STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2010-CP-10-10355

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 Masterframers, ... Defendants,

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

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

v.

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERROR IN GRANTING DEFENDANTS BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC AND BUILDERS FIRSTSOURCE, INC. (COLLECTIVELY "BFS") SUMMARY JUDGMENT ON D.R. HORTON, INC. F/K/A C. RICHARD DOBSON BUILDERS, INC.'S (HEREIN AFTER "DR HORTON") CLAIMS FOR CONTRIBUTION PURSUANT TO THE SOUTH CAROLINA UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, § 15-38-10, *ET SEQ.*?

II. DID THE TRIAL COURT ERROR IN GRANTING BFS SUMMARY JUDGMENT ON DR HORTON'S CONTRACTUAL INDEMNITY CLAIM?[1]

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

DR Horton was the general contractor for a single family residential home constructed at 403 Milner Court, Charleston, South Carolina (the "Residence"). BFS, as a subcontractor for DR Horton, provided and installed framing materials and windows at the Residence. Prior to construction of the Residence, DR Horton and BFS entered into an Independent Contractor Agreement (the "Contract") that contains an indemnity agreement. (R. pp. 608-610). The Contract was drafted by DR Horton. (R. p. 642, lines 6-23).

In addition to acting as the general contractor, DR Horton also owned the Residence. DR Horton sold the Residence to Patricia Clark ("Clark"). In 2008, Patricia Clark filed *Patricia Clark v. D.R. Horton, Inc.*, Case No. 2008-CP-08-1633, in the Circuit Court of Berkeley County, South

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[1]BFS believes that DR Horton's statement of the Issues on Appeal is an inaccurate characterization of the rulings of the Trial Court. Therefore, BFS has attempted to track the Trial Court's Order Granting BFS Summary Judgment as closely as possible in framing its Issues on Appeal. DR Horton does not include, in its Issues on Appeal, any issue regarding the Trial Court's ruling that BFS is entitled to summary judgement on DR Horton's claims for contribution and contractual indemnify because there is no admissible evidence that the Judgment is attributable to damage caused by BFS's work. Therefore, DR Horton has failed to properly preserve that issue for appeal and the Trial Court's Order should be upheld on that basis. *See* SCACR 208(B)("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.")

Carolina (the "Homeowner's Suit")(R. pp. 11-20).

The Homeowner's Suit alleged causes of action against DR Horton for negligence, breach of contract, breach of warranty, and violations of the South Carolina Unfair Trade Practices Act. (R. pp. 11-20). The Homeowner's Suit alleged that the Residence was defective because of, among other things, improper installation of siding, improper installation of the exterior wall system, improper flashing, improper installation of a moisture barrier, improper water management system, improper installation of framing, improper installation of the concrete slab and driveway, improper installation of the roof and shingles, and improper installation of a gas hot water heater. (R. pp. 11-20).

It is undisputed that some of the allegations in the complaint filed in the Homeowner's Suit related to materials supplied and installed by BFS and other allegations in the complaint filed in the Homeowner's Suit were related to the work of others. BFS did not install the driveway, concrete slab, siding, roofing or hot water heater at the Residence.[2] (R. p. 637, line 1-p. 639, line 9).

While the parties disagree on whether DR Horton gave BFS oral notice of the Homeowner's Suit, it is undisputed that DR Horton did not provide BFS with any written notice or tender of defense for the Homeowner's Suit.[3] The Contract provides that "[a]ll notices pursuant to [the

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[2]During the course of the Homeowner's Suit Clark also alleged there were other problems with the Residence. For instance, Clark testified that there were bathroom plumbing issues. (R. p. 643, lines 1-12). Because there is no record from the arbitration of this matter it is not known to what extent these plumbing issues - or other additional defects- were part of the testimony at arbitration.

[3] DR Horton's Initial Brief incorrectly states that it is "undisputed" that DR Horton gave BFS oral notice of the Homeowner's Suit. BFS disputes that it received any notice, verbal or otherwise. *See* Depo. of Terry Rosamond, Oct. 24, 2013 (R. p. 584, line 17-p. 585, line 3) ("everyone I've talked to we received no notice that it was going to be an arbitration."). In any event, oral notice is irrelevant to the outcome of this case. *See* Contract at ¶19 (R. p. 610).

Contract] or otherwise shall be in writing and shall be delivered to the respective business address of the Parties." *See* Contract at ¶19 (R. p. 610).

DR Horton filed a Motion to Compel Arbitration and to Stay the Homeowner's Suit and on April 1, 2009, the Berkeley County, South Carolina, Circuit Court entered a Consent Order Referring Claims to Arbitration whereby the Homeowner's Suit was referred to binding arbitration. (R. pp. 69-71). The Homeowner's Suit was arbitrated during a two day period on December 10th and 11th 2009. There is no transcript or other record of the evidence presented at the arbitration. DR Horton's 30(b)(6) corporate representative testified that there was testimony at the arbitration hearing indicating that the Residence had defective siding, defective "kick out flashing," defective slab and driveway, defective roof and shingles, and a defective hot water heater. (R. p. 629, line 16-p. 630, line 3; R. p. 631, line 1-p. 632, line 21; R. p. 633, line 2-p. 637, line 13).[4] Further, DR Horton's 30(b)(6) corporate representative testified that BFS was not responsible for any of these defects:

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

A: That is correct.

Q: And with regards to the kick-out flashing, did Builders FirstSource have any responsibility to do the kick-out flashing?

A: They did not.

("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.").

[4]Jay Marshall Henderson is DR Horton's 30(b)(6) representative for all matters relating to the Homeowner's Suit.

Q: Did Builders FirstSource have any responsibility with regard to the slab in the driveway?

A: They did not.

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

A: They did not.

Q: Did Builders FirstSource have any responsibility in installing the gas hot water heater?

A: They did not.

(R. p. 637, line 21-p. 638, line 13). Neither party to the Homeowner's Suit deposed any BFS personnel and no BFS personnel were called as witnesses at the arbitration.

During the litigation of the Homeowner's Suit Clark produced a repair estimate of $269,917 to repair all problems at the Residence. (R. pp. 76-77). At the arbitration of the Homeowner's Suit DR Horton produced an estimate to repair all issues at the Residence for either $69,622, or $27,845. (R. p. 665, line 23-p. 667, line 5). In the Homeowner's Suit DR Horton's repair estimate allocated $2,367, to framing related repairs. (R. pp. 671, line 18-p. 672, line 6).

The arbitrator awarded Patricia Clark $150,000. Said award states that "Counsel for the parties have requested an Order containing a monetary award only." (R. p. 72). It does not indicate what amounts, if any, were awarded for specific defects. Nor does the award specify which of the causes of action asserted in the Homeowner's Suit were successful. (R. p. 640, line 10-p. 641, line 15). DR Horton argues that at least $10,466.24, of the Judgment is attributable to work performed by BFS. (R. p. 86).

The record indicates that DR Horton was represented by counsel at all times during the Homeowner's Suit. Prior to the arbitration, DR Horton was advised by its attorneys that it could ask for an unreasoned "monetary award" and that "[a] monetary award would not include any explanation as to the basis for the award . . . a monetary award would not subject DR Horton to any negative precedent. . ." (R. p. 382, lines 12-23; R. pp. 389-390).

DR Horton, with the advice of counsel, weighed the pros and cons of getting an unreasoned "monetary only" award. On the positive side:

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

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

(R. p. 383, lines 11-14).

On the negative side, DR Horton was advised by its attorneys that "[a] monetary award would not include any explanation as to the basis for the award," and it would "make matters less certain with respect to a subsequent action against a sub, in this case most likely Builders FirstSource." (R. p. 389). DR Horton to agreed to an unreasoned award after being advised that it would make a subsequent suit for indemnity and contribution against its subcontractors less certain:

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

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

(R. p. 384, lines 15-19). DR Horton agreed to an unreasoned award with the express goal of

making it difficult for future litigants to determine what was decided in the Homeowner's Suit:

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

A: I believe that was a consideration.

