

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

RECEIVED

JAN 28 2016

SC Court of Appeals

Appellate Case No.: 2015-001238

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

v.

Builders FirstSource - Southeast Group, LLC, and Builders FirstSource, Inc., and Joseph Naccari, Individually and d/b/a Master Framers..... Defendants,

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

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

v.

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

SUPPLEMENTAL RECORD ON APPEAL

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Explanation of Supplement

Builders FirstSource's Response to DR Horton's Motion to Reconsider which appears in the Record at page 299 fails to contain the corresponding exhibits. Therefore, this supplement contains the complete pleading with exhibits, starting on page 599.

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

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

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

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

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

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

Notwithstanding any other provision of law, a promise or agreement . . . purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of . . . property damage proximately caused by or resulting from **the sole negligence of the promisee, its independent contractors**, agents, employees, or indemnitees is against public policy and unenforceable . . .

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

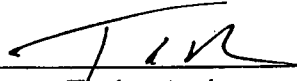
The only caveat to the above rule, that a promisor (BFS), may agree to indemnify the promisee (DRH), in connection with "liability for damages resulting from the negligence, in whole or in part, **of the promisor**," has no application to DRH's attempt to require BFS to indemnify it for "liability for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

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

[SIGNATURE ON FOLLOWING PAGE]

KERNODLE ROOT + COLEMAN

By:


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

Charleston, South Carolina
June 10, 2014

CERTIFICATE OF SERVICE

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

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 Masterframers**

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

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 JULIE J. ARMSSTRONG
 CLERK OF COURT

FILED

June 5, 2014

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**KERNODLE
ROOT +
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ATTORNEYS AT LAW

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

May 15, 2013

VIA EMAIL ONLY

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

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

Dear Judge Nicholson:

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

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

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

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

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

KernodleLaw.com
**DEFENDANT'S
EXHIBIT**

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DRH failed to follow its own dispute resolution procedures. Instead, DRH decided not to add BFS as a party to the Clark arbitration, not make any transcript of the two day arbitration proceeding, and not ask the arbitrator to allocate damages among Clark's various allegations. DRH is now equitably estopped from bringing this lawsuit. "Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290 (Ct.App. 2012).

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

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

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

²Importantly, the *Vermeer* Court held that the failure to allocate damages in the settlement ended the case. The Court did not allow Vermeer to litigate how much of the settlement was attributable to claims subject to contribution. The Contribution Act does not allow a party to try a case, when some claims are subject to contribution, and others are not, and then bring a separate action to litigate how much of the underlying judgment is attributable to the negligence of a nonparty. Allowing DRH to maintain a separate action to decide how much of the judgment entered in the Clark case is subject to contribution would lead to duplicate litigation and violate the Act's prohibition against litigating "relative degrees of fault" in a contribution action. *See* S.C. Code Ann. § 15-38-30.

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

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

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

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

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

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

Hayne Federal Credit Union, supra at 252.

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

The Honorable J. C. Nicholson, Jr.
May 15, 2013
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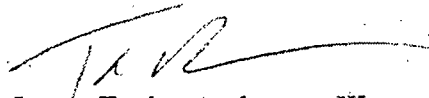
For all of the above reasons, and the reasons set forth in BFS's Memorandum and Reply briefs, BFS respectfully asks this Court for summary judgment.

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

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

Sincerely,

KERNODLE ROOT + COLEMAN



James Taylor Anderson, III

JTA/ads
Enclosures

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

D.R. HORTON

Division Name: <u>HH</u>
Area Name: _____
Assigned Vendor No.: <u>81AW</u>

INDEPENDENT CONTRACTOR AGREEMENT

FEB - 6 2001

NAME OF CONTRACTOR BUILDER FIRST SOURCE DBA - JAMES ("Contractor")
 _____ Sole Proprietorship _____ Partnership ☒ Corporation _____ LLC _____ Other (ATTACH W-9)
 Social Security No. or Tax ID No.: 57-061425
 Name of Owner(s)/Officer(s): MORRIS TOLLY, SE GROUP PRESIDENT
 Address for All Notices: ROUTE 1, BOX 170
 City: RINDLELAND State: SC Zip Code: 29936
 Telephone: (843) 987-0810 Fax: (843) 987-0833 E-Mail Address: _____
 Insurance Carriers: ATTACH INSURANCE CERTIFICATES, OR THERE WILL AUTOMATICALLY BE WITH HOLDING
 This agreement (the "Agreement") is entered into on this 31 day of JANUARY, 2001, between D.R. HORTON
 (hereinafter "Owner") and Contractor.

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

and shall include all work performed by Contractor for Owner. The applicable quantities and pricing for the Work shall be that reflected in the price sheet, proposal, bid or other documentation most recently accepted and approved by Owner (the "Pricing Schedule"). It is understood and agreed that no Pricing Schedule will modify any other terms of this Agreement other than price and quantity. It is understood and agreed that Owner is not obligated to award any work on specific property to Contractor, does not guarantee any quantity of work to Contractor, and may at its sole 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 so specified. Contractor acknowledges that TIMING 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 material suppliers. Contractor shall immediately notify Owner's construction supervisors of any unsafe condition or practice observed on the Work site. Further, Contractor shall immediately notify Owner of any accidents or injuries on the Work site.

5. **Contract Price.** The Pricing Schedule shall be applicable to all Work performed under this Agreement. The Pricing Schedule shall reflect the maximum total payment due to Contractor, and Contractor shall pay all applicable sales taxes and any other taxes resulting from such payment or 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: BUILDER FIRST SOURCE
 Name: Morris Tolly
 Title: Southeast Div.

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 at Owner's request to: (i) procure a bond to indemnify Owner and any home purchaser from Owner, in an amount equal to one hundred fifty percent of the lien amount, against such lien, or (ii) refund to Owner all monies, including any additional amount necessary to cover all of Owner's or home purchaser's attorneys' fees and court costs paid in discharging the lien, whichever remedy Owner elects in its sole and absolute discretion. Payment to Contractor for any Work shall not be construed as a waiver by Owner as to Work later found to be defective and shall not release Contractor from liability for warranties and warranty service and/or defective Work.

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

8. **Contractor's Warranties.** Contractor unconditionally warrants to Owner, its successors and assigns, and to each purchaser of a house incorporating the Work from Owner, each subsequent owner, and their successors and assigns (collectively referred to as the "Homeowner"), that all labor performed and materials furnished by Contractor shall conform to the specifications of this Agreement, are free from any defects or deficiencies in workmanship or materials when judged by the standards of accepted residential construction industry trade practices, and be in accordance with the requirements of all applicable government authorities. All Work not conforming to the aforementioned requirements shall be considered to be defective. In addition to the foregoing warranty, Contractor expressly warrants that the Work shall remain free of defects for the following warranty periods: (a) for a period of ten (10) years all structural elements, including, but not limited to, roof framing members (rafters and trusses), floor framing members (joists and trusses), bearing walls, columns, lintels (other than lintels supporting veneers), girders, load-bearing beams, and foundation and footing systems; (b) for a period of two (2) years all (i) heating/ventilating/air conditioning duct work, refrigerant lines, steam and water pipes, registers, convectors and dampers, (ii) plumbing pipes (supply and waste) and their fittings, as well as gas supply lines and vent pipes located within the home, and (iii) electrical wiring, electrical boxes and connections up to the public utility connections, installed by Contractor; (c) all other elements for a period of one (1) year. The foregoing notwithstanding, in no event shall a warranty period for any system, element or other portion of the Work be less than the applicable warranty period for such system, element, or other portion of the Work under any residential warranty program from any residential warranty company for the residential warranty policy to be provided by Owner to any Homeowner (a "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-Stegler 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 (s, 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 carried by Contractor. 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 that subcontractors and material suppliers 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 to any dispute shall have a right to collect his reasonable attorney's fees and expenses.

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

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

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

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

21. Termination and Waiver. This Agreement shall remain in full force and effect until terminated in writing by mailing 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 is specifically authorized by an authorized representative of Owner. Any failure of Owner to enforce any of the terms and provisions of this Agreement shall not constitute a waiver of such required performance by Contractor or of any other performances in the future required by Contractor hereunder.

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

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

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

INITIALS:

Owner:

Contractor:

CORPORATE

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

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

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

GENERAL OBJECTIONS

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

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

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

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

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

SUPPLEMENTAL INTERROGATORIES

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

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

ANSWER:

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

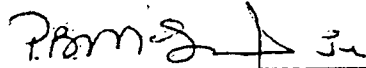
Howard Althen
Curry Engineers
401E Seacoast Parkway
Mount Pleasant, South Carolina 29464

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

Dated this 13 day of November 2012.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.



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

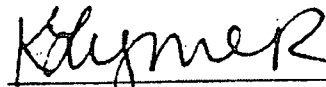
CERTIFICATE OF SERVICE

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

ADDRESSEE(S)

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

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



Kristyn Lynne Robertson

914 Folly Road, Suite 2
P.O. Box 13897
Charleston, SC 29422-3897
Phone (843) 793-7866
Fax (843) 793-3032

**KERNODLE
ROOT +
COLEMAN**
ATTORNEYS AT LAW

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

September 13, 2013

VIA EMAIL AND U.S. MAIL
The Honorable J. C. Nicholson, Jr.
100 Broad Street, Suite 106
Charleston, SC 29401

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

Dear Judge Nicholson:

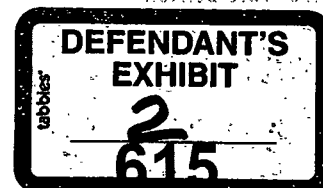
I represent Builders FirstSource-Southeast Group, LLC, and Builders Firstsource, Inc., (collectively "BFS") in this case brought by D.R. Horton, Inc. ("DRH"). DRH asserts claims against BFS for contribution and contractual indemnity. BFS filed a Motion for Summary Judgment in this matter and the Court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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: I'm uncertain.

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

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

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

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

A: Again, the document does not indicate.

