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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2021-001050
Civil Action No. 2016-CP-10-03738

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; 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; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollio Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos 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 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.

FINAL BRIEF OF RESPONDENT EAST COAST CARPENTRY/ CARPENTRY COMPANY

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INTRODUCTION

The crux of this appeal is an inquiry into the ability of Appellant Builders FirstSource-Southeast Group, LLC ("BFS") to bring Contractual and Equitable Indemnity claims against its subcontractors ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co, LLC, AC Construction Corp and/or AC Construction Inc., L&G Construction Group, LLC, WS Contractors, LLC, Pohlman Quality Exteriors, Inc., Palmetto Trim and Renovations, LLC, Edward Bruce Witham, and East Coast Carpentry Company (also known as East Coast Carpentry)(herein after as "East Coast") (collectively as "Subcontractors"). BFS has conceded that its claims for Negligence, Breach of Contract, and Breach of Warranty fail as a matter of law pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 776 S.E.2d 434, (Ct. App. 2015) and has failed to appeal the dismissal of those claims. BFS also has tacitly conceded that its contractual indemnity provisions violate the "clear and unequivocal" standard of Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 176 (Ct. App. 2018), reh'g denied (Oct.

[2] Appellant's Argument III is not applicable to this Respondent.

18, 2018) as well as the Anti-Indemnity Statute SC Code §32-2-10, by abandoning, in its opposition to the Respondents' Motions – but not in its operative pleadings, the argument that it is entitled to indemnification for damages/legal fees from the Concurrent Negligence of BFS and Respondents. Instead, BFS now claims that it seeks indemnification only for the sole negligence of its subcontractors without running afoul of the confines on indemnity in a construction contract. Because BFS has failed to identify any basis upon which this Court should reverse the circuit court's grant of summary judgment in East Coast's favor on this issue, the circuit court's determination should be affirmed.

STATEMENT OF THE CASE

BFS filed third-party claims against East Coast on November 11, 2019. BFS Amended Answer to Fourth Amend. Compl. BFS asserted claims against East Coast for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence. Id. BFS's cross-claims allege that BFS is entitled to be indemnified in the amount which BFS "may pay in satisfaction" of Plaintiffs' claim "plus [BFS's] costs for defense, inclusive of attorneys' fees", without regard to the fault of either ECC or BFS. (R. pp. 441, 443, 444, 445).

STATEMENT OF FACTS[3]

This appeal arises from the construction and development of the Retreat at Charleston National alleged defects in that project. BFS is alleged to have supplied and installed the windows and doors on the Subject Property. BFS in turn alleged that the Subcontractors installed the windows and doors at the Subject Property. According to BFS, East Coast executed a BFS "Master Subcontractor Agreement" dated October 21, 2005 (hereafter "Master Agreement"). The Master

[3] For the sake of brevity, Counsel of East Coast adopts by reference, but does not repeat the arguments of and the full statement of the Case and the Facts as set forth by the other Respondents.

Agreement at issue here is a BFS contract form bearing "Version – 4/20/05." BFS seeks to recover from East Coast in indemnity under the terms of the applicable BFS Master Agreement. The Agreement is a "Hub and Spoke"[4] type agreements where the baseline contract does not commit anyone to anything (and, arguably, does not meet the basic requirements of a contract) until a purchase order is issued, accepted, and payment is made, but the Agreement sets the terms of the relationship in the event it is consummated/continued.

LEGAL STANDARD

This Court utilizes the same standard of review as the trial court to review the grant of summary judgment. See e.g., Knight v. Austin, 396 S.C. 518, 722 S.E.2d 802 (2012). In determining whether any triable issues of fact exist, "the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329–30, 673 S.E.2d 801, 804-805 (2009). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Manley v. Manley, 291 S.C. 325, 329, 353 S.E.2d 312, 316 (Ct. App. 1987). "[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to

[4] This is not a term of art but merely a description counsel has come up with to explain how the master trade agreement picks up purchase orders as the contractor-subcontractor relationship rolls forward.

establish the existence of an essential element of that party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

ARGUMENT

I. BFS'S CONTRACTS VIOLATE THE ANTI-INDEMNITY STATUTE, SC CODE § 32-2-10

At the heart of BFS's appeal is the contention that it can re-write its contract and its pleadings. The contract between BFS and East Coast contains multiple indemnity provision including those which require ECC to indemnify BFS for damages incurred as a result of BFS' sole negligence in violation of S.C. Code Ann. § 32-2-10. The relevant indemnity provision, which is provided in Section 6 of the contract between BFS and ECC, states:

