THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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

Appellate Case No.: 2015-001238

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

v.

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

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

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D.R. Horton ("DRH") agrees with Builders FirstSource ("BFS") that this case is "about the basics." (Br. of Resp. BFS at p. 8). DRH is seeking to be indemnified under the indemnification provision of the contract with BFS, and in the alternative, seeking contribution from BFS for damages resulting from a construction defect lawsuit. There are two primary questions in this case. First, does the indemnification provision obligate BFS to indemnify DRH for loss arising out of the construction defect suit filed by the homeowner, Patricia Clark ("Homeowner's Suit")? And, the second question is whether DRH is entitled to contribution from BFS. In an effort to defeat these claims, BFS raised numerous issues that are not relevant to causes of action for contractual indemnification and contribution in an attempt to confuse the issues before the trial court. BFS's strategy worked, and the trial court looked beyond the contractual language and beyond the contribution statute to grant BFS summary judgment as to both causes of action.

In response to DRH's appeal, BFS continues to raise the same irrelevant issues. However, in doing so, BFS's brief acknowledges that the indemnification provision applies to the Homeowner's Suit, and acknowledges that the indemnification provision does obligate BFS to indemnify DRH from those losses sustained from the Homeowner's Suit. As to DRH's claim for contribution, the evidence is clear that the Homeowner's Suit alleged violations of the building code, and BFS's employees acknowledge code violations with BFS's work. South Carolina courts have held that violations of a legal duty are deemed as liability in contract and tort, BFS is a joint tortfeasor, and DRH is entitled to contribution.

I. BFS's Statement of Case is Binding on BFS.

Respondents felt it necessary to provide its own statement of the case and pursuant to Rule 208, SCAR, BFS "shall be bound by the matters stated or alleged in in his statement of the case." BFS states in its statement of the case that BFS was the subcontractor that installed framing materials and windows at the residence that was the subject of the Homeowner's Suit (the "Residence"). (Br. of Resp. BFS at p. 1). However, BFS failed to acknowledge that BFS also designed and manufactured the framing elements installed at the Residence. BFS also acknowledges that there was a contract between DRH and BFS that contained an indemnification agreement. Id. BFS acknowledges that the Homeowner's Suit was filed in 2008, and alleged that the Residence was defective because of a number of areas including improper installation of the exterior wall system, improper flashing, improper water management system, and improper installation of framing.[1] (Br. of Resp. BFS at p. 2). BFS even acknowledges in its statement of the case that it is "undisputed that some of the allegations in the complaint . . related to materials supplied and installed by BFS." Id.

BFS states in the statement of the case that the parties "disagree" on whether DRH gave BFS oral notice of the Homeowners Suit. (Br. of Resp. BFS at p. 2). However, in spite of this statement, BFS concedes in a footnote that BFS's 30(b)(6) witness stated that "everyone I've talked to we received no notice that it was going to be an arbitration." (Br. of Resp. BFS at p. 3). Although BFS claims that there is a dispute as to whether DRH gave oral notice of the Homeowner's suit, the only thing BFS mentions in the statement of the

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[1] All of these areas involved some of BFS work since windows are considered part of the exterior wall system, contain flashing, are part of a water management system, and BFS was the framer.

case is notice of the "arbitration." Notice of the suit is one thing, notice of the arbitration is another. DRH gave oral notice of the Homeowner's suit to BFS, and BFS has failed to provide any factual allegations that state otherwise.

In the same footnote regarding a lack of notice of the arbitration, BFS also notes that "oral notice is irrelevant to the outcome of this case," but later argues that the doctrine of "vouching in" is a "well established procedure for making rulings binding on a non-party indemnitor" if provided notice. (Br. of Resp. BFS at pp. 3, 40-43). If oral notice was given to BFS, they will be deemed "vouched in" and be bound by the Homeowner's Suit. Oral notice is hardly "irrelevant" in this matter.

Noticeably absent in BFS's statement of the case is a reference to an email from a BFS employee that acknowledges BFS inspected the property after the Residence was sold to Homeowner and complaints about the Residence were made. (R. p. 193). The BFS employee's email acknowledges that BFS found several building code violations with BFS's work, and acknowledges that the code violations needed to be repaired. Id.

