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
Appellate Case No.: 2022-000016

Richard W. and Rebecca A. Drier; Sarmed and Jessica M. Shafi; *et al.,*

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design; LLC, D.R. Horton, Inc.; East Coast Construction Cleanup Corp. f/k/a S. C. Cleanup Co., Inc.*;* Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; *et al.*,

Defendants,

And

D. R. Horton, Inc.,

Appellant,

v.

Sarmed and Jessica M. Shafi, East Coast Construction Cleanup Corp. f/k/a S. C. Cleanup Co., Inc.; Hutton's Landscapes, Inc., and Lather Construction, Inc.,

Respondents.

INITIAL BRIEF OF RESPONDENT LATHER CONSTRUCTION, INC.

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STATEMENT OF THE CASE[1]

This case arises from the development of the Tidewater Creek Neighborhood on Lady's Island, South Carolina, and construction of fifteen single-family homes within the same. The construction of the homes occurred in 2015. Plaintiffs commenced the action on May 1, 2018, seeking damages for alleged construction defects in the vertical and horizontal construction and development of the homes. Plaintiffs sued the general contractor and developer, D.R. Horton (hereinafter "Horton"), along with numerous other Horton subcontractors, including Respondent Lather Construction, Inc. (hereinafter "Lather"), and Lather Construction SC, Inc.[2] Horton asserted crossclaims against its subcontractors for contractual and equitable indemnification. Litigation ensued and most of the Plaintiffs' claims against the Horton subcontractors were resolved prior to the first home being called to trial. On October 29, 2021, the Hon. H. Steven DeBerry heard

[1] Lather largely adopts Respondent East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc.'s statement of the case.

[2] As noted in counsel's February 2, 2023, letter to the Court, Lather Construction SC, Inc., was dismissed with prejudice prior to trial and thus cannot be an appellant in this case. This was an error made by Horton in the caption. To the extent the Court determines that Lather Construction SC, Inc., should be a respondent in this matter, then all the arguments made in this brief are also made on behalf of and adopted by Lather Construction SC, Inc.

motions for summary judgment filed by Lather, Lather Construction SC, Inc., and Hutton's Landscapes, Inc. (hereinafter "Hutton") against Horton's indemnification claims. Respondent East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc. (hereinafter "East Coast") subsequently filed a motion for summary judgment against Horton's crossclaims on November 10, 2021. Judge DeBerry denied Lather's, Lather Construction SC, Inc.'s, and Hutton's motions via Form 4 Order on November 12, 2021. The trial began on Monday, November 15, 2021, with the Hon. Bentley Price presiding. Judge Price heard East Coast's motion for summary judgment prior to opening statements and took it under advisement. On the second day of trial, Hutton, Lather, and East Coast moved to bifurcate the Horton Crossclaims from Plaintiffs' case without objection from Horton. Upon being granted by Judge Price, the same Respondents argued for a directed verdict on Horton's indemnification crossclaims. Judge Price granted the motion for a directed verdict against the contractual indemnification claims leaving only the equitable indemnification claim against the Respondents. Horton's equitable indemnification claims against Lather were dismissed without prejudice via agreement on day four of trial. Ultimately, the jury returned a verdict against Horton for $140,000.00.

STANDARD OF REVIEW

On appeal from a directed verdict, the reviewing court must view the evidence in the light most favorable to the nonmoving party. *Miller v. FerrellGas, L.P.*, 392 S.C. 295, 297, 709 S.E.2d 616, 617 (2011). If any of the evidence may be reasonably construed to create a question of fact, the motion must be denied. *Id.* at 297, 709 S.E.2d at 617. However, this does not allow submission of speculative, theoretical, or hypothetical views to the jury. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997) (*superseded on other grounds by* S.C. Code Ann. § 15-36-10(C)(1)). The

appellate court will reverse the trial court *only when* there is *no evidence* to support the ruling below or the trial court's decision is controlled by an error of law. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010).

