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Court of Appeals, State of Colorado Colorado State Judicial Building 2 E. 14th Ave, Denver CO 80202/(303) 861-1111	
Appeal from the District Court, Douglas County, Colorado Honorable Paul King, Case No. 04CV1638	
Appellant/Cross Appellee: D.R. HORTON, INC.-DENVER d/b/a D.R. HORTON-TRIMARK SERIES, a Delaware Corporation, v. Appellees-Cross Appellants: B&D FOUNDATIONS, INC.; BISCHOF & COFFMAN CONSTRUCTION, LLC; KIOWA CREEK CONSTRUCTION, INC.; SNOW'S CONCRETE FORMING, INC.; and SPRIGG CONSTRUCTION, INC.	▲ COURT USE ONLY ▲ Case Number: 07CA2081
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AMICUS BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION AND AMERICAN SUBCONTRACTORS ASSOCIATION COLORADO

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I. STATEMENT OF INTEREST

The American Subcontractors Association is a national organization representing the interests of approximately 5,000 subcontractor member businesses in the United States.[1] Founded in 1966, the ASA is a non-profit trade association that leads and amplifies the voice of trade contractors to improve the business environment in the construction industry and to serve as stewards for the community. The American Subcontractors Association Colorado is a component chapter of the ASA National, representing approximately 130 subcontractors and suppliers located in the State of Colorado. The American Subcontractors Association National and Colorado are hereafter referred to as the "ASA."

The ASA's primary focus is the equitable treatment of subcontractors in the construction industry. The ASA acts in the interest of all subcontractors by promoting legislative action and by appearing as Amicus Curiae in significant legal actions that affect the construction industry at large. Subcontractors perform approximately 80-90% of the work on construction projects. The issues raised by the Amicus Homeowners in the instant appeal affects ASA's member companies as well as thousands of

[1] Pryor Johnson Carney Karr Nixon, P.C., the law firm representing the ASA Amicus, defended subcontractor and third-party defendant J&K Pipeline

Colorado residents who are gainfully employed by these companies. The financial survival of ASA's member companies depends on the reasonable, fair, and consistent adjudication of the rights of subcontractors.

II. ISSUES TO BE BRIEFED

The second of the four issues that the appellant D.R. Horton, Inc. ("Horton") asked this court to review is the following:

> Did the district court abuse its discretion in excluding evidence of the amounts of [Horton's] settlement with the Plaintiff homeowners' association ("Association") attributable to the Subcontractors, where those amounts are relevant to [Horton's] indemnity damages and the court's interest in maintaining its trial calendar did not justify the exclusion of evidence?

The amicus supporting Horton, Homeowners Against Deficient Dwellings ("Homeowners"),[2] described the issue before the court as:

> Whether the trial court's rulings, particularly its refusal to admit into evidence Horton's allocated settlement with the plaintiff association, undermine Colorado's strong public policies requiring enforcement of valid contractual indemnity claims and, in doing so, create powerful disincentives for residential developers to settle innocent homeowners' construction defect claims before trial?

Inc., in the trial court. J&K Pipeline settled with appellant D.R. Horton, Inc. before trial and is not a party to this appeal.

[2] Counsel representing the amicus Homeowners represented the plaintiff St. Andrews Homeowners Association in the instant case. This case and D.R. Horton v. AAA Waterproofing, Inc., 06CA1874 (Oct. 9, 2008), involved settlements between the homeowners and the developer/general contractor, with the developer/general contractor then attempting to recover the settlement amount from subcontractors who were not allowed to participate in settlement negotiations.

The Homeowners' amicus brief then argues that this court should extend Burlington Northern Railroad Co. v. Stone Container Corp., 934 P.2d 902 (Colo. App. 1997) (in a two-party indemnity case, indemnitee may pursue claims against single indemnitor following indemnitee's settlement of underlying claims), to multi-party construction defect claims. The issue that the amicus Homeowners address was not appealed by Horton and thus is improper for consideration on appeal.[3]

III. ISSUE ADDRESSED BY AMICUS ASA

This amicus brief responds to the amicus Homeowners' contention that under Colorado law a construction contract's indemnity language obviates any need for a general contractor or other party seeking indemnity to prove at trial the causation and liability of the subcontractor or other party from whom it seeks indemnity. Specifically, the amicus Homeowners ask this court to unreasonably expand and apply legal reasoning articulated in a two-party railroad indemnity case to multi-party construction defect litigation.