II. Application of BFS's Statement of Case to the Indemnification Provision

DRH is entitled to contractual indemnification simply by applying BFS's statement of the case to the language of the indemnification provision. BFS even acknowledges that the provision requires that BFS to indemnify DRH for the Homeowner's Suit.

"[P]eople should be free to contract as they choose." Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981). "An indemnity agreement is an ideal method for businesses to allocate costs and expenses that may arise in future

litigation." Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 492, 763 S.E.2d 19, 22 (2014), reh'g denied (Sept. 25, 2014). "While the freedom to contract is not without limitation, '[s]trong policy considerations ... generally permit business owners to allocate risk amongst themselves as they see fit.'" Id. (quoting Constable v. Northglenn, LLC, 248 P.3d 714, 718 (Colo. 2011)). DRH and BFS are "sophisticated business entities that engaged in an arms-length purchase agreement and chose to include an indemnity provision in the contract," and the Court should not "trump the plain language of the indemnity agreement." Id.

A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. Fed. Pac. Elec. v. Carolina Prod. Enterprises, 298 S.C. 23, 25, 378 S.E.2d 56, 57 (Ct. App. 1989). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to it. Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct.App.1995). The courts are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. C.A.N. Enters., Inc., 296 S.C. at 378, 373 S.E.2d at 587. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994)

The trial court did not find that the indemnity provision was ambiguous. Furthermore, BFS, in its brief, describes the indemnification provision as "plain language" several times. "[T]he Court must enforce the clause pursuant to its terms 'regardless of its wisdom or folly, apparent unreasonableness, or [BFS]'s failure to guard their rights carefully." Ellis v. Taylor, supra. Furthermore, the Court is without authority to alter the clause to make a new contract between DRH and BFS. C.A.N. Enters., Inc., supra.

The plain language of the contract states that BFS "agrees to protect, indemnify, and hold [DRH] harmless from against, any and all claims, demands, causes of actions, suits, or other litigation of every kind and character (including all costs thereof and attorneys' fees) . . . on account of damage to property . . . in any way occurring, incident to, arising out of, or in connection with . . . the Work performed by . . . [BFS] . . ." (R. p. 56). In other words, BFS agrees to indemnify DRH for damages from a construction defect lawsuit in any way occurring in connection with BFS's work.

Applying BFS's statement of case to the indemnification provision establishes that DRH is entitled to contractual indemnification. To use BFS's language - "[t]he Homeowner's Suit alleged that the Residence was defective" and "[i]t is undisputed that some of the allegations in the complaint filed in the Homeowner's Suit related to materials supplied and installed by BFS." (Br. of Resp. BFS at p. 2). BFS states in its brief that "[t]he 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." (Br. of Resp. BFS at p. 30). Based on this statement, BFS has admitted that DRH is entitled to contractual

indemnification because Homeowner's Suit alleged damages associated with BFS's work. DRH totally agrees with BFS, and agrees that this is a "case about the basics."

BFS acknowledged that DRH was entitled to indemnificaition a second time by stating that "DR Horton may have had a right to demand that BFS defend any claims relating to its work." (Br. of Resp. BFS at page). However, as noted by BFS, DRH elected not to tender a defense to BFS. Even though DRH did not tender the claim for a defense, DRH is seeking to be indemnified by BFS through this action.

Although BFS acknowledges the applicability of the indemnification provision to the Homeowner's Suit, BFS attempts to avoid its indemnification obligation by arguing that there is no order or judgment entered attributing homeowner's damages to BFS. This claim is without merit because the indemnification provision does not require a judgment attributing homeowner's damages to BFS's work.

The indemnification provision is triggered, as noted by BFS, when there is a third-party suit initiated against DRH alleging damages associated with BFS's work. Of course for DRH to be entitled to contractual indemnification, DRH will have to have sustained damages as a result of the third-party suit. The damages would have to be proved by DRH in this action, and would include DRH's loss of goodwill, costs of defense (which is specifically included in the indemnification provision), as well as any amounts that DRH is liable to the third-party, such as the obligation to satisfy the judgment in the Homeowner's Suit.

