South Carolina Construction Law Update

September 2014 to October 2015

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Scope Note

This update is a summary of important decisions addressing issues within the practice of construction law from South Carolina State Courts and Federal Courts from September 2014 to October 2015.

I. Arbitration

A. Arbitration Agreement Still Enforceable Under the FAA Even Though it Failed to Comply With the SCUAA

Health Care Provider ("HCP") filed suit against Medical Records Provider ("MRP") alleging a breach of warranty with a medical records system installed by MRP and misrepresentations regarding the operability of the system. MRP removed the action to federal court and filed a motion to stay and compel arbitration. HCP also filed a motion to remand the case to state court arguing that S.C. Code Ann. § 15-48-190 mandated that the determination of the applicability and enforceability of the parties' arbitration agreement be made where HCP had its place of business. The Court rejected this argument, holding that under the SCUAA, specifically, S.C. Code Ann. § 15-48-20(c), the "an application to compel arbitration should be made in the court in which the matter is pending." MRP moved to compel arbitration under the FAA. HCP opposed the motion arguing that it was not enforceable under South Carolina law due to the fact that the arbitration clause on the first page of the parties' contract was not underlined pursuant to the SCUAA. HCP also argued that the arbitration provision was unconscionable and that the parties' claims fell outside the scope of the arbitration provision.

The District Court held that although the arbitration clause failed to comply with the SCUAA by not being underlined, "it may still be enforced under the FAA", where "the FAA preempts state laws that render arbitration provisions unenforceable for lack of compliance with special notice requirements." The Court also held that the FAA applied to the parties' contract due to the fact that it involved interstate commerce. HCP argued that "if the FAA were to apply to the agreement, there would be no meeting of the minds between the parties because the arbitration provision states that the agreement is subject to the SCUAA." The Court rejected this argument, holding that "[t]he application of the FAA to an arbitration provision does not completely invalidate an agreement that a contract will be governed by the SCUAA." The Court also stated that "although the FAA operates to enforce arbitration provisions that would otherwise by invalid under the SCUAA, the contract will still be governed by the remaining provisions of the SCUAA and South Carolina substantive law." Finally, the Court found that the contract was not unconscionable as both parties' were sophisticated and there was no evidence of HCP being forced to sign the contract. The Court also found that the parties' claims fell within the scope of the provision and rejected HCP's argument that the

complaint's misrepresentation claim did not constitute a fraud claim, holding that the allegations did not "reveal illegal or outrageous acts that no reasonable person would foresee at the time the contract was executed." *Low Country Rural Health Educ. Consortium, Inc. v. Greenway Med. Tech., Inc.*, 2014 WL 5771850 (D.S.C. Nov. 5, 2014).

B. Arbitrator's Decision Issued Under a Collective Bargaining Agreement Vacated

Communications Company and Union were parties to a collective bargaining agreement ("CBA") that provided for binding and final arbitration of any disputes not settled through the grievance process. In 2012, Union filed a grievance arising out of the termination of a union member who was a sales and service technician. After the parties were unable to resolve the dispute through the grievance process they instituted arbitration proceedings. The arbitrator found that the discharge of the employee was in violation of the CBA and ordered that the Communications Company reinstate him with back pay beginning from the time of his termination. The employee was discharged as a result of his entering an *Alford* plea to the charge of contributing to the delinquency of a minor, where the events that led to the criminal charges occurred while he was performing service repairs at a customer's home. Communications Company refused to comply with the arbitrator's award and filed suit against the Union, asking the Court to vacate the arbitrator's award.

Both parties filed cross-motions for summary judgment and the District Court found in favor of the Communications Company, holding that the arbitrator's award violated two South Carolina statutes. The Court specifically stated that the award violated S.C. Code §§63-1-20 and 16-17-490(10). The District Court emphasized that these statutes affirm the policy that the State has a "public interest in the protection of children and their families." The Court also noted that the arbitrator's award "violate[d] the State's public policy that its criminal adjudications be given proper legal effect." *Frontier Commun. of the Carolinas, LLC v. Intl. Bhd. of Elec. Workers*, 2015 WL 3712004 (D.S.C. June 15, 2015).

C. Trial Court's Order Compelling Arbitration Divests Court of Appeals of Jurisdiction

Electrical Contractor appealed the trial court's order that granted Leasing Company's motion to stay and compel arbitration. On appeal, Electrical Contractor argued that the trial court erred in "(1) compelling arbitration when the parties did not contractually agree to arbitrate all of [Leasing Company's] claims, (2) ignoring the plain language of the contracts and finding all of [Leasing Company's] causes of action were for indemnification, and (3) ruling on the merits of the claim."

The Court of Appeals dismissed the appeal, holding that it lacked jurisdiction over "an appeal from an order granting a motion to stay and compel arbitration." The

Court emphasized that "[a]n order compelling arbitration is not appealable under section 15-48-200(a)." The Court also stated that "[a]lthough the parties completed arbitration and the circuit court lifted the stay, the circuit court did not resume jurisdiction over the case because it did not issue an order to confirm, vacate, modify, or correct the arbitrator's award." *Lend Lease (US) Pub. Partn., LLC v. Allsouth Elec. Contractors, Inc.*, Op. No. 2015-UP-164 (S.C.Ct.App. dated March 25, 2015).

D. FAA and F.R.C.P. Do Not Prohibit a Party from Filing Multiple Motions to Compel Arbitration

Debtor filed a putative class action against Bank defendants, alleging that Banks were complicit in the unlawful practices of charging illegal interest rates on certain payday loans under North Carolina law. In 2012 through 2013 Debtor applied for four online payday loans from various lenders. Debtor authorized lenders to collect their payments for the loans by debiting Debtor's bank account. Debtor's loans were approved and Banks processed the electronic funds transfers from Debtor's account. Debtor's claims against Banks involved allegations that the Banks were complicit in the lender's unlawful practices because the Banks made it possible for the lenders to collect their payments through a certain electronic payment system known as the ACH Network.

In late 2013, Banks filed motions to compel arbitration and stay the proceedings on the premise that Debtor agreed to submit any claims regarding the loans to arbitration due to an arbitration clause found within the loan applications. Debtor argued that the loan agreements were "inadmissible hearsay because they did not bear his physical signature and because the Banks did not offer proof that they had been authenticated." Banks argued that the loan agreements were "integral to [Debtor's] complaint" because they constituted the basis for Debtor's claims, Debtor was a signatory to the loan agreements, and because Debtor "had not actually questioned the agreements' authenticity."