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[3] The district court in the instant case ruled that Burlington Northern did not apply because: (1) Burlington Northern was factually distinguishable; and (2) the issue of indemnification was not ripe here until Horton proved to the jury the existence of at least one of the three triggering events contained in the indemnification clause. Record volume 8, at pages 60-66. Horton did not appeal the ruling.

As demonstrated in this brief, the framework proposed by the amicus Homeowners is manifestly inappropriate to multi-party construction defect litigation and would represent an unwarranted expansion of Colorado law, to the detriment of Colorado's numerous subcontractors and suppliers, who are often in a much weaker economic position than the contractor or developer who insisted on the indemnity clause in the first place.

A reversal in this case would further have a direct and profoundly negative impact on the ability of the ASA's members to conduct their subcontracting businesses with the most basic of economic protections. This, in turn, will increase prices, reduce competition, and limit economic growth to the detriment of all Colorado residents.

IV. STATEMENT OF THE CASE

The ASA incorporates the appellees' ("the subcontractors") answer brief's statement of the case.

V. SUMMARY OF ARGUMENT

The amicus Homeowners and the developer/general contractor, Horton, reflect a larger problem raised by the implications of the holding the Homeowners urge: neither Colorado law nor good public policy supports the conclusion that a non-negotiable "take it or leave it" subcontract indemnity clause can be wielded as a tool to not only force subcontractors to pay for

damages caused by others, but to deprive them of the right to defend their work. In response to construction project lawsuits many general contractors will seek to join their subcontractors as defendants. For every defect claimed, the general contractor uses C.R.C.P. 14(a) (third-party complaints) to attempt to pass through responsibility to a multitude of subcontractors.

Typically, the subcontractor is required by contract to adhere to architectural or engineering designs or specifications provided to it (whether by the owner, architect, design-build contractor, or general contractor on behalf of the owner). If the plans are defective or unworkable, it is not the subcontractor's responsibility to pay to correct the defects. Similarly, if the work is damaged by another (whether directly or through improper maintenance), such damage is not the responsibility of the subcontractor.

The position urged by the amicus Homeowners would, if its reasoning is adopted, undermine Colorado law by exposing all construction subcontractors to damages not caused by them but that may have been caused by the party being indemnified – the general contractor.

This court should affirm the district court decision. If this court decides to expand this appeal beyond the issues raised by the Appellant, and reach the issue raised by the amicus Homeowners -- the extension of Burlington Northern to multi-party construction defect claims -- then this

court should pronounce a policy that prevents unjustifiable destruction of subcontractor rights and that prohibits general contractors like Horton from being rewarded for requiring subcontractors to sign indemnity clauses that are the equivalent of adhesion contracts.

VI. ARGUMENT

The amicus Homeowners' brief endorses efforts to convert a mechanism used in railroad cases into a means to: (1) maximize property owner's recovery in construction cases, while (2) removing, at innocent subcontractors' expense, a general contractor's need to prove the liability of the various subcontractors from which the general contractor is demanding indemnity. Lawsuits for construction defects typically assert a combination of concerns of varying legitimacy, but which almost always include a component of comparative fault on the part of the property owner (who may have neglected, for example, to perform routine maintenance) and the architect and general contractor.

When sued for a myriad of construction defects, general contractors tend to reflexively join into the suit all subcontractors who may have worked on the project, regardless of whether the subcontractor's work is implicated in the homeowners' claims. A general contractor (like Horton in this case) targets as many insurance policies as there are subcontractors to maximize

recovery from the subcontractors and minimize its own contribution toward settlement with the owner.

