THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2018-CP-07-00911
Appellant Case No. 2022-000016

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier; Jacob R. and Carla Emerson; John B. and Lori Anne Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall; Michael B. and Cheyenne M. Johnson; Kenny Manuel Lopez and Kelsey Trudel Lopez; Dylan C. and Samantha Dawn Machado; Marvin K. and Maryalice Mamaril; Thomas R. and Melissa S. McFeely; Michael and Karen M. Rodriguez; Sarmed and Jessica M. Shafi; James J. Smith, III and Alayshia Smith and Nichole J. Verstegen; Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC; Americo Roofing Concepts, Inc.; Archer Exteriors, Inc.; Armor Building Solutions, LLC; Builders FirstSource-Southeast Group, LLC; Crossroads Enterprises, LLC; D.R. Horton, Inc.; Dean Custom Air, LLC; East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.; Freedom Homes, Inc. f/k/a Armor Building Solutions, Inc.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Masco Cabinetry, LLC; ProBuild East, LLC; Professional Drywall & Paint Services, LLC; Professional Exteriors, II, LLC; Quality Electric of the Coastal Carolinas Incorporated; Superior Association Services, LLC; and Valim Construction, LLC, Defendants,

Of Whom Sarmed and Jessica M. Shafi, Lather Construction, Inc., Lather Construction SC, Inc., Hutton's Landscapes, Inc., and East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc. are the Respondents,

And

D.R. Horton, Inc. is the Appellant.

INITIAL BRIEF OF APPELLANT

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3. Did Judge Price incorrectly read into S.C. Code Ann. § 32-2-10 a prohibition on a duty to defend, which was not included in that statute by the General Assembly?

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5. Did Judge Price incorrectly rule that the parties' contractual provisions concerning indemnity and duty to defend were unenforceable as a matter of law?

STATEMENT OF THE CASE

This case was commenced on May 1, 2018. It sought damages for alleged deficiencies concerning construction and landscaping of the plaintiffs' homes and yards in the Tidewater Creek subdivision in Beaufort County. The plaintiffs are the owners of 15 homes there. The defendants are various contractors and appellant D. R. Horton, Inc., which developed the subdivision. All of the plaintiffs' claims have now been settled.

The appeal concerns cross-claims by appellant Horton against three of the respondent/defendant contractors: Lather Construction, Inc., Hutton's Landscapes, Inc. and East Coast Construction Cleanup Corp. Appellant initially cross-claimed on December 2, 2019. It subsequently amended; its cross-claims on appeal were filed on August 23, 2021. Appellant had cross-claimed against other defendants, but those cross-claims are not involved in this appeal.

The cross-claims against these three respondents were for equitable indemnification and contractual indemnification and defense obligations. The equitable indemnification cross-claims

are not involved in this appeal. The appeal concerns only the contractual indemnification and defense obligations of respondents Lather, Hutton's and East Coast to appellant Horton.

Respondent Lather moved for summary judgment on the cross-claims on October 8, 2021. Respondent Hutton's so moved on October 19, 2021. The gravamen of the motions was that the contractual indemnification and defense obligations were unenforceable. The Hon. H. Steven DeBerry heard these motions on October 29, 2021, and denied them on November 12, 2021. His orders denying the motions were filed within an hour after respondent East Coast filed its memorandum in support of its similar motion for summary judgment, which it filed on November 10, 2021. East Coast's legal arguments are the same as Lather's and Hutton's and were determined as a matter of law in the case by Judge DeBerry when he ruled on the same legal issues on November 12, 2021.[1]

Certain of the plaintiffs' claims were outstanding against the appellant and these three respondents when trial began on Monday, November 15, 2021. It was a jury trial before the Hon. Bentley Price. During the first two days of trial, the respondents argued that their contractual indemnification and defense obligations were unenforceable. On November 16, 2021, Judge Price verbally granted the respondents' summary judgment motions during a hearing to bifurcate, dismissed appellant's cross claims and directed a verdict against it on its cross-claims. The three respondents settled with the plaintiffs, leaving appellant as the sole defendant at trial even though the equitable indemnification factual issues could not have been decided until after a jury verdict. On Friday, November 19, 2021, the jury returned a verdict against appellant D. R. Horton for $140,000.

[1] East Coast did not argue otherwise before the trial court.

On November 24, 2021, pursuant to Rule 59, SCRCP, appellant D. R. Horton moved to alter or amend Judge Price's bench ruling that these sections of its contracts with these respondents were unenforceable. On November 29, 2021, it moved for J.N.O.V., or in the alternative for a new trial absolute or new trial nisi remittitur. Judge Price denied the motions on December 3, 2021. Notice of appeal was served December 30, 2021.

Appellant Horton settled with the plaintiffs after trial and that verdict is not involved in this appeal. This appeal involves the ruling of Judge Price that the contractual indemnification and defense obligations of these three respondents is unenforceable. The estimated amount involved in the appeal of that ruling is well in excess of $1,500,000.

STANDARD OF REVIEW

The appellate court reviews the grant of a summary judgment motion de novo as to matters of law. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRP." *Savannah Bank, N.A. v Stalliard*, 400 S.C. 246, 250, 734 S.E.2d 161, 163 (S.C. 2012) (quoting *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (S.C. 2002)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. To withstand a motion for summary judgment 'in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence.'" *Id.* (quoting *Hancock v. Mid-South Mgmt. Co., Ins.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (S.C. 2009).

SUMMARY OF FACTS

The contractual provisions at issue are identical. There are contained in a printed form agreement titled "South Carolina Independent Contractor Agreement ('ICA')." Section 10

concerns the respondents' indemnification and defense obligations. Section 11 requires them to provide insurance for those obligations and to name appellant D. R. Horton as an additional insured. (All three contracts between appellant and respondents.)