ARGUMENTS

I. JUDGE PRICE HAD THE AUTHORITY TO RULE THE CONTRACTUAL PROVISIONS WERE UNENFORCEABLE AS A MATTER OF LAW.

A. Judge Price did not rule on a motion for summary judgment.

A party can move for a directed verdict when the case presents only issues of law. Rule 50, SCRCP. The rule does not require testimony or any specific evidence to be given. *Id.* However, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Unlimited Servs., Inc. v. Macklen Enters., Inc.*, 303 S.C. 384, 386, 401 S.E.2d 153, 154 (1991).

Hutton, joined by Lather, moved to bifurcate the trial. T. V. II Rev. 32:23–25. Hutton argued "[i]t's within the Court's discretion to bifurcate those claims. . . . I think the threshold issue for the Court to decide in bifurcating is whether [the contractual provisions] are actually enforceable and [the crossclaims] can be bifurcated." T. V. II Rev. 33:23–25; 34:1–2. Additionally, Hutton and Lather argued for a directed verdict, stating the provisions were void as against public policy, unenforceable under Section 32-2-10, and in conflict with *Concord & Cumberland*.[3] T. V. II 36–52.

Horton agreed that the motion to bifurcate was proper, procedurally, stating "[a]s a general matter, [Horton] believe[s] that the motion to bifurcate is proper to bring procedurally at this time." T. V. II Rev. 40:13–15. Horton then noted "[w]e do not think it is procedurally appropriate . . . [to] argu[e] the enforceability of the contract provisions given that the Court has already found that these provisions are not unenforceable as a matter of law." T. V. II Rev. 40:16–19. Horton further

[3] *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 657–58, 819 S.E.2d 166, 176 (Ct. App. 2018) (setting forth the "clear and unequivocal" test).

argued "we believe if there are any issue [sic] before the Court pertaining to these provision [sic], it is one, is it enforceable as a matter of law, or two does it need to go to a jury to parse out the different negligence of the parties." T. V. II Rev. 40:20–23. Following Horton's argument, Hutton responded, stating: "Judge DeBerry's ruling . . . did not make any findings as a matter of law. He issued a Form 4 order with one lines [sic] and there is no [sic] genuine issue of material fact. He did not make any specific finding of fact or specific ruling."

T. V. II Rev. 44:17–20. Hutton continued:

> Going back to the issue, it's not just the indemnification for claims related to Hutton's work. That is not what their contract says. They have a lot of lawyers who do a lot of contracts and they could have written that into their contract. What is said is: Once the duty to defend is triggered, Hutton's is obligated to defend the entire action, including any claims not there and subject to indemnity. So if Lather was out of business and not here and no one came, I guarantee that they would be looking to me, Hutton's, to cover fees related to the dirt work.

T. V. II Rev. 45:18–25; 46:1–2. Judge Price immediately responded "[i]t'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." T. V. II Rev. 46:3–4; 46:6–8. Judge Price continued, stating "I don't think it's legally enforceable, to be quite honest with you." T. V. II Rev. 47:3–4. After a colloquy with Horton, the Court *again* reiterated "I'm saying the indemnification portion is not [enforceable]. Again, I think it's like an adhesion contract. You can take it or leave it. Again, the fact that you – that D.R. Horton can pass all of its liability whatsoever off to other people, obviously, I think is completely unenforceable." T. V. II Rev. 49:5–9. Continuing the colloquy with Horton, the Court concluded that while the duty to indemnify and defend were different, they both had to be taken "as a whole." T. V. II Rev. 50:13–17.

At this point, Hutton asked the court to "declare the indemnity provisions unenforceable and void against public policy." T. V. II Rev. 50:22–24. Lather joined, specifically arguing that the indemnity provisions are an adhesion contract. T. V. II Rev. 51:1–4. Judge Price found:

> [T]he 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. So I am going to grant the motion[.]

