling of holes, notching, cutting or removing any cross sectional area of wood will void the structural member. The contractor is the responsible for securing the engineering required for any repair and the subsequent cost.

6. Nail or bolt schedules for girder trusses or scabs are indicated on the individual design drawing.

7. The building components supplied are designed to only support the listed loads at the spacing indicated.

8. Truss to bearing connection to be designed and specified by the building designer. Truss to truss connections to be specified by Builder's FirstSource-Shaw, Inc.

9. The contractor should inspect trusses after installation for any damage, such as, cracks, breaks, plates, etc., and secure engineered repairs. The contractor should inspect truss installation for bow, variation from plumb, etc., and ensure tolerances are not exceeded. See HIB-91.

10. The contractor should contact Builder's FirstSource-Shaw, Inc. should there be questions understanding the documents supplied.

0013
BFS

Job	Truss	Truss Type	Qty	Ply	
19009	A1_2	ROOF TRUSS	2	1	(optional)

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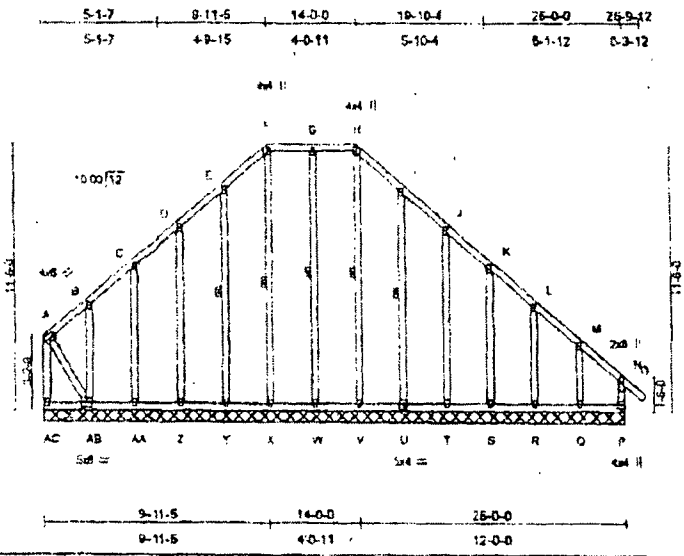

Plate Offsets (X,Y): [F:Edge,0-1-12], [H:Edge,0-1-12], [U:0-2-0,0-3-0]

LOADING (psf)		SPACING	2-0-0	CSI		DEFL	in	(loc)	l/defl	PLATES	GRIP
TCLL	20.0	Plates Increase	1.15	TC	0.34	Vert(LL)	n/a	-	n/a	MII20	249/190
TCDL	10.0	Lumber Increase	1.15	BC	0.32	Vert(TL)	0.03	N-O	>507		
BCLL	0.0	Rep Stress Incr	YES	WB	0.35	Horz(TL)	0.01	P	n/a		
BCDL	10.0	Code	SBC/ANSI85	(Matrix)		1st LC LL Mn l/defl = 240				Weight: 234 lb	

LUMBER
TOP CHORD 2 X 4 SYP No.1
BOT CHORD 2 X 4 SYP No.1
WEBS 2 X 4 SYP No.2 *Except*
A-AB 2 X 4 SYP No.3
OTHERS 2 X 4 SYP No.2 *Except*
B-AB 2 X 4 SYP No.3, L-R 2 X 4 SYP No.3, M-Q 2 X 4 SYP No.3

BRACING
TOP CHORD Sheathed or 5-0-0 oc purlins, except end verticals, and 2-0-0 oc purlins (6-0-0 max.): F-H.
BOT CHORD Rigid ceiling directly applied or 10-0-0 oc bracing, Except 6-0-15 oc bracing: AB-AC.
WEBS 1 Row at midpt H-V, G-W, F-X, E-Y, I-U

REACTIONS (lb/size) AC=75/26-0-0, U=160/26-0-0, P=153/26-0-0, V=155/26-0-0, W=162/26-0-0, X=155/26-0-0, Y=158/26-0-0, Z=160/26-0-0, AA=161/26-0-0, AB=157/26-0-0, T=160/26-0-0 S=159/26-0-0, R=164/26-0-0, Q=140/26-0-0
Max Horz AC=-888(load case 7)
Max Uplift AC=-1170(load case 2), U=-266(load case 5), P=-226(load case 3), W=-153(load case 3), X=-113(load case 3), Y=-266(load case 4), Z=-313(load case 4), AA=-296(load case 4), AB=-969(load case 3), T=-311(load case 5), S=-314(load case 5), R=-226(load case 5), Q=-606(load case 5)
Max Grav AC=1104(load case 3), U=160(load case 7), P=275(load case 7), V=198(load case 5), W=166(load case 7), X=474(load case 5), Y=158(load case 1), Z=160(load case 8), AA=161(load case 1), AB=904(load case 2), T=160(load case 1), S=159(load case 7), R=164(load case 1), Q=232(load case 3)

FORCES (lb) - First Load Case Only
TOP CHORD A-B=31, B-C=31, C-D=30, D-E=30, E-F=30, F-G=-6, G-H=-6, H-I=-46, I-J=-46, J-K=-46, K-L=-46, L-M=-44, M-N=-44, N-O=40, A-AC=-57, N-P=-132
BOT CHORD AB-AC=5, AA-AB=6, Z-AA=6, Y-Z=6, X-Y=6, W-X=6, V-W=6, U-V=6, T-U=6, S-T=6, R-S=6, Q-R=6, P-Q=6
WEBS H-V=-115, G-W=-122, F-X=-115, E-Y=-118, D-Z=-120, C-AA=-120, B-AB=-120, I-U=-120, J-T=-120, K-S=-120, L-R=-123, M-Q=-135, A-AB=2

NOTES (13)
1) This truss has been checked for unbalanced loading conditions.
2) This truss has been designed for the wind loads generated by 130 mph wind at 25 ft above ground level, using 7.0 psf top chord dead load and 5.0 psf bottom chord dead load, in the gable end roof zone on an occupancy category II, condition I enclosed building, with exposure C ASCE 7-98 per SBC/ANSI85 if end verticals or cantilevers exist they are exposed to wind. If porched exist, they are not exposed to wind. The lumber DOL increase is 1.60, and the plate grip increase is 1.60
3) Truss designed for wind loads in the plane of the truss only. For studs exposed to wind (normal to the face), see MiTek "Standard Gable End Detail"
4) Provide adequate drainage to prevent water ponding.
5) All plates are 2x4 MII20 unless otherwise indicated.
6) Gable requires continuous bottom chord bearing.
7) Truss to be fully sheathed from one face or securely braced against lateral movement (i.e. diagonal web).
8) Gable studs spaced at 2-0-0 oc.
9) * This truss has been designed for a live load of 20.0psf on the bottom chord in all areas with a clearance greater than 3-6-0 between the bottom chord and any other members.

Continued on page 2

0014
BFS

Job	Truss	Truss Type	Qty	Ply	
70009	A1_2	ROOF TRUSS	2	1	(optional)

NOTES (13)

10) Provide mechanical connection (by others) of truss to bearing plate capable of withstanding 1170 lb uplift at joint AC, 266 lb uplift at joint U, 226 lb uplift at joint P, 163 lb uplift at joint W, 113 lb uplift at joint X, 266 lb uplift at joint Y, 313 lb uplift at joint Z, 298 lb uplift at joint AA, 969 lb uplift at joint AB, 311 lb uplift at joint T, 314 lb uplift at joint S, 226 lb uplift at joint R and 606 lb uplift at joint Q.

11) This truss has been designed with ANSI/TPI 1-1995 criteria.

12) Design assumes 4x2 (flat orientation) purlins at oc spacing indicated, fastened to truss TC w/ 2-10d nails.

13) This manufactured truss is designed as an individual building component. The suitability and use of this component for any particular building is the responsibility of the building designer per ANSI / TPI 1 as referenced by the building code.

LOAD CASE(S) Standard

0015
BFS

Job	Truss	Truss Type	Qty	Ply	
70009	A2_2	ROOF TRUSS	15	1	(optional)

Builders FirstSource, Sumter, SC 29150 4.201 S R1 s Nov 16 2000 MiTek Industries, Inc. Mon Aug 06 08:35:22 2001 Page 1

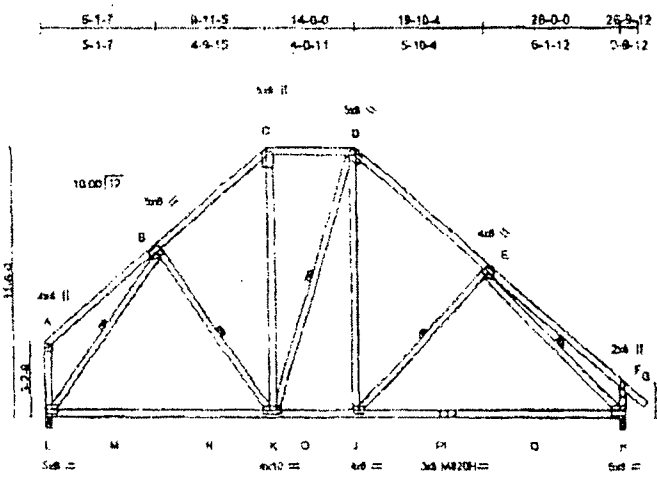

Plate Offsets (X,Y): [C:0-1-12,0-2-0], [D:0-4-4,0-1-4]

LOADING (psf)		SPACING	2-0-0	CSI		DEFL	in	(loc)	l/defl	PLATES	GRIP
TCLL	20.0	Plates Increase	1.15	TC	1.00	Vert(LL)	-0.38	H-J	>811	M20	244/190
TCDL	10.0	Lumber Increase	1.15	BC	0.72	Vert(TL)	-0.70	H-J	>441	M20H	187/143
BCLL	0.0 *	Rep Stress Incr	YES	WB	0.88	Horz(TL)	0.03	H	n/a		
BCDL	10.0	Code	SBC/ANSI95	(Matrix)		1st LC LL Min l/defl = 240				Weight: 194 lb	

LUMBER
TOP CHORD 2 X 4 SYP No.1
BOT CHORD 2 X 4 SYP No.1
WEBS 2 X 4 SYP No.2

BRACING
TOP CHORD Sheathed or 5-11-15 oc purlins, except end verticals, and 2-0-0 oc purlins (6-0-0 max.): C-D.
BOT CHORD Rigid ceiling directly applied or 8-0-1 oc bracing.
WEBS 1 Row at midpt B-K, D-K, E-J, B-L, E-H

REACTIONS (lb/size) L=12530/0-3-8, H=13030/0-3-8
Max Horz L=-868(load case 2)
Max Uplift L=-788(load case 4), H=-859(load case 5)

FORCES (lb) - First Load Case Only
TOP CHORD A-B=-311, B-C=-1022, C-D=-715, D-E=-1108, E-F=-781, F-G=440, A-L=-290, F-H=-869
BOT CHORD L-M=695, M-N=695, K-N=695, K-O=765, J-O=765, J-P=908, I-P=808, I-Q=908, H-Q=908
WEBS B-K=27, C-K=338, D-K=-153, D-J=476, E-J=-712, B-L=-934, E-H=-575

NOTES (9)
1) This truss has been checked for unbalanced loading conditions.
2) This truss has been designed for the wind loads generated by 130 mph winds at 25 ft above ground level, using 7.0 psf top chord dead load and 5.0 psf bottom chord dead load, in the gable end roof zone on an occupancy category II, condition I enclosed building, with exposure C ASCE 7-98 per SBC/ANSI95 If end verticals or cantilevers exist, they are exposed to wind. If porches exist, they are not exposed to wind. The lumber DOL increase is 1.60, and the plate grip increase is 1.60
3) Provide adequate drainage to prevent water ponding.
4) All plates are M20 plates unless otherwise indicated.
5) * This truss has been designed for a live load of 20.0psf on the bottom chord in all areas with a clearance greater than 3-6-0 between the bottom chord and any other members.
6) Provide mechanical connection (by others) of truss to bearing plate capable of withstanding 788 lb uplift at joint L and 859 lb uplift at joint H.
7) This truss has been designed with ANSI/TPI 1-1995 criteria.
8) Design assumes 4x2 (flat orientation) purlins at oc spacing indicated, fastened to truss TC w/ 2-10d nails.
9) This manufactured truss is designed as an individual building component. The suitability and use of this component for any particular building is the responsibility of the building designer per ANSI / TPI 1 as referenced by the building code.

