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S.C. SUPREME COURT

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

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

APPELLATE CASE NO. 2025-000783

Opinion No. 2025-UP-056 (S.C. Ct. App. filed February 19, 2025)

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. Versteegen,

PLAINTIFFS,

versus

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 Lather Construction, Inc., Hutton's Landscapes, Inc., and East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc. are the

PETITIONERS,

and

D.R. Horton, Inc. is the

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

Carmen V. Ganjehsani (S.C. Bar No. 73515)
Payton D. Hoover (S.C. Bar No. 75967)
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
phoover@richardsonplowden.com

Nosizi Ralephata (S.C. Bar No.72484)
Julie C. Fekete (S.C. Bar No. 105513)
GORDON & REES LLP
677 King Street
Suite 450
Charleston, SC 29403
(843) 478-4597
nralephata@grsm.com
jfekete@grsm.com
**ATTORNEYS FOR PETITIONER
HUTTON'S LANDSCAPES, INC.**

Jeffrey A. Ross (S.C. Bar No. 74254)
Scott H. Winograd (S.C. Bar No. 103483)
ROSS & CRISTALDI, LLC
863 Coleman Blvd., Ste. B
Mt. Pleasant, SC 29464
jross@rclawsc.com
swinograd@rclawsc.com
**ATTORNEYS FOR PETITIONER LATHER
CONSTRUCTION, INC.**

Tyler Ethan Cloud (S.C. Bar No. 103155)
CLAWSON & STAUBES, LLC
126 Seven Farms Drive, #200
Charleston, SC 29492
tcloud@cslaw.com
**ATTORNEYS FOR PETITIONER EAST
COAST CONSTRUCTION CLEANUP, CORP.**

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals (1) erred in holding the trial judge lacked authority to dismiss D.R. Horton's contractual indemnification claims which were based upon broad indemnity provisions requiring Petitioners to defend and reimburse D.R. Horton for its sole negligence and intentional acts in violation of South Carolina's Anti-Indemnity Statute and public policy; and (2) eschewed its independent duty to consider whether the indemnity provisions contained illegal contractual terms which contravened statutory law or public policy?

INTRODUCTION

This construction defect action concerns Respondent D.R. Horton, Inc.'s attempt as the general contractor to seek contractual indemnification from Petitioners Hutton's Landscapes, Inc., Lather Construction, Inc., and East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc. 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. More specifically, the indemnity provisions upon which D.R. Horton bases its claims for contractual indemnification require Petitioners to either defend D.R. Horton against all of the homeowners' direct claims, including claims based upon D.R. Horton's sole negligence, or to reimburse D.R. Horton for all sums accrued on account of the homeowners' claims, including those related to its sole negligence. These clauses violate the Anti-Indemnity Statute's prohibition against any promise or agreement in a construction contract which requires a promisor to indemnify the promisee for the promisee's sole negligence. The indemnification provisions at issue further violate public policy because such provisions require Petitioners to indemnify D.R. Horton for its intentional acts.

During the trial of the homeowners' direct claims against D.R. Horton and Petitioners, as well as D.R. Horton's contractual indemnification claims against Petitioners, the circuit court dismissed D.R. Horton's contractual indemnification claims on grounds that the indemnity

provisions were void and unenforceable as a matter of law under statutory law and as against public policy.

Following an appeal by D.R. Horton, the Court of Appeals reversed the circuit court's dismissal of the contractual indemnification claims. The Court of Appeals' reversal was not based upon any error on the merits by the circuit court with respect to the question of law of whether the indemnity provisions were violative of statutory law or public policy. Instead, the Court of Appeals held the circuit court did not have the procedural authority to rule upon the legal question of the enforceability of the indemnity provisions because (1) a previous circuit court judge had denied summary judgment prior to trial based upon "genuine issues of material fact," and (2) the ruling on enforceability was not made at the proper time during the trial of the case.

The question presented in this appeal presents solely a question of law as to whether the overreaching indemnity provisions which D.R. Horton seeks to impose upon Petitioners violate statutory law or public policy. Contrary to the Court of Appeals' Opinion, both the circuit court and the Court of Appeals had authority to rule upon the legality of the indemnity provisions because no court may "lend its assistance" in any manner towards allowing claims based upon the terms of an illegal contract to proceed. Yet, the Court of Appeals concluded the circuit court had no such authority. The Court of Appeals further disregarded its inherent power to review whether the indemnity provisions violated statutory law or public policy.