T. V. II Rev. 52:16–23.

Horton now argues that Judge Price granted a motion for summary judgment, and in turn improperly overturned the order of Judge DeBerry denying summary judgment. However, in their post-trial motion to alter or amend judgment, Horton specifically argued that "the [trial court] effectively heard a *Directed Verdict motion by co-defendants*[.]" Horton Motion to Alter or Amend Judgment at 7–8. (emphasis added). Horton cannot present an argument on appeal inconsistent with what it argued below. *See Vaughn v. Kalyvas*, 288 S.C. 358, 362, 342 S.E.2d 617, 619 (Ct. App. 1986) ("We decline to allow the Kalyvases to assert a contrary position on appeal."); *see also King v. Daniel Int'l Corp.*, 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982) (holding an argument raised on appeal inconsistent with appellant's statement at trial was without merit). This Court should not allow Horton to now argue the motion heard and ruled on by Judge Price was anything other than a motion for a directed verdict. *See Vaughn*, 288 S.C. at 362, 342 S.E.2d at 619;

see also King, 278 S.C. at 354, 296 S.E.2d at 337.

Furthermore, the motion ruled on by Judge Price was a motion for a directed verdict. The only question presented to Judge Price was whether the indemnity provisions were, as a matter of law, enforceable. *See* Rule 50, SCRCP. Therefore, the motion was for a directed verdict.

B. Even if Judge Price ruled on a motion for summary judgment, the denial of a motion for summary judgment does not prevent any defense from being raised again in the future.

Furthermore, Lather was not foreclosed from raising the same (and other) arguments before Judge Price at a later point in time. While parties cannot move on the same facts already moved upon, The Supreme Court of South Carolina held the denial of summary judgment did not finally determine anything about the merits of the case and did not prevent any defenses from being raised again later in the proceedings. Rule 41(l), SCRCP; *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings."); *see also McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) (holding a motion for summary judgment can be raised again at a later stage of the proceedings). Judge DeBerry's denial of the previous motion for summary judgment did not extinguish the defenses set forth in that motion, nor did it prohibit Lather from moving at a later stage of the proceedings. *See Ballenger*, 313 S.C. at 477, 443 S.E.2d at 380; *McLendon*, 313 S.C. at 526 n.2, 443 S.E.2d at 540 n.2. Therefore, even if Judge Price ruled on a motion for summary judgment, it was

proper. *See Ballenger*, 313 S.C. at 477, 443 S.E.2d at 380; *McLendon*, 313 S.C. at 526 n.2, 443 S.E.2d at 540 n.2.

II. JUDGE PRICE'S RULING ON RESPONDENT'S MOTION FOR A DIRECTED VERDICT WAS PROCEDURALLY PROPER AND SUBSTANTIVELY CORRECT.

A. S.C. Code Ann. § 32-2-10 contemplates the duty to defend.

S.C. Code Ann. § 32-2-10 sets forth:

> 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.

Courts within South Carolina have specifically held that the damages resulting from a duty to defend are encompassed by indemnity. *See Addy v. Bolton*, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971) (holding that in actions brought where the duty to indemnify arises under contract, reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses); *see also Columbia/CSA-HS Greater Columbia Healthcare Sys., LP, v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n.*, 411 S.C. 557, 568, 769 S.E.2d 847, 852 (2015) (holding the innocent party's right to *sue for*

indemnification accrues when it sustains damages, either by paying an injured party on behalf of the tortfeasor or by *incurring attorneys' fees from defending itself in the underlying tort suit*).

Section 32-2-10 specifically excludes insurance contracts and the applicability of any insurance-related caselaw is therefore dubious at best.[4] Therefore, Section 32-2-10 *must* contemplate the duty to defend within the term "indemnify." *See* S.C. Code Ann. § 32-2-10; *Addy*, 257 S.C. at 34, 183 S.E.2d at 710; *see also Greater Columbia Healthcare*, 411 S.C. at 568, 768 S.E.2d at 852.