Insurance is more than a theoretical part of these indemnification and obligations. It is critical in this case because respondents Lather and Hutton's are out of business. (Defendant Lather Construction SC, Inc.'s Motion for Summary Judgment as to Claims of Plaintiffs and D. R. Horton, Inc., including Exhibits D and F; Tr. 33:23—35:10.)

Respondent Lather's "Work generally consists of clearing, grading and constructing the water, sewer, drainage, and roads for the proposed residential subdivision." (Article I – WORK 1.01, Document 00505 Standard Form of Agreement Between Owner and Contractor.) The lump sum price was $1,014,423.63. (Agreement, Article 5.) Clearly, Lather was a sophisticated contractor.

According to Hutton's contract its work included "rough grade, final grade, landscape turnkey, landscaping, sod/seed, trees, backfill foundations/crawl spaces, flatwork labor turnkey, forming, pouring, stripping forms, slab backfill, and house slab turnkey (monolithic)". (Hutton's Landscapes, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment on the Cross-Claims of D. R. Horton, Inc. (Pp. 1-4 and Ex. A. Contract.) It was likewise a sophisticated contractor.

East Coast had been working with Horton at least since November 30,2012, the date of its contract and before the Tidewater development began. (East Coast contract.) Horton did not even buy the land for Tidewater Creek until 2013 and the engineering specifications were not prepared until June 30, 2014. (Tr. 135:10—23; Contract Documents and Specifications for Tidewater Creek.) Exhibit A to its contract provided that it was to "supply all material,

equipment, and labor necessary to complete the landscaping final grade phase of construction" and "pick up all construction debris a minimum of 5 days/week." Item 22 of that Exhibit also provided "Subcontractor shall comply with all insurance requirements including the subcontractor agreement before setting foot on any D. R. Horton site." Each and every page was signed or initialed. East Coast knew exactly what was required, including the requirement of insurance.

When plaintiffs sued D.R. Horton, D.R. Horton tendered the suit to the respondents to defend. No respondent or respondent insurance company provided D.R. Horton a defense. (Tr. Vol. II Rev. 45:12-14.) R.p. Instead, the respondents filed motions for summary judgment to evade their obligations and their insurance company's obligations under the obligation to indemnify and duty to defend provisions of the ICA contract. Judge DeBerry heard the motions for summary judgment and denied them in a Form 4 Order that stated there were material issues of fact. The respondents asked Judge DeBerry to hold the contractual provisions unenforceable as a matter of law. He refused. There was no reason for Judge DeBerry to decide that factual issues existed unless he had first decided that the indemnification and duty to defend provisions were enforceable as a matter of law. Had he decided that the provisions were unencodable as a matter of law, that would have been the end of the matter.

Instead, Judge DeBerry denied the summary judgment motions and ruled on November 12, 2021. (Order, Nov. 12, 2021) R.p. Two business days later, on the second day of trial, Judge Price overruled Judge DeBerry and decided "that the contract indemnification and Subsection 10 is unenforceable. I think it's an adhesion contract. I think it's take-it-or-leave-it. I think it's similar and likened to a non-compete in the sense that if the opposing party doesn't have a whole lot of negotiating power, then it can be deemed unenforceable. I don't think it's enforceable. I

think it violates public policy." (Tr. V. II Rev. 52:16-23.) R.p. Over appellants objection, Judge Price decided the issue during a hearing on the respondents so-called 'motion to bifurcate,' which was in reality their motions for summary judgment that were simply presented a second time and to a second judge after receiving a decision against them by the first judge. (Tr. V. II Rev. 33:4-9.)

This appeal concerns the authority of Judge Price to overrule Judge DeBerry.

ARGUMENTS

1. DID JUDGE PRICE HAVE SUBJECT MATTER JURISDICTION AND AUTHORITY TO OVERRULE JUDGE DEBERRY AND DECLARE UNENFORCEABLE THE PARTIES' CONTRACTUAL INDEMNITY AND DUTY TO DEFEND ONLY TWO BUSINESS DAYS AFTER ENTRY OF JUDGE DEBERRY'S WRITTEN SUMMARY JUDGMENT ORDER?

This is the threshold issue in this appeal. If the Court agrees with appellant that Judge Price did not have authority to overrule Judge DeBerry, the appellants request that the Court remand the case to the trial court for a trial on appellant's cross-claims.

It is settled law in South Carolina that one trial judge may not overrule another trial judge because doing so is reserved to the appellate courts. "It is axiomatic . . . a Circuit Judge does not have the power to reverse the ruling of another Circuit Judge." *Tisdale v. Am. Life Ins. Co.*, 216 S.C. 10, 13, 56 S.E.2d 580, 581 (S.C. 1949). "The rule is well settled that the prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge, except in cases when the right to do so has been reserved to the succeeding Judge, when it is allowed by rule of Court or statute or when the subsequent order does not alter or substantially affect the ruling or decision represented by the previous order." *Dinkins v. Robbins*, 203 S.C. 199, 202, 26 S.E.2d 689, 690 (S.C. 1943) (citing *Mut. Bldg. Loan Ass'n of Sumter v. Hewson*, 196 S.C. 181, 12 S.E.2d 715 (S.C. 1940)); *see also Charleston Co. Dep't Soc. Serv. v. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (S.C. 1995) (citing *Tisdale*, 216 S.C. at 13 and *Dinkins*, 203 S.C. at

202), ("There is a long-standing rule in this State that one judge of the same court cannot overrule another. . . . Accordingly, we hold a successor judge may not substitute his own judgment for that of the trial judge.").

The question in *Dinkins* was: "Does a Circuit Judge have jurisdiction and power to grant a compulsory order of reference as to certain equitable issues raised by the pleadings when a former Circuit Judge has refused a general order of reference, from which there has been no appeal?" 203 S.C. at 202. The *Dinkins* Court decided that the prior judge's decision to not refer any issues on a general order of reference embraced all matters that could have been referred. *Id*. Thus, a subsequent circuit judge could not parse out equitable issues for referral.

