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SC Court of Appeals

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. 2022-000016

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

PLAINTIFFS,

v.

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

DEFENDANTS,

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

RESPONDENTS,

And

D.R. Horton, Inc. is the

APPELLANT.

Petition for Rehearing and/or Motion for Clarification

s/Nosizi Ralephata

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I. INTRODUCTION

Respondents Hutton’s Landscapes, Inc., East Coast Construction Cleanup Corp., and Lather Construction, Inc. (together, “Respondents” or “Subcontractors”), by and through their undersigned counsel, respectfully move this Court for a rehearing or, in the alternative, clarification of its Opinion No. 2025-UP-056, filed on February 19, 2025, in the above-referenced matter pursuant to Rules 221 and 240, SCACR, and the Court’s inherent authority to rehear and clarify its rulings.

This Court reversed Judge Price’s dismissal of Appellant D.R. Horton’s cross-claims for contractual indemnification asserted against the Subcontractors. Specifically, this Court reversed Judge Price’s verbal order dismissing the cross-claims and his written orders denying D.R. Horton’s Rule 59(e), SCRCR, motion and a motion for JNOV or in the alternative, for a new trial absolute or a new trial nisi remittitur. This Court declined to reach the merits of this case—that is, whether the indemnification provision is enforceable—finding the record was not sufficient for consideration on appeal.

Respondents now ask this Court to reconsider its Opinion for two reasons. First, Respondents ask this Court to rehear and decide, as a matter of law, whether the contract provision at issue is enforceable or void. As discussed below, this Court may resolve this issue now, regardless of the procedural irregularities presented by Judge Price’s dismissal.

Second, in the alternative, Respondents move for clarification of this Court’s Opinion. *See, e.g., McIntire v. Sequest Dev. Co., Inc.*, No. 2021-001055, 2023 WL 3736051 (S.C. Ct. App. May 31, 2023) (affirming denial of motion for clarification of trial court order following appeal where the motion was untimely and issues were unappealed); *Watson v. Ford Motor Co.*, 389 S.C. 434, 441, 699 S.E.2d 169, 172 (2010) (granting motions to clarify the Supreme Court’s initial opinion);

Florence Cnty. Democratic Party v. Florence Cnty. Republican Party, 398 S.C. 124, 126, 727 S.E.2d 418, 419 (2012) (providing clarification in response to a request for rehearing and clarification); *Bowen & Smoot v. Plumlee*, 308 S.C. 325, 326–27, 417 S.E.2d 855, 855 (1992) (granting motion for clarification of Supreme Court’s opinion after remand). Specifically, because the Opinion does not end the case, the circuit court will be tasked with handling D.R. Horton’s cross-claims on remand in a lawsuit that concluded without participation from Respondents. The Opinion does not instruct the circuit court on how to address the unresolved issues, including whether to permit D.R. Horton to reassert the cross-claims, and does not include instructions regarding the circuit court’s authority to reach the merits of this case or the procedural process to do so.

Accordingly, and in the event Respondents’ motion for rehearing is denied, Respondents request clarification of this Court’s Opinion to the extent necessary to adequately inform the circuit court of its authority to hear and decide issues presented in light of the reversal of Judge Price’s dismissal of the cross-claims.

II. PETITION FOR REHEARING

Respondents bring this petition for rehearing pursuant to Rule 221 SCACR and request that this Court decide the indemnification issue raised on appeal on the merits. The action of this Court has finally decided the appeal and this petition is timely. *See* Rule 221(a), (c), SCACR.

This lawsuit is a construction defect case whereby D.R. Horton seeks contractual indemnification from its subcontractors to recover damages that D.R. Horton may be liable for to the Plaintiff homeowner. Prior to trial, Respondent Subcontractors asked the circuit court to determine the validity of the indemnification provision and the issue was raised repeatedly without resolution. This Court held that the cross-claims were erroneously dismissed because the motion(s)

before Judge Price was (were) procedurally improper. The issue is wholly dispositive to D.R. Horton's cross-claims against the Subcontractors and is a matter of law to be decided by a court, not a jury. Respondents note the contracts at issue are in the record and no further evidence is necessary to make a determination as to enforceability as a matter of law.