B. Section 10 of the Contract was unenforceable under S.C. Code Ann. § 32-2-10 and *Concord & Cumberland*.

Section 32-2-10 prohibits indemnification of the indemnitee's own negligence. In *Concord & Cumberland*, this Court held the contractual language did not show a "clear and unequivocal" intent for Munoz to indemnify Superior for Superior's own negligence and was therefore unenforceable. *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. Where contractual language purports to make one party indemnify another for the negligence of the indemnified party, these terms must be set forth in terms under a heightened standard of "clear and unequivocal." *Id.* at 648–49, 819 S.E.2d at 171 (holding deterrence is the policy basis for the heightened standard of clear and unequivocal standard); *see also id.* at 658 n.6, 176 n.6 (holding no precedent has upheld indemnity provisions that can meet the "clear and unequivocal" test).

The South Carolina Independent Contractor Agreement between Lather and Horton

[4] However, even in insurance law, this Court has made statements such as "[a]n insurer that breaches its duty to defend and indemnify the insured may be held liable for the expenses the insured incurs in providing for his own defense." *Unisun Ins. Co. v. Hertz Rental Corp.*, 312 S.C. 549, 436 S.E.2d 182, 186 (Ct. App. 1993). Thus showing that even an in insurance context, this Court has still blurred the lines (if not outright conflated the two) between indemnity and the duty to defend.

(hereinafter “the Contract”) set forth the following provisions:

> 10.1 GENERALLY, TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR SHALL PROTECT, DEFEND, INDEMNIFY, AND HOLD OWNER AND OWNER’S PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THESE ENTITIES’ RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY “ INDEMNITEE"), *FREE AND HARMLESS FROM AND AGAINST ANY AND ALL CLAIMS, DEMANDS, LAWSUITS OR OTHER LITIGATION, ACTIONS, CAUSES OF ACTION, OR OTHER LIABILITIES, OF EVERY KIND AND CHARACTER* (INCLUDING ALL COSTS THEREOF AND ATTORNEYS’ FEES), WHETHER ASSERTED BY A PURCHASER OR OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING BUT NOT LIMITED TO PERSONNEL FURNISHED BY CONTRACTOR, ITS SUPPLIERS AND SUBCONTRACTORS OF ANY TIER), ON ACCOUNT OF BODILY OR PERSONAL INJURY, DEATH, OR DAMAGE TO OR LOSS OF TANGIBLE OR INTANGIBLE PROPERTY INCLUDING THE LOSS OF USE THEREOF IN ANY WAY OCCURRING, INCIDENT TO, ARISING OUT OF, OR IN CONNECTION WITH: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS, OR OTHER OBLIGATIONS OF CONTRACTOR SET FORTH IN THIS AGREEMENT; (2) THE WORK, AS DEFINED IN SECTION 1, INCLUDING BUT NOT LIMITED TO WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR OR BY CONTRACTOR’S AGENTS OR EMPLOYEES, OR BY SUPPLIERS OR SUBCONTRACTORS OF ANY TIER, OR THEIR RESPECTIVE AGENTS OR EMPLOYEES; (3) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF CONTRACTOR OR ANY OF CONTRACTOR’S EMPLOYEES, PERSONNEL, AGENTS, OR SUBCONTRACTORS, REGARDLESS OF WHETHER CAUSED IN PART BY INDEMNITEE; OR (4) ANY NEGLIGENT OR INTENTIONAL ACT OR OMISSION OF INDEMNITEE, RELATED IN ANY WAY TO TIIE WORK. EXCEPTING ONLY LIABILITY OR CLAIMS ARISING OUT OF BODILY INJURY TO PERSONS, DEATH, OR DAMAGE TO PROPERTY PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OF INDEMNITEE. CONTRACTOR’S DUTY TO DEFEND IS A SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATION FROM ITS DUTY TO INDEMNIFY AND IS TRIGGERED IMMEDIATELY WHEN ANY CLAIM, DEMAND, OR OTHER ASSERTION OF LIABILITY IS MADE AGAINST INDEMNITEE WHICH POTENTIALLY OR ARGUABLY IS SUBJECT TO CONTRACTOR’S DUTY TO INDEMNIFY, REGARDLESS OF CONTRACTOR’S ULTIMATE LIABILITY FOR INDEMNITY.

