THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge
Civil Action No. 2016-CP-10-03783

Appellate Case No. 2021-001050

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.; CollenBatissa; 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; 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 WS CONTRACTORS, LLC

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STATEMENT OF ISSUES ON APPEAL

I. Whether Builders FirstSource-Southeast Group, LLC can recover in indemnity from WS Contractors, LLC when Builders FirstSource-Southeast Group, LLC cannot bear any liability to Plaintiffs for any of WS Contractors, LLC's alleged conduct because WS Contractors, LLC has procured an issue release from Plaintiffs, which releases Builders FirstSource-Southeast Group, LLC from any liability associated with WS Contractors, LLC's scope of work.

II. Whether Builders FirstSource-Southeast Group, LLC can use the indemnity provisions contained in its master subcontractor agreement to recover a portion of its defense costs from WS Contractors, LLC when the contractual indemnity provisions upon which its right to recover its costs have been held to be illegal, unenforceable, and against public policy on several occasions.

III. Whether the court can sever certain language from the indemnity provision of the master subcontractor agreement where the illegality pervades the provision and the language of the indemnity provision is intertwined and dependent on each other.

IV. Whether Builders FirstSource-Southeast Group, LLC has the right to recover attorney's fees and costs on its contractual indemnity claim when the indemnity provisions providing for the recovery purport to allow Builders FirstSource-Southeast Group, LLC to recover attorney's fees and costs even where incurred based upon its sole negligence.

V. Whether Builders FirstSource-Southeast Group, LLC has limited the damages it seeks from WS Contractors, LLC in indemnity based upon the prior positions it has taken in its court filings in this case.

VI. Whether Builders FirstSource-Southeast Group, LLC's master subcontractor agreement and/or the indemnity and duty to defend provisions found therein are unconscionable.

STATEMENT OF THE CASE

This litigation arises out of alleged construction defects at The Retreat at Charleston National Country Club, a third-one building townhome community in Mount Pleasant, South Carolina (hereinafter referred to as "the Project").

Plaintiffs initiated suit against the developer, Winston Carlyle Charleston National, LLC, the general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually, on July 22, 2016, alleging negligence, gross negligence, breach of express and implied warranties

as to all defendants as well as breach of fiduciary duties with respect to the developer. **(R. pp. 174-186).**

The developer and/or general contractor subcontracted a portion of the work on the Project to Appellant Builders FirstSource-Southeast Group, LLC ("BFS"). **(R. p. 380, ¶ 9 – R. p. 381, ¶ 10; R. p. 374, ¶ 3).** BFS is a Delaware limited liability company who furnishes building materials and provides turn-key contracting and installation services. **(R. p. 374, ¶ 3; R. p. 875, lines 11-16).** While BFS did not serve as the general contractor on this Project, it holds an unlimited general contractor's license issued by the South Carolina Department of Labor, Licensing, and Regulation. **(R. p. 875, lines 11-16; R. p. 879).**

On May 1, 2017, Plaintiffs filed an amended complaint adding BFS as an additional defendant. **(R. p. 202, ¶ 57 – R. p. 207, ¶ 64).** Plaintiffs allege BFS provided the framing, window, and door materials, including all related components, and to have installed such elements of the Project. **(R. p. 351, ¶ 9 – R. p. 352, ¶ 10).** Plaintiffs allege BFS supplied defective materials[1] and failed to install the materials in accordance with the plans, specifications, and applicable building codes. **(R. p. 202, ¶ 57 – R. p. 207, ¶ 64).**

BFS responded by denying Plaintiffs' allegations and bringing its subcontractors into this suit as third-party defendants. **(R. p. 208).** Respondent WS Contractors, LLC ("WSC") served as one of BFS' subcontractors on the Project and performed work on certain buildings between 2012 and late 2014.[2] **(R. pp. 811-825).**

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[1] By way of example, Plaintiffs' forensic expert specifically contends that the windows selected have inadequate design pressure ("DP") ratings which require replacement of the windows. **(App. Br. p. 1).** BFS supplied the windows for the Project. **(R. p. 864).**

[2] WSC was only involved in the construction of Buildings 22 through 31 at the Project. **(R. pp. 822-825).**

Through subsequent amended pleadings, Plaintiffs asserted direct claims against WSC and other third-party defendants. **(R. p. 366, ¶ 86 – R. p. 368, ¶ 93).** Accordingly, BFS's claims against WSC and its other subcontractors, including the Respondents to this appeal, are cast as crossclaims which sound in contractual and common-law indemnity, breach of express and implied warranties, breach of contract, and negligence. **(R. p. 437, ¶ 124 – R. p. 445, ¶ 155).**

Respondent WSC is uniquely situated among other Respondents to this appeal in that it settled with Plaintiffs in December 2019 and, in doing so, procured from Plaintiffs an issue release in favor of BFS, the developer, and the general contractor relating to or arising from WSC's scope of work on the Project and for WSC's acts, omissions, labor, materials, work, or involvement with the Project. **(R. p. 813, ¶ 6).** WSC and its subcontractors paid Plaintiffs $1,000,000.00 to resolve Plaintiffs' claims against them and as consideration for an issue release in favor of BFS. **(R. p. 812, ¶ 2).**

WSC filed a motion for summary judgment as to BFS's crossclaims on January 22, 2020. **(R. p. 708).** WSC amended its motion for summary judgment twice, providing additional arguments and exhibits with each amended notice and motion.[3] **(R. p. 737; R. p. 781).** WSC further supported its motion for summary judgment by way of its memorandum of law filed on October 30, 2020. **(R. p. 848).** BFS did not file a memorandum or brief in opposition to WSC's motion for summary judgment or any affidavits or exhibits.

The Honorable Jennifer B. McCoy heard WSC and the subcontractor-Respondents' motions for summary judgment as to BFS's crossclaims on November 6, 2020. **(R. p. 1386).** BFS admitted its causes of action for breach of express and implied warranties, breach of contract, and

[3] WSC made the applicable BFS Master Subcontractor Agreements, its Settlement Agreement, General Release, and Issue Release with the Plaintiffs, and certain circuit court orders part of the record by filing the same as exhibits to its October 19, 2020 amended motion for summary judgment. **(R. pp. 785-845).**

negligence failed as a matter of law and were subject to dismissal. **(R. p. 1392, lines 4-21; R. p. 1081; R. pp. 1182-1183).** The dismissal of those claims is not part of this appeal. BFS solely appeals the dismissal of its contractual indemnity claim.

At the hearing on November 6, 2020, BFS's counsel announced, repeatedly, that BFS was only seeking indemnity against liability from subcontractors for damages occasioned by its subcontractors. **(R p. 1416, lines 11-16; R. p. 1417, lines 12-14; R. p. 1422, lines 20-25; R. p. 1424, lines 7-13).** BFS's counsel characterized attorney's fees as "a consequence of damages occasioned by a claim of indemnity" and explained BFS's "claim for attorney's fees is for attorney's fees arising out of the negligence that we contend Freeman (sic.) and the other subcontractors were guilty of, which has redoubted (ph) to our detriment in the form of liability to third parties." **(R. p. 1422, lines 8-14).** BFS's counsel argued BFS was entitled to seek an imposition of attorney's fees under the contractual indemnity provisions contained in BFS's master subcontractor agreement, even if certain contractual indemnity provisions of the master subcontract agreement violate South Carolina law. **(R. pp. 1426-1428).**

WSC argued that BFS's limitation of its claimed damages to attorney's fees and costs incurred in its defense does not change that the contractual indemnity provisions upon which BFS relies require WSC to indemnify BFS for their attorney's fees and costs even if BFS is solely at fault, which violates South Carolina law. **(R. p. 1409).** WSC joined in and adopted the arguments made by counsel for Respondents ECC Contracting and East Coast Carpentry, to the extent those arguments apply to the claims against WSC. **(R. p. 1404).**

Judge McCoy granted summary judgment to WSC on May 10, 2021 via a Form 4 Order on all of BFS's crossclaims but its equitable indemnity claim. **(R. p. 16).**