The district court denied Banks' motions, holding that they failed to meet their burden of showing the existence of an agreement to arbitrate, and because "they failed to produce authenticating evidence." Banks then obtained declarations from the various payday lenders to authenticate the loan agreements and subsequently filed renewed motions to compel arbitration and stay any further proceedings, which the court denied noting that it had previously denied these motions and "observed that the Banks had offered no legal basis to revisit this previously decided issue." The court further held that "it would grant the Renewed Motions only if (1) there had been an intervening change in controlling law; (2) there was additional evidence that was not previously available; or (3) its prior decision was based on clear error or would work manifest injustice."

On appeal, the Fourth Circuit reversed the district court and remanded the case back for further proceedings, holding that the district court "erred by treating as

motions for reconsideration what were, in both form and substance, renewed motions to compel arbitration and stay further court proceedings." The Court emphasized that neither the "FAA, the Federal Rules of Civil Procedure, or any other source of law of which we are aware – limits a party to only one motion under §§ 3 or 4 of the FAA", which allow for a party to petition the court to compel arbitration and stay the case. The Court stated that the "FAA lists only one circumstance under which a party may lose its right to compel arbitration, when that party is in default in proceeding with such arbitration." (referencing 9 U.S.C. § 3). The Court also held that "because the Renewed Motions presented different issues than did the Initial Motions, the district court could not have relied on the law of the case doctrine to deny the Renewed Motions." *Dillon v. BMO Harris Bank, N.A.*, 2015 WL 3425150 (4th Cir. 2015).

E. Specific Language Not Needed for an Arbitration Clause to Encompass Statutory Claims

Purchasers completed a license application for a mobile home and subsequently entered into a credit and sale contract with Finance Company for the purchase of the mobile home. The finance contract had a dispute resolution clause that provided that any dispute arising out of the agreement would "be determined by arbitration, reference or trial by a judge as provided below." The finance contract also provided that any arbitration "shall be conducted in accordance with the FAA." After the Property Owners defaulted on their monthly payments, Finance Company repossessed the home and sold it to someone else. Purchasers subsequently filed a complaint against Finance Company alleging breach of contract and unjust enrichment. They also filed certain "statutory claims" alleging statutory violations of claim and delivery proceedings and notification provisions. Finance Company filed a motion to dismiss, or in the alternative, a motion to stay, pending arbitration. The trial court "found that it did not have subject matter jurisdiction over [Purchasers'] claims for breach of contract and unjust enrichment because those claims were subject to mandatory arbitration pursuant to the arbitration clause," but "found the remaining two claims were not subject to mandatory arbitration because the arbitration clause did not contain language indicating [they] agreed to arbitrate [the delivery and notification claims]." The trial court did however, find that the "arbitration clause was valid and enforceable, because [Purchasers] failed to present any evidence supporting their claim that it was unconscionable."

On appeal, the Court of Appeals reversed the trial court, holding that the trial court erred in finding that the arbitration clause "must include specific language stating it covers statutory claims." The Court emphasized that based on its review of "the applicable precedent, we find no specific language is necessary for an arbitration clause to encompass statutory claims." The Court relied on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); and *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013). Finally, the Court also held that the trial court erred in holding that the claims did not arise under the parties' contract. The Court

emphasized that the claim alleging a violation of the claim and delivery proceedings statute fell within the scope of the arbitration clause, "because [Finance Company's actions to recover the property as a result of [Purchasers'] default created a controversy arising out of the Contract." The Court also held that the statutory notification claim arose out of the Contract "because [Finance Company] reclaimed the property due to [Purchaser's] failure to comply with the terms of the Contract." *Hall v. Green Tree Servicing, LLC*, 2015 WL 4002236 (S.C. Ct. App. filed July 1, 2015).

F. Medical Practice Involving Patients from GA and SC Did Not Implicate Interstate Commerce

In 2006, Doctor and Hospital Corporation negotiated for Doctor's employment at Medical Center in Hardeville, SC which was owned through one of Hospital Corporation's subsidiaries. Doctor was on staff at a Savannah, GA hospital but desired to practice in Hardeeville, South Carolina. In 2006, Doctor and Medical Center entered into a five year employment contract that contained a litigation and arbitration provision. The litigation provision provided that South Carolina law would apply to any disputes arising out of the agreement and the arbitration provision provided that any dispute arising out of the agreement would be settled by arbitration. In 2007, Medical Center was sold to Healthcare System. Healthcare System presented an "Amendment to and Assignment of Physician Employment Agreement" that was designed to assign Doctor's employment contract to Healthcare System. Doctor refused to sign this amendment. In 2008, Doctor sent a formal notice of termination for cause to Medical Center. In 2009, Medical Center sent Doctor a letter demanding over $725,000 in amounts due under the agreement and also demanded that Doctor stop working at the Savannah, GA hospital.

In the spring of 2009, Doctor filed a breach of contract action against Hospital, Medical Center, and Healthcare System "alleging that prior to entering into [his employment contract], Hospital Corporation failed to disclose it was in negotiations with [Healthcare System] for [Healthcare System's] purchase of [Medical Center's] assets. The suit also alleged that in order for Doctor to comply with the employment contract, Doctor would be required to close his practice in Savannah and Medical Center's refusal to purchase equipment and hire an audiologist to assist in Doctor's practice in Hardeeville.

In 2009, Medical Center filed a motion to compel arbitration, arguing that the FAA applied due to Doctor's necessity of terminating his medical practice in Georgia in order to comply with his employment contract. The trial court denied Medical Center's motion, holding that "there is no language in the [employment contract] that mentions, conditions, requires, affects or involves interstate commerce …. Further, … the parties to the [employment contract] specifically agreed to litigate any dispute arising from, under or pursuant to the [employment contract] in the courts of South Carolina." Medical Center appealed the trial court's order in 2012,

which the Court of Appeals affirmed, holding that the employment contract and surrounding facts did not affect interstate commerce.

In 2010, Hospital Corporation filed its own motion to compel arbitration, which it later withdrew after the Court of Appeals issued its remittal on Medical Center's 2009 appeal. Hospital Corporation then took Doctor's deposition. Doctor admitted that his performance under the employment contract involved his providence of medical services in both Georgia and South Carolina. He also admitted that saw many patients in Hardeeville that traveled from Georgia.

Hospital Corporation then renewed its motion to compel arbitration which was heard by a second trial court in 2013. Medical Center subsequently filed a motion for relief from judgment pursuant to Rule 60(b) seeking relief from the trial court's 2009 order due to newly discovered evidence, based on Doctor's deposition testimony. The 2013 trial court denied both motions, holding that the "[employment agreement and the surrounding facts did not implicate interstate commerce." The 2013 trial court also held that "the facts and testimony from [Doctor's] deposition argued by [Hospital Corporation and Medical Center] are not substantially different than those before the court in the prior rulings." The 2013 trial court also "concluded that if [Hospital Corporation and Medical Center] believed [Doctor's] deposition was necessary for a full review of this issue, they could have sought to present that contention to the lower and appellate courts when this issue was before them." Finally, the 2013 trial court also held that its decision "on the FAA's applicability to the Agreement was the law of the case." Hospital Corporation filed a motion to alter or amend the order, which the trial judge denied.