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

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

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

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

Sincerely,

KERNODLE ROOT + COLEMAN



James Taylor Anderson, III

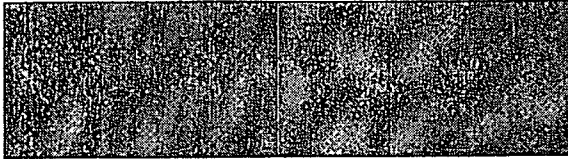
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cc: VIA EMAIL ONLY
Peden Brown McLeod, Jr., Esquire and Neil S. Haldrup, Esquire
David S. Cobb, Esquire
R. Trippett Boineau, III, Esquire

EXHIBIT 1

**Ogletree
Deakins**

December 31, 2009



PERSONAL AND CONFIDENTIAL

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

Attorneys at Law

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Telephone: 864.241.1900
Facsimile: 864.235.4649
www.ogletreedeakins.com

Invoice # 683321
Matter # 005641-000215

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

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

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

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

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

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

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Los Angeles • Memphis • Miami • Morristown • Nashville • New Orleans • Philadelphia • Phoenix • Pittsburgh • Raleigh • St. Louis • St. Thomas • San Antonio • San Francisco • Tampa • Torrance • Tucson • Washington

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

For professional services rendered through December 31, 2009:

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

Date	Initials	Description	Hours	Amount
12/08/09		Additional review of depositions in preparation of witness outlines for arbitration; additional preparation of witness outlines; several e-mails with Randy Still regarding preparation for arbitration; additional preparation of exhibits; travel to Charleston, SC, for arbitration.	7.30	2,555.00
12/09/09		Additional review of depositions in preparation of witness outlines for arbitration; additional preparation of witness outlines; additional preparation of exhibits; conference with [REDACTED] regarding preparation for arbitration.	9.80	3,430.00
12/10/09		Attendance at arbitration (first day); review of testimony and preparation of additional examination and cross-examination of witnesses; conference with Randy Still regarding same.	9.70	3,395.00
12/10/09		Telephone call with [REDACTED] concerning first day of arbitration.	0.30	88.50
12/11/09		Conference with [REDACTED] and Randy Still regarding arbitration preparation; attendance at arbitration (second day); travel from Charleston, SC, for arbitration..	11.40	3,990.00
12/11/09		Conference with [REDACTED] concerning results of arbitration.	0.50	147.50
12/14/09		Initial preparation of arbitration summary.	1.30	455.00
12/15/09		Conference with [REDACTED] concerning closing statement submission.	0.70	206.50
12/16/09		Review of arbitration exhibits and notes in preparation for evidentiary summary to arbitrator Tom Wills; initial preparation of evidentiary summary to arbitrator Tom Wills.	2.10	735.00
12/18/09		Email to arbitrator and all counsel concerning submission of closing statement brief.	0.10	29.50
12/21/09		Telephone call with Randy Still regarding evidentiary summary; additional preparation of evidentiary summary to arbitrator Tom Wills.	7.80	2,730.00

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

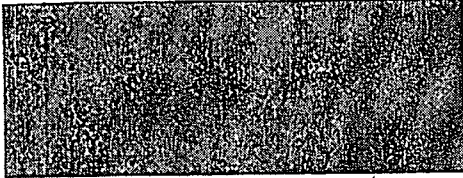
Timekeeper		Timekeeper Summary			
		Title	Rate	Hours	Amount
		Shareholder	350.00	80.90	28,315.00
		Associate	295.00	2.50	737.50

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

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

Ogletree Deakins

February 28, 2009



PERSONAL AND CONFIDENTIAL

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

Attorneys at Law

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

Invoice # 615337
Matter # 005641-000215

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

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

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

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

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

For professional services rendered through February 28, 2009:

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

Timekeeper



Timekeeper Summary

Title	Rate	Hours	Amount
Shareholder	350.00	0.80	280.00

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

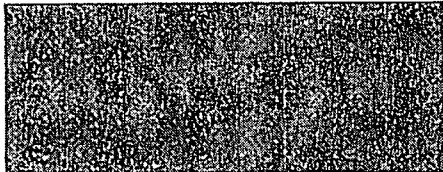
Ogletree Deakins

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

Attorneys at Law

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

July 31, 2008



PERSONAL AND CONFIDENTIAL

Invoice # 572589
Matter # 005641-000215

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

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

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

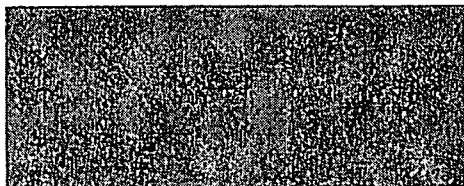
Year-to-Date Fees	\$5,114.50
Year-to-Date Expenses	\$3,469.25
Life-to-Date Fees	\$5,732.78
Life-to-Date Expenses	\$3,472.15

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

Payable upon receipt.

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

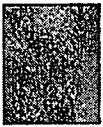
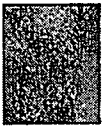
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Re: Mrs. Pat Clark
(Charleston Division / CD)

For professional services rendered through July 31, 2008:

Date	Initials	Description	Hours	Amount
07/07/08		Conduct research and prepared memorandum regarding Unfair Trade Practices Act and Economic Loss Rule.	3.20	560.00
07/08/08		E-mail from John Chakeris' office concerning Home Purchase Agreement; coordination of additional investigation into missing portions of Home Purchase Agreement.	0.40	130.00
07/14/08		Several e-mails with John Chakeris' office regarding missing portion of Home Purchase Agreement.	0.20	65.00
07/16/08		Address contract form issues.	0.30	82.50
07/22/08		Review of client file materials regarding information on vendors for potential third-party claims; revision of Answer to include potential third-party claims against vendors; preparation of Motion to Compel Arbitration; preparation of Motion Information Form and Cover Sheet; letter to Clerk of Court regarding filing of Motion to Compel Arbitration and Answer; letter to John Chakeris and Philip Segui regarding filing and service of Motion to Compel Arbitration and Answer.	4.60	1,495.00
07/22/08		Advise on pleadings and third party issues.	0.50	137.50
07/23/08		Telephone call with Randy Still regarding status of report and additional information needed to complete; preparation of truss information for Randy Still; letter to Randy Still regarding same.	0.60	195.00

Date	Initials	Description	Hours	Amount
07/23/08		Address documents for forwarding to Randy Still.	0.20	\$5.00
07/31/08		Review of roof truss information from Builders FirstSource.	0.40	130.00
Total Services			10.40	\$2,850.00

Timekeeper Summary

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

Expenses

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

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

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

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

Plaintiff,)

-vs-)

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

Defendants.)

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

Third-Party Plaintiff,)

-vs-)

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

Third-Party Defendant.)

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

SOUTHEASTERN TRANSCRIPT * (843)762-2442

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

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

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

13 Q. Okay.

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

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

19 A. It appears so, yes.

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

23 A. Yes.

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

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

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

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

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

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

10 MR. HALDRUP: Object to the form.

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

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

20 MR. HALDRUP: Object to the form.

21 A. Could you repeat that, please?

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

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

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

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

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

11 A. Yes, they alleged that.

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

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

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

21 MR. HALDRUP: Object to the form.

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

24 Q. An engineer?

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

1 gave testimony to the contrary. Two differing opinions.

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

5 MR. HALDRUP: Object to the form.

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

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

11 A. That's correct.

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

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

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

21 A. Yes.

22 Q. Okay.

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

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

SOUTHEASTERN TRANSCRIPT * (843)762-2442

1 defective in the Clark case?

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

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

8 A. In general?

9 Q. Yes, sir.

10 A. Yes.

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

15 A. Not to my recollection, no.

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

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

24 Q. Was evidence introduced by Ms. Clark in the Clark
25 proceeding to substantiate her allegation that the slab

SOUTHEASTERN TRANSCRIPT * (843) 762-2442

SOUTHEASTERN TRANSCRIPT * (843) 762-2442

1 and driveway at her home were negligently installed?

2 MR. HALDRUP: Object to the form.

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

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

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

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

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

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

SOUTHEASTERN TRANSCRIPT * (843)762-2442

SOUTHEASTERN TRANSCRIPT * (843)762-2442

1 A. True.

2 Q. Correct?

3 A. Yes, yes.

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

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

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

15 A. It was alleged, yes.

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

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

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

SOUTHEASTERN TRANSCRIPT * (843)762-2442

SOUTHEASTERN TRANSCRIPT * (843)762-2442

1 were improperly installed?

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

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

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

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

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

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

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

25 Q. Yes, sir.

SOUTHEASTERN TRANSCRIPT * (843)762-2442

SOUTHEASTERN TRANSCRIPT * (843)762-2442

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

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

6 MR. HALDRUP: Object to the form.

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

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

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

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

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

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

24 A. That is correct.

25 Q. And with regards to the kick-out flashing, did
SOUTHEASTERN TRANSCRIPT * (843)762-2442

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

3 A. They did not.

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

6 A. They did not.

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

10 A. They did not.

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

13 A. They did not.

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

18 MR. HALDRUP: Object to the form.

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

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

23 MR. HALDRUP: Object to the form.

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

SOUTHEASTERN TRANSCRIPT * (843)762-2442

SOUTHEASTERN TRANSCRIPT * (843)762-2442

1 Q. And had no responsibility to do it?

2 A. They did not.

3 Q. Same with the driveway?

4 A. They did not install the driveway.

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

7 A. They did not.

8 Q. Or the slab?

9 A. That is correct.

10 Q. Or the roof and shingles?

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

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

16 A. Underlayment, felt.

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

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

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

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

25 Q. So you don't know if there was an adjudication
SOUTHEASTERN TRANSCRIPT * (843)762-2442

1 that D.R. Horton was negligent?

2 A. I'm uncertain.

3 Q. Dr. Horton does not know?

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

6 Q. All right.

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

9 (Exhibit No. 3 marked for identification.)

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

13 A. Yes.

14 Q. Okay. What is this document?

15 A. It's an arbitration order.

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

20 A. Yes.

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

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

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

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

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

8 A. Again, the document does not indicate.

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

12 A. The document does not indicate.

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

15 A. The document does not indicate.

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

19 A. Page?

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

22 A. Yes.

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

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1 any of them have been produced.

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

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

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

8 A. I do.

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

10 A. Dispute resolution.

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

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

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

23 A. I believe it was, yes.

24 Q. In the Patricia Clark case, does D.R. Horton
25 consider that a dispute that relates to the agreement

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

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

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

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

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

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

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

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

19 MR. HALDRUP: Object to the form.

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

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

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1 not what he said.

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

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

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

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

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

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

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

18 EXAMINATION BY MR. COBB:

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

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

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**KERNODLE
ROOT
COLEMAN**
ATTORNEYS AT LAW

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

November 1, 2013

VIA EMAIL AND U.S. MAIL
The Honorable J. C. Nicholson, Jr.
100 Broad Street, Suite 106
Charleston, SC 29401

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

Dear Judge Nicholson:

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

1. Judgments are not conclusive as to nonparties.

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

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

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

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

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

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

The only potential exception to the above rule is that a nonparty indemnitor - given notice and an opportunity to defend an action - may be bound by the findings made in that action. *See 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.”).² The rule was stated by the United States Supreme Court as follows:

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

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

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

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

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

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

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

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

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

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

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

S.C. Code Ann. § 36-2-607(5).