General contractors maintain that they join all of the subcontractors at the outset of a case because trial judges, with overcrowded dockets, treat multi-party construction defect litigation no differently than a two-party personal injury action. As a consequence, trial courts require that cases go to trial within a year of filing; deadlines to join parties, endorse experts and close discovery all depend on how soon the case can be scheduled for trial. General contractors apparently believe that if they do not use the shot-gun approach of joining every single subcontractor at the beginning of the case, then courts will not allow the addition of parties, given the short time frame from the "at issue" date to trial.[4]

This practice is illustrated well, if sadly, by Horton's actions in this case, where it sued over two dozen of its subcontractors, many *for the same defect* at the St. Andrews project. For example, Horton blamed the plumber, the roofer, the carpenters and the heating subcontractor for a single defect to the asphalt roof and gutter system.

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[4] C.R.S. § 13-80-104(1)(b)(II) provides that a general contractor may file a separate construction defect lawsuit for claims such as indemnity or contribution from subcontractors within 90 days after settlement or entry of judgment in the underlying suit brought by homeowners. The statute is not

Colorado law, however, has *not* dispensed with the need to prove causation in the prosecution of third-party claims against the subcontractors. And there is no reason to allow such dispensation under the guise of Burlington Northern.

A. The Burlington Northern framework is unworkable for a multi-party construction defect case.

The amicus Homeowners urges adoption of Burlington Northern, 934 P.2d 902, for the proposition that when dealing with the prosecution of an indemnity claim in multi-party construction defect cases, the subcontractor's causation should be irrelevant. The amicus Homeowners suggests that Burlington Northern's "policy of encouraging settlement [is] equally applicable to claims involving multiple indemnitors." Amicus brf at 4.

Burlington Northern held that when an indemnitor refuses its obligations to indemnify the indemnitee and the indemnitee settles the underlying claim, the indemnitee need only prove that the amount of settlement was reasonable in order to recover from the indemnitor. Burlington Northern relied on two other railroad cases, Burlington Northern, Inc. v. Hughes Bros., Inc., 671 F.2d 279 (8th Cir. 1982), and Missouri Pacific R.R. v. Kansas Gas & Electric Co., 862 F.2d 796 (10th Cir. 1988). Each of

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mandatory, and general contractors continue to file third-party claims against subcontractors at the beginning of the plaintiff homeowners' lawsuit.

these railroad cases involved a single injured party, a single indemnitor, a negotiated indemnification agreement between the railroad and the landowner, and no culpability on the part of the indemnitee. Simply put, Burlington Northern did not, and had no reason to, consider the degree of fault, if any, among a group of indemnitors like the subcontractors here, and the subcontractors one typically finds in construction defect cases. The Homeowner Group cites to Crane Constr. Co. v. Klaus Masonry, 71 F.Supp.2d 1125 (D. Kan. 1999), for the proposition that the Burlington framework is just as applicable in a multi-party construction defect case as it is in a railroad case. However, Crane did not involve multiple trades being blamed for the same alleged defects.

In contrast, City of Westminster v. Centric-Jones, 100 P.3d 472 (Colo. App. 2003), held that when a claimant targets more than one subcontractor for defects, the degree of causation must be apportioned among the responsible parties. Allocation or apportionment requires an analysis of causation; thus, Burlington Northern cannot apply. See also D.R. Horton v. D&S Landscaping, 2008WL2522232 (Colo. App.) (general contractor required to present evidence of defective work or negligence by subcontractor in order to reach duty of indemnification).

B. It is bad public policy to allow general contractors such as Horton to pass on their responsibility for construction oversight to non-negligent subcontractors.

Anti-indemnity statutes exist to discourage unfair risk-shifting. Including Colorado, thirty-eight states have enacted laws prohibiting construction businesses from contractually transferring the consequences of their own negligence to others. (See subcontractors chart of anti-indemnity statutes, American Subcontractors Association (2005) at http://asaonline.com/pdfs/antiindemnitychart.2005.04.20.pdf).