On July 29, 2021, Judge McCoy entered an 18-page formal order granting summary judgment to WSC on *all* claims asserted by BFS. **(R. pp. 84-101).** Because these same indemnity issues have been adjudicated, adversely to BFS, in multiple other lawsuits against its subcontractors, Judge McCoy found that BFS had a full and fair opportunity to litigate identical issues in those prior cases and that in each of those cases, the contract terms were actually litigated, directly determined, and the issues were essential to the judgments rendered therein. **(R. pp. 89-92).** Therefore, the doctrine of collateral estoppel precludes BFS from re-litigating the issues determined in those prior cases, including whether the indemnity provisions contained in its master subcontractor agreements fail to meet the clear and unequivocal standard, violate South Carolina public policy, and/or fail to meet the requirements of South Carolina law. **(R. pp. 89-92).**

In addition to finding the doctrine of collateral estoppel was applicable and barred BFS's claims, Judge McCoy also independently found the indemnity and duty to defend provisions of the BFS master subcontractor agreement are unclear, unconscionable, unintelligible, conflicting, and are unenforceable as a matter of law. **(R. p. 99).** Judge McCoy specifically found the indemnity and duty to defend provisions violate South Carolina public policy and S.C. Code § 32-2-10, making them illegal and unenforceable. **(R. p. 99).**

With respect to the equitable indemnity claim, Judge McCoy found the claim fails as a matter of law because the issue release absolves and releases BFS from all liability stemming from any acts or omissions of WSC; therefore, any prospective liability of BFS to Plaintiffs relative to the Project would necessarily be derived from BFS's negligence or fault without any reference to WSC. **(R. p. 99).**

On August 9, 2021, BFS filed a motion for reconsideration of the July 29, 2021 order. **(R. pp. 1373-1385).** In its motion for reconsideration, BFS states it is "seeking only recovery of

attorney's fees and costs, expended in defending against the plaintiffs claims." **(R. p. 1379).**[4]

Judge McCoy denied BFS's motion for reconsideration on August 23, 2021. **(R. pp. 137-138).** On September 22, 2021, BFS filed its Notice of Appeal of the July 29, 2021 order granting summary judgment to WSC and the August 23, 2021 order denying BFS's motion for reconsideration. **(Notice of Appeal).**

BFS has not amended its pleadings to conform to the position that it took at the hearing and in its Motion for Reconsideration. It has not released or stipulated to the partial dismissal of its claims other than what it stated in writing in its Motion for Reconsideration. **(R. p. 1379).**

STATEMENT OF THE FACTS

BFS's opening Brief does not discuss certain facts in the record that are relevant to the issues presented for review with respect to BFS's claim against WSC for indemnity. Those facts relate to three subjects, which are addressed in this section: (1) WSC's settlement with Plaintiffs and procurement of an issue release in favor of BFS; (2) the indemnity provisions contained in "Version – 5/17/06" of BFS's master subcontractor agreement; and (3) other circuit court orders considering the enforceability of the same indemnity provisions in this case and in other cases.

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[4] BFS was clear in its Motion for Reconsideration that it is only seeking to recover a portion of its attorney's fees and costs from WSC.

However, BFS does not reaffirm its limitation of claims against WSC in its opening Brief. To the contrary, BFS asserts that it is seeking indemnification, and corresponding damages, against liability for loss or damage arising from Respondents' negligence (with no distinction as to WSC). **(App. Br. p. 11).** Its prior limitation of its claims against WSC are not separately addressed in BFS's Statement of the Case. **(App. Br. pp. 1-4).** Mere reference to BFS's opening Brief would give no indication that BFS has, in fact, limited its claim for indemnification from WSC to the defense costs.

As such, the facts relative to BFS's claim for indemnity against WSC are fully addressed herein; however, the issues in this appeal should be limited to whether BFS can recover the attorney's fees and costs it expended in defending against the Plaintiffs' claims arising out of the performance of WSC's work under a theory of indemnity. See Argument Section IV, infra.

I. WSC's Settlement with the Plaintiffs and the Issue Release in Favor of BFS

In December 2019, WSC settled with the Plaintiffs. **(R. pp. 811-825).** WSC paid the Plaintiffs $500,000.00 in consideration for Plaintiffs' release of their direct claims against WSC and its subcontractors and for Plaintiffs to release BFS, the developer, and general contractor from liability arising from any of WSC's errors, omissions, and scope of work on the Project (the later hereinafter referred to as the "issue release"). **(R. pp. 811-825).** The issue release provides:

> In consideration of the receipt of the Settlement Amount, Releasors hereby release, acquit, and forever discharge Builders FirstSource, Inc., Builders FirstSource Southeast Group, Winston Carlyle Charleston National, LLC, Colin R. Campbell Construction, Inc., C.R. Campbell Construction Co., Inc., Colin Campbell Construction, LLC, and their respective owners, parents, subsidiaries, directors, officers, shareholders, members, managers, principals, employees, agents, heirs, assigns, and Colin Campbell, individually (hereinafter collectively "Issue Releasees") relating to or arising from (a) the scope of work for the Project identified in Exhibit A attached hereto involving Building Numbers 22 through 31, inclusive, and made a part hereof, including, without limitation, the acts, omissions, labor, materials, work, and involvement of Issue Releasees with respect to the scope of work for the Project identified in Exhibit A, and (b) the acts, omissions, labor, materials, work, or involvement of the Settling Defendants and Releasee(s) identified in Paragraph 2 at the Project known as The Retreat at Charleston National Country Club.

(R. p. 813).

Surprisingly, after WSC paid to procure a release for BFS, BFS did not amend, withdraw, or dismiss its crossclaims against WSC. BFS's Fourth Amended Answer, Crossclaims, and Third-Party Complaint remains its operative pleading. In that pleading, BFS seeks indemnification from WSC for the amounts that BFS "may pay in satisfaction" of Plaintiffs' claims against it "plus BFS's costs for defense, inclusive of attorneys' fees." **(R. p. 441; R. pp. 443-445).** BFS asserts it is entitled to be indemnified by WSC based on common-law indemnity and contractual indemnity theories of liability. **(R. p. 440).**

II. The Indemnity Provisions in the Master Subcontractor Agreement

BFS's contractual indemnity against WSC relies upon certain provisions of "Version – 5/17/06" of BFS's form master subcontractor agreement. **(R. pp. 785-798).** BFS alleges WSC entered into this version of its master subcontractor agreement on September 24, 2012, and again on December 31, 2014. **(R. pp. 785-810).**

Section 5 of the master subcontractor agreement contains indemnity language which reads as follows:

> TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY DEFENDANT 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 FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS 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 SUBCONTRACTORS, 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 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 HEREUNDUER 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.

(R. pp. 790-791) (all caps emphasis in original).

The master subcontractor agreement also contains indemnity language buried in the fine print of "Section 3. Warranty", which reads as follows:

> **Section 3. Warranty.**
> … subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns … If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship … including, without limitation, property damage to the homes or properties into which the Work is incorporated …"

(R. p. 788).

More indemnity language is found within Section 9.i:

> INDEMNIFICATION FOR LIENS. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACT, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMENS' LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMETN, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS.
> . . .

(R. p. 796).

III. Prior Litigation Concerning the Subject Indemnity Provisions

BFS has attempted, unsuccessfully, to seek indemnity against its subcontractors in this case, and in other cases, based upon the same indemnity language within the same master subcontractor agreement (i.e., "Version – 5/17/06"). The prior litigation in this case is addressed first.