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

³It should be remembered that "vouching in" a third party indemnitor is an exception to the general rule that nonparties are not bound by issues determined in a lawsuit. If South Carolina had not adopted the practice, the general rule that nonparties are not bound would remain in full force and nonparties, even with notice, would not be bound by judgments.

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

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

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

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

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

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

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

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

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

opportunity to participate and interpose defenses, the party to be indemnified can estop the indemnitor to controvert the matter anew in an action against him upon the indemnity contract or obligation.

Aetna Cas. & Sur. Co. v. Golightly, 289 S.C. 408, 410 (1985)(emphasis added).

Similarly, in *Otis Elevator, Inc., v. Hardin Const. Co. Group, Inc.*, 316 S.C. 292, 297, (1994), the Supreme Court noted: "Where, as here, the indemnitee gave the indemnitor notice and an opportunity to participate in the litigation, the indemnitee is not required to prove the plaintiff's actual ability to recover the amount paid in settlement so long as the indemnitee proves that he was potentially liable to the plaintiff." *Id.*

4. **Pursuant to the Contract, any notice giving BFS an opportunity to defend the Clark Case must have been written.**

Paragraph 19 of the Contract provides:

Notices. All notices pursuant to this Agreement *or otherwise* shall be in writing and shall be delivered to the respective business address of the Parties. (emphasis added).

It is undisputed that no written notice of the Clark Case was provided to BFS.

5. **Nothing in the Contract eliminates the requirement of notice plus an opportunity to defend in order to bind a nonparty.**

Indemnity provisions are to be strictly construed. *Sherlock Holmes Pub., Inc. v. City of Columbia*, 389 S.C. 77, 81 (Ct. App. 2010). It is true that Paragraph 11 of the Contract contains an indemnity provision whereby "contractor" agrees to indemnify "owner" for the contractor's breach of warranty, the work performed by the contractor or contractor's negligence.⁵ Paragraph 11, however, is silent on the issue of notice.

To the extent that it is even possible to contractually deprive a party of notice and an opportunity to defend, at the very least it would require an express statement to the effect that contractor expressly "agrees to waive any and all right to notice and an opportunity to defend action concerning the work" and "agrees to be bound, without notice and an opportunity to defend, by any actions concerning the work" Nothing in the Contract approaches such an explicit waiver of basic due process.

Instead, the only portion of the Contract referencing arbitration between DRH and a third-

⁵DRH was the general contractor for Ms. Clark's house. BFS was the framing subcontractor. The Contract, however, refers to DRH as "owner" and BFS as "contractor."

The Honorable J. C. Nicholson, Jr.

November 1, 2013

Page 6

party explicitly recognizes that if BFS is to be bound by such a proceeding it has the right to participate. Paragraph 22, "**Dispute Resolution**," explicitly provides: "Contractor agrees to participate in, and be bound by, any arbitration proceeding between Owner and any third party relating to the work . . ." The dispute resolution procedure in the Contract does not say that BFS agrees to be left out of arbitration, given no notice thereof, and nonetheless be bound by such arbitration.

6. Conclusion.

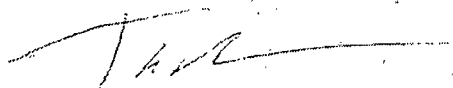
DRH cites no case for the incredible proposition that a general contractor can be sued for multiple construction defects, give no notice of the suit to its subcontractors, have a judgment entered against it for a multitude of unrelated construction defects, and then sue a single subcontractor and require that subcontractor to pay the entire judgment. The reason DRH cites no such cases is because there aren't any.

Because DRH has the burden of proving that BFS's work was defective, and the amount of damages caused thereby, there are factual issues that preclude summary judgment for DRH.

Thank you for the opportunity to submit this letter and I greatly appreciate your attention to this case. Per your instructions, BFS does intend to submit a letter addressing the testimony given by DRH's expert Randall Still, P.E., during his October 28, 2013, deposition. Please let me know should you require any additional information.

Sincerely,

KERNODLE ROOT + COLEMAN



James Taylor Anderson, III

JTA/

Enclosure

cc: VIA EMAIL ONLY

Peden Brown McLeod, Jr., Esquire and Neil S. Haldrup, Esquire

David S. Cobb, Esquire

R. Trippett Boineau, III, Esquire

149 N.J. Super. 574
Superior Court of New Jersey,
Appellate Division.

INTERNATIONAL FIDELITY INSURANCE CO.,
a New Jersey corporation, Plaintiff-Appellant,

v.

The GOLTRA CORPORATION
et al., Defendants-Respondents.

Submitted April 25, 1977.

Decided May 10, 1977.

Surety under payment and performance bond brought action against principal seeking indemnification for default judgment previously entered against surety. The Superior Court, Law Division, granted defendants' motion for summary judgment, and surety appealed. The Superior Court, Appellate Division, Lamer, J.A.D., held that substantial fact issue existed as to whether surety properly notified principal of action instituted against it and made unequivocal demand that principal undertake the defense, precluding summary judgment.

Reversed and remanded.

West Headnotes (4)

[1] Principal and Surety

↔ Conclusiveness as Against Principal of
Adjudication Against Surety

If surety fails to "vouch in" its principal by notifying it of an action instituted by a claimant and making an unequivocal demand that it undertake the defense, the lack of proper notification simply results in the inability of surety to realize the judgment as conclusive evidence of principal's liability and quantum of damages in subsequent suit for indemnity.

[2] Principal and Surety

↔ Conditions Precedent

Failure of surety to effectuate a "vouching in" demand upon its principal does not affect

surety's right to prosecute indemnity action by appropriate proof of its elements at plenary trial

[3] Principal and Surety

↔ Conclusiveness as Against Principal of
Adjudication Against Surety

If the "vouching in" procedure by which surety notifies principal of action instituted by a claimant is deficient, the surety, in indemnity action, will not be able to rely upon prior judgment as conclusive proof of propriety of claim underlying the bond liability; under such circumstances, surety will be required to introduce evidence anew which will demonstrate that indebtedness was rightfully due to claimant for labor or materials furnished for job encompassed by the bond, and indemnitor may contest the validity of supplier's claim in toto or as to quantum of damages.

1 Cases that cite this headnote

[4] Judgment

↔ Contract Cases in General

In indemnity action brought by surety against principal under payment and performance bond, substantial fact issue existed as to whether surety properly notified principal of action instituted against it and made unequivocal demand that principal undertake the defense, precluding summary judgment.

Attorneys and Law Firms

**482 *575 Sills, Beck, Cummins, Radin & Tischman,
Newark, for plaintiff-appellant (Thomas J. Denski, Newark,
of counsel; Donald Zarin, Elizabeth, on the brief).

Johnstone & O'Dwyer, Westfield, for defendants-respondents
(John F. Malone, Westfield, on the brief).

Before Judges CARTON, KOLE and LARNER

Opinion

*576 The opinion of the court was delivered by

LARNER, J.A.D.

International Fidelity Insurance Co. (International) issued a payment and performance bond for defendant The Goltra Corporation (Goltra), as principal, in connection with a construction project which Goltra undertook to perform for the City of Plainfield. Defendants had executed an all-embracing indemnity agreement whereby they agreed to indemnify International for all losses and expenses flowing from its suretyship obligations on all bonds written for Goltra as principal.

On October 24, 1974 suit was instituted by United Steel Products Corporation (United) against Herman Builders Company, Inc. (Herman) and International, asserting that United supplied materials for the Plainfield job to Herman, a subcontractor of Goltra, which was not paid, and that International was therefore liable on its payment bond. Upon receipt of the complaint, and apparently after some telephone conversations not delineated in the record, International forwarded it on November 5, 1974 to O'Gorman & Young, Inc., alleged to be Goltra's insurance broker, with a transmittal note which stated, 'You indicated that Goltra is prepared to defend us in this action. Please see that this is handled immediately so that we are not involved in a default judgment.' A copy of this note was transmitted to Goltra by O'Gorman & Young, Inc. on November 18, 1974, together with the summons and complaint, with a letter requesting some evidence that Goltra's attorney had 'the matter under control.'

It appears that neither Goltra nor its attorney communicated with International, nor was a defense interposed in the United lawsuit. As a consequence, a default judgment was entered in that suit against International for the full amount of the claim. Letters from International's attorney to Goltra's attorney thereafter remained unanswered, and no further action was taken to set aside the default judgment against International. There followed this action for indemnity.

*577 Plaintiff and defendants both moved for summary judgment. The trial judge denied plaintiff's motion and granted defendants'. Plaintiff appealed only from the summary judgment in favor of defendants, and did not seek leave to appeal from the denial of its motion for summary judgment.

The sole basis for the entry of summary judgment for defendants was the finding that the 'vouching in' notice by which International called upon its principal, Goltra, to

defend the United lawsuit was not sufficiently certain and explicit under the legal principle expressed in *U.S. Wire & Cable Corp. v. Ascher Corp.*, 34 N.J. 121, 167 A.2d 633 (1961).

[1] The trial judge erred in its interpretation of the opinion in *U.S. Wire & Cable Corp.* The issue before the Supreme Court in that case, and the only issue considered by the trial judge in this case, deals with a problem of evidence and not ultimate liability for indemnity. If the surety fails to 'vouch in' its principal by notifying it of an action instituted by a claimant and an unequivocal demand to undertake the defense, the lack of proper notification simply results in the inability of the surety to utilize the judgment as conclusive evidence of the principal's liability and quantum of damages in the subsequent suit for indemnity. See *U.S. Wire & Cable Corp.*, supra, 34 N.J. at 126, 167 A.2d 633; *Hoppaugh v. McGrath*, 53 N.J.L. 81, 88, 21 A. 106 (Sup.Ct. 1890). See also, *United New York Sandy Hook Pilots Ass'n v. Rodenmond Industries, Inc.*, 394 F.2d 65, 72-73, (3 Cir. 1968); *West Indian Co. v. S.S. Empress of Canada*, 277 F.Supp. 1 (S.D.N.Y. 1967); **483 *Orth v. Consumers' Gas Co.*, 280 Pa. 118, 121-122, 124 A. 296, 297 (Sup.Ct. 1924).