> SECTION 6. Waiver, Release, and Indemnification. Subcontractor agrees that **Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages** to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or **relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors**. Subcontractor will indemnify, defend, and hold Contractor harmless against any such injuries and claims.
>
> a. Waiver [refers to workers comp and is thus omitted]
>
> b. Release and Indemnity,
>
> (1) Subcontractor hereby agrees to release, indemnify, defend, and hold harmless Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees (each an "Indemnitee"), to the fullest extent permitted by law from any costs, expenses, demands, causes of action, claims, damage, liability, loss, or costs ("Claims") (together with attorneys' fees) arising out of, resulting from, or connected with the death of or any injury to, or any damage to the property of, Subcontractor or its employees, agents, or subcontractors or any of their respective subcontractors, employees, officers, agents, or invitees.
> (2) For all Claims not covered by (1) above and to the fullest extent permitted by law, Subcontractor agrees to release, indemnity, defend, and hold harmless the Indemnitees for, and to save them harmless against, any and all Claims (together with reasonable attorneys' fees), **to the extent of liability resulting from Subcontractor's negligence or willful misconduct** incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or

> malfunction in any of the services or materials provided in connection with the Work; or **(iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations**.
> (R. pp. 533-534) (*emphasis added*)

Section 6 explicitly calls for East Coast to unconditionally defend and indemnify BFS in subsection (1) and then calls for East Coast to indemnify BFS for BFS' failure to supervise in subsection (2). Id. These provisions explicitly violation of SC Code Ann. §32-2-10 as they require East Coast to indemnify BFS for BFS' sole negligence.

As BFS should well know, indemnification provisions calling for the Indemnitor to indemnify the Indemnitee "for damages caused by its [the Indemnitee's] negligence or the negligence of its subcontractors" are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45-6 (Ct. App. 2018). Further, our Court of Appeals has held that "[A]n illegal contract is unenforceable." Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, this Court held that the indemnification agreement "purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10" and went on to conclude that "[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton." Id. This case is no different. BFS attempts to draw a distinction between the present case and D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC by claiming that it is not seeking indemnification for its own negligence, whether sole or concurrent. However, BFS puts the cart before the horse. The question is not what relief Counsel for BFS claims his client seeks, in contravention to the problematic indemnity language in BFS' contracts and the allegations of his operative pleading, but rather is there a legal valid indemnity provision to enforce.

Because the indemnity provisions of the contracts between BFS and East Coast require East Coast to indemnify BFS for BFS's sole negligence, BFS's contracts are illegal, and thus unenforceable.

Therefore, Respondents respectfully assert that no further inquiry is necessary with regard to the failure of Appellant's contractual indemnity claims.

II. BFS' CLAIMS FOR CONTRACTUAL INDEMNITY ARE BARRED BY THE CONCORD AND CUMBERLAND HOLDING.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to recover for an indemnitee's concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018), reh'g denied (Oct. 18, 2018) (affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity cross-claims of contractor based on application of the clear and unequivocal standard). The provision relevant to this argument section is set forth in full above. The key phrase, for our purposes is "to the extent of liability resulting from Subcontractor's negligence or willful misconduct". Though the wording is slightly different in our case, the key language is substantially the same.

The South Carolina Court of Appeals issued an opinion in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC that is directly on point to this case. That appeal dealt almost exclusively with the interpretation of contractual indemnity provisions. The Court of Appeals noted that the standard for upholding a Contractual Indemnity provision is "clear and unequivocal." In that case in the underlying Circuit Court Opinion, Judge Newman held that:

> In order for Superior and C&C to defeat Muhler's and Weather Shield's motions for summary judgment on the contractual indemnity issue, they have to meet the very high standard of eliminating any possibility that the contract language on which they rely can be read to limit indemnification to the indemnitor's own negligence. In other words, in order to prevail on their contract claims, Superior and C&C must demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the

> indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contract claims as a matter of law.

Concord and Cumberland Horizontal Property Regime v Concord & Concord & Cumberland, LLC, No. 2010-CP-10-3026, 2014 WL 12783397, at *3 (S.C. Com. Pl. Oct. 06, 2014).

One of the two indemnity provisions interpreted by the Court was based on the AIA provision we are dealing with (the underlined provisions are identical to the AIA A201 Indemnity Provision):

> 12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that
>
> (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, **to the extent caused or alleged to be caused in whole or in any 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, regardless of whether it is caused in part by a party indemnified hereunder.

(b) [omitted].

Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018), reh'g denied (Oct. 18, 2018).

If anything the language of BFS's indemnity provision is less clear than the language in Concord and Cumberland, because it does not have the qualifying phrase "caused in whole or in part". Regardless, the Court has already found this Indemnity language to be invalid.