The indemnification provision does not require that there be a judgment attributing fault to BFS. As acknowledged by BFS, the indemnification provision only requires there be a third party suit alleging damages associated with BFS's work. That is what the Homeowner's Suit did, and thus, BFS is obligated to indemnify DRH for any losses associated with the Homeowner's Suit.

III. Notice and Implication of Giving Notice

Although BFS acknowledges that the indemnification provision is applicable to the Homeowner's Suit, they raise the issue of notice as grounds for avoiding the contractual duty to indemnify DRH. BFS's first argument as to notice is that written notice is required under the contract between DRH and BFS. However, there is no mention of any type of notice within the indemnification provision. BFS refers to paragraph 19 of the contract which states "All notice **required pursuant to this Agreement** or otherwise shall be in writing and shall be delivered to the respective business address of the Parties." (Br. of Resp. BFS at pp. 30-32). Since there is no mention of any type of notice required under the indemnification provision, this notice section does not apply to the indemnification provision. It only applies where notice is "required pursuant to th[e] agreement."

BFS's brief acknowledges that notice is not required under the indemnification provision based on their arguments. BFS next argues that "notice" is required based on: (1) the use of the term "and" within the indemnification provision; (2) reading the contract as a whole indicating that the parties' intention was that BFS will be given notice of any third-party suit that DRH contends implicates BFS's indemnification obligations; and (3) the

implied covenant of good faith and fair dealing. (Br. of Resp. BFS at p. 29-35). BFS then argues that as a result of the lack of notice: (1) the indemnification provision does not have any effect; (2) DRH waived its right to contractual indemnification; (3) DRH is estopped from seeking contractual indemnification; and (4) BFS is not bound by the Homeowner's Suit.

BFS, by arguing in its brief that the Court should read a notice requirement into the indemnification provision, simply acknowledges that there is no requirement of notice under the indemnification provision. If notice is expressly required pursuant to the terms of the indemnification provision - which it does not, why does BFS feel it necessary to assert that notice is "implied" under these grounds.

BFS's series of arguments regarding the lack of notice resulting in the indemnification provision having no effect, that DRH waived its rights by failing to give notice, and DRH is estopped for failing to give notice are wholeheartedly without merit based on BFS's acknowledgment that the issue of whether oral notice was given is an issue in dispute. If oral notice is an issue in dispute - as stated by BFS, the lack of notice is not sufficient to grant summary judgment. It is an issue of fact that needs to be determined by a fact finder.

Furthermore, DRH submits that BFS cannot refute that DRH gave oral notice of the Homeowner's Suit. BFS's brief states that BFS did not get notice of the "arbitration." DRH's 30(b)(6) witness, Jay Henderson, testified that he contacted Morris Tolly with BFS regarding the Homeowner's Suit and discussed the Homeowner's Suit, the mediation of the

Homeowner's Suit, and the pending arbitration of the Homeowner's Suit in two telephone calls. (R. pp. 555-559). When BFS's 30(b)(6) witness was asked about the telephone calls and oral notice, BFS's 30(b)(6) witnesses stated that he asked Morris Tolly about the telephone conversations with Jay Henderson, and Morris Tolly told him that he recalled the telephone calls, but could not recall if they discussed the Homeowner Suit or not. (R. pp. 561-564). Based upon BFS's 30(b)(6) witness's testimony, BFS has no testimony that can refute Jay Henderson's testimony that he provided oral notice to BFS regarding the Homeowner's Suit, that mediation was unsuccessful, and that the matter was to be arbitrated.

Whether DRH gave oral notice of the Homeowner's Suit to BFS is either an undisputable fact, or it is a disputed fact. Either way, the trial court's ruling as to summary judgment cannot stand, especially in light of the BFS's arguments regarding "vouching in."