In *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546 (S.C. 1986), the court confirmed that "[O]ne Circuit Court Judge does not have the authority to set aside the order of another (citing Circuit Court Rule 60 and *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (S.C. 1979)). "The effect of Judge Pyle's order was to reverse the earlier substantive order, clearly an impermissible act. Respondents erred under the rules of civil procedure when it repeatedly asked the court to revisit the Judge DeBerry's decision. Rule 41(l), SCRCP prohibits repeat motions on the same facts. "If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in the action." *Id.*

Similarly, in this case, Judges DeBerry and Price are both Circuit Judges. Judge DeBerry had before him the entirety of the summary judgment motions, including the additional insured

(AI) issue[2] – both as to matters of law and issues of fact. He declined to find for the respondents on any issue. To consider the factual issues, he first would have decided that the contract was enforceable as a matter of law. If it were not enforceable as a matter of law, he would have had no reason to then consider factual issues. This was specifically brought to Judge Price's attention by appellant's counsel.

> MS. PETERSON: . . . A judge has already decided as a matter of law that it's not unenforceable. (Tr. V. II Rev. 10:8 – 10) R. p.

Judge Price apparently recognized this and acknowledged earlier that he did not have the power to rule on the matter that Judge DeBerry had already ruled on. (Tr. V. II Rev. 6:25 – 7:5.) R.p.

> MS. PETERSON: If this case is to go forward with the trial and the jury deciding, then we believe it's wholly improper for the summary judgment to be re-heard.
>
> THE COURT: I agree with that. I don't think I can do that. So I'm agreeing with you 100% on that. That is what we talked about. I don't think that is something I can do. You don't get to just bring it back up again, because a prior circuit judge has already ruled on that. So I am with you on that. (Tr. V. II Rev. 6:22 – 7:5.) R. p.

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[2] Appellant attached the insurance contract to its response to respondents' motions for summary judgment. The AI coverage each respondent was required to provide to appellant covers the duty to defend and the duty to indemnify, which is critical because respondents Hutton's and Lather are no longer in business. At its heart, this is an insurance claim case.

Respondents' counsel then proceeded to re-argue their summary judgment motions under the guise of a motion to bifurcate. (Tr. V. II Rev. 8:11 – 53:5.) R.p. In doing so, they put front and center exactly the same matter that Judge DeBerry had decided on the motions for summary judgment, namely the enforceability of the contractual indemnity and duty to defend.[3]

> MS. LUCEY: A lot of uncertainty for us in terms of trying to resolve the claim. . . . Another alternative, Your Honor, is for Hutton's and likely Lather to raise a motion -- in an effort to expedite the trial, raise a motion to bifurcate the cross-claims.
>
> But I think the threshold issue and whether we can bifurcate the claims is to determine whether or not the contractual indemnity provision would remain enforceable. If they are enforceable – if they are not enforceable, which is our position, then there is no reason to bifurcate them, and they can be dismissed. And that's already been decided then, Your Honor. (Tr. V. II Rev. 7:8 – 21.) R. p.

Appellant's counsel objected because the matter had already been heard and decided by Judge DeBerry. (Tr. V. II Rev. 9:8 – 10.) R.p. Albeit Judge Price allowed a motion to bifurcate

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[3] At the pretrial summary judgment hearing before Judge DeBerry, Respondents argued that as a matter of law the indemnity and duty to defend provisions violated public policy and were therefore unenforceable as to S.C. Code Ann. § 32-2-10 and under the "clear and unequivocal" standard when an indemnitee will be indemnified for its concurrent negligence. (Pretrial Tr. 19:10 – 24:14.) R.p. (contractual indemnity and duty to defend) and (Pretrial Tr. 9:8 – 10:3) R.p. ("clear and unequivocal"). Judge DeBerry declined to find for Respondents. It is not surprising that Judge DeBerry did not find for Respondents because neither the indemnity provision nor the duty to defend provision violate public policy, as discussed in this brief. Additionally, the indemnity language is clear and unequivocal and follows the language the court suggested in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 658 n. 6, 819 S.E.2d 166, 176 n. 6 (S.C. App. 2018). The same arguments based on the same legal theories were then raised before Judge Price two business days after Judge DeBerry's ruling.

after the trial had already commenced and then turned it into a rehearing of the summary judgment motions.

> MS. LUCEY: At this time, may I make a motion to bifurcate the contractual and equitable indemnity claims that D.R. Horton has asserted against Hutton's?
>
> THE COURT: Sure.
>
> MR. ROSS: [Lather] would like to join, Your Honor.
>
> MR. CLOUD: East Coast would join in that as well.
>
> MS. PETERSON: For the record, I think any arguments that go to the enforceability of contracts and which contracts apply have already been dealt with on the summary judgment motion. They made the same arguments, and the Court did not rule in their favor. (Tr. V. II Rev. 33:23 – 33:9.) R. p.

Over counsel's objection and against what Judge Price himself had correctly recognized earlier as settled law precluding him from overruling another Circuit Judge, (Tr. V. II Rev. 6:26 –7:5), R. p., Judge Price then proceeded to rule on exactly the same issue that Judge DeBerry had previously decided.

Without subject matter jurisdiction or authority, Judge Price reversed Judge DeBerry. (Tr. V. II Rev. 52:16 – 17.) R.p.

If the Court agrees with appellant that Judge Price did not have authority to overrule Judge DeBerry and remands the case for trial on appellant's cross-claims against respondents, the Court need not reach any of the other issues on appeal.

