

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
THE HONORABLE BENTLEY D. PRICE
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2022-000469
CASE NO. 2019-CP-07-02629

Margaret A. Eberly and Barbara J. Pavelik,

PLAINTIFFS,

versus

Advanced Flooring & Design Division of ISI, LLC;
Archer Exteriors, Inc.; Crossroads Enterprises, LLC;
D.R. Horton, Inc.; East Coast Construction Cleanup Corp.;
Hutton's Landscapes, Inc.; Lather Construction SC, Inc.;
Lather Construction, Inc.; Professional Drywall & Paint Services, LLC;
Professional Exteriors II, LLC; and Valim Construction, LLC,

DEFENDANTS,

Of whom

D.R. Horton, Inc. is

APPELLANT,

versus

Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; and
Lather Construction, Inc.

RESPONDENTS.

INITIAL BRIEF OF RESPONDENT HUTTON'S LANDSCAPES, INC.

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COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. D.R. Horton's argument that the Trial Court erred in granting summary judgment to Hutton's Landscapes due to alleged actions in a prior and separate trial is not preserved for review and further has no bearing upon the propriety of the grant of summary judgment which involved matters of law before the court.
- II. The Trial Court granted summary judgment on each of D.R. Horton's six cross-claims as shown and supported by the record and of which D.R. Horton had notice of and did not object to the Trial Court's consideration of summary judgment on such cross-claims.
- III. The contractual indemnity provisions are void and unenforceable under South Carolina's Anti-Indemnity Statute because these provisions require Hutton's Landscapes to defend D.R. Horton against all of the plaintiffs' claims, including claims based on D.R. Horton's sole negligence, or to reimburse D.R. Horton for all sums accrued on account of the claims, including those related to its sole negligence.
- IV. The contractual indemnity provisions are not clear and unequivocal as to Hutton's Landscapes' obligations and thus void.
- V. The contractual indemnity provisions are void and unenforceable as against public policy because the provisions require Hutton's Landscapes to indemnify D.R. Horton for its intentional acts.
- VI. The contractual indemnity provisions between D.R. Horton and Hutton's Landscapes fail in their entirety and are not subject to severability.
- VII. D.R. Horton's claim for equitable indemnity fails because D.R. Horton is a joint tortfeasor who shares fault for the Plaintiffs' alleged damages and the equitable indemnity claim is not ripe.
- VIII. The Trial Court properly granted summary judgment on D.R. Horton's cross-claims for breach of contract, breach of warranties, and negligence which were disguised claims for equitable indemnity.

COUNTERSTATEMENT OF THE CASE

This construction defect lawsuit concerns Appellant D.R. Horton, Inc.’s (“D.R. Horton”) attempt as the general contractor to seek indemnification from Respondent Hutton’s Landscapes, Inc. (“Hutton’s Landscapes”) as its subcontractor under indemnity provisions that are void under South Carolina’s Anti-Indemnity Statute, S.C. CODE ANN. § 32-2-10, and prohibited by the public policy of this State and for actions for which D.R. Horton is not without fault.

Plaintiffs Margaret A. Eberly and Barbara J. Pavelik instituted this action in the Court of Common Pleas for Beaufort County on November 25, 2019 with a First Amended Complaint filed on December 19, 2019. [R.pp. ____; First Am. Compl.] The Plaintiffs brought suit against a number of defendants, including Defendants D.R. Horton, Hutton’s Landscapes, Lather Construction SC, Inc., and Lather Construction, Inc. (Lather Construction SC, Inc. and Lather Construction, Inc. hereafter known as “Lather Construction”).

The Plaintiffs alleged they were the owners of real property located at 4837 Breeze Way, Beaufort, South Carolina in the Tidewater Creek neighborhood (the “Property”). [R.p. ____; *Id.* at ¶ 1.] According to the Plaintiffs, they purchased the Property in August 2016 and began to notice defects in 2019 related to alleged wrongful and negligent practices of the Defendants “related to their ownership, survey, platting, subdividing, construction, marketing, selling and/or maintenance” of the Property. [R.p. ____; *Id.* at ¶¶ 6-7.] Among the issues complained of by the Plaintiffs were “improper site preparation; improper and inadequate infrastructure installation; inadequate inspections of the site during surveying, platting and subdividing; hazardous debris strewn throughout the

Property; premature erosion; standing water; dead and dying trees; water intrusion; damage resulting from water intrusion; improperly installed siding; improperly installed trusses; improperly installed roof; defective and improperly installed flooring; and other deficiencies” [R.pp. ___; Id. at ¶ 7.]

The Plaintiffs also alleged that in “developing, surveying, platting, subdividing, constructing, maintaining, marketing, and selling the Property,” the Defendant further made misrepresentations that (1) the site preparation and other construction had been conducted in accordance with the law when it had not; (2) that the Property was habitable when it was not; (3) that the Property was built in accordance with industry standards and good construction practices when it was not; and (4) that the site preparation and other construction work had been conducted in a workmanlike fashion when it was not. [R.p. ___; Id. at ¶ 8.] The Plaintiffs brought claims against the Defendant seeking, among other things, actual and punitive damages for negligent misrepresentation/recission; negligence/gross negligence; violation of South Carolina’s Unfair Trade Practice Act; breach of express and implied warranties; breach of contract; and fraud in the inducement/recission. [R.pp. ___; Id. at ¶¶ 10-33.]

Hutton’s Landscapes and Lather Construction answered the First Amended Complaint, denying its general allegations. [R.pp. ___; ___; Hutton’s Answer; Lather Answer.]

On November 9, 2020, D.R. Horton filed cross-claims against Hutton’s Landscapes and Lather Construction. [R.pp. ___; Cross-Claims.] D.R. Horton generally alleged that throughout the preparation and construction of the Plaintiffs’ Property, it contracted with subcontractors to supply certain labor and materials and that each subcontractor entered

into an agreement with D.R. Horton under which they agreed to indemnify D.R. Horton. [R.pp. ____; Id. at ¶¶ 59-60; 66-69.] Therefore, D.R. Horton alleged it was entitled to “full contractual indemnification from any liability D.R. Horton is found to have to Plaintiffs . . . entitling D.R. Horton to recover from Subcontractors its attorneys’ fees, costs, and any and all expenses associated with defending this action as well as any sums for which it may be held liable to Plaintiffs, whether by judgment, compromise, settlement, or otherwise.” [R.p. ____; Id. at ¶ 84.]

D.R. Horton also alleged cross-claims for equitable indemnification, breach of contract, breach of express and implied warranties, and negligence/gross negligence/recklessness against the subcontractors, including Hutton’s Landscapes and Lather Construction. [R.pp. ____; Id. at ¶¶ 86-112.]

Hutton’s Landscapes and Lather Construction answered D.R. Horton’s Cross-Claims and denied all material allegations of such claims. [R.pp. ____; ____; Hutton’s Answer; Lather’s Answer.]