Consequently, this Court should grant rehearing for two reasons. First, because the first order considering the issues was ambiguous, this Court has the inherent authority to resolve the legal issues now. Second, new case law supports a determination that the indemnification provision is void as a matter of law.

A. This Court May Rehear an Ambiguous Decision from the Circuit Court.

As an initial matter, this Court has the inherent authority to consider issues sua sponte that violate statutory law or public policy even if not previously raised or properly preserved. *See Ward v. West Oil Co., Inc.*, 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010) (finding appellate court rules regarding error preservation were inapplicable because "this Court will not 'lend its assistance' to carry out the terms of a contract that violates statutory law or public policy"). Thus, because the enforceability of the indemnification provision is ultimately a legal question, this Court has the inherent authority to decide the issue now despite procedural irregularities below. *See Miliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) ("Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court." (quoting 17B C.J.S. Contracts § 1030)).

Here, the issue of enforceability was first presented pre-trial, to Judge DeBerry, along with other matters raised by both D.R. Horton and the Subcontractors. Without analysis, Judge DeBerry issued a Form 4 Order merely concluding that "genuine issues of material fact exist." No further

analysis was provided by the court, creating an ambiguous order that ultimately decided nothing about the validity of the contract provisions.

As the issue of enforceability was raised again during trial, Judge Price had the authority to interpret the prior order as a matter of law for the court. *See John Deere Constr. & Forestry Co. v. N. Edisto Logging, Inc.*, 443 S.C. 424, 436–37, 904 S.E.2d 889, 896 (Ct. App. 2024), *reh’g denied* (Aug. 12, 2024), *cert. denied* (Feb. 12, 2025).¹ This Court stressed that no new facts were introduced between Judge DeBerry’s Form 4 Order and when the issue was raised again to Judge Price. Because of this, it is Respondents’ position that Judge DeBerry simply refrained from deciding the issues on the merits so that no judgment was made on the validity of the contract provision because the Order did not expressly address the issue. His Order was ambiguous because it conflated the issues before him when it stated there were issues of fact for the jury (indeed, it is error to submit the issue of enforceability of the contract provision to a jury because it is a legal question for the court to decide).

Considering the ambiguity below and this Court’s inherent ability to decide the issue, Respondents respectfully request this Court rehear Respondent’s argument and make a determination that the indemnification provision is invalid and unenforceable, consistent with South Carolina law and public policy. Thus, notwithstanding the procedural infirmities below, this Court can—and should—resolve this issue now. *See Ward*, 387 S.C. at 274, 692 S.E.2d at 519 (finding appellate court rules regarding error preservation were inapplicable because “this Court

¹ The *John Deere* Court explained that the South Carolina Rules of Civil Procedure contemplate a situation in which a case is not fully adjudicated by the determination of a summary judgment motion. *See id.* at 438–45, 904 S.E. 2d at 896–900 (construing the order as a whole and finding **no judgment was made on the causes of action not expressly addressed in the order**). The court must construe the meaning of a judgment that is not clear and unambiguous, “and in so doing may resort to the record upon which the judgment was based.” *Spearman v. J&S Farms, Inc.*, 755 F. Supp. 137, 140 (D.S.C. 1990).

will not ‘lend its assistance’ to carry out the terms of a contract that violates statutory law or public policy”); *Miliken & Co.*, 399 S.C. at 30, 731 S.E.2d at 291 (“Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court.” (quoting 17B C.J.S. Contracts § 1030)).

B. New Case Law Supports Rehearing.

Additionally, Respondents petition this Court to rehear the specific issue of the validity of the indemnification provision considering recent favorable case law. *See, e.g., State v. Davis-Kocsis*, 436 S.C. 468, 489, 872 S.E.2d 415, 426 (Ct. App. 2022), (recognizing “the court of appeals should generally consider recent case law from our supreme court when ruling on petitions for rehearing” (citation omitted)) *aff’d*, 443 S.C. 127, 903 S.E.2d 491 (2024).

Indeed, this Court recently decided a very similar issue that provides clear guidance on the standard for reviewing a contract indemnity provision. *See Retreat at Charleston Nat’l County Club Home Owners Ass’n, Inc. v. Winston Carlyle Charleston Nat’l, LLC*, No. 2021-001050, 2025 WL 466562 (S.C. Ct. App. Feb. 12, 2025). The *Retreat* Court decided, as a matter of law, the indemnification provisions within subcontractor agreements violate South Carolina law and public policy,² deeming the subcontracts unconscionable and unenforceable.