LOAD CASE(S) Standard

0016
BFS

Job	Truss	Truss Type	Qty	Ply	
70009	PB2	PIGGYBACK	17	1	(optional)

Builders FirstSource, Gumlet, SC 29150 — 4.201 S R1 s Nov 15 2000 MiTek Industries, Inc. Mon Aug 06 08:35:15 2001 Page 1

-2-0-0 2-0-0 | 2-0-6 2-0-6 | 4-0-11 2-0-5 | 6-0-11 2-0-0

Scale = 1:10.0

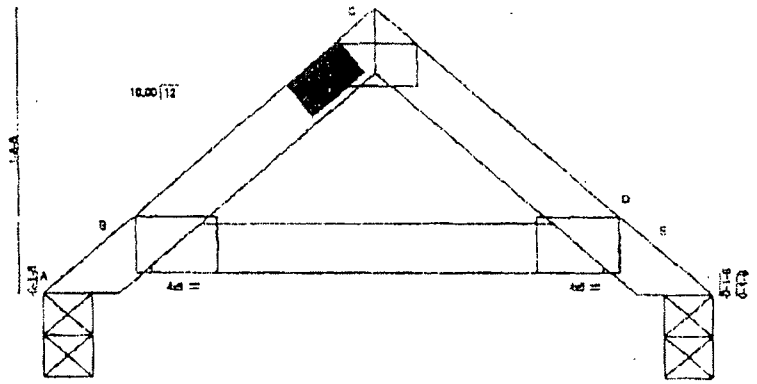

Plate Offsets (X,Y): [C:0-3-0,Edge]

LOADING (psf)		SPACING	2-0-0	CSI		DEFL	in	(loc)	l/defl	PLATES	GRIP
TCLL	20.0	Plates Increase	1.15	TC	0.11	Vert(LL)	0.01	B-D	>999	MI20	249/190
TCDL	10.0	Lumber Increase	1.15	BC	0.07	Vert(TL)	-0.01	B-D	>999		
BCLL	0.0 *	Rep Stress Incr	YES	WB	0.00	Horz(TL)	-0.01	E	n/a		
BCDL	10.0	Code	SBC/ANSI95	(Matrix)		1st LC LL Min l/defl = 240				Weight: 12 lb	

LUMBER
TOP CHORD 2 X 4 SYP No.1
BOT CHORD 2 X 4 SYP No.1

BRACING
TOP CHORD
Installation 1 Stabilizer(s) at 1-7-11 oc.
Permanent Sheathed or 4-0-11 oc purlins.
BOT CHORD
Permanent Rigid ceiling directly applied or 10-0-0 oc bracing.

REACTIONS (lb/size) A=151/0-3-8, E=151/0-3-8
Max Horiz A=103(load case 3)
Max Uplift A=-112(load case 4), E=-112(load case 5)

FORCES (lb) - First Load Case Only
TOP CHORD A-B=-81, B-C=-146, C-D=-146, D-E=-81
BOT CHORD B-D=122

NOTES (8)
1) This truss has been checked for unbalanced loading conditions.
2) This truss has been designed for the wind loads generated by 130 mph winds at 25 ft above ground level, using 7.0 psf top chord dead load and 5.0 psf bottom chord dead load, in the gable end roof zone on an occupancy category II, condition I enclosed building, with exposure C ASCE 7-98 per SBC/ANSI95 if end verticals or cantilevers exist, they are exposed to wind. if porches exist, they are not exposed to wind. The lumber DOL increase is 1.60, and the plate grip increase is 1.60
3) * This truss has been designed for a live load of 20.0psf on the bottom chord in all areas with a clearance greater than 3-6-0 between the bottom chord and any other members.
4) Bearing at joint(s) A, E considers parallel to grain value using ANSI/TPI 1-1995 angle to grain formula. Building designer should verify capacity of bearing surface.
5) Provide mechanical connection (by others) of truss to bearing plate capable of withstanding 112 lb uplift at joint A and 112 lb uplift at joint E.
6) This truss has been designed with ANSI/TPI 1-1995 criteria.
7) Where diaphragm bloobing is required at pitch breaks, Stabilizers may be replaced with wood blocking.
8) This manufactured truss is designed as an individual building component. The suitability and use of this component for any particular building is the responsibility of the building designer per ANSI / TPI 1 as referenced by the building code.

LOAD CASE(S) Standard

0017
BFS

EXHIBIT "I"

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 their is no reason to remove the trusses.

Second Floor: The homeowner pointed out the floor has dips in it. I noted one are 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 were 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

EXHIBIT "J"

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**

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

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.

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

March 26, 2014
Charleston, South Carolina

Deposition Index

1. Deposition of 30(b)(6) Witness for Builders FirstSource-Southeast Group, LLC and Builders FirstSource, Inc.

   - 142:25 - 143:11

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 NACARRI, 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
www.MagnaLS.com

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

Appearances for the Plaintiff:
By: Peden Brown McLeod, Jr., Esquire
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145 King Street, Suite 300
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(843) 329-9500
Kristyn.robertson@walltempleton.com

Appearances for the Defendant:
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Tanderson@kernodlelaw.com
and
By: Jennie M. Smith, Esquire
TURNER PADGET GRAHAM & LANEY, P.A.
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Charleston, South Carolina 29401
(843) 576-2805
Jsmith@turnerpadget.com
and
By: Trippett Boineau, III, Esquire
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1320 Main Street
Columbia, South Carolina 29201
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Trippettboineau@mgclaw.com

president of Southeast Group, which would be Morris Tolly involved in this contract, correct?

MR. ANDERSON: Object to form.

A. Correct.

Q. And whose signature is at the bottom of this on behalf of Builders FirstSource?

A. Morris Tolly.

Q. And what was he at the time of the execution of this contract, if you know or it doesn't have to be right?

A. He was actually the -- we had two groups, Atlantic Group, Southeast Group. He was the president of the Southeast Group at the time. '01, yeah.

Q. And at some point he moved up the corporate ladder, I guess, and we can find him at the -- on the company website as under management as a Senior Vice President of Operations. When did he make that transition, that move?

MR. ANDERSON: Object to the extent that that's beyond the scope of notice.

Q. If you know?

A. I don't know the actual dates.

Q. And this contract between Builders

FirstSource and D.R. Horton is the contract that would have been applicable to the construction of 403 Milner Court, correct?

A. I assume this is a master subcontract. It doesn't specify any particular job or lot, but I would assume it had to do with that.

Q. Yeah. But it -- so this contract applied to the obligations of Builders FirstSource with regard to the construction of 403 Milner Court, correct?

A. That's correct.

Q. And, you know, you've been in the construction business for a long time. I guess you've seen contracts similar to this action, correct?

A. Yes.

Q. You'd agree with me this is a valid contract between two parties, correct?

MR. ANDERSON: Object to form.

A. I'm not a lawyer, so I can't say whether it's a contract or not.

Q. You've looked at this before today, correct?

A. Yes.

Q. Did you see any problems with the

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. SUMMARY JUDGMENT**

This matter comes before the Court on Defendants Builders FirstSource-Southeast Group, LLC, and Builders FirstSource, Inc.'s (hereinafter collectively "BFS") Second Motion for Summary Judgment. A hearing on this motion was held on August 13, 2014. Plaintiff D.R. Horton, Inc., f/k/a C. Richard Dobson Builders, Inc., ("DRH"), and Defendant BFS appeared at the hearing through their respective counsel. After considering the entire record in this matter, including all 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 should be, and

hereby is, GRANTED SUMMARY JUDGMENT.

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

1. DRH was the general contractor for the construction of a single family residential home at 403 Milner Court, Charleston, South Carolina (the "Residence"). The Residence was constructed in 2001. BFS, as a subcontractor for DRH, provided and installed framing materials and windows at the Residence.

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

3. In addition to acting as the general contractor, DRH also owned the Residence. 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 ("UTPA"). The complaint in 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. It is undisputed that some of the allegations in the complaint filed in the

RMQ2

Homeowner's Suit related to materials supplied and installed by BFS and other allegations in the complaint filed in the Homeowner's Suit were related to the work of others. BFS did not install the driveway, concrete slab, siding, roofing or hot water heater at the Residence.

6. 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.

7. 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.

8. 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.

9. The parties to the Homeowner's Suit agreed to request an unreasoned arbitration award that would not contain findings of fact or conclusions of law. 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.

10. The record in this case indicates that DRH was represented by counsel at all times during the Homeowner's Suit and was advised by counsel that requesting an unreasoned arbitration award would make any future indemnity claim against BFS uncertain.

11. On February 26, 2010, the arbitration award was filed, confirmed and made a

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final judgment of the Berkeley County Circuit Court. (the "Judgment"). No party objected to the confirmation of the arbitration award.

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

13. 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.

II. CONCLUSIONS OF LAW

A. BFS IS ENTITLED TO SUMMARY JUDGMENT ON DRH'S CLAIMS FOR CONTRIBUTION PURSUANT TO THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, § 15-38-10, et seq.

14. The statutory right of contribution among joint tortfeasors is in derogation of the common law and thus the South Carolina Contribution Among Tortfeasors Act must be strictly construed. *G & P Trucking v. Parks Auto Sales Service & Salvage, Inc.*, 357 S.C. 82, 87 (Ct.App. 2003). "Moreover, in a suit in which contribution is sought from a joint tortfeasor, the claimant obviously must prove facts sufficient under the statutes and the common law . . . to establish a right of contribution between wrongdoers." *Id.*

15. Here, there is no basis in the record to find that DRH has sustained tort liability. The plaintiff in the Homeowner's Suit alleged causes of action for breach of contract, breach of warranty, negligence and violations of the UTPA. The parties to the Homeowner's Suit requested an award from the arbitrator that does not specify the legal basis for his award of damages.

16. In order for a party who has litigated a case to judgment to maintain an action as a joint tortfeasor that party must have first been adjudicated to have committed a tort. *See* S.C. Code Ann. § 15-38-40(B)("*Once the issue of liability has been resolved* . . . a defendant has the right to seek contribution . . ."); *See also Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 406 (2005)(No right of contribution against negligent employer because workers compensation laws prevent employer from being subject to tort liability). The record before the Court does not contain any finding of tort liability from the Homeowner's Suit and therefore DRH is not entitled to contribution. *See Jenkins v. Few*, 391 S.C. 209, 221 (Ct.App. 2010)("Because the verdict was a general verdict, it is impossible to determine how the jury allocated damages between civil conspiracy, conversion, and trespass to personal property. We will not speculate as to how the jury allocated damages.").

17. In addition to the absence of a finding of tort liability, there is no record evidence that the Judgment is attributable to defects in the materials supplied and installed by BFS. Because the arbitration award contains no findings of fact or conclusions of law, it is impossible for the Court to determine what defects the arbitrator found at the Residence.

18. Even if, somehow, DRH were able to establish its own tort liability, and that BFS's work was determined to be defective in the Homeowner's Suit, there is no way to determine what portion of the Judgment is related to said liability. 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).

19. Any attempt to determine what portion of the Judgment is attributable to the joint negligence of BFS and DRH would be an exercise in impermissible guesswork. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 70-71 (Ct.App. 1999)(refusing to allow contribution when "The settlement agreement does not place a specific value on any potential claim . . ." and the court "cannot, therefore, determine whether [the party seeking contribution] paid more than its pro rata share of liability . . ."). *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.").

20. As stated by the *Vermeer* Court, "[i]n this case the lack of apportionment may work a hardship . . . but it is one which he could have avoided by a properly drawn" award. *Vermeer* 336 S.C. at 70. The record indicates that DRH, with the advice of counsel, made a strategic decision to agree to an unreasoned arbitration award. Having failed to obtain a finding of tort liability or findings regarding what portions of the Residence were ultimately determined to be defective, DRH cannot now maintain this action for contribution.

B. BFS IS ENTITLED TO SUMMARY JUDGMENT ON DRH'S CLAIM FOR CONTRACTUAL INDEMNITY.

i. There is no evidence that any portion of the Judgment is attributable to materials supplied and installed by BFS.

21. Because the arbitration award contains no findings of fact or conclusions of law, there is no evidence that the Judgment is attributable to property damage caused by defects in the materials supplied and installed by BFS. Based on the record before the Court, DRH, as the Plaintiff, cannot meet its burden of proving that a Judgment was entered against it because of

property damage caused by defects in the materials supplied and installed by BFS.

ii. There is no evidence in the record indicating what portions of the Judgment are attributable to the work of others.

22. Even if DRH could prove that the arbitrator concluded that defects in the materials supplied and installed by BFS caused property damage at the Residence, it is impossible to determine what portion of the Judgment is attributable to said property damage. Because the parties to the arbitration did not request an award with findings of fact or conclusions of law, there is no record before the Court to indicate what portion of the Judgment is attributable to the various distinct defects alleged in the Homeowner's Suit.

23. The Contract does not require BFS to indemnify DRH for judgments based on defects in the work of others. *See* Contract ¶ 11 (requiring indemnification for "(I) A BREACH OF THE WARRANTIES . . . PROVIDED HEREIN BY CONTRACTOR; (II) THE WORK PERFORMED . . . BY CONTRACTOR).

24. Applicable law does not permit BFS to indemnify DRH for judgments based on defects in the work of others. *See* S.C. Code Ann. § 32-2-10 (prohibiting agreements whereby subcontractor agrees to indemnify general contractor for general contractor's sole negligence or the negligence of its "independent contractors.").

iii. The Contract provides that BFS has the right to defend any suit implicating its contractual indemnity obligations.