Pursuant to Rule 242(b) of the South Carolina Appellate Court Rules, Petitioners respectfully request this Court to grant the Petition for Writ of Certiorari to review the Court of Appeals' Opinion and either (1) remand to the Court of Appeals with instructions to consider the merits of the appeal and enforceability of the indemnification provisions or, in the alternative, (2)

review under this Court's inherent authority whether the circuit court correctly dismissed D.R. Horton's contractual indemnification claims which were based upon illegal and unenforceable indemnification provisions.

This appeal involves significant public policy implications in the field of construction contracts. Clarity is needed in the construction industry as to whether a general contractor can burden a smaller subcontractor with the general contractor's entire defense of construction defect claims, including claims regarding the general contractor's sole negligence, or whether a general contractor can require a subcontractor to reimburse the general contractor for all amounts paid on a defect claim, including amounts paid for the general contractor's sole negligence. Also of import is whether a smaller subcontractor must indemnify a general contractor for its intentional acts where such a provision eliminates any incentive for the general contractor to act with any care. Accordingly, under Rule 242(b), there are special and important reasons why this Court should grant the Petition for Writ of Certiorari.

Finally, under Rule 242(b)(3), the Court of Appeals' Opinion conflicts with this Court's prior decision in Ward v. W. Oil Co., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010) in which this Court emphasized that no court should "lend its assistance" to carry out the terms of any contract which violates statutory law or public policy. For this additional reason, grant of the Petition for Writ of Certiorari is warranted.

STATEMENT OF THE CASE

Twenty-nine (29) named plaintiffs, who are residents and/or homeowners at Tidewater Creek, a neighborhood located in Beaufort, South Carolina, initially brought this construction defect action on May 1, 2018 in the Court of Common Pleas for Beaufort County. [R.pp. 20-28.]

The homeowners collectively own fifteen (15) separate and unique parcels of property. A second amended complaint was eventually filed on November 20, 2019. [R.pp. 33-42.] The homeowners' action was filed against D.R. Horton, who served as developer and general contractor for the construction of the neighborhood, and multiple subcontractors, including Petitioners.

On December 2, 2019, D.R. Horton brought cross-claims against certain subcontractors, including Petitioners, which were ultimately amended August 23, 2021. [R.pp. 43-76; 82-113.] D.R. Horton alleged that it and each Petitioner entered into an Independent Contractor Agreement pursuant to which each Petitioner agreed to provide labor and/or materials for the construction of homes in Tidewater Creek. [R.pp. 96, ¶ 77; 98-99, ¶ 88; 101, ¶ 99.] D.R. Horton asserted claims for equitable and contractual indemnity against each of the Petitioners. [R.pp. 96-98, ¶¶ 79-85; 99-100; ¶¶ 90-96; 101-03, ¶¶ 101-107.] Each of the Petitioners responded to D.R. Horton's amended cross-claims and denied the material allegations of the cross-claims. [R.pp. 114-139.]

On October 8, 2021, Lather Construction filed a motion for summary judgment on D.R. Horton's cross-claims. [R.pp. 140-143; 147-297.] On October 19, 2021, Hutton's Landscapes also filed a motion for summary judgment on the cross-claims. [R.pp. 144-146; 298-356.] The motions argued, in part, that the indemnity provisions which D.R. Horton sought to enforce were void and unenforceable under South Carolina's Anti-Indemnity Statute, S.C. CODE ANN. § 32-2-10 and as against public policy. [R.pp. 141-142; 145; 152; 302-310.]

The Honorable H. Steven DeBerry, IV heard the motions for summary judgment on October 29, 2021. [R.pp. 556-607.] On November 10, 2021, subsequent to the hearing, East Coast Construction also moved for summary judgment on D.R. Horton's cross-claims. [R.pp. 425-427.]

On November 12, 2021, Judge DeBerry issued Form 4 Orders denying the motions for

summary judgment of Hutton's Landscapes and Lather Construction. In a one sentence ruling, Judge DeBerry simply found that genuine issues of material fact existed. [R.pp. 1-6.]