On December 9, 2021, Hutton’s Landscapes filed a motion for summary judgment on D.R. Horton’s contractual and equitable indemnity claims, asserting that (1) the Indemnity Clause contained in the Independent Contractor Agreement between it and D.R. Horton is void and unenforceable under South Carolina’s Anti-Indemnity Statute, S.C. CODE ANN. § 32-2-10, because the Indemnity Clause required Hutton’s Landscapes to defend D.R. Horton against all of the Plaintiffs’ claims, including those based on D.R. Horton’s sole negligence; (2) the Indemnity Clause is void and unenforceable as against public policy because it requires Hutton’s Landscapes to indemnify D.R. Horton for its intentional acts; and (3) D.R. Horton’s claim for equitable indemnity failed as a matter of

law because it was not ripe and D.R. Horton has unclean hands. [R.pp. ____; Hutton’s Mtn. for Summary Judgment.]

In its Motion, Hutton’s Landscapes reserved the right to assert additional grounds for dismissal and/or summary judgment and also adopted and incorporated by reference as if fully stated therein any and all grounds for dismissal and/or summary judgment asserted at any time by the other defendants in the case. [R.p. ____; Id. at p. 2.]

On January 3, 2022, Lather Construction also moved for summary judgment on D.R. Horton’s cross-claims and asked the Court to dismiss with prejudice the claims asserted by D.R. Horton against Lather Construction. [R.pp. ____; Lather Mtn. for Summary Judgment.] On February 28, 2002, Lather Construction filed its Memorandum in Support of its Motion for Summary Judgment on D.R. Horton’s Cross-Claims and asserted it was entitled to judgment as a matter of law as to all causes of action asserted by D.R. Horton. [R.pp. ____; Lather Memo. in Support.]

In its memorandum, Lather Construction argued the contractual indemnity provision, which was the same as Hutton’s Landscapes’ indemnity provision, (1) violated the clear and unequivocal standard set forth in Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018); (2) violated the Anti-Indemnity Statute; and (3) was void as against public policy because it required the subcontractors to indemnify D.R. Horton for its intentional acts. [R.pp. ____; Id. at pp. 5-7.] Lather Construction further argued that D.R. Horton’s claim for equitable indemnification failed as a matter of law where D.R. Horton had unclean hands and the claim was not ripe. [R.pp. ____; Id. at pp. 7-8.] Finally, Lather Construction argued that D.R. Horton’s remaining claims for breach of contract, breach of express and implied

warranties, and negligence/gross negligence should be dismissed as a matter of law under Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) because these claims were merely disguised equitable indemnity claims. [R.p. ____; Id. at p. 8.]

A hearing on the motions for summary judgment was held before The Honorable Bentley D. Price on March 3, 2022. [R.pp. ____; Transc.] Counsel for Hutton's Landscapes and Lather Construction argued they were entitled to summary judgment on D.R. Horton's cross-claims for contractual indemnity, equitable indemnification, and all remaining cross-claims which were disguised claims for equitable indemnity. [R.pp. ____; ____; Id. at pp. 3, ll. 5-11; 28, l. 9 – 31, l. 20; 32, l. 25 – 33, l. 25.] Because the indemnity provision between D.R. Horton and Hutton's Landscapes had been recently found unenforceable and in violation of the Anti-Indemnity Statute and public policy by Judge Price in a related action involving construction defects in the same neighborhood involving the same contract, *Richard W. and Rebecca A. Dreier et al. v. Advanced Flooring & Design et al. including D.R. Horton, Inc.*, 2018-CP-07-00911, Hutton's Landscapes incorporated and submitted the briefing and memoranda filed in that case. There was no objection by D.R. Horton to the submission of these documents. [R.pp. ____; Id. at pp. 3, l. 11 – 4., l. 22.]

On March 11, 2022, Judge Price granted the motions for summary judgment of Hutton's Landscapes and Lather Construction. [R.pp. ____; Order.] D.R. Horton moved to alter or amend the judgment on March 18, 2022 which was denied on March 24, 2022. [R.pp. ____; ____; Mtn.; Order.] D.R. Horton filed and served a Notice of Appeal with this Court of the order granting summary judgment on its cross-claims.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004). Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted 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 that the moving party is entitled to judgment as a matter of law.” See Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). “In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment.” Id.; Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). Furthermore, the “construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment.” Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A., 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995).

The interpretation of a statute is also a question of law which the appellate court reviews de novo. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ARGUMENT

- I. D.R. Horton’s argument that the Trial Court erred in granting summary judgment to Hutton’s Landscapes due to alleged actions in a prior and separate trial is not preserved for review and further has no bearing upon the propriety of the grant of summary judgment which involved matters of law before the court.**

In challenging the Trial Court’s grant of summary judgment, D.R. Horton contends Judge Price was biased against D.R. Horton after handling a previous trial a few months earlier in the case of *Richard W. and Rebecca A. Dreier et al. v. Advanced Flooring & Design et al. including D.R. Horton, Inc.*, 2018-CP-07-00911. D.R. Horton further argues that in the *Dreier* case, Judge Price improperly overruled another circuit judge’s order denying Hutton Landscape’s motion for summary judgment when Judge Price determined that the contractual indemnification provision between D.R. Horton and Hutton’s Landscapes was void and unenforceable during the trial of the case. D.R. Horton insists that the grant of summary judgment entered by Judge Price in favor of Hutton’s Landscapes in this case must be reversed due to these purported allegations which occurred in a separate case.

These issues are not preserved for appellate review by this Court. D.R. Horton neither raised these issues to the Trial Court in its bench brief, during the summary judgment hearing, or in its motion to alter or amend. These issues cannot be raised for the first time on appeal. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); see also *Gaddy v. Douglass*, 359 S.C. 329, 349-50, 597 S.E.2d 12, 23 (Ct. App. 2004)

(holding that allegations of a judge's lack of impartiality would not be addressed by the appellate court where the matters were not raised to and ruled upon by the trial court).

This case also does not involve any prior ruling by a circuit court judge. The Trial Court was hearing and ruling upon summary judgment for this first time in this case.

Finally, whatever may or may not have occurred in the separate *Dreier* trial has no bearing on the grant of summary judgment in this case which, as Hutton's Landscapes will show, are matters of law for which the grant of summary judgment was proper. This Court should reject D.R. Horton's fruitless endeavor to muddle the straightforward issues in this case.

II. The Trial Court granted summary judgment on each of D.R. Horton's six cross-claims as shown and supported by the record and of which D.R. Horton had notice of and did not object to the Trial Court's consideration of summary judgment on such cross-claims.

D.R. Horton next complains that the Trial Court erred in failing to provide a full basis for the grant of its summary judgment to Hutton's Landscapes on each of D.R. Horton's cross-claims. While it is true that the Trial Court's order granting summary judgment simply states the motions for summary judgment are granted, it is readily apparent from the record that the Trial Court granted summary judgment in favor of Hutton's Landscapes on all cross-claims asserted by D.R. Horton. See Rule 52(a) ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."); see also Porter v. Labor Depot, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) (stating "not all situations require a detailed order, and the [circuit] court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal"); Easterling v. Burger King Corp., 416 S.C. 437, 453, 786 S.E.2d 443, 452 (Ct.

App. 2016) (disagreeing with the argument that the appellate court was “unable to ascertain the basis behind the circuit court's order’ because the circuit court ruled upon the motion for summary judgment via Form 4 order” and finding “the parties provided an ample record for [the appellate] court to conduct meaningful appellate review”).