2. DID JUDGE PRICE EXCEED HIS AUTHORITY IN ATTEMPTING TO FORCE A SETTLEMENT OF THE CASE?

Judge Price declared the contractual indemnity and defense obligations of the respondents to be unenforceable in order to force the appellant to settle the case. He did this for three reasons. The first is that he had to be out of town on Thursday night and wanted the trial to be finished by then. The second is that his daughter's birthday party was the next day, and he did not want the trial to interfere with it. The third is that the trial was for only one of 15 homes in the same case, and there was another home in a related case (*Eberly*) also to be tried for a total of 15 future trials. Judge Price seemed to want no part of these other looming trials.

This perspective emerges from a review of the trial transcript, beginning with his greeting of the jury pool on Monday and culminating in a threat, invasion of the attorney-client privilege, and improper settlement disclosures over appellant's objection. On the first day,

> THE COURT: There is one trial this week. It will last for about four days. (Tr. 5:14 – 15.) R.p.

After the jury was selected, he returned to the duration of the trial.

> THE COURT: Again, I am not sure exactly how long it will last, but in doing so, we think it should last until Thursday. (Tr. 23:7 – 8.) R.p.

Sensing Judge Price's underlying concerns, the respondents seized the moment and renewed their motions for summary judgment under the guise of a motion to bifurcate. (See Issue 1 of Argument.) Not surprisingly, their argument was that if Judge Price would rule with them, that would simplify things and speed up the trial. Appellant's counsel resisted and suggested that the trial proceed.

MR. NAIL: I would just suggest, Your Honor, that maybe we see how much we get through today. (Tr. V. II Rev. 10:16 – 17.) R.p.

With Thursday and Friday on his mind, Judge Price demurred.

THE COURT: The concern I have, of course, with that – I am fine with that. But if we don't get through enough, we have backed ourselves into a corner. (Tr. V. II Rev. 10:18 – 20.) R.p.

Respondents' counsel then played the Thursday card by name.

MS. LUCEY: Your honor, based on – I can't imagine we would finish by Thursday. (Tr. V. II Rev. 10: 21 – 22.) R.p.

MR. ROSS: . . . Then if we bifurcate the cross-claims of Horton out from what we are dealing with today, again, a two party case. I think they would agree it gets done by Thursday . . . (Tr. V. II Rev. 31:11 – 13.) R.p.

Judge Price then asked for specific direction.

THE COURT: Tell us what they have to do.

MR. ROSS: We have maintained the position that the contractual indemnity claims of D. R. Horton are unenforceable . . . (Tr. V. II Rev. 31:16 – 18.) R.p.

The answer from the respondents was that dismissing the appellant's claim for indemnity and defense under the contracts was the way out.

Having previously recognized that under the law he could not rule on the respondents' summary judgment motions because Judge DeBerry had done so just two business days before, Judge Price then attempted to force a settlement. (See Issue 1 of Argument.)

THE COURT: Do you have authority? (Tr. V. II Rev. 10:23 – 24.) R.p.

> THE COURT: Where are we as to settlement talks? (Tr. V. II Rev. 29:19.) R.p.
>
> THE COURT: All right. Where are you at, Mr. Nail (appellant's counsel)? (Tr. V. II Rev. 30:6 – 7.) R.p.

In order to stoke the fire, the respondents revealed to Judge Price confidential settlement negotiations Tuesday morning, contrary to Rule 408, SCRE, which "codifies the longstanding principle that evidence of conduct or statements made in compromise negotiation is not admissible." *See, e.g. QHG of Lake City, Inc. v. McCutcheon,* 360 S.C. 196, 209, 600 S.E.2d 105, 111 (Ct. App. 2004) ("Because the law favors compromises, our appellate courts have long held that testimony as to negotiations and offers to compromise are inadmissible for proving liability"). In this case, because Judge Price was the decision-maker as to the substantive issue in the cross-claims, it was not appropriate for him to receive or seek confidential settlement information because it was admitted as evidence for the judge to consider.

> MS. LUCEY: . . . And I think – I don't know if Michael (appellant's counsel) is comfortable in disclosing what I understand the attorneys' fees are in this case.
>
> THE COURT: I assume they are very high. This is a very old case. I think you-all had 50 depositions.
>
> MS. LUCEY: They are over $500,000. . . . my client is going to be forced to pay $750,000 in attorneys' fees. (Tr. V. II Rev. 11:23– 12.) R.p.
>
> MS. LUCEY: Your Honor, I don't know how specific Horton is or what kind of specifics you want, but I think it's important to know that there is an AI [additional insured] demand that Horton has made that separate and apart from resolving this case. It's over $1 million in attorneys' fees.

MR. NAIL: I move to strike that. That is subject to confidential settlement communication. That is also what was requested.

MS. LUCEY: It was, but I think it's relevant and is part and parcel of part of the issue with the contractual indemnity claims. (Tr. V. II Rev. 30:14 – 24.) R.p.

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THE COURT: I tell you what I am going to do. … We will take about an hour and 40 minutes to see if you-all can work something out. But at the close of that, I will tell you this . . . at the close of the hour I am going to hear your motion; okay. If you [Ms. Lucey] are telling me the truth, I am a big fan of that.

MS. LUCEY: I am telling you the truth, sir.

THE COURT: Well, give me a copy of the contract, and let me take a look at it for an hour. (Tr. V. II Rev. 28:17 – 29:4.) R.p.

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THE COURT: All right. Who wants to start?

MS. LUCEY: Your Honor, I am happy to try to update the Court on the status of settlement talks, if you want to jump right into that.

THE COURT: Where are we on settlement talks?

MS. LUCEY: The parties have been talking, and Hutton's and Lather have communicated or are working on putting money on the table to settle the plaintiffs' claims. I don't believe that Horton has contributed any money towards the settlement a global settlement. (Tr. V. II Rev. 29:15 – 24.) R.p.