[2] [3] Failure to effectuate a 'vouching in' demand does not, however, affect the right of the surety to prosecute its cause of action by appropriate proof of its elements at a plenary trial. If the 'vouching in' procedure is deficient, the surety will not be able to rely upon the prior judgment as conclusive proof of the propriety of the claim underlying the bond liability. Under such circumstances it will be required *578 to introduce evidence anew which will demonstrate that the indebtedness was rightfully due to the claimant for labor or materials furnished for the job encompassed by the bond; and the indemnitor may contest the validity of the supplier's claim in toto or as to quantum of damages. See *MacArthur v. Gaines*, 286 So.2d 608, 610 (Fla.D.Ct.App. 1973); *Karas v. Snell* 11 Ill.2d 233, 247-248, 142 N.E.2d 46, 54-55 (Sup.Ct. 1957); *Hoppaugh v. McGrath*, supra, 53 N.J.L. at 89-90, 21 A. 106; *Illinois Central R.R. Co. v. Blaha*, 3 Wis.2d 638, 646-647, 89 N.W.2d 197, 201-202 (Sup.Ct. 1958). See also, 42 C.J.S. *Indemnity* s 32a(2) at 618.

[4] It is therefore clear that the summary judgment for defendants was unwarranted. In light of this conclusion, we do not reach the question whether the record supports the trial judge's finding that the notice was insufficient to bring into play the conclusive effect of the default judgment entered in favor of United against International. Since the case is to be remanded for plenary trial, the judge presiding at such

trial will be called upon to determine preliminarily upon an evidential hearing whether the notice given herein suffices to afford the surety the benefit of the rule of evidence set forth in U.S. Wire & Cable Corp., supra. At such hearing there should be explored the communications, oral and written, among International, O'Gorman & Young, Inc., Goltra and its officers and attorneys, as well as the status of O'Gorman & Young as agent of Goltra. From all the evidence the trial judge will decide whether the notice was adequate, bearing in mind the guidelines of U.S. Wire & Cable Corp. as to the substance and timing of the notice and the lack of necessity of any particular formality of such notice. In making this determination he is not controlled by the finding made on the

summary judgment reversed herein. If the judge finds that International properly 'vouched in' Goltra, the prior judgment will conclude the defendants as to liability to United and the amount thereof. If he finds *579 the notice to have been insufficient, the matter will be heard in a plenary trial with full proofs on both sides.

Reversed and remanded for further proceedings consistent with this opinion.

Parallel Citations

374 A.2d 481

End of Document

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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,)

**PLAINTIFF D.R. HORTON, INC. f/k/a
C. RICHARD DOBSON BUILDERS,
INC.'S THIRD SUPPLEMENTAL
ANSWERS TO ALL PARTIES'
INTERROGATORIES**

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

Third-Party Plaintiff,)

-versus-)

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

Third-Party Defendant.)

TO: ALL NAMED PARTIES AND THEIR COUNSEL:

The Plaintiff, D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. ("DRH") hereby
supplements its answers to all Parties' Interrogatories as follows:

INTERROGATORIES

4. Please list the names, addresses and telephone numbers of any expert witnesses whom

you propose to use in the trial of this case and provide the following information:

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

ANSWER

- (1) **Robert G. Sisnroy, P.E.
Sisnroy Engineering, LLC
Post Office Box 12806
Charleston, South Carolina 29422**

See Mr. Sisnroy's Construction Deficiencies Investigation report produced in the underlying action dated February 29, 2008 for his expert opinions relating to this litigation. Mr. Sisnroy will testify in accordance with his knowledge of the facts relating to his investigations and opinions which lead him to the conclusions in said report. Additionally, Mr. Sisnroy will testify in accordance with his knowledge of the facts relating to the order of magnitude of defects between structural/framing, roofing, siding, and concrete, as well as his opinions as to general means and methods necessary to address structural/framing defects. Mr. Sisnroy will further testify as to the scope of Builders FirstSource work during the construction of 403 Milner Court, Charleston, SC, and provide opinions as to the industry standard when a subcontractor undertakes to design, supply, and install structural framing components.

- (2) **Howard Althen
Curry Engineers
401E Seacoast Parkway
Mount Pleasant, South Carolina 29464**

See Mr. Althen's documents and repairs scope for his expert opinions relating to

this litigation. Mr. Althen will testify in accordance with his knowledge of the facts relating to the deficiencies of the structural framing as noted in his documents and repairs scope, as well as to the general means and methods necessary to address issues noted in his documents. Mr. Althen will further testify as to the scope of Builders FirstSource work during the construction of 403 Milner Court, Charleston, SC, and provide opinions as to the industry standard when a subcontractor undertakes to design, supply, and install structural framing components.

- (3) ~~W. Randall Still, SR., P.E.~~
RanDrew Consulting
Forensic/Structural Engineering
209 N. Main Street
#418
Greenville, South Carolina 29601

See Calibogue Construction's Preliminary Remediation and Restoration Estimate, Mr. Still's estimates, and all supplemental estimates thereto for Mr. Still's expert opinions relating to this litigation. Mr. Still will testify in accordance with his knowledge of the facts relating to what repair line items directly related to Builders FirstSource's scope of work and what repair line items are indirectly related to Builders FirstSource's scope of work and would be affected by repairs to deficiencies in Builders FirstSource's work. ~~Mr. Still will further testify in accordance with his knowledge of the facts relating to the arbitration award and a reasonable allocation of the award.~~ Additionally, Mr. Still will testify as to the scope of Builders FirstSource work during the construction of 403 Milner Court, Charleston, SC, and provide opinions as to the industry standard when a subcontractor undertakes to design, supply, and install structural framing components.

Dated this 07 day of October 2013.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.



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

CERTIFICATE OF SERVICE

The undersigned employee of WALL TEMPLETON & HALDRUP, P.A. hereby certifies that on this 8th day of October 2013 she served a copy of **PLAINTIFF D.R. HORTON, INC. F/K/A C. RICHARD DOBSON BUILDERS, INC.'S THIRD SUPPLEMENTAL ANSWERS TO ALL PARTIES' INTERROGATORIES** via electronic mail to all below-named counsel and by placing a copy in a postpaid envelope for collection and processing for mailing, following this business's ordinary practice, with which she is readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited with the United States Postal Service in the ordinary course of business and addressed to the persons hereinafter named, at the places and addresses stated below, which are the last known address, in Charleston, South Carolina:

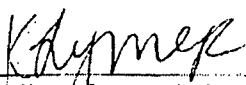
ADDRESSEE(S)

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**KERNODLE
ROOT +
COLEMAN**
ATTORNEYS AT LAW

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

November 7, 2013

VIA EMAIL AND U.S. MAIL
The Honorable J. C. Nicholson, Jr.
100 Broad Street, Suite 106
Charleston, SC 29401

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

Dear Judge Nicholson:

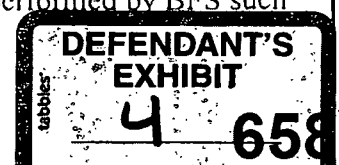
At the hearing of October 30th, the parties indicated that D.R. Horton's (DRH) expert witness, W. Randall Still, Sr., P.E., was deposed on October 28, 2013. All of DRH's experts have now been deposed. Your Honor indicated that the parties could supplement the record after receiving the transcript of Mr. Still's deposition and this letter is being written for that purpose, as well as to address Mr. McLeod's email of November 5th.

1. Mr. Still's testimony and DRH's Motion for Summary Judgment on Contractual Indemnification.

Builders FirstSource's ("BFS") work at the residence included structural framing and the installation of windows and doors.¹ In the underlying case the homeowner used Curry Engineering to address the structural framing at the residence. In the opinion of Mr. Still, the only cost of repair expert deposed in this case, the repairs implicated by Curry Engineering would cost \$2,367 (Still Dep., P. 94, ll. 6-18; P. 150, l. 1-P. 151, l. 6) (Attached hereto as "Exhibit 1"). Mr. Still also testified to this figure at the arbitration of the underlying case. (Still Dep., P. 11, l. 19- P. 12, l. 1; Still Dep. Ex. No. 2).

Mr. Still prepared two repair estimates for the underlying case. DRH used either Mr. Still's estimate of \$69,622, or \$27,845, at the arbitration. (Still Dep., P. 114, l. 18-P. 116, l. 5). Both of

¹No witness has testified that any damage was caused by any improper window or door installation. Even assuming damages were awarded for defective window and door installation, however, DRH's own repair estimates still include damages for work not performed by BFS such as "exterior repairs" and "roofing system repairs."



DRH's own repair estimates - presented as evidence at the arbitration of the underling case - include expenses not attributable to BFS. Every witness deposed in this case has testified that the underling case included the litigation of issues that did not implicate BFS's work and no witness has testified that the entire \$150,000, is attributable to BFS.

2. BFS's Motion for Reconsideration.

As Mr. McLeod indicated, I was not under the impression that BFS's Motion for Reconsideration was ruled on at the October 30th hearing. Because the Motion for Reconsideration involved many of the same issues as DRH's Motion for Summary Judgment, Your Honor asked if BFS's would need additional oral argument on the Motion for Reconsideration. I indicated that BFS would not need additional oral argument and it was my understanding that the Court was taking BFS's Motion for Reconsideration under advisement.

BFS contends that the discovery conducted since its Motion for Summary Judgment was filed in December of 2012, shows BFS is entitled to summary judgment. Mr. Still's October 28th testimony, which was not available at the hearing of October 30th, makes this clearer.

Mr. Still was identified by DRH as an expert who would provide testimony regarding "a reasonable allocation of the award." (Plaintiff D.R. Horton, Inc.'s Third Supplemental Answers to all Parties' Interrogatories)(Attached hereto as "Exhibit 2"). However, Mr. Still testified that he has not done any analysis of how much of the judgment is attributable to BFS's scope of work and, further, that it would be speculation to attempt such an analysis.(Still Dep., P. 116, l. 17-P. 117, l. 3; P. 145, l. 20- P. 146, l. 2).

The judgment says nothing about what it is for. DRH, as the plaintiff, has the burden of proving its damages. Therefore, DRH must produce *someone* who can testify as to what the judgment represents. Because DRH has no witness to identify what portion of the judgment - if any - is attributable to work performed by BFS, BFS is entitled to summary judgment.

3. The other motions heard on October 30, 2013.

BFS generally agrees with Mr. McLeod's assessment of the other motions heard on October 30th. The only caveat is that BFS would ask that the order granting BFS's Motion to Compel require the production of all communications between DRH's attorneys, and any third parties, within five days of the order. Also, should the Court deny DRH's Motion for Protective Order, BFS requests that the at-issue documents be produced well in advance of the continued 30(b)(6) deposition of DRH.

Again, thank you very much for your attention to this matter. Please let me know should the Court require additional information.

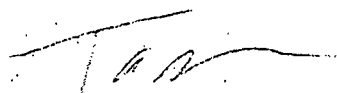
The Honorable J. C. Nicholson, Jr.