Hutton’s Landscapes initially moved for summary judgment on D.R. Horton’s cross-claims for contractual and equitable indemnification, but also reserved the right to assert additional grounds for summary judgment and adopted and incorporated by reference any and all grounds for summary judgment asserted at any time by any other defendant. [R.pp. ___; Hutton Mtn. for Summary Judgment.] Lather Construction then also filed a motion for summary judgment seeking the Trial Court “to dismiss with prejudice the claims asserted by D.R. Horton, Inc. against Lather Construction.” [R.pp. ___; Lather Mtn. for Summary Judgment.]

Lather Construction subsequently filed a memorandum in support, arguing it was entitled to summary judgment on the contractual indemnity claim because the indemnity provision, which was identical to the provision in Hutton’s Landscape’s contract, (1) violated the clear and unequivocal standard set forth in Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018); (2) violated the Anti-Indemnity Statute; and (3) was void as against public policy because it required the subcontractors to indemnify D.R. Horton for its intentional acts. [R.pp. ___; Memo. in Support, pp. 5-7.] Lather Construction further argued that D.R. Horton’s claim for equitable indemnification failed as a matter of law where D.R. Horton had unclean hands and the claim was not ripe. [R.pp. ___; Id. at pp. 7-8.] Finally, Lather Construction argued that D.R. Horton’s remaining claims for breach of contract, breach of

express and implied warranties, and negligence/gross negligence should be dismissed as a matter of law under Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) because these claims were merely disguised equitable indemnity claims. [R.p. ____; Id. at p. 8.] Hutton's Landscapes, via its prior motion, had adopted each of these arguments. [R.p. ____; Hutton's Mtn. for Summary Judgment, p. 2.]

D.R. Horton was well aware of the basis for the motions for summary judgment, submitting a bench brief where it argued for the validity and enforceability of the indemnity provisions at issue, contended it could not be found negligent for purposes of the equitable indemnification claim, and maintained that Stoneledge did not apply. [R.pp. ____; D.R. Horton Bench Brief.] D.R. Horton had notice of the arguments for summary judgment by Hutton's Landscapes and Lather Construction on each of its cross-claims and cannot claim any prejudice from any alleged insufficiency in the motions for summary judgment. See Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195(2007) (observing any alleged non-compliance with the technical requirements of Rules 6(d) and 7(b)(1), SCRPC did not prejudice appellant where she had sufficient notice of arguments to prepare for hearing).

At the beginning of the hearing, counsel for Hutton's Landscapes announced it was moving for summary judgment on each of D.R. Horton's cross-claims, including contractual and equitable indemnification and D.R. Horton's remaining claims for breach of contract, breach of warranties and negligence which were disguised claims for equitable indemnity. [R.p. ____; Transc., p. 3, ll. 5-11.]

Notably D.R. Horton had no objection to the summary judgment hearing proceeding on each and every one of its cross-claims against Hutton's Landscapes and

Lather Construction. See Ball v. Canadian American Express Co., Inc., 314 S.C. 272, 277, 442 S.E.2d 620, 623 (Ct.App.1994) (failure to object to an issue during a hearing before the trial court waives the right to object on appeal).

The Trial Court heard argument by Hutton's Landscapes and Lather Construction and also had before it memoranda and exhibits from the parties on the enforceability of the contractual indemnity provisions, D.R. Horton's unclean hands to as equitable indemnity, whether the equitable indemnity claim was ripe, and the bar under the cited Stoneledge case as to D.R. Horton's cross-claims for breach of contract, breach of express and implied warranties, and negligence/gross negligence. [R.pp. ___; ___; ___; Id. at pp. 3, l. 11 – 4, l. 4; 28, l. 13 – 31, l. 20; 32, l. 20 – 33, l. 23.; Lather Memo. in Support and Exhibits; Hutton's Landscapes Memo. in Support and Exhibit from the *Dreier* case.] It was clear that the parties were seeking summary judgment as a matter of law on all six of D.R. Horton's cross-claims.

The natural conclusion from the record is that the Trial Court granted summary judgment and ruled upon all the arguments raised by Hutton's Landscapes and Lather Construction. Furthermore, and as argued more fully below, the record establishes and supports that the grant of summary judgment was proper as a matter of law on each of D.R. Horton's six cross-claims.

III. The contractual indemnity provisions are void and unenforceable under South Carolina's Anti-Indemnity Statute because these provisions require Hutton's Landscapes to defend D.R. Horton against all of the plaintiffs' claims, including claims based on D.R. Horton's sole negligence, or to reimburse D.R. Horton for all sums accrued on account of the claims, including those related to its sole negligence.

On May 16, 2014, D.R. Horton and Hutton's Landscapes entered into an Independent Contractor Agreement for Hutton's Landscapes to perform the work as

described above to D.R. Horton (the “Contract”). The Contract was entered into on a “blanket basis” and intended to govern all current and future work of Hutton’s Landscapes performed for D.R. Horton. [R.pp. ____; Contract.]

The Contract includes an indemnity clause comprised of one long, continuous paragraph (the “Indemnity Clause”) which purports to require Hutton’s Landscapes, as Contractor, to defend and indemnify D.R. Horton, as Owner:

10.1 Generally. To the fullest extent permitted by law, Contractor shall protect, defend, indemnify, and hold Owner . . . (“Indemnatee”), 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 . . . 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 I, including but not limited to work performed or to be performed or material supplied by Contractor or Contractor’s agents, or employees; (3) any negligent or intentional act or omission of Contractor . . . regardless whether caused in part by Indemnatee; or (4) any negligent or intentional act of Indemnatee, related in any way to the 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 Indemnatee. 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 Indemnatee which potentially or arguably is subject to Contractor’s duty to indemnify regardless of Contractor’s ultimate liability for indemnity. Contractor must defend Indemnatee even where the allegations against Indemnatee 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 Indemnatee 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 of Indemnatee.

[R.p. ____; Contract, p. 4, § 10.1 (all caps removed for readability).]

The Contract further contains a reimbursement provision (the “Reimbursement Clause”):

10.2 Indemnity Not Exclusive Remedy. Any payments by Contractor under Section 10 to or on behalf of the Indemnatee shall be in an addition to all other legal remedies available to th Indemnatee and shall not be considered the Indemnatee’s exclusive remedy. Indemnatee shall have the right, it if so chooses in its absolute discretion, to defend all claims which may be asserted and Contractor will reimburse Indemnatee for all expenditures that Owner may incur on account of the claim.

[R.p. ____; Id. at p. 4, § 10.2 (all caps removed for readability).]

Under its contractual indemnity claim, D.R. Horton asserted it is entitled to “full contractual indemnification from any liability D.R. Horton is found to have to Plaintiffs . . . entitling D.R. Horton to recover from Subcontractors its attorneys’ fees, costs, and any and all expenses associated with defending this action as well as any sums for which it may be held liable to Plaintiffs, whether by judgment, compromise, settlement, or otherwise.”

[R.p. ____; Cross-Claims, ¶ 84.]

D.R. Horton is not entitled to contractual indemnification because the Indemnity and Reimbursement Clauses in the Contract between D.R. Horton and Hutton’s Landscapes are unenforceable under South Carolina’s Anti-Indemnity Statute. These clauses require Hutton’s Landscapes to defend and/or pay damages, such as attorneys’ fees and costs, for D.R. Horton’s sole negligence in violation of the statute. Accordingly, the Trial Court properly granted summary judgment to Hutton’s Landscapes on D.R. Horton’s contractual indemnification claim.