Along the way, the respondents reminded Judge Price about the other 15 related trials for the homes that he faced in the future, as well as a trial on the respondents' contractual indemnity and defense obligations.

> MS. LUCEY: I think the only reasonable way to do it is for Hutton's to settle all of the claims with all of the homes with plaintiffs' counsel. I don't know that I am in a position to try to negotiate one house settlement; because that simply kicks the can down the road, and we will be here in three months.
>
> THE COURT: Right. You will be right back in front of me in February.
>
> MS. LUCEY: Right. (Tr. V. II Rev. 9:5 – 13.) R.p.

The stoking worked. Tuesday morning, Judge Price became exasperated.

> THE COURT: Well, it's a huge mess. (Tr. V. II Rev. 15:5.) R.p.

The Court saw appellant's desire to enforce the contracts regarding work they had already paid respondents for as the biggest problem in the case.

> THE COURT: The biggest issue continues to be the cross-claims. That is the biggest snag. Because without that being resolved, then it's never going to settle or be resolved. It will always be - - there will always be this, you know, this case out there with you-all, and it's just never going to end. (Tr. V. II Rev. 18:14 – 18.) R.p.

At the end of Tuesday, after securing more confidential settlement information, Judge Price's exasperation led him to squeeze the appellant in a manner that crossed the line.

THE COURT: Earlier when I got the update from the settlement conference that you all went into, why did D. R. Horton not throw anything in the pot? They had previously.

MR. NAIL: I don't have an answer. It was two years ago.

THE COURT: I am talking about today.

MR. NAIL: Today?

THE COURT: Yes. (Tr. V. II Rev. 109:10 – 17.) R.p.

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THE COURT: I am getting really concerned about the time and what is going to happen Thursday at 3:00.

All right. Tell D. R. Horton they are being absolutely ridiculous. I want you to email them, and I want you to bring me the email and tell them I said that, all right? Ask them if they know what an additur is, all right? Bring it to me tomorrow. (Tr. V. II Rev. 110:18 – 24.) R.p.

At the end of Thursday, the trial was still underway. Judge Price left town for the evening.

THE COURT: I need to be out of town. I told you that I thought this case would finish on Thursday. I am going to travel out of town tonight, but I will be back in the morning, but I am going to be late. I should be here by 11:15. I would ask all of you to be here around 11:00. (Tr: 488:25 – 489:4.) R.p.

The trial concluded at 8:10 p.m. on Friday. Judge Price then went to his daughter's birthday party.

> THE COURT: . . . Today's my daughter's ninth birthday, so they're waiting on me to get home to do the cake, so imagine how many texts I've gotten today. . . . I have a birthday party waiting on me. (Tr: 654:5 – 7 and 22.) R.p.

It is one thing for a judge to encourage settlement. It is another thing for a judge to browbeat and threaten a party toward settlement. What is particularly troubling about Judge Price's conduct is his invasion of the attorney/client privilege and the threat of an additur before the witnesses had all testified and before the jury rendered a judgment. He told Mr. Nail what to write to his client and then demanded a copy of it and threatened appellant with additur. Judges are not permitted to threaten litigants or coerce settlement. In *Ledford v. Dep't of Pub. Safety*, 428 S.C. 387 (S.C. 2019), the Court admonished,

> We are deeply concerned by Commissioner Braden's conduct in this matter. We first address her comments during the phone conference, especially those regarding a "duty" to report Ledford for criminal prosecution. Commissioner Braden's remarks essentially left Ledford with two equally undesirable options: (1) move forward with his claim and risk being referred for criminal prosecution; or (2) settle the case and forfeit his right to have his claim adjudicated, and concomitantly Commissioner would ignore her purported "duty" to report Ledford for criminal prosecution. Even if Commissioner Braden's statements were not intended as bona fide threats, there were undisputedly coercive. Commentary to Section 3(B)(8), Code of Judicial Conduct (CJC), Rule 501, SCACR ("A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts").

Id. at 391-92.

The threat of additur occurred during the second day of trial, after only two witnesses appeared, and during the plaintiffs' case – none of the defendants had yet put on their respective cases. When appellant did not settle and declined to forego well over a million dollars (as of day two of the trial) in additional insured coverage because respondents' insurance carriers failed to provide coverage for the claims and failed to defend appellant despite appellant's tender of the claim to respondents' carriers, the Court took it upon itself to grant summary judgment against appellant as to its indemnity and duty to defend cross-claims. "A trial judge must act with absolute impartiality in the performance of judicial duties." *State v. Davis*, No. 2006-UP-316, 2006 S.C. App. Unpub. Lexis 299 (S.C. Ct. App. Aug. 4, 2006).[4] In *Cabrera v. Esso Std. Oil Co. P.R.*, held that the court "abused its discretion by factoring the plaintiff's refusal to settle into its decision to dismiss the case." 723 F.3d 82, 88 (1st Cir. 2013). The court admonished the trial court when it "permitted the information gleaned through its involvement with the settlement talks to exert influence over its disposition of appellant's motion." *Id.* at 89. The court also cautioned the court that it had been too involved in settlement discussions when it obtained information about the parties' positions that unduly influenced its ruling. *Id.* at 90 (the Eight Circuit similarly had concerns in *United States v. Pfizer*, 560 F.2d 319 (8th Cir. 1977) in situations where the decision-maker is too involved in settlement). In this case Judge Price was the decision-maker as to the

[4] Additionally, a Judge's family and social life are not supposed to bear upon any litigant's trial and a judge is supposed to perform the duties of office impartially and diligently. S.C. Rule 501, Code of Judicial Conduct. Appellant felt repeated pressure and coercion to settle to accommodate the trial judge's social calendar during typical court hours. Appellant were provided only one day to present their defense, while Plaintiffs had four days.

cross-claims when he removed them from the jury's purview by granting respondents summary judgment motion.