November 7, 2013

Page 3

Sincerely,

KERNODLE ROOT + COLEMAN



James Taylor Anderson, III

JTA/

Enclosure

cc: VIA EMAIL ONLY

Peden Brown McLeod, Jr., Esquire and Neil S. Haldrup, Esquire

David S. Cobb, Esquire

R. Trippett Boineau, III, Esquire

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 BUILDERS, INC.,

Plaintiff,

VS

BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC, ET AL,

Defendants.

DEPOSITION OF: W. RANDALL STILL, SR., P.E.

DATE: October 28, 2013

TIME: 1:00 p.m.

LOCATION: Turner Padgett Graham & Laney
200 East Broad Street, Suite 250
Greenville, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: MICHELE E. BECKER,
Registered Merit Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 that I prepared. It looks like it's dated
2 November 17th, 2009, for the purposes of the
3 underlying litigation.

4 BY MR. ANDERSON:

5 Q. Okay. And the numbers that appear on
6 Exhibit 2 are your estimates, that's your opinion of
7 what it would take to fix Ms. Clark's house,
8 correct?

9 A. Yes. I think we've already talked
10 about this. When I talked about this before, this
11 is an evaluation that is based on those items that
12 were in the Bob Sisnroy report that had merit,
13 things that were included in the Curry Engineering
14 report. But it did not include items in the
15 Calibogue estimate that only had an allowance set.
16 So in other words, if there was the word, allowance,
17 and there were no units, they were not even
18 considered in this evaluation.

19 Q. Okay. The numbers, the cost to repair
20 numbers that are in Exhibit Number 2 are the numbers
21 that you testified were the correct cost of repair
22 ~~numbers for Ms. Clark's house, correct?~~

23 MR. HALDRUP: Object to the form.

24 THE DEPONENT: In the underlying
25 litigation, yes. For the purpose of arbitration,

1 yes.

2 MR. ANDERSON: Okay. Let's mark this
3 as Exhibit 3.

4 (DFT. EXH. 3, Ogletree Deakins October 25, 2013
5 Letter with Attached documents, was marked for
6 identification.)

7 THE DEPONENT: Yes, sir.

8 BY MR. ANDERSON:

9 Q. Have you ever seen the documents
10 that's been labeled as Exhibit Number 3 before?

11 A. Based on the October 25th date, no.

12 Q. Do you have any role --

13 A. Should I go through each of these
14 pages?

15 Q. Well, I believe it's an evidentiary
16 summary that was sent to Mr. Wills by D.R. Horton's
17 attorneys, and I didn't know if you had any role in
18 helping those attorneys prepare this letter.

19 MR. HALDRUP: I think this is clearly
20 beyond the scope. He's not seen it.

21 MR. ANDERSON: It was just produced
22 today. I couldn't ask him about it at the last
23 deposition.

24 MR. HALDRUP: But if you wouldn't be
25 able to re-notice it, I mean, he doesn't know

1 \$1,500.

2 A. Yes sir.

3 Q. What is that, just painting what is
4 put up on 7007?

5 A. Yes, sir. I would think so.

6 Q. Can you look at Exhibit 2 on the Curry
7 Engineering allowances.

8 A. Yes, sir.

9 Q. Is it your opinion that the Curry
10 scope of repair could be done for \$2,367?

11 MR. HALDRUP: Object to the form.

12 THE DEPONENT: That was my opinion in
13 November of 2009 based on the method I got to.

14 BY MR. ANDERSON:

15 Q. Okay. Is it still your opinion today?

16 MR. HALDRUP: Object to the form.

17 THE DEPONENT: Yeah. That hadn't
18 changed.

19 BY MR. ANDERSON:

20 Q. Okay. Division eight, interior
21 repairs.

22 A. Yes, sir.

23 Q. Is it true looking at Carlson's
24 numbers that he basically contemplates taking off
25 the exterior and the interior of the -- he's going

1 for -- on Exhibit 1 for what Builders FirstSource is
2 responsible for is what?

3 A. Well, there are two considerations if
4 you go back to page 1. One is those components that
5 were supplied and installed. And that number is
6 140,037 from Carlson's estimate. And then there's a
7 second one, column, which is the fifth column which
8 includes collateral repairs to implement -- which is
9 a separate and complete number which includes the
10 140,037, and then that number for that column is --
11 199,926.

12 Q. Okay. And how does that compare with
13 your numbers, your overall numbers on Exhibit 2?

14 MR. HALDRUP: Object to the form.

15 THE DEPONENT: Well, I can't compare
16 them.

17 BY MR. ANDERSON:

18 Q. Well, what was your Means repair
19 estimate amount to be considered on Exhibit 2?

20 MR. HALDRUP: Object to the form.

21 THE DEPONENT: 27,845.

22 BY MR. ANDERSON:

23 Q. All right. And is that the number
24 that D.R. Horton would have put up at the
25 arbitration as being the appropriate number to fix

1 Ms. Clark's house?

2 MR. HALDRUP: Object to the form.

3 THE DEPONENT: I don't recall the
4 specific number they put up.

5 BY MR. ANDERSON:

6 Q. Do you know of any other number they
7 might have put up?

8 A. I don't know what number they put up.

9 Q. You were there though, right?

10 A. Yeah. And I don't recall what the
11 number was.

12 Q. Do you have any reason to believe that
13 it would be another -- a number other than the one
14 that you came up with?

15 MR. HALDRUP: Object to the form.

16 THE DEPONENT: Well, I had two numbers
17 I came up with.

18 BY MR. ANDERSON:

19 Q. Okay.

20 A. One of them was 69,622, and the other
21 one was 27,845.

22 ~~Q. Do you think D.R. Horton would have~~

23 put up one of those two numbers as being the
24 appropriate number for the cost to repair.

25 Ms. Clark's house?

1 MR. HALDRUP: Object to the form.

2 THE DEPONENT: I would think so.

3 BY MR. ANDERSON:

4 Q. Okay. You just don't know which one?

5 A. I don't recall.

6 Q. In the supplemental discovery
7 responses that we got recently, under your name it
8 said that you were going to potentially offer
9 testimony regarding the reasonable allocation of the
10 award entered in the Clark case.

11 Have you ever seen that supplemental
12 discovery response?

13 MR. HALDRUP: Object to the form.

14 Object to the form.

15 THE DEPONENT: I don't think so.

16 BY MR. ANDERSON:

17 Q. Are you intending to testify to a
18 reasonable allocation of the judgment that was
19 entered in the Patricia Clark case?

20 MR. HALDRUP: Object form.

21 THE DEPONENT: I haven't been asked to
22 yet.

23 BY MR. ANDERSON:

24 Q. Any attempt by you to try to get
25 behind what the arbitrator was thinking or anything

1 like that, that would be speculation and guesswork,
2 wouldn't it?

3 A. It would be. You might ask Mr. Wills.

4 Q. And other than producing the report
5 that's been marked as Exhibit 1 to your deposition,
6 have you done any kind of further analysis since the
7 last deposition regarding this case?

8 A. No.

9 Q. To the extent you're asked to testify
10 in this case regarding your engineering opinions, do
11 you intend to testify in accordance with the reports
12 that you produced in the Patricia Clark case?

13 MR. HALDRUP: Object to the form.

14 THE DEPONENT: Yes. On the knowledge
15 I gained during the arbitration that we've already
16 discussed.

17 BY MR. ANDERSON:

18 Q. Okay. Is there any particular
19 knowledge that you gained during the arbitration
20 that is not reflected on any of your reports that
21 you intended to testify about at this trial?

22 A. ~~Only what's in the deposition.~~

23 Q. The deposition?

24 A. My deposition.

25 Q. What are you referring to in

1 I said was, there are -- I used the Tom Carlson
2 estimate and evaluated in the manner I just talked
3 about and out of that came two numbers. And those
4 numbers are what they are. I didn't create the
5 numbers.

6 BY MR. COBB:

7 Q. The arbitration award is \$150,000,
8 correct?

9 A. I guess so.

10 Q. All right. And so if your testimony
11 is correct that 140,000 and change of the
12 150,000-dollar arbitration award should be paid by
13 BFS and its subcontractors based on your review of
14 the Carlson numbers, what does your review show the
15 other 9,000 and plus balance between the arbitration
16 award and the 140,000-dollar number? What is that
17 allocated to?

18 MR. HALDRUP: Objection.

19 BY MR. COBB:

20 Q. What trade is implicated by that?

21 MR. HALDRUP: Object to the form.

22 ~~THE DEPONENT: I haven't allocated.~~

23 If you believe that this is an allocation, this is
24 an engineering calculation of cost presented by
25 Calibogue at the arbitration. I don't have anything

1 to do with the award amount from the arbitration or
2 the demand by D.R. Horton.

3 BY MR. COBB:

4 Q. Well, then how can you testify that
5 Horton should be entitled to the \$140,000 plus from
6 BFS and its subcontractors?

7 MR. HALDRUP: Object to the form.

8 THE DEPONENT: All I'm testifying to
9 is what the numbers that Mr. Carlson put up.
10 There's a range.

11 BY MR. COBB:

12 Q. What other basis do you have to
13 generate the \$140,000-dollar number other than some
14 mathematical computation off of what Tom Carlson
15 presented?

16 MR. HALDRUP: Object to the form.

17 THE DEPONENT: Absolutely nothing,
18 other than my judgment of those components and the
19 review of the Builders FirstSource invoices and
20 documents I have.