25. The plain language of the indemnity agreement provides that BFS "AGREES TO PROTECT, DEFEND, INDEMNIFY AND HOLD OWNER . . . FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTIONS, SUITS, OR OTHER LITIGATION . . ." The parties plainly agreed that BFS, not DRH, would

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defend any lawsuit alleging property damage caused by BFS's work. The Contract not only obligates BFS to defend any suits alleging property damage associated with defects in its work, it also gives BFS the right to defend any such claims. The Contract does not provide that DRH can defend itself, control the defense, select the attorneys of its choice, provide no notice to BFS, and nonetheless require BFS to indemnify it.

26. It is undisputed that DRH did not give BFS written notice of the Homeowner's Suit and did not tender the defense of the Homeowner's Suit to BFS. Because DRH undertook the defense of the Homeowner's Suit without providing BFS an opportunity to defend said suit, DRH cannot pursue indemnity under the Contract.

iv. The Contract provides that BFS will receive written notice of any suit implicating its contractual indemnity obligations.

27. "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). "A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used . . ." *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367 (1966).

28. Paragraph 19 of the Contract provides: "*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.*"

29. The indemnity provision in the Contract, upon which DRH relies in this case, provides that BFS will "protect" DRH against, and "defend" DRH from, allegations of property

damage caused by BFS's work. BFS cannot protect and defend DRH from lawsuits implicating BFS's work without being provided notice that a suit has been filed. Therefore, it is implied in the Contract that DRH will provide BFS with notice of any suit implicating its indemnity obligations. *See Commercial Credit Corp*, 247 S.C. at 367 ("In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.").

30. Other portions of the Contract also demonstrate that the parties intended that BFS should get notice of homeowner lawsuits implicating BFS's indemnity obligations. Indeed, with reference to the factual scenario presented in this case, 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 . . ." Contract ¶ 22. Clearly, BFS must be given notice of the third-party suit in order to "participate in" the arbitration.

v. The implied covenant of good faith and fair dealing requires DRH to provide BFS with notice of any suit implicating its indemnity obligations.

31. "There exists in every contract an implied covenant of good faith and fair dealing." *Adams v. G. J. Creel and Sons, Inc.*, 320 S.C. 274, 277 (1995). Here, good faith and fair dealing require DRH to notify BFS of any lawsuit which DRH contends implicates BFS's indemnity obligations. DRH's actions in litigating the Homeowner's Suit without notifying BFS, in failing to make any transcript of the arbitration hearing, and in failing to request an award with factual findings and legal conclusions, all violate the implied covenant of good faith and fair dealing and prohibit DRH from requiring BFS to indemnify it for any portion of the Judgment or defense costs.

vi. DRH waived its right to contractual indemnification by failing to give BFS notice of the Homeowner's Suit and failing to request an award with factual findings and conclusions of law.

32. "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).

33. Here, DRH's failure to give BFS notice of the Homeowner's Suit is inconsistent with its assertion of a right to indemnity. In fact, the record reveals that DRH was informed by counsel that it should provide BFS with notice of the Homeowner's Suit and that DRH declined to provide BFS notice.

34. Additionally, DRH intentionally relinquished its right to indemnity by failing to request an arbitration award containing findings of fact and conclusions of law. The record reveals that DRH made a strategic decision not to request findings of fact or conclusions of law with the express purpose of making it difficult to determine what was decided in the Homeowner's Suit. Additionally, the decision not to request a reasoned award was made after being advised by counsel that an unreasoned award would make any future case against BFS uncertain.

35. The record conclusively indicates that DRH knowingly waived its right to seek indemnity from BFS.

vii. DRH is equitably estopped from seeking contractual indemnity.

36. "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

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equity." *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290 (Ct. App. 2012). "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *Southern Development Land and Golf Co., Ltd. v. South Carolina Public Service Authority*, 311 S.C. 29, 33 (1993). "Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." *Id.*

37. By DRH's own theory of this case, DRH had knowledge of a lawsuit alleging defects in BFS's work and implicating BFS's indemnity obligations. Rather than giving BFS written notice of the Homeowner's Suit, DRH remained silent. DRH's silence deprived BFS of the right to participate in discovery, to cross-examine witnesses at depositions, and to participate in the arbitration hearing. DRH is now equitably estopped from seeking indemnification from BFS.

viii. The indemnification clause in the Contract violates S.C. Code Ann. § 32-2-10.

38. In relevant part, the indemnity clause in the Contract provides that BFS will indemnify DRH for "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 . . ."

39. The Contract purports to require BFS to indemnify DRH for DRH's own negligent acts or omissions "even when the loss is caused by the fault or negligence of" DRH. The clause violates S.C. Code Ann. § 32-2-10 and thus the "agreement" is "unenforceable." *See* S.C. Code Ann. § 32-2-10 ("a promise or agreement in connection with the . . . construction . . . of a building . . . purporting to indemnify the promisee, its independent contractors, agents,

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employees, or indemnitees against liability for damages arising out of . . . 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.).

40. 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. The indemnity agreement is unenforceable.

ix. Having failed to obtain findings of fact and conclusions of law in the Homeowner's Suit, DRH cannot litigate the issue of what was decided in the Homeowner's Suit in this action.1

41. DRH cannot litigate, in this action, the issue of what portion of a judgment entered in a previous action is attributable to property damage caused by materials supplied and installed by BFS. Principles of waiver, the requirement of proving damages to a reasonable certainty, and collateral estoppel prevent DRH from maintaining an independent action in order to apportion the Judgment.

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1 Significantly, even if DRH were able to present competent evidence that some particular portion of the Judgment is attributable to property damage caused by defects in work performed by BFS, BFS, as a non-party without notice, would not be bound to pay that amount. *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."). There is a well-established procedure whereby an indemnitee may bind a nonparty indemnitor to the findings made in a suit against the indemnitee by a third-party. *See Black 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."). *See also* S.C. Code Ann. § 36-2-607(5)(recognizing "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)). Because BFS was not "vouched in" to the Homeowner's Suit, even if DRH could prove what portion of the Judgment was awarded for defects in BFS's work, BFS could require DRH to prove, from scratch, the existence of defects in BFS's work and the amount of damage caused thereby. *See* 47 Am.Jur.3d Judgments § 606 ("The effect of the omission of such notice and opportunity is that the judgment is not binding on the person liable over, who has the right to litigate every essential fact necessary to support the judgment.").

42. "[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. As stated above, in this case the arbitration award was made a final judgment of the Berkeley County Circuit Court.

43. Having fully litigated the Homeowner's Suit, without requesting findings of fact, DRH has waived the right to make those findings of fact in this case. The failure to request findings of fact in the Homeowner's Suit constitutes a waiver of a judicial ruling on those omitted factual issues. *See Moore v. Moore*, 360 S.C. 241, 257 (Ct.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 (Ct.App. 2005) ("Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages."). A litigant who has requested a ruling that does not include findings of fact cannot file a second independent action and ask a second trier of fact to determine what was decided by the first finder of fact.

44. "[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." *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 570-571 (1971). Any attempt by a judge or jury in this action to determine what portion of the Judgment, if any, is attributable to property damage caused by products installed by BFS would be an exercise in rank guesswork and speculation.

45. Additionally, collateral estoppel prevents DRH from re-litigating issues decided

Exhibit 13

in the Homeowner's Suit. In order to maintain its case, DRH must take the position that the issue of defects in BFS's work, and the amount of damage caused thereby, was actually litigated and decided in the Homeowner's Suit. "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.

46. "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.*

47. Here, DRH necessarily contends that it has already litigated the issue of whether BFS's work was defective, and the damages caused thereby, in the Homeowner's Suit. DRH is collaterally estopped from litigating those issues anew in this case.

III. CONCLUSION

48. Pursuant to the Contract, and applicable law, DRH was required to give BFS notice of the Homeowner's Suit in order to trigger BFS's indemnity obligations. Further, DRH's

complete failure to make any record of what was determined in the Homeowner's Suit precludes it from maintaining an action based on the Judgment. There is no basis in the Contract, or in any other applicable law, whereby BFS can be held responsible for portions of the Judgment or attorney's fees attributable to the fault of others. Furthermore, there is no evidence available whereby the Court can conclude what portion of the Judgment, if any, is attributable to property damage associated with the products installed by BFS. For all of the above reasons, BFS is hereby GRANTED SUMMARY JUDGMENT AS TO ALL OF DRH'S CLAIMS.

AND IT IS SO ORDERED.

The Honorable R. Markley Dennis, Jr.
Circuit Court Judge, Ninth Judicial Circuit

August 20, 2014

Charleston, South Carolina

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,)	
-versus-)	**PLAINTIFF'S MOTION TO RECONSIDER**
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.)	

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 filed on September 5, 2014, granting Defendant Builders FirstSource - Southeast Group, LLC and Builders FirstSource, Inc. ("BFS") summary judgment. See Exhibit "A". DRH's grounds for this Motion are that the Court erred: (1) by finding a disputed fact, but then using that disputed fact as grounds for granting summary

judgment; (2) in not finding that DRH provided oral notice to BFS; (3) in finding that the indemnity agreement was unenforceable; (4) by misconstruing the unambiguous language of the contract; (5) in concluding that DRH sustained tort liability by failing to consider South Carolina case law that specifically states that construction defect claims are based both in tort and contract; and (6) by improperly relied on extrinsic and parol evidence. Based on the following authorities and argument, DRH is entitled to an order granting its Motion to Reconsider and altering or amending the Court's Order granting BFS summary judgment finding that DRH is entitled to contractual indemnification and contribution from BFS.

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

1. THE COURT'S FINDING OF FACT STATES THAT IT WAS DISPUTED WHETHER DRH GAVE BFS ORAL NOTICE; HOWEVER, THE COURT USES A LACK OF NOTICE AS GROUNDS FOR SUMMARY JUDGMENT.

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Toomer v. Norfolk S. Ry. Co., 544 S.E.2d 634, 635 (S.C. Ct. App. 2001) (citing SCRCP 56(c); Mosteller v. County of Lexington, 520 S.E.2d 620 (S.C. 1999); Young v. South Carolina Dep't of Corrections, 511 S.E.2d 413 (S.C. Ct. App.1999)). "It is not appropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law." Id. (citing Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, & Regulation, 523 S.E.2d 795 (S.C. Ct. App.1999)). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." Id. (citing Young, 511 S.E.2d at 415). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., Inc., 673 S.E.2d 801, 803 (S.C. 2009).

The Court's findings of fact state that "the parties disagree on whether DRH gave BFS oral notice of the Homeowner's Suit . . ." Exhibit "A" at ¶ 6. However, the Court then uses lack of notice as grounds in several of its conclusions of law. Id. at ¶¶ 30, 31, 33, and 37 ("Clearly, BFS must be given notice of the third-party suit in order to 'participate in' arbitration;" "DRH's

actions in litigating the Homeowner's Suit without notifying BFS . . . violate the implied covenant of good faith and fair dealing and prohibit DRH from requiring BFS to indemnify it for any portion of the judgment or defense costs;" "DRH's failure to give BFS notice of the Homeowner's Suit is inconsistent with its assertion of a right to indemnity;" "DRH's silence deprived BFS of the right to participate in discovery, to cross-examine witnesses at depositions, and to participate in the arbitration hearing . . . DRH is now equitably estopped from seeking indemnification from BFS.")

The Court finds that there was a dispute as to oral notice, but then concluded the lack of notice was grounds for summary judgment. The Court erred in relying on a fact that the Court found to be disputed. Based on the foregoing, DRH is entitled to an order granting its motion to reconsider.

2. **CONTRARY TO THE COURT'S FINDING, IT IS UNDISPUTED THAT DRH PROVIDED BFS WITH ORAL NOTICE.**

Although there is no notice requirement contained within the indemnification provision, it is undisputed that DRH did provide notice to BFS via telephone on at least two occasions. As noted above, Jay Henderson called Morris Tolly two times about the Homeowner's Suit, and BFS cannot disputed it.

DRH's 30(b)(6) witness testified that he called Morris Tolly and "discussed the case in general," and "reminded him of the circumstances and inspection that occurred by [BFS] back in the fall of 2007, how the matter had proceeded, and where we were currently with the case . . . [a]nd we discussed the mediation . . . was unsuccessful and we were going to end up arbitrating it and working on the date." Exhibit "B" (Depo. of Jay Henderson, 59:11 - 61:16). DRH's

30(b)(6) witness further testified that "I asked him point blank if he wanted to intervene and try to head this thing off before we got to that point," and that "[h]e indicated that he would follow up with me." Id. DRH's 30(b)(6) witness had to follow up with Mr. Tolly in November, and "asked if they had had any further thoughts on it." and "[s]aid we were arbitrating in December." Id.