(R. p. 385, lines 8-13).

On February 26, 2010, the arbitration award was filed, confirmed and made a final judgment of the Berkeley County, South Carolina, Circuit Court. (the "Judgment"). No party objected to the confirmation of the arbitration award. On March 24, 2010, a Satisfaction of Judgment was entered in the Berkeley County, South Carolina, Circuit Court indicating that DR Horton had satisfied the Judgment. (R. pp. 22-23).

On December 17, 2010, DR Horton filed the instant action against BFS seeking contribution pursuant to S.C. Code Ann. § 15-38-10, *et seq.*, and contractual indemnity. DR Horton alleges that BFS is responsible, "in whole or in part," for the Judgment and for $155,717.05, in attorney's fees and costs associated with the defense of the Homeowner's Suit. (R. pp. 3-8).

On December 11, 2012, BFS filed a Motion for Summary Judgment as to Plaintiff's claims for contribution and contractual indemnity. This Motion for Summary Judgment was heard on May 15, 2013, and on September 30, 2013, the Honorable J.C. Nicholson, Jr., entered a Form 4 Order denying said Motion for Summary Judgment.

On October 16, 2013, BFS filed a Motion for Reconsideration requesting that the Honorable J.C. Nicholson, Jr., reconsider his September 30, 2013, Order denying BFS's Motion for Summary Judgment. BFS's Motion for Reconsideration came before the Court on October 30, 2013, and in

an Order filed May 2, 2014, the Honorable J.C. Nicholson, Jr., granted BFS's Motion for Reconsideration and granted BFS partial summary judgment. (R. pp. 273-280). Judge J.C. Nicholson, Jr., ruled "that BFS is not required to contribute to, or indemnify [DR Horton] for, any portion of the Judgment, attorney's fees, or defense costs, attributable to the work or fault of others," and ruled that, DR Horton, as the Plaintiff, would "have the burden of proving what portion of the Judgment, attorney's fees, and costs, if any, are attributable to BFS." (R. pp. 277-278).

On July 24, 2014, BFS filed BFS's Second Motion for Summary Judgment. BFS's Second Motion for Summary Judgment was heard by the Honorable R. Markley Dennis, Jr., on August 13, 2014. On August 20, 2014, the Honorable R. Markley Dennis, Jr., entered an Order Granting BFS Summary Judgment. DR Horton filed a Motion to Reconsider the Order Granting BFS Summary Judgment and that Motion to Reconsider was denied by Order of April 29, 2015. DR Horton now appeals the August 20, 2014, Order Granting BFS Summary Judgment.

ARGUMENTS

OVERVIEW OF ARGUMENTS AND STANDARD OF REVIEW

a. Overview of arguments.

This case is about the basics. DR Horton, as the Plaintiff, has the burden of proving its case. *See Estate of Cantrell by Cantrell v. Green*, 302 S.C. 557, 560 (Ct. App. 1990) There is no competent evidence to support DR Horton's claim that some portion of the $150,000, Judgment entered in the Homeowner's Suit is attributable to work performed by BFS. This should not be a surprise as DR Horton made a conscious decision, for strategic purposes, not to request a reasoned award and not to have a transcript made of the hearing in the Homeowner's Case. DR Horton made these decisions with the express purpose of making it difficult to determine what was decided in the

arbitration so that no negative precedent would be created. (R. p. 383, lines 11-14).

DR Horton's own attorneys in the Homeowner's Case explained to DR Horton that, "A monetary award would not include any explanation as to the basis for the award . . It would . . . make matters less certain with respect to a subsequent action against a sub, in this case most likely Builders FirstSource. However, a monetary award would not subject DR Horton to negative precedent, which is a consideration given that this is a Daniel Island house." (R. p. 389-390). Prior to its initiation of the instant lawsuit, DR Horton's counsel informed it "There is no reasoning behind the award to show that the award is related to cladding issues, structural issues, or some combination thereof. As such, I doubt a reasonable judge would accept this as sufficient evidence to support such a claim." (R. pp. 595-597).

By failing to do the basics - give BFS notice of the Homeowner's Suit and make a record of that proceeding - DR Horton has made it impossible to prove its case. Having failed to give BFS notice of the Homeowner's Suit, failed to make a transcript of the hearing, and failed to request a reasoned award, DR Horton is left with zero evidence to indicate what was actually determined in the Homeowner's Suit. As DR Horton's 30(b)(6) witness testified:

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

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

(R. p. 587, lines 18-23).

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

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

(R. p. 643, lines 16-22).

DR Horton itself does not have any idea why the Judgment was ultimately awarded. As its own lawyers recognized the Judgment "obviously doesn't specify what" it "is for." (R. p. 595- 597). DR Horton has filed this action, arguing that "at least $10,466.24" of the Judgment is related to BFS's framing work at the house and has designated an expert witness to testify as to "a reasonable allocation of the award." (R. p. 86; R. pp. 656). Having failed to make any record of what was determined in the Homeowner's Suit, DR Horton now essentially wants a "do over," wherein it will ask an engineering expert to opine as to what an arbitrator in a previous case should have awarded for liability associated with the work of BFS. No authority is cited for the proposition that a litigant can strategically fail to make a record of what was determined in one case, obtain a Judgment that gives no explanation as to what the Judgment represents, and then file a second action and have an engineering expert testify about what he believes should have been decided in the earlier case.

DR Horton, in its Initial Brief, appears to fundamentally miss the point of both Judge Nicholson's ruling, granting BFS partial summary judgment, and Judge Dennis's ruling, granting BFS summary judgment on all of DR Horton's claims. In its Brief DR Horton argues that the "trial court erred in reading into the indemnification provision a requirement that there be a judgment attributing absolute fault to Builders FirstSource, or apportioning the homeowner's damages." (DR Horton Initial Brief at P. 14). The Trial Court made no such ruling. The Trial Court ruled that BFS

cannot be required to indemnify BFS for liability it incurred because of property damage caused by the work of others and that DR Horton has presented no evidence indicating what portion of the Judgment is attributable to BFS.

Although DR Horton has argued that "at least $10,466.24" of the Judgment is related to BFS's framing work at the house, its confidence that some portion of the Judgment was, in fact, related to BFS's work is belied by the fact that DR Horton has never submitted any testimony from or attempted to depose the only person who has first hand knowledge concerning what was actually decided in the Homeowner's Suit. To the extent that anyone could possibly testify concerning what was decided in the Homeowner's Suit, it would be the arbitrator, and DR Horton apparently is not interested in presenting his testimony.

b. Standard of review.

"In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP. Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 528 (2014). "In order to resist a defendant's motion for summary judgment, the plaintiff, as the party with the burden of proof at trial, must present affirmative evidence . . . he cannot rest of the allegations of his complaint." *Estate of Cantrell by Cantrell v. Green*, 302 S.C. 557, 560 (Ct. App. 1990).

I. THE TRIAL COURT CORRECTLY RULED THAT BFS IS ENTITLED TO SUMMARY JUDGMENT ON DR HORTON'S CLAIM FOR CONTRIBUTION PURSUANT TO THE SOUTH CAROLINA UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, § 15-38-10, et seq.

The statutory right of contribution among joint tortfeasors is in derogation of the common law and thus the South Carolina Uniform Contribution Among Tortfeasors Act (the "Act") must be strictly construed. *G & P Trucking v. Parks Auto Sales Service & Salvage, Inc.* 357 S.C. 82, 87 (Ct.App. 2003). "Moreover, in a suit in which contribution is sought from a joint tortfeasor, the claimant obviously must prove facts sufficient under the statutes and the common law . . . to establish a right of contribution between wrongdoers." *Id.* As part of its burden, DR Horton must prove the damages attributable to BFS with reasonable certainty. *See Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 570-571 (1971).

a. There is no evidence that the Judgment against DR Horton is based on tort liability.