On appeal, the Court of Appeals affirmed the 2013 trial court's order, holding that the Court of Appeals' opinion from the 2012 appeal was decisive and "the law of the case," which stated that the employment agreement and surrounding circumstances did not implicate interstate commerce. The Court held that Doctor's "deposition testimony should have been presented to the first circuit court judge." The Court emphasized that the "law of the case" doctrine precludes "a party from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." The Court also emphasized that the "doctrine does not apply when the evidence is substantially different on a second appeal." The Court did agree that Doctor's deposition testimony presented additional facts that were substantially different from the facts presented to the first trial judge, but emphasized that these facts "should have been developed before, and raised in, the hearing on [Medical Center's] motion to compel." Finally, the Court rejected Hospital Corporation's argument that the 2013 trial court erred in holding that Hospital Corporation's "failure to timely depose [Doctor] [could not] now be grounds for reargument of issues about which the parties spent two years litigating in the Court of Appeals." The Court emphasized that Hospital Corporation could have filed its own motion to compel arbitration, joined in Medical Center's motion, or taken Doctor's deposition

prior the first trial court's hearing of Medical Center's motion to compel. *Flexon v. PHC-Jasper, Inc.*, 2015 WL 4549210 (S.C.Ct.App. July 29, 2015).

G. Arbitrator Did Not Lose His Authority By Failing to Deliver Award Within Timeframe in Parties' Arbitration Agreement

Arbitrator issued an award in a family court proceeding but failed to deliver the award within the timeframe set forth in the parties' arbitration agreement. After he had a chance to review the award, Husband moved to terminate the arbitrator's authority or stay arbitration, which the family court denied. Husband also moved to amend the arbitration award which the family court denied.

In an unpublished opinion, the Court of Appeals affirmed the family court, holding that Husband failed to present any grounds for the Court to set aside the arbitration award. The Court noted that Husband did not cite any authority to "support his contention that the arbitrator lost his authority or jurisdiction when he did not timely deliver his award." The Court also emphasized that "[a]lthough section 15-48-90(b) of the South Carolina Code (2005) requires the arbitrator to file the agreement within the timeframe set forth in the arbitration agreement, it does not provide a remedy for the arbitrator's failure to do so or state the arbitrator loses authority or jurisdiction if the award is not timely filed." The Court also noted that the parties' arbitration agreement did not "condition the arbitrator's authority or jurisdiction upon timely filing an award." Finally, the Court stated "[u]nder the facts of this case – where [Husband] did not file his motion to terminate the arbitrator's authority or otherwise object to the arbitrator's delay until after he had an opportunity to review a draft of the award – we decline to create a legal remedy under section 15-48-90 or determine, as a matter of law, the arbitrator lost his authority or jurisdiction." *Sosebee v. Sosebee*, Op. No. 2015-UP-481 (S.C.Ct.App. October 14, 2015).

II. Contracts

A. General Terms and Conditions Give Rise to Contractual Indemnity Claim

Contractor entered into a purchase order with Utility Company to perform installation of a concrete vault. The parties' purchase order provided that Contractor would perform all of its work pursuant to the general terms and conditions. The general terms and conditions contained an indemnity provision and an additional clause that stated that the purchase order would be formed when the Contractor rendered work for the Utility Company. The contract negotiation process began when Contractor issued a quotation to Utility Company. Utility Company subsequently issued a counteroffer in the form of a purchase order, which contained the general terms and conditions. Contractor then proceeded to perform its work after receiving Utility Company's purchase order. The trial court granted partial summary judgment as to the Utility Company's contractual

indemnity claim, holding that the Contractor's quote, the Utility Company's purchase order, and terms and conditions all governed the parties' contractual relationship.

On appeal, Contractor argued that the terms and conditions did not make up part of the parties' contract. The Court of Appeals affirmed the trial court, holding that Contractor accepted Utility Company's counteroffer when it began its work on the Project as governed by the general terms and conditions found within the purchase order issued by the Utility Company. The Court also held that the "documents exchanged by the parties unambiguously provided [Utility Company] with a right of indemnity." *S.C. Elec. & Gas Co. v. Anson Constr. Co., Inc.*, 2015 WL 2231894 Op. No. 2015-UP-248 (S.C.Ct.App. filed May 13, 2015).

B. Town's Conditional Approval of Lease Agreement Did Not Constitute Acceptance of Lease Agreement

Town solicited proposals from prospective tenants to operate a restaurant on a local beach pier. Prospective Tenants submitted a Letter of Intent to Town that was signed by an associate broker for Century 21 on behalf of an undisclosed principal. The terms of the Letter of Intent proposed the formation of a corporation to operate the restaurant once there as a meeting of the minds regarding the lease terms. During a meeting, the town council accepted the terms of the Letter of Intent and authorized the Town Administrator to present a proposed Lease Agreement to the town council for approval. The Lease Agreement provided that it would only become effective "upon execution and delivery hereof by both parties." It also provided that it could only be modified "by a writing signed by the party against whom the modification is enforceable." The town council then authorized the Town Administrator to enter into the lease agreement with Prospective Tenant conditioned upon the town's receipt and approval of Tenant's creditworthiness and a satisfactory background check. After reviewing the relevant credit information and background check, Town Administrator informed Prospective Tenant that "everything looked good" and that "he would be in touch." Town Administrator never signed the lease agreement and did not deliver it to Prospective Tenant. Later, the town rescinded its conditional approval of the Lease Agreement.

Prospective Tenant filed suit against Town seeking a declaratory judgment as to the validity of the Lease Agreement in addition to damages for lost profits. Town moved for summary judgment, which the trial court granted. Prospective Tenant subsequently filed a Rule 59 Motion to alter or amend, which the trial court denied.