That Court, citing *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (S.C. Ct. App. 2018), explained the “clear and unequivocal standard applies any time an indemnitee is seeking indemnification for its negligence, whether sole or concurrent.” *Retreat*, 2025 WL 466562, at *8. The *Retreat* Court, citing *Concord & Cumberland*, further noted the “challenges lawyers often face in drafting indemnity provisions”

² Indemnity provisions in the contracts between Builders FirstSource and the Subcontractors “violate § 32-2-10, are ambiguous, conflict with each other, and do not meet the clear and unequivocal standard articulated in *Concord & Cumberland*.” 2025 WL 466561, at * 15.

and recognized that “even the American Institute of Architects (AIA) form indemnity clause” failed to satisfy the standard required to deem it enforceable. *Id.* at *8 n.5.

In light of the *Retreat* opinion, further narrowing an indemnitee’s ability to recover from an indemnitor, this Court should analyze any indemnification provision with dubious suspicion. The indemnification provision at issue here likewise seeks indemnification from the Subcontractors for D.R. Horton’s negligence, such that this Court should find the provision to be ambiguous, against public policy, and in violation of South Carolina law.

Further, after the claims against the Subcontractors were dismissed, the trial concluded with the jury finding D.R. Horton negligent, without any determination of the portion attributable to the subcontractors, including Respondents. The record is devoid of any finding as to D.R. Horton’s sole or concurrent negligence so that some portion of damages could later be recovered from the Subcontractors in a subsequent separate action. In the interests of fairness and judicial efficiency, Respondents respectfully request a rehearing on the indemnification provision at issue here, considering this new clear law that supports Respondents’ position, and because the issue could be disposed of here, without the need for remand.

III. GROUNDS FOR CLARIFICATION

If rehearing is denied, Respondents request, in the alternative, clarification of the Opinion with instructions on remand to the circuit court.

When the Court of Appeals remands a case, the trial court is vested with jurisdiction but “only to the extent conferred by the appellate court’s opinion and mandate.” *S.C. Dep’t of Soc. Servs. v. Basnight*, 346 S.C. 241, 250, 551 S.E.2d 274, 279 (Ct. App. 2001) (quoting 5 Am. Jur.2d *Appellate Review* § 784, at 453 (1995)). The trial court may “take any action consistent with the appellate court ruling.” *Ackerman v. McMillan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App.

1996). However, the trial court has a duty to follow the appellate court's directions and "has no authority to exceed the mandate of the appellate court on remand." *Prince v. Beaufort Mem'l Hosp.*, 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011). Further, "[m]atters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form." *Prince*, 392 S.C. at 606.

Here, this Court held that the issue of whether the indemnification provisions are enforceable was not properly before Judge Price and thus reversed the order dismissing the cross-claims and the orders denying reconsideration of the same issue. This Court did not make any determination as to the enforceability of the provisions and did not instruct the circuit court regarding the procedure to follow once the case is remanded. Because the threshold issue of enforceability is dispositive to the cross-claims, clarification is respectfully requested for the two reasons discussed below.

A. The Impact of the Reversal of Dismissal of Cross-Claims Makes the Procedural Posture and the Authority of the Circuit Court Unclear.

First, the procedural posture of the case on remand is unclear, which may detrimentally affect the circuit court's ability to resolve the lingering issues. Reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no judgment had ever been rendered. *McIntire v. Seaquest*, No. 2016-CP-10-01833, 2021 WL 9456863, at *3 (S.C. Com. Pl. Aug. 23, 2021) (citing *Brown v. Brown*, 331 S.E.2d 793, 793-94 (S.C. Ct. App. 1985) and *Moore v. N. Am. Van Lines*, 462 S.E.2d 275 (S.C. Ct. App. 1995)).

Here, this Court found that Judge Price improperly dismissed the cross-claims because the issue was not properly before him at the time he made his ruling. However, the underlying trial continued and has already concluded, with the jury returning a verdict against D.R. Horton and awarding damages to the homeowners. Consequently, it is not clear what effect the Opinion has

on the standing of the case, which has been decided on the merits without participation from the Subcontractors.