III. ADRESSING APPELLANT'S ARGUMENTS I, AND II:

Sections I, and II of BFS's arguments both focus on the lower court's dismissal of the contractual indemnity claim. At the heart of all these argument subsections, is the contention that BFS is

seeking to be indemnified only for the sole negligence of its subcontractors.[5] BFS asserts that the trial court erred by dismissing the entire contractual indemnity claim and that such was an error of law contending that the question of whether or not the liability of BFS was the result of the sole negligence of Respondents is a genuine issue of material fact precluding grant of summary judgment on their claims for "full contractual and common law indemnification"…entitling BFS to recover from East Coast its attorney's fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from the East Coast any sums for which BFS may be held liable to the Plaintiffs, and/or to others in such action." (R. pp.449). BFS's position is unsupported by its contracts, its pleadings, South Carolina case law, and the relief it requests as is set forth below.

A. BFS'S CONTRACT DOES NOT SUPPORT THEIR ARGUMENTS

The above indemnity language is based on the AIA form indemnification language and the key phrase for East Coast's arguments at the Circuit Court level was "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." The South Carolina Court of Appeals issued an opinion in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 176 (Ct. App. 2018), reh'g denied (Oct. 18, 2018), that specifically recognized that this contract language fails as a matter of law because it does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own liability.

However, BFS, contending that it can rewrite the contract and its pleadings to seek merely indemnification for the sole negligence of ECC, would have the inquiry end here without regard to the first paragraph of this Section 6 of the contract. The first paragraph of Section 6 states:

[5] BFS also refers to its Subcontractors "own negligence" and "own sole negligence"

> Subcontractor agrees that **Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages** to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or **relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors**. Subcontractor will indemnify, defend, and hold Contractor harmless against any such injuries and claims.
> (R. pp.533).

Again, BFS cannot argue that its claims for contractual indemnity are for those sums that are solely attributable to the negligence of East Coast when its contractual indemnity provisions clearly says "Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages". The first sentence betrays BFS' true intentions - for 100% of its attorneys' costs and fees regardless of who is found to be at fault to be paid by its subcontractor. "It is not the function of the court to rewrite contracts for parties." Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002)*(*citation omitted*)*.

B. BFS IS BOUND BY THE ALLEGATIONS OF ITS OPERATIVE PLEADING.

BFS claims its attorneys' costs and fees as damages in its operative complaint. "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (citing Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964)). "The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." Id. BFS seeks "full contractual indemnity for any liability BFS is found to have to the Plaintiffs" for "its attorneys' fees, costs, and other expenses incurred in defending this action" and "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". (R. pp.449). The

only way that BFS can achieve such as result is for the Subcontractors to indemnify BFS for its concurrent negligence (assuming BFS was not solely negligent). BFS's pleadings betray their current arguments and show the true character of their claims.

Further, BFS has sued eight subcontractors as well as the window manufacturer. See generally BFS's Summons and Complaint. It is, quite simply, impossible for us to be dealing with anything but concurrent negligence. BFS cannot recover from all of these parties without recovering purely for damages created by the concurrent negligence of BFS and its subcontractors. There is no way that East Coast will be found solely negligent and solely responsible for the sums BFS seeks to recover in indemnity.

In short, BFS's contract, pleadings, oral arguments, and the Lower Court's order all contemplate BFS seeking to recover in indemnity for damages resulting exclusively from the concurrent negligence of the parties. BFS admits that its contract language does not meet the heightened "clear and unequivocal" standard. The lower court's ruling should be affirmed.

C. BFS IS STATUTORILY RESPONSIBLE FOR THE WORK OF RESPONDENT.

It is undisputed that BFS holds an unlimited commercial general contractor's license (License No. 112969). SC Code Ann. § 40-11-270 allows licensed contractors to use unlicensed subcontractors to perform their work. However, it also requires the licensed contractor, here BFS, to be provide supervision and it says that the contractor is "fully responsible" for the actions of the unlicensed subcontractor. In this case, nine of the thirteen subcontractors, including East Coast, sued by BFS are not licensed. BFS is 'fully responsible' for its unlicensed subcontractors, thus it cannot be adjudged without fault and cannot succeed on its claims in indemnity. This is in keeping with the universal public perspective on hiring contractors. Consider what anyone, layperson or the most sophisticated construction company on the planet, would do if they hired a

contractor to install windows, for instance BFS, and that company hires a subcontractor (or sub-subcontractor) to perform the labor, and something goes wrong with the installation. The layperson, the construction lawyer, or the sophisticated construction company, always calls the contractor, here BFS, that they initially hired – not the subcontractor.