On appeal, Prospective Tenant argued that the Town's approval of the Lease Agreement at its meeting constituted a "sufficient signing" for purposes of the agreement. Prospective Tenant also argued that the town council's signing of the meeting minutes constituted "an effective execution of the Lease Agreement." Lastly, Prospective Tenant argued that the Town satisfied the delivery requirement of the Lease Agreement when the town council posting the meeting minutes on its

website. The Court of Appeals rejected all three arguments and affirmed the trial court, holding that Prospective Tenant's signature on the Lease Agreement was "not sufficient to create a binding contract" due to the fact that the "Lease Agreement expressly provide[d] it [was] not binding unless signed by all parties." The Court emphasized that "[w]hen the parties know that the condition and delivery of a written contract is a condition precedent to their being bound by that contract, the contract is simply not binding until the written agreement is executed and delivered, even if all of the terms have been agreed upon." The Court further stated that because the "Lease Agreement expressly provides it is not binding unless signed by all parties, we conclude [Prospective Tenant's] signing was not sufficient to create a binding contract."

The Court also rejected Prospective Tenant's argument that the town council's signing of the meeting minutes was an execution of the Lease Agreement. The Court noted that "this argument misse[d] an express term of the agreement, namely that the lease could not be enforceable against the Town unless the Town actually signed it." Finally, the Court rejected Prospective Tenant's argument that the Town satisfied the delivery requirement in the Lease Agreement. The Court noted that this argument "ignore[d] the conditions precedent to delivery" and that the town council's meeting minutes "evidence[d] a clear intent to reconvene or, at a minimum, receive the results of the background and credit checks before it would authorize the Town Administrator to enter into the Lease Agreement." The Court also noted that Prospective Tenant's "own failure to act in accordance with the Lease Agreement's terms confirm[ed] that neither party interpreted the posting of the minutes to constitute valid delivery." *Sifonios v. Town of Surfside Beach*, 2015 WL 5567986 (S.C.Ct.App. September 23, 2015).

III. Insurance

A. S.C. Property & Casualty Insurance Guaranty Association Allowed to Offset Payments from Solvent Insurers

Passenger was injured in an automobile collision with a truck driven by Logging Company. Passenger filed suit and subsequently settled his claim for $185,000 with Logging Company's Driver and Logging Company's Insurer. Soon after the settlement was reached, Logging Company's Insurer was declared insolvent. Due to its insolvency, the fact that Insurer was licensed to do business in South Carolina and the fact that insured was a South Carolina resident, the claim was referred to the South Carolina Property and Casualty Insurance Guaranty Association (the "Association"). The Association is created by statute under S.C. § Code 38-31-60 and provides some protection for insureds of insolvent insurance companies for covered claims. Passenger subsequently made a demand for payment for $185,000 to the Association. Passenger also received payment from other insurers in the amount of $93,090.45 including Passenger's medical

insurance payments, uninsured motorist coverage, personal injury insurance and liability coverage from the driver's insurer.

The Association filed a declaratory judgment action for a determination of any offsets that could be taken for payments made by other insurers. The Association paid Passenger $91,909.55 which was the difference between the settlement amount and the offset amount. The trial court held that that S.C. Code 38-31-100(1) was "ambiguous, and held that [the Association] could not offset the benefits received under [the driver's] policy or the amount paid by [Passenger's] medical insurance." The trial court "did allow offset of the uninsured motorist (UM), and personal injury protection (PIP) benefits" and ordered the Association to pay Passenger an additional $63,090.45.

On appeal, the Court of Appeals reversed the trial court, holding that the statutory language of S.C. Code § 38-31-100(1) was unambiguous, and allowed the Association to offset the payments made by the solvent insurers. The Court also rejected Passenger's argument and the trial court's holding that allowing the set-off was in violation of the collateral source rule. The Court held that the trial court and Passenger "misconstrue[d] the applicability of the collateral source rule" holding that the Association "is neither the wrongdoer nor the insurer of a wrongdoer, but is instead a statutory entity that exists to provide protection for the insureds of insolvent insurance companies." Finally, the Court held that the Association was only entitled to offset $22,500 in liability coverage as opposed to the $25,000 policy limits due to the fact that the Association failed to preserve the issue for appeal. *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 764 S.E.2d 920 (Ct. App. 2014).

B. Damages Stipulation Prevented Developer from Recovering Excess Insurance Coverage for Excess Property Damage Costs

Developers constructed multiple condominium projects in South Carolina between 1992 and 1999 and were later sued by many of the projects' homeowners as a result of construction defects. Developers settled the suits for approximately $16.8 million. Subsequent to the settlements, Developers filed a declaratory judgment action seeking coverage for the settlement payments made from multiple insurers, including Insurer I and Insurer II. Insurer I provided Developer with CGL primary and excess coverage with a $1 million per occurrence limit and a $2 million products completed operations aggregate limit between July 1993 and August 1998. The excess policies provided a $10 million each occurrence limit. Insurer II provided excess umbrella policies from July 1998 to July 2002 with $10 million in coverage for each occurrence annual limit and annual aggregate limit. During the trial, both parties stipulated to the facts and damages and only presented coverage questions to the court.

Among other things, the parties stipulated to damages in the amount of $7.2 million in the event that there was an occurrence, where the damages at the respective

condominium projects resulted from water intrusion that met the definition of property damage. The parties also stipulated that the damage began within 30 days after the Certificate of Occupancy was issued for each building, and the damage progressed until repaired or until the settlement of the cases, whichever came first. The primary issues before the trial court were: (1) Did the property damage amount to an occurrence? and (2) In the event the Court found that there was an occurrence or occurrences, how should the $7.2 million in damages be allocated, via either joint and several or time on risk? During the first hearing on remand, the parties agreed that the stipulations "remained the status quo, a part and partial [sic] of [the] case."

In 2007, the trial court found coverage under the policies, that the stipulated loss was $7.2 million, that the condominium projects sustained property damage during the policy periods. The court entered judgment against Insurer I in the amount of $7.2 million, and held that because the $7.2 million in damages were to be allocated joint and several, there was no need to rule on whether Insurer II's excess policies were triggered. Insurer I appealed the trial court's order and the Supreme Court affirmed the trial court's finding of coverage, but reversed the trial court's finding that damages were to be allocated jointly and severally. The Court instead, imposed the time on risk methodology for allocating damages and remanded the issue of whether or not Insurer I had any liability. On remand, the trial court attributed roughly $1.6 million in damages to Insurer I based on the time on risk methodology. The trial court also found that Insurer II's excess policies were not triggered due to the fact that the "underlying CGL policies were not exhausted, and [Insurer II] was not precluded from litigating this issue by not appealing the 2007 judgment." The trial court also found that Insurer II's policies could only be triggered if "the underlying policies were exhausted either by paying the full limits available or by [Developers] funding the difference between a settlement for less than the full limits and the limits of the relevant policies." The court noted that "the excess policies would be triggered if the amount of the damages paid in settlement of the underlying cases, as calculated using the time on risk method, exceeded the limits of the underlying insurance for each policy period." The trial court noted that Insurer II paid around $16.7 million to settle the condominium lawsuits, where roughly $9.6 million was left over to repair "defective construction", but relied on the parties' stipulation that the covered damages amounted to $7.2 million. After applying a daily calculation of losses on each project, the trial court did not find that the excess coverage was triggered. Developers filed a motion to reconsider which the trial court denied.