This may affect the circuit court's decision making. Specifically, D.R. Horton's cross-claims rest solely on seeking contractual indemnification from the Subcontractors after a jury found D.R. Horton negligent. On remand, D.R. Horton is likely to seek contractual indemnification again. The enforceability of the indemnification provision is still an open question, which can be decided as a matter of law. While the circuit court cannot reconsider matters decided by this Court, it must address the indemnity issue if D.R. Horton continues to seek relief from the Subcontractors. Thus, there is a risk that the circuit court may hesitate to address the purely legal question of whether indemnification provision is enforceable, given this Court's Opinion that Judge Price improperly dismissed the cross-claims. Consequently, guidance from this Court on the authority and procedure for deciding the indemnity issue would ensure the circuit court acts within its authority on remand.

B. Instructions Can Avoid Procedural Ambiguity on Remand.

Second, related to potential hesitancy by the circuit court on remand, it is unclear what course the circuit court should take on remand. This Court's Opinion reverses the dismissal of the cross-claims, but does not specify whether the circuit court is expected to:

- a. Resolve the enforceability of the indemnity provisions as a matter of law based on the existing record, with or without a motion by the parties;
- b. Conduct an evidentiary hearing to provide D.R. Horton and Subcontractors notice and an opportunity to be heard on the issue;
- c. Permit further dispositive motions (e.g., summary judgment) on remand before any trial;

- d. Resolve the enforceability of the indemnity provisions through a motion for clarification as to Judge DeBerry's Order denying summary judgment or Judge Price's Order dismissing the cross-claims;
- e. Conduct a new trial limited solely to the cross-claims for contractual indemnification;
or
- f. Take some other specified procedural course.

Consequently, without clear guidance from this Court, the circuit court may struggle to determine the appropriate procedural steps, leading to potential further disputes over the scope of the Opinion and purpose of the remand. Clarification will ensure that the Respondents and Appellant D.R. Horton understand the proper next steps and that the circuit court correctly implements this Court's ruling without unnecessary delay or procedural missteps. Accordingly, in the interests of judicial economy and to prevent further confusion over the matters presented to this Court, Respondents contend that clarification is warranted.

C. Relief Requested.

This Court reversed Judge Price's dismissal of the cross-claims but did not decide the threshold issue of whether the indemnification provisions are enforceable, as D.R. Horton argues, or void and/or against public policy, as argued by the Subcontractors. The issue of enforceability is legal question to be decided by a judge (not a jury) before the circuit court may consider the reassertion and adjudication of D.R. Horton's cross-claims. Further pre-trial proceedings are required to address the status of the cross-claims in light of the record's deficiencies. Respondents respectfully request this Court instruct the circuit court accordingly.

a. Proposed Order for Evidentiary Hearing.

Respondents ask this Court to direct the circuit court to hold an evidentiary hearing to resolve any lingering factual issues left dangling by Judge Price's improper dismissal of the indemnity claims. The indemnity enforceability issue is dispositive and must be resolved before D.R. Horton may move for a new trial. An evidentiary hearing will ensure that all relevant matters are properly considered, that the circuit court's decision is consistent with this Court's opinion, and will allow the indemnification issue to be resolved expeditiously and without the necessity and costs of a full trial.

b. Requests for Clarification.

In the alternative, and in order to ensure proper and efficient handling of the remand proceedings, Respondents respectfully request that this Court clarify:

1. The intended scope of the remand and whether it authorizes or requires a separate trial on the cross-claims for indemnity;
2. Whether the circuit court may entertain new dispositive motions on the enforceability of the indemnification provisions before trial on the cross-claims; and
3. Any procedural guidance this Court deems appropriate to avoid uncertainty and promote judicial economy.

VI. CONCLUSION

For all of the foregoing reasons, Respondents respectfully request rehearing or clarification. Respondents appreciate the Court's attention to this request and stand ready to provide any additional briefing the Court may find helpful in resolving this petition/motion.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Richard W. and Rebecca A. Dreier; Yolanda J. Dreier;
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Gecy; Aaron M. and Stasha R. Grooms; AvaRae Hall;
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Thomas R. and Melissa S. McFeely; Michael and Karen
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Smith, III and Alayshia Smith and Nichole J. Verstegen;
Plaintiffs,

v.

