

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy

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SC Court of Appeals

Appellate Case No. 2021-001050
Common Pleas Case No. 2016-CP-10-03783

The Retreat at Charleston National Country Club Home Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime.....Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, Individually; C.R. Campbell Construction Co., Inc.; Colin Campbell Construction, LLC; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollo Architecture; JC Construction d/b/a JC Construction, LLC a/k/a JC Contractors a/k/a JC Contractors, LLC; Soto & Vasquez Construction, LLC a/k/a Costa De Oliveira Construction, LLC a/k/a Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveira; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Colleen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin; Carlos Marroquin and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva Garcia Roofing, LLC; Givair De Caris; and Mario Salgado.....Defendants,

Builders FirstSource-Southeast Group, LLC.....Third-Party Plaintiff, Appellant,

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry.....Third-Party Defendants,

Of which Palmetto Trim and and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the.....Respondents.

RESPONDENT AC CONSTRUCTION, INC.'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the circuit court correctly found that BFS's contractual indemnity cross-claim against AC Construction is barred by collateral estoppel where BFS had a full and fair opportunity to litigate identical issues involving the same contractual indemnity language in three prior cases that have not been reversed on appeal.

- II. Whether the circuit court correctly found the clear and unequivocal standard applies to BFS's contractual indemnity claims against AC Construction where BFS's contract purportedly requires AC Construction to defend BFS regardless of ultimate liability and where BFS's pleadings plainly seek indemnity for any liability BFS is found to have to others.

- III. Whether the circuit court correctly found that the indemnity language of BFS's master subcontract with AC Construction are neither clear nor unequivocal, violate public policy, violate *S.C. Code* § 32-2-10, and consequently fail as a matter of law.

- IV. Whether the circuit court erred in failing to sever unlawful BFS indemnity provisions when doing so would have merely left a disintegrated fragment of the parties' contract.

STATEMENT OF THE CASE

This is an appeal from the circuit court's grant of partial summary judgment on Builder FirstSource-Southeast Group, LLC's (hereinafter "BFS") cross claim for contractual indemnity against Respondent AC Construction on July 7, 2021. **R. Vol. I, pp. 71-83, Circuit court order July 7, 2021.** As to AC Construction, this case centers on the trial court's interpretation of the indemnity provision in a "Master Subcontract Agreement" entered into between AC Construction and BFS on or about November 7, 2007, and its determination that the contractual indemnity provision is not enforceable and that BFS is collaterally estopped from arguing otherwise. **R. Vol. I, pp. 71-83, Order.**

Plaintiffs¹ commenced this complex construction defect action on July 22, 2016 in the Charleston County Court of Common Pleas. **R. Vol. I, pp. 174-186, Complaint.** The general allegations are that alleged construction defects in the design, development, construction, and sale of a series of townhomes at the Retreat at Charleston National has resulted water intrusion into the interior of the buildings requiring repair. **R. Vol. I, pp. 174-186, Complaint.** The underlying pleadings were amended a series of times as new parties were added to the case.

On May 1, 2017, Plaintiffs filed an Amended Complaint naming BFS as a direct defendant. **R. Vol. I, pp. 187-207, Amended Complaint.** The general allegations against BFS are that it provided materials and/or labor, including but not limited to framing, windows, doors, and all related components at all or a portion of the project. **R. Vol. I, pp. 187-207, Amended Complaint.** Against BFS, Plaintiffs allege negligence/gross negligence and breach of implied warranties. **R. Vol. I, pp. 187-207, Amended Complaint.**

¹ The Retreat at Charleston National Country Club Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime.

In its Second Amended Complaint, Plaintiffs allege direct claims against AC Construction and BFS for negligence/gross negligence and breach of implied warranties. **R. Vol. I, pp. 248-274, Second Amended Complaint.** In its Answer to Plaintiffs' Second Amended Complaint, BFS asserts cross claims against AC Construction for contractual indemnity, breach of express warranties, breach of implied warranties, negligence/gross negligence, and breach of contract. **R. Vol. I, pp. 275-308, BFS Answer to Plaintiffs' Second Amended Complaint.** BFS's allegations against AC Construction are derived from Plaintiffs' allegations against BFS.