On appeal, the Court of Appeals affirmed the trial court, holding that the stipulations the parties entered into were "clear, unambiguous, and binding on [the Developers]." The Court rejected the Developers arguments that payments made in other states should have been considered in determining whether the policy limits were exhausted, holding that Developers failed to submit any "information specifying the portions of these [other] payments that related to property damage as defined under the policies compared to the costs related to defective

construction, which were not covered under the policies." Finally, the Court noted that the trial court applied the correct methodology in calculating whether or not the policy limits had been exhausted, emphasizing that "all of the damage that happens in one policy year constitutes a single occurrence, and therefore progressive environmental damage creates a separate occurrence in each policy year." *Crossman Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506, 769 S.E.2d 453 App. (Ct. App. 2015).

C. Fourth Circuit Holds that Subcontractor's Insurer Had a Duty to Defend General Contractor as an Additional Insured

General Contractor subcontracted foundation, structural, and underpinning work to Subcontractor on a construction project in Washington, DC that involved 55 and 57 Bryant Street. The parties' subcontract required that Subcontractor name General Contractor as an additional insured on its commercial general liability policy. Subcontractor's Insurer issued an Endorsement that covered General Contractor as an additional insured only with respect to liability "for … property damage … caused in whole or in part by: 1. [Subcontractor's] acts or omissions or 2. The acts or omissions of those acting on [Subcontractor's] behalf; in the performance of [Subcontractor's] ongoing operations for [General Contractor in Washington, D.C.]." While Subcontractor was performing its work on the project, the common wall between 55 and 57 Bryant Street collapsed. General Contractor's insurer sent a letter to Subcontractor's Insurer notifying it of the collapse and "tendering … all claims that are being or will be asserted by [the Owner] and/or others." Subcontractor's Insurer did not respond to this letter. Subrogee then filed suit against General Contractor and others alleging negligence on behalf of all defendants as a result of the wall collapse, but did not name Subcontractor's insurer as a defendant. General Contractor subsequently filed a third-party complaint against Subcontractor and its owner, seeking indemnification for any and all liabilities, damages or fees resulting from Subcontractor's breach of contract. Subcontractor's insurer later denied coverage for the defense of General Contractor.

General Contractor subsequently filed a declaratory judgment action in the U.S. District Court of Maryland seeking a declaration that Subcontractor's Insurer had a duty to defend in the underlying lawsuit. Both parties filed cross-motions for summary judgment and the court ruled in favor of Subcontractor's Insurer.

On appeal, the Fourth Circuit reversed the district court, holding that under Maryland Law, Subcontractor's Insurer had a duty to defend General Contractor in the underlying lawsuit. The Court noted that the policy Endorsement explicitly provided coverage for the damages at issue. The Court also noted that the allegations in the underlying complaint created a "potentiality of coverage" because it was "undisputed that [Subcontractor] did the foundation work during the course of the renovations." *Capital City Real Est., LLC v. Certain Underwriters at Lloyds London*, 2015 WL 3606861 (4th Cir. 2015).

IV. Mechanic's Liens

A. Money Judgments Were Improper Remedy in Mechanic's Lien Foreclosure Suit

General Contractor contracted with Subcontractors for work on a development involving three tracts of land. Bank provided the construction loan for the Project to Owner. After two years, Owner stopped paying General Contractor and Subcontractors and defaulted on its loan payment. Owner executed a deed-in-lieu of foreclosure to Bank to one tract and obtained title to the other two tracts. General Contractor and Subcontractors filed mechanic's liens on all three tracts and also asserted claims for breach of contract and the Owner and foreclosure against the Bank. The trial court entered money judgments against the Bank.

On appeal, the Court of Appeals held that the trial court did not have the authority to enter money judgments against the Bank. The Court held that Bank "cannot be liable for money judgments because [General Contractor and Subcontractors] had no contractual relationship with [the Bank] or any other right to recover damages." The Court emphasized that "the exclusive remedy available to [General Contractor and Subcontractors] is foreclosure of their mechanic's liens." The Court remanded the remaining issues to the trial court. General Contractor and Subcontractors argued that foreclosure was not an issue due to the fact that Bank bonded off the mechanic's lien. The Court rejected this argument holding that the record only supported the fact that the bond "served to stay execution of money judgments" under S.C. Code 18-9-130 as opposed to the mechanic's lien under section 29-5-110. The Court also held that even if the bond were effective under 29-5-110, the foreclosure action must proceed as General Contractor and Subcontractors would still have to establish their right to foreclosure of their mechanic's liens. *Moorhead Constr. Inc. v. Enterprise Bank of S.C.*, 410 S.C. 386, 765 S.E.2d 1 (Ct. App. 2014).

B. Subcontractor that Crushed Concrete was a Laborer Under Mechanic's Lien Statute

Owner hired General Contractor to construct portions of a riverfront project in Rock Hill. Part of the work involved the demolition of an abandoned manufacturing facility, grading, and the installation of roads. After the demolition phase, there were large pieces of scrap concrete that still remained. General Contractor hired Subcontractor to crush the concrete into usable material. Subcontractor performed its work and subsequently filed mechanic's liens in the amount of $295,591 pursuant to S.C. Code § 29-5-20. Owner filed a petition to vacate the lien arguing that Subcontractor "did not provide labor, material, or supplies for the improvement of real property." Subcontractor sought foreclosure of its lien. The trial court vacated Subcontractor's liens and dismissed its foreclosure claim. The court found that Subcontractor was not a laborer as "it did not . . . do anything to improve the

real estate" or "improve the real property," and "[Subcontractor] did not meet the requirements for a mechanic's lien under section 29-5-20."

On appeal, the Court of Appeals reversed the trial court, holding that Subcontractor was a "laborer that performed work for the improvement of real estate." The Court emphasized that Subcontractor was a laborer because it "rented equipment and provided all the labor, fuel, and supervision necessary to remove the scrap concrete from the property – a component of the work necessary for the development project to continue – by crushing it into a material that went directly back into the project." The Court also noted that the "legislature has expanded the scope of the mechanic's lien statute to cover persons performing a component of the labor necessary to complete construction and development projects, even though the labor performed [does] not go into something which has attached to and become part of the real estate." *Greens of Rock Hill, LLC v. Rizon Commercial Contracting, Inc.*, 411 S.C. 152, 766 S.E.2d 876 (Ct. App. 2014).