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

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

Inc. are the Respondents,

And

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

Appellate Case No. 2022-000016

Appeal From Beaufort County
Bentley Price, Circuit Court Judge

Unpublished Opinion No. 2025-UP-056
Heard September 11, 2024 – Filed February 19, 2025

REVERSED

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Philip Paul Cristaldi, III, Scott Harris Winograd, and Jeffrey A. Ross, all of Ross & Cristaldi, LLC, of Mount Pleasant; and Brenten Heath DeShields, of Mount Pleasant, all for Respondent Lather Construction, Inc.

PER CURIAM: D.R. Horton, Inc. appeals Judge Bentley Price's dismissal of its cross-claims for contractual indemnification against Lather Construction Inc., Hutton's Landscape, Inc., and East Coast Construction Cleanup Corp. (collectively, the Subcontractors). D.R. Horton argues that Judge Price erred in dismissing its cross-claims because Judge Price (1) lacked subject matter jurisdiction or authority to overrule the denial of the Subcontractors' prior motions for summary judgment, (2) exceeded his authority in attempting to force a settlement, (3) incorrectly read a prohibition on a duty to defend into section 32-2-10 (2007) of the South Carolina Code, (4) overrode the parties' contractual agreement in ruling the Subcontractors' respective duties to indemnify and defend were not separate and distinct obligations, and (5) improperly ruled the provisions concerning indemnity and duty to defend in the parties' contracts were unenforceable as a matter of law. We reverse Judge Price's verbal order dismissing D.R. Horton's crossclaims and his written orders denying D.R. Horton's Rule 59(e), SCRCPP, motion and motion for JNOV or in the alternative, for a new trial absolute or a new trial nisi remittitur.

This case commenced in May 2018 when owners of fifteen properties in Tidewater Creek, a subdivision in Beaufort County, sought damages from the subdivision's developer, D.R. Horton, and the Subcontractors for alleged deficiencies in the horizontal construction and landscaping of their homes and yards. In its answer to the homeowners' complaint, D.R. Horton brought cross-claims for equitable indemnity and contractual indemnity against the Subcontractors.¹ The contractual indemnity cross-claims were based on the indemnity provision in section 10 of the independent contractor agreement the Subcontractors entered into with D.R. Horton. D.R. Horton alleged the Subcontractors agreed to "defend, indemnify, and hold [D.R. Horton] harmless against any and all claims, losses, costs and damages, including but not limited to claims for property damage, pertaining to [the Subcontractors' performances] under the contract and caused in whole or in part by [the Subcontractors'] conduct."

Lather and Hutton's filed motions for summary judgment on D.R. Horton's cross-claims. Lather argued the cross-claims should be dismissed because its

¹ D.R. Horton's cross-claims for equitable indemnity are not at issue on appeal.

contract with D.R. Horton did not contain an indemnification provision, but to the extent the circuit court found an indemnity provision existed, the provision was barred by section 32-2-10, it was illegal and unenforceable, and it violated the requirements outlined in the case of *Concord & Cumberland*.² Hutton's argued the indemnity clause in its contract with D.R. Horton was void and unenforceable under section 32-2-10 because it required Hutton's to defend D.R. Horton against all claims, including those based on D.R. Horton's sole negligence. Hutton's also argued that the indemnity clause was against public policy because it required Hutton's to indemnify D.R. Horton for its intentional acts.

Circuit Court Judge Steven DeBerry heard the motions for summary judgment on October, 29, 2021. On November 10, 2021, East Coast filed a motion for summary judgment, arguing D.R. Horton did not produce a contract containing an indemnification provision applicable to the Tidewater Creek project, and that the indemnification provision D.R. Horton relied on was void and unenforceable under South Carolina law. On November 12, 2021, Judge DeBerry issued Form 4 Orders denying Lather's and Hutton's' motions for summary judgment, finding genuine issues of material fact existed in the case.