Separate trials were ordered for each of the fifteen (15) properties. The homeowners selected the home owned by Sarmed and Jessica Shafi to be the subject of the first trial.

The trial began on November 15, 2021 before The Honorable Bentley D. Price. [R.p. 608.] During the trial, the issue arose of whether the contractual indemnification cross-claims of D.R. Horton against Petitioners should be bifurcated from the trial of the Shafis' direct claims against D.R. Horton and the subcontractors. Petitioners argued that in determining whether such claims should be bifurcated, the threshold issue of whether the indemnity provisions were enforceable or unenforceable as a matter of law should be decided by the court. If the provisions were unenforceable, bifurcation would be unnecessary because the court would be required to dismiss the contractual indemnity claims. [R.pp. 678, ll. 12-21; 697, ll. 12-20.]

Subsequent to the discussion with the court, Hutton's Landscapes moved to bifurcate the indemnification claims from the trial of the Shafis' direct claims in which both Lather Construction and East Coast Construction joined. [R.pp. 702, l. 24 – 703, l. 4.] Petitioners argued the court should first decide as a matter of law the threshold issue of whether the indemnity provisions were enforceable or instead void as against public policy and in violation of South Carolina's Anti-Indemnity Statute. [R.pp. 703, l. 12 – 709, l. 25.] Judge Price agreed and ruled the indemnity provisions were unenforceable and violated public policy; therefore, he dismissed D.R. Horton's contractual indemnity claims against Petitioners. [R.pp. 722, ll. 17-25; 724, l. 15 – 725, l. 2.]

The trial of the direct claims against D.R. Horton and the subcontractors continued. The plaintiffs resolved their claims with Petitioners during the trial. [R.pp. 742, ll. 18-21; 771, ll. 7-

22.] The jury returned a verdict against D.R. Horton on November 19, 2021, finding (1) D.R. Horton was negligent in the construction and supervision of the Shafis' property; and (2) breached its contract with the Shafis. The jury awarded damages in the amount of \$140,000.00 to the Shafis against D.R. Horton. [R.pp. 874, l. 5 – 876, l. 3; 14-19.] On November 24, 2021, D.R. Horton moved to alter or amend Judge Price's dismissal of its cross-claims against Petitioners. [R.pp. 515-538.] Judge Price denied the motion on December 3, 2021. [R.pp. 8-10.]

D.R. Horton appealed the dismissal of its contractual indemnity claims against Petitioners to the Court of Appeals. Following oral argument, the Court of Appeals issued its Opinion on February 19, 2025 in which it reversed Judge Price's dismissal of the contractual indemnity claims because it determined he lacked procedural authority to rule upon the enforceability of the indemnification provisions. Op. No. 2025-UP-056 (S.C. Ct. App. Feb. 19, 2025). On March 6, 2025, Petitioners filed a Petition for Rehearing and/or Motion for Clarification with the Court of Appeals, which the court denied on March 27, 2025. Petitioners now petition this Court to grant their writ of certiorari for review of the Court of Appeals' Opinion.

ARGUMENT

The Court of Appeals (1) erred in holding the trial judge lacked authority to dismiss D.R. Horton's contractual indemnification claims which were based upon broad indemnity provisions requiring Petitioners to defend and reimburse D.R. Horton for its sole negligence and intentional acts in violation of South Carolina's Anti-Indemnity Statute and public policy; and (2) eschewed its independent duty to consider whether the indemnity provisions contained illegal contractual terms which contravened statutory law or public policy.

Central to this appeal is D.R Horton's ability to pursue contractual indemnity cross-claims against Petitioners under provisions which violate South Carolina's Anti-Indemnity Statute and public policy. D.R. Horton and each of the Petitioners entered into Independent Contractor

Agreements (the “Contracts”). [R.pp. 317-348 (Hutton’s Landscapes Contract dated May 16, 2014); 894-902 (Lather Construction’s Contract dated December 2, 2013); 879-893 (East Coast Construction Contract dated November 30, 2017).] The Contracts were entered into on a “blanket basis” and intended to govern all current and future work of Petitioners performed for D.R. Horton.