The right of contribution exists only between joint tortfeasors. In order for a party who has litigated a case to judgment to maintain an action as a joint tortfeasor that party must have first been adjudicated to have committed a tort. *See* SC Code Ann. § 15-38-40(B)(***"Once the issue of liability has been resolved*** . . . a defendant has the right to seek contribution against any judgment defendant and other persons who were not made parties to the action").[5] DR Horton litigated the Homeowner's Suit, received an arbitration award, had the award confirmed by the Berkeley County Circuit Court, and reduced it to a judgment. "[A]n arbitration award is a final, binding award on the merits."

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[5] The only exception to the requirement of a tort judgment involves a settlement expressly extinguishing a third-party's liability. *See* S.C. Code Ann. §15-38-20(D); *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35 (2013). The case before this Court involves a judgment of the Berkeley County, South Carolina, Circuit Court, not a settlement. Therefore portions of the Act pertaining to settlements have no applicability to this case. *See* S.C. Code Ann. §15-48-150 (arbitration award confirmed in accordance with the South Carolina Uniform Arbitration Act to "be enforced as any other judgment."). A party seeking contribution must have either (1) a judgment expressly based on tort liability or (2) a settlement agreement meeting the requirements of the Act. DR Horton has neither.

Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 494 (Ct.App. 2003). DR Horton is in the same position it would be in had it litigated the Homeowner's Suit in court. A party cannot litigate a case to judgment, ask the fact finder not to make a finding as to tort liability, and then file a subsequent action for contribution and seek to establish its own tort liability in that subsequent action.

Here, the Homeowner's Suit asserted causes of action based on tort and contract. Because the arbitration order and the Judgment are silent on the issue of DR Horton's negligence, there is no way to determine whether the Judgment entered against DR Horton is based in tort.[6] *See Jenkins v. Few*, 391 S.C. 209, 221 (Ct.App. 2010)("Because the verdict was a general verdict, it is impossible to determine how the jury allocated damages between civil conspiracy, conversion, and trespass to personal property. We will not speculate as to how the jury allocated damages.").

Indeed, DR Horton's own 30(b)(6) representative has testified that DR Horton cannot determine whether or not it sustained tort liability in the Homeowner's Suit:

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

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

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

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[6]Because DR Horton was not only the builder, but also the owner of the Residence, an award for breach of contract would be a relatively straight forward proposition. The arbitrator may have simply found that DR Horton sold the Homeowner a home that did not comply with the requirements of the sales agreement. There is certainly nothing in the award or Judgment indicating that DR Horton, as the general contractor, negligently performed any particular portion of the construction, planning or development of the Residence. In fact, DR Horton has never even alleged what it was found to have done negligently. Was it negligent supervision of the siding installer? Negligent supervision of the concrete subcontractor? Did DR Horton negligently design the Residence?

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.

(R. p. 640, line 21-p. 641, line 8).

One who litigates a claim to verdict, or award, with the intention of suing a third-party for contribution as a "joint tortfeasor" must, at a minimum, have the finder of fact say "yay or nay" on the issue of tort liability. Because there is no evidence that the Judgment is based in tort liability, DR Horton cannot maintain an action as a "joint tortfeasor" with BFS.[7]

In an attempt to remedy its failure to obtain a ruling on the issue of tort liability DR Horton cites to *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335 (1989), a case that holds the economic loss rule does not foreclose the possibility of a tort action against the builder of a new home. BFS agrees that it is legally possible for a general contractor to sustain tort liability despite the economic loss rule. There is no evidence, however, that DR Horton did, in fact, sustain tort liability in the Homeowner's Suit. Indeed, there is no admissible evidence even indicating what particular defects were testified to at the hearing, much less what determinations were ultimately made.

b. There is no evidence that the Judgment includes damages relating to the work

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[7]It is worth noting that if BFS were not granted summary judgment, DR Horton would be in the nearly impossible situation of having to prove that (1) it was negligent in constructing the Residence, (2) it was adjudicated to be negligent by the arbitrator in the Homeowner's Suit, and (3) it was not guilty of being reckless or grossly negligent. *See* S.C. Code Ann. § 15-38-15(F). The procedural nightmares that would be created by allowing an independent action to determine the basis for an unreasoned award, that has been confirmed and reduced to a final judgment, are without end.

performed by BFS.

There is no evidence that the arbitrator determined that the work performed by BFS was defective. The complaint in the Homeowner's Suit alleged problems with improper installation of siding, improper installation of "kick out flashing," improper installation of the slab and driveway, improper installation of the roof and shingles, and improper installation of a gas hot water heater.[8] BFS was not involved with the installation of the siding, "kick out flashing," the slab and driveway, the roof and shingles, or the gas hot water heater. (R. p. 629, line 16-p. 639, line 13). There is no evidence that the Judgment is based on defects in the work done by BFS.

c. There is no evidence regarding what portion of the Award, if any, is attributable to the common liability of DR Horton and BFS.

The Act provides that the "right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the **common liability**." S.C. Code Ann. § 15-38-20. While fault is not considered in determining the pro-rata shares of joint tortfeasors, the Court must still make a determination regarding what constitutes the common liability of DR Horton and BFS. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53 (Ct.App. 1999).

BFS is not a joint tortfeasor with the roofer, siding contractor, concrete contractor and hot water heater installer. Joint and severally liability applies when the negligence of two or more parties is the "proximate cause of inherently indivisible injuries. Both wrongdoers are jointly and severally liable for the entire harm, and plaintiff has the election of suing one or both." *Rourk v. Selvey*, 252 S.C. 25, 27-28 (1968). In the Homeowner's Suit Clark alleged, and provided separate damages estimates for, items as distinct as a hot water heater, cracks in a driveway, and roofing

[8]Again, there are indications that testimony regarding other unrelated construction defects was introduced by Clark in the arbitration.

problems. BFS, as the framer, is not jointly and severally liable with the plumber for a faulty hot water heater, and is not jointly and severally liable with the concrete contractor for cracks in the driveway.[9]

To the extent that DR Horton's negligence and BFS's negligence combined to cause an indivisible harm, it could only have possibly done so in relation to the work performed by BFS. Thus, in order to determine the common liability of DR Horton and BFS, it is necessary to determine what portion of the Judgment relates to the framing work performed by BFS. This is impossible.

The South Carolina Court of Appeals has dealt with this issue in the context of settlements. In *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., supra*, an injured plaintiff had previously sued both Vermeer and Wood/Chuck for personal injuries. Shortly before trial in the underlying lawsuit the plaintiff dismissed Wood/Chuck with prejudice. Vermeer then settled with the plaintiff. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 58 (Ct.App. 1999).

Having settled with the plaintiff in the underlying lawsuit, Vermeer then sued Wood/Chuck for contribution under the Act. *Id.* Wood/Chuck defended on the grounds that, at the time of Vermeer's settlement, Wood/Chuck had already been dismissed with prejudice and therefore Vermeer's settlement with the plaintiff could not have "extinguished" Wood/Chuck's liability. *Vermeer* at 68-69. Vermeer countered that the settlement included a release of the plaintiff's wife's claims for loss of consortium, as well as the plaintiff's claims, and that the plaintiff's wife had not

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[9]If parties are jointly responsible for an indivisible injury "plaintiff has the election of suing one or both." *Rourk v. Selvey*, 252 S.C. 25, 28 (1968). Clearly, Clark could not sue the roofer for cracks in the driveway, nor could she sue the plumber because shingles fell off the roof. While some construction defect cases do involve indivisible injuries, the Homeowner's Suit involved several separate and distinct problems. Far from litigating the case as if it involved a single indivisible injury, both Clark and DR Horton produced damages estimates that actually broke down the repair costs among the various defects. *See* R. pp. 658-681.

been a party to the underlying lawsuit. Therefore, Vermeer argued that its settlement extinguished Wood/Chuck's liability to plaintiff's wife and it was entitled to contribution. *Id.*

The *Vermeer* Court held that because the settlement between Vermeer, the plaintiff, and the plaintiff's wife, did not allocate the settlement proceeds between the plaintiff's claims and the plaintiff's wife's claims, it was impossible to prove what portion of the settlement funds were attributable to the wife's cause of action and therefore Vermeer could not maintain a contribution action:

> The settlement agreement does not place a specific value on any potential claim by Ms. Causey. Under the agreement no portion of the settlement is allocated to her for any potential loss of consortium claim. We cannot, therefore, determine whether Vermeer paid more than its pro rata share of liability to Ms. Causey.