Plaintiffs amended the Complaint two more times, and BFS asserted the same cross claims against AC Construction. **R. Vol. II, pp. 372 – 413, BFS's Answer to Plaintiffs' Fourth Amended Complaint and Cross Claims.** AC Construction timely answered BFS's claims and raised relevant affirmative defenses. **R. Vol. II, pp. 495-511, AC's Answer to BFS's Answer to Plaintiffs' Fourth Amended Complaint and Cross Claims.**

On October 29, 2020, AC Construction filed its motion for summary judgment as to BFS's cross claims. **R. Vol. V, pp. 1205-1207, AC Motion.** By formal order entered July 7, 2021, the circuit court granted AC's motion except as to BFS's equitable indemnity claims. **R. Vol. I, pp. 71-83, Order.** BFS filed a motion to alter or amend on July 19, 2021 which was denied by Form 4 order entered August 23, 2021. **R. Vol. I, pp. 128-130, Form 4.**

On September 22, 2021, BFS filed its Notice of Appeal. **Notice.**

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), *SCRPC*; *see also Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

Under Rule 56(c), *SCRPC*, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct.App.2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(c), *SCRPC*; *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990).

STATEMENT OF THE FACTS

The subject development is the Retreat at Charleston National Country Club. **R. Vol. II, pp. 343-371, Fourth Amended Complaint.** It is a thirty-one building townhome community in Mount Pleasant, South Carolina. **R. Vol. II, pp. 343-371, Fourth Amended Complaint; R. Vol. I, pp. 71-83, Circuit court order dated July 7, 2021.** BFS holds an unlimited commercial general contractor's license with the South Carolina Labor Licensing & Regulation. **R. Vol. I, pp. 71-83, Circuit court order dated July 7, 2021.** As part of its work at the project, AC Construction executed a BFS prepared Master Subcontractor Agreement, dated November 7, 2007, bearing Version – 5/17/06. **R. Vol. I, pp. 71-83, Circuit court order dated July 7, 2021;**

R. Vol. VI, pp. 1477-1488, BFS contract. AC Construction performed framing labor only at certain buildings. **R. Vol. I, pp. 71-83, Circuit court order dated July 7, 2021.** The framing materials were provided by BFS. **R. Vol. I, pp. 71-83, Circuit court order dated July 7, 2021.** BFS provided superintendents to oversee, inspect, and manage AC Construction's work. **R. Vol. I, pp. 71-83, Circuit court order dated July 7, 2021.** In reply to Plaintiffs' underlying construction defect allegations, BFS seeks to recover from AC Construction full contractual indemnity for "any liability BFS is found to have to the Plaintiffs or others in this action," including attorney's fees, under the terms of BFS's Master Subcontractor Agreement with AC Construction. **R. Vol. VI, pp. 1477-1488, BFS Contract; R. Vol. I, pp. 71-83, Circuit court order dated July 7, 2021; R. Vol. II, pp. 372 – 413, BFS pleadings.**

ARGUMENT

I. The circuit court correctly held that BFS's claim for contractual indemnity against AC Construction is barred by the doctrine of collateral estoppel.

Under South Carolina law, collateral estoppel prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues. *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008).

Here, the circuit court correctly held that BFS “actually litigated” the legal efficacy of the contractual indemnity language found in the BFS/AC Construction “Master Subcontract Agreement” bearing “Version – 5/17/06” on three prior occasions,² that the same issues were directly determined, and that the issues decided were necessary to support the prior judgments.