> CONTRACTOR MUST DEFEND INDEMNITEE EVEN WHERE THE ALLEGATIONS AGAINST INDEMNITEE ARE. AMBIGUOUS OR INCOMPLETE WITH RESPECT TO THE ISSUE OF CONTRACTOR'S DUTY TO INDEMNIFY. ONCE THE DUTY TO DEFEND IS TRIGGERED, CONTRACTOR IS OBLIGATED TO DEFEND THE ENTIRE ACTION, LAWSUIT, ARBITRATION, OR OTHER LITIGATION, INCLUDING ANY CLAIMS THEREIN NOT SUBJECT TO INDEMNITY BY CONTRACTOR. NOTWITHSTANDING THE FOREGOING, NOTHING HEREIN SHALL REQUIRE CONTRACTOR TO INDEMNIFY INDEMNITEE AGAINST LIABILITY FOR DAMAGES ARISING OUT OF BODILY INJURY OR PROPERTY DAMAGE PROXIMATELY CAUSED BY OR RESULTING FROM THE SOLE NEGLIGENCE OR SOLE INTENTIONAL ACT OR OMISSION OK INDEMNITEE. PAYMENT FOR THE WORK IS NOT A CONDITION PRECEDENT TO CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION.
>
> 10.2 INDEMNITY NOT EXCLUSIVE REMEDY. ANY PAYMENTS BY CONTRACTOR UNDER SECTION 10 TO OR ON BEHALF OF THE INDEMNITEE SHALL BE IN ADDITION TO ALL OTHER LEGAL REMEDIES AVAILABLE TO THE INDEMNITEE AND SHALL NOT BE CONSIDERED THE INDEMNITEE'S EXCLUSIVE REMEDY. INDEMNITEE SHALL HAVE THE RIGHT, IF IT SO CHOOSES IN ITS ABSOLUTE DISCRETION, TO DEFEND ALL CLAIMS WHICH MAY BE ASSERTED, AND CONTRATOR WILL REIMBURSE INDEMNITEE FOR ALL EXPENDITURES THAT OWNER MAY INCUR ON ACCOUNT OF THE CLAIM.

(Contract p.4 §§ 10.1–10.2). (emphasis added). Horton's Contract with Lather does exactly what Section 32-2-10 and *Concord & Cumberland* prohibit. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. The language in the Contract is *not* the exception to the experience of this Court—every reviewed provision has failed *Concord & Cumberland's* test, and so does this one. *See Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. While the contract purports to exclude liability for Horton's sole negligence, the provisions contain a broad requirement of indemnification and a duty to defend Horton no matter whether Lather was ultimately liable. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. Furthermore, even if § 10.1 limits this in any way, § 10.2 grants Horton the right to

choose, *in its own absolute discretion*, whether to defend *any claim* that may be asserted, requiring "reimbursement" from Lather for "all expenditures" that Horton may incur in doing so. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. This language necessarily includes defending claims resulting from Horton's sole negligence, in violation of Section 32-2-10 and *Concord and Cumberland*. *See* S.C. Code Ann. 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176.

Thus, reading Section 10 of the Contract as a whole, it fails the "clear and unequivocal" standard required by this Court, along with every other provision that has come before this Court. *See Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. Therefore, the provision is unenforceable as a matter of law, and this Court should affirm the ruling of the trial court.