If anything, the judge should have stayed out of any settlement discussions because he was being called upon to decide a dispositive motion concerning the very heart of the case. Instead, he plunged right into those discussions, even entertaining confidential aspects of the discussions which, moreover, were intended to and had the effect of poisoning him against the appellant. His conduct concerning settlement and his desire to get through the trial in time for his Thursday at 3:00 p.m. trip and his daughter's birthday show a clear bias which led him to rule against the appellant contrary to the law and without facts, as more fully set forth in the other sections of the Argument, and he overruled another circuit judge who just two business days earlier had denied the very same summary judgment motions. The Court deprived appellant of its day in court as to its cross-claims without due notice or a meaningful opportunity to heard when a procedurally ill-timed motion to bifurcate was allowed to proceed as a repeat motion for summary judgment.

3. DID JUDGE PRICE INCORRECTLY READ INTO S.C. CODE ANN. § 32-2-10 A PROHIBITION OF A DUTY TO DEFEND, WHICH WAS NOT INCLUDED IN THAT STATUTE BY THE GENERAL ASSEMBLY?

If the Court agrees with appellants as to Issue 1 or 2 above, the Court need not reach Issues 3, 4, or 5 on the merits of the contracts. Appellant provides its arguments on Issues 3, 4, and 5 in the event the Court reaches the merits of the contractual obligations.

The heart of the respondents' argument is that their contractual duty to defend the appellant violates S.C. Code Ann. § 32-2-10. Hutton's counsel argued,

MS. LUCEY: At the heart of the matter is – in the contract is the indemnity provision. It's quite lengthy. I believe Your Honor has a copy of the contract, and the language is included also in Hutton's motion for summary judgment.

The issue is - Hutton's is arguing that the indemnity provision is void and unenforceable under South Carolina's anti-indemnity statute, which is South Carolina Code Section 32-2-10, which at its heart prevents one party from requiring another to indemnify it for its own negligence; namely, Horton cannot require Hutton's to indemnify and defend, is our position for its own negligence. The indemnity clause in the contract does purport to exclude indemnity liability for Horton's sole negligence, but within that same provision, there is a broad and expansive duty to defend that Hutton's is required to undertake.

So the indemnity clause requires Hutton's Landscape to defend D.R. Horton against all of the plaintiffs' claims, including those that may be based on Horton's sole negligence. It's our position that that violates the anti-indemnity statute. (Tr. V. II Rev. 34:18 – 35:13.)

That statute, however, does not contain a word about a duty to defend. It reads as follows:

SECTION 32-2-10. Hold harmless clauses in certain construction contracts. 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 any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

S.C. Code Ann. § 32-2-10.

South Carolina law is clear, "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Eagle Container Co., LLC v. City of Newberry,* 379 S.C. 564, 570-71, 666 S.E.2d 892, 896 (S.C. 2008) (quoting *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (S.C. 1994)). The absence of any mention in the statute of a duty to defend means that it does not exist there.

When the General Assembly wants to address duty to defend in a statute, it uses the words "duty to defend', "defend" and "defense". That is clear from "2021-2022 Bill 4048: Duty

to defend and indemnify" passed by the General Assembly on May 12, 2022 and signed by the Governor on May 13, 2022. It reads, in relevant part, as follows:

> AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 1-11- 445 SO AS TO PROVIDE THAT THE STATE OF SOUTH CAROLINA MUST PROVIDE A LEGAL **DEFENSE** FOR AND I**NDEMNIFICATION** TO . . . AND TO PROVIDE A SIMILAR **DEFENSE** AND **INDEMNIFICATION** TO . . . TO REPEAL SECTION 1-11-440 RELATING TO LEGAL **DEFENSES** AND **INDEMNIFICATIONS** PROVIDED TO . . . AND TO REPEAL SECTION 12-4-325 RELATING TO LEGAL **DEFENSES** AND I**NDEMNIFICATION** PROVIDED TO . . . .
>
> **Defense and indemnification of state agencies**
>
> SECTION 1. Article 1, Chapter 11, Title 1 of the 1976 Code is amended by adding:
>
> Section 1-11-445. (A) The State of South Carolina, by and through its agencies, departments, and instrumentalities, must **defend** … and must **indemnify**…. The State also must **defend** . . . . The State shall **indemnif**y . . . . This commitment to **defend** and **indemnify** . . . .

H. 4048, 2022, 124th Sess. (S.C. effective date May 13, 2022) (emphasis added)

2021-2022 Bill 4048 is not unique in this respect. The statutes repealed by it likewise used the words "defend" and "defense" and were crystal clear about a duty to defend. *See* S.C. Code Ann. § 1-11-440 (repealed May 13, 2022), and S.C. Code Ann. § 12-4-325 (repealed May 13, 2022). "Indemnity" and "defense" were made separate and distinct from each other by the

General Assembly in all three statutes. In contrast, the General Assembly said not a word about "defense", "defend" or "duty to defend" in Section 32-2-10. *See* S.C. Code Ann. § 32-2-10. Neither a duty to defend nor the prohibition of a duty to defend is to be read into the term "indemnity" in a South Carolina statute.

S.C. Code Ann. § 32-2-10 reflects a policy decision the General Assembly made. The South Carolina Supreme Court has recognized that such a decision is for the legislature. *Smith v. Tiffany*, 419 S.C. 548, 559, 799 S.E.2d 479, 485 (S.C. 2008); *Machin v. Carus Corp.*, 419 S.C. 527, 576, 799 S.E.2d 468, 478 (S.C. 2008). "But the policy decision belongs to the legislature, and the legislature has crafted the provisions of the Act as it sees fit. We are a court, not a legislative body. That a court may disagree with a legislative body's policy decisions or believe a perceived 'more fair' outcome exists is of no moment." *Smith,* 419 S.C. at 559. Judge Price incorrectly read a limitation on a duty to defend into S.C. Code Ann. § 32-2-10 that does not exist.