IV. ADRESSING APPELLANT'S ARGUMENT IV:

In Section IV, BFS argues that the Lower court erred by holding that it lacked the authority to sever provisions of the contract which are illegal or otherwise unenforceable. To the extent that this was an erroneous holding, it was a harmless error because the contractual indemnity provisions are "so infected with unconscionability that [they] must be scrapped entirely…" Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020). Finally, Counsel for Pohlman Quality Contractors and Palmetto Trim and Renovation have done an excellent job briefing the issue of severance. East Coast adopts their arguments (on that issue and all others) and offers the following in addition to their positions:

A. BFS HAS NOT PRESERVED THE ISSUE OF SEVERANCE FOR THE 2005 CONTRACT ON APPEAL.

Section 4(A) of BFS' initial brief deals with the issue of severability. BFS' argument seems to mix provisions of the 2005 and 2008 Contracts. It cites the severability provision of the 2005 Contracts and the 2008 indemnity provision and argues that various portions of the Later Contract could be severed and BFS would still be entitled to pursue its claim for contractual indemnity. However, at no point does BFS argue a 'severed version' of the 2005 Contract which could be potentially viable. Because BFS has failed to propose a potentially viable 'severed version' of its Indemnity Provision with East Coast to the Trial Court or in its Initial Brief, this argument and its contractual indemnity claims must fail. Hunter v. Staples, 335 S.C. 93, 103, 515 S.E.2d 261, 267 (Ct. App. 1999) citing Creech v. South Carolina Wildlife & Marine Resources Dep't, 328

S.C. 24, 491 S.E.2d 571 (1997) (It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.) Id. citing Continental Ins. Co. v. Shives, 328 S.C. 470, 492 S.E.2d 808 (Ct.App.1997) (An appellant may not use the reply brief to argue issues not argued in the initial brief.)

B. SEVERANCE IS NOT POSSIBLE WITHOUT RE-WRITING THE CONTRACT.

BFS cites Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 34, 644 S.E.2d 663, 673–74 (2007) in support of its argument against the findings that its Contracts are unconscionable. However, BFS seems not to have considered the full text of that opinion or its ultimate holding with regard to severance. In Simpson, the Court stated:

> At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration 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." Booker v. Robert Half Intn'l Inc., 413 F.3d 77, 84–85 (D.C.Cir.2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties. Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 34, 644 S.E.2d 663, 673–74 (2007)(citations in the body)

The Simpson Court went on to rule that the arbitration provision in question had to be severed in its entirety because severing multiple unenforceable provisions would amount to "rewriting" the provision. Id. ("While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions." It is important to note that State and Federal Courts nationwide have a strong policy of favoring

arbitration, but due to multiple [3] unenforceable provisions the Court ruled the entire provision had to be severed. Id. at Fn. 9. In this case there is no strong public policy favoring indemnity – to the contrary all of the public policy and statutes in issue specifically limit parties' ability transfer liability via contract. See generally S.C. Code Ann. § 32-2-10 & Concord and Cumberland. In this case, the Court would have to sever multiple portions of multiple provisions BFS' Contracts in order to come up with some rough facsimile of a legal indemnity provision. Arguably finer linguistic surgery, than the Court was willing to do in Simpson and in a scenario where our Courts are less inclined to do so. In short, Severance is not appropriate in this case.

V. ADDRESSING APPELLANT'S ARGUMENT V:

Finally, BFS argues that its contracts are not unconscionable and unenforceable. East Coast joins in the arguments of the other Respondents as to why BFS' contracts are unconscionable and unenforceable. However, East Coast, briefly, sets forth why it is entitled to benefit from this ruling if affirmed.

A. IT WILL BE THE LAW OF THE CASE THAT BFS'S CONTRACTS ARE UNCONSCIONABLE IF THIS COURT AFFIRMS

If the lower court rulings are upheld, they will become the Law of the Case and will apply, to the extent the contracts are the same, to all parties regardless of whether or not the Lower Court rulings mentioned one issue or another in each order. See Segarra v. Farm Bur. Ins. Co., No. 2012-UP-090, 2012 WL 10830188, at *1 (S.C. Ct. App. Feb. 22, 2012) citing Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law of the case doctrine, a party is precluded 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."); Also citing Hudson v. Lancaster Convalescent Ctr., 393 S.C. 1, 7, 709 S.E.2d 65, 68 (Ct.App.2011) (stating a circuit court ruling that is appealed but subsequently withdrawn is the law of the case); see

also Buckner v. Preferred Mut. Ins. Co., 255 S .C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (holding an unappealed ruling, right or wrong, is the law of the case). Thus the 'discrepancies' BFS in the various orders BFS focuses so heavily upon at various stages of its brief are immaterial.

CONCLUSION

Ironically, it is clearer that BFS seeks indemnification for its own negligence, than the language it relies upon to do so. The Lower Court's application of the "clear and unequivocal" standard was proper. The Indemnity provisions are confusing, ambiguous, irreconcilable, illegal, violate public policy and are unenforceable. The provisions were drafted by BFS such that they are inextricably linked, so it is impossible for the Court to use the Severability clause to remove one or more from the Subcontract without rewriting the subcontract. Thus, BFS' claims fail as a matter of law. Wherefore, East Coast hereby requests that this Court AFFIRM the findings and Order of the Lower Court in favor of Respondent East Coast. Respectfully Submitted,

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