21 BY MR. COBB:

22 Q. All right. Did you ever speak with
23 anybody with Calibogue?

24 A. Mr. Carlson's dead. It's going to be
25 a little more difficult.

1 Mr. Cobb asked you what numbers in
2 Exhibit 2 you came up with on framing in the
3 underlying case.

4 A. Uh-huh.

5 Q. And I think you said 69,622 and
6 27,845. But those are the overall numbers for
7 everything, right?

8 MR. HALDRUP: Object to the form.

9 THE DEPONENT: Yes. That's what it
10 appears to be.

11 BY MR. ANDERSON:

12 Q. That includes a lot of stuff that is
13 not framing too, those two numbers?

14 MR. HALDRUP: Object to the form.

15 THE DEPONENT: It includes everything
16 that's in Exhibit 2.

17 BY MR. ANDERSON:

18 Q. The framing number is division 7,
19 \$2,367, right?

20 MR. HALDRUP: Object to the form.

21 THE DEPONENT: I'm sorry?

22 BY MR. ANDERSON:

23 Q. The framing number is 2,367, correct?

24 MR. HALDRUP: Object to the form.

25 BY MR. ANDERSON:

1 Q. Division seven.

2 A. Those are the Curry issues, yes.

3 Q. All the Curry Framing issues, the
4 repair number, \$2,367?

5 A. That was a number I prepared in this
6 estimate, yes.

7 Q. Okay. And then Mr. Cobb also asked
8 you if you rebutted the testimony of Mr. Carlson; do
9 you recall that?

10 A. Uh-huh.

11 Q. And if you could look at Exhibit
12 Number 3 and look at page 6 of that.

13 A. Yes.

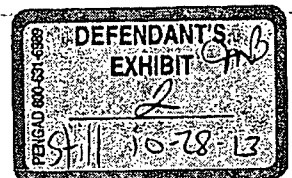
14 Q. I just want to -- I'm going to read to
15 you from the third paragraph, and I just want to
16 know if you agree or disagree with this. This is a
17 letter from the attorneys for D.R. Horton to
18 Mr. Wills and it says: Still testified he
19 considered each of the items in the Calibogue
20 estimate, determined whether there was any basis for
21 considering each item, which is critical given that
~~22 Clark has the burden of proof as to all aspects of~~
23 alleged damage and input detailed information on the
24 project location and specific information as to each
25 line item where possible. Still testified that the

Clark Residence
H2L Evaluation of Calibogue Construction Estimate

H2L Project no. 08582
WRS 17-Nov-09

The following document compares the repair estimate prepared by Calibogue Construction using MEANS Cost Estimating software. Where units of material are used H2L used those units in the tabulation of the MEANS costs. Where ALLOWANCES are used for a cost estimate item by Calibogue without units of material then NO COST was included in the MEANS Repair Estimate line item. If repairs are cited by Curry Engineering without the notation for contractor verification then H2L estimated the material quantities and then used MEANS to arrive at a repair cost. The Calibogue repair estimate information was taken from the repair estimate dated August 5, 2009.

H2L selected various items from the MEANS cost estimate for inclusion in an estimate concurrent with H2L's observations and opinions of repairs evidenced by Sisroy inspections or Curry engineering calculations and those items are calculated in the far right column of the spreadsheets.



2123
DRH

Clark Residence
H2L Evaluation of Calboque Construction Estimate

H2L Project no. 08582
VETS

17-Nov-09

Calboque Construction Estimate					H2L Review		
DIVISION # - DESCRIPTION OF WORK	Labor Cost Estimate Total	Misc/Equip Cost Estimate Total	Subcontract cost Estimate Total	Profit Cost Estimate Total	Means Repair Estimate	H2L Comments	Means Repair Estimate Amount to be Considered
DIV #1 GENERAL CONDITIONS	\$ 14,800	\$ 12,328	\$ 2,675	\$ 28,803	\$ 6,486		\$ 6,486
DIV#2 CLADDING REMOVAL & SCAFFOLDING	\$ 5,723	\$ 4,317		\$ 10,040	\$ 3,700		\$ 1,767
DIV#3 EXTR WALL REPAIR ALLOWANCE	\$ 8,218	\$ 2,054		\$ 10,272	\$ 3,389		\$
DIV#4 WINDOW & DOOR REPAIRS	\$ 13,200	\$ 825		\$ 14,025	\$ 10,824		\$ 8,891
DIV #5 WATER MANAGEMENT SYSTEM	\$ 4,007	\$ 2,625		\$ 7,622	\$ 2,232		\$ 1,338
DIV#6 EXT. WALL CLADDING SIDING			\$ 17,976	\$ 17,976	\$ 7,704		\$ 2,500
DIV#7 CURRY ENGINEERING ALLOWANCES			\$ 20,800	\$ 20,800	\$ 2,367		\$ 2,367
DIV#8 INTERIOR REPAIRS			\$ 47,789	\$ 47,789	\$ 6,009		\$
DIV#9 EXTERIOR REPAIR ALLOWANCE	\$ 300		\$ 31,470	\$ 31,770	\$ 10,329		\$ 865
DIV#10 ROOFING SYSTEM REPAIRS		\$ 400	\$ 7,576	\$ 7,976	\$ 4,640		\$ 712
DIV#11 ELECTRICAL/MECH ALLOWANCE			\$ 11,000	\$ 11,000	\$		\$
DIV#12 SITE WORK			\$ 5,000	\$ 5,000	\$		\$
ESTIMATE SUBTOTAL	\$ 47,238	\$ 27,549	\$ 153,286	\$ 223,072	\$ 57,539		\$ 23,013
CONTRACTOR'S FEE (10%+10%)				\$ 46,845	\$ 12,083		\$ 4,833
CLARK RESIDENCE PRELIMINARY ESTIMATE TOTAL				\$ 269,917	\$ 69,622		\$ 27,845

2124
DRH

674

Clark Residence
H2L Evaluation of Calibogue Construction Estimate

H2L Project no. 08582
WRS 17-Nov-09

Calibogue Construction Estimate									
COST CODE	DIVISION #1- GENERAL CONDITIONS	Lebor Cost	Misc Cost	Subcont	Prei Cost	Per Cent	H2L Review		Means Repor Estimate Applied to be Considered
		Estimate Total	Estimate Total	cost: Estimate Total	Estimate Total		Means Repor Estimate	H2L Comments	
1001	City of Charleston Bldg Permit & Business License		\$ 1,800		\$ 1,800	0.08%	\$ 414		\$ 414
1002	Preconstruction / Mobilization Expense	\$ 800	\$ 200		\$ 1,000	0.52%	\$ 298		\$ 298
1003	Project Management/ Supervision	\$ 10,825			\$ 10,825	5.00%	\$ 3,223		\$ 3,223
1004	Gas & Oil Expense		\$ 800		\$ 800	0.41%	\$ 238		\$ 238
1005	Construction Documentation / Photos		\$ 400		\$ 400	0.21%	\$ 119		\$ 119
1006	Jobsite / Mobile Phone Expense		\$ 400		\$ 400	0.21%	\$ 119		\$ 119
1007	Vehicle Expense		\$ 875		\$ 875	0.32%	\$ 186		\$ 186
1008	General Unallocated Dumpster Expense		\$ 2,000		\$ 2,000	1.03%	\$ 585		\$ 585
1009	Temporary Power - By Owner		\$ 750		\$ 750	0.39%	\$ 183		\$ 183
1010	Temporary Water - By Owner		\$ 250		\$ 250	0.13%	\$ 54		\$ 54
1011	Temporary Facilities		\$ 325		\$ 325	0.17%	\$ 71		\$ 71
1012	Safety & Security	\$ 375	\$ 125		\$ 500	0.26%	\$ 102		\$ 102
1013	Consumable Tool & Equipment Expense		\$ 300		\$ 300	0.16%	\$ 65		\$ 65
1014	Finish Cleaning / Window Cleaning			\$ 2,000	\$ 2,000	1.03%	\$ 435		\$ 435
1015	Misc Equipment / Rental Expense		\$ 500		\$ 500	0.26%	\$ 109		\$ 109
1016	General Liability Expense		\$ 3,000		\$ 3,000	1.55%	\$ 653		\$ 653
1017	Builders Risk Insurance - By Owner						\$ -		\$ -
1018	General Construction Clean Up	\$ 2,000			\$ 2,000	1.03%	\$ 435		\$ 435
1019	Project Demobilization/ Closeout	\$ 800	\$ 200		\$ 1,000	0.62%	\$ 218		\$ 218
1020	Storage Trailer Expense Tools & Materials		\$ 550		\$ 550	0.28%	\$ 120		\$ 120
1021	Storage Unit for cabinets / Appliance / Misc			\$ 875	\$ 875	0.35%	\$ 147		\$ 147
	GENERAL CONDITIONS - SUBTOTAL	\$ 14,800	\$ 12,378	\$ 2,875	\$ 29,603	15.42%	\$ 6,488		\$ 6,488

2125
DRH

675

Clark Residence
H2L Evaluation of Calabogue Construction Estimate

H2L Project no. 04382
WRS

17-Nov-08

Calabogue Construction Estimate						H2L Review		
COST CODE	DIVISION #2 - CLADDING REMOVAL & SCAFFOLDING	Labor Cost Estimate Total	Misc/Equip Cost Estimate Total	Subcontract Estimate Total	Pre Cost Estimate Total	Notes	Means Repair Estimate	Means Repair Estimate Amount to be Considered
2001	Siding & Trim Removal	\$ 2,440	\$ 128		\$ 2,568	2568 sf @ \$1.00	\$ 2,003	No evidence of damage has been presented but it is determined the nailing pattern is incorrect. Even face nailing of the existing siding will comply with manufacturers instructions.
2002	Cladding Demolition Dumpster Expense	\$ -	\$ 400		\$ 400	1 load at \$400		
2003	Temporary Protection During Demo Procedures	\$ 619	\$ 41		\$ 1,027	2568 sf @ \$0.40		
2004	Scaffolding Equipment Expense		\$ 3,328		\$ 3,328	3536 sf @ \$0.95	\$ 1,449	To be used during face nailing of siding and painting
2005	Scaffolding erection & Dismantle Labor	\$ 2,587			\$ 2,587	2556 sf @ \$0.75	\$ 317	To be used during face nailing of siding and painting
	DIV #2 - SUBTOTAL	\$ 5,723	\$ 4,317	\$ -	\$ 10,040		\$ 3,769	\$ 3,767

Calabogue Construction Estimate						H2L Review			
COST CODE	DIVISION #3 - EXTER WALL REPAIR ALLOWANCE	Labor Cost Estimate Total	Misc/Equip Cost Estimate Total	Subcontract Estimate Total	Pre Cost Estimate Total	Notes	Means Repair Estimate	H2L Comments	Means Repair Estimate Amount to be Considered
2001	Ext Wall Repair Allowance	\$ 8,218	\$ 2,054		\$ 10,272	3568 sf @ \$1.00	\$ 3,369	No Evidence presented by Owner to indicate this item is damaged and the Calabogue estimate contemplates 100% removal and replacement of wall sheathing. H2L considers no wall sheathing should be replaced	
	DIV #3 - SUBTOTAL	\$ 8,218	\$ 2,054		\$ 10,272		\$ 3,369		