Vermeer, supra at 70-71.

The *Vermeer* Court held that in order for a settling party to maintain a cause of action for contribution, the settlement must allocate payments between those claims subject to contribution, and those claims not subject to contribution. If the party seeking contribution fails to separate the settlement funds between claims subject to contribution, and claims not subject to contribution, that party will be unable to prove its damages and cannot maintain an action for contribution. *See Vermeer, supra* at 70-71.

Just as Verneer's failure to allocate damages between claims subject to contribution, and those not subject to contribution, defeated its claim for contribution, DR Horton's failure to request that the arbitrator allocate damages between claims related to BFS's work, and those unrelated to BFS's work, defeats its claim for contribution. As the *Vermeer* Court noted this problem is purely of DR Horton's own making. *See Verneer* at 70 ("In this case the lack of apportionment may work a hardship . . . but it is one which he could have avoided by a properly drawn release."); *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.").

d. The Act does not provide a mechanism whereby a party that has a judgment entered against it- which judgment is only partially the joint responsibility of a nonparty - may litigate what portion of the judgment is, in fact, the joint responsibility of the judgement debtor and the nonparty.

Joint and several liability, of course, only applies in cases where the negligence of two or more parties combines to cause a single indivisible injury. *See* S.C. Code Ann. § 15-38-20(A)("where two or more persons become jointly or severally liable in tort for **the same injury to person or property**"); *Collins v. Bisson Moving & Storage, Inc.*, 332 S.C. 290, 306 (Ct.App. 1998) (Joint and several liability arises only when two or more tortfeasors are responsible for a **single** injury); *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64 (Ct. App. 1999) ("'Joint tortfeasor' refers to '[t]hose who act together in committing wrong, or whose acts if independent of each other, unite in causing a **single injury**'; 'two or more persons jointly or severally liable in tort for the **same injury to person or property**.'")(quoting Black's Law Dictionary 839 (6th ed. 1990)).[10]

The Homeowner's Suit does not involve the classical contribution scenario where the combined negligence of two or more parties creates a single indivisible injury. It cannot be seriously argued that a faulty water heater, cracks in the driveway, and roofing problems are "indivisible" from

[10]Determining whether two or more parties are jointly and severally liable in tort involves analyzing the facts that give rise to a lawsuit and determining whether the parties' joint negligence leads to a single indivisible injury. It has nothing whatsoever to do with the manner in which a case is litigated. Failing to make a record of a proceeding does not magically transform several discrete injuries into a "single injury to person or property."

problems related to BFS's framing. Indeed, the cost of repair estimates produced in the Homeowner's Suit, and repeatedly relied on by DR Horton, actually do divide the damages between various portions of the Residence.

To the extent that the Act allows a judgment debtor to pursue a nonparty for contribution, it only contemplates that scenario in a case involving a single indivisible injury. The Act itself states that the tortfeasors' "relative degrees of fault shall not be considered" in a contribution action, and thus prevents DR Horton from introducing evidence showing that BFS is somehow responsible for most of the Judgment. *See* S.C. Code Ann. § 15-38-30(1). Neither Clark nor DR Horton produced a damages estimate for the Residence that included $150,000, in repairs related to BFS's work. Some portion of the Judgment is undeniably related to the work of others. In a case where multiple unrelated defects are alleged, the Act does not allow a defendant to try the case to judgment and then litigate what portion of the judgment is the joint responsibility of that defendant and a nonparty.

If DR Horton wanted contribution for any portion of the Judgment attributable to the joint negligence of DR Horton and BFS, it needed to request that the arbitrator apportion damages between the various defects alleged by Clark. *See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 70 (Ct.App. 1999)("In order for a party to be entitled to contribution, he must allege and the evidence must show **the amount** he has paid in excess of his just proportion of the joint indebtedness."). Just as the plaintiff in *Vermeer*, *supra*, neglected to allocate settlement proceeds between those subject to contribution, and those not subject to contribution, DR Horton neglected to request that the arbitrator allocate damages between those attributable to BFS's work, and damages not attributable to BFS's work. *See Vermeer*, *supra* at 70 (no recovery where "open-end, blanket, joint release gives no indication as to how the amount paid for the release relates to any

present or future damage . . ."). Here, there is also no recovery where the "open-end, blanket [Judgment] gives no indication as to how the amount paid . . . relates to any . . . damage." *Id.*

II. THE TRIAL COURT CORRECTLY RULED THAT BFS IS ENTITLED TO SUMMARY JUDGMENT ON DR HORTON'S CLAIM FOR CONTRACTUAL INDEMNITY.

a. The relevant portions of the Contract drafted by DR Horton are as follows[11]:

In relevant part, the Contract reads as follows:

> 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 . . . 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. . . .
>
> Contract at ¶11 (R. p. 609).

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[11]Notably, the Contract does not contain a provision stating that it will not be construed against the drafter. Because the Contract was drafted by DR Horton, any ambiguous portions of the Contract must be strictly construed against DR 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.*

> 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.
>
> Contract at ¶19 (R. p. 610).
>
> Dispute Resolution. . . . Contractor agrees to participate in, and be bound by, any arbitration proceeding between Owner and any third party relating to the Work . . .
>
> Contract at ¶ 22 (R. p. 610).

b. There is no admissible evidence that any portion of the Judgment is attributable to work performed by BFS.

DR Horton is the Plaintiff in this case and therefore must prove that it has incurred liability to a third-party because of work performed by BFS. *See Jackson v. Midlands Human Resources Center*, 296 S.C. 526 (1988). DR Horton has produced no evidence that any portion of the Judgment is, in fact, related to work performed by BFS. The argument of an attorney that the Judgment "could have been," or "should have been" based on damages caused by BFS's work is not evidence. The only person with any personal knowledge of what was decided at the arbitration is the arbitrator and DR Horton has made a decision not to obtain testimony from the arbitrator. It is still unclear exactly what admissible first hand testimony DR Horton contends establishes that BFS's work was found to be defective in the arbitration. Because there is no evidence that the Judgment is based on defects in work performed by BFS, BFS is entitled to summary judgment.

DR Horton's Initial Brief extensively quotes South Carolina cases indicating that parties have the freedom to contract. What DR Horton apparently misses is that the Contract does not say that BFS will indemnify DR Horton for claims arising out of the negligence of other DR Horton contractors. In an indemnity case, like any other civil action, the plaintiff has the burden of proving its damages. DR Horton has not presented any evidence that the Judgment was entered because of

defects in the work performed by BFS, as opposed to defects in the work of other subcontractors who worked on the Residence.

DR Horton's lawyers in the Homeowner's Suit recognized that there is no evidence to support a claim that the Judgment is based on property damage caused by BFS's work. In the words of DR Horton's counsel: "[t]here is no reasoning behind the award to show that the award is related to cladding issues, structural issues, or some combination thereof. As such, I doubt a reasonable judge would accept this as sufficient evidence to support such a claim." (R. pp. 595- 597).

(i) DR Horton's reliance on *Campbell v. Beacon Mfg. Co., Inc.*, 313 S.C. 451 (Ct. App. 1993), is misplaced.