As noted by BFS, "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." (Br. of Resp. BFS at pp. 40-43). BFS further notes in its brief that "in order to invoke the principle of *res judicata* against one not a party to the action in which the judgment was obtained, it must appear, in the action in which the principal 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; and (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. v. J.F. & J.D. Blankenship, 130 S.C. 131, 125 S.E. 420 (1924).

According to the testimony in this case, DRH notified BFS regarding: (1) the Homeowner's Suit; (2) the unsuccessful mediation; and (3) the pending arbitration. (R. Pp. 555-559). According to BFS's 30(b)(6) witness, the BFS employee - Morris Tolly - to whom the notice was given, does not recall if the Homeowner's Suit was discussed or not, and cannot dispute DRH's testimony that notice was given. (R. Pp. 561-564). Therefore, DRH seasonably notified BFS, and under the doctrine of "vouching in," and BFS is bound by the award in the Homeowner's Suit. In the alternative, BFS states in its statement of the case that the question of oral notice is a disputed fact. Therefore, lack of notice cannot be a grounds for summary judgment.

IV. BFS Contractually Agreed to be Bound to the Award

Not only is BFS bound by the award in the Homeowner's Suit under South Carolina common law, BFS is bound under the terms of the contract between DRH and BFS. As noted by BFS in its brief, paragraph 22 of the contract "provides that BFS 'agrees to participate in, and be bound by, any arbitration proceeding between [DRH] and any third party relating to the Work . . .'" (Br. of Resp. BFS at p. 31). BFS states that "[c]learly, BFS would have to be given notice of the arbitration in order to 'participate' and therefore notice is required by the Contract," and concludes that "[n]otice of the suit is required for each of these provisions to have any effect." Id. Again, it is either undisputed that DRH gave BFS notice of the Homeowner's suit, or it is an issue of fact, both require that Court reverse the trial court's order for summary judgment based on a lack of notice.

V. The Indemnification Provision Cannot be Interpreted to mean "Sole Negligence" Because It Specifically References BFS's Scope of Work.

The indemnification provision quoted within BFS's brief as violating the S.C. Code Ann. Section 32-2-10 cannot be read as indemnification for DRH's (or any other of its subcontractors) sole negligence because the language specifically refers to BFS's scope of work which obviously would have been performed by BFS. Pursuant to BFS's brief the "relevant part" of the indemnification is: "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] . . ." (Br. of Resp. BFS at p. 39).

Paragraph 1 of the contract between DRH and BFS defines the term "the 'Work.'" (R. p. 55). The first two sentences of the contract states: "[a]ll work performed by Contractor [BFS] for Owner [DRH] 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 . . . and shall include all work performed by Contractor for Owner." Id. Applying the definition of "the Work," to the indemnification provision, it is apparent that this "relevant part" cannot mean the sole negligence of DRH or any of its subcontractors. This part of the indemnification provision means that BFS will indemnify DRH for negligent action and/or omission of DRH related in anyway to BFS's scope of work, even if the loss is caused by the fault or negligence of DRH.

If there is a loss relating to BFS's work, the only conceivable action and/or omission of DRH would be its negligently hiring of BFS, and/or negligent supervision of BFS's work. Both of which could not be "sole negligence" since BFS would have performed their scope of work. Therefore, because there can be no sole negligence in the part of the indemnification provision, there can be no violation of S.C. Code Ann. Section 32-2-10.

Furthermore, the statutory language states that any language that violates the statute, would not affect any other agreements of indemnification. DRH is seeking indemnification through the second indemnification provision regarding losses any way occurring, incident to, arising out of, or in connection with BFS's work. DRH is not seeking indemnification through the "relevant part" identified by BFS. Therefore, if the "relevant part" violates the S.C. Code Section 32-2-10, then the other sections that do not violate the statute, remain in effect.

VI. BFS's Employee Acknowledges Building Code Violations with BFS's Work Which is Considered Liability Based Both In Tort and Contract.

BFS states in its brief that "the Homeowner's Suit asserted causes of action based on tort and contract." (Br. of Resp. BFS at p. 13). What BFS fails to mention is that it also asserted violations of the applicable building codes.