Clark Railroads
H2L Evaluation of Callispey Construction Estimate

H2L Project no. 06542
WRB

17-Nov-09

Callispey Construction Estimate						H2L Review		
COST CODE	DIVISION #4 - WINDOW & DOOR REPAIRS	Labor Cost Estimate Total	Mat/Equip Price Cost Estimate Total	Subcontract Cost Estimate Total	Pre Cost Estimate Total	Notes	Means Repair Estimate	H2L Comments
4001	Window removal & Reinstall Labor	\$ 8,000	\$ -	\$ -	\$ 8,000	18 window units @ 22 yards at \$400 ea	\$ 8,891	Consider removal and installation of new windows
4002	Ext door Remove & Reinstall Labor	\$ 1,000	\$ -	\$ -	\$ 1,000	2 doors at \$500 ea	\$ 3,649	Both doors are covered by roof and resetting is not necessary
4003	Window Interior Trim Replacement	\$ 2,100	\$ 625	\$ -	\$ 2,675	15 openings at \$176 ea		Windows can be removed without removal and replacement of interior trim
4004	Window & Interior Trim Painting	\$ 1,200	\$ 300	\$ -	\$ 1,500	15 openings at \$100 ea		Windows can be removed without removal and replacement of interior trim
4005	Window Treatment removal & Reset	\$ 900	\$ -	\$ -	\$ 900	Assume 12 openings @ \$75 ea		Windows can be removed without removal and replacement of trim
DIV #4 - SUBTOTAL		\$ 13,200	\$ 925	\$ -	\$ 14,075		\$ 10,024	
Callispey Construction Estimate						H2L Review		
COST CODE	DIVISION #5 - WATER MANAGEMENT SYSTEM	Labor Cost Estimate Total	Mat/Equip Price Cost Estimate Total	Subcontract Cost Estimate Total	Pre Cost Estimate Total	Notes	Means Repair Estimate	H2L Comments
5001	Weather Barrier & Flexible Flashing	\$ 2,690	\$ 1,185	\$ -	\$ 3,875	2500 sf @ \$1.50	\$ 659	Consider removal and installation of windows
5002	Window & Door Head Flashing Assembly	\$ 436	\$ 304	\$ -	\$ 740	76 lf @ \$10 / lf	\$ 619	Consider removal and installation of windows
5003	Window EZ Pan Flashing	\$ 750	\$ 750	\$ -	\$ 1,500	15 windows @ \$100 ea	\$ 197	Consider removal and installation of windows
5004	Interior Door G.I. Panel	\$ 75	\$ 75	\$ -	\$ 150	10 lf @ \$15 / lf	\$ 277	
5005	Sealant Joints	\$ 1,020	\$ 340	\$ -	\$ 1,360	800 lf @ \$1.70 / lf	\$ 480	Consider removal and installation of windows
DIV #5 - SUBTOTAL		\$ 4,971	\$ 2,674	\$ -	\$ 7,645		\$ 2,232	

2127
DRH

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Clark Residence
HCL Evaluation of Callisno Construction Estimate

HCL Project no. 06582
WHS

17-Nov-09

Callisno Construction Estimate						HCL Review			
COST CODE	DIVISION 06 - EXT. WALL CLADDING : SIDING	Labor Cost Estimate Total	Mat/Equip Misc Cost Estimate Total	Subcontract Estimate Total	Pri/ Cost Estimate Total	Notes	Means Repair Estimate	Means Repair Estimate Amount to be Considered	
6001	Ext Wall Cladding: Siding			\$ 17,876	\$ 17,876	2563 sq ft @ \$7.00 / sq ft	\$ 7,704	No evidence of damage has been presented but if it determined the existing pattern is better than late nailing of the existing siding will comply with manufacturers instructions.	\$ 2,500
	DIV 06 - SUBTOTAL			\$ 17,876	\$ 17,876		\$ 7,704	\$ 2,500	

Callisno Construction Estimate							HCL Review		
COST CODE	DIVISION 07 - CURRY ENGINEERING ALLOWANCES	Labor Cost Estimate Total	Mat/Equip Misc Cost Estimate Total	Subcontract Estimate Total	Pri/ Cost Estimate Total	Notes	Means Repair Estimate	HCL Comments	Means Repair Estimate Amount to be Considered
7001	Rim Joist Repairs as Specified			\$ 5,000	\$ 5,000	Allowance	\$ 139	Curry repair documents indicate that approximately 82 feet of rim joist were replaced.	\$ 139
7002	Lateral Bracing @ CMU Pier as Specified			\$ 9,300	\$ 9,300	\$300 / pier Allowance		Metals straps are currently installed between CMU columns and rim joist.	
7003	Jacking & Shoring during Structural Repairs			\$ 2,500	\$ 2,500	Allowance		No requirement presented by Curry for this work.	
7004	Living Room Wall Framing Repairs			\$ 2,500	\$ 2,500	Allowance		Wall framing repairs not as house cited by Curry and no destructive testing has been performed by Curry to evidence this condition.	
7005	Airic Truss Repairs			\$ 5,000	\$ 5,000	Allowance		No requirement presented by Curry for this work.	
7006	LVA Roof Beam Support			\$ 1,000	\$ 1,000	Allowance		No requirement presented by Curry for this work.	
7007	Remove & Replace 5/8" GWS in Garage			\$ 2,000	\$ 2,000	Allowance	\$ 1,715	Some work will be required for the modifications of two rim joists.	\$ 1,715
7008	Paint GWS in Garage (lower level)			\$ 1,500	\$ 1,500	Allowance	\$ 512	Some work will be required for the modifications of two rim joists.	\$ 512
	DIV 07 - SUBTOTAL			\$ 29,120	\$ 29,120		\$ 3,367		\$ 3,367

Clark Residence
IOL Evaluation of Contractor Construction Estimate

H2L Project no. 06582
VRS

17-Nov-09

CalEberque Construction Estimate						H2L Review		
COST CODE	DIVISION #5 - INTERIOR REPAIRS	Labor Cost Estimate Total	Major Equip Allow Cost Estimate Total	Subcontract Cost Estimate Total	Prod Cost Estimate Total	Notes	Means Repair Estimate	Means Repair Estimate Amount to be Considered
8001	Interior GWN Repair Allowance			\$ 10,000	\$ 10,000	Allowance		No evidence presented by Survey or Core to indicate this item is necessary.
8002	Interior Painting & Decorating Allowance			\$ 12,000	\$ 12,000	Allowance		No Evidence presented by Survey to indicate this item is damaged.
8003	Remove & Replace 1st Floor Hardwood Flooring			\$ 6,000	\$ 6,000	Precision Flooring 773109 Quote	\$ 6,000	No Evidence presented by Survey to indicate this item is damaged.
8004	Rem, Store & Reset Int. contents 1st & 2nd Flooring			\$ -	\$ -	NOC by Owner		
8005	Repairs to Level 1st & 2nd Floor Framing			\$ 11,780	\$ 11,780	2356+ at @ \$5.00 / sf		No Evidence presented by Survey to indicate this item is damaged.
8006	Remove & Reinstall Powder Room Vanity (Plumbing)			\$ -	\$ -	Included in CC#11002		No Evidence presented by Survey to indicate this item is damaged.
8007	Remove & Reinstall Powder Room Water Closet			\$ -	\$ -	Included in CC#11002		No Evidence presented by Survey to indicate this item is damaged.
8008	Remove & Repl Travertine Tile Floor @ Powder Room			\$ -	\$ -	Included in CC#8003		No Evidence presented by Survey to indicate this item is damaged.
8009	Rem, Store & Reinstall all Built-In base Cabinets			\$ 3,000	\$ 3,000	Allowance		No Evidence presented by Survey to indicate this item is damaged.
8010	Rem, Store & Reinstall Granite countertops & Backsplash			\$ 2,500	\$ 2,500	Allowance		No Evidence presented by Survey to indicate this item is damaged.
8011	Remove & Replace Interior Trim @ 1st & 2nd Floors			\$ 2,500	\$ 2,500	Allowance		No Evidence presented by Survey to indicate this item is damaged.
8012	Rem, Store & Reinstall 1st & 2nd Flr carpet w/ New			\$ -	\$ -	Ind in CC #8003		No Evidence presented by Survey to indicate this item is damaged.
DIV #5 - SUBTOTAL				\$ 47,780	\$ 47,780		\$ 6,000	

Note: Item 8002 is a quote for the replacement of all first floor flooring surface replacement.

Clark Residence
HQL Evaluation of Calbag Construction Estimate

HQL Project no. 08502
VRS

17-Nov-09

Calbag Construction Estimate						HQL Review		
COST CODE	DIVISION #9 - EXTERIOR REPAIR ALLOWANCE	Labor Cost Estimate Total	Mat/Equip. Cost Estimate Total	Subcontract Cost Estimate Total	Prod Cost Estimate Total	Notes	Means Repair Estimate	Means Repair Estimate - Amount to be Considered
9001	Remove, Store & Reset Shutters	\$ 300			\$ 300	4 per ft \$75 ea		
9002	Paint siding and Exterior Trim			\$ 10,000	\$ 10,000	Allowance	\$ 965	Consider exterior to be repainted after face nailing the siding \$ 885
9003	Remove & Replace Ext. Rear Deck Tread Boards			\$ 240	\$ 240	18 linear ft @ \$15 / lin ft	\$ 458	Not an issue reported by Blumway \$ -
9004	Rem. & Repl Deck Boards @ Front and Rear Glab Landings			\$ 830	\$ 830	83 sq ft @ \$10 / sq ft	\$ 663	Not an issue reported by Blumway \$ -
9005	Inspect & Replace Nails in Pressure Treated Lumber			\$ 500	\$ 500	Allowance for shortcoming customers		Not an issue reported by Blumway \$ -
9006	Remove & Replace Concrete Drive & Garage SOG			\$ 18,800	\$ 18,800	262 Masonry units	\$ 8,247	Casting of concrete SOG is original and common, and does not require replacement \$ -
	DIV #9 - SUBTOTAL	\$ 300	\$ -	\$ 31,470	\$ 31,770		\$ 10,378	\$ 965

Calbag Construction Estimate						HQL Review		
COST CODE	DIVISION #10 - ROOFING SYSTEM REPAIRS	Labor Cost Estimate Total	Mat/Equip. Cost Estimate Total	Subcontract Cost Estimate Total	Prod Cost Estimate Total	Notes	Means Repair Estimate	Means Repair Estimate - Amount to be Considered
10001	Shingle Roofing System Removal & Replacement			\$ 9,175	\$ 9,175	73 sq ft @ \$125 / sq ft	\$ 3,486	Main roof not inspected only consider screen porch and front porch - sample 200 sq ft of shingles to be replaced \$ 347
10002	Roof Sheathing Repair Allowance			\$ 1,000	\$ 1,000	Allowance	\$ 358	Not an issue reported by Blumway Ltd added to Calbag estimate \$ -
10003	Horizontal Roof to Wall Flashing			\$ 600	\$ 600	60 lf @ \$10 / lf	\$ 332	Destructive testing has not been performed to determine if flashing is or is not installed \$ 232
10004	Stepped Roof to Wall Flashing			\$ 600	\$ 600	20 lf @ \$30 / lf	\$ -	16 Consider for front porch roof \$ 16
10005	Nightout Flashing			\$ 200	\$ 200	6 linear ft @ \$30 / linear ft	\$ -	17 Consider for front porch roof \$ 17
10006	Roofing Replacement Dumpster Expense	\$ 400		\$ -	\$ 400	1 load @ \$400 ea	\$ 450	Corrected estimate in the estimate \$ -
	DIV #10 - SUBTOTAL	\$ 400	\$ -	\$ 1,575	\$ 1,975		\$ 4,610	\$ 712