DR Horton relies extensively on *Campbell v. Beacon Mfg. Co., Inc.*, 313 S.C. 451 (Ct. App. 1993). The *Beacon* case is wholly inapposite the facts of the instance case. *Beacon* involved an agreement whereby a security company, Spartan, agreed to indemnify Beacon - the lessor of a building where Spartan provided security - for any "judgments, damages . . . and expenses . . . arising out of work done pursuant to this agreement or the action of any of [Spartan's] agents or employees." The undisputed evidence was that one of Spartan's employees set a fire that burned down the at-issue building. *Beacon* at 454.

Spartan argued that the negligence of Beacon, in failing to install a fire protection system in the warehouse, "proximately caused the damages from the fire." *Id.* The *Beacon* Court determined that there was "no evidence in the record to support Spartan's allegation that Beacon was negligent and thus contributed to its own damage." *Id.* The Court also stated, however, that "[e]ven if it is conceded Beacon's own negligence was a concurring cause of the damage, it remains undisputed that the damage arose 'in part' from the employee's act of setting the fire."

The *Beacon* case, if anything, shows the problems with DR Horton's arguments. It was undisputed that Spartan's employee was responsible for a building burning down, *the only loss at issue in the case*. In the words of the *Beacon* Court, "[e]ven if it is conceded Beacon's own negligence was a concurring cause of the damage, it remains undisputed that the damage arose "in part" from the employee's act of setting the fire." *Beacon* at 455. Here, there is no evidence suggesting that BFS's actions were a "concurring cause" of problems with a hot water heater, cracks in the driveway, cracks in the concrete slab, problems with the "kickout flashing," and roofing defects. Further, liability incurred by DR Horton because of those defects was not caused - "in part" or otherwise - by work performed by BFS.[12] In the *Beacon* case there was no question that the judgment ultimately entered would be for a fire that was caused, at least in part, by Spartan's employee setting a fire. In this case, on the other hand, there is no evidence that DR Horton incurred liability because of defects that BFS is responsible for.

What the *Beacon* case does illustrate is the proper way to handle a case involving contractual indemnity. In the *Beacon* case the contractual indemnity claim was resolved in the same case as the underlying liability and it was resolved before a judgment was even entered.

(ii) DR Horton's argument that the "indemnification provision's express terms provide that Builders FirstSource's indemnification obligation is triggered when the homeowner filed the Underling Action asserting property damage resulting "in part" to Builders FirstSource's work," is incorrect.

The duty to indemnify does not arise until liability has been established. "South Carolina courts have consistently defined indemnity as 'that form of compensation in which a first party is

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[12]The Contract between BFS and DR Horton does not actually say that BFS is responsible for losses that are caused "in part" by BFS's work. Additionally, the agreement in the *Beacon* case was not subject to S.C. Code Ann. § 32-2-10.

liable to pay a second party for loss or damage the second party incurs to a third party.'" *Laurens Emergency Medical Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109 (2003). Until DR Horton incurs some "loss or damage" to a "third party," there is no possible way to "indemnify" DR Horton. Prior to incurring "loss or damage" to a "third party," DR Horton may have had a right to demand that BFS defend any claims relating to its work. DR Horton did not, however, demand a defense from BFS.

Prior to DR Horton incurring liability to a third-party what could BFS possibly indemnify DR Horton for? BFS's indemnification obligation could only be triggered when DR Horton incurs liability to a third-party because of work performed by BFS. If a case is filed asserting deficiencies with BFS's framing work, and other deficiencies related to a defective concrete slab installed by others, BFS does not have any obligation to indemnify DR Horton with regard to liability it incurs to a third-party because of the defective concrete slab. Here, other than arguments made by lawyers, there is zero **evidence** that DR Horton ultimately sustained liability to a third-party because of work performed by BFS. There is no admissible testimony, no order, no judgment, no admissible evidence at all, indicating that DR Horton incurred liability to a third-party because of work performed by BFS. Clark produced a damages estimate of $269,917, sought attorney's fees and sought treble damages. (R. pp. 76- 77; R. pp. 11-20). The arbitrator awarded $150,000. Clearly, the arbitrator did not award damages for all of Clark's allegations.

DR Horton admits that it cannot prove that it incurred a loss to a third-party because of work performed by BFS:

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

performed?

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

(R. p. 587, lines 18-23).

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

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

(R. p. 643, lines 16-22).

DR Horton, as the Plaintiff, has the burden of proving its case. *See Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64-65 (Ct. App. 1999); *Estate of Cantrell by Cantrell v. Green*, 302 S.C. 557, 560 (Ct. App. 1990) ("In order to resist a defendant's motion for summary judgment, the plaintiff, as the party with the burden of proof at trial, must present affirmative evidence . . . he cannot rest of the allegations of his complaint."). There is no competent evidence that DR Horton incurred liability to a third-party because of "property damage . . . occurring, incident to, arising out of, or in connection with . . . the work performed . . ." by BFS. *See* Contract at ¶11 (R. p. 609).

c. Any apportionment of the Judgment would be impermissibly speculative.

"[I]n order for damages to be recoverable the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 570-571 (1971). The South Carolina Appellate Courts have

recognized the inherently speculative nature of any attempt to determine how a jury allocated damages in a general verdict and have repeatedly declined to indulge in such guesswork. *See Jenkins v. Few*, *supra*, at 221 ("Because the verdict was a general verdict, it is impossible to determine how the jury allocated damages . . .); *Moore v. Moore*, 360 S.C. 241, 257 (Ct.App. 2004)("Without a special verdict form, we cannot speculate at to what portion of the award the jury attributed to lost profit as opposed to other tort damages."); *Armstrong v. Collins*, 366 S.C. 204, 227 (Ct.App. 2005) ("Because the verdict was a general verdict, we cannot now speculate as to how the jury allocated damages.").

DR Horton made a strategic decision, with the advice of counsel, to purposefully make it difficult for any future litigant to determine what was decided in the arbitration. Its efforts were successful. As DR Horton has recognized there is no reliable way to retrospectively determine what portions of the Judgment are attributable to what alleged defects:

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.

(R. p. 644, lines 11- 15).

The damages sought by DR Horton are based on rank speculation regarding the findings of an arbitrator in a previous case. They are not recoverable in a Court of law.

If the speculative nature of DR Horton's damages were not apparent enough, a review of its own arguments advanced in this litigation make the speculative nature of its damages crystal clear:

The total repair estimate was $269,917, and the arbitration award totaled $150,000.

> The difference between the total repair estimate and those repairs related to framing is $130,388.24, so $130,388.24 is related to non-framing issues. Based on these calculations at least some of the award had to have been related to framing because the award of $150,000 exceeded non-framing related repairs of $130,388.24. Therefore, at least $10,466.24 was related to framing.

(R. p. 86).

BFS disagrees with the above figures and disagrees with DR Horton's characterization of certain damages as "repairs related to framing." However, even if the above figures were accurate, and aside from the fact that DR Horton's argument completely ignores its own repair estimates in the Homeowner's Suit (DR Horton's repair estimate for Clark's framing repairs was $2,367), and aside from the fact that DR Horton ignores the possibility that the arbitrator awarded attorneys' fees, treble damages and punitive damage, DR Horton's own argument conclusively demonstrates the hopelessly speculative nature of its damages. (R. p. 671, line 18-p. 672, line 6). By the above analysis DR Horton claims to demonstrate that somewhere between $10,466.24, and $139,533.76, of the Judgment is attributable to BFS's framing work. DR Horton's own argument, that the framing related portion of the Judgment is either $10,466.24, or over thirteen times that amount, clearly demonstrates that its claims are hopelessly speculative.