4. DID JUDGE PRICE INCORRECTLY OVERRIDE THE PARTIES' CONTRACT BY RULING THAT THE RESPONDENTS' DUTIES TO INDEMNIFY AND DEFEND ARE NOT SEPARATE, DISTINCT AND INDEPENDENT OBLIGATIONS?

Section 10.1 of the parties' identical contracts, which describes the respondents' indemnity and defense obligations to the appellant, specifically states that these obligations are separate, distinct, and independent. The contracts specifically state that the "[c]ontractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify…" App. Exhibit __. For emphasis, the entire section is in all capital letters, bold, and font larger than the remainder of the contract. The indemnity obligation in Section 10.1 is enforceable and the duty to defend obligation in Section 10.1 is enforceable. There is no law in South Carolina that limits

or prohibits enforcement of either of the obligation as they are written and were agreed to by the parties.

If either of the indemnity or duty to defend obligations is determined to be unenforceable, which appellant thinks neither should be, then the unenforceable obligation is severable as a separate, distinct, and independent obligation from the other obligation. The South Carolina Supreme Court has long allowed the severability of contracts.

> In *Packard Field v. Byrd*, 73 S.C. 1, 51 S.E. 678 (1905), our Court previously articulated the general rule with regard to the severability of contracts: . . . '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. The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention.'

Columbia Architectural Grp. v. Barker, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (S.C. 1980) (quoting *Packard Field v. Byrd*, 73 S.C. 1, 6, 51 S.E. 678, 679 (S.C. 1905)).

The intent of the respondents and appellant in this case is clear from their contracts. They have expressly agreed the obligation to indemnify and the duty to defend are separate, distinct, and independent obligations, therefore, they have agreed upon severability. That is sufficient to allow it. The Judge agreed with appellants counsel that the duty to defend and the duty to indemnify are separate.

> MS. PETERSON: I still think there is a difference between a duty to defend and a duty to indemnify.

THE COURT: I agree with that. I see your point on that. (Tr. 47:8 – 11.)

If more is needed, there is ample evidence elsewhere. In multiple statutes, the General Assembly has treated indemnity and defense obligations separately. *See, e.g.*, H. 4048, 2022, 124th Sess. (S.C. effective date May 13, 2022), S.C. Code Ann. § 1-11-440 (repealed May 13, 2022), and S.C. Code Ann. § 12-4-325 (repealed May 13, 2022). Indemnity and defense obligations are commonplace and likewise separately treated in many commercial transactions, including all or virtually all liability insurance contracts. For example, in *Sloan Const. Co. v. Cent. Nat'l Ins. of Omaha*, 269 S.C. 183, 236 S.E.2d 818 (S.C. 1977), the South Carolina Supreme Court held that duty to defend and indemnity obligations are separate and distinct.

> A liability insurance policy contains two insuring provisions of major significance: one, providing for the payment by the insurer of sums the insured shall become obligated to pay, the other providing, in substance, for the defense . . . . The duty to defend is separate and distinct from the obligation to pay a judgment. . . .

Id. at 186 (citing *Am. Cas. Co. v. Howard*, 187 F.2d 322, 327 (4th Cir. 1951)).

It is noteworthy that *Sloan* does not rest on the fact that the contract under consideration was one for insurance. *Id*. There is nothing in the law or logic that limits severability of indemnity and defense provisions to insurance policies.

The respondents may attempt to argue insurance as a limiting factor; however, the parties' contracts undermine that argument completely. Section 11.1 of the contracts require the respondents to provide insurance for "(iv) commercial liability risk covering the indemnity obligations set forth in this Agreement." The indemnity obligations are those of the respondents to indemnify the appellant set forth in Section 10. Section 11.3 then requires the respondents to

add the appellant as "a named, Additional Insured." Insurance was a part of the parties' overall contractual arrangement. Moreover, insurance is all that is left because both Lather and Hutton's are no longer in business. The cross-claims and additional insured claims are simply issues between D.R. Horton and respondents' insurance companies.

The role of insurance in the parties' relationship has another very important effect – it makes Section 32-2-10 inapplicable. S.C. Code Ann. § 32-2-10. That statute states that it "shall not affect any insurance contract." *Id.* The appellant is a "named, Additional Insured" in its contracts with the respondents. Exhibit __ (Contract §11) R.p. Insurance coverage exists in favor of the appellant for the respondents' indemnity obligations. That is the "AI demand that Horton has made" identified by counsel for respondent Hutton's at (Tr. V. II Rev. 30: 16 – 17.) Counsel for respondent Lather also acknowledged the existence of insurance for the indemnity in his argument to Judge Price. "We have got a demand from the plaintiffs and the contractual indemnity and AI clause is blocking it." (Tr. V. II Rev. 32:21 – 22) This was a theme throughout the respondents' arguments to Judge Price. It was their effort to paint the appellant as stubborn and an impediment to settlement. (Tr. V. II Rev. 10:25 – 18:9 and 109:2 - 9.)[5] In doing so, however, they removed themselves from Section 32-2-10 because their argument "affected an insurance contract." *See* S.C. Code Ann. § 32-2-10. By ruling for the respondents, Judge Price purports to release the respondents' insurance companies from their obligations to

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[5] The Court saw appellant's desire to enforce its rights under the contracts with respondents as the biggest problem in the case.

> THE COURT: The biggest issue continues to be the cross-claims. That is the biggest snag. Because without that being resolved, then it's never going to settle or be resolved. It will always be - - there will always be this, you know, this case out there with you-all, and it's just never going to end." (Tr. V. II Rev. 18:14 – 18.) R.p.

the appellant as a "named, Additional Insured." There can be no greater way to "affect an insurance contract" than by totally releasing the insurance company from its obligations to its "named, Additional Insured." Such a release goes against South Carolina law.