The Contracts each include an indemnity clause comprised of one long, continuous paragraph (the “Indemnity Clause”) which purports to require Petitioners, as Contractors, 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 . . . (“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: (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 Indemnitee; or (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. Contractor’s duty to defend is a separate, distinct, and independent obligation from its duty to indemnify and is triggered immediately when any claim, demand, or other assertion of liability is made against Indemnitee which potentially or arguably is subject to Contractor’s duty to indemnify regardless of Contractor’s ultimate liability for indemnity. Contractor must defend Indemnitee even where the allegations against Indemnitee are ambiguous or incomplete with respect to the issue of Contractor’s duty to indemnify. Once the duty to defend is triggered, Contractor is obligated to defend the entire action, lawsuit, arbitration, or other litigation, including any claims therein not subject to indemnity by Contractor. Notwithstanding the foregoing, nothing herein shall require Contractor to indemnify Indemnitee against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence or sole intentional act or omission of

Indemnitee.

[R.p. 320, § 10.1 (all caps removed for readability).]

The Contracts further contain 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 Indemnitee shall be in an addition to all other legal remedies available to the Indemnitee and shall not be considered the Indemnitee’s exclusive remedy. Indemnitee shall have the right, if it so chooses in its absolute discretion, to defend all claims which may be asserted and Contractor will reimburse Indemnitee for all expenditures that Owner may incur on account of the claim.

[R.p. 320, § 10.2 (all caps removed for readability).]¹

Under its contractual indemnity claims, D.R. Horton alleged Petitioners “agreed to defend, indemnify and hold [D.R. Horton] harmless” against any claims, losses, costs, and damages, including claims for property damage. [R.pp. 97-98, ¶ 83; 100, ¶ 94; 102, ¶ 105.] Consequently, D.R. Horton asserted that if the homeowners recovered damages against it, D.R. Horton would be entitled to contractual indemnity against Petitioners in full for the same amount. D.R. Horton additionally alleged that it was entitled to be reimbursed and indemnified for the costs of the entire action, including attorneys’ fees. [R.pp. 98, ¶ 85; 100, ¶ 96; 102, ¶ 104.] As admitted in its brief to the Court of Appeals, D.R. Horton sought over \$1.5 million from Petitioners.

¹ The Contract provisions cited to above are from the Contract with Hutton’s Landscapes. The Indemnity and Reimbursement Clauses of the Contracts with Lather Construction and East Coast Construction may vary slightly in language, but the provisions at issue in this appeal are relatively the same, except that East Coast Construction’s Indemnity Clause does not contain a duty to defend provision. East Coast Construction’s Contract does have a similarly worded Reimbursement Clause requiring it to reimburse D.R. Horton for all expenditures. [See R.pp. 897 (Lather Construction Indemnity and Reimbursement Clauses); 882 (East Coast Indemnity and Reimbursement Clauses).]

- A. As a matter of law, the Indemnity and Reimbursement Clauses are void and unenforceable under South Carolina statutory law and public policy.**
- i. The Indemnity and Reimbursement Clauses violate South Carolina's Anti-Indemnity Statute because these provisions require Petitioners to defend D.R. Horton against all of the homeowners' claims, including claims based on D.R. Horton's sole negligence, and/or to reimburse D.R. Horton for all sums accrued on account of the claims, including those related to its sole negligence.**

The Indemnity and Reimbursement Clauses which D.R. Horton seeks to enforce against Petitioners are void and unenforceable under South Carolina's Anti-Indemnity Statute because these provisions require Petitioners to defend D.R. Horton against all of the homeowners' claims, including claims based on D.R. Horton's sole negligence, and/or to reimburse D.R. Horton for all sums accrued on account of the claims, including those related to its sole negligence.

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 Contracts² 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 the contractor to bear entirely the costs of D.R. Horton's defense regardless of whether the contractor 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 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.**

[R.p. 320, § 10.1 (emphasis added).]

The Reimbursement Clause further requires the contractor 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:

Indemnatee shall have the right, if it 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. 320, § 10.2 (emphasis added).]

The Indemnity Clause therefore requires Petitioners to defend D.R. Horton against all of the homeowners' claims, including those based on D.R. Horton's sole negligence. The

² As previously noted, the East Coast Construction Contract does not contain a duty to defend clause, but does contain a Reimbursement Clause.