South Carolina’s Anti-Indemnity Statute, S.C. CODE ANN. § 32-2-10, prohibits any promise or agreement in a construction contract which requires a promisor to indemnify the promisee for the promisee’s sole negligence:

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.

Id. (emphasis added).

While the Indemnity Clause in the Contract between D.R. Horton and Hutton's Landscapes purports to exclude from indemnity liability for D.R. Horton's sole negligence, contained within the same Indemnity Clause is a broad and expansive duty to defend which requires Hutton's Landscapes to bear entirely the costs of D.R. Horton's defense regardless of whether Hutton's Landscapes is ultimately required to indemnify D.R. Horton:

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**.

[R.p. ____; Contract, p. 4, § 10.1 (emphasis added).]

The Reimbursement Clause of the Contract further requires Hutton's Landscapes to reimburse D.R. Horton for "all expenditures" which it incurs on account of any claim against D.R. Horton without any limit as to what is being indemnified and without any exclusion for D.R. Horton's sole negligence:

Indemnitee shall have the right, if it so chooses in its absolute discretion, to defend all claims which may be asserted and **Contractor will reimburse Indemnitee for all expenditures** that Owner may incur on account of the claim.

[R.p. ____; Contract, p. 4, § 10.2 (emphasis added).]

The Indemnity Clause therefore requires Hutton's Landscapes to defend D.R. Horton against all of the plaintiffs' claims, including those based on D.R. Horton's sole negligence. The Reimbursement Clause requires Hutton's Landscapes to reimburse D.R. Horton for the entirety of its expenditures incurred on account of such claims without any limitation. The Plaintiffs asserted negligence claims against D.R. Horton and multiple subcontractors, including claims unrelated to Hutton's Landscapes' work and claims which could be attributed to solely D.R. Horton's negligence. In its cross-claim for contractual indemnity against Hutton's Landscapes, D.R. Horton sought to be fully reimbursed for the costs of the entire action pursuant to the terms of the Contract. [R.p. ____; Cross-Claim, ¶ 84.]

The Indemnity and Reimbursement Clauses therefore violate the express prohibition under the Anti-Indemnity Statute which bars any promise to indemnify another for its sole negligence. See § 32-2-10. These indemnity provisions in the Contract between D.R. Horton and Hutton's Landscapes thus constitute an illegal contract which is unenforceable. See D.R. Horton, Inc. v. Builders FirstSource – Southeast Group, LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) (finding indemnification clause void as against

public policy to the extent it purported to require subcontractor to indemnify contractor for its own sole negligence); see also Berkebile v. Outen, 311 S.C. 50, 54 n. 2, 426 S.E.2d 760, 762 n.2 (1993) (recognizing that an illegal contract is unenforceable and that South Carolina courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the constitution).

While the Anti-Indemnity Statute refers only to promises to “indemnify,” the term “indemnify” in a contractual indemnity context under South Carolina law encompasses a duty to defend as well. Under South Carolina law, the two duties are intimately related under the principles of contract indemnity. The right of indemnity under South Carolina law includes “the right to attorney's fees and litigation costs incurred in defending the underlying claim.” Fountain v. Fred’s Inc., 429 S.C. 533, 556-58, 839 S.E.2d 475, 488-89 (Ct. App. 2020), rev’d on other grounds, 436 S.C. 40, 871 S.E.2d 166 (2022) (“[A]ttorney's fees and costs proximately resulting from the at-fault party's breach of contract or negligence are treated as the legal consequences of the at-fault party's original wrongful act and may be recovered as damages.”); see also Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971) (holding “in actions of indemnity, brought where the duty to indemnify is either implied by law or arises under contract . . . reasonable attorneys' fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses”). Thus, attorneys’ fees incurred by a party for defending a claim can be recovered and considered as damages, and under the provisions of the Anti-Indemnity Statute, such damages are not recoverable as to acts arising out of the sole negligence of the promisee.

Moreover, the Anti-Indemnity Statute is specifically entitled “Hold harmless clauses in certain construction contracts.” A promise to “hold harmless” “is generally held to include an obligation to defend, or to reimburse for the costs of the defense, when an action within the terms of the agreement is filed against the indemnitee.” Sunset Presbyterian Church v. Andersen Const. Co., 341 P.3d 192, 197 (Or. Ct. App. 2014) (internal citation omitted).

Consequently, it is clear from the express language used by the Legislature that the Anti-Indemnity Statute encompasses not only the scope of an indemnitor’s responsibility to pay damages, but also the scope of promises to defend claims brought against the indemnitee and to reimburse the indemnitee for any such defense costs. Accordingly, the Anti-Indemnity Statute invalidates the Indemnity Clause in the Contract here because the Indemnity Clause requires Hutton’s Landscapes to defend D.R. Horton against all of the Plaintiffs’ claims, including those based on D.R. Horton’s own negligence. See Sunset Presbyterian Church, 341 P.3d at 197-200 (finding Oregon’s anti-indemnity statute, which bars “any provision in a construction agreement that requires a person . . . to indemnify another against liability for damage arising out of death or bodily injury to persons or damage to property caused in whole or in part by the negligence of the indemnitee,” applies to a duty to defend); see also Arthur v. State of Hawaii, 377 P.3d 26, 34-38 (Haw. 2016) (determining Hawaii’s anti-indemnity statute, which bars indemnification for the sole negligence or willful misconduct of the indemnitee, by implication, voids a duty to defend such claims).

In addition, the Reimbursement Clause of the Contract explicitly violates the Anti-Indemnity Statute, regardless of whether the statute expressly refers to a duty to defend,

because this provision obligates Hutton's Landscapes to pay out sums to D.R. Horton for all of its expenditures accrued on account of the claim, even for expenditures incurred by D.R. Horton due to its sole negligence.

D.R. Horton argues that because the Legislature did not expressly use the word "defend" in the Anti-Indemnity Statute, the statute does not void the indemnity provisions which render Hutton's Landscapes liable to D.R. Horton for the entire amount of costs accrued on account of the plaintiffs' action, including for D.R. Horton's sole negligence.

In using the term "indemnify" in the Anti-Indemnity Statute, however, the Legislature would have understood the meaning of the term as understood at common law in the context of contractual indemnity, which includes a duty to defend. See Addy, 257 S.C. at 34 183 S.E.2d at 710. "The General Assembly is presumed to be aware of the common law, . . . and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997); see also AM. JUR. *Statutes* § 143 ("It is a familiar rule of construction that when a statute uses words which have a definite and well-known meaning at common law, it will be presumed that the terms are used in the sense in which they were understood at common law."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320 (2012) ("[W]ords undefined in a statute are to be interpreted and applied according to their common-law meanings.").

Additionally, the language of a statute "must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Eagle Container Co., LLC v. Cty. of Newberry, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008) (internal

citation omitted). The purpose of an anti-indemnity statute is to prohibit a general contractor from shifting its exposure for its sole negligence to the subcontractor. See Sunset Presbyterian Church, 341 P.3d at 199. Anti-indemnity statutes are “designed to prevent parties with greater leverage in construction agreements (generally, owners and contractors) from shifting exposure for their own negligence to other parties (generally subcontractors) on a ‘take-it-or-leave-it’ basis.” Id. at 200 (internal citation omitted).