C. Trial Court Did Not Err by Failing to Charge Jury on the Law Regarding an Unlicensed Home Builder's Licensing Requirement

Development Corporation and Individual ("Plaintiff") filed a mechanic's lien foreclosure suit in 2005 against individual defendant ("Defendant"). After a jury trial, Defendant was ordered to pay attorney's fees, costs and prejudgment interest. On appeal, Defendant argued that the trial court erred by denying his motions for directed verdict and partial summary judgment due to the statutory licensing requirements of S.C. Code § 40-59-30, prohibiting an unlicensed home builder from suing to enforce a mechanic's lien. Defendant also argued that the issue of Plaintiff's licensing should have been presented to the jury.

The Court of Appeals affirmed the trial court, holding that the denial of Defendant's summary judgment motion was not appealable, and because Defendant failed to renew his directed verdict motion at the close of the case, the issue was not preserved for appeal. As to the trial court's failure to charge the jury on the requirements of S.C. Code § 40-59-30, the Court held that Defendant failed to preserve his argument as to this issue on appeal because "[Defendant] requested only that the [trial] court revisit its rulings regarding Chapter 11 of Title 40 and made no arguments concerning Chapter 59 of Title 40." *Tri-County Dev., Inc., v. Pierce*, 2015 WL 1741920 Op. No. 2015-UP-205 (S.C.Ct.App. April 15, 2015).

D. S.C. Code § 29-7-10 Creates a First Lien on Funds for Laborers Regardless of Their Employer

General Contractor subcontracted certain industrial pipe work to Subcontractor on an industrial facility project in Beech Island, South Carolina. Subcontractor borrowed money from two separate lenders to fund its work and the lenders perfected security interests in Subcontractor's accounts receivable. Subcontractor obtained a labor force for its work under its subsidiary that had a labor union.

Labor Union had a plan whereby its employees could set aside a percentage of their wages for a vacation fund, which was paid out twice a year. After General Contractor suspended Subcontractor's work on the project, Subcontractor's subsidiary stopped making payments to the vacation fund. Subcontractor filed a breach of contract action against General Contractor and prevailed at arbitration, receiving an award of roughly $2 million.

General Contractor challenged the arbitration award in circuit court, which the trial court affirmed. Subcontractor also filed a third-party complaint against its creditors, which included both lenders and the employees who participated in the vacation fund. The two lenders asserted security interests in the arbitration award proceeds and sought a declaratory judgment that their security interests had priority over all other liens held by General Contractor's creditors. The employees asserted a first lien priority to the funds based upon S.C. Code § 29-7-10.

After the trial court affirmed the arbitration award, the parties settled for $1.8 million. The settlement provided that the trial court would order General Contractor to pay the funds into Subcontractor's attorneys' trust account while the court determined the priority of the creditors. The case was referred to a special referee, who ordered all of the funds to be disbursed to the lenders, except for $325,000. Both the lenders and employees filed cross-motions for summary judgment, claiming priority in the remaining $325,000. The special referee granted the lenders motion, holding that the employees were not entitled to a first lien under 29-7-10 because they were not directly employed by Subcontractor. The special referee also held that the employees were not entitled to a first lien because the monies had not come into the hands of the Subcontractor, and that they "did not have an independent claim to the unpaid vacation funds because the union brought a claim for the funds that had already been litigated and resolved."

On appeal, the Court of Appeals reversed the special referee's finding and remanded the case for trial, holding that 29-7-10 does not require that "laborers to be directly employed by the contractor who receives the money in order for them to be entitled to a first lien." The Court noted that 29-7-10 establishes "a first lien in favor of laborers who worked on the erection . . . of buildings regardless of their specific employer." The Court also emphasized that the employees were "not prohibited from establishing a first lien on [Subcontractor's] arbitration award merely because the $325,000 balance remains in [Subcontractor's] attorney's trust account pursuant to a court order." The Court held that the trial court's order outlined that Subcontractor "retained ownership of the funds even though the funds were held pending resolution of any claims asserted by [Subcontractor's] creditors because they could only be disbursed pursuant to further Order of the Court." The Court noted that "[t]he lien attached once [Subcontractor's] attorneys received the funds on its behalf, and section 29-7-10 gave the lien first priority." The Court also emphasized that "the Legislature did not intend the creation of a lien under section 29-7-10 to turn on how the contractor received the funds – whether physically, in its own bank account, or in the account of an escrow agent." Finally, the Court of

Appeals held that the employees had "independent claims regarding their entitlement to the funds regardless of whether the union also brought a claim." *C.R. Meyer & Sons Co. v. Custom Mech. CSRA, LLC*, 2015 WL 3609137 (Ct.App. 2015).

V. Miscellaneous

A. Supreme Court Upholds Public Service Commission's Approval for Increased Construction Costs on Nuclear Power Plant

In 2009, Electric Company obtained a base load review order authorizing it to construct a nuclear power plant. In 2012, Electric Company petitioned the Public Service Commission ("PSC") for a base load review order for updates to the capital cost and schedule for the project. As part of the order, Electric Company sought $283 million in capital costs to be recouped by its customers and a change order involving schedule changes and additional costs. After a hearing, the PSC approved $278.05 million of the capital cost increases and approved an updated construction schedule. The State Energy Users Committee and Sierra Club filed petitions for reconsideration which the PSC denied.

On appeal, the Supreme Court upheld the PSC findings holding that the S.C. Base Load Review Act "contemplates changes to an initial base load review order and provides the mechanism to accomplish such changes in section [S.C. Code §] 58-33-270, not section [S.C. Code §] 58-33-275" as argued by the State Energy Users Committee (the "Committee") and the Sierra Club. The Court emphasized that section 275 applies to situations where a "utility has already deviated from an existing base load review order and attempts to recoup costs from the deviation" whereas in this case Electric Company simply "sought to update the existing base load review order." The Court also rejected the Committee's and Sierra Club's arguments regarding a prudency evaluation of the project going forward at the time of the modification request under section S.C Code § 58-33-280(K), holding that the language of the BLRA contradicted this argument, in particular the language found within S.C. Code § 58-33-275(A). Finally, the Court rejected the Committee and Sierra Club's arguments that Electric Company failed to show that the increased costs were necessary, holding that the PSC's findings were "supported by substantial evidence in the Record." *S. Carolina Energy Users Comm. v. S. Carolina Elec. & Gas*, 410 S.C. 348, 764 S.E.2d 913 (2014).