On November 15, 2021, three days after Judge DeBerry issued the order denying summary judgement to Lather and Hutton's, the case proceeded to trial before Judge Price.³ East Coast presented its arguments for granting summary judgment on D.R. Horton's cross-claims. Judge Price stated he would "see what comes out further into the trial and then [he would] make a ruling." On the second day of trial, the jury heard testimony from the individual who owned the property that became the location for Tidewater Creek before it was sold to D.R. Horton. D.R. Horton stated that if Hutton's and Lather reached a settlement with the homeowners it would refer the cross-claims to a special referee or settle them through arbitration or mediation. However, D.R. Horton contended it was "wholly improper for the summary judgment to be re-heard" if the trial continued. Judge

² *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018) (stating that when indemnity provisions purport to make one party indemnify another for the negligence of the indemnified party "such intentions [must be] expressed in clear and unequivocal terms" (quoting *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989))).

³ The circuit court determined that separate trials would be held for each of the fifteen properties at issue, beginning with the property of Sarmed and Jessica Shafi.

Price agreed that he could not rehear the summary judgment arguments because Judge DeBerry already denied Hutton's' and Lather's motions for summary judgment. D.R. Horton then stated Judge Price could decide whether the indemnity provision was enforceable as a matter of law or decide that it was a question for the jury. Hutton's offered that it and Lather could make a motion to bifurcate the cross-claims but contended determining the enforceability of the indemnity provisions was a threshold issue. East Coast and Lather stated that they supported and joined Hutton's argument that the indemnity provisions were unenforceable.

Lather stated Judge Price could hear arguments from Hutton's that the indemnity provision was unenforceable. Judge Price believed he could hear those arguments as part of the motion to bifurcate. Lather argued that D.R. Horton's contractual indemnity claims were unenforceable pursuant to *Concord & Cumberland* and because they were against public policy. Hutton's made a motion to bifurcate D.R. Horton's contractual and equitable indemnity claims, which Lather and East Coast joined. D.R. Horton argued the motion to bifurcate was not proper because the Subcontractors were arguing the indemnity provisions of their contracts were unenforceable after Judge DeBerry denied their motions for summary judgment based on the same argument. Hutton's argued Judge DeBerry did not make any findings as a matter of law when denying the contractor's motions for summary judgment.

Judge Price stated the parties' contracts were "essentially an adhesion contract. It's a take-it-or-leave-it style contract." Judge Price continued,

I will find that the contract indemnification and Subsection 10 is unenforceable. I think it's an adhesion contract. I think it's take-it-or-leave-it. I think it's similar and likened to a non-compete in the sense that if the opposing party doesn't have a whole lot of negotiating power, then it can be deemed unenforceable. I don't think it's enforceable. I think it violates public policy. So I am going to grant the motion

Judge Price stated his ruling was applicable to the cross-claims against the Subcontractors. When D.R. Horton requested that Judge Price clarify the extent to which he determined the indemnity provision was an adhesion contract, Judge Price stated his comments regarding an adhesion contract were not part of the ruling.

The homeowners resolved their claims against the Subcontractors during the trial. The jury ruled against D.R. Horton, finding it was negligent in the construction and supervision of the Shafis' property and it breached its contract with the Shafis. The jury awarded the Shafis \$140,000 in damages against D.R. Horton.

D.R. Horton filed a Rule 59(e), SCRCP, motion, arguing Judge Price erred in dismissing its cross-claims against the Subcontractors. In its motion, D.R. Horton noted Judge Price's "bench ruling did not fully indicate the basis for [his] dismissal of [the] cross-claims. Therefore, [D.R. Horton could not] specifically identify the arguments or issues on which it [sought] reconsideration or that impacted [Judge Price's] ruling." D.R. Horton argued Judge Price erred because it was improper to adjudicate the merits of the case and to reconsider a motion for summary judgment through a motion to bifurcate. Judge Price denied its Rule 59(e) motion without clarifying the basis of his oral ruling. D.R. Horton also filed a motion for JNOV, or in the alternative, for a new trial absolute or a new trial nisi remittitur, which Judge Price also denied.