The South Carolina Supreme Court in Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 345-46, 384 S.E.2d 730, 736-37 (1989), addressed the issue of whether an action against a builder for violating a legal duty is an action in contract or an action in tort. The court stated that "[i]f a builder performs construction in such a way that he violates

a contractual duty only, then his liability is only contractual," and "[i]f he acts in a way as to violate a legal duty, however, his liability is both in contract and in tort." Id.

In discovery, BFS produced an e-mail dated September 24, 2007, from an BFS employee to several other BFS employees that identified construction defects with BFS's work at the Residence, and described some of them as violations of the building code. (R. pp. 190-193). The issues included: (1) two sets of trusses and lateral bracing were not installed; (2) dips in the second level floor is out of code; (3) a suspicion that there is a lack of support under a beam; (4) dips in the floor on the first floor which are probably out of code and resulting from a deflected load from a beam.

Accordingly, BFS's own employee acknowledged that he found several building code violations in BFS's work. The allegations in the Homeowner's Suit included building code violations (violations of a statutory duty), and the evidence in this action proves that BFS violated a statutory duty. Under South Carolina law, building code violations form the basis for liability in contract and in tort. Kennedy, supra. BFS's employee stated that he found a dip in the second floor of the residence and stated that it "is probably out of code and recommend that we fix this." (R. pp. 190-193). He further noted in the email that the homeowner complained of numerous dips in first floor and stated that he "found two areas that are probably out of code" that needed to be fixed as well. Id. BFS is a joint tortfeasor, and DRH is entitled to contribution from BFS for the amount DRH paid in the Homeowner's Suit in excess of its pro rata share.

VII. Contribution Statute Language Indicates that "Potential Tortfeasors" are Subject to a Claim for Contribution.

BFS argues that because there was no judgment including damages related to BFS's work, DRH is unable to pursue a contribution claim. However, this argument fails based on the language of the contribution statute.

Pursuant to the contribution statute, "[w]hether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action." S.C. Code Ann. § 15-38-40(A). "The recovery of a judgment for an injury or wrongful death against one tortfeasor does not of itself discharge the other tortfeasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution." S.C. Code Ann. § 15-38-40(E). The statute specially states that it does not matter if there is no judgment entered against two or more tortfeasors, contribution can be still enforced, as long as the judgment has been satisfied. There was a judgment against DRH and DRH satisfied the judgment. DRH retained the right to assert its claims against BFS regardless of the fact that the judgment in Homeowner's Suit did not mention BFS.

South Carolina Uniform Contribution Among Tortfeasors Act states that "[a] defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." S.C. Code Ann. § 15-38-15. The Act also notes that "contribution may not be enforced in the action until the issue of liability and resulting damages against the defendant or defendants named in the action is determined," and that

"[o]nce the issue of liability has been resolved, subject to Section 15-38-20(B), a defendant has the right to seek contribution against any judgment defendant and other persons who were not made parties to the action." S.C. Code Ann. § 15-38-40.

In reading this statutory language together it is clear that the statute contemplates contribution claims identical to DRH claims against BFS where DRH was a party to the Homeowner's Suit, and BFS was not a party. The act specifically states that DRH "shall retain the right to assert that another potential tortfeasor [BFS] . . . contributed to the alleged injury or damages and/or may be liable for any or all the damages alleged by the other party." Here DRH has retained the right to bring a contribution claim against BFS as a "potential tortfeasor," and that DRH is entitled to contribution. To be entitled to contribution, DRH must establish liability and resulting damages against BFS in this contribution action.

However, BFS argues that DRH should have established BFS's liability and damages in the Homeowner's Suit. (Br. of Resp. BFS at pp. 40-46). This assertion is disingenuous because BFS also argues in its brief that because BFS was not a party in the Homeowner's Suit, BFS is not bound by the Homeowner's Suit under the contractual indemnification claims. BFS cannot have it both ways.