A. Prior, Unappealed Order in this Case, Concerning the Indemnity Language at Issue in this Appeal.

On September 6, 2019, McDaniel Construction Co. ("McDaniel"), another one of BFS's

subcontractors and a co-defendant in this case, moved for summary judgment as to BFS's indemnity crossclaim. **(R. pp. 1532-1537).** At the time McDaniel's motion for summary judgment came before the circuit court, Plaintiffs had conceded there were no issues as to McDaniel's work and stipulated to dismissal of its claims against McDaniel with prejudice. **(R. p. 1569).** "In spite of this stipulation, which specifically identifies McDaniel's scope in broad terms and concedes there are no defects, BFS refuse[d] to dismiss its [then] baseless cross-claims." **(R. p. 1569).**

BFS sought to recover from McDaniel pursuant to the indemnity language in "Version – 5/17/06" of its master subcontractor agreement (i.e., the same form agreement WSC allegedly entered). **(R. p. 1572; R. pp. 1577-1600).** McDaniel argued that its liability was not in question in light of the Plaintiffs' dismissal of claims against it, that the issues relating to the enforceability of the indemnity language had been previously ruled upon in the cases discussed infra, and that BFS's contractual indemnity language, including the "defend and hold harmless" language contained therein, violates the South Carolina Anti-Indemnity Statute codified at S.C. Code § 32-2-10 and are neither clear nor unequivocal under Concord & Cumberland, Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018). **(R. pp. 1569-1575).**

BFS filed an extensive memorandum in opposition to McDaniel's motion for summary judgment. **(R. pp. 1538-1566).** BFS asserted McDaniel's liability was still in question and that Plaintiffs' stipulation of dismissal of McDaniel did not preclude Plaintiffs from pursuing claims against BFS regarding McDaniel's defective work. **(R. p. 1553).** As BFS put it, "[b]ecause Plaintiffs had not released their claims relating to alleged improper framing installation implemented by McDaniel, summary judgment is not proper at this time." **(R. p. 1553).** BFS further argued:

> Even if McDaniel secured an issue release or Plaintiffs stipulated there are no defects in McDaniel's scope, BFS still has a viable claim for contractual indemnity that obligates McDaniel to pay the defense costs incurred by BFS in defending against Plaintiffs' claims regarding McDaniel's alleged improper scope of work. Until such a release or stipulation is executed, BFS will continue to incur defense costs arising out of or relating to the acts or omissions of McDaniel's scope of work.

(R. p. 1554).

BFS argued that its indemnity claim against McDaniel was not subject to collateral estoppel and did not run afoul of Concord & Cumberland or the South Carolina Anti-Indemnity Statute[5] because BFS was only seeking indemnity against liability for damages occasioned by the negligent acts or omissions of its subcontractor McDaniel. **(R. p. 1565).**

The Honorably Bentley D. Price granted McDaniel's motion and rejected BFS's arguments.[6] **(R. pp. 1601-1603; R. p. 1565).** BFS did not move for reconsideration, alteration, or amendment of the Form 4 Order. Nor did it appeal the order. That order was a final order and is now the law of the case. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

B. Litigation Regarding the Indemnity Language in Other Cases

At the time WSC's second amended motion for summary judgment was heard, South Carolina circuit courts had considered the enforceability of the indemnity provisions contained in the "Version – 5/17/06" master subcontractor agreement in three prior actions: (1) in Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al. case number 2018-CP-

[5] The South Carolina Anti-Indemnity Statute is codified at S.C. Code § 32-2-10. It is hereinafter cited by Code section or referred to as the "Anti-Indemnity Statute."

[6] This is the same argument BFS makes on this appeal. **(App. Br. p. 11)** ("Appellant is not seeking indemnification for its own or sole concurrent negligence, but is only seeking indemnification, and corresponding damages, against liability for loss or damage arising from Respondents' negligence.").

08-02547, filed in the Berkeley County Court of Common Pleas ("MI Windows")[7]; (2) in Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al., case No. 2016-CP-10-03455, filed in Charleston County Court of Common Pleas ("Six Fifty Six")[8]; and (3) in Pavic v. Carolina Cottage Homes, LLC, et al., case number 2019-CP-10-00772, filed in the Charleston County Court of Common Pleas ("Pavic").[9] **(R. pp. 826-847).** In each case, the circuit court concluded the indemnity language in the master subcontract agreement was not enforceable as a matter of law. **(R. pp. 90-92; R. pp. 146-173).**[10]

The Honorable Clifton Newman was the first circuit court judge to consider the enforceability of the indemnity provisions of the BFS "Version – 5/17/06" master subcontractor agreement. **(R. pp. 826-836).** In MI Windows, Judge Newman determined the indemnity language presented the prospect of BFS's subcontractors being forced to indemnify BFS for BFS's sole negligence and, as a result, applied the "clear and unequivocal" standard set out in Concord & Cumberland, Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018). **(R. pp. 826-836).** In evaluating the indemnity language contained within the master subcontractor agreement under this standard, Judge Newman found the language "is confusing at best and deceptive at worst" and therefore was not enforceable. **(R.**

[7] The subject order, discussed further infra, was entered by the circuit court on February 3, 2020. It is contained within the record as Exhibit D to WSC's Second Amended Motion for Summary Judgment. **(R. pp. 826-836).**

[8] The subject order in this case was entered by the circuit court on April 29, 2020. It is Exhibit E to WSC's Second Amended Motion for Summary Judgment. **(R. pp. 837-842).**

[9] The subject order in this case was entered on January 25, 2021. **(R. pp. 162-173).**

[10] At the time of filing this Brief, BFS's appeal of the orders entered in MI Windows (appellate case no. 2020-000415), Six Fifty Six (appellate case no. 2020-001328), and Pavic (appellate case no. 2021-000290) are all pending.

p. 831).

The Honorable Roger M. Young, Sr., considered the same issues a month later in the case of Six Fifty-Six. **(R. pp. 837-842).** Judge Young applied collateral estoppel to BFS's claims for contractual indemnity based upon Judge Newman's prior ruling, but also independently concluded that BFS's contractual indemnity crossclaim was based on language in its master subcontractor agreement that was "neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law." **(R. p. 840).**

The Honorable Jennifer B. McCoy was the next circuit court judge to consider the issues in Pavic. **(R. pp. 162-173).** In Pavic, Judge McCoy held that BFS's master subcontractor agreement is a contract of adhesion; that BFS's master subcontractor agreement contains multiple indemnity provisions, including multiple provisions in "Section 5. INDEMNITY" and another "buried in the fine print of "Section 3. Warranty"; that the indemnity language in BFS's master subcontractor agreement are unconscionable within the meaning of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644, S.E.2d 663 (2007); and that the indemnification provisions in Section 5 of BFS's master subcontractor agreement are unclear, conflict with each other and the provisions found in Section 3, do not meet the clear and unequivocable standard of Concord & Cumberland, and violate South Carolina public policy and the Anti-Indemnity Statute. **(R. pp. 162-173).**

Judge McCoy also found and ruled that the orders entered by Judge Newman in MI Windows and Judge Young in Six Fifty Six are final orders that collaterally estop BFS from contesting the findings in Pavic, as BFS had a full and fair opportunity to litigate the issues in those cases, and that the contract terms were "actually litigated, directly determined in the prior [actions], and the issues were essential to the [judgments] such that collateral estoppel should apply." **(R. p.**

170). Judge McCoy decided Pavic on January 25, 2021. **(R. pp. 162-173).**

Accordingly, this case was the second occasion in 2021 in which Judge McCoy considered the indemnity provisions contained in "Version – 5/17/06" of BFS's master subcontractor agreement,[11] and BFS's second chance at convincing her the indemnity provisions contained therein were enforceable.

STANDARD OF REVIEW

This Court applies the same standard applied by the circuit court when reviewing a grant of summary judgment. Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 211-212, 826 S.E.2d 285, 290 (2019). That standard is set by Rule 56(c) of the South Carolina Rules of Civil Procedure, which provides a circuit court shall grant summary judgment "if 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 ... the moving party is entitled to a judgment as a matter of law." 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). On a motion for summary judgment, "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, 802 (2009).

[11] It is undisputed that the contractual indemnification provisions before Judge Newman in MI Windows, Judge Young in Six Fifty Six, and Judge McCoy in Pavic are found in "Version – 5/17/06" of BFS's master subcontractor agreement. **(App. Br. pp. 36-37).**

ARGUMENT

I. BFS CANNOT RECOVER IN INDEMNITY FROM WSC BECAUSE BFS WILL NOT BEAR ANY LIABILITY TO PLAINTIFFS FOR ANY OF WSC'S ALLEGED CONDUCT BASED UPON THE ISSUE RELEASE WSC PROCURED IN BFS'S FAVOR.