In the *MI Windows* matter, the Honorable Clifton Newman directly determined that identical BFS contractual indemnity language found in the AC Construction subcontractor agreement at bar was “confusing, conflicting, and neither clear nor unequivocal” and that the purported indemnity language fails as a matter of law. Similarly, in the *Six Fifty Six* matter the Honorable Roger M. Young expressly adopted Judge Newman’s analysis and legal conclusions articulated in the *MI Window* matter and found identical BFS’s contractual indemnity language fails as a matter of law. Then again, in the *Pavic* matter, BFS made the same arguments being advanced here: **that BFS is only seeking indemnification against liability for loss or damage arising from a subcontractor’s negligence.** In accord with Judge Newman and Judge Young, Judge McCoy held the same BFS contractual indemnity language fails as a matter of law and is not enforceable.

In this case, BFS’s allegations against AC Construction are plainly derived from Plaintiffs’ direct claims against BFS. Despite BFS denying adverse claims, BFS is now attempting to transfer all risk to its labor only subcontractors, including AC Construction, through the fine print in its master subcontractor agreement that three circuit court judges have found to be confusing at best, deceptive at worst, and that fail as a matter of law.

² Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al, Case No. 2018-CP-08-02547, Appellate Case No. 2020-000415 (“MI Windows”), Six Fifty Six Onwers Association, Inc., et al. v. Winsor South, LLC, et al., Case No. 2016-Cp-10-03455, Appellate Case No. 2020-001328 (“Six Fifty Six”), and Pavic v. Carolina Cottage Homes, LLC, et al., Case No. 2019-CP-10-00772, Appellate Case No. 2021-000290 (“Pavic”).

BFS's argument that collateral estoppel does not apply because the *MI Windows, Six Fifty Six*, and *Pavic* trial court orders are on appeal is wholly without merit. The weight of authority supports AC Construction's position that a trial court order on the merits is a final judgment for purposes of invoking collateral estoppel. *See, e.g., Hapgood v. City of Warren*, 127 F.3d 490 (6th Cir. 1997) ("The pendency of an appeal, however, does not prohibit application of claim preclusion. The prior state court judgment remains 'final' for preclusion purposes, unless or until overturned by the appellate court."); *Planned Parenthood of the Columbia/Willamette, Inc. v. Bray (In re Bray)*, 256 B.R. 708, 711 (Bankr. D. Md. 2000) (internal citations omitted) ("pendency of an appeal does not affect the finality of a judgment for purposes of res judicata or collateral estoppel."). As of this writing, the *MI Windows, Six Fifty Six*, and *Pavic* trial court orders have not been reversed on appeal.

BFS cites no authority for its position that collateral estoppel cannot be invoked until appellate review of a trial court order is exhausted; therefore, this BFS argument should be considered abandoned. *See* Rule 208(b)(1)(E), *SCACR* (requiring the citation of authority in the argument portion of an appellant's brief); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal).

II. The circuit court correctly held that the clear and unequivocal standard articulated in *Concord and Cumberland* applies to BFS's contractual indemnity claim against AC Construction and that the contractual indemnity language fails as a matter of law.

a. BFS is bound by its pleadings that it seeks "full contractual" indemnity for "any liability" against AC Construction.

The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of,

or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible. *See Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015).

Here, despite BFS's argument that it seeks "only" indemnity for AC Construction's negligence, as the circuit court correctly found, the plain language of BFS's pleadings seek **full contractual indemnification** from AC Construction for **any liability** BFS is found to have to Plaintiffs or others in this action. Settled precedent binds BFS to its operative pleadings³ seeking "full contractual indemnity" for "any liability." Relevant excerpts are as follows:

137. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omission, negligence, gross negligence, and/or representations of the Cross Claim Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending the Plaintiffs' claims.

138. That BFS is entitled to **full contractual and common law indemnification** from Cross Claim Defendants, **for any liability** BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for negligence, as aforesaid, on the part of the Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, **its attorneys' fees**, costs, and other expenses incurred in defending this action, and **further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs** or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

BFS may not now take a contradictory position from the statements in its pleadings and argue that it "only" seeks contractual indemnity for AC Construction's own negligence.