Reimbursement Clause requires Petitioners to reimburse D.R. Horton for the entirety of its expenditures incurred on account of such claims without any limitation. The homeowners asserted negligence claims against D.R. Horton and multiple subcontractors, including claims unrelated to Petitioners' work and claims which could be attributed to solely D.R. Horton's negligence. In its cross-claims for contractual indemnity against Petitioners, D.R. Horton sought to be fully reimbursed for the costs of the entire action pursuant to the terms of the Contract. [R.pp. 98, ¶ 85; 100, ¶ 96; 102, ¶ 104.]

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 Contracts thus constitute illegal and unenforceable contracts. 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 may refer 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, 558, 839 S.E.2d 475, 489 (Ct. App. 2020), rev'd on other grounds, 436 S.C. 40, 871 S.E.2d 166 (2022); 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”).

Consequently, the Legislature's use of the term “indemnify” in 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. The Court of Appeals recently found that a broad duty to defend clause was simply a “disguised indemnity provision” violative of public policy and the Anti-Indemnity Statute. Retreat at Charleston Nat'l Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC, No. 2021-001050, 2025 WL 466562, at *11-13 (S.C. Ct. App. Feb. 12, 2025).

Accordingly, the Anti-Indemnity Statute invalidates the Indemnity Clause in the Contracts because the Indemnity Clause requires the contractor to defend D.R. Horton against all of the homeowners’ claims, including those based on D.R. Horton’s own negligence. See Sunset Presbyterian Church v. Andersen Const. Co., 341 P.3d 192, 197-200 (Or. Ct. App. 2014) (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 explicitly violates the Anti-Indemnity Statute, regardless of whether the statute expressly refers to a duty to defend, because this provision obligates Petitioners 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.

Public policy further supports an interpretation of the Anti-Indemnity Statute as prohibiting a promise to defend another party for that party's sole negligence. The purpose of an anti-indemnity statute is to prevent 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. 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.

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 contains such a duty to defend and violates South Carolina's Anti-Indemnity Statute. In addition, the Reimbursement Clause specifically requires Petitioners to repay D.R. Horton for all expenditures accrued on account of the homeowners' 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 are void and unenforceable as a matter of law.

ii. The contractual indemnity provisions are not clear and unequivocal as to Petitioners' obligations and thus void.

The obligations of Petitioners are also 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 Petitioners' indemnification obligations. On the one hand, the Indemnity Clause purports to require Petitioners 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 Petitioners to reimburse D.R. Horton for all expenditures accrued on account of the homeowners' claims, irrespective of whether D.R. Horton was solely responsible or not. The unclear and conflicting language of these two provisions prevents Petitioners from determining its indemnity obligations. Accordingly, these indemnity provisions are unenforceable as a matter of law for this additional reason.

iii. The contractual indemnity provisions are void and unenforceable as against public policy because the provisions require Petitioners to indemnify D.R. Horton for its intentional acts.

The Indemnity Clause in the Contracts between further violates public policy because it explicitly requires Petitioners 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. 320, § 10.1 (emphasis added).]

Additionally, the Reimbursement Clause requires Petitioners to reimburse D.R. Horton for all expenditures accrued on account of the homeowners' claims. The Reimbursement Clause does not except intentional acts. [R.p. 320, § 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). This 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 Petitioners, for which the homeowners have made claims for and sought punitive damages, under the second amended complaint [R.pp. 38-40, ¶¶ 15, 18, 20, 23, 26.] 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 . . .”). The Indemnity and Reimbursement Clauses are void and unenforceable as a matter of law for this additional reason.

B. The Trial Court correctly dismissed D.R. Horton’s contractual indemnification cross-claims.

During the trial, Petitioners moved to bifurcate D.R. Horton’s contractual indemnification claims from the trial of the Shafis’ direct claims. [R.pp. 702, l. 24 – 703, l. 4.] As a part of that motion, Petitioners informed Judge Price that if the indemnity provisions at issue were unenforceable as a matter of law, bifurcation would be unnecessary. [R.pp. 678, ll. 12-21; 697, ll. 12-20; 703, ll. 12-13.] Petitioners proceeded to argue the Indemnity and Reimbursement Clauses were void and unenforceable as against public policy and the Anti-Indemnity Statute as set forth herein in Section A. [R.pp. 703, l. 12 – 709, l. 25.] After consideration of the arguments, Judge Price ruled that the Indemnity and Reimbursement Clauses were unenforceable and violated public policy³; therefore, Judge Price dismissed D.R. Horton’s contractual indemnity claims against Petitioners. [R.pp. 722, ll. 17-25; 724, l. 15 – 725, l. 2.]