It is illogical that the Legislature would intend to protect subcontractors from agreements requiring them to indemnify general contractors against damages caused by the general contractors’ sole negligence, but yet intend that general contractors still be allowed to require subcontractors to defend them against claims for such damages. If an indemnitee is permitted to require an indemnitor to defend it for its sole negligence, this would have the effect of relieving the indemnitee from the consequences of its sole negligence, which is squarely what an anti-indemnity statute is designed to prohibit.

In light of the relationship between a promise to indemnify and a duty to defend in terms of contractual indemnification, it is evident that the Legislature did not intend that result. An anti-indemnity statute remedies the resulting unfairness when general contractors force subcontractors to accept exposure for the general contractors’ sole negligence as part of the cost of doing business, which includes the cost of defending an action against the contractor for its sole negligence. Id. at 199-200. Interpreting South Carolina’s Anti-Indemnity Statute to prohibit construction contracts that require an indemnitor to defend an indemnitee for the indemnitee’s sole negligence achieves the public policy contemplated by the Legislature. The purpose of the Anti-Indemnity Statute

is not fulfilled is D.R. Horton is permitted to recover fees and costs arising from its sole negligence.

In its brief, D.R. Horton points to another statute, S.C. CODE ANN. § 1-11-445(A) which requires the State of South Carolina to defend and indemnify state agencies, and argues that when the Legislature wants to address the duty to defend in a statute, it will use the word defend. This argument is unconvincing because there are important differences between Section 1-11-445(A) and the Anti-Indemnity Statute. Section 1-11-445(A) imposes particular duties worded in the traditional formulation of an indemnity provision on the State. By contrast, the Anti-Indemnity Statute places limits on indemnity provisions in construction contracts and prohibits any provision in a construction contract which requires the indemnitee to bear the costs of the indemnitor's sole negligence. The Anti-Indemnity Statute is one of protection and should be construed in favor of the indemnitor who – typically in the construction context – is the party with inferior bargaining power. The Anti-Indemnity Statute does not impose duties like S.C. CODE ANN. § 1-11-445(A), but rather limits any such duties.¹

¹ D.R. Horton also references proposed bill S. 422, 124th Session (2021-2022) by Senator Thomas C. Alexander which according to Senate Journal p. 307 was referred to the Committee on Judiciary on January 12, 2021 with no further action or progress indicated on the bill. There should not be any intent by the Legislature delineated from this proposed bill. Further, this proposed bill also included in Section (E) that “nothing in this section shall be interpreted to exclude from any indemnity or hold harmless provision . . . attorney fees, litigation or arbitration expenses, or court costs actually incurred by the promisee when guarding against third-party claims . . . **if the fault of the promisor . . . is a proximate cause** of the attorney fees, litigation or arbitration expenses or courts costs to be indemnified.” (emphasis added). This provision suggests, contrary to D.R. Horton's argument, that a duty to defend when the promisor is partially at fault is valid, but that a duty to defend when the promisee is solely negligent remains invalid under the Anti-Indemnity Statute.

D.R Horton also attempts to equate contractual indemnity and the limitations placed upon it with respect to construction contracts by the Anti-Indemnity Statute to insurance law where the duty to defend and the duty to indemnify have been described as separate and distinct. Insurance law, however, involves separate concepts than contractual indemnity and different principles of law apply. Courts have distinguished the characteristics of liability insurance contracts from private indemnity agreements. On the one hand, “an insurance contract denotes a policy issued by an authorized and licensed insurance company whose primary business it is to assume specific risks of loss of members of the public at large in consideration of the payment of a premium.” Stickovich v. Cleveland, 757 N.E.2d 50, 61 (Ohio Ct. App. 2001) (internal citation omitted).

In contrast, “[t]here are, however, other risk-shifting agreements which are not insurance contracts. These include the customary private indemnity agreement where affording the indemnity is not the primary business of the indemnitor and is not subject to governmental regulation but is merely ancillary to and in furtherance of some other independent transactional relationship between the indemnitor and the indemnitee. The indemnity is, thus, not the essence of the agreement creating the transactional relationship but is only one of its negotiated terms.” Id.

Moreover, “[t]he primary purpose of a liability insurance policy is to provide coverage to a policy holder for the policy holder’s own negligence.” Heat & Power Corp. v. Air Prods. & Chems., Inc., 578 A.2d 1202, 1208 (Md. Ct. App. 1990). A liability insurer is not an “unwary or uninformed promisor.” Id. Contrarily, the Legislature has determined as a matter of public policy that no construction contract may contain a promise by one to indemnify a promisee for the promisee’s sole negligence and that each party to a

construction contract shall be responsible for its own sole negligence. S.C. CODE ANN. § 32-2-10. The Legislature even exempts insurance contracts from the Anti-Indemnity Statute, recognizing the differing nature of insurance contracts. Id.

Insurance contracts are also construed differently from construction indemnity contracts. Under insurance law, where an ambiguity is present, it is the court's policy to construe the ambiguity against the insurer - the one giving the indemnity. Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co., 410 S.C. 175, 763 S.E.2d 598 (Ct. App. 2014) ("The court must construe ambiguous terms in an insurance policy liberally in favor of the insured and strictly against the insurer."). Indemnity provisions in a construction contract are inversely strictly construed against the indemnitee – the party receiving the indemnity. Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 16 170-71 (Ct. App. 2018).

In light of the differing public policies behind contractual indemnity and insurance coverage, D.R. Horton's attempt to draw from insurance jurisprudence is misplaced. The concepts regarding the duty to defend and the duty to indemnify as applied to insurance do not pertain to construction indemnity contracts. The Supreme Court of South Carolina has long confirmed that common law contractual indemnification includes the duty to defend and that defense of an action is not separate and distinct from the act of indemnification in the context of contractual indemnity. Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971). The Legislature, by excluding insurance contracts from the Anti-Indemnity Statute, has also signaled its intent that construction contracts are to be treated differently than insurance contracts. Construction contractors are not in the business of providing insurance and recognizing that fact, the Legislature has provided that contractors who provide an

indemnity agreement as a part of a construction contract do not insure a promisee's sole negligence.

Correspondingly, D.R. Horton's argument that this case is not about the indemnity provisions of the Contract, but rather about insurance obligations to which the Anti-Indemnity Statute does not apply is also misguided. The Contract contains separate provisions regarding Hutton's Landscape obligations to provide certain insurance to D.R. Horton. While D.R. Horton argues that the Contract requires Hutton's Landscapes to provide insurance to cover its indemnity obligations, the indemnity obligations must still be construed and determined in accordance with South Carolina law, which here, the Anti-Indemnity Statute invalidates. The case relied upon by D.R. Horton, Midland Ins. Co. v. Delta Lines, Inc., 530 F. Supp. 190 (D.S.C. 1982), is not applicable. This case involved a contractual indemnity provision from a 1976 transaction which predates South Carolina's Anti-Indemnity Statute which was enacted in 1980. The District Court in Midland Ins. Co. further did not analyze the enforceability of the contractual indemnity provision, only the interpretation of the provision.