This appeal is different than others. WSC is in a unique position among Respondents. BFS has limited its claim against WSC to contractual indemnification. The circuit court granted WSC complete summary judgment, including summary judgment on BFS's equitable indemnity claim, in addition to those non-indemnity causes of action BFS conceded. BFS has limited the damages it is seeking on its sole remaining claim against WSC, a contractual indemnity claim, to attorney's fees and costs. The issue in this appeal should be limited to whether BFS can use the indemnity provisions contained in its master subcontractor agreement to recover a portion of its defense costs from WSC where BFS's damages, if any, are a result of its own negligence.

BFS cannot as a result of the issue release, which should be dispositive of this appeal. As part of WSC and its subcontractors' $1,000,000.00 settlement with Plaintiffs, WSC procured an issue release from Plaintiffs in favor of BFS. According to the terms of the issue release, Plaintiffs released BFS from liability arising from any of WSC's errors, omissions, and scope of work on the Project. **(R. pp. 811-825).** BFS has not, cannot, and will not bear any liability on account of WSC's acts, omissions, or work on the Project based upon the issue release.

BFS has previously acknowledged that an issue release settles the question of its potential liability to Plaintiffs in absolute terms. In BFS's opposition to co-defendant McDaniel's motion for summary judgment, BFS admits summary judgment as to its claim for indemnity for liability is proper where a subcontractor obtains an issue release in favor of BFS, thereby eliminating the question of BFS's liability for the subcontractor's negligence. **(R. p. 1553).** McDaniel had not procured an issue release in BFS's favor. BFS was arguing that its liability on McDaniel's account remained

uncertain because the issue release was not in place. The issue release here resolves any question of fault. If BFS is held liable to the Plaintiffs, it will not be on WSC's account.

The resolution of the question of fault is significant for two reasons. First, it is dispositive of BFS's equitable indemnity claim. In addition to establishing that a special relationship exists, a party seeking equitable indemnity must also prove the following elements: (1) the party from whom it is seeking indemnification is at fault in causing damages to the third party; (2) it has no fault for those damages; and (3) it incurred expenses that were necessary to protect its interests in defending against the third-party's claim. See Inglese v. Beal, 403 S.C. 290, 299, 742 S.E. 2d 687, 692 (Ct. App. 2013). The circuit court reasoned that because WSC had procured an issue release in favor of WSC, BFS was necessarily seeking to recover from WSC in indemnity for its sole negligence which is unlawful. **(R. p. 96).** The court further found that the issue release absolves and releases BFS from all liability stemming from any acts or omissions of WSC; therefore, any prospective liability of BFS to Plaintiffs relative to the Project would necessarily be derived from BFS's negligence or fault without any reference to WSC and there can be no equitable indemnity among mere joint tortfeasors. **(R. pp. 98-99).** In short, the issue release was dispositive of BFS's equitable indemnity claim. **(R. pp. 96-99).** That decision was proper in this case and not challenged by BFS.[12]

The issue release is also dipositive of BFS's contractual indemnity claim because the Anti-Indemnity Statute, S.C. Code § 32-2-10, renders a promise or agreement in connection with the construction of a building purporting to indemnify the promise against liability for damages arising

[12] The issue is not addressed in its Motion for Reconsideration or in its opening Brief. BFS has abandoned any claim of error in the lower court's dismissal of its equitable indemnity claim. See Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.").

out of property damages proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and enforceable. That's exactly what the BFS's master subcontractor agreement purports to do and precisely the relief BFS is seeking from WSC. BFS bases its right to recover attorney's fees and costs on the following language contained within the Section 5 "Indemnity" section of its master subcontractor agreement:

> 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**.

(R. p. 791) (all caps emphasis in original, bold and underline emphasis added).

Judge McCoy correctly found that the above-quoted language and the terms of Section 8.i of the master subcontractor agreement that call for WSC[13] to reimburse BFS for its attorney's fees

[13] The language quoted above, drawn from Section 5 of the master subcontractor agreement, is not the only indemnity provision that requires WSC to indemnify BFS for its attorney's fees and costs where BFS is solely negligent. See **(R. p. 790) (**"TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACT, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMENS' LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS.); **(R. pp. 790-791)** ("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 SUBCONTRACTORS, 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") (original in capitals, but some emphasis added).

and costs, regardless of fault, explicitly violate the Anti-Indemnity Statute. Judge McCoy was also correct in finding that the master subcontractor agreement was void against public policy.

The circuit court relied on these facts in granting WSC complete summary judgment as to BFS's crossclaims. **(R. pp. 92-99).** The court reasoned that because WSC had procured an issue release in favor of WSC, BFS was necessarily seeking to recover from WSC in indemnity for its sole negligence which is unlawful. **(R. p. 96).** The court further found that the issue release absolves and releases BFS from all liability stemming from any acts or omissions of WSC; therefore, any prospective liability of BFS to Plaintiffs relative to the Project would necessarily be derived from BFS's negligence or fault without any reference to WSC and there can be no equitable indemnity among mere joint tortfeasors. **(R. pp. 98-99).**

A plain reading of the Anti-Indemnity Statute, S.C. Code § 32-2-10, supports the circuit court's conclusion that the indemnity provisions contained in the master subcontractor agreement are wholly enforceable. See S.C. Code § 32-2-10 (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 is against public policy and unenforceable) (emphasis added).

The statute does not provide that the specific clause, paragraph, or subsection of such agreements that run afoul of the statute are unenforceable. It provides **the agreement** is against public policy and unenforceable as a matter of law. Moreover, if there's any doubt as to the absolute nature of this rule, the statute provides this rule is true "notwithstanding any other provision of law." Pursuant to the express terms of the Anti-Indemnity Statute, the fact that the

agreement purports to have WSC indemnify BFS for its sole negligence renders the entire agreement unenforceable and void as against public policy.

BFS does not address the implications of WSC procuring an issue release in favor of BFS in its motion for reconsideration or in its opening Brief. It didn't address it at all in the hearing. **(R. pp. 1386-1450).** BFS just asserts blanket, conclusory statements throughout its opening Brief that it is just seeking to be indemnified by its subcontractors for their sole or concurrent negligence. **(App. Br. pp. 9, 24, 35).** That is not the case as it relates to WSC. BFS is seeking to be indemnified by WSC for its sole negligence or the negligence of its other contractors. There's absolutely no possibility that BFS will bear any liability to Plaintiffs for loss or damage arising from WSC or its subcontractors' alleged negligence because of the issue release.

The circuit court was correct in finding the issue release serves as a unique and independent ground to find that BFS is seeking to recover in indemnity against WSC for its sole negligence and in finding the issue was dispositive of BFS's equitable and contractual indemnity claims. BFS has no right for WSC to indemnify it for the costs it has expended defending its own negligence or that of its other subcontractors for whom WSC is not liable.

II. BFS'S CLAIM FOR ATTORNEY'S FEES AND COSTS IS BASED ON INDEMNITY LANGUAGE CONTAINED IN ITS MASTER SUBCONTRACTOR AGREEMENT THAT IS ILLEGAL, UNENFORCEABLE, AND VOID AS AGAINST PUBLIC POLICY.

BFS's right to recover damages is based upon the indemnity language set out in its master subcontractor agreement. While attorney's fees and costs are generally recoverable elements of damages where a subcontractor has contractually agreed to indemnify a contractor or owner, see Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971), BFS cannot recover attorney's fees and costs from WCS in this case because such claims rely on the indemnity provision of the master

subcontractor agreement which is fatally flawed. Circuit courts have unanimously found the same indemnity language to be illegal, unenforceable, and void as against public policy.

A. The indemnity provisions in BFS's master subcontractor agreement are not clear and unequivocal as required by Concord & Cumberland, making those provisions unenforceable as a matter of law.