South Carolina law is clear that the **amount** of damages cannot be based on speculation. *See Collins Music Co., Inc. v. Ingram*, 292 S.C. 537, 541-542 (Ct.App. 1987) ("Assuming [plaintiff] proved the fact of damage resulting from [defendant's] interference with its contract, the record contains no evidence showing the amount of damages with reasonable certainty."); *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559 (Ct.App. 2008)("the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy."). DR Horton cannot prove its damages to a reasonable certainty and summary judgment was appropriate on that

basis. *See Woodson v. DLI Properties, LLC*, 406 S.C. 517, 531 (2014)(summary judgment proper when plaintiff testified he had estimated his damages and "'had no clue' of actual amount of" damages.).

d. The Trial Court correctly ruled that the plain language of the Contract required DR Horton to give BFS notice of any suit implicating BFS's indemnity obligations.

The plain language of the indemnity agreement provides that BFS "AGREES TO PROTECT, DEFEND, INDEMNIFY AND HOLD OWNER . . . FREE AND HARMLESS. . ." DR Horton used the word "and,"a conjunctive, as opposed to "or," a disjunctive, when describing the obligations of BFS under the indemnity clause. *See Plunkett v. Adkinson*, 290 S.C. 363, 365-366 (Ct. App. 1986) (use of the word "and" is "clearly conjunctive" and should be "construed literally."); *State v. Beckroge*, 49 S.C. 484 (1897)("and" is conjunctive while "or" is disjunctive.). This language creates not only a duty on the part of BFS to defend third-party suits alleging defects in its work, but also gives BFS the *right* to defend any such suit. Whatever else the Contract says, it does not say that DR Horton can defend a suit itself, give BFS no notice of the suit, make no transcript, lump the damages related to multiple subcontractors into a single judgment, and nonetheless require BFS to indemnify it for the loss ultimately sustained.

The plain language of the Contract indicates that BFS, not DR Horton, will defend any lawsuit alleging property damage caused by BFS's work. To the extent there is any ambiguity, that ambiguity must be resolved in favor of BFS. *See Southern Atlantic Financial Services, Inc. v. Middleton*, 356 S.C. 444, 447 (2003). The Contract says that if a third-party suit is initiated, alleging damages associated with BFS's work, BFS will defend that suit and indemnify DR Horton. It does not say that BFS agrees to indemnify DR Horton for suits defended by DR Horton.

e. The Trial Court was correct in ruling that the Contract, read as a whole, provides that BFS will receive written notice of any suit implicating its contractual indemnity obligations.

"As a rule of construction, the Court must consider the entire contract between the parties to determine the meaning of its provisions. That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so." *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592 (1976). Additionally:

> A contract includes not only what is expressly stated but also what is necessarily to be implied from the language used and external facts, such as the surrounding circumstances; and terms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly written on its face. In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.

Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 367 (1966)(quoting 17A C.J.S. *Contracts* § 328 at 282-84).

Here, the various provisions of the Contract evidence the parties' intention that BFS will be given notice of any third-party suit that DR Horton contends implicates BFS's indemnity obligations.

As stated above, the Contract contains a notice provision:

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

Contract at ¶ 19 (R. p.610).

Additionally, the Contract contains detailed provisions related to BFS's insurance obligations. BFS is required to carry "Broad Form Commercial General Liability Insurance on an Occurrence Form, naming the indemnitee as an additional insured. . ." *See* Contract at ¶ 13 (R. p. 609). Notice is a necessary prerequisite to DR Horton's seeking coverage as an additional insured

and is necessary to effectuate the intent of the parties.

Indeed the Contract provides for exactly the situation which occurred in this case. Paragraph 22 of the Contract provides that BFS "**agrees to participate in, and be bound by, any arbitration proceeding between [DR Horton] and any third party relating to the Work . . .**" *See* Contract at ¶ 22 (R. p. 610). Clearly, BFS would have to be given notice of the arbitration in order to "participate" and therefore notice is required by the Contract. *See Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367 (1966).

The records produced in this case indicate that DR Horton's attorneys in the Homeowner's Suit recognized that the Contract required DR Horton to give BFS notice of any suit implicating BFS"s indemnify obligations. DR Horton's attorneys in the Homeowner's Suit instructed DR Horton "We can proceed without brining in the third-parties, which would allow us to proceed to arbitration and get a decision. We would then have the opportunity to seek contribution from BFS and others, although **we would suggest that you provide them with notice of the pending arbitration and your potential contribution claim. . . would like to simply provide notice to the sub-contractors or your potential contribution claim and proceed without them**." (R. p. 413-414). We "can certainly proceed with the defense **with DRH independently placing Builders FirstSource on notice of its potential liability . . .**" (R. p. 415-416). DR Horton ignored the instructions of its attorneys and did not provide BFS with notice of the Homeowner's Suit.

The risk management scheme created by the Contract provides that BFS will defend any third-party suits alleging defects in BFS's work, carry insurance coverage naming DR Horton as an additional insured with regard to such allegations, and that BFS will participate in any arbitration between DR Horton and a homeowner. Notice of the suit is required for each of these provisions

to have any effect.

f. The Trial Court was Correct in ruling that the implied covenant of good faith and fair dealing required DR Horton to give BFS notice of the Homeowner's Suit.

There exists in every contract an implied covenant of good faith and fair dealing." *Adams v. G.J. Creel and Sons, Inc.*, 320 S.C. 274, 277 (1995). Even if a contract is silent as to notice, courts have consistently implied a notice requirement when an indemnitee seeks to recover attorney's fees and expenses incurred in defending a third-party action. "Fairness requires prompt notice so that an indemnitor may not only respond to a claim, but also protect its interests as the party ultimately paying the bill." *West Bend Co. v Chiaphua Industries, Inc.*, 112 F.Supp.2d 816, 827 (E.D. Wisc. 2000); *see also Town of Fairfield v. D'Addario*, 149 Conn. 358, 362-363, 179 A.2d 826, 829 (1962) ("It can be fairly implied that the giving of reasonable notice was a condition precedent to [Defendant's] duty to defend and indemnify . . . Furthermore, when a party to a contract assumes an express obligation to do certain things- in this case, to defend and indemnify the plaintiff - the law implies a corresponding obligation on the other party to allow him all reasonable opportunity to perform."); *Cochrane Roofing & Metal Co., Inc., v. Callahan*, 472 So.2d 1005, 1007 (1985) ("the law would imply an obligation to notify the indemnitor within a reasonable time of a claim against the indemnitee, and certainly it would require the prompt forwarding of the complaint if the indemnitor is to be required to furnish a defense of it.").[13]

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[13]It is not surprising that there is no South Carolina case on point. Given the availability of third-party complaints, as well as the obvious step of tendering the defense to any alleged indemnitor, its unclear why any party would proceed to defend a case without giving an alleged indemnitor notice. *See Robbins v. First Federal Sav. Bank*, 294 S.C. 219, 223-224 (Ct. App. 1987)(If defendant seeks to hold third-party liable in the event of judgment proper procedure is to implead third-party as third-party defendant.).

The case of *Cochrane Roofing & Metal Co., Inc., v. Callahan*, 472 So.2d 1005, (1985), is instructive. In the *Cochrane* case, Cochrane Roofing, as a subcontractor for Mark Construction, put a roof on a building. *Cochrane, 472 So.2d* at 1006. The contract between Cochrane Roofing and Mark Construction contained an indemnity clause. The indemnity clause was silent as to notice requirements. *Id* at 1007. During the warranty period, Mark Construction notified Cochrane Roofing that the building owner had some complaints regarding the roof. *Id* at 1006. Later, the building owner sued Mark Construction claiming the roof was defective. *Id* at 1007.

Mark Construction undertook the defense of the roof lawsuit, using two law firms and regularly paying their bills. Mark Construction did not give Cochrane Roofing notice of the lawsuit until over two years later when its attorney wrote to Cochrane Roofing demanding a defense and indemnification. *Cochrane, 472 So.2d* at 1007.