Whether there are any insurers who are not parties to this action and who may have been required to provide additional insured coverage to D.R. Horton is also a distinct legal issue from the validity of D.R. Horton's contractual indemnity claim against Hutton's Landscapes and the enforceability of the Indemnity and Reimbursement Clauses.

An all-encompassing duty to defend provision, requiring the promisor to defend even claims for the promisee's sole negligence, contravenes public policy because of the unfairness occasioned by the shifting of all attorneys' fees, costs, and expenses to the promisor. The Indemnity Clause in the Contract contains such a duty to defend and violates

South Carolina's Anti-Indemnity Statute. In addition, the Reimbursement Clause specifically requires Hutton's Landscapes to repay D.R. Horton for all expenditures accrued on account of the plaintiffs' claims and places no limitation on the reimbursement in violation of the Anti-Indemnity Statute's prohibition against an indemnitor's promise to pay for an indemnitee's sole negligence. Therefore, the Indemnity and Reimbursement Clauses, in which the duties to indemnify and defend are intertwined, are void and unenforceable. D.R. Horton's contractual indemnity claim against Hutton's Landscapes accordingly fails as a matter of law, and the Trial Court correctly dismissed the claim.

IV. The contractual indemnity provisions are not clear and unequivocal as to Hutton's Landscapes' obligations and thus void.

The obligations of Hutton's Landscapes are not clear and unequivocal under the Indemnity and Reimbursement Clauses when construed together; therefore, these two clauses fail as a matter of law.

If an indemnity clause purports "to relieve an indemnitee from the consequences of its own negligence, South Carolina law requires strict construction of the clause. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018) (internal citations omitted). As such, it is well-established under South Carolina law that "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." Id. at 647, 819 S.E.2d at 171 (internal citation omitted).

The language of the Indemnity and Reimbursement Clauses is not clear and unequivocal as to Hutton's Landscapes' indemnification obligations. On the one hand, the Indemnity Clause purports to require Hutton's Landscapes to indemnify D.R. Horton for

everything except its sole acts. However, in the immediately following Reimbursement Clause, D.R. Horton asserts a broad right to defend any action that is brought against it and requires Hutton's Landscapes to reimburse D.R. Horton for all expenditures accrued on account of the plaintiffs' claims, irrespective of whether D.R. Horton was solely responsible or not. The unclear and conflicting language of these two provisions prevents Hutton's Landscapes from determining its indemnity obligations. Accordingly, these indemnity provisions are unenforceable for this additional reason, and the Trial Court did not err in dismissing D.R. Horton's contractual indemnity claim.

V. The contractual indemnity provisions are void and unenforceable as against public policy because the provisions require Hutton's Landscapes to indemnify D.R. Horton for its intentional acts.

The Indemnity Clause in the Contract between D.R. Horton and Hutton's Landscapes further violates public policy because it explicitly requires Hutton's Landscapes to indemnify D.R. Horton for D.R. Horton's intentional acts. The Indemnity Clause provides:

To the fullest extent permitted by law, **Contractor shall protect, defend, indemnify, and hold Owner . . . ("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 . . . 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: . . . (4) any negligent or intentional act of Indemnitee**, related in any way to the 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.

[R.p. ____; Contract, p. 4, § 10.1 (emphasis added).]

Additionally, the Reimbursement Clause requires Hutton's Landscapes to reimburse D.R. Horton for all expenditures accrued on account of the plaintiffs' claims. The Reimbursement Clause does not except intentional acts. [R.p. ____; Id. at p. 4, § 10.2.]

“The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions.” White v. J.M. Brown Amusement Co., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). Our State's Supreme Court has observed as a matter of public policy that contracts of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms. The policy basis behind this rule serves to deter negligent conduct by the indemnitee, “for the indemnitee will know that the indemnification agreement will not save it from liability if it fails to act with due care.” Ashley II of Charleston II, L.L.C. v. PSC Nitrogen, Inc., 409 S.C. 487, 490-91, 763 S.E.2d 19, 20-21 (2014); see also Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 648-49, 819 S.E.2d 166, 171 (Ct. App. 2018).

The public policy concerns are greater with respect to indemnification for intentional acts. Under the Indemnity and Reimbursement Clauses, D.R. Horton has sought to shift the burden and exposure for its intentional acts to Hutton's Landscapes, for which the plaintiffs have made claims for and sought punitive damages, under the First Amended Complaint. [R.pp. ____; First Am. Compl., ¶¶ 9, 15, 18, 20, 23, 26, 31-32.] Enforcing such indemnity provisions eliminates any incentive for D.R. Horton to act with any care in the performance of its work. Public policy commands that such an indemnity provision,

permitting indemnification for the indemnitee’s intentional acts, be forbidden. See Equitex, Inc. v. Ungar, 60 P.3d 746, 750 (Colo. Ct. App. 2002) (“Public policy prohibits indemnifying a party for damages resulting from intentional or willful wrongful acts.”) (internal citation omitted); cf. S.C. CODE ANN. § 15-38-20(C) (“There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury”).

On this additional basis, the Indemnity and Reimbursement Clauses between D.R. Horton and Hutton’s Landscapes are void and unenforceable. Therefore, D.R. Horton’s contractual indemnity claim against Hutton’s Landscapes fails for this independent and separate reason.

VI. The contractual indemnity provisions between D.R. Horton and Hutton’s Landscapes fail in their entirety and are not subject to severability.

Recognizing that portions of the indemnity clauses under the Contract cannot withstand scrutiny under the Anti-Indemnity Statute or public policy, D.R. Horton argues that any unenforceable provisions of these clauses can be severed. To the contrary, the Indemnity and Reimbursement Clauses cannot simply be broken into multiple provisions, some of which are enforceable and some of which are not.

The Supreme Court has warned that severability is not always appropriate to remedy unenforceable contractual provisions, particularly those that are unconscionable or violate public policy. Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 618, 879 S.E.2d 746, 758 (2022). Under South Carolina law, “it is not the function of the court to rewrite contracts for parties.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 34, 644 S.E.2d 663, 673-74 (2007). The Supreme Court has further noted that “courts are reluctant to sever the unconscionable provisions when illegality pervades the entire agreement ‘such that

only a disintegrated fragment would remain after hacking away the unenforceable parts.” Damico, 437 S.C. at 618, 879 S.E.2d at 758 (quoting Simpson, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted)). In those circumstances, “judicial severing ‘look[s] more like rewriting the contract than fulfilling the intent of the parties.” Damico, 437 S.C. at 618, 879 S.E.2d at 758-59 (quoting Simpson, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted)).

The indemnity provisions are not susceptible to division. Rather, the clauses present a series of interconnected purported obligations which D.R. Horton has imposed upon Hutton’s Landscapes. The Indemnity Clause begins by stating that Hutton’s Landscapes is required to “defend, indemnify and hold [D.R. Horton] free and harmless from” a series of conduct, including D.R. Horton’s intentional acts which is violative of public policy. Then the Indemnity Clause goes further to require Hutton’s Landscape to defend more than just the previous listed series of conduct and which in fact mandates that Hutton’s Landscapes defend D.R. Horton for the entirety of its own acts, including its sole negligence and intentional acts. Finally, under the Reimbursement Clause, Hutton’s Landscapes is required to reimburse D.R. Horton for all expenditures that D.R. Horton accrues on account of the plaintiffs’ claims without any limitation on the indemnity, which includes reimbursement for D.R. Horton’s sole negligence and intentional acts. [R.p. ___; Contract, p. 4, §§ 10.1, 10.2.]