³ BFS's answer to Fourth Amended Complaint and Cross Claims

b. The contractual indemnity language in BFS's contract with AC Construction fails as a matter of law and violates public policy.

The clear and unequivocal standard applies whether BFS is seeking indemnification for its sole or concurrent negligence. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct. App. 2018). When an indemnity clause purports to relieve an indemnitee from the consequences of its own negligence, South Carolina case law requires strict construction of the clause. *Id.*, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018). South Carolina appellate courts have never upheld an indemnity clause as "clear and unequivocal." *Id. at* 424 S.C. 639, 658, 819 S.E.2d 166, 176 (Ct. App. 2018).

The South Carolina anti-indemnity statute states in part that "a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promise . . . against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable." *S.C Code* § 32-2-10. In determining the parties' intentions, the court must read the contract as a whole. *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003).

Here, the circuit court correctly held that the contractual indemnity language in BFS's contract with AC Construction is confusing at best, contradictory at times, arguably misleading, and therefore neither clear nor unequivocal. To fully appreciate the complexity and confusing,

burdensome nature of the BFS / AC Construction contractual indemnity provision⁴, it is produced in full below:

SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION

⁴ Additional indemnity provisions are buried in the fine print of "Section 3. Warranty" and "Section 8. Payment to Subcontractor."

OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

As the circuit court correctly held, Paragraph 1 of the "Section 5. Indemnity" clause contemplates indemnification for all attorney's fees incurred in the defense of BFS, attempts to shift liability to the subcontractor for "ANY AND ALL CLAIMS" resulting from property damage "BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR . . ." Paragraph 1

irreconcilably conflicts with Paragraph 2 where BFS's contract purportedly requires AC Construction to indemnify BFS **"REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INEMNITEES."**

Paragraph 2 clearly violates *S.C. Code* § 32-2-10 because it could require AC Construction to indemnify BFS for BFS's sole negligence. Then, at Paragraph 3, BFS's contract contains a purported **"DUTY TO DEFEND" "REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR . . ."** Paragraph 3 likewise plainly violates *S.C. Code* § 32-2-10 because it allegedly requires AC Construction to defend BFS even if BFS were solely liable for causing the loss that gives rise to the claim for defense.

Settled precedent requires the contract be read as a whole. In doing so, it is evident the various indemnity and duty to defend terms drafted by BFS are confusing at best, contradictory at times, and arguably misleading just as three circuit court judges have found. Importantly, it is undisputed the BFS is a licensed general contractor. By virtue of its license, BFS is liable for all acts of unlicensed subcontractors as a matter of law. *See S.C. Code* § 40-11-270 (E) (stating "[t]he licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee."). At the very least, BFS is concurrently negligent for its subcontractor's alleged negligence thereby invoking the "clear and unequivocal" standard.

Because the "Section 5. Indemnity" language of BFS's contract with AC Construction plainly fails to meet the clear and unequivocal standard and violates public policy, the orders of the circuit court should be affirmed.

c. BFS's claim for attorney's fees are claims for "damages" and the *Concord and Cumberland* standard and S.C. Code § 32-2-10 still apply.

Recoverable damages may include attorney's fees when so provided by contract or statute. *See Rimer v. State Farm Mut. Auto. Ins. Co.*, 248 S.C. 18, 148 S.E.2d 742 (S.C. 1966); *see also McCoy v. Greenwave Enters., Inc.*, 408 S.C. 355, 759 S.E.2d 136 (S.C. 2014) (stating "attorney's fees and costs were the natural and probable consequence of [a] breach of the purchase agreement.").