The indemnity provisions in BFS's master subcontractor agreement are not clear and unequivocal, as required by Concord & Cumberland, making those provisions unenforceable as a matter of law.[14] The contractual indemnity language contained in BFS's master subcontractor agreement are subject to Concord & Cumberland because the agreement calls for BFS's subcontractors to indemnity BFS for its sole or concurrent negligence. Paragraph Three of Section 5 of the "Version – 5/17/06" of the BFS master subcontractor provision is an example. **(R. p. 791).** The language of this paragraph provides:

> 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.

(R. p. 791).

Where an indemnitee is seeking to be indemnified for his/her/its concurrent negligence, South Carolina courts require the contractual indemnity provisions expressing such intention to be stated in clear and unequivocal terms. Concord & Cumberland, 424 S.C at 643-644, 168-169 (affirming trial court's grant of summary judgment in favor of subcontractor dismissing

[14] BFS argues the indemnity provisions relating to its claim for attorney's fees and costs (which applies regardless of BFS's sole negligence) are not subject to S.C. Code § 32-2-10. **(App. Br. pp. 30-32).** BFS does not argue on appeal that these indemnity provisions are not subject to Concord & 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). This issue should be considered abandoned on appeal, Fields v. Melrose, Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283 (Ct. App. 1993), but even if this Court interprets BFS's general arguments as to Concord & Cumberland to apply to its claims against WCS, these terms are subject to the clear and unequivocal standard and do not satisfy it.

contractual indemnity crossclaims of contractor based upon the application of the clear and unequivocable standard).

The circuit court properly found that the indemnity provisions in BFS's master subcontractor agreement are neither clear, nor unequivocal. The lower court analyzed the indemnity language in the master subcontractor agreements and concluded the indemnification provisions set out in "Section 5., INDEMNITY" are unclear, conflict with each other and the indemnification provision in the fine print of "Section 3. WARRANTY." and do not meet the elevated clear and unequivocal standard found in Concord & Cumberland. **(R. pp. 92-94).** With respect to attorney's fees and costs, the circuit court specifically found that the master subcontractor agreement contemplates BFS's subcontractors indemnifying it for all attorney's fees incurred in the defense of the BFS without any regard to the negligence of BFS in some sections and yet in other areas, qualifies the duty to defend and indemnify against attorney's fees and costs to the extent the loss is caused in whole or part by the negligence of the subcontractor. **(R. pp. 94-96).** In the court's words, "[t]he terms are confusing at best, contradictory at times, and arguably misleading." **(R. p. 94).** As such, the Master Agreement's indemnity clauses are unenforceable as a matter of law.

BFS attempts to explain away the ambiguities between the various indemnity provisions by "looking at the context of the paragraphs containing the text." **(App. Br. p. 19).** This misses the mark. If BFS has to explain to the Respondents and the Court what it meant to say, how it meant for various provisions to apply and interact with each other, and how one can interpret the ambiguities among the various conflicting provisions, the indemnity clause does not express the intention in clear and unequivocal terms. Concord & Cumberland, 424 S.C at 647, 171.

B. The trial court was proper to apply the doctrine of collateral estoppel to the issue of whether the indemnity provisions in BFS's master subcontractor agreement meet the Concord & Cumberland standard, comply with the Anti-Indemnity Statute, and South Carolina public policy.

Judge McCoy was proper to apply the doctrine of collateral estoppel to the issues of whether BFS's master subcontractor agreement met the Concord & Cumberland clear and unequivocal standard, complied with the Anti-Indemnity Statute, and South Carolina public policy because BFS has litigated these issues, in this case, and before Judge McCoy and other circuit courts in other cases. See infra. pp. 12-15. The circuit court orders should be affirmed in this regard.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was litigated and "determined by a valid and final judgment" in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). Where the "illegality of the contract has been actually litigated and directly determined in the prior action and that issue was essential to the judgment," the application of offensive collateral estoppel is appropriate. South Carolina Property Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). The party invoking collateral estoppel need not have also been a party in the prior action; the law only requires that the party *against* whom estoppel is applied (here, BFS) have been a party to that action and had a full and fair opportunity to litigate the issue in the prior action. Id. ("Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action . . ."). In other words, parties can invoke collateral estoppel even in the absence of "mutuality." Id. BFS was a party to each of the prior orders. There is no dispute that BFS is the party seeking to enforce the subject indemnity clauses from its master subcontractor agreement and the party litigating the issue of enforceability in this case (the McDaniel order) and in the MI Windows, Six Fifty Six, and Pavic cases.

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. Beall v. Doe, 281 S.C. 363, 369 at n. 1, 315 S.E.2d 186, 189–90 at n. 1 (Ct. App. 1984). BFS argues that the prior orders are on appeal and should not be considered "final judgments" for the purposes of collateral estoppel. **(App. Br. p. 37).** BFS does not cite any case, statute, or court rule in support of this argument. It also does not address that the prior order entered in this case was not appealed and therefore is final.[15]

Contrary to BFS's claims, a judgment is final and remains final unless and until it has been overturned on appeal. See Rule 201 (a) SCACR (stating that "[a]ppeal may be taken, as provided by law, from any final judgment or appealable order."). Additionally, as many courts have held,

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[15] Even on BFS's own theory that an order granting summary judgment and ending a case is not a final judgment if appealed, the order entered in this case by Judge Price granting summary judgment to McDaniel, another BFS subcontractor, is certainly a final judgment. It ended the case as between BFS and McDaniel and was not appealed.

The McDaniel order is significant in other ways as well. BFS attempts to avoid the application of collateral estoppel by arguing the issues decided in MI Windows, Six Fifty Six, and Pavic are different than the issues here because BFS now just seeks indemnity occasioned by its subcontractors' negligence. That's all BFS sought as against McDaniel. Even closer to the facts of this appeal, the thrust of BFS's argument against McDaniel was that while Plaintiffs had dismissed their claims against McDaniel with prejudice (finding no deficiencies with its work), BFS "still has a viable claim for contractual indemnity that obligates McDaniel to pay the defense costs incurred by BFS in defending against Plaintiffs' claims regarding McDaniel's alleged improper scope of work." **(R. p. 1554).**

McDaniel, like WSC here, argued BFS's contractual indemnity provisions, including the "defend and hold harmless" clause contained therein, violates the Anti-Indemnity Statute and are neither clear nor unequivocal under Concord & Cumberland. The circuit court granted McDaniel's motion for summary judgment over BFS's arguments that its indemnity claim was not subject to collateral estoppel and did not run afoul of Concord & Cumberland or the Anti-Indemnity Statute.

BFS had litigated the exact issue – whether it can recover defense costs under its indemnity provisions where BFS bears no liability to Plaintiffs on the indemnifying subcontractor's account – in this very case, the answer was determined to be no, and the judgment rendered is final.

a judgment is final for purposes of collateral estoppel or res judicata unless and until it is overturned on appeal.[16]

Circuit courts have unanimously found the indemnity language in BFS's master subcontractor agreement to be illegal, unenforceable, and against public policy. The master subcontractor agreement at issue in this case includes the *same* language. BFS has already litigated the issue of the enforceability of its indemnification provisions. It should not be permitted to now relitigate the same exact issue. The circuit court was correct in holding that collateral estoppel applies to this matter and should be affirmed in that regard.

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[16] See B&B Hardware, Inc. v. Hargis Industries, Inc., 575 U.S. 138, 140, 135 S.Ct. 1293, 1298-99 (2015) ("Sometimes two different tribunals are asked to decide the same issue. When that happens, the decision of the first tribunal usually must be followed by the second, at least if the issue is really the same. Allowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring."); Lee v. Criterion Ins. Co., 659 F. Supp. 813, 819 (S.D. Ga. 1987) ("However, '[t]he established rule in the federal courts is that a final judgment retains all of its res judicata [or collateral estoppel] consequences pending decision of the appeal . . . .'" (internal citations omitted); In re Kramer, 543 B.R. 551, 554 (Bankr. E.D. Mich. 2015) ("that under Michigan law, collateral estoppel applies to judgments even when they are pending on appeal or the time for appeals has not yet expired."); Hapgood v. City of Warren, 127 F.3d 490, 494 (6th Cir. 1997) ("It is worth noting that when the district court granted defendant summary judgment, plaintiff's case in Ohio state court was on appeal. 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."); 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4433, p. 308 (". . . it is likewise held in federal courts that the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided."). The rationale behind this rule is that if cases on appeal were not final judgments, parties could re-file cases in trial court while the appeal is pending in order to try and achieve a different result, thus subjecting courts to inefficient duplicative litigation. See generally, Warwick Corp. v. Maryland Dep't of Transp., 573 F. Supp. 1011, 1014 (D. Md. 1983), aff'd sub nom. Warwick Corp. v. Maryland Dep't of Transportation, 735 F.2d 1359 (4th Cir. 1984) ("Such a consequence would also be laughable. If a judgment was denied its res judicata effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation.").