We hold this court cannot reach the merits of this case because the record is not sufficient for consideration on appeal. *See Porter v. Lab. Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) ("[N]ot all situations require a detailed order, and the trial court's form order may be sufficient *if the appellate court can ascertain the basis for the trial court's ruling from the record on appeal.*" (emphasis added)). Judge Price verbally dismissed D.R. Horton's cross-claims, finding the indemnity provisions in the subcontractor's contracts with D.R. Horton were unenforceable, but he did not issue a written order. The Subcontractors raised the issue of the enforceability of the indemnity provisions when discussing their motion to bifurcate D.R. Horton's cross-claims. The record does not indicate whether Judge Price dismissed the cross-claims by granting the Subcontractors' motion to bifurcate, motion for summary judgment, or motion for directed verdict.⁴

⁴ East Coast and Lather argue that Judge Price dismissed D.R. Horton's cross-claims by granting the Subcontractors' motion for directed verdict but also argue that Judge Price did not err even if he granted the Subcontractors' motion for summary judgment to dismiss the cross-claims. Hutton's argues that Judge Price granted the Subcontractors' motion for summary judgment dismissing D.R. Horton's cross-claims, but also include the appellate standard of review for a motion for directed verdict in case this court considered Judge Price's ruling as a grant of directed verdict. The Subcontractors' differing arguments indicate confusion amongst the parties as to what motion Judge Price ruled on to dismiss D.R. Horton's cross-claims.

D.R. Horton noted in its Rule 59(e), SCRCP, motion that Judge Price did not indicate his basis for the dismissal of the cross-claims, but Judge Price did not clarify his ruling when he denied the Rule 59(e) motion. Because this court cannot ascertain from the record on appeal what motion Judge Price ruled on or the basis for his dismissal of D.R. Horton's cross-claims, we reverse the dismissal of D.R. Horton's cross-claims.

Further, we hold Judge Price could not dismiss D.R. Horton's contractual indemnity cross-claim based on a motion to bifurcate, a motion for summary judgment, or a motion for directed verdict. First, we hold Judge Price could not address substantive issues such as the enforceability of the Subcontractor's indemnity provision on a motion to bifurcate, which is a procedural motion. *See* Rule 42(b), SCRCP ("The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any . . . cross-claim . . ."). Second, we hold Judge Price could not grant a second motion for summary judgment on the issue of the enforceability of the indemnity provisions because Judge DeBerry had denied summary judgment on the same issue based on the same arguments and the Subcontractors presented no new evidence to support the second motion. *See Crosswell Enters., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992) ("The denial of a motion for summary judgment does not bar a party from making a later motion for summary judgment based on matters not involved in the decision on the first motion."); *Dorrell v. S.C. Dep't of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004) ("That a different trial judge previously denied the motion [for summary judgment] did not preclude [a party] from renewing its motion once new evidence came to light"). Third, although the issues raised in a motion for summary judgment that has been denied can be raised in a subsequent motion for a directed verdict, we hold a motion for a directed verdict was not proper at the time that Judge Price dismissed D.R. Horton's cross-claims. *See Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict."). Judge Price dismissed D.R. Horton's cross-claims before it could present any evidence supporting its position that the indemnity provisions were enforceable.⁵ *See* Rule 50 (a), SCRCP ("When upon a trial the case presents only questions of

⁵ Three days earlier, Judge DeBerry ruled genuine issues of material fact existed regarding D.R. Horton's cross-claims when he denied the Subcontractors' motions for summary judgment.

law the judge may direct a verdict."). Additionally, Judge Price dismissed the cross-claims without notice to D.R. Horton because the Subcontractors never made a motion for a directed verdict and Judge Price never stated he was granting a motion for a directed verdict when he made his ruling. *See Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."). Therefore, we hold Judge Price erred in dismissing D.R. Horton's cross-claims at that point in the trial, regardless of whether he did so by granting a motion to bifurcate, a motion for summary judgment, or a motion for directed verdict.

CONCLUSION

Based on the foregoing, Judge Price's verbal order dismissing D.R. Horton's cross-claims and his written orders denying D.R. Horton's Rule 59(e), SCRCP, motion and motion for JNOV, or in the alternative, for a new trial absolute or a new trial nisi remittitur are

REVERSED.

THOMAS, HEWITT, and VINSON, JJ., concur.

RECEIVED

Mar 06 2025

SC Court of Appeals

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. 2022-000016

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

PLAINTIFFS,

v.

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

DEFENDANTS,

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

RESPONDENTS,

And

D.R. Horton, Inc. is the

APPELLANT.

PROOF OF SERVICE

I certify that I have served Respondents' Petition for Rehearing/Motion for Clarification on the Appellant via email upon its attorney of record as addressed below:

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Dated: March 6, 2025