C. Section 10 of the Contract was an unenforceable contract of adhesion.

Adhesion contracts are standard form contracts offered on a take-it or leave-it basis with terms that are not negotiable. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 362 (2001). These contracts are not per se unconscionable under state law; however, where there is an absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive no reasonable person would make them, and no fair and honest person would accept them, adhesion contracts are unenforceable as against public policy. *Id.*

The provisions at issue between Respondents and Horton are unconscionable and unenforceable as a matter of public policy. *See Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (setting forth the elements of an unenforceable adhesion contract). The evidence in the record shows Lather had no meaningful choice—the contract was "take-it or leave-it." *See Munoz*, 343 S.C. at

541, 542 S.E.2d at 365 (holding there must be an absence of meaningful choice on the part of one party due to one-sided contractual provisions). Horton is an extremely large homebuilder who builds homes throughout not only South Carolina, but the entire country, and Respondent Lather was a small, local contractor who is no longer even in business. *See id.* Respondent Lather had no real bargaining power with Horton. *See id.*

Furthermore, the terms required by Horton are so one-sided and oppressive that no reasonable person would make them, and no fair and honest person would accept them. *See Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (holding that the terms of the contract must be so oppressive and unreasonable that no person would make them, and no fair and honest person would accept them). The contractual provisions violated Section 32-2-10 and *Concord & Cumberland*. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. No reasonable person would propose contractual provisions in direct violation of South Carolina law, and no fair or honest person would accept them. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. It stands in direct contention with being reasonable, fair, and honest that one would require indemnity for their sole negligence in violation of South Carolina law. *See* S.C. Code Ann. § 32-2-10; *Concord & Cumberland*, 424 S.C. at 658, 819 S.E.2d at 176. Therefore, the provisions were unconscionable and unenforceable, and this Court should affirm the ruling of the trial court.

III. JUDGE PRICE'S DISCUSSION WITH THE PARTIES REGARDING SETTLEMENT IS NOT PRESERVED FOR REVIEW AND WAS NEVERTHELESS PROPER.

A judge shall dispose of all judicial matters promptly, efficiently, and fairly. Rule 3(B)(8), CJC, Rule 501, SCACR. Furthermore, a judge should encourage and seek to facilitate

settlement. Commentary to Rule 3(B)(8), CJC, Rule 501, SCACR. However, a party "should never feel coerced into surrendering the right to have their controversy resolved by the courts." Commentary to Rule 3(B)(8), CJC, Rule 501, SCACR.

Judge Price communicated with the parties about timing of the trial as well as settlement progress of the case. Throughout discussions, the parties provided Judge Price with information regarding the status of negotiations, including barriers to settlement. Hutton noted Horton's corporate office appeared to be unwilling to discuss settlement due to the high attorneys' fees. Tr. V. II Rev. 11:12–17. Hutton told Judge Price "[Horton's attorneys' fees are over $500,000" and that "[it] is going to be forced to pay $750,000 in attorneys' fees. Tr. V. II Rev. 12:5; 12:9–12.

Following an hour and forty-minute break, Horton told Judge Price it issued a demand to Hutton and Lather, but noted discussions were still ongoing. Tr. V. II Rev. 30:9–12. Hutton stated Horton had an additional insured demand separate and apart from resolving the current case with over $1,000,000 in attorneys' fees. Tr. V. II Rev. 30:14–18. Horton moved to strike because this was "confidential settlement communication[s]."[5] Tr. V. II Rev. 30:19–21.

Tr. V. II Rev. 31:1–53:6. After a colloquy regarding Respondents' motion to bifurcate, and after dismissing the jury for the day, Judge Price asked Horton's counsel why their client did not throw anything into the settlement pot earlier that day. Tr. V. II Rev. 109:10–12. Horton stated it "[did not] have a good answer for that." Tr. V. II Rev. 109:18. Judge Price noted his concern that the parties would be unable to finish by Thursday. Tr. V. II Rev.

[5] Judge Price never ruled on Horton's motion to strike. *See I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an issue must be raised to and ruled on by the trial court to be properly preserved for appellate review).