The Cochrane Court held that:

> *Although the contract here does not contain a specific requirement that the contractor give notice to the subcontractor of a suit which the subcontractor agrees to defend and as to which the subcontractor agrees to save harmless the contractor, it goes without saying that notice is a prerequisite to performance by the subcontractor . . . Under the facts of this case, the law would imply an obligation to notify the indemnitor within a reasonable time of a claim against the indemnitee, and certainly would require the prompt forwarding of the complaint if the indemnitor is to be required to furnish a defense of it.*

Cochrane, 472 So.2d at 1007.

Here, DR Horton's failure to give BFS notice of the Homeowner's Suit is even more inexplicable than the general contractor's failure to give notice in the *Cochrane* case. In *Cochrane* notice was at least given before a judgment was entered. Here, the Homeowner's Suit was filed on June 12, 2008. DR Horton did not give BFS notice of the Homeowner's Suit until December of

2010, after it had litigated the case, obtained an award, and had the award confirmed and made a final judgment of the Berkeley County Circuit Court. As the *Cochrane* Court stated:

> The contractor retained counsel of its choice, who prepared a defense without consulting with the indemnitor/subcontractor. Now, at this late date, it calls upon the indemnitor to pay the lawyer of the contractor's choice and to save harmless the contractor. Having failed to perform its part of the bargain, the contractor cannot now compel performance by the subcontractor.

Cochrane, 472 So.2d at 1008.

"Since its application in this state, South Carolina appellate courts have consistently given credence to the underlying purpose of the doctrine of good faith and fair dealing by using it to protect the intentions of the parties to the contract." *Williams v. Riedman*, 339 S.C. 251, 273 (Ct. App. 2000):

> The policy of the law is to supply in contracts what is presumed . . . to have been deemed perfectly obvious to the parties, the parties being supposed to have made those stipulations which as honest, fair and just men they ought to have made . . .It has been said that implied promises always exist . . . where the covenant on one side involves some corresponding obligation on the other; where, by the relationships of the parties and the subject matter of the contract, a duty is owing by one not expressly bound by the contract to the other party in reference to the subject thereof . . .

Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 367 (1966)(quoting 17 Am.Jur.2d Contracts, Sec. 255, pages 649-650).

Here, the duty of good faith and fair dealing requires DR Horton to give BFS notice of any third-party suit for which DR Horton will seek indemnification from BFS.

g. The Trial Court correctly ruled that, by failing to give BFS notice of the Homeowner's Suit, and failing to request an arbitration award with factual findings and conclusions of law, DR Horton waived its right to contractual indemnity.

"Waiver is an intentional relinquishment of a known right and may be implied from

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

The applicable contract between DR Horton and BFS provides that BFS agrees to participate in any arbitration between DR Horton and a homeowner. *See* Contract at ¶ 22 (R. p. 610). (Contractor "**agrees to participate in, and be bound by, any arbitration proceeding between [DR Horton] and any third party relating to the Work**. . .") Rather than following the agreed upon dispute resolution procedure DR Horton chose to arbitrate the Homeowner's Suit without joining BFS, without making any transcript of the hearing, and without having the arbitrator make findings of fact and conclusions of law relating to the portion of the award attributable to the framing performed by BFS. DR Horton made the decision to ask for an unreasoned award with the express purpose of making it difficult or impossible for any future litigant to determine what was decided in the arbitration. Further, DR Horton made the decision to agree to an unreasoned award after its own lawyers had advised it that an unreasoned award would make any case against BFS uncertain. (R. p. 384, lines 15-19).

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

DR Horton agreed to an unreasoned award that was, without objection, made a final

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

h. The Trial Court correctly ruled that DR Horton is equitably estopped from seeking contractual indemnity.

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290 (Ct. App. 2012). Here, DR Horton's actions in failing to join BFS as a party to the Homeowner's Suit, failing to make a transcript, and failing to give BFS notice of the arbitration, preclude DR Horton from now bringing an action for contractual indemnity.

The Contract provides that BFS will participate in any arbitration between DR Horton and a third-party and that BFS will defend DR Horton from third-party suits implicating BFS's work. DR Horton alleges that it was sued by a third-party because of BFS's work, and that it had those

third-party claims referred to binding arbitration. Its own attorneys indicated that DR Horton should put BFS on notice of the Homeowner's Suit. DR Horton's failure to give notice to BFS deprived BFS of any opportunity to participate in the Homeowner's Suit, to cross-examine witnesses, to testify in its own defense, to make a transcript of the hearing, and to request a reasoned award. DR Horton remained silent and is estopped from now maintaining an indemnity action against BFS. *See Southern Development Land and Golf Co., Ltd. v. South Carolina Public Service Authority*, 311 S.C. 29, 33 (1993).

Additionally, the record indicates that DR Horton's failure to request a reasoned award renders any suit for indemnity contrary to equity. As DR Horton has itself recognized, the judgment "obviously doesn't specify what" it "is for." (R. pp. 595-597). Just as DR Horton planned, it is impossible to determine whether the judgment is based property damage caused by BFS's work. When addressing the possibility of Ms. Clark's attorneys using the award to support a future Unfair Trade Practices Act claim, counsel for DR Horton stated "[i]f their intent from the outset had been to get an award and use it later to support an unfair trade practices claim, it seems they would have requested a reasoned award." (R. pp. 595-597). The same can be said of DR Horton's attempt to bring a contractual indemnity claim without a reasoned award. "If their intent from the outset had been to get an award and use it later to support [a contractual indemnity] claim, it seems they would have requested a reasoned award."

The actions of DR Horton have rendered its assertion of a right to contractual indemnity contrary to equity. Therefore, DR Horton is estopped from asserting those rights. *See Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290 (Ct. App. 2012).

i. The indemnification clause drafted by DR Horton violates S.C. Code Ann § 32-

2-10.

In relevant part, S.C. Code Ann § 32-2-10 states:

> 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 . . .

(i) On its face the indemnification agreement violates S.C. Code Ann § 32-2-10 and is against public policy and unenforceable.

In relevant part, the indemnification agreement provides that BFS will indemnify DR Horton for: "ANY NEGLIGENT ACTION AND/OR OMISSION OF THE INDEMNITEE [DR Horton] RELATED IN ANY WAY TO THE WORK, EVEN WHEN THE LOSS IS CAUSED BY THE FAULT OR NEGLIGENCE OF THE INDEMNITEE [DR Horton] . . ." Contract at ¶11 (R. p. 609). It is hard to imagine language more clearly violating S.C. Code Ann § 32-2-10.

The indemnity agreement purports to require BFS to indemnify DR Horton for DR Horton's own negligent acts or omissions "even when the loss is caused by the fault or negligence of" DR Horton. Pursuant to the plain language of the statute the "agreement" is "unenforceable." *See* S.C. Code Ann § 32-2-10.

DR Horton argues that the Court should save it from the consequences of its drafting an indemnification agreement that violates South Carolina law and South Carolina public policy. DR Horton suggests that, while the above quoted language may violate S.C. Code Ann § 32-2-10, the Court should rewrite the indemnification agreement, removing those portions that violate South Carolina law and South Carolina public policy, and allow DR Horton to move forward with a contractual indemnification suit based on the remainder of the agreement. The legislature, however,

has already spoken. The statute says the "agreement" is "unenforceable." It does not say that a particular sentence or clause of the "agreement" is "unenforceable," it says that the "agreement" is "unenforceable." *See* S.C. Code Ann § 32-2-10. Therefore, DR Horton cannot enforce the indemnification agreement.

Adopting DR Horton's position would encourage contractors with overwhelming economic power over their subcontractors to draft agreements that violate S.C. Code Ann § 32-2-10, safe in the knowledge that, if they are unable to coerce their subcontractors into settling based on an illegal indemnity agreement, they can rely on the South Carolina Courts to rewrite the indemnification agreement for them. The better policy is the policy already codified by the legislature; the "agreement" is "unenforceable."