C. The Court of Appeals erred in failing to address the enforceability of the indemnity provisions.

D.R. Horton appealed the dismissal of its contractual indemnity claims to the Court of Appeals. It argued, in part, that Judge Price did not have subject matter jurisdiction and authority to overrule Judge DeBerry’s prior order denying summary judgment. The Court of Appeals agreed with D.R. Horton and reversed Judge Price’s dismissal of the claims. Specifically, the Court of

³ While initially finding that the Contracts were adhesion contracts, Judge Price expressly clarified that his ruling was based upon the violation of public policy and not because the Contracts were adhesion contracts. [R.pp. 722, ll. 17-25; 724, l. 15 – 725, l. 2]

Appeals held it could not reach the merits of the case because the record was not sufficient for consideration on appeal and did not indicate whether Judge Price dismissed the cross-claims by granting Petitioners' motion to bifurcate, motion for summary judgment, or motion for directed verdict. Op. No. 2025-UP-056, p. 6 (S.C. Ct. App. Feb. 19, 2025).

The Court of Appeals further held Judge Price could not procedurally dismiss the cross-claims based on a motion to bifurcate, a motion for summary judgment, or a motion for directed verdict because (1) substantive issues could not be addressed on a motion to bifurcate; (2) Judge Price could not grant a second motion for summary judgment where Judge DeBerry had previously denied summary judgment; and (3) the motion for directed verdict was not proper at the time Judge Price dismissed the cross-claims because D.R. Horton had not yet presented any evidence supporting its position that the indemnity provisions at issue were enforceable. *Id.* at p. 7. The Court of Appeals therefore reversed the dismissal of the contractual indemnification cross-claims, but gave no specific instructions for how the case should proceed upon remand. *Id.* at p. 8.

The Court of Appeals' refusal to address the merits and validity of the Indemnity and Reimbursement Clauses which D.R. Horton seeks to enforce against Petitioners is based upon two fundamental errors. First, Judge Price had the authority to rule upon the enforceability of the Indemnity and Reimbursement Clauses during the trial of the cross-claims because Judge DeBerry's prior order denying summary judgment was ambiguous and did not address the enforceability of the relevant clauses. Additionally, the issue of enforceability was a question in law based upon the language of the Contracts which did not require the presentation of factual evidence. Second, the Court of Appeals had inherent authority to decide the issues in the appeal

despite any procedural irregularities because the indemnification provisions violated statutory and public policy .

- i. **As trial judge, Judge Price had the authority and duty to rule upon the legal question of whether D.R. Horton could proceed with its contractual indemnification claims based upon illegal and unenforceable indemnity provisions, particularly where it was ambiguous as to whether the prior circuit court judge had ruled upon the issue in denying summary judgment.**

The issue of enforceability was first presented pre-trial, to Judge DeBerry, along with other matters raised by both D.R. Horton and Petitioners. Without any analysis, Judge DeBerry issued Form 4 Orders denying the motions for summary judgment merely concluding that “genuine issues of material fact exist.” [R.pp. 1-6.] No further analysis was provided by Judge DeBerry, creating an ambiguous order that ultimately decided nothing about the validity of the contract provisions.

The issue of enforceability was raised again during the trial of D.R. Horton’s cross-claims. Judge DeBerry’s prior orders denying summary judgment were ambiguous as to whether the court had ruled the indemnification provisions at issue were enforceable or not. As the trial judge, Judge Price had the authority to interpret the prior orders denying summary judgment as a matter of law for the court. “A court order or judgment is construed like any written instrument, and [w]hether a court order is clear and unambiguous is a question of law for the court.” John Deere Constr. & Forestry Co. v. N. Edisto Logging, Inc., 443 S.C. 424, 437-37, 904 S.E.2d 889, 895-96 (Ct. App. 2024), reh'g denied (Aug. 12, 2024), cert. denied (Feb. 12, 2025) (internal citation omitted). In construing an ambiguous order, the determinative factor is to ascertain the intent of the judge who issued the order. Id. at 437, 904 S.E.2d at 896.