Illegality permeates the Contract’s indemnity provisions. Moreover, the indemnity provisions are inconsistent, with part of the clause stating that Hutton’s Landscapes is only obligated to defend and indemnify D.R. Horton for certain acts and not its sole negligence or sole intentional acts, while the remainder of the provisions require Hutton’s Landscapes

to defend D.R. Horton for the entire claim, even as to its sole negligence and sole intentional acts, and reimburse D.R. Horton for all expenditures it incurred without any limitation. Whatever intent D.R. Horton may have had in its Indemnity and Reimbursement Clauses cannot be deciphered with the number of inconsistencies contained therein.

It is not the function of the court to rewrite the indemnity provisions to resolve the inconsistencies drafted by D.R. Horton and to make the provisions comply with public policy. Doing so would create an incentive by D.R. Horton to overreach, knowing that if the indemnity provision is found to violate public policy, the courts will substitute a narrower version. See Damico, 437 S.C. at 622, 879 S.E.2d at 760. The court should not rescue and reward D.R. Horton from including clearly violative clauses in its indemnity provisions by rewriting a narrower provision. See id. at 624, 879 S.E.2d at 762. Accordingly, the indemnity provisions in the Contract between D.R. Horton and Hutton's Landscapes are void and unenforceable in their entirety. D.R. Horton cannot maintain a contractual indemnity claim against Hutton's Landscapes based upon these void indemnity provisions.

VII. D.R. Horton's claim for equitable indemnity fails because D.R. Horton is a joint tortfeasor who shares fault for the Plaintiffs' alleged damages and the equitable indemnity claim is not ripe.

The Trial Court also properly granted summary judgment on D.R. Horton's cross-claim for equitable indemnity because D.R. Horton, as the general contractor to Hutton's Landscapes, was ultimately responsible for Hutton's Landscapes work at the project, and, thus, cannot be adjudged without fault.

In general, there is no right to indemnity between joint tortfeasors. Atl. Coast Line R.R. Co. v. Whetstone, 243 S.C. 61, 70, 132 S.E.2d 172, 176 (1963). Equitable indemnity

arises in scenarios where “the first party is at fault, but the second party is not.” Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); see also Fowler v. Hunter, 697 S.E.2d 531, 388 S.C. 355 (S.C. 2010). “If the second party is also at fault, he comes to court without equity and has no right to indemnity.” Id. For a party to recover under the theory of equitable indemnity, it must satisfy the following three elements: (1) the party from whom indemnity is sought is liable for causing the plaintiff’s damages; (2) the party seeking indemnity is exonerated from any liability for those damages; and (3) the party seeking indemnity incurred damages as a result of the plaintiff’s claims against it, which were eventually proven to be the fault of the indemnitor. Id. However, under South Carolina law it is clear that “[t]he most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault.” Id.

In this case, the Plaintiffs allege defects and misrepresentations/concealments of D.R. Horton and its subcontractors related to the “developing, surveying, platting, subdividing, constructing, maintaining, marketing and selling the Property.” [R.pp. ____; First Am. Compl., ¶¶ 7-8]. The Plaintiffs specifically allege defects related to “improper site preparation; improper and inadequate infrastructure installation; inadequate inspections and testing of the site during surveying, platting and subdividing; hazardous debris strewn throughout the Property; premature erosion; standing water; dead and dying trees; water intrusion; damage from water intrusion; improperly installed siding; improperly installed trusses; improperly installed roof; defective and improperly installed flooring; and other deficiencies. . . .” [R.pp. ____; Id. at ¶ 7].

D.R. Horton, by way of its managers and superintendents, bore responsibility,

oversight, and coordination as owner, developer, and general contractor for the Property, which included the responsibility to develop, survey, plat, subdivide, construct, maintain, market, and sell to the Plaintiffs the Property. More specifically, D.R. Horton chose the land for the Property, hired the contractors, sold the Property, and oversaw the work on the Property [R.p. ____; D.R. Horton's 30(b)(6) Dep., p. 177]; drafted and prepared the project specifications and scopes of work of its contractors for this neighborhood [R.p. ____; Id. at pp. 53-54]; performed daily supervision and oversight of the vertical construction [R.pp. ____; ____; ____; Id. at pp. 35-36, 51-52, 179]; oversaw the grading [R.p. ____; Id. at p. 180]; and walked the yards of each lot in the neighborhood [R.p. ____; Id. at p. 158].

After construction under D.R. Horton's supervision, D.R. Horton determined that the homes were built according to D.R. Horton's plans and specification and in compliance with the applicable building codes and industry standards, and D.R. Horton facilitated the sale of the homes. If it is determined that Hutton's Landscapes' vertical construction scope of work was improper and contributed to the Plaintiffs' damages, then, D.R. Horton, as the owner, developer, and general contractor and whom the Plaintiffs have alleged had independent duties to inspect and test [R.pp. ____; First Am. Compl., ¶¶ 7-8], would share responsibility for those damages. See Fountain v. Fred's, Inc., 436 S.C. 40, 49-52, 871 S.E.2d 166, 171-73 (2022) (concluding where landlord and commercial tenant were sued for their independent negligence for customer's trip and fall and the landlord's and tenant's failure to inspect the premises and to warn of hazardous conditions could have proximately caused the customer's injuries, landlord and tenant not entitled to equitable indemnification from contractor). Accordingly, under this scenario, D.R. Horton and Hutton's Landscapes

would be considered joint tortfeasors²; and, under South Carolina law, a joint tortfeasor cannot maintain an action for equitable indemnity.

Therefore, based on D.R. Horton's role as the owner, developer, and general contractor, there is no genuine issue of material fact for a jury to consider with respect to D.R. Horton's equitable indemnity claim against Hutton's Landscapes. If the Plaintiffs' claims for which D.R. Horton seeks indemnity are proven, D.R. Horton will be found, at least in part, at fault; thus barring D.R. Horton's equitable indemnification claim as a matter of law.

Additionally, D.R. Horton's pleadings state that their claim for indemnity arises if the Plaintiffs are entitled to recover damages against D.R. Horton for the injuries complained of in the First Amended Complaint. [R.pp. ___; Cross-Claim, ¶¶ 86-93.] In other words, this Court must find D.R. Horton to be liable or negligent with regards to Plaintiffs' claims before D.R. Horton's claim for indemnity arises. In this scenario, D.R. Horton would be at fault, and, thus, not entitled to indemnity. Indeed, in its pleadings against Hutton's Landscapes, D.R. Horton contends that if it is held liable to the Plaintiffs, its wrongful actions are "passive and secondary only." [R.p. ___; *Id.* at ¶ 92.] But even if D.R. Horton's fault is secondary, as it alleges, that is nonetheless fault under the law of South Carolina to preclude a claim for equitable indemnification.

Lastly, D.R. Horton's claim for equitable indemnity is not ripe and D.R. Horton has not been "exonerated from any liability for those damages." See Vermeer Carolina's, Inc., 336 S.C. at 63, 518 S.E.2d at 307; Addy v. Bolton, 257 S.C. 28, 32, 183 S.E.2d 708, 709

² Black's Law Dictionary defines joint tortfeasor as "two or more tortfeasors who contributed to the claimant's injury . . ." Black's Law Dictionary 765 (4th Ed. 2011).