(ii) DR Horton's attempt to use the indemnification agreement to force BFS to pay portions of the Judgment related to the work of its other independent contractors violates S.C. Code Ann. § 32-2-10.

The plain language of the statute states that the promisor (BFS) cannot indemnify the promisee (DR Horton), for liability arising out of property damage proximately caused by the sole negligence of the **promisee or its independent contractors**. Any claims in the Homeowner's Suit, relating to work performed by DR Horton's other independent contractors, are claims for the sole negligence of DR Horton and those independent contractors. Requiring BFS to indemnify DR Horton 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 (DR Horton), in connection with "liability for damages resulting from the negligence, in whole or in part, **of the promisor**," has no application to DR Horton's attempt to require BFS to indemnify it for "liability for damages resulting from the negligence" **of DR Horton's other**

independent contractors. Many of the claims asserted in the Homeowner's Suit 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.

j. The Trial Court correctly ruled that DR Horton cannot litigate the issue of what was ruled on in the Homeowner's Suit in the instant action.

(i) BFS, as a nonparty without notice, is not bound by the rulings made in the Homeowner's Suit.

Even assuming that DR Horton were able to somehow prove what portion of the Judgment entered in the Homeowner's Suit was based on defects in BFS's work, BFS, as a non-party without notice, is not bound by any determinations made in the Homeowner's Suit. BFS is not bound by the arbitrator's findings regarding the existence of defects in BFS's work, and is not bound by any determination of the amount of property damage caused by said defects. *See Robbins v. First Federal Sav. Bank*, 294 S.C. 219, 223 (Ct. App. 1987)("absent party's interests can rarely be legally bound by principles of res judicata in proceedings to which he was not a party.").

There is a well established procedure for making rulings binding on a non-party indemnitor. "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." *Black v. Patel*, 352 S.C. 76, fn 2 (Ct. App. 2002). In South Carolina, the practice of "vouching in" has been codified in the Uniform Commercial Code:

> 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).[14]

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.[15] 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,

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[14]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 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. It is undisputed that the Contract provides that all notices must be in writing and that no written notice was given.

[15]"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)).

> 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 on several occasions. *See Aetna Cas. & Sur. Co. v. Golightly*, 289 S.C. 408, 410 (1985), ("Where *an indemnitor has notice of the suit in which he is to be bound and has an 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."); *Otis Elevator, Inc., v. Hardin Const. Co. Group, Inc.*, 316 S.C. 292, 297, (1994),("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.").

Because BFS was not "vouched in" to the Homeowner's Suit, if DR Horton were allowed to move forward it would be required to essentially prove Ms. Clark's case as to any work performed by BFS. *See International Fidelity Insurance Co. v. Goltra Corporation*, 149 N.J.Super. 574, 374 A.2d 481 (1977) (Plaintiff "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.")[16]

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[16] It is not surprising that there are few recent South Carolina cases where an indemnitee attempts to sue a non-party indemnitor for a judgment obtained in another case. Because of

(ii) DR Horton has already litigated the issue of whether BFS's work was defective and is collaterally estopped from litigating that issue in this case.

DR Horton cannot litigate, in this action, issues it litigated in the Homeowner's Suit. In order to maintain an indemnification action against BFS, DR Horton must necessarily argue that it litigated the issue of whether BFS's work was defective, and the amount of damages caused by that defect, in the Homeowner's Suit.

DR Horton litigated the issues related to BFS's work, received an arbitration award, had the award confirmed by the Berkeley County Circuit Court, and reduced it to a judgment. "[A]n arbitration award is a final, binding award on the merits." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 494 (Ct.App. 2003). "[A]n arbitration award is conclusive and binding . . . as to all matters submitted to the arbitrators." *Id.* at 494. General principle of res judicata and collateral estoppel apply to arbitration awards. *See Palmetto Homes, Inc., supra* (giving *res judicata* effect to arbitration award); *Murakami v. Wilmington Star News, Inc.*, 137 N.C.App. 357, 360 (2000) ("collateral estoppel will bar relitigation of the issues actually decided during the arbitration proceeding").

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. SCDOT*, 385 S.C. 550, 554 (Ct.App.

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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 Robbins 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.). Absent filing a third-party complaint, it is difficult to imagine why anyone would proceed with litigating an entire case without at least giving written notice to an alleged indemnitor.

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

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

"The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action, (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, supra* at 554. Here, the issue of whether BFS's work at the Residence was defective, and the damages caused thereby, was actually litigated in the Homeowner's Suit, it was determined by the arbitrator and was necessary to support the Judgment. Indeed, DR Horton's entire case against BFS is premised on the assertion that the issue of whether BFS's work was defective, and the damages caused thereby, was actually litigated, determined and necessary to support the Judgment.[17]

(iii) Because BFS is not bound by findings made in the Homeowner's Suit,

[17]In order to maintain this suit DRH must take the position that the issue of whether the framing work done by BFS was defective, and the damages caused thereby, was decided in the prior lawsuit. If it was not, then BFS has no liability for the Arbitration Order.

and because DR Horton cannot re-litigate the issue of whether BFS's work was defective, there is no way that DR Horton can prove that BFS's work was defective and the damages associated with any such defective work.

BFS is not bound by the findings from the Homeowner's Suit. DR Horton cannot re-litigate the issue of whether the framing was defective and the amount of damages associated with that defective framing. That effectively ends this matter. Having neglected to make any record of what was decided by the first fact finder, DR Horton now essentially wants a "do over" whereby it can re-litigate the exact issues that were litigated in the Homeowner Suit but, this time, actually record the results. Not only would this result in a colossal waste of judicial resources, it runs afoul of the doctrine of collateral estoppel.

CONCLUSION

At the end of the day it is still unclear exactly what DR Horton's position is in this case. It never really clearly states whether it contends (1) that BFS must pay for the entire Judgment and all associated attorney's fees, even though the entire Judgment and attorney's fees are not associated with work performed by BFS or (2) that BFS is responsible for that portion of the Judgment and associated attorney's fees related to its work. There is a good reason DR Horton never clearly states which of these positions it is taking; both positions are completely untenable.

As to the first position, there is no case from South Carolina, or anywhere else in the Country, that holds that a general contractor who has an indemnity agreement with its subcontractors can be sued for multiple unrelated defects, attributable to multiple subcontractors, give no notice of that suit to its subcontractors, lump all of the damages into a single judgment, and then, willy nilly, pick whatever subcontractor it wants to sue and require that subcontractor to pay the entire judgment. If

DR Horton's position were correct it could have sued the plumber who installed the hot water heater and required him to pay the entire Judgment, or the roofer and required the roofer to pay the entire Judgment, or the driveway installer and required it to pay the entire Judgment. That is not the way the law works - not even close.

As to the second position - that DR Horton can litigate, in this case, how much of the Judgment rendered in a previous case is attributable to work performed by BFS - that position is also completely untenable. A party cannot litigate a case involving multiple distinct construction defects to judgment, request that the fact finder lump the damages from all of the various distinct construction defects into a single judgment, and then file a second action and ask a judge or jury to determine what portion of the judgment entered in the first case is related to a certain construction defect.

For all of the above reasons, BFS prays that this Honorable Court affirm the Trial Court's grant of Summary Judgment to BFS.

Respectfully Submitted,

February 4, 2015

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STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2010-CP-10-10355

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 Masterframers, ... Defendants,

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

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR.

February 4, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 4, 2016 he served a copy of the foregoing **Final Brief of Respondents** by depositing the same in the U.S. Mail, First Class postage prepaid, and addressed to the following:

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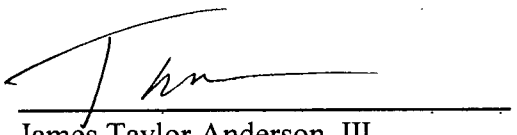

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