During the deposition of BFS's 30(b)(6) witness, BFS's witness stated that "Morris [Tolly] could have known, but when I talked to him he said he had no recollection of anything about going to arbitration and no written notice of us participating or being involved." Exhibit "C" (Depo. of Terry Rosamond, 139:12 - 140:4). Based on this testimony, Morris Tolly has "no recollection" of the two telephone calls from Jay Henderson to Morris Tolly. Therefore, BFS cannot refute or dispute the testimony of Jay Henderson that he contacted Morris Tolly on two occasions about DRH asking BFS to get involved in the Homeowner's Suit. Accordingly, it is undisputed that DRH provided oral notice of the Homeowner's Suit, including the results of mediation and the impending arbitration via two telephone calls.

When facts are undisputed and susceptible of only one inference, the issue presented for review is one purely of law. Lusk v. Callaham, 287 S. C. 459, 339 S. E. 2d 156 (Ct. App. 1986). Furthermore, a question concerning the existence or nonexistence of evidence is one of law. Mims v. Coleman, 248 S. C. 235, 149 S. E. 2d 623 (1966). BFS cannot dispute the testimony of Jay Henderson because Morris Tolly has no recollection, and thus, the testimony is undisputed. This undisputed fact is discussed further below and defeats several of the grounds that the Court cites as support for granting BFS summary judgment. Furthermore, as a result of this oral notice, BFS was "vouched in" and is bound to any arbitration award according to the Order's footnote

one - further discussed below.

Based on the foregoing, DRH is entitled to an order granting its motion to reconsider, and finding that DRH is entitled to be indemnified by BFS for all damages arising out of the Homeowner's Suit.

3. THE COURT ONLY FOUND THAT ONE PORTION THE INDEMNITY AGREEMENT IS UNENFORCEABLE.

In the Order's finding of fact, the Court found that "[p]rior to construction of the Residence, DRH and BFS entered into an Independent Contractor Agreement ("Contract") that contains an indemnity. Id. at ¶ 2. The Contract's Scope of Work clause, defined "Work" as "labor, services and/or materials, equipment, transportation, or facilities necessary to complete the construction-related activities generally described as Turnkey and shall include all work performed by [BFS] for [DRH]." See Exhibit "D". The Contract's indemnity provision contained the following language:

> 11. Contractor's Indemnity and Waiver.
>
> To the **fullest extent permitted by law**, [BFS] hereby agrees to . . . defend, **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**, [DRH], or any third party . . on account of . . . **damage to . . . property** (including the loss of use thereof) . . . in **any way occurring**, incident to, **arising out of**, or **in connection** with . . . (I) a **breach of the warranties, representations**, obligations, and covenants provided herein by [BFS]; (II) the Work performed or to be performed by [BFS] or [BFS]'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 [BFS] 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.
>
> Id. (emphasis added).

In the Order's conclusions of law, the Court found that "[t]he indemnity agreement is unenforceable." Id. at ¶ 40. In this section of the Order, the Court discusses the S.C. Code Ann. Section 32-2-10, which states:

> Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. **Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.** The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.
>
> (emphasis added).

The Court only found that one of the three portions in the indemnification provision was unenforceable, so, the other two portions remain enforceable under Section 32-2-10. The Court in its Order notes that the "relevant part" of the indemnity provision was "ANY NEGLIGENT ACTION AND/OR OMISSION OF THE INDEMNITEE RELATED IN ANY WAY TO THE WORK, EVEN WHEN THE LOSS IS CAUSED BY THE FAULT OR NEGLIGENCE OF THE

INDEMNOTEE . . ." The Court's Order states that this language "purports to require BFS to indemnify DRH for DRH's own negligent acts or omissions 'even when the loss is caused by the fault or negligence of' DRH." Id. at ¶ 39.

Assuming the Court's finding that this "relevant part" of the indemnification provision was unenforceable under Section 32-2-10, the statute specifically provides that "[n]othing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability resulting for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees." So, the other portions of the indemnification provision, which were not addressed by the Court, would still be enforceable.

DRH has never asserted that DRH was seeking to recover under the third indemnity portion which the Court cited as the "relevant part." DRH has always maintained that it was entitled to contractual indemnification under the second (Roman numeral number II in the provision) of the three portions which states "[t]o the **fullest extent permitted by law**, [BFS] hereby agrees to . . . defend, **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**, [DRH], or any third party . . . on account of . . . **damage to . . . property** (including the loss of use thereof) . . . in **any way occurring**, incident to, **arising out of**, or **in connection** with . . . (II) the Work performed or to be performed by [BFS] or [BFS]'s personnel, agents, suppliers, or permitted subcontractors . . ."

The Court only found that the third portion (Roman numeral number III) was

unenforceable under Section 32-2-10. The other two portions of the indemnification provision are enforceable under Section 32-2-10 because the Court did not find them unenforceable. Since the Court did not find the other two portions unenforceable, the Court's remaining consideration is whether DRH's claim for indemnification falls within the scope of either one of those two portions of the indemnification provision.

Based on the foregoing, DRH is entitled to an order granting its motion to reconsider, and finding that DRH is entitled to be indemnified by BFS for all damages arising out of the Homeowner's Suit.

4. THE COURT MISCONSTRUES THE UNAMBIGUOUS LANGUAGE OF THE CONTRACT.

There was no finding by the Court that the contract between DRH and BFS was ambiguous. See Exhibit "A". When there is no ambiguity in the language, a contract will be deemed to express the entire and exact meaning of the parties, and every material part of the agreement will be presumed to have been expressed therein. Suttles v. Wood, 280 S.C. 272, 312 S.E.2d 574 (Ct. App. 1984). If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. Progressive Max Ins. Co. v. Floating Caps, Inc., 747 S.E.2d 178 (S.C. 2013).

A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. Campbell v. Beacon Mfg. Co., Inc., 313 S.C. 451, 453-54, 438 S.E.2d 271, 272 (Ct. App. 1993)(Federal Pacific Electric v. Carolina Production Enterprises, 298 S.C. 23, 378 S.E.2d 56 (Ct.App.1989)). An indemnity obligation that arises out of contract

is subject to strict construction. Sherlock Holmes Pub, Inc. v. City of Columbia, 389 S.C. 77, 81, 697 S.E.2d 619, 621 (Ct. App. 2010).

"The plaintiff in an action to establish and enforce its right to contractual indemnity will be required to show: (1) the existence of a valid indemnification agreement; and (2) that its claim for indemnification falls within the scope of that agreement. 7 Causes of Action 2d 509 (Originally published in 1995). Any and all issues outside of whether there was a valid indemnification agreement or whether the claim/suit was within the scope of the indemnification agreement are irrelevant.

A. The Court erred in construing that the Contract requires a judgment be entered before an indemnity obligation is triggered.

The Court's findings of fact state that "[i]t is undisputed that some of the allegations in the complaint filed in the Homeowner's Suit related to materials supplied and installed by BFS . . ." Id. at ¶ 5. The Court's conclusions of law states that "[b]ecause the arbitration award contains no finding of fact or conclusions of law, there is no evidence that the Judgment is attributed to property damage caused by defects in the materials supplied and installed by BFS." Id. at ¶ 21. The Court concludes that "DRH . . . cannot meet its burden of proving that a Judgment was entered against it because of property damage caused by defects in the materials supplied and installed by BFS. Id. In the next section of the conclusion of law the Court states that there was "no evidence in the record indicating what portions of the Judgment are attributable to the work of others." Id. at ¶ 22. In this section, the Court concludes that the "Contract does not require BFS to indemnify DRH for judgments based on defects in others work." Id. at ¶ 23.

Nowhere in the indemnification provision does it say that a judgment must be entered to

trigger the indemnification provision, or that a judgment must be apportioned between the various trades. As the Court states in its Order "[t]he plain language of the indemnification agreement provides" that BFS 'AGREES TO PROTECT, DEFEND, INDEMNIFY AND HOLD OWNER . . . FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTIONS, SUITS, OR OTHER LITIGATION . . .'" Id. at ¶ 25. The indemnity agreement further states "ON ACCOUNT OF DAMAGE TO PROPERTY, IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH . . . THE WORK PERFORMED . . . BY [BFS] OR . . . PERMITTED SUBCONTRACTORS . . ."

The Court's order correctly states that "[t]he parties plainly agreed that BFS, not DRH, would [indemnify] any lawsuit **alleging** property damage caused by BFS's work." Id. at ¶ 25. (emphasis added). Additionally, the Court's order found that the Homeowner's Suit involved claims and lawsuit alleging property damage caused by BFS's work. Id. at ¶ 5. Because there was a claim, by a homeowner, on account of alleged property damage, which was connected with the work of BFS, DRH's claims for contractual indemnification fall within the terms of the indemnification provision.

There is no reference to judgments against DRH for the work of BFS as a pre-requisite to indemnification. Just as the Court notes in the Order, "[t]he parties plainly agreed that BFS . . . would defend, [indemnify and hold DRH harmless for] any lawsuits alleging property damage caused by BFS's work. Id. at ¶25. The Homeowner's Suit was a lawsuit alleging property damage caused by BFS's work, and work by others. The Court erred in concluding that a judgment against DRH for the work of BFS is required to trigger the indemnification obligations. Based on the foregoing, DRH is entitled to an order granting its motion to reconsider, and finding

that DRH is entitled to be indemnified by BFS for all damages arising out of the Homeowner's Suit.

B. The Court erred in finding that BFS has a "right" to defend any suit implicating it contractual indemnification obligations.

Again, the Court misconstrued the "plain" language of the indemnification agreement. The entire indemnification agreement contains an agreement by BFS to do something. Nowhere in the indemnification provision does DRH agree to do anything. This provision was for the protection of DRH. By BFS agreeing to protect, defend, indemnify, and hold DRH harmless, it does not then mean that DRH has agreed to give up any rights to defend any lawsuits alleging property damage caused by BFS's work. This language simply gives DRH the option to tender the defense to BFS. Here DRH did not "tender" the defense, but put them on notice of the lawsuit, and is now seeking indemnification. Based on the foregoing, DRH is entitled to an order granting its motion to reconsider, and finding that DRH is entitled to be indemnified by BFS for all damages arising out of the Homeowner's Suit.

C. The Court erred in finding that the Contract required DRH provide written notice to BFS for any suit implicating BFS's contractual indemnity obligations.

As noted above, the Court never found that the Contract between DRH and BFS was ambiguous. "When there is no ambiguity in the language, a contract will be deemed to express the entire and exact meaning of the parties, and every material part of the agreement will be presumed to have been expressed therein." Suttles v. Wood, 280 S.C. 272, 312 S.E.2d 574 (Ct. App. 1984). An indemnity obligation that arises out of contract is subject to strict construction. Sherlock Holmes Pub, Inc. v. City of Columbia, 389 S.C. 77, 81, 697 S.E.2d 619, 621 (Ct. App.

2010). The Court should only look at the language of the Contract to determine whether written notice is required.

The Court correctly states paragraph 19 of the contract which says "Notices. All notices **required** pursuant to the Agreement or otherwise shall be in writing and shall be delivered to the respective business address of the Parties." Id. at 28 (emphasis added). However, the indemnification provision does not contain any notice requirement, written or otherwise. Although the "plain" language of the contract does not require that notice be given, the Court goes outside the four corners of the Contract and concludes that "it is **implied** in the Contract that DRH will provide BFS with notice of any suit implicating its indemnity obligations." Id. at ¶ 29 (emphasis added). The Court's Order further states that "the Contract **demonstrates** that the parties intended that BFS should get notice of homeowner lawsuits implicating BFS's indemnity obligations." Id. at ¶ 30 (emphasis added). Both of these conclusions indicate that not only did the Court have to look beyond the four corners of the Contract, but that the Court could not find any specific requirement of notice within the indemnification provision itself.

The Court is going beyond the four corners of the Contract and determining that notice is "implied" and that the Contract "demonstrates" the parties intended that notice be given. The Court is limited to construing the language of the unambiguous Contract, and erred in adding a notice requirement which is not stated in or required by the indemnification provision.

Although the Court erred in determining that notice is required in this section of the Order, the Court's own conclusion states that the Homeowner's Suit **did** implicate BFS's indemnification obligations. The Court concludes in this section that notice was required (although DRH disagrees) because "the parties intended that BFS should get notice of

Homeowner's lawsuits **implicating** BFS's indemnity obligations." Id. (emphasis added). So, based on the the Court's rationale, the Homeowner's Suit did implicate the indemnification obligation, and so notice was required. Although the Court erred by reading into the Contract a notice requirement if BFS's indemnification obligation was implicated, the Court's Order correctly concludes that the Homeowner's Suit implicated BFS's indemnity obligation.

Based on the foregoing, DRH is entitled to an order granting its motion to reconsider, and finding that DRH is entitled to be indemnified by BFS for all damages arising out of the Homeowner's Suit.

D. The Court erred in concluding that the covenant of good faith and fair dealing required notice.

Although implied covenants are not favored in the law, there exists in every contract an implied covenant of good faith and fair dealing. Williams v. Riedman, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000). However, there is no breach of the implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him or her the right to do. Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995).