B. S.C. Supreme Court Orders the Dismissal of *The Spriggs Group, P.C. v. Slivka*

Architect was hired to perform certain design and architectural services for Owner in connection with Owner's home. Owner paid Architectural Firm for half of the cost of its services at the start of the design process and agreed to pay the remaining funds after the project was completed. Owner subsequently fired

Architectural Firm but Architectural Firm continued to perform its services pursuant to the parties' agreement. Architectural Firm submitted Owner a bill for its services which led to Architectural Firm filing a mechanic's lien against the property due to Owner's non-payment. Subsequent to the trial, Architectural Firm made a motion seeking attorney's fees, costs and interest which the trial court granted and awarded $235,030.31 in attorney's fees and costs and $37,413.92 in prejudgment interest pursuant to S.C. Code Ann. § 29-5-10 and § 27-1-15. On appeal, Owner argued that Architectural Firm's amount of total recovery was limited to the amount of the cash bond he posted with the clerk of court under S.C. Code Ann. § 29-5-110. The Court of Appeals stated that S.C. Code Ann. § 29-5-110 did not apply because the provision "relates to the amount of the judgment and makes no mention of attorney's fees" and emphasized that S.C. Code Ann. § 29-5-10 specifically addresses the issue of attorney's fees in a mechanic's lien action. The Court reversed the trial court's award of attorney's fees and remanded the issue back to the trial court because the trial court's order was unclear "as to which fees were awarded under which statutory authority."

In February 2015, the Supreme Court granted certiorari and ordered that the Court of Appeals "depublish its opinion and assign the matter an unpublished opinion number." The Court also emphasized that the "opinion shall no longer have any precedential effect." *Spriggs Grp., P.C. v. Slivka*, 411 S.C. 636, 770 S.E.2d 392 (2015).

C. District Court Rules Plaintiff's Expert is Unqualified Based on Lack of Education and Experience

Decedent was fatally injured while performing work on an asphalt mixing device known as a pugmill. Decedent's personal representative ("Plaintiff") filed a product's liability action against the manufacturers of the mixing device and its motor ("Manufacturers"). Prior to trial, both the Plaintiff and Manufacturers filed motions in limine, which included the Manufacturers' motion to exclude the Plaintiff's expert witness. Manufacturer's argued that Plaintiff's expert did not have the requisite experience in asphalt plants and pugmills to offer an expert opinion in the case.

The District Court granted Manufacturer's motion to exclude Plaintiff's expert's testimony, holding that under the requirements of F.R.E. 702, the expert lacked the requisite education and experience to offer an opinion, and that his opinions were unreliable. The Court noted that Plaintiff's expert's "status as a licensed Professional Engineer is not, in and of itself, sufficient to qualify him as an expert" in the case. The Court also noted that Plaintiff's expert reached conclusions and offered opinions in his report that involved "topics more appropriately addressed by an electrical, mechanical, or industrial engineer." The Court also emphasized that he never took any courses that dealt with the "design, manufacture, or operation of an asphalt plant, or the design, manufacture, or operation of an interlock or e-stop." The Court also noted that Plaintiff's expert's deposition testimony revealed that he

had little "knowledge, skill or experience related to interlocks, e-stops, pugmills, asphalt plants, or even industrial equipment similar to the equipment involved in the accident in question."

The Court also found that Plaintiff's expert's opinions were unreliable as: (1) he "did not prepare a reasonable alternative design for his proposed interlock system or e-stop or otherwise subject his theory to testing of any kind; (2) he failed to publish any of his theoretical alternative designs or submitted them for peer review; (3) he failed to "point to any industry standards or literature that reference[d] his theoretical design modifications", and (4) his "opinions and conclusions [were] not based on or derived from any specialized knowledge in a relevant field and [had] not been subjected to any form of scientific or other testing." *Estate of Ravenell ex rel. Ravenell v. Pugmill Sys., Inc.*, 2014 WL 7146848 (D.S.C. December 15, 2014).

D. District Court Orders Plaintiff to Produce Settlement Agreement Because of its Relevance to Set-Off

Restaurant filed a Motion to Compel requesting Plaintiff to produce "any and all settlement agreements, memoranda of settlement, releases, or mediation agreements in relation to the settlement of" Plaintiff's claims against Settled Defendant. Restaurant argued that the settlement agreement was discoverable because: (1) The Fourth Circuit does not recognize a settlement privilege, rather the Court should focus on whether the "agreement is relevant and not unduly burdensome to produce"; (2) the settlement information was relevant to the issue of set-off, due to the applicability of joint and several liability; (3) "settlement information [would] allow it to better assess its liability and evaluate its risks in continuing the litigation," and (4) the settlement agreement was relevant in assisting whether or not Plaintiff's release of the defendant was given in good faith. Restaurant also argued that the settlement agreement was needed to "evaluate and determine any bias or prejudice that any [Settled Defendant] witness may have."

Plaintiff argued that: (1) the information was not reasonably calculated to lead to the discovery of admissible evidence; (2) would not be admissible at trial under FRE 408; (3) the information would only be relevant to set-off if a verdict were entered against Restaurant, and (4) Restaurant could "not show any legal interest in bringing a contribution claim, as this [was] not a bad faith, Mary Carter situation where the settlement agreement did not fully release [Settled Defendant] while purporting to do so." Additionally, Plaintiff argued that "the potential for settlement alone is in no way reasonably calculated to lead to the discovery of admissible evidence." Finally, Plaintiff argued that because he did not plan on calling any witnesses of Settled Defendant, no bias would exist.

The District Court granted Restaurant's Motion to Compel, holding that the settlement agreement was discoverable because it was relevant to the issue of set-off. The Court noted that "[i]t is undisputed that the information will be relevant

if in fact a judgment is entered against [Restaurant]." *Wilshire v. WFOI, LLC*, 2015 WL 1643456 (D.S.C. April 14, 2015).

E. District Court Awards Attorney's Fees Under the S.C. Residential Property Condition Disclosure Act

Purchasers bought a beach house from Sellers. As required under S.C. Code § 27-50-10 *et seq*., Sellers completed a Residential Disclosure Statement and indicated that they had no knowledge of "any leakage or any other problem with the roof and no knowledge of any water seepage, leakage, dampness or standing water, or water intrusion from any source in any area of the structure." After Purchasers bought the home, they discovered mold in two rooms in the basement while performing some remodeling work. Purchaser's contractor also found a small amount of mold behind a piece of molding. Purchasers subsequently filed suit against the Sellers alleging negligent misrepresentation, seeking damages and rescission of the sales contract. Sellers removed the case to federal court and moved for summary judgment, which the court granted via a written order. In May 2015, Sellers filed a motion for attorney's fees.