"It is well-established under South Carolina law that forfeitures of insurance contracts are not favored." *Johnson v. S. State Ins. Co.*, 288 S.C. 239, 241, 341 S.E.2d 793, 794 (S.C. 1986) (citing *Trakas v. Globe Rutgers Fire Ins.*, 141 S.C. 64, 68, 139 S.E. 176, 177 (S.C. 1927)) (holding that an insurance policy was severable).

The contractual indemnity and defense obligations of the respondents are separate, distinct and independent. Neither Section 32-2-10, nor any other law, nor logic provide otherwise.

5. DID JUDGE PRICE INCORRECTLY RULE THAT THE PARTIES' CONTRACTUAL PROVISIONS CONCERNING INDEMNITY AND DUTY TO DEFEND WERE UNENFORCEABLE AS A MATTER OF LAW?

Judge Price did not cite a single fact, case or statute in support of his ruling that the respondents' contractual indemnity and defense obligations were unenforceable. All he said was the following:

> I think it's an adhesion contract. I think it's take-it-or-leave it. I think it's similar and likened to a non-compete in the sense that if the opposing party doesn't have a whole lot of negotiating power, then it can be deemed unenforceable. I don't think it's enforceable. I think it violates public policy. So I am going to grant the motion, and we are going to take an hour break so everybody can eat and we will come back. (Tr. V. II Rev. 52:17-53:1.)

Judge Price repeatedly called the contract an adhesion contract. "It's essentially an adhesion contract. It's a take-it-or-leave-it style contract . . . Essentially, you either sign this and you get the work, or you don't sign it and you have to indemnify us as to everything . . . ." (Tr. V. II Rev. 46:3-8.) "Again, I think it's like an adhesion contract. You can take it or leave it." (Tr. V. II Rev. 49:5-7.)[6]

There are a number of problems with such a ruling. Judge Price himself recognized at least one. After lunch, in response to a request from appellant's counsel for clarification about his reliance upon adhesion as a basis for his ruling, he tried to fix what was an obvious error.

> MR. NAIL: I just wanted to clarify one thing about your ruling earlier. I didn't stand by Ms. Peterson's objection to the procedural nature of the ruling. If there was a ruling to the extent that there was and making a determination that the contract was one of adhesion –
>
> THE COURT: I said it was my thoughts on it. It's not part of the ruling.
>
> MR. NAIL: We were going to object based on the lack of facts.
>
> THE COURT: That is me taking out loud and working through it. No. I am not making that ruling. (Tr. V. II Rev. 54:14-24.)

The problem for Judge Price, however, was that he had made that ruling; and he had made it with no facts and without appreciation of what is required under South Carolina law to find a contract unenforceable because it is one of adhesion.

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[6] Judge Price asserted the adhesion contract and noncompete theories *sua sponte* during what was supposed to be a bifurcation motion – which he instead treated as a summary judgment motion hearing to reconsider Judge DeBerry's decision.

That law is set out by the South Carolina Supreme Court in *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001), which upheld an arbitration clause against an attack that it was an unconscionable part of an adhesion contract.

> Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable. Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). Under state law, an adhesion contract is not per se unconscionable. Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996) (unconscionability is the absence of meaningful choice on the part of one party due to one-sided 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); Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998) (fact that a contract is one of adhesion does not render it unconscionable). Further, a person who can read is bound to read an agreement before signing it. Hood v. Life & Cas. Ins. Co. of Tennessee, 173 S.C. 139, 175 S.E. 76 (1934). We find the arbitration clause is not unconscionable as an adhesion contract.

Munoz, 343 S.C. at 541 (citing *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. Ct. App. 1998); *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (S.C. 1996); *Hood v. Life & Cas. Ins. Co. of Tennessee*, 173 S.C. 139, 175 S.E. 76 (S.C. 1934)).

Judge Price considered no facts required by the law. Had he done so, he would have known that the respondents are sophisticated contractors and subcontractors who had freely contracted to work on various aspects of a 34-home subdivision. There was nothing about them

or their contracts with the appellant that made the contracts unconscionable and unenforceable as ones of adhesion.

Likewise, Judge Price's statement of the law of non-competes was plainly wrong. It is not the law that "if the opposing party doesn't have a whole lot of negotiating power, then it can be deemed unenforceable." (Tr. V. II Rev. 52: 20 – 21.) That is especially not the law in the context of a commercial transaction rather than an employment agreement. The applicable law for a non-compete agreement in a commercial transaction, such as the parties' contract, is more relaxed than that in an employer/employee relationship. *Palmetto Mortuary Transport, Inc. v. Knight Systems, Inc*., 424 S.C. 444, 457-58, 818 S.E.2d 724 (S.C. 2018). That relaxed business relationship standard was not met here, by analogy or otherwise. The law of non-competes has nothing to do with the parties' contractual indemnity and defense provision, and it was error for Judge Price to twist it in a way to support his ruling. *Palmetto Mortuary* also describes public policy in a business-to-business noncompete context as something affecting the public interest in the procurement process. *Id.* at 458-61. Here, the public's procurement interest is unaffected by the parties' agreement concerning indemnity and defense; and as noted above in Section 3 of the Argument, both the General Assembly and the South Carolina Supreme Court have approved indemnity and defense obligations.

CONCLUSION

Appellant requests that the Court reverse Judge Price's summary judgment order on the ground that he lacked authority to overrule Judge DeBerry and remand the case for trial on D.R. Horton's cross-claims against the respondents. If the Court reaches the merits on the contractual obligations, appellants request that the Court determine the contractual indemnity and duty to

defend obligations are (1) enforceable, (2) separate and distinct obligations, and (3) severable if any part of Section 10 of the ICA contract is not enforceable.

January 3, 2023

Respectfully,

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