DRH did not breach the implied covenant of good faith and fair dealing related to notice because no notice was required under the indemnification provision. Furthermore, it is undisputed that DRH provided oral notice to BFS via two telephone call from Jay Henderson to Morris Tolly. Exhibit "B" (Depo. of Jay Henderson, 59:11 - 61:16). Therefore, the Court erred in finding that no notice was given by DRH to BFS and that DRH breached the covenant of good faith and fair dealing.

Based on the foregoing, DRH is entitled to an order granting its motion to reconsider, and

finding that DRH is entitled to be indemnified by BFS for all damages arising out of the Homeowner's Suit.

E. The Court erred in finding that DRH was equitably estopped from seeking contractual indemnification.

The Court quotes in its Order that "[e]quitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." Id. at ¶ 38 (quoting Pearson v. Hilton Head Hospital, 400 S.C. 281 (Ct. App. 2012)). The Court also quoted that "[s]ilence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." Id. (quoting Southern Development Land and Golf Co., Ltd v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33 (1993)).

The Court then concludes that by failing to provide "written" notice, "DRH's silence deprived BFS of their right to participate" in the Underlying Suit. Id. at ¶ 37. Again, as noted above, it is undisputed that DRH provided oral notice to BFS via two telephone call from Jay Henderson to Morris Tolly. Exhibit "B" (Depo. of Jay Henderson, 59:11 - 61:16).

More importantly, this section of the Order indicates that the Court concluded that DRH did have indemnification rights to assert against BFS. The Court correctly states the law that equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his conduct renders assertion of those rights contrary to equity. Here the Court has ruled that equitable estoppel applies (although DRH disagrees because DRH did gave oral notice to BFS), and thus must have concluded that DRH had indemnification rights that DRH could assert against BFS.

Based on the foregoing, DRH is entitled to an order granting its motion to reconsider, and

finding that DRH is entitled to be indemnified by BFS for all damages arising out of the Homeowner's Suit.

F. The Court erred in ruling that the issue of what property damage was attributable to BFS's work was ruled on during the arbitration.

Arbitration is defined as "[a]n informal process in which a third-party arbitrator issues an award deciding the issues in controversy." Rule 2(c), SCRADR. The issues in controversy in the Homeowner's Suit were not about which alleged defective condition was associated with a particular subcontractor. The issues in controversy were whether there was defective construction, and, if so, what were the homeowner's damages. The Court's finding of fact clearly states what the issues were in the Homeowner's Suit. See Id. at ¶ 4. None of the issues in arbitration had anything to do with which subcontractor was involved in the various alleged defective conditions.

More importantly, the section of the Order which discusses collateral estoppel contained a footnote wherein the Court discussed "vouching in." Id. at fn 1. The Court in its footnote states that "[t]here is a well-established procedure whereby an indemnitee may **bind** a nonparty indemnitor to the findings made in a suit against indemnitee by a third-party." Id. (citing Black v. Patel, 353 S.C. 76, fn. 2 (Ct. App. 2002))(emphasis added). Within the Court's footnote, the Court includes a parenthetical quote that states "[v]ouching in is a common law procedural device by which a defendant **may give notice** of a 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." Id. (emphasis added).

As noted above, it is undisputed that DRH gave BFS oral notice of the Homeowner's Suit

via two telephone calls from Jay Henderson to Morris Tolly. Therefore, DRH "vouched in" BFS and BFS is bound by the arbitrator's award.

Based on the foregoing, DRH is entitled to an order granting its motion to reconsider, and finding that DRH is entitled to be indemnified by BFS for all damages arising out of the Homeowner's Suit.

5. THE COURT ERRED IN CONCLUDING THAT THE COURT COULD NOT DETERMINE THAT THE ARBITRATION AWARD WAS BASED IN TORT.

The Court states in its Order that "there is no basis in the record to find that DRH has sustained tort liability." Id. at ¶ 15. The South Carolina Supreme Court in Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 345-46, 384 S.E.2d 730, 736-37 (1989), addressed the issue of whether an action against a builder for violating a legal duty is a action in contract or an action in tort. In Kennedy, the Supreme Court stated that "[t]he Court of Appeals itself correctly recognized in Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct.App.1986), that a violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses." Id. The Court continued in its opinion and stated "Terlinde, 275 S.C. at 399, 271 S.E.2d at 770, imposes a legal duty on builders to undertake construction commensurate with industry standards. Where a building code or industry standard does not apply, public policy further demands the imposition of a legal duty on a builder to refrain from constructing housing that he knows or should know will pose serious risks of physical harm." Id.

In Columbia Lumber, the Court noted that the prior legal framework regarding "economic loss" rule as it relates to the purchase of a residence generates difficulties because the framework's focus is on consequence, not action. Id. The court noted that "Builder 'A' and

Builder 'B' can be equally blameworthy, and build equally shoddy housing, but because Builder 'A' 's negligence happened to be discovered early enough, no one was harmed." Id. The court continued and noted that "[i]t hardly seems fair that Builder 'A' should profit from a diligent buyer's discovery, or because he was fortunate," and that the new "framework we adopt focuses on activity, not consequence." Id.

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

In the Homeowner's Suit there is sufficient evidence that BFS violated a legal duty in the construction of 403 Milner Court. The evidence indicates that BFS violated building codes, industry standards, and manufacture's installation recommendations in the work they performed at 403 Milner Court. Even BFS's own employees that were involved in the investigation of the conditions of 403 Milner Court in 2007 noted that there were building code violations. See Exhibit "E". All these duties arise **outside** of the contractual duties included in the contract between Clark and D.R. Horton. Accordingly, these are the types of legal duties that when violated by a builder, the South Carolina Supreme Court has determined give rise to liability "both in contract and in tort." Accordingly, the arbitrator's award was based on liability arising **both in contract and in tort.**

Based on the foregoing, DRH is entitled to an order granting its motion to reconsider, and finding that DRH is entitled to contribution from BFS for all damages arising out of the

Homeowner's Suit.

6. THE COURT IMPROPERLY RELIED ON PAROL OR EXTRINSIC EVIDENCE.

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).

As noted above, the Court's Order never found that the Contract was ambiguous. Therefore, the interpretation of an unambiguous provision of an agreement is confined to the language contained within the four corners of the instrument itself and extrinsic evidence is inadmissible if it contradicts or varies the terms of the written agreement or give a perfectly clear agreement a different meaning or effect than that indicated by the plain language of the agreement.

Furthermore, the Court's Order describes the indemnity language as being "plain." Id. Exhibit A, ¶ 25. 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. 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 Order contains numerous references to extrinsic or parol evidence which ultimately are referenced again in the Court's conclusions of law as support. The Court notes that the parties in the Homeowner's Suit agree to request an unreasoned arbitration award that would not contain findings of fact or conclusions of law. Id. at ¶ 9. The Court's finding of fact further states that the record in this case indicates that DRH was represented by counsel in the Homeowner's Suit and that DRH was advised by counsel that by requesting an unreasoned award would make any future indemnification claims against BFS uncertain. Id. The Court's order gives credence to this particular finding of fact, and uses this finding as support for some of the Court's conclusions regarding construction of the Contract.

The Court's conclusion of law states that "[b]ecause DRH undertook the defense of the Homeowner's Suit without providing BFS an opportunity to defend said suit, DRH cannot pursue indemnity under the Contract. Id. at ¶ 26. The Court clearly considered evidence outside the plain language of the indemnification provision to come to this conclusion.

Whether the parties agreed or requested an unreasoned award or whether an unreasoned award affects DRH's claims against BFS in this action is outside the Court's function in interpreting the Contract's language. Accordingly, the Court consideration of any evidence outside of the Contract is improper because this is extrinsic evidence and unrelated to the Court's

function to interpret the plain language of the Contract. Therefore, the Court erred in considering extrinsic and/or parol evidence.

Based on the foregoing, DRH is entitled to an order granting its motion to reconsider, and finding that DRH is entitled to be indemnified by BFS for all damages arising out of the Homeowner's Suit.

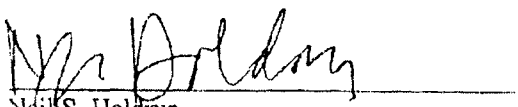
CONCLUSION

Based on the foregoing arguments and authorities, DRH respectfully requests that this Honorable Court grant it's 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 19th day of September 2014.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.



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CERTIFICATE OF SERVICE

The undersigned employee of WALL TEMPLETON & HAI DRUP, P.A. hereby certifies that on this 18th day of September 2014 she served a copy of **PLAINTIFF'S 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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EXHIBIT "A"

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. SUMMARY JUDGMENT**

This matter comes before the Court on Defendants Builders FirstSource-Southeast Group, LLC, and Builders FirstSource, Inc.'s (hereinafter collectively "BFS") Second Motion for Summary Judgment. A hearing on this motion was held on August 13, 2014. Plaintiff D.R. Horton, Inc., f/k/a C. Richard Dobson Builders, Inc., ("DRH"), and Defendant BFS appeared at the hearing through their respective counsel. After considering the entire record in this matter, including all 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 should be, and

hereby is, GRANTED SUMMARY JUDGMENT.

I. FINDINGS OF FACT AND PROCEDURAL BACKGROUND

1. DRH was the general contractor for the construction of a single family residential home at 403 Milner Court, Charleston, South Carolina (the "Residence"). The Residence was constructed in 2001. BFS, as a subcontractor for DRH, provided and installed framing materials and windows at the Residence.

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

3. In addition to acting as the general contractor, DRH also owned the Residence. 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 ("UTPA"). The complaint in 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. It is undisputed that some of the allegations in the complaint filed in the

Homeowner's Suit related to materials supplied and installed by BFS and other allegations in the complaint filed in the Homeowner's Suit were related to the work of others. BFS did not install the driveway, concrete slab, siding, roofing or hot water heater at the Residence.

6. 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.

7. 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.

8. 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.

9. The parties to the Homeowner's Suit agreed to request an unreasoned arbitration award that would not contain findings of fact or conclusions of law. 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.

10. The record in this case indicates that DRH was represented by counsel at all times during the Homeowner's Suit and was advised by counsel that requesting an unreasoned arbitration award would make any future indemnity claim against BFS uncertain.

11. 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.

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

13. 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.

II. CONCLUSIONS OF LAW

A. BFS IS ENTITLED TO SUMMARY JUDGMENT ON DRH'S CLAIMS FOR CONTRIBUTION PURSUANT TO THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, § 15-38-10, et seq.

14. The statutory right of contribution among joint tortfeasors is in derogation of the common law and thus the South Carolina Contribution Among Tortfeasors Act must be strictly construed. *G & P Trucking v. Parks Auto Sales Service & Salvage, Inc.*, 357 S.C. 82, 87 (Ct.App. 2003). "Moreover, in a suit in which contribution is sought from a joint tortfeasor, the claimant obviously must prove facts sufficient under the statutes and the common law . . . to establish a right of contribution between wrongdoers." *Id.*

15. Here, there is no basis in the record to find that DRH has sustained tort liability. The plaintiff in the Homeowner's Suit alleged causes of action for breach of contract, breach of warranty, negligence and violations of the UTPA. The parties to the Homeowner's Suit requested an award from the arbitrator that does not specify the legal basis for his award of damages.

16. In order for a party who has litigated a case to judgment to maintain an action as a joint tortfeasor that party must have first been adjudicated to have committed a tort. *See* S.C. Code Ann. § 15-38-40(B)("*Once the issue of liability has been resolved* . . . a defendant has the right to seek contribution . . ."); *See also Gordon v. Phillips Utilities, Inc.*, 362 S.C. 403, 406 (2005)(No right of contribution against negligent employer because workers compensation laws prevent employer from being subject to tort liability). The record before the Court does not contain any finding of tort liability from the Homeowner's Suit and therefore DRH is not entitled to contribution. *See Jenkins v. Few*, 391 S.C. 209, 221 (Ct.App. 2010)("Because the verdict was a general verdict, it is impossible to determine how the jury allocated damages between civil conspiracy, conversion, and trespass to personal property. We will not speculate as to how the jury allocated damages.").

17. In addition to the absence of a finding of tort liability, there is no record evidence that the Judgment is attributable to defects in the materials supplied and installed by BFS. Because the arbitration award contains no findings of fact or conclusions of law, it is impossible for the Court to determine what defects the arbitrator found at the Residence.

18. Even if, somehow, DRH were able to establish its own tort liability, and that BFS's work was determined to be defective in the Homeowner's Suit, there is no way to determine what portion of the Judgment is related to said liability. 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).

19. Any attempt to determine what portion of the Judgment is attributable to the joint negligence of BFS and DRH would be an exercise in impermissible guesswork. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 70-71 (Ct.App. 1999)(refusing to allow contribution when "The settlement agreement does not place a specific value on any potential claim . . ." and the court "cannot, therefore, determine whether [the party seeking contribution] paid more than its pro rata share of liability . . ."). *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.").