Here, the circuit court correctly held that BFS's pleadings claim attorney's fees and costs as damages. *See* Section II (a), *supra*. Likewise, certain provisions of the "Section 5. Indemnity" clause above purportedly require AC Construction to pay BFS's attorney's fees "**regardless of any ultimate liability or negligence of the contractor . . .**" In addition, neither the plain language of S.C. Code § 32-2-10 nor *Concord and Cumberland* make an exception for attorney's fees as potentially being within the scope of an indemnity clause. In any event, BFS again cites no specific authority in its brief that attorney's fees cannot fall within the scope of indemnity, so this BFS argument should also be considered abandoned. Rule 208(b)(1)(E), *SCACR* (requiring the citation of authority in the argument portion of an appellant's brief); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal). S.C. Code § 32-2-10 and *Concord and Cumberland* still apply to BFS's claim for attorney's fees.

III. The circuit court did not err in failing to sever unlawful indemnity provisions.

In South Carolina, courts do not generally rewrite parties' contracts. *See Poynter Invs. Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15, 159 Lab.Cas. P 61 (S.C.

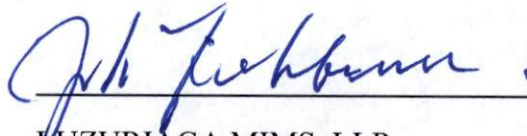
2010). In its brief, BFS primarily cites *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (S.C. App. 2016) as authority for this court to sever unlawful indemnity provisions in the BFS / AC Construction contract; however, *One Belle Hall* is factually and legally distinguishable as that case dealt with severing certain arbitration provisions and warranty terms. Other cases cited by BFS do not address severability in the contractual indemnity context.

Indeed, it appears no South Carolina published appellate court opinion supports BFS's argument that the circuit court should have severed the numerous unlawful provisions in the contractual indemnity context. But, in the arbitration context, this court recently cautioned that "[i]f illegality pervades the [] agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Smith v. D.R. Horton, Inc.*, 742 S.E.2d 37, 403 S.C. 10 (S.C. App. 2013). Finally, this court does not need to address BFS's severability arguments because resolution of the other issues raised above would dispose of the appeal. *See Johns v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

CONCLUSION

For the foregoing reasons, Respondent AC Construction respectfully requests the court **AFFIRM** the circuit court's order granting partial summary judgment in favor of AC Construction and **AFFIRM** the circuit court's Form 4 order denying BFS's motion to reconsider.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "J. Barnwell Fishburne, Jr.", is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy

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SC Court of Appeals

Appellate Case No. 2021-001050
Common Pleas Case No. 2016-CP-10-03783

The Retreat at Charleston National Country Club Home Owners Association, Inc. and The
Retreat at Charleston National Country Club Horizontal Property Regime.....Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin
Campbell, Individually; C.R. Campbell Construction Co., Inc.; Colin Campbell Construction,
LLC; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.; Americo Roofing
Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building
Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; ECC Contracting, LLC;
Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC
Construction, Inc.; L&G Construction Group, LLC; Liollo Architecture; JC Construction d/b/a
JC Construction, LLC a/k/a JC Contractors a/k/a JC Contractors, LLC; Soto & Vasquez
Construction, LLC a/k/a Costa De Oliveira Construction, LLC a/k/a Costa De Oliveira
Construction, LLC; Solesmar Jesus De Oliveira; Wilson Lucas Sales d/b/a Miracle Siding;
Miracle Siding, LLC; Royal Homes of SC, Inc.; Colleen Batissa; Christopher Batissa; Norma
Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos; Juan Garza Ramos d/b/a Juan
Constructors; Jessica Marroquin; Jessica Marroquin d/b/a Marroquin Construction; Carlos
Marroquin; Carlos Marroquin and Jessica Marroquin d/b/a Marroquin Construction; Feliciano
Cruz Silva Garcia Roofing, LLC; Givair De Caris; and Mario Salgado.....Defendants,

Builders FirstSource-Southeast Group, LLC.....Third-Party Plaintiff, Appellant,

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation;
Edward Bruce Witham; and East Coast Carpentry.....Third-Party Defendants,

Of which Palmetto Trim and and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that this Final Brief of Respondent AC Construction, Inc. complies with Rule 211(b), SCACR.

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November 11, 2022