III. THE COURT CANNOT SEVER CERTAIN LANGUAGE FROM THE INDEMNITY PROVISION OF THE MASTER SUBCONTRACTOR AGREEMENT BECAUSE ILLEGALITY PERVADES THE PROVISION, THE LANGUAGE OF THE INDEMNITY PROVISIONS IS INTERTWINED AND DEPENDENT ON EACH OTHER.

BFS argues the illegal and unenforceable language in its master subcontract agreement should be severed and this court should create an indemnity right where none currently exist (because the indemnity language is illegal and unenforceable). **(App. Br. pp. 37-41).** The circuit court in this case, and in the other cases involving the same indemnity provisions, was correct to not sever or re-write BFS's master subcontractor agreement because the illegality pervades the agreement and the indemnity language.

BFS asserts that certain portions of the indemnity provisions contained in its master subcontractor agreement are irrelevant to the analysis of whether it should be permitted to recover in indemnity for its subcontractor's negligence. **(App. Br. pp. 19-20).** The Court must interpret the agreement as a whole. See generally, McGill v. Moore, 672 S.E.2d 571, 574, 672 S.E.2d 571, 574 (2009) ("A contract is read as a whole document….").

The language of the master subcontractor agreement that provides BFS the purported right to recover its defense costs is contained within Section 5 of the agreement (labeled "Indemnity"). The language of Section 5, in part, calls for WSC to defend BFS even if BFS is solely liable for causing the loss that gave rise to the claim for defense. **(R. pp. 790-792).** Section 5 of the master subcontractor agreement provides that the defense costs obligation ends once it is finally proven in court that the claims against BFS are barred by the applicable statute of limitations but contains no exception to the extent the claims are the result of the negligence or sole negligence of BFS. **(Id.).** Although the end of Section 5 provides an exception for defense and indemnity for claims arising from design defects and the professional negligence of architects and engineers, it does not provide any exception relative

to the fault of BFS in whole or part. **(Id.).** Section 9.i. of the Master Subcontractor Agreement also provides for indemnification of attorneys' fees and expenses and amounts paid in settlement without regard to the fault of BFS. **(R. p. 796).** All of these purported indemnity rights disregard the negligence of BFS violate South Carolina law and are unenforceable. Moreover, when viewed against other parts of the same master subcontract agreement, they are conflicting and contradictory.

As a general rule, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) (quoting Berkebile v. Outen, 311 S.C. 50, 53, n. 2, 426 S.E.2d 760, 762 n. 2 (1993)). It is not the function of the court to rewrite contracts for parties. Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 694 S.E.2d 15, 18 (2010); Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002); ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011). Section 5 of the master subcontractor agreement, alone, is filled with indemnity provisions that do not conform to South Carolina law. Because the indemnity provisions violate South Carolina law in many respects, BFS's request that the Court rewrite the indemnity provisions must be rejected.

The South Carolina Supreme Court cautioned in Simpson v. MSA of Myrtle Beach, Inc., "if 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." 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007) (internal citations omitted).

It is also worth note that the language of Section 5 is not subdivided into sections, not separately enumerated by separate paragraphs (as Appellant's brief would suggest), and its language is intertwined and dependent on the language of the whole provision. See **(R. pp. 79-**

792). The second and third blocks of text within the indemnity provision begin with "NOTWITHSTANDING THE FOREGOING" and "THE DUTY TO DEFEND UNDER THIS SECTION 5," each referring to the provision as a whole. **(Id.)**. Eliminating portions of Section 5 as BFS suggests would require a rewriting of the whole section.

South Carolina courts do not "blue pencil" agreements and rewrite a contract's terms to make it comply with the law, as BFS would have it. See Poynter, 387 S.C. at 588, 694 S.E.2d at 18 (recognizing that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy). "Replacing some [illegal] language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term" to which WSC did not agree. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 175 (S.C. App. 2018) (declining appellant's invitation to rewrite the indemnity provisions of its contracts and replace language violative of South Carolina law).

BFS cites to the case of Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) in support of its argument for severability. Beach Co. is inapposite. There, a landlord brought suit against tenant for breach of lease agreement, and the landlord countersued for breach of contract. 351 S.C. 56, 566 S.E.2d 863. The contract at issue contained provisions that waived the tenant's right to a jury trial and to assert compulsory counterclaims. Id. at 64, 866. This Court held that "A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be." Id. at 64, 867. This Court ultimately held that the tenant's rights to a jury trial and to assert counterclaims were separate and distinct rights, and it severed the waiver of compulsory

of counterclaims. Id. at 65, 867.

Here, unlike Beach Co., the indemnification language of BFS's master subcontractor agreement is intertwined and not susceptible of division. BFS is not seeking to sever an illegal part of a contract. It is asking this court to cherry pick lines of a section of a contract to salvage its claim for indemnity. BFS should not be allowed to jumble multiple "confusing at best and deceptive at worst" indemnity provisions within the indemnification section of the master subcontractor agreement, and then ask this Court to cherry-pick terms to be enforced when confronted with the illegality of the indemnity language. **(R. p. 831).**

This Court's decision in Simpson is on point. In Simpson, the South Carolina Supreme Court found an arbitration agreement with unconscionable terms wholly unenforceable, despite the presence of a separate contractual severability clause, due to the "cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause." 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007). The contractual severability provision did not result in an exception to the general rule of unenforceability of illegal contracts, especially where the contract is one-sided, oppressive, or a contract of adhesion. Id.

BFS should not and cannot, as a matter of law, be saved from its own illegal contract, by a rewriting of its terms, especially rewriting by a court. Poynter, 387 S.C. at 588, 694 S.E.2d at 18; Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002), ERIE Ins. Co., 393 S.C. at 460, 713 S.E.2d at 321. For this reason, the circuit court should be affirmed.

IV. THE ANTI-INDEMNITY STATUTE APPLIES TO BFS'S CLAIMS FOR ATTORNEY'S FEES AND COSTS.

BFS does not challenge in this appeal that it cannot use its master subcontractor agreement to require its subcontractors to indemnify it from its own negligence. BFS admits it cannot recover in indemnity for its sole negligence under South Carolina law; however, it argues that the same

law does not restrict its right to recover, in indemnity, its attorney's fees and costs – even if such costs were incurred because of its sole negligence or the negligence of its other subcontractors. This argument is illogical, against the letter and spirit of applicable law, and more importantly, was crafted by BFS after the circuit court fully granted WSC summary judgment.

A. Attorney's fees and costs are recoverable elements of damages of a contractual indemnity claim.

BFS argues "the [Anti-Indemnity] statute addresses general damages and not recovery of attorney's fees; thus, the statute does not apply to this portion of the Contract."[17] BFS's argument ignores that "general damages" may include attorney's fees and costs when the right to recover the same is provided by contract or statute, as it is here. See Townsend v. Singleton, 257 S.C. 1, 12, 183 S.E.2d 893, 988 (1971); Rimer v. State Farm, 248 S.C. 18, 27, 148 S.E.2d 742, 747 (1966); U.S. Rubber Co. v. White Tire Co., 231 S.C. 84, 96, 97 S.E.2d 403, 409-410 (1956).