Judge DeBerry's orders denying summary judgment were ambiguous because the orders conflated a legal issue for the court – the enforceability of the indemnification provisions – with issues of fact for a jury. It is indeed error to submit the issue of enforceability of the contractual provisions to a jury because enforceability is a legal question for the court to decide. See Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) (Because “[t]he construction of a clear and unambiguous contract is a question of law for the court to determine,” the court is authorized to determine whether the contract violates public policy and direct a verdict on the issue of whether such contract is enforceable.).

As the presiding judge over the trial of D.R. Horton's contractual indemnification cross-claims, Judge Price had not only the authority to determine if issues of enforceability had been resolved previously, but also the duty to determine if D.R. Horton could move forward on contractual provisions which violated statutory law and public policy. See Ward v. W. Oil Co., 387 S.C. 268, 275, 692 S.E.2d 516, 520 (2010) (“[I]f a question of illegality develops during the course of the trial, a court must consider that question, whether pleaded or not.”) (quoting 17A Am.Jur.2d *Contracts* § 323 (2004)).

Judge DeBerry's prior orders decided nothing about enforceability, and of course, as a matter of well-established law, the denial of a motion for summary judgment does not finally determine anything about the merits of a case and is thus never appealable, even after a trial or final judgment. Ballenger v. Bowen, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (1994); see also Olson v. Fac. House of Carolina, Inc., 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003); Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) (“[T]he denial of a motion for summary judgment before trial is not reviewable after a trial of a case on its merits.”).

The Court of Appeals' decision holding Judge Price could not rule upon the enforceability of the indemnity provisions at issue during the trial leaves the parties in a precarious position. The Court of Appeals 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 Court of Appeals' Opinion has on the standing of the case, which has been decided on the merits without participation from Petitioners.

This may affect the circuit court's decision making on remand. Specifically, D.R. Horton's cross-claims rest solely on seeking contractual indemnification from Petitioners 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 should be decided as a matter of law. While the circuit court cannot reconsider matters decided by the Court of Appeals, it must address the indemnity issue if D.R. Horton continues to seek relief from Petitioners. Thus, there is a risk that the circuit court may hesitate to address the purely legal question of whether indemnification provision is enforceable, given the Court of Appeals' Opinion that Judge Price improperly dismissed the cross-claims.

Nevertheless, the issue of enforceability of the indemnity provisions must necessarily be decided before D.R. Horton can proceed on its contractual indemnity claims against Petitioners. There are no evidentiary or factual issues involved in determining the enforceability of the indemnity provisions. Rather, enforceability is determined as a matter of law by analyzing the

language of the Indemnity and Reimbursement Clauses in comparison to contractual provisions prohibited by the Anti-Indemnity Statute and public policy.

The issue of enforceability was a matter of law for Judge Price and was also a matter of law for the Court of Appeals. Judge Price was either correct on that issue or he was not. There were no disputed issues of fact which had to be resolved before enforceability could be determined. D.R. Horton had a full opportunity to be heard on the enforceability of the indemnity provisions, and there was no prejudice to D.R. Horton in the procedural manner in which Judge Price took up the issue of law. [R.pp. 699, ll. 4-5; 702, l. 24 – 722, l. 25; 724, l. 15 – 725, l. 2.]

Accordingly, the Court of Appeals erred in reversing Judge Price's dismissal of D.R. Horton's contractual indemnity cross-claims based upon perceived procedural infirmities. Petitioners request this Court to grant the Petition for Writ of Certiorari and remand to the Court of Appeals with instructions to decide the narrow issue of the validity of the applicable indemnification provisions.

- ii. **The appellate courts have the authority and duty to consider the enforceability of indemnity provisions which violate statutory law and public policy despite any procedural irregularities before the circuit court below.**

Petitioners alternatively request this Court to either review the indemnification provisions which D.R. Horton seeks to impose upon Petitioners under its inherent authority or remand to the Court of Appeals with instructions to consider the enforceability of such provisions under its duty as an appellate court faced with contractual provisions which violate statutory law or public policy.