In 2007, the General Assembly adopted C.R.S. § 13-21-111.5(6), which bans construction agreements that require a party to indemnify another person against liability for damage caused by the negligence or fault of the indemnitee (the general contractor) or any third-party under the indemnitee's control or supervision.[5] The effect of these laws is to void, as contrary to public policy, agreements in construction contracts that attempt to indemnify a person, such as a general contractor or developer, against the consequences of its own negligence. Matthew Bender & Company, Inc. (2006) 4-13 Construction Law § 13.17[2] ("Construction Law").

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[5] The 2007 statutory provision does not apply to this case because the indemnification provisions in the subcontractors' contracts were entered into before 2007.

Nationally, courts recognize several public policy objectives served by anti-indemnity statutes. First, the statutes ensure that players in the construction industry maintain an incentive to provide a safe workplace. 4-13 Construction Law at § 13.17[2b]. Allowing a contractor to contractually free itself from liability for its own negligence reduces its incentive to safely operate in the workplace. Id. Second, the statutes combat overreaching by general contractors and developers in the construction industry where small subcontractors and suppliers are often powerless to negotiate an allocation of risk through indemnity agreements. Id. These "public policy goals of enhancing safety and eliminating 'unconscionable' contract provisions outweigh the normal right of private individuals to contract as they see fit." Id.

ASA represents a constituency whose businesses implicate both of these considerations. The norm in the construction industry is that general contractors (or developers) are responsible for overseeing the construction work and maintaining order and safety on the jobsite. Individual subcontractors, often just one of many subcontractors working concurrently on the same project, are not in the position of the general contractor to oversee the job due to the limited and specialized nature of their trade or role in the project. Subcontractors are focused on perfecting their discrete area of

work and, as much as possible, staying out of the way of other contractors on the project.

The amicus Homeowners' effort to extend Burlington Northern to construction litigation would remove an important incentive for general contractors and developers to take their oversight and safety obligations seriously. In most cases, the party best able to control the risks associated with construction is the general contractor or developer. The Homeowners urge this Court to expand the limitation in Burlington Northern to construction cases so that when a general contractor seeks indemnification from multiple subcontractors, a subcontractor may only contest the reasonableness of the settlement between the homeowners' association and the general contractor. But adoption of Burlington Northern would be contrary to Colorado's anti-indemnity statute and would create a disincentive for indemnitees (general contractors and developers) to exercise due care.

Moreover, subcontractors are usually in the weaker bargaining position in construction contract negotiations. Disparate bargaining power is an indication of a contract of adhesion. Jones v. Dressel, 623 P.2d 370 (Colo. 1981). Subcontractors are often faced with the decision to sign an

entire subcontract, full of onerous terms, or lose the job. Horton,[6] for example, vividly illustrated this undesirable (and unfortunate) wielding of its economic might when it rejected a subcontractor's request to negotiate the indemnification language and withheld payment from another subcontractor who had performed work for Horton (and expended its own money to do so) on the project until the subcontractor signed Horton's contract without change. E-record@LNFS # 13045648 and # 13231894. Allowing a general contractor to recover under an indemnification clause in a subcontract without proof that a subcontractor caused damages only increases the disproportionate power of the general contractor.

VII. CONCLUSION

When a general contractor seeks indemnification from multiple subcontractors, the amicus Homeowners wants to limit the subcontractors to contesting only the reasonableness of the settlement between the homeowners' association and the general contractor. Not only is the Homeowners' request procedurally improper (given that not even Horton has assigned error to the trial court on this issue), but it is a legally, factually, and equitably meritless attempt that should be denied as a matter of law and good public policy. ASA, and Colorado's many subcontractors and related

[6] Horton's website identifies it as the largest homebuilder in the country.

businesses who depend for their livelihood on fair construction contracts, fair application of the law, and the right to defend their work urge the court to reject the Homeowners' effort.

Respectfully submitted November 13, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2008, the original and five copies of the foregoing **AMICUS BRIEF OF AMERICAN SUBCONTRACTORS ASSOCIATION were filed via hand delivery with the Clerk of the Colorado Courts of Appeals and served by U.S. Mail service, postage prepaid, to the following:**

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