2130
DRH

Clark Residence
HQL Evaluation of Calbague Construction Estimate

HQL Project No. 08562
WRS

17-Nov-09

Calbague Construction Estimate									
COST CODE	DIVISION #11 - ELEC / PLUMBING / MECH ALLOWANCE	Labor Cost Estimate Total	Mech/Equip Hvac Cost Estimate Total	Subcont. cost Estimate Total	Prep Cost Estimate Total	Notes	Means Repair Estimate	HQL Comments	Means Repair Estimate Amount to be Considered
11001	HVAC Repair Allowance			\$ 1,000	\$ 1,000	Allowance		No Evidence presented by Survey to indicate this item is damaged	\$ -
11002	Electrical Repair Allowance			\$ 5,000	\$ 5,000	Extens & Kitchen Fixtures		No Evidence presented by Survey to indicate this item is damaged	\$ -
11003	Plumbing Repair Allowance			\$ 5,000	\$ 5,000	Ext. Fixtures, HAVT/Instal. Repair, Kitchen		No Evidence presented by Survey to indicate this item is damaged	\$ -
	DIV #11 - SUBTOTAL	\$ -	\$ -	\$ 11,000	\$ 11,000				\$ -
Calbague Construction Estimate									
COST CODE	DIVISION #12 - SITE WORK	Labor Cost Estimate Total	Mech/Equip Hvac Cost Estimate Total	Subcont. cost Estimate Total	Prep Cost Estimate Total	Notes	Means Repair Estimate	HQL Comments	Means Repair Estimate Amount to be Considered
12001	Single Roofing System Removal & Replacement			\$ 5,000	\$ 5,000	Allowance		Calbague Item 2003 includes protection.	\$ -
	DIV #12 - SUBTOTAL	\$ -	\$ -	\$ 5,000	\$ 5,000				\$ -

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

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

Plaintiff,)

-versus-)

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

Defendants,)

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

Third-Party Plaintiff,)

-versus-)

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

Third-Party Defendant.)

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

PLAINTIFF D.R. HORTON, INC. f/k/a
C. RICHARD DOBSON BUILDERS,
INC.'S THIRD SUPPLEMENTAL
ANSWERS TO ALL PARTIES'
INTERROGATORIES

TO: ALL NAMED PARTIES AND THEIR COUNSEL:

The Plaintiff, D.R. Horton, Inc. f/k/a C. Richard Dobson Builders, Inc. ("DRH") hereby
supplements its answers to all Parties' Interrogatories as follows:

INTERROGATORIES

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

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

ANSWER

- (1) **Robert G. Sisnroy, P.E.
Sisnroy Engineering, LLC
Post Office Box 12806
Charleston, South Carolina 29422**

See Mr. Sisnroy's Construction Deficiencies Investigation report produced in the underlying action dated February 29, 2008 for his expert opinions relating to this litigation. Mr. Sisnroy will testify in accordance with his knowledge of the facts relating to his investigations and opinions which lead him to the conclusions in said report. Additionally, Mr. Sisnroy will testify in accordance with his knowledge of the facts relating to the order of magnitude of defects between structural/framing, roofing, siding, and concrete, as well as his opinions as to general means and methods necessary to address structural/framing defects. Mr. Sisnroy will further testify as to the scope of Builders FirstSource work during the construction of 403 Milner Court, Charleston, SC, and provide opinions as to the industry standard when a subcontractor undertakes to design, supply, and install structural framing components.

- (2) **Howard Althen
Curry Engineers
401E Seacoast Parkway
Mount Pleasant, South Carolina 29464**

See Mr. Althen's documents and repairs scope for his expert opinions relating to

this litigation. Mr. Althen will testify in accordance with his knowledge of the facts relating to the deficiencies of the structural framing as noted in his documents and repairs scope, as well as to the general means and methods necessary to address issues noted in his documents. Mr. Althen will further testify as to the scope of Builders FirstSource work during the construction of 403 Milner Court, Charleston, SC, and provide opinions as to the industry standard when a subcontractor undertakes to design, supply, and install structural framing components.

(3) ~~W. Randall Still, SR., P.E.~~
RanDrew Consulting
Forensic/Structural Engineering
209 N. Main Street
#418
Greenville, South Carolina 29601

See Calibogue Construction's Preliminary Remediation and Restoration Estimate, Mr. Still's estimates, and all supplemental estimates thereto for Mr. Still's expert opinions relating to this litigation. Mr. Still will testify in accordance with his knowledge of the facts relating to what repair line items directly related to Builders FirstSource's scope of work and what repair line items are indirectly related to Builders FirstSource's scope of work and would be affected by repairs to deficiencies in Builders FirstSource's work. ~~Mr. Still will further testify in accordance with his knowledge of the facts relating to the arbitration award and a reasonable allocation of the award.~~ Additionally, Mr. Still will testify as to the scope of Builders FirstSource work during the construction of 403 Milner Court, Charleston, SC, and provide opinions as to the industry standard when a subcontractor undertakes to design, supply, and install structural framing components.

Dated this 07th day of October 2013.

Respectfully submitted,

WALL TEMPLETON & HALDRUP, P.A.



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

CERTIFICATE OF SERVICE

The undersigned employee of WALL TEMPLETON & HALDRUP, P.A. hereby certifies that on this 8th day of October 2013 she served a copy of **PLAINTIFF D.R. HORTON, INC. F/K/A C. RICHARD DOBSON BUILDERS, INC.'S THIRD SUPPLEMENTAL ANSWERS TO ALL PARTIES' INTERROGATORIES** via electronic mail to all below-named counsel and by placing a copy in a postpaid envelope for collection and processing for mailing, following this business's ordinary practice, with which she is readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited with the United States Postal Service in the ordinary course of business and addressed to the persons hereinafter named, at the places and addresses stated below, which are the last known address, in Charleston, South Carolina:

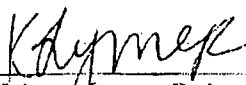
ADDRESSEE(S)

James Taylor Anderson, III
Kernodle, Root & Coleman
914 Folly Road, Suite 2 (29412)
Post Office Box 13897
Charleston, South Carolina 29422
tanderson@kernodlslaw.com

**ATTORNEYS FOR BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP,
LLC AND BUILDERS FIRSTSOURCE,
INC.**

David S. Cobb
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dcobb@turnerpadgett.com
**ATTORNEYS FOR JOSEPH NACCARI,
INDIVIDUALLY AND D/B/A
MASTERFRAMERS**

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Meridian, 1320 Main Street, 10th Floor
(29201)
Columbia, South Carolina 29211
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mrutland@mgclaw.com
cwells@mgclaw.com
**ATTORNEYS FOR JAIME ARREGUIN
D/B/A MAYA CONSTRUCTION**



Kristyn Lynne Robertson

914 Holly Road, Suite 2
P.O. Box 13597
Charleston, SC 29422-3897
Phone (843) 795-7600
Fax (843) 795-3022

**KERNODLE
ROOT
COLEMAN**
ATTORNEYS AT LAW

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

November 18, 2013

VIA EMAIL AND U.S. MAIL

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

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

Dear Judge Nicholson:

Unfortunately, I feel it is necessary to respond to D.R. Horton's ("DRH") proposed order on Builders FirstSource's ("BFS") Motion to Compel. At the hearing of October 30, 2013, Your Honor ordered DRH to produce all correspondence between Ogletree Deakins and third-parties relating to the case of *Patricia Clark v. D.R. Horton, Inc.*, Berkeley County Case No. 2008-CP-08-1633 (the "Clark Case."). To date, DRH has not produced the documents but has offered to draft an order granting BFS's Motion to Compel.¹

While I appreciate DRH's efforts at drafting an order granting BFS's Motion to Compel, I do not believe that the proposed order is appropriate. DRH's proposed order on BFS's Motion to Compel contains language stating "The indemnification provision within the contract between DRH and BFS provides that DRH is entitled to recover all costs and attorney's fees incurred as a result of the Underling Action as long as the claims were in anyway occurring, incident to, arising out of, or in connection with BFS's work . . ."

The contract between DRH and BFS does not mention any "Underling Action" and speaks for itself. DRH's attempt to cherry pick and paraphrase the language and requirements of the contract, and insert its own interpretation of the contract into an order granting BFS's Motion to Compel, is inappropriate. Accordingly, I am attaching a proposed order granting BFS's Motion to Compel.

¹None of these communications are even arguably privileged. Your Honor specifically stated at the hearing that DRH should get the documents and provide them to BFS. While I don't think a written order should be necessary, apparently DRH wants a written order.

**DEFENDANT'S
EXHIBIT**

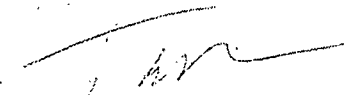
686

The Honorable J. C. Nicholson, Jr.
November 18, 2013
Page 2

Thank you again for your attention to this matter. Please let me know should the Court require additional information.

Sincerely,

KERNODLE ROOT + COLEMAN



James Taylor Anderson, III

JTA/

Enclosure

cc: VIA EMAIL ONLY

Peden Brown McLeod, Jr., Esquire and Neil S. Haldrup, Esquire

David S. Cobb, Esquire

R. Trippett Boineau, III, Esquire

914 Folly Road, Suite 2
P.O. Box 13897
Charleston, SC 29422-3897
Phone (843) 795-7800
Fax (843) 795-3032

**KERNODLE
ROOT +
COLEMAN**
ATTORNEYS AT LAW

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

June 6, 2014

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

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

Dear Ms. Armstrong:

Enclosed for filing is the original and one (1) copy of *Builders FirstSource-Southeast Group, LLC and Builders FirstSource, Inc.'s Response to DR Horton's Motion for Reconsideration*. Please file the original, and return the date-stamped copy to me in the envelope provided for your convenience.

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

Sincerely,

KERNODLE ROOT + COLEMAN



James Taylor Anderson, III

JTA/jlc

Enclosures

cc: **Via U.S. Mail and Via Electronic Mail:**

Peden Brown McLeod, Jr., Esquire and Neil S. Haldrup, Esquire (w/enc.)
David S. Cobb, Esquire (w/enc.)
R. Trippett Boineau, III, Esquire (w/enc.)

kernodlelaw.com