110:18–19. Judge Price then told Horton's counsel "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. 110:20–25.

The next morning, the Court did not ask about the email he told Horton to send; rather, trial proceeded normally. Tr. V. III 268:1–10. On Thursday, prior to dismissing the jury, Judge Price alerted the jury that the case would finish on Friday. Tr. V. IV 488:21–489:6. On Friday, the trial concluded, with Judge Price letting the jury and remaining parties know that it was his daughter's ninth birthday, and they were waiting for him to get home to serve cake. Tr. V. V 654:1–11. Judge Price dismissed the jurors and exchanged pleasantries with Horton's and Respondents' counselors before departing himself. Tr. V. V 654:13–25.

A. Judge Price's discussion with the parties regarding settlement was not preserved for appellate review.

Horton advanced multiple arguments to the effect that Judge Price exceeded his authority in attempting to force a settlement. None of these arguments were appropriately preserved for appeal. First, Horton asserts Judge Price declared the contractual immunity and defense obligations of Respondents to be unenforceable "in an attempt to force the Horton to settle the case."[6] Ap. Br. at 11. Horton claimed their Attorney/Client Privilege was "invaded" and they were "browbeat" and "threatened" by Judge Price to make them settle. Ap. Br. at 17. Horton also claims Judge Price dismissed Horton's crossclaims because of its refusal to settle. Ap. Br. at 11.

[6] Horton alleged Judge Price did this for three reasons: 1) he needed to be out of town on Thursday; 2) his daughter's birthday party was the next day; and 3) the trial was only one of fifteen in the same neighborhood and Judge Price did not want anything to do with the other trials. Ap. Br. at 11.

Horton failed to preserve these arguments. *See Humbert v. State*, 345 S.C. 332, 337–38, 548 S.E.2d 862, 865–66 (2001) (holding when an issue is presented to the trial court but not ruled upon, the issue must be raised in an appropriate post-trial motion to be preserved for appeal); *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an issue must be raised to and ruled on by the trial court to be properly preserved for appellate review); *see also Gaddy v. Douglass*, 359 S.C. 329, 349–50, 597 S.E.2d 12, 23 (Ct. App. 2004) (noting the appellants never took issue with Judge Hughston's involvement in or handling of the case at the trail level, and holding it unpreserved for review on appeal); *Abba Equip., Inc., v. Thomason*, 335 S.C. 477, 486, 517 S.E.2d 235, 240 (Ct. App. 1999) ("The same ground argued on appeal must have been argued to the trial [court]."). Horton never raised any issue with Judge Price's partiality or involvement in settlement discussions at trial. *See Humbert*, 345 S.C. at 337–38, 548 S.E.2d at 865–66; *I'On*, 338 S.C. at 422, 526 S.E.2d at 724; *Gaddy*, 359 S.C. at 349–50, 597 S.E.2d at 23; *Abba*, 335 S.C. at 486, 517 S.E.2d at 240. Horton improperly attempts to question Judge Price's partiality and involvement in the case for the first time on appeal. *See Humbert*, 345 S.C. at 337–38, 548 S.E.2d at 865–66; *I'On*, 338 S.C. at 422, 526 S.E.2d at 724; *Gaddy*, 359 S.C. at 349–50, 597 S.E.2d at 23; *Abba*, 335 S.C. at 486, 517 S.E.2d at 240.

Horton's *only objection* to any mention of settlement discussions was when Hutton stated Horton was seeking $1,000,000 in attorneys' fees. However, there are two problems with this objection. First, Horton failed to object when Hutton told Judge Price approximately two hours prior to the above that Horton's attorneys' fees were over $500,000 and it was on the

hook for $750,000.[7] *See State v. Wannamaker,* 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001) (holding a contemporaneous objection must be made to preserve an issue regarding the admissibility of evidence and a failure to object when evidence is offered constitutes waiver of the right to have the issue considered on appeal). Second, Judge Price never actually ruled on Horton's objection and Horton failed to raise the issue in an appropriate post-trial motion. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 (holding an issue must be raised to and ruled on by the trial court to be properly preserved for appellate review).