Had DRH established that BFS was liable in the Homeowner's Suit, and had established that homeowner's damages were associated with BFS's work, BFS would then be arguing that because BFS was not a party to the Homeowner's Suit, BFS would not be bound to the findings in the Homeowner's Suit as required by the doctrine of *res judicata.*

A claim for contribution is not ripe until there has been a payment. First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 445 S.E.2d 446 (1994). Therefore, DRH could not have joined BFS in the Homeowner's Suit and asserted a claim for contribution. Had DRH joined BFS in the Homeowner's Suit and asserted the contractual indemnification claim against BFS, then DRH could have been barred from bringing the contribution claim in a separate action based on *res judicata*. South Carolina Supreme Court has noted that a claim for contribution and a claim for indemnification are different remedies for similar claims, and the claims are subject to the doctrine of *res judicata*. (see RIM Associates v. Blackwell, 359 S.C. 170, 184, 597 S.E.2d 152, 160 (Ct. App. 2004).

The Contribution Act attempts to address this Catch 22 scenario by stating that "[t]his chapter does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation." S.C. Code Ann. § 15-38-20.

DRH could not bring its contribution claim until after DRH had satisfied the judgment in the Homeowner's Suit because the contribution claim was not ripe during the Homeowner's Suit. Therefore, DRH elected to bring both the claim for contractual indemnification and the claim for contribution in this one action, and avoided the application of the doctrine of *res judicata*.

The South Carolina Uniform Contribution Among Tortfeasors Act provides for a separate contribution action wherein the plaintiff must establish both the liability and the

damages associated with the "potential tortfeasor." To hold that DRH is precluded from prosecuting its claim for contribution against BFS in a second action because there was no judgment in the Homeowner's Suit related to BFS work, would create a Catch 22 situation that surely could not be the intent of the contribution statute. This is what Section 15-38-20 notes that the Act does not do - "impair any right of indemnity under existing law."

The Contribution Act does not require a judgment that BFS was at fault in the Homeowner's Suit. In prosecuting this contribution claim, DRH is required to prove that BFS was a joint tortfeasor, and that DRH paid in excess as its pro rata share. The trial court's order granting summary judgment as to DRH's contribution claim should be reversed.

CONCLUSION

BFS states in its conclusion that "[a]t the end of the day it is still unclear exactly what DR Horton's position is in this case." (Br. of Resp. BFS at p. 46). Although BFS acknowledges a lack of understanding of DRH's appellate position, BFS's brief rambles on, sometimes with legal assertions without authority, raising issues outside the relevance of the two causes of action asserted by DRH in a brief that exceeds the allowable number of pages.[2] Despite BFS's acknowledged lack of understanding, and the excessive length, BFS admits that the indemnification provision applies to the Homeowner's Suit; describes the indemnification provision as containing "plain language;" admits that there is a dispute as

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[2] BFS's failure to comply with the margin requirements under Rule 267(d), SCAR, and excessive use of lengthy footnotes clearly makes the document in excess of 50 pages.

to whether oral notice was given; and acknowledges that if notice is given, then BFS is bound to the award in the Homeowner's Suit under common law, as well as being bound under the contract terms.

DRH is entitled to an order reversing the trial court's order granting BFS summary judgment as to contractual indemnification because (1) BFS cannot dispute that oral notice was given to BFS; or (2) BFS acknowledges that oral notice is a genuine issue of material fact regarding whether BFS is bound by the award issued in the Homeowner's Suit.

Furthermore, DRH is entitled to an order reversing the trial court's order granting summary judgment as to contribution because the contribution statute specifically permits a contribution claim to be enforced against "potential tortfeasors" even when there is no determination as to the liability and damages associated with BFS in the Homeowner's Suit.

This 9 day of February 2016.

Respectfully submitted,

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v.

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

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

v.

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

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CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Reply Brief complies with Rule 211(b), SCACR.

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THE 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

Appellate Case No.: 2015-001238

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

v.

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

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

v.

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

PROOF OF SERVICE

I, Peden Brown McLeod, of Wall Templeton & Haldrup, do hereby certify that I have served the Appellant's Final Reply Brief on counsel for Respondents, as well as other parties' counsel, by depositing the same in the United States Mail, properly posted on February 11, 2016 addressed as follows to counsel of record:

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