20. As stated by the *Vermeer* Court, "[i]n this case the lack of apportionment may work a hardship . . . but it is one which he could have avoided by a properly drawn" award. *Vermeer* 336 S.C. at 70. The record indicates that DRH, with the advice of counsel, made a strategic decision to agree to an unreasoned arbitration award. Having failed to obtain a finding of tort liability or findings regarding what portions of the Residence were ultimately determined to be defective, DRH cannot now maintain this action for contribution.

B. BFS IS ENTITLED TO SUMMARY JUDGMENT ON DRH'S CLAIM FOR CONTRACTUAL INDEMNITY.

i. There is no evidence that any portion of the Judgment is attributable to materials supplied and installed by BFS.

21. Because the arbitration award contains no findings of fact or conclusions of law, there is no evidence that the Judgment is attributable to property damage caused by defects in the materials supplied and installed by BFS. Based on the record before the Court, DRH, as the Plaintiff, cannot meet its burden of proving that a Judgment was entered against it because of

property damage caused by defects in the materials supplied and installed by BFS.

ii. There is no evidence in the record indicating what portions of the Judgment are attributable to the work of others.

22. Even if DRH could prove that the arbitrator concluded that defects in the materials supplied and installed by BFS caused property damage at the Residence, it is impossible to determine what portion of the Judgment is attributable to said property damage. Because the parties to the arbitration did not request an award with findings of fact or conclusions of law, there is no record before the Court to indicate what portion of the Judgment is attributable to the various distinct defects alleged in the Homeowner's Suit.

23. The Contract does not require BFS to indemnify DRH for judgments based on defects in the work of others. *See* Contract ¶ 11 (requiring indemnification for "(I) A BREACH OF THE WARRANTIES . . . PROVIDED HEREIN BY CONTRACTOR; (II) THE WORK PERFORMED . . . BY CONTRACTOR).

24. Applicable law does not permit BFS to indemnify DRH for judgments based on defects in the work of others. *See* S.C. Code Ann. § 32-2-10 (prohibiting agreements whereby subcontractor agrees to indemnify general contractor for general contractor's sole negligence or the negligence of its "independent contractors.").

iii. The Contract provides that BFS has the right to defend any suit implicating its contractual indemnity obligations.

25. The plain language of the indemnity agreement provides that BFS "AGREES TO PROTECT, DEFEND, INDEMNIFY AND HOLD OWNER . . . FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTIONS, SUITS, OR OTHER LITIGATION . . ." The parties plainly agreed that BFS, not DRH, would

defend any lawsuit alleging property damage caused by BFS's work. The Contract not only obligates BFS to defend any suits alleging property damage associated with defects in its work, it also gives BFS the right to defend any such claims. The Contract does not provide that DRH can defend itself, control the defense, select the attorneys of its choice, provide no notice to BFS, and nonetheless require BFS to indemnify it.

26. It is undisputed that DRH did not give BFS written notice of the Homeowner's Suit and did not tender the defense of the Homeowner's Suit to BFS. Because DRH undertook the defense of the Homeowner's Suit without providing BFS an opportunity to defend said suit, DRH cannot pursue indemnity under the Contract.

iv. The Contract provides that BFS will receive written notice of any suit implicating its contractual indemnity obligations.

27. "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). "A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used . . ." *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367 (1966).

28. Paragraph 19 of the Contract provides: "*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.*".

29. The indemnity provision in the Contract, upon which DRH relies in this case, provides that BFS will "protect" DRH against, and "defend" DRH from, allegations of property

damage caused by BFS's work. BFS cannot protect and defend DRH from lawsuits implicating BFS's work without being provided notice that a suit has been filed. Therefore, it is implied in the Contract that DRH will provide BFS with notice of any suit implicating its indemnity obligations. *See Commercial Credit Corp*, 247 S.C. at 367 ("In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.").

30. Other portions of the Contract also demonstrate that the parties intended that BFS should get notice of homeowner lawsuits implicating BFS's indemnity obligations. Indeed, with reference to the factual scenario presented in this case, 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 . . ." Contract ¶ 22. Clearly, BFS must be given notice of the third-party suit in order to "participate in" the arbitration.

v. The implied covenant of good faith and fair dealing requires DRH to provide BFS with notice of any suit implicating its indemnity obligations.

31. "There exists in every contract an implied covenant of good faith and fair dealing." *Adams v. G. J. Creel and Sons, Inc.*, 320 S.C. 274, 277 (1995). Here, good faith and fair dealing require DRH to notify BFS of any lawsuit which DRH contends implicates BFS's indemnity obligations. DRH's actions in litigating the Homeowner's Suit without notifying BFS, in failing to make any transcript of the arbitration hearing, and in failing to request an award with factual findings and legal conclusions, all violate the implied covenant of good faith and fair dealing and prohibit DRH from requiring BFS to indemnify it for any portion of the Judgment or defense costs.

vi. DRH waived its right to contractual indemnification by failing to give BFS notice of the Homeowner's Suit and failing to request an award with factual findings and conclusions of law.

32. "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).

33. Here, DRH's failure to give BFS notice of the Homeowner's Suit is inconsistent with its assertion of a right to indemnity. In fact, the record reveals that DRH was informed by counsel that it should provide BFS with notice of the Homeowner's Suit and that DRH declined to provide BFS notice.

34. Additionally, DRH intentionally relinquished its right to indemnity by failing to request an arbitration award containing findings of fact and conclusions of law. The record reveals that DRH made a strategic decision not to request findings of fact or conclusions of law with the express purpose of making it difficult to determine what was decided in the Homeowner's Suit. Additionally, the decision not to request a reasoned award was made after being advised by counsel that an unreasoned award would make any future case against BFS uncertain.

35. The record conclusively indicates that DRH knowingly waived its right to seek indemnity from BFS.

vii. DRH is equitably estopped from seeking contractual indemnity.

36. "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

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equity." *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290 (Ct. App. 2012). "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *Southern Development Land and Golf Co., Ltd. v. South Carolina Public Service Authority*, 311 S.C. 29, 33 (1993). "Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." *Id.*

37. By DRH's own theory of this case, DRH had knowledge of a lawsuit alleging defects in BFS's work and implicating BFS's indemnity obligations. Rather than giving BFS written notice of the Homeowner's Suit, DRH remained silent. DRH's silence deprived BFS of the right to participate in discovery, to cross-examine witnesses at depositions, and to participate in the arbitration hearing. DRH is now equitably estopped from seeking indemnification from BFS.

viii. The indemnification clause in the Contract violates S.C. Code Ann. § 32-2-10.

38. In relevant part, the indemnity clause in the Contract provides that BFS will indemnify DRH for "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 . . ."

39. The Contract purports to require BFS to indemnify DRH for DRH's own negligent acts or omissions "even when the loss is caused by the fault or negligence of" DRH. The clause violates S.C. Code Ann. § 32-2-10 and thus the "agreement" is "unenforceable." *See* S.C. Code Ann. § 32-2-10 ("a promise or agreement in connection with the . . . construction . . . of a building . . . purporting to indemnify the promisee, its independent contractors, agents,

employees, or indemnitees against liability for damages arising out of . . . 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.).

40. 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. The indemnity agreement is unenforceable.

ix. Having failed to obtain findings of fact and conclusions of law in the Homeowner's Suit, DRH cannot litigate the issue of what was decided in the Homeowner's Suit in this action.1

41. DRH cannot litigate, in this action, the issue of what portion of a judgment entered in a previous action is attributable to property damage caused by materials supplied and installed by BFS. Principles of waiver, the requirement of proving damages to a reasonable certainty, and collateral estoppel prevent DRH from maintaining an independent action in order to apportion the Judgment.

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1 Significantly, even if DRH were able to present competent evidence that some particular portion of the Judgment is attributable to property damage caused by defects in work performed by BFS, BFS, as a non-party without notice, would not be bound to pay that amount. *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."). There is a well-established procedure whereby an indemnitee may bind a nonparty indemnitor to the findings made in a suit against the indemnitee by a third-party. *See Black 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."). *See also* S.C. Code Ann. § 36-2-607(5)(recognizing "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)). Because BFS was not "vouched in" to the Homeowner's Suit, even if DRH could prove what portion of the Judgment was awarded for defects in BFS's work, BFS could require DRH to prove, from scratch, the existence of defects in BFS's work and the amount of damage caused thereby. *See* 47 Am.Jur.3d Judgments § 606 ("The effect of the omission of such notice and opportunity is that the judgment is not binding on the person liable over, who has the right to litigate every essential fact necessary to support the judgment.").

42. "[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. As stated above, in this case the arbitration award was made a final judgment of the Berkeley County Circuit Court.

43. Having fully litigated the Homeowner's Suit, without requesting findings of fact, DRH has waived the right to make those findings of fact in this case. The failure to request findings of fact in the Homeowner's Suit constitutes a waiver of a judicial ruling on those omitted factual issues. *See Moore v. Moore*, 360 S.C. 241, 257 (Ct.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 (Ct.App. 2005) ("Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages."). A litigant who has requested a ruling that does not include findings of fact cannot file a second independent action and ask a second trier of fact to determine what was decided by the first finder of fact.

44. "[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." *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 570-571 (1971). Any attempt by a judge or jury in this action to determine what portion of the judgment, if any, is attributable to property damage caused by products installed by BFS would be an exercise in rank guesswork and speculation.

45. Additionally, collateral estoppel prevents DRH from re-litigating issues decided

in the Homeowner's Suit. In order to maintain its case, DRH must take the position that the issue of defects in BFS's work, and the amount of damage caused thereby, was actually litigated and decided in the Homeowner's Suit. "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.

46. "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.*

47. Here, DRH necessarily contends that it has already litigated the issue of whether BFS's work was defective, and the damages caused thereby, in the Homeowner's Suit. DRH is collaterally estopped from litigating those issues anew in this case.

III. CONCLUSION

48. Pursuant to the Contract, and applicable law, DRH was required to give BFS notice of the Homeowner's Suit in order to trigger BFS's indemnity obligations. Further, DRH's

complete failure to make any record of what was determined in the Homeowner's Suit precludes it from maintaining an action based on the Judgment. There is no basis in the Contract, or in any other applicable law, whereby BFS can be held responsible for portions of the Judgment or attorney's fees attributable to the fault of others. Furthermore, there is no evidence available whereby the Court can conclude what portion of the Judgment, if any, is attributable to property damage associated with the products installed by BFS. For all of the above reasons, BFS is hereby GRANTED SUMMARY JUDGMENT AS TO ALL OF DRIP'S CLAIMS.

AND IT IS SO ORDERED.

The Honorable R. Markley Dennis, Jr.
Circuit Court Judge, Ninth Judicial Circuit

August 20, 2014

Charleston, South Carolina

EXHIBIT "B"

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 R. 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-

CAIME AFREGUIN 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 Padget Graham & Laney, PA, 40 Calhoun Street, Suite 200, Charleston, South Carolina, on Friday, September 6, 2013, commencing at 9:44 a.m.

APPEARANCES

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SOUTHEASTERN TRANSCRIPT * (843)762-2442

Q. Do you think it was more than $200,000?

A. I don't recall.

Q. Is there any reason that D.R. Horton didn't tender this case, the Patricia Clark case, to Builders FirstSource's insurance company as an additional insured?

A. Again, I'm not the attorney that handles that. I'm not an attorney, so I don't have a particular -- don't have particular knowledge of that reasoning behind it.

Q. I guess let's talk about the notice issue. And there are some new documents that were produced this morning. Some e-mails, I guess we'll mark them as the next exhibits.

(Exhibit Nos. 8 and 9 marked for identification.)

Q. I'm going to show you, Jay, these two e-mails that were produced this morning by your attorney that have been marked as Exhibit 8 and 9. Can you identify those for me?

A. Yes. Exhibit 8 is two e-mails, initial one from me to Mr. Tolly on August 28th. His followed to me later that morning on August 28th. Exhibit 9 is an e-mail received from Mr. Tolly on June 18th, that was following up the phone call, the voicemail that I had

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left for him.

Q. Can you tell me the significance of those e-mails?

A. It's the start of the communication that I had between myself and Mr. Tolly along with Mr. Massalon, related to this case. Among other things, but we discussed this case.

Q. Let me see 8, if I could. On Exhibit 8 it's your e-mail to Morris Tolly says, "I have a matter that dates back a few years that I would like to discuss, if you have time for lunch one day next week." Is it your testimony that that matter that you're referring to is the Patricia Clark case?

A. Yes.

Q. Did you actually meet with Mr. Tolly for lunch?

A. I did not. We were never able to make our schedules work, but we did discuss it by phone.

Q. What did you tell Mr. Tolly when you spoke with him on the phone about the Patricia Clark case?

A. We discussed the case in general. I reminded him of the circumstances and inspection that occurred by Mr. Shah back in the fall of 2007, how the matter had proceeded, and where we were currently with the case. And we were -- I think that was immediately after the mediation had occurred, right around that time. And we

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discussed the mediation that, you know, the fact that, if I remember correctly, the fact that the mediation was unsuccessful and we were going to end up arbitrating it and working on the date.