The Anti-Indemnity Statute addresses "Hold harmless clauses in certain construction contracts." The text of the statute reads as follows:

> Notwithstanding any other provision of law, **a promise or agreement** in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, **purporting to indemnify the promisee**, its independent contractors, agents, employees, or indemnitees **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**. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to

[17] BFS is referring specifically to Paragraph Three of Section 5 of the master subcontractor agreement. **(App. Br. p. 30).** BFS defines this designation ("Paragraph Three") in its opening Brief. The text of Section 5 of the master subcontractor agreement is not separately designated by sections and the paragraphs are not separately numbered as this designation would convey. See the text of Section 5 on pages 14-16, supra.

> any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

S.C. Code § 32-2-10 (emphasis and double emphasis added).

The circuit court was correct in concluding the Anti-Indemnity Statute is applicable to BFS's claim for attorney's fees and costs because the statute speaks of "damages" and attorney's fees and costs can only be recoverable in indemnity as damages. **(R. pp. 94-95).**

It is well-established under South Carolina law that "attorney's fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses" associated with a contractual indemnity claim. See McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) (citing Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971)); see also Fountain v. Fred's, Inc., 429 S.C. 533, 556–57, 839 S.E.2d 475, 488 (Ct. App. 2020), reh'g denied (Mar. 30, 2020), cert. granted (May 28, 2021); Sherlock Holmes Pub, Inc. v. City of Columbia, 389 S.C. 77, 697 S.E.2d 619 (Ct. App. 2020); 22 Am. Jur. 2d, Damages, § 166, pp. 235-236.

In fact, BFS pled it was entitled to attorney's fees and costs on its indemnity cause of action. **(R. p. 399)** ("The BFS is entitled to full contractual and common law indemnification from the 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 any negligence, as aforesaid, on 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, of which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims."). BFS's own pleading acknowledges that attorney's fees and costs are recoverable items of damages on a contractual indemnity claim. There is no support for BFS's argument that S.C.

Code § 32-2-10's reference to "damages" does not include attorney's fees and costs.

BFS's other argument on appeal is that the Anti-Indemnity Statute, S.C. Code § 32-2-10, does not preclude the recovery of attorney's fees and costs as "consequential damages of an indemnity claim" because they are not damages that BFS will incur to a third-party. **(App. Br. p. 31).** This is an argument that BFS created after summary judgment was entered. As an initial matter, it is not properly preserved for appeal. It is also an argument that is wholly inconsistent with its agreement, pleadings, the plain and ordinary meaning of the statutory language, and the purpose of the statute and South Carolina law.

While this argument lacks substantive merit, it must first be addressed that BFS crafted this argument after the circuit court granted WSC summary judgment. BFS did not properly preserve these arguments for appeal, because these arguments were not raised prior to BFS's Motion for Reconsideration. See **(R. pp. 1386-1450); (R. pp. 1373-1385).**

It is well-established that a party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not. Kelaher, Connell & Connor, P.C. v. S.C. Workers' Comp. Comm'n, 435 S.C. 55, 61, 863 S.E.2d 842, 845 (Ct. App. 2021) (finding an issue that was first raised in a Rule 59(e) motion was unpreserved for appellate review) citing Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). This Court should find that BFS did not properly preserve this issue for appeal given that they were raised for the first time in BFS's Motion for Reconsideration and uphold the circuit court's orders granting summary judgment to WSC on this independent basis alone.

The argument must also be rejected because it conflicts with the language of both BFS's pleading and its master subcontractor agreement. See **(R. p. 441)** (quoted above). The language of BFS's master subcontractor agreement provides for BFS's recovery of attorney's fees and costs as

a form of indemnification:

> TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY DEFENDANT 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 FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. . . . 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 HEREUNDUER 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.

(R. pp. 790-791) (all caps emphasis in original, underline emphasis added).

BFS's pleadings seek attorney's fees and costs on its contractual indemnity cause of action. **(R. p. 441).** In fact, the only cause of action that BFS has not abandoned is its contractual indemnity cause of action.

BFS attempts to support its argument against the application of the Anti-Indemnity Statute by reference to an explanation of what "indemnity" means in Concord & Cumberland, Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646-647, 819 S.E.2d 166, 170-171 (Ct. App. 2018). BFS cites to Concord & Cumberland not for the case holding, but rather for its description of "indemnity" as "that form of compensation in which a first party is liable to pay a second party for loss or damage to the second party incurs to a third party." **(App. Br. p. 31).** BFS argues that the attorney's fees and costs WSC would be required to reimburse BFS for are not damages BFS has incurred to a third party, therefore they are not "within the scope of indemnity." **(Id.).**

The Legislature's intent to prevent a situation where a subcontractor, such as WSC, must reimburse a general contractor, like BFS, for amounts BFS must pay in indemnity or to defend against its own negligence or the negligence of its other subcontractors, is clear and unambiguous from the language of the Anti-Indemnity Statute.

It is fundamental that:

> The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in language used construed in light of intended purpose. The legislature's intent should be ascertained primarily from the plain language of the statute. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation, and the court has no right to look for or impose another meaning.

Rorrer v. P.J. Club, Inc., 347 S.C. 560, 569, 556 S.E.2d 726, 730 (Ct. App. 2001).

The word "indemnity" is not found within the Anti-Indemnity Statute. See S.C. Code § 32-2-10. The word "indemnify" and phrase "hold harmless" are. Id. To "indemnify" and "hold harmless" are synonymous with each other and the well-understood meaning of each verb is to

make immune from liability.[18] The statute does not limit or qualify its application as BFS would have it, nor does the ordinary meaning of the language contained therein.

The lower court was correct in giving the words "indemnify" and "hold harmless" their "'plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" CFRE, LLC v. Greenville Cnt'y Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting Sloan v. Hardee, 371 S.C. 495, 640 S.E.2d 457, 459 (2007)).

It is also proper to consider BFS's efforts to construe the language in the Anti-Indemnity Statute in conjunction with the purpose of the whole statute and the policy of the law, which disfavors indemnity provisions that are "overly broad." See Keith v. River Consulting, Inc., 365 S.C. 500, 600 S.E.2d 302 (Ct. App. 2005); see also Rorrer v. P.J. Club, Inc., 347 S.C. at 569, citing S.C. Coastal Council v. S.C. State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). The object of the Anti-Indemnity Statute is to prevent the enforcement of agreements that require a subcontractor to indemnify a general contractor for damages caused by the general contractor's negligence or the negligence of its subcontractors. D.R. Horton, Inc. v. Builders First-Source-Southeast Group, LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018).

BFS seeks an interpretation of the statutory language that is not consistent with the plain language of the statute, its ordinary meaning, and the overall purpose of the statute and South Carolina law. Its argument should be rejected for these additional reasons.

[18] Black's Law Dictionary defines "indemnify" as: "**1.** To reimburse (another) for a loss suffered because of a third party's or one's own act or default; HOLD HARMLESS. **2.** To promise to reimburse (another) for such a loss. **3.** To give (another) security against such a loss" and "hold harmless" to mean "[t]o absolve (another party) from any responsibility for damage or other liability arising from the transaction; INDEMNIFY." Black's Law Dictionary 11th Ed. (2019); see also New York & Presbyterian Hosp. v. United States, 881 F.3d 877, 883-87 (Fed. Cir. 2018) (holding "indemnify" was commonly understood to mean "to compensate" and "to reimburse" after examining various definitions of the word).

V. BFS CANNOT SEEK INDEMNITY AGAINST LIABILITY FROM WSC ON APPEAL WHEN BFS PREVIOUSLY LIMITED ITS CLAIM AGAINST WSC TO ATTORNEY'S FEES AND COSTS.

BFS represented to the lower court, in a writing signed by its counsel, that it is ***only*** seeking to recover the portion of its attorney's fees and costs incurred in defending the claims that arose out of WSC's work. BFS scaled-back its claim against WSC after WSC procured the issue release in BFS's favor.