Therefore, Horton's arguments were not preserved for review and this Court cannot properly address the arguments. *See Humbert*, 345 S.C. at 337–38, 548 S.E.2d at 865–66; *I'On*, 338 S.C. at 422, 526 S.E.2d at 724; *Gaddy*, 359 S.C. at 349–50, 597 S.E.2d at 23; *Wannamaker*, 346 S.C at 499, 552 S.E.2d at 286.

B. Even if the discussion was preserved for review, it was nevertheless proper.

Even if this Court holds Horton's arguments are preserved, Horton's arguments are without merit. Horton presents the record in a confusing manner—by jumping out of order, Horton presents statements without context in an attempt to twist the record to suit their narrative. Ap. Br. at 11–19. While Judge Price did need to go out of town on Thursday, his daughter's birthday was Friday, and the trial was one out of many more relating to the community at issue, Horton did not present *any evidence* that these factors had any bearing on Judge Price's decisions. Horton now asks this Court, without properly preserving their

[7] However, Lather would also note to any extent Horton argued this information was improper under Rule 408, SCRE, Horton's argument is incorrect. Under Rule 408, SCRE, offers to compromise are not admissible to prove liability for or invalidity of the claim or its amount. Hutton was not offering statements as "evidence" in order to prove invalidity of the claim or its amount, it was merely alerting Judge Price that the reason settlement negotiations have stalled is because of Horton's demand. *See* Rule 408, SCRE.

arguments and without presenting *any evidence*, to rule that Judge Price violated a Judicial Canon.

As an initial matter, Judge Price's colloquy at the end of day two (and Horton's reliance on *Ledford v. Dep't of Pub. Safety*[8]) are wholly unrelated to the issues on appeal. The only discussion related to any appealed issue *must have taken place prior to Judge Price's applicable ruling on Horton's contractual indemnity claim*. Judge Price granted the motion to bifurcate and motion for a directed verdict early on day two. Therefore, the exchange taking place at the end of day two referencing an email from Horton's counsel to D.R. Horton is wholly unrelated to the matters on appeal.

Thus, the only exchanges that this Court could properly consider occurred prior to Judge Price's ruling. Horton's attorney/client privilege was never "invaded," and Horton was never "browbeat" or "threatened" by Judge Price. Consistently throughout trial, Judge Price stated he did not believe the provisions were enforceable. Horton never claimed to feel coerced at trial and never asked Judge Price to take a step back. Indeed, in its brief, Horton only claims it felt "pressure" or "coercion" to settle due to constrictions with Judge Price's "social calendar." It is inconceivable that a party would feel "pressure" or "coercion" to settle because a judge brought up his scheduling obligations. Working around schedules of both other parties and the Court is a common issue within trial practice. The parties had multiple options available to them to accommodate Judge Price's schedule—the trial could have been continued to Monday, and Horton was not forced to rest its case when it chose to.

[8] *Ledford v. Dep't of Pub. Safety*, 428 S.C. 387, 835 S.E.2d 509, 511 (2019). In *Ledford*, the Supreme Court of South Carolina examined Commissioner Barden's remarks regarding a "duty" to report Ledford for criminal prosecution, holding "even if Commission Barden's statements were not intended as bona fide threats, they were indisputably coercive," citing the commentary to Rule 3B(8), CJC, Rule 501, SCACR.

Thus, Horton's arguments were not preserved for review and cannot be considered by this Court. However, even if this Court finds the arguments preserved, Judge Price did not overstep in his discussions with the parties.

Additionally, pursuant to Rule 208(b)(6), SCACR, Lather joins in the arguments contained in the briefs of other Respondents to the extent they are applicable and incorporates those arguments herein.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

SIGNATURE PAGE FOLLOWING

Respectfully submitted,

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