Q. Did you indicate that Builders FirstSource had intervened in the Patricia Clark case?

A. Intervened in what matter?

Q. Did you indicate that Builders FirstSource that they should become a party to the Patricia Clark case?

A. I asked him point blank if he wanted to intervene and try to head this thing off before we got to that point. He indicated that he would follow up with me.

Q. Did he ever follow up with you?

A. I followed up with him in November, asked if they had had any further thoughts on it. Said we were arbitrating in December.

Q. Did you tell him to come to the arbitration?

A. I gave him the opportunity. I indicated where it was and told him what we were doing.

Q. Did you give him the location?

A. I don't recall specifically if I gave him the location, but certainly he was notified and had an opportunity to call me back.

Q. Did you talk to Mr. Tolly about specific numbers that Ms. Clark was wanting to settle the case?

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EXHIBIT "C"

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 NACARRI, 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

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

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looking at paragraph nine and its subparts, so if you go to paragraph ten that may help you.

A. That's what the complaint reads, that there's damages.

Q. The homeowner is asserting -- now looking at a combination of number nine and subparts and number ten, the homeowner in this suit is asserting or claiming damages associated in part to Builders FirstSource's scope of work, correct?

A. That's the allegations, correct.

Q. Okay. This case ended up, it was -- you may or may not know, but I'm gonna preface my next couple of questions about this. It went to mediation. Was Builders FirstSource aware of the mediation that took place in this lawsuit?

A. Not to my knowledge.

Q. Who would have knowledge about that?

A. Our legal department. Somebody in Dallas. There could have been written notice sent to a number of places, but everything I've checked I can't find any written notice of anything about it.

Q. What about Morris Tolly?

A. Morris actually could have known, but

when I talked to him he said he had no recollection of anything about going to arbitration and no written notice of us participating or being involved.

Q. He did get an e-mail from Jay Henderson at D.R. Horton, correct?

MR. ANDERSON: Object to the form.

A. He received an e-mail from Jay Henderson about having lunch. It didn't mention the Milner house or anything.

Q. Well, certainly Builders FirstSource was aware the homeowner was having complaints about Builders FirstSource's scope of work in September of 2007, correct?

A. That's what the e-mail reads.

Q. What about the arbitration, were you aware of the arbitration of this lawsuit between Ms. Clark and D.R. Horton?

A. Not 'til after arbitration.

Q. When after the arbitration?

A. Now, within the last month.

Q. Understand. Who would have knowledge?

A. Like I said, again, I would say that our legal department or Morris Tolly or somebody

EXHIBIT "D"

D·R·HORTON

Division Name: HH
Area Name:
Assigned Vendor No.: 8/AW

RECEIVED
FEB. – 6 2001

INDEPENDENT CONTRACTOR AGREEMENT

NAME OF CONTRACTOR: Builders First Source DBA -Same- ("Contractor")

___ Sole Proprietorship ___ Partnership X Corporation ___ LLC ___ Other (ATTACH W-9)

Social Security No. or Tax ID No.: 57-0618425

Name of Owner(s)/Officer(s): Morris Tolly, SE Group President

Address for All Notices: Route 1, Box 170

City: Kingstree State: SC Zip Code: 29556

Telephone: (843) 387-0810 Fax: (843) 387-0855 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 perform the construction-related activities generally described as: Trusses

_____ 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 and the 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 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 Contractor's agreement it can complete the Work by the completion date specified by an authorized Owner employee and shall be deemed Contractor's acknowledgment that Contractor has inspected the job location and approves of the requirements 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 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 ordinances 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 supervisor 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 or any new Pricing Schedule, the superseded Pricing Schedule shall remain in effect for Purchase Orders issued after the date of any new Pricing Schedule, till 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: Builders First Source
Name: Morris Tolly
Title: Southeast Division VP

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 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 as Owners' recourse for (i) provisions hereof 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 services and/or defective Work.

7. Independent Contractor Status. Contractor, in performing the Work, shall come 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 Work and shall be and have all necessary licenses. Contractor acknowledges that it 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 governmental 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: (i) for a period of ten (10) years all structural elements, including, but not limited to, roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, joists (other than joists 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 all supply lines and vent pipes located within the home, and (iii) electrical wiring, electrical lights 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 an event if the 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 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 abrogate 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 of appliances and equipment, and shall furnish all certificates required by any municipality and/or VA and/or FHA. 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 other 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) regarding 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 TIER), 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 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, sold 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 (x, 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 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 excess coverage. Such coverages will be carried continuously during the term of this Agreement with insurance companies acceptable to Owner in its reasonable 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 minimum 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 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 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 homes 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 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 attorneys' 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 unbilled 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 or 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 "E"

Builders FirstSource

114 & 116 Myrtle Beach Hwy
P.O. Box 1546
Sumter, SC 29153
TEL 803-778-1821
FAX 803-934-9691

October 7, 2007

Builders FirstSource - Charleston
4450 Arco Lane
North Charleston, South Carolina 25418

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 60 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- 1/16" 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 7/16" and 1'-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.

0003
BFS

Builders FirstSource

114 & 116 Myrtle Beach Hwy.
P.O. Box 1548
Sumter, SC 29150
TEL 803-778-1921
FAX 803-934-0081

Item 2:
The 4' — 7 1/8" horizontal 16 chord members in A1-2 (F-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 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 5:
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 use 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,

SOUTH CAROLINA REGISTERED PROFESSIONAL ENGINEER No. 10658 SCOTT D. COFFMAN

Scott D. Coffman, PE
Director of Engineering

004
DES

Larry Woznlak

From:	Gifford Shaw
Sent:	Monday, September 24, 2007 11:66 AM
To:	Bob Lanier; Larry Woznlak; Bill Crabtree; Lou Davis; Terry Rosamond
Cc:	Randy Thomason
Subject:	Horton

I am recommending the following actions:

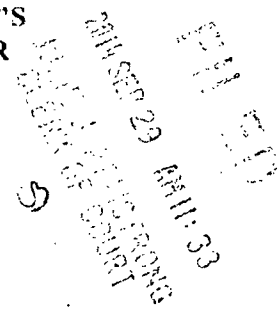
Roof: The issue is that there are 2 sets of trusses and lateral bracing is not installed. I recommend that we install the lateral bracing and get a letter from an engineer stating that there is no reason to remove the trusses.

Second Floor: The homeowner pointed out the floor has dips in it. I noted one are 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 were 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.

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.'S RESPONSE TO PLAINTIFF'S MOTION TO RECONSIDER**
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.	)	



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

BFS responds to D. R Horton's (DRH) arguments as follows:

1. **DRH's argument that "The Court's findings of fact states that it was disputed whether DRH gave BFS oral notice; however, the Court uses lack of notice as grounds for summary judgment."**

The very contract that DRH relies on in making its claim for contractual indemnity provides

that "[a]ll notices pursuant to this Agreement or otherwise shall be in writing and shall be delivered to the respective business address of the Parties." Additionally, South Carolina statutory law requires notices from indemnitees to indemnitors to be in writing. *See* S.C. Code Ann. § 36-2-607(5) ("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 . . ."). Verbal notice is irrelevant to the outcome of this case.

2. **DRH's argument that "Contrary to the Court's finding, it is undisputed that DRH provided BFS with oral notice."**

Aside from being irrelevant, DRH's argument that it is "undisputed" that DRH provided oral notice of the arbitration to BFS is inaccurate. To be clear, BFS denies that Jay Henderson, or anyone else from DRH, gave BFS oral notice of the Clark lawsuit. BFS's 30(b)(6) representative testified that he had spoken to Morris Tolly, the person who was allegedly verbally notified of the Clark Case, and that "everyone I've talked to we received no notice that it was going to be an arbitration." (Rosamond Dep., P. 140, l. 17- P. 141, l. 3).

DRH goes on to suggest that its alleged verbal notice to BFS resulted in BFS being "vouched in" to the Clark case. Again, the relevant statute requires "written notice." *See* S.C. Code Ann. § 36-2-607(5).

3. **DRH's argument that "The Court only found that one portion [of] the indemnity agreement is unenforceable."**

The plain language of the relevant statute states that an "agreement in connection with the . . . construction . . . of a building . . . 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." S.C. Code Ann. § 32-2-10. The statute says that if the "agreement" purports to indemnify the general contractor for "property damage proximately caused by" its "sole negligence" **the "agreement"** is "unenforceable." The statute does not say that a "clause," "sentence," or "portion" of the agreement is unenforceable, its says that the entire agreement is unenforceable.

Further, in this case, DRH is clearly seeking to hold BFS responsible for the "sole negligence" of DRH and its other "independent contractors." Any claims in the Clark Case, 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.

4. DRH's argument that "The Court misconstrues the unambiguous language of the Contract."

DRH breaks this argument down into several parts. BFS will address each:

A. DRH's argument that "The Court erred in construing that the Contract requires a judgment be entered before an indemnity obligation is triggered."

DRH argues that "nowhere in the indemnification provision does it say that a judgment must be entered to trigger the indemnification provision, or that a judgment must be apportioned between the various trades." Obviously, there must be some award or judgment in order to trigger an

agreement to "indemnify." "South Carolina courts have consistently defined indemnity as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'" *Laurens Emergency Medical Specialists, PA v. M S. Bailey & Sons Bankers*, 355 S.C. 104, 109 (2003). Until DRH incurs some "loss or damage" to a "third party," there is no possible way to "indemnify" DRH. Prior to incurring "loss or damage" to a "third party," DRH had a right to demand that BFS defend any claims relating to its work. DRH did not avail itself of that right.

At this point in the litigation DRH, as the Plaintiff, has the burden of proving its case. *See Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64-65 (Ct. App. 1999); *Estate of Cantrell by Cantrell v. Green*, 302 S.C. 557, 560 (Ct. App. 1990) ("In order to resist a defendant's motion for summary judgment, the plaintiff, as the party with the burden of proof at trial, must present affirmative evidence . . . he cannot rest of the allegations of his complaint."). DRH admits that it cannot prove that it incurred a loss to a third-party because of work performed by BFS:

Q: Again, my question again is, does D.R. Horton know whether or not it was determined in the Patricia Clark case that the framing was negligently performed?

A: Again, that is a question for the arbitrator, if he could answer, but we do not have specific information as it relates to how the findings came about.

(Henderson Dep. of 09/06/13, P. 13, ll. 18-23)

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).

If DRH's 30(b)(6) witness, who was present at the arbitration, does not know whether BFS's scope of work was determined to be defective, or what portion of the arbitration award is attributable to BFS's work, it is unclear how DRH proposes that this Court, or a jury, should make that determination. Without admissible evidence regarding the basis for the arbitration award, DRH cannot prove that it incurred a loss, to a third party, attributable to BFS's work.[1]

B. DRH's argument that "The Court erred in finding that BFS has a 'right' to defend any suit implicating its contractual indemnification obligations."

The clause at issue was drafted by DRH and states that BFS "agrees to protect, defend, indemnify, and holder owner . . . harmless." If DRH wanted an agreement whereby BFS agreed to allow DRH to defend a lawsuit on its own, without giving BFS notice, and nonetheless indemnify DRH for whatever judgment or settlement resulted, at the very least it would have needed to draft an indemnification agreement that expressly said so. It is BFS's position that the plain language of the contract provides that BFS, not DRH, will defend any third-party suits implicating BFS's work. However, to the extent that the language has any ambiguity, that ambiguity must be resolved against DRH. *See Southern Atlantic Financial Services, Inc. v. Middleton*, 349 S.C. 77, 84 (Ct. App. 2002)("It is well settled that ambiguities arising within a contract must be construed against the drafter").

C. DRH's argument that "The Court erred in finding that the Contract required DRH provide written notice to BFS for any suit implicating BFS's contractual indemnity obligations."

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[1] DRH's own counsel in the Clark Case took the position 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)

It is self evident that notice must be given for BFS to defend and indemnify DRH with regard to a third party lawsuit. The Contract provides that any such notice must be in writing. Further, the Contract provides that any "notices pursuant to this Agreement or otherwise" must be in writing. The statutory and common law of South Carolina required notice in order for BFS to be bound by any determinations made in the Clark Case.

D. DRH's argument that "The Court erred in concluding that the covenant of good faith and fair dealing required notice."

DRH, while acknowledging that the Contract contains an implied covenant of good faith and fair dealing, argues that "there is no breach of the implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly gave him or her the right to do." The Contract between DRH and BFS does **not** expressly give DRH the right to litigate a suit involving multiple claims, some related to BFS's work, and others unrelated, give BFS no notice of the suit, make no transcript of the hearing, agree to an award that lumps together the damages from various unrelated defects, and then sue BFS and require it to pay the entire judgment. By its own admission, this is exactly what DRH seeks to do. DRH admits that portions of the judgment were likely awarded for defects unrelated to work performed by BFS:

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

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

(Henderson Dep. of 09/06/13, P. 18, ll. 3-8).