After Judge McCoy granted WSC summary judgment on BFS's crossclaims, BFS filed a Motion for Reconsideration. In its Motion for Reconsideration, BFS stated repeatedly that it was only seeking to recover the defense costs it incurred in defending BFS from those of Plaintiffs' claims that arose out of WSC's work. **(R. p. 1376)** ("BFS is not seeking indemnification for its own negligent acts or omissions, but rather is seeking attorney's fees pursuant to the clear provisions of its agreement with WSC."); **(R. p. 1379)** ("BFS is, in fact, seeking only recovery of attorney's fees and costs, expended in defending against the plaintiff's claims, arising out of the performance of WSC's work."); **(R. p. 1381)** ("In this case, where BFS originally sought indemnity against liability resulting from the (sic.) WSC's negligence, those specific indemnity claims have been resolved. The sole remaining claims are those seeking attorney's fees pursuant to the BFS/WSC contract, claims which are not even addressed, much less prohibited by 32-2-10.") (emphasis in original).

BFS waived its right to seek indemnity against liability arising from WSC's work by expressly relinquishing its claim. See Janasik v. Fairway Oaks Horizontal Property Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992) ("A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights

or of all the material facts upon which they depended. The doctrine of waiver does not necessarily imply that the party asserting waiver has been misled to his prejudice or into an altered position."). There is no question that BFS's waiver of its claim for indemnity against liability was knowing and intentional and that a party can waive its rights by its acts, omissions, and representations made during litigation. See, e.g., Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (examining whether a party waived its right to move for a new trial based upon its counsel's statement to the jury during closing arguments that he would not argue with the jury's verdict); Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (examining whether a party waived its right to compel arbitration based upon party's actions taken in case).

Further, the doctrine of judicial estoppel binds BFS to the positions it has previously taken in this case. See Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 251 489 S.E.2d 472, 477 (1997) ("Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation."); Hawkins v. Bruno Yacht Sales, Inc., 342 S.C. 352, 536 S.E.2d 698 (Ct. App. 2000) ("Courts invoke the doctrine [of judicial estoppel] to deter parties from playing 'fast-and-loose' with the facts of a case such that the judicial system is adversely impacted."); Quinn v. Sharon Corp., 343 S.C. 411, 422-23, 540 S.E.2d 474, 480 (Ct. App. 2000) (J. Anderson, concurrence) (discussing the history of the application of the judicial estoppel doctrine in South Carolina courts and maintaining that is immaterial whether the party who switched its position was successful or not in propounding the validity of its initial position).

BFS should be judicially estopped from taking any positions in this appeal that run contrary to the positions it previously took in this case. Beyond the statements BFS made in its Motion for Reconsideration with respect to its express limitation of its indemnity claim against WSC, BFS made certain statements in its opposition to co-defendant McDaniel's motion for summary judgment that

are relevant to the analysis of the issues involved in this appeal. See **(R. pp. 1538-1566).** BFS admits its opposition to McDaniel's motion for summary judgment:

- Summary judgment as to indemnity for liability is proper where a subcontractor obtains an issue release in favor of BFS, thereby eliminating the question of BFS's liability for the subcontractor's negligence. See **(R. p. 1553)**;

- Where a subcontractor secures an issue release in favor of BFS, the only viable claim BFS has against the subcontractor is a claim for contractual indemnity that obligates the subcontractor to pay the defense costs BFS incurred in defending against Plaintiffs' claims regarding the subcontractors' alleged improper work. **(R. p. 1554)**;

- BFS should only incur defense costs arising out of or relating to the acts or omissions of its subcontractor's work until such time as a release is executed. **(R. p. 1554)**.

Therefore, while BFS should not be permitted to recover on any theory of indemnity for the reasons set out supra, there is absolutely no circumstance where WSC's liability should extend beyond a sliver of defense costs when BFS has expressly limited its claims to such recover.

VI. BFS'S MASTER SUBCONTRACTOR AGREEMENT DRAFTED IS A CONTRACT OF ADHESION AND SO ONE-SIDED AND OPPRESSIVE THAT IT IS UNCONSCIONABLE.

Judge McCoy specifically found the indemnity and duty to defend provision of the BFS master subcontractor agreement to be unconscionable. **(R. p. 99).** In the event this Court finds BFS can enforce the contractual indemnification provisions contained in its master subcontractor agreement against WSC under the facts of this case, WSC maintains the trial court order should be affirmed on the grounds the master subcontractor agreement is unconscionable.

Unconscionability has been recognized as "the absence of meaningful choice on the part of one party due to one-side contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007), citing Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 554,

606 S.E.2d 752, 757 (2004). S.C. Code § 36-2-302 provides:

> If a court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or may enforce the remainder of the contract without to unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. unconscionable clause, or so limit its application so as to avoid any unconscionable result.

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness (or unfairness) of the bargaining process in the contract at issue. Simpson, 373 S.C. at 25. "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." Id. at 26-27. The fact that an agreement is an adhesion contract bears on the analysis of whether a contract or terms therein are unconscionable. Id. at 27.

It should be viewed as an undisputed fact that the BFS master subcontractor agreement containing the subject indemnity and duty to defend clause is a contract of adhesion. The agreements between BFS and its subcontractor-Respondents in this case and those involved in the decisions in other cases are all the same agreement. The indemnity provisions that are the subject of review are not different, they are all the same. The Respondents did not drive different deals based upon their respective bargaining power; nor is there any indication that any were successful in negotiating the provisions contained within the form agreement, including the indemnity and duty to defend provisions. This is typical in the context of the parties' relations. See, e.g., Kennedy v. Columbia Lumber & Mgf. Co., 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989) (taking judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller).

The indemnity provisions within the master subcontractor agreements are also one-sided and oppressive to BFS's contractors. The master subcontractor agreement was drafted by BFS in a way which would obligate its subcontractors to warrant the design and suitability of products

provided by BFS, and further, for subcontractors to indemnify and defend BFS and others from any property damage or personal injury resulting from those products.

The deceptive nature of the definitional, warranty, guaranty, and indemnity provisions contained in Sections 1, 2, 3, 5 and 8 of the agreement have been discussed in detail elsewhere in this brief. It should be noted, however, that the disguised indemnity provisions in **SECTION 3 Warranty** were buried in fine print unlike the bold type found in **SECTION 5 Indemnity.**

In finding contract provisions unconscionable in Simpson the court observed, in pertinent part, as follows:

> [W]hile certain phrases within other provisions of additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) ... We cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law ...

Simpson, 373 S.C. at 28.

In addition, although WSC provided no material in connection with the installation of windows, doors, and Tyvek, the fine print language of **SECTION 3 Warranty** obligates WSC for "defects in design, workmanship and materials" and "structural applications" which obviously relates to manufactured products selected and sold by BFS. WSC was not involved in the design of any of the manufactured materials or any portion of the project. These provisions expose WSC to liability for property damage and personal injury claims arising from deficient materials selected and sold by BFS. The agreement also requires WSC to assume the risk of loss to the work, provides indemnification of BFS for its own negligence, waives delay or damages claims in favor of BFS, mechanic's lien rights, in addition to other waivers of rights. **(R. pp. 785-798).** A party who appreciated the implications of the language of these agreements would not have signed them

unless they had no choice but to do so. The absence of a meaningful choice on the part of WSC and other subcontractors, fact that this is a contract of adhesion with deceptive language, and many one-sided, oppressive provisions should render the entire agreement unenforceable, or at the least, the indemnity and duty to defend clauses unenforceable and Judge McCoy's orders should be affirmed on this further basis.

CONCLUSION

For the reasons stated above and for any other reason stated in the record, to the extent not inconsistent with the argument set out herein, the circuit court's Order Granting Defendant WS Contractors, LLC's Motion for Summary Judgment Against the Claims of Builders FirstSource-Southeast Group, LLC and the Form 4 Order Denying Builders FirstSource-Southeast Group, LLC's Motion for Reconsideration and/or Alteration/Amendment should be **AFFIRMED**.

Respectfully Submitted,

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December 1, 2022
Charleston, South Carolina

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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
Civil Action No. 2016-CP-10-03758

Appellate Case No. 2021-001050

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.; CollenBatissa; 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; 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.

CERTIFICATE OF COUNSEL

I, the undersigned counsel for Respondent WS Contractors, LLC, certify that the Final Brief of Respondent WS Contractors, LLC complies with the requirements of SCACR Rule 211(b).

Respectfully submitted,

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