Sellers argued that they were entitled to attorney's fees based on a provision in the S.C. Residential Property Condition Disclosure Act, specifically S.C. Code § 27-60-65. The Court noted that the S.C. Court of Appeals has stated that "the attorney's fees provision of the Act applies even if it is not specifically cited in the complaint if the allegations implicate a claim based on the Act." (citing *Winters v. Fiddie*, 394 S.C. 629, 716 S.E.2d 316 (Ct.App. 2011)). Thus, the Court held that "[b]ecause the [Sellers] prevailed on the [Purchaser's] negligent misrepresentation claim that was based on the Disclosure Act, … the [Purchasers] have established a basis for attorney's fees under S.C. Code Ann. § 27-50-65." Purchasers argued that because Seller's failed to request attorney's fees in their answer to the complaint they were not entitled to them. Purchasers argued that the attorney's fees fell within the parameters of "special damages" which must be specifically pleaded under F.R.C.P. 9. The Court rejected this argument, holding that because S.C. Code Ann. § 27-50-65 contains mandatory language, similar to the S.C. mechanic's lien statute of S.C. Code Ann. § 29-5-10, Sellers were not required to specifically plead attorney's fees in their answer, where such fees may be "properly awarded under Rule 54." The Court relied on *Utilities Constr. Co. v. Wilson*, 321 S.C. 244, 468 S.E.2d 1 (Ct.App. 1996) in determining this issue.

Finally, the Court awarded $104,600 in attorney's fees and $6,167.94 in expenses to the Sellers, which was based on 209.2 hours of work performed by their attorney at $500 an hour. *Calland v. Carr*, 2015 WL 4394977 (D.S.C. July 16, 2015).

F. General Contractor's Cross-Claims against Subcontractors for Negligence, Breach of Contract, and Breach of Warranty Amounted to Equitable Indemnity Claims

In 2012, Lake Homeowner's Association ("HOA") filed an action against General Contractor and other defendants alleging construction defects in townhomes constructed by General Contractor. General Contractor filed cross-claims for equitable indemnity, negligence, breach of contract and breach of warranty against Stone Subcontractor and its owner (collectively "Stone Subcontractor") that performed various stone work on the project. Stone Subcontractor filed a motion for summary judgment on all of General Contractor's cross-claims which the trial court granted. The trial court held that General Contractor's negligence claim was an equitable indemnity claim and also held that General Contractor's equitable indemnity claim failed because General Contractor could not "be adjudged without fault because it failed to discover building code violations that resulted, in part, from [Stone Subcontractor's] faulty installation of stone and failure to install flashing." The trial court also granted summary judgment as to General Contractor's cross-claim for equitable indemnity due to the fact that General Contractor failed to discover various building code violations.

On appeal, the Court of Appeals affirmed the trial court's holding as to the negligence claim. The Court focused on General Contractor's allegations that as a result of the HOA's lawsuit it faced attorney's fees, costs and potential liability to the HOA. The Court stressed that General Contractor failed to show that it sustained its own damages as a result of any negligence suffered by Stone Subcontractor. The Court also stated that "the damages [General Contractor] seeks to recover resulted only from it potential liability to [HOA] and from the expenses it incurred in defending itself." The Court held that "the circuit court properly granted summary judgment on [General Contractor's] negligence cross-claim because it is not an independent cause of action from [General Contractor's] equitable indemnity claim." The Court reversed the trial court's granting of summary judgment as to General Contractor's equitable indemnity claim due to the fact that "[General Contractor] presented a question of fact as to whether it was at fault for the alleged construction defects" because there was conflicting evidence as to whether or not General Contractor was at fault, since a person may not recover for equitable indemnity when they are at fault. *Stoneledge at Lake Keowee Owners' Assoc., Inc. v. Clear View Constr., LLC*, 2015 WL 4925497 (S.C. Ct.App. August 19, 2015).

In the same case, Stone Subcontractor and two other Subcontractors' (collectively "Subcontractors") filed motions for summary judgment as to General Contractor's breach of contract and breach of warranty claims, which the trial court granted. The trial court held that the breach of contract and breach of warranty claims were disguised equitable indemnity claims, holding that "the claims stem from the potential liability [General Contractor] faces from the claims brought against it by [HOA] because [General Contractor] is not alleging personal injury or property

damage as to itself." The trial court also granted summary judgment in favor of Subcontractors on General Contractor's contractual indemnity claim, holding that General Contractor "offered no evidence that the contracts applied to the … Project."

In a separate opinion, the Court of Appeals affirmed the trial court, holding that General Contractor's cross-claims against Subcontractors for breach of contract and breach of warranty were merely disguised as equitable indemnity claims. The Court based its reasoning on the fact that the damages alleged in General Contractor's cross-claim only amounted to the costs it incurred in defending against the HOA's lawsuit as opposed to any breaches by the Subcontractors. The Court also affirmed the trial court's granting of summary judgment as to General Contractor's cross-claim for contractual indemnity, holding that the record and evidence did not present any factual issues as to whether the relevant subcontracts contained contractual indemnity provisions. *Stoneledge at Lake Keowee Owners' Assoc., Inc. v. Builders FirstSource-Southeast Group*, 2015 WL 4925717 (S.C. Ct.App. August 19, 2015).

G. Court of Appeals Suggests that Building Official Had a Duty to Comply with the Building Code

Building Official issued a stop work order as a result of work that was being performed on a local restaurant without a construction permit. Building Official was subsequently terminated by Town as a result of her issuance of a stop work permit and later filed a wrongful termination suit against Town. At trial, Town moved for a directed verdict and judgment notwithstanding the verdict, arguing that her discharge was not in violation of public policy, and also arguing that under South Carolina law, a government employee fired for "exercising discretionary authority cannot assert a claim for public policy discharge." The trial court denied both motions.

On appeal, the Court of Appeals affirmed the trial court. As to the issue of whether Building Official was required to issue the stop work order, the Court stated "[b]ecause the construction at the … Restaurant violated the building code, the law required [Building Official], … to take action to enforce compliance with the code." Notably, the Court implied that the Building Official had a duty to enforce the building code, stating that "[i]n order to carry out her legal duty to enforce compliance with the building code, [Building Official] issued a stop-work order as she was required to do by law." *Donevant v. Town of Surfside Beach*, 2015 WL 5027593 (S.C. Ct.App. August 26, 2015).

VI. Legislation

A. Gov. Haley Signs Legislation Granting Sales Tax Exemptions on Construction Materials for Non-Profits

On June 15, 2015 Governor Nikki Haley signed H 3568 into law. This legislation grants tax exemptions on certain construction materials used by non-profits that build or repair homes for low-income families. The law goes into effect on January 1, 2016 and will largely benefit the state's largest non-profit home builder, Habitat for Humanity.