Illegal contracts are unenforceable as a matter of law, and “[t]he general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the

Constitution.” Berkebile v. Outen, 311 S.C. 50, 54 n. 2, 426 S.E.2d 760, 762 n.2 (1993); see also White v. J.M. Brown Amusement Co., 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004) (“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.”). “Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court.” Milliken & Co. v. Morin, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) (quoting 17B C.J.S. *Contracts* § 1030.).

This Court has held that it “will not ‘lend its assistance’ to carry out the terms of a contract that violates statutory law or public policy.” Ward v. W. Oil Co., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010); see also McMullen v. Hoffman, 174 U.S. 639, 654 (1988) (“The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.”).

Under this principle, this Court can review *sua sponte* a question of illegality of a contract. See Ward, 387 at 274-75, 692 S.E.2d at 519-20 (reviewing the merits of the legality of a contract even though parties to appeal had not preserved issue for review) (citing Hyta v. Finley, 137 Idaho 755, 53 P.3d 338, 340–41 (2002) (holding, in a partnership dissolution action involving a bar that primarily profited from illegal gaming machines, appellate court could *sua sponte* raise issue of whether underlying contract was illegal); Parente v. Pirozzoli, 87 Conn. App. 235, 866 A.2d 629, 635 (2005) (“It is generally true that illegality of a contract, if of a serious nature, need not be

pleaded, as a court will generally of its own motion take notice of anything contrary to public policy if it appears from the pleadings or in evidence, and the plaintiff will be denied relief, for to hold otherwise would be to enforce inappropriately an illegal agreement.” (quoting 6 Richard A. Lord, *Williston on Contracts* § 12:5 at 56–64 (4th ed.1995)).

As the legality of the contract in Ward was proper for this Court’s review despite the unpreserved status of the issue, the illegality of the Indemnity and Reimbursement Clauses was not barred from consideration by either the circuit court or the Court of Appeals. It was error for the Court of Appeals to reverse the circuit court without considering the enforceability of the indemnity provisions and whether such provisions violated statutory law or public policy. Petitioners therefore request this Court to correct this error by either reviewing pursuant to this Court’s inherent authority the Indemnity and Reimbursement Clauses or remanding to the Court of Appeals with instructions to consider the legality of such provisions.

CONCLUSION

For the reasons set forth herein, Petitioners request this Court to grant their Petition for Writ of Certiorari and either (1) remand to the Court of Appeals with instructions to consider the merits of the appeal and enforceability of the indemnification provisions or, in the alternative, (2) review under this Court’s inherent authority whether the circuit court correctly dismissed D.R. Horton’s contractual indemnification claims which were based upon illegal and unenforceable indemnification provisions.

[signatures on following page]

Respectfully submitted,

/s/ Carmen V. Ganjehsani

Carmen V. Ganjehsani (S.C. Bar No. 73515)

Payton D. Hoover (S.C. Bar No. 75967)

RICHARDSON, PLOWDEN & ROBINSON, PA

Post Office Drawer 7788

Columbia, South Carolina 29202

(803) 771-4400

cganjehsani@richardsonplowden.com

phoover@richardsonplowden.com

Nosizi Ralephata (S.C. Bar No. 72484)

Julie C. Fekete (S.C. Bar No. 105513)

GORDON & REES LLP

677 King Street

Suite 450

Charleston, SC 29403

(843) 478-4597

nralephata@grsm.com

jfekete@grsm.com

**ATTORNEYS FOR PETITIONER
HUTTON'S LANDSCAPES, INC.**

Jeffrey A. Ross (S.C. Bar No. 74254)

Scott H. Winograd (S.C. Bar No. 103483)

ROSS & CRISTALDI, LLC

863 Coleman Blvd., Ste. B

Mt. Pleasant, SC 29464

jross@rclawsc.com

swinograd@rclawsc.com

**ATTORNEYS FOR PETITIONER LATHER
CONSTRUCTION, INC.**

Tyler Ethan Cloud (S.C. Bar No. 103155)

CLAWSON & STAUBES, LLC

126 Seven Farms Drive, #200

Charleston, SC 29492

tcloud@cslaw.com

**ATTORNEYS FOR PETITIONER EAST
COAST CONSTRUCTION CLEANUP, CORP.**

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