(1971) (A party seeking indemnity may be “entitled to recover their costs and attorneys' fees incurred in the *successful* defense of this action under an implied contract”) (emphasis added). An indemnity claim “accrues at the time the indemnity claimant suffers loss or damage, that is, at the time of payment of the underlying claim, payment of a judgment thereon, or payment of a settlement thereof by the party seeking indemnity.” Maurice T. Brunner, Annotation, When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort, 57 A.L.R.3d 867 (1974). Accordingly, there is no justiciable case or controversy until the conclusion of the underlying tort action, regardless of its outcome.³

Once an indemnity claim accrues, the party wishing to recover attorneys' fees must show: “(1) that the plaintiff had become involved in a legal dispute either because of a breach of contract by the defendant or because of defendant's tortious conduct; (2) that the dispute was with a third party—not with the defendant; and (3) that the plaintiff incurred attorneys' fees connected with that dispute.” Addy, 257 S.C. at 33, 183 S.E.2d at 709–10. In this case, there have been no findings of fact or award of damages; there has been no determination as to Hutton's Landscapes alleged tortious or wrongful conduct; and there has been no determination that D.R. Horton is without fault and did not join in causing Plaintiffs' alleged injuries. Until D.R. Horton establishes a “successful defense” in this action, a claim for equitable indemnity is not ripe and D.R. Horton is not entitled to incurred

³ See, e.g., Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 227–28, 467 S.E.2d 913, 917–18 (1996) (“A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. . . . It is not enough that a threat of *possible* injury currently exists; the mere threat of a potential injury is too contingent or remote to support present adjudication.” (citations omitted)).

attorneys' fees connected with the underlying dispute. For these reasons, D.R. Horton's claim for equitable indemnity fails as a matter of law.

D.R. Horton also requests this Court to change this State's well-established law on equitable indemnification and allow a party bearing some fault to nevertheless be allowed to maintain a claim for equitable indemnification. This issue is not preserved for review as it was not argued to the Trial Court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised and ruled upon in the trial court will not be considered on appeal."). Further, this State's Supreme Court has seen no need to revise the law in South Carolina on equitable indemnification and has continued to require the party seeking indemnification to be without fault. Fountain, 436 S.C. at 49, 871 S.E.2d at 171. Accordingly, this Court should disregard D.R. Horton's attempt to change the elements of an equitable indemnification claim.

VIII. The Trial Court properly granted summary judgment on D.R. Horton's cross-claims for breach of contract, breach of warranties, and negligence which were disguised claims for equitable indemnity.

In addition to D.R. Horton's cross-claims for contractual and equitable indemnification, D.R. Horton asserted cross-claims for breach of contract, breach of express and implied warranties, and negligence/gross negligence/recklessness against Hutton's Landscapes. The Trial Court properly granted summary judgment on these claims as a matter of law.

Under South Carolina law, a claimant cannot maintain derivative tort or breach of warranty claims arising only from the claimant's potential liability for another party's damages and the claimant's need to defend itself in litigation; such contingent claims properly lie in indemnity. Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View

Const., LLC, 413 S.C. 615, 622, 776 S.E.2d 426, 430 (Ct. App. 2015) (“Stoneledge I”); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 637, 776 S.E.2d 434, 438 (Ct. App. 2015) (“Stoneledge II”). In the Stoneledge cases, a homeowners’ association sued a general contractor and its subcontractors for construction defects at a townhome complex. Stoneledge I, 413 S.C. at 619, 776 S.E.2d at 428; Stoneledge II, 413 S.C. at 634, 776 S.E.2d at 436. The general contractor filed cross-claims against its subcontractors for breach of contract, breach of warranty, negligence, and equitable indemnity. Stoneledge I, 413 S.C. at 619, 776 S.E.2d at 428; Stoneledge II, 413 S.C. at 634, 776 S.E.2d at 436. Because the general contractor's cross-claims were contingent upon whether the plaintiff HOA prevailed against the general contractor, the Court of Appeals concluded the general contractor's “cross-claims arose only when it faced potential liability for Stoneledge's damages and incurred fees and costs defending against Stoneledge's lawsuit. [The general contractor's] breach of contract and breach of warranty cross-claims are nothing more than claims for equitable indemnity.” Stoneledge II, 413 S.C. at 637, 776 S.E.2d at 438; see also Stoneledge I, 413 S.C. at 621, 776 S.E.2d at 429 (finding cross-claimant's negligence allegations showed Stoneledge was the party suffering damages and contractor's “injuries arose exclusively from having to defend itself in Stoneledge's lawsuit”).

Like the general contractor in the Stoneledge cases, D.R. Horton has not shown it suffered independent damages as a result of any alleged actions or inaction of Hutton’s Landscapes other than potential liability to the Plaintiffs. In the cross-claims for breach of contract, breach of warranties, and negligence, D.R. Horton incorporated the allegation that “it has been subjected to suit and to the costs, expenses, attorneys’ fees, and other damages

associated therewith.” [R.pp. ____; Cross-Claims, ¶¶ 69, 94, 98, 102, and 109.] The damages D.R. Horton seeks under these cross-claims result from the need to defend itself against a potential judgment in the Plaintiffs’ case, for which D.R. Horton also seeks indemnity. Thus, the grant of summary judgment by the Trial Court to Hutton’s Landscapes on D.R. Horton’s cross-claims for breach of contract, breach of warranties, and negligence is proper.

In addition, as explained in Section II hereof, the record shows that the Trial Court granted summary judgment to Hutton’s Landscapes on these cross-claims for breach of contract, breach of warranties, and negligence. D.R. Horton had notice of the argument as to these cross-claims and moreover did not object when Hutton’s Landscapes moved for summary judgment on these cross-claims claims at the beginning of the summary judgment hearing. [R.p. ____; Transc., p. 3, ll. 5-11.]

CONCLUSION

For the reasons set forth herein, Respondent Hutton's Landscapes respectfully requests this Court to affirm the Trial Court's grant of summary judgment on each of D.R. Horton's cross-claims. The record in this appeal supports affirmance of the Trial Court's grant of summary judgment on each of the cross-claims as a matter of law. Additionally, pursuant to Rule 208(b)(6), SCACR, Hutton's Landscapes joins in the arguments contained in the brief of Lather Construction to the extent such arguments are applicable and incorporates those arguments herein.

Respectfully submitted,

/s Carmen V. Ganjehsani

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September 20, 2024.

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Sep 20 2024

SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent Hutton's Landscapes, Inc., do hereby certify that I have this date served the foregoing Initial Brief of Respondent Hutton's Landscapes, Inc., dated September 20, 2024, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated April 24, 2024, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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[2022-000469 Eberly v. D.R. Horton et al \(Hutton's DOM\) \(3508324\).pdf](#)

Pursuant to the Supreme Court's Order dated April 24, 2024, please find served upon you the Initial Respondent's Brief and Designation of Matter to be Included in the Record on Appeal on behalf of Hutton's Landscapes, Inc.

Thank you,
Carmen Ganjehsani

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