Allowing DRH to litigate claims related to multiple defects, related to the work of multiple DRH subcontractors, give no notice of the litigation to those various subcontractors, request an award that lumps the damages from the various defects together, and then select, willy-nilly, the

subcontract who will ultimately have to pay the entire judgment, is a recipe for collusion, fraud, and injustice.

E. DRH's argument that "The Court erred in finding that DRH was equitably estopped from seeking contractual indemnification."

For the reasons given above, it would be inequitable to allow DRH to require BFS to pay the judgment entered in the Clark Case. Further, DRH's assertion that it is "undisputed" that Jay Henderson, via telephone, gave BFS oral notice of the Clark Case, is both irrelevant and incorrect. BFS hotly disputes that any notice, oral or otherwise, was given.[2] In considering the equities, it is also worth noting that DRH was advised, prior to the arbitration, that lumping together all damages into a single award, with no findings, would make any proceeding against BFS "less certain." (Henderson Dep., of 06/27/14 P. 138, l. 25- P. 139, l. 19).

F. DRH's argument that "The Court erred in ruling that the issue of what property damage was attributable to BFS's work was ruled on during the arbitration."

DRH's argument starts out with the proposition that an arbitration is an "informal process." However, DRH enrolled the arbitration award and made it a final judgment of the Berkeley County Circuit Court. "[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.

DRH's argument demonstrates the hopelessness of its position. It argues that "[n]one of the issues in arbitration had anything to do with which subcontractor was involved in the various alleged defective conditions." Is that so? There is absolutely no record before the Court of what was litigated in the Clark Case. There is no transcript to show what damages estimates were testified to

[2] It is worth noting that despite DRH's current contention that the Clark Case chiefly involved work performed by BFS, DRH did not depose a single BFS employee or call a single BFS employee as a witness at the arbitration of the Clark Case.

or what testimony was given regarding damages associated with various scopes of work. There is simply no basis to determine what subjects were litigated in the arbitration.

DRH goes on to argue that BFS was "vouched in" to the Clark Case based on an alleged telephone conversation. As stated earlier, both the Contract, and applicable South Carolina law, require any such "vouching notice" to be in writing.

5. DRH's argument that "The Court erred in concluding that the Court could not determine that the arbitration award was based in tort."

BFS does not dispute that a homeowner, under some circumstances, can receive an award against its general contractor based in tort. There is no evidence, however, that the judgment entered against DRH in the Clark Case is based on tort. Indeed, the simplest and most straight forward award would be based on breach of contract, not tort.

DRH has not provided the details of how it, as the general contractor, was adjudicated to have been negligent. Was it negligent supervision of the siding subcontractor? negligent coordination of work between the concrete subcontractor and another subcontractor ? negligent hiring? Negligently drafting plans? The plain and simple answer is that DRH itself has absolutely no idea whether it was found negligent.[3] Despite the argument of counsel otherwise, DRH has acknowledged that it is unable to determine whether there was a finding of negligence in the Clark Case:

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.

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[3]DRH's motion confuses the issue somewhat in stating that "there is sufficient evidence that BFS violated a legal duty in the construction of 403 Milner Court." However, the real issue is not BFS's negligence, it is the lack of any ruling that ***DRH*** was negligent. In order to bring a contribution action DRH must have, itself, been adjudicated a tortfeasor in the Clark Case. There is no finding of negligence and, for a multitude of reasons, DRH cannot litigate the issue of its own negligence in this action.

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

A: **I'm uncertain.**

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

6. **DRH's Argument that "The Court improperly relied on parol or extrinsic evidence."**

DRH, apparently, believes that the facts of this case are "parol evidence." Prior to determining whether DRH is entitled to indemnity, the Court obviously must look to the basis of the award entered in the Clark Case in order to determine whether it is attributable to BFS's work. Under DRH's interpretation of the parol evidence rule, it is unclear how any court could ever determine whether any judgment was, or was not, within the scope of the at-issue indemnity provision. BFS's indemnity obligations do not extend to <u>any</u> judgment rendered against DRH, but only to those judgments based on work performed by BFS. If the Court cannot determine the basis for a particular judgment, DRH cannot meet its burden of proof and summary judgment for BFS is proper.

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

KERNODLE ROOT + COLEMAN

By: _____

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

September 26, 2014
Charleston, South Carolina

2010-CP-10-10355

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of ***Builders FirstSource-Southeast Group, LLC and Builders Firstsource, Inc.'s Response to Plaintiff's Motion to Reconsider*** 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

September 26 2014

Alison D. Sessoms

Alison D. Sessoms

FILED
2014 SEP 29 AM 11:34
JULIE J. ARMSTRONG
CLERK OF COURT

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

CASE NO. 2010-CP-10-10555

D.R. HORTON, INC., D/B/A
J. 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 NACARRI, 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

when I talked to him he said he had no recollection of anything about going to arbitration and no written notice of us participating or being involved.

Q. He did get an e-mail from Jay Henderson at D.R. Horton, correct?

MR. ANDERSON: Object to the form.

A. He received an e-mail from Jay Henderson about having lunch. It didn't mention the Milner house or anything.

Q. Well, certainly Builders FirstSource was aware the homeowner was having complaints about Builders FirstSource's scope of work in September of 2007, correct?

A. That's what the e-mail reads.

Q. What about the arbitration, were you aware of the arbitration of this lawsuit between Ms. Clark and D.R. Horton?

A. Not 'til after arbitration.

Q. When after the arbitration?

A. Now, within the last month.

Q. Understand. Who would have knowledge?

A. Like I said, again, I would say that our legal department or Morris Tolly or somebody

would have been contacted saying, from D.R. Horton, and everyone I've talked to we received no notice that it was going to arbitration.

MR. MCLEOD: Let's mark this as Exhibit 16.

(Plaintiff's Exhibit 16 was marked for identification.)

Q. All right. Exhibit 16, do you recognize this document?

A. Yes.

Q. What is this document?

A. It's a contract agreement between Builders FirstSource and D.R. Horton.

Q. And according to this document, contractor is Builders FirstSource?

A. Correct.

Q. And it doesn't say Builders FirstSource, Southeast Group, does it?

A. It just says Builders FirstSource.

Q. And then it even notes below it, it's got name of owner or officers, Norris Tolly, Southeast Group President, correct?

A. Correct.

Q. So according to this document you got Builders FirstSource and then you've got

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,

-vs-

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

Defendants.

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

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 Padget Graham & Laney, PA, 40 Calhoun Street, Suite 200, Charleston, South Carolina, on Friday, September 6, 2013, commencing at 9:44 a.m.

whether or not the framing was negligently installed at the Clark residence?

A. Again, the arbitrator made an award for $100,000 to the Plaintiff.

Q. Well, does D.R. Horton know whether or not that the arbitrator found that the framing work at the Clark residence was defective?

A. Again, the majority of the testimony given, the majority of the arguments, the brunt of the case, was focused around the framing structure, and the window and door installation.

Q. Okay.

A. That is what was most argued, what was focused on in the entire event.

Q. The hotly contested issue, the framing?

A. It was the majority of the conversation and testimony, yes.

Q. Again, my question again is, does D.R. Horton know whether or not it was determined in the Patricia Clark case that the framing was negligently performed?

A. Again, that is a question for the arbitrator, if he could answer, but we do not have specific information as it relates to how the findings came about.

Q. D.R. Horton does not have specific information in terms of whether or not the framing was determined to be

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

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

MR. HALDRUP: Object to the form.

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

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

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

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

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

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

A. That is correct.

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

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Q. And had no responsibility to do it?

A. They did not.

Q. Same with the driveway?

A. They did not install the driveway.

Q. And had no responsibility to install the driveway?

A. They did not.

Q. Or the slab?

A. That is correct.

Q. Or the roof and shingles?

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

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

A. Underlayment felt.

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

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

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

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that D.R. Horton was negligent?

A. I'm uncertain.

Q. Dr. Horton does not know?

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

Q. All right.

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

(Exhibit No. 3 marked for identification.)

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

A. Yes.

Q. Okay. What is this document?

A. It's an arbitration order.

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

A. Yes.

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.

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

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

A. I don't recall that she did.

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

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

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

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

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?

MR. HALFPOP: Object to the form.

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

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

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
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,

DEFENDANTS.

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.

times.

A And my answer was I believe I just answered that and I just read that same statement.

Q Okay. So yes, D.R. Horton was advised by their attorneys that a monetary award only would not subject D.R. Horton to any negative precedent?

MR. HALDRUP: Object to the form.

A Mr. Johnson stated in his e-mail "The monetary award would not subject D.R. Horton to any negative precedent." That is what his statement was.

Q Okay. What did that mean to you when you got that e-mail that said, "A monetary award will not subject Horton to any negative precedent," how did you understand that?

MR. HALDRUP: Object to the form

A I understand it as Matt's opinion as it relates to the type of award. I think I've answered that question previously as well.

Q Did you understand it's Matt's opinion that the award entered in the Clark case could not be used in future cases to prove any particular defect?

MR. HALDRUP: Object to the form

A That may have been what he was inferring as he relates to a negative precedent.

Q What did you understand -- what did Horton

understand Mr. Johnson to mean in his December 6, 2007, e-mail when he said that a monetary award would make matters less certain with respect to a subsequent action against a sub, in this case, most likely Builders FirstSource?

A Again, he's stating his opinion as it relates to a monetary award with respect to subsequent actions. His opinion, it would be less certain.

Q What did Horton understand that to mean, "less certain"?

A That it would be less certain.

Q Okay. So Horton agreed to the monetary award only, right?

A We agreed to it.

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

MR. HALDRUP: Object to the form.

A With full knowledge that it may be less certain.

Q Okay. And one of the reasons that Horton did that was so that there would not be a reasoned award that could be used as negative precedent against Horton; is that right?

MR. HALDRUP: Object to the form.

A Again, in Mr. Johnson's opinion, a monetary award

Johnson, Matthew K.

From:	David Monroe <dmonroe@dhorton.com>
Sent:	Tuesday, January 19, 2010 8:55 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 show we got a 6 figure judgment against DRH. Obviously they won't follow that up with the rest of the story including that was technically a loss for them and their client. I guess it is possible they just want to make sure we will pay, 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 execute on it. I will have the check tomorrow.

Thanks,

David E. Monroe
Vice President & Legal Counsel
D.R. Horton, Inc.
401 Commerce Street, Suite 500
Fort Worth, Texas 76102
Phone: (817) 900-8200
Fax: (817) 900-1713

From: Johnson, Matthew K. [mailto:Matthew.Johnson@ogletreedeakins.com]
Sent: Tuesday, January 19, 2010 5:43 PM
To: David Monroe
Cc: Jay M Henderson; Dillard, W. Kyle
Subject: RE: DR Horton/Clark - arbitration award and check

EXHIBIT
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David

I offered the stipulation of dismissal as opposed to the entry and enrollment of the judgment course to Clark's attorneys and they prefer to enter and enroll the judgment. I called to see why and got little other than that in most they to arbitrate a case they prefer to have the judgment enrolled. He indicated they would keep us informed and 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 would have

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 and 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@ogletreedeakins.com | www.ogletreedeakins.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

D·R·HORTON America's Builder

From: Johnson, Matthew K. [mailto:Matthew.Johnson@ogletreedeakins.com]
Sent: Tuesday, January 19, 2010 3:44 PM
To: David Morice
Cc: Jay B. Henderson; Dillard, W. Kyle
Subject: RE: Nathan Clark - arbitration award and check

David:

Per our discussion earlier today, attached is a copy of the Arbitration Order received from Tom Wills and the [illegible] received from Clark's attorneys. They have asked for a single check made payable to "Chakeris Law Firm, as attorneys for Pat Clark" in the amount of $150,000. Please let me know if you need anything further to get these checks 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.

Thanks.

Matthew K. Johnson | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
P.O. Box 2757 | Greenville, SC 29602 | Telephone: 864-271-1300 | Fax: 864-235-8800
matthew.johnson@ogletreedeakins.com | www.ogletreedeakins.com

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS Case No. 2010-CP-10-~~10935~~ 10355
D.R. HORTON, INC. f/k/a C. RICHARD DOBSON BUILDERS, INC. Plaintiff, **BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC; and BUILDERS FIRSTSOURCE, INC. and JOSEPH NACCARI, Individually and d/b/a MASTER FRAMERS,** Defendants.	ORDER

FILED
2015 MAY -6 PM 3:35
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before me upon Motion to Reconsider, filed 9/18/2015, by Plaintiff, D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc., by and through counsel. After fully considering said Motion, this Court finds no need for oral argument in this matter and therefore the Motion to Reconsider is denied;

AND IT IS SO ORDERED!

R. MARKLEY DENNIS, JR.
Presiding Judge

Charleston, South Carolina

April 29 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No.: 2015-001238

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

v.

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

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

v.

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

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

January 19, 2016

Neil S. Haldrup, Esquire
Peden Brown McLeod, Jr., Esquire
Wall Templeton & Haldrup, P.A.
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Attorneys for Appellants