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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,

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 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.

FINAL BRIEF OF RESPONDENT HUTTON'S LANDSCAPES, INC.

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
COUNTERSTATEMENT OF ISSUES ON APPEAL.....	1
COUNTERSTATEMENT OF THE CASE.....	2
COUNTERSTATEMENT OF FACTS	7
STANDARD OF REVIEW	13
ARGUMENT.....	14
I. Judge Price as the trial judge had the authority to rule that the contractual indemnity provisions between D.R. Horton and Hutton’s Landscapes were void and unenforceable as a matter of law	14
II. The contractual indemnity provisions are void and unenforceable under South Carolina’s Anti-Indemnity Statute because these provisions require Hutton’s Landscapes to defend D.R. Horton against all of the plaintiffs’ claims, including claims based on D.R. Horton’s sole negligence, or to reimburse D.R. Horton for all sums accrued on account of the claims, including those related to its sole negligence	18
III. The contractual indemnity provisions are not clear and unequivocal as to Hutton’s Landscapes’ obligations and thus void.....	27
IV. The contractual indemnity provisions are void and unenforceable as against public policy because the provisions require Hutton’s Landscapes to indemnify D.R. Horton for its intentional acts.....	28
V. The contractual indemnity provisions between D.R. Horton and Hutton’s Landscapes fail in their entirety and are not subject to severability	30
VI. D.R. Horton’s argument that Judge Price exceeded his authority in urging a settlement is not preserved for review and further has no bearing upon whether the contractual indemnity provisions are enforceable which is a question of law for the court	33
CONCLUSION.....	34

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Addy v. Bolton</u> , 257 S.C. 28, 183 S.E.2d 708 (1971)	21, 22, 26
<u>Arthur v. State of Hawaii</u> , 377 P.3d 26 (Haw. 2016)	21
<u>Ashley II of Charleston II, L.L.C. v. PSC Nitrogen, Inc.</u> , 409 S.C. 487, 763 S.E.2d 19 (2014)	29
<u>Ballenger v. Bowen</u> , 313 S.C. 476, 443 S.E.2d 379 (1994)	15
<u>Berkebile v. Outen</u> , 311 S.C. 50, 426 S.E.2d 760 (1993)	20
<u>Charleston Cnty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother</u> , 317 S.C. 283, 454 S.E.2d 307 (1995)	17
<u>Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC</u> , 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).....	25, 27, 29
<u>Cook v. Taylor</u> , 272 S.C. 536, 252 S.E.2d 923 (1979)	17
<u>D.R. Horton, Inc. v. Builders FirstSource – Southeast Group, LLC</u> , 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).....	20
<u>Damico v. Lennar Carolinas, LLC</u> , 437 S.C. 596, 879 S.E.2d 746 (2022)	30, 31, 32
<u>Dawkins v. Fields</u> , 354 S.C. 58, 580 S.E.2d 433 (2003)	13
<u>Dinkins v. Robbins</u> , 203 S.C. 199, 26 S.E.2d 689 (1943)	17
<u>Eagle Container Co., LLC v. Cty. of Newberry</u> , 379 S.C. 564, 666 S.E.2d 892 (2008)	22
<u>Edward Pinckney Assocs., Ltd. v. Carver</u> , 294 S.C. 351, 364 S.E.2d 473 (Ct. App. 1987).....	14

<u>Ellis v. Davidson</u> , 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004).....	13
<u>Enoree Baptist Church v. Fletcher</u> , 287 S.C. 602, 340 S.E.2d 546 (1986)	17
<u>Equitex, Inc. v. Ungar</u> , 60 P.3d 746 (Colo. Ct. App. 2002)	30
<u>Fountain v. Fred’s Inc.</u> , 429 S.C. 533, 839 S.E.2d 475 (Ct. App. 2020), <u>rev’d on other grounds</u> , 436 S.C. 40, 871 S.E.2d 166 (2022)	20, 21
<u>Guffey v. Columbia/Colleton Reg'l Hosp., Inc.</u> , 364 S.C. 158, 612 S.E.2d 695 (2005)	14
<u>Heat & Power Corp. v. Air Prods. & Chems., Inc.</u> , 578 A.2d 1202 (Md. Ct. App. 1990).....	25
<u>Holloman v. McAllister</u> , 289 S.C. 183, 345 S.E.2d 728 (1986)	15
<u>Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.</u> , 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).....	13
<u>Miller v. FerrellGas, L.P.</u> , 392 S.C. 295, 709 S.E.2d 616 (2011)	13, 14
<u>Mut. Bldg. & Loan Ass'n of Sumter v. Hewson</u> , 196 S.C. 181, 12 S.E.2d 715 (1940)	17
<u>Olson v. Fac. House of Carolina, Inc.</u> , 354 S.C. 161, 580 S.E.2d 440 (2003)	15
<u>Parrish v. Allison</u> , 376 S.C. 308, 656 S.E.2d 382 (Ct. App. 2007).....	14
<u>Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton</u> , 311 S.C. 56, 427 S.E.2d 673 (1993)	33
<u>Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co.</u> , 410 S.C. 175, 763 S.E.2d 598 (Ct. App. 2014).....	25
<u>Progressive Max Ins. Co. v. Floating Caps, Inc.</u> , 405 S.C. 35, 747 S.E.2d 178 (2013)	13

<u>S.C. Pub. Int. Found. v. Wilson,</u> 437 S.C. 334, 878 S.E.2d 891 (2022)	15
<u>Simpson v. MSA of Myrtle Beach, Inc.,</u> 373 S.C. 14, 644 S.E.2d 663 (2007)	30, 31
<u>State v. Bridgers,</u> 329 S.C, 11, 495 S.E.2d 196 (1997)	22
<u>Stickovich v. Cleveland,</u> 757 N.E.2d 50 (Ohio Ct. App. 2001).....	24, 25
<u>Sunset Presbyterian Church v. Andersen Const. Co.,</u> 341 P.3d 192 (Or. Ct. App. 2014).....	21, 23
<u>Tisdale v. Am. Life Ins. Co.,</u> 216 S.C. 10, 56 S.E.2d 580 (1949)	17
<u>Town of Summerville v. City of N. Charleston,</u> 378 S.C. 107, 662 S.E.2d 40 (2008)	14
<u>Wachovia Bank, N.A. v. Coffey,</u> 404 S.C. 421, 746 S.E.2d 35 (2013)	13
<u>Weil v. Weil,</u> 299 S.C. 84, 382 S.E.2d 471 (Ct. App. 1989).....	16
<u>White v. J.M. Brown Amusement Co.,</u> 360 S.C. 366, 601 S.E.2d 342 (2004)	29
<u>Williams v. Gov't Emps. Ins. Co. (GEICO),</u> 409 S.C. 586, 762 S.E.2d 705 (2014)	14, 16

STATUTES

S.C. CODE ANN. § 1-11-445(A)	23, 24
S.C. CODE ANN. § 32-2-10.....	2, 4, 18, 20, 25
S.C. CODE ANN. § 15-38-20(C)	30

RULES

Rule 208(b)(6), SCACR.....	34
Rule 408, SCRE	33

Rule 56(c), SCRCF 13

OTHER AUTHORITIES

AM. JUR. *Statutes* § 143 22

Antonin Scalia & Bryan A. Garner,
Reading Law: The Interpretation of Legal Texts 320 (2012) 22

COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Judge Price as the trial judge had the authority to rule that the contractual indemnity provisions between D.R. Horton and Hutton's Landscapes were void and unenforceable as a matter of law.
- II. The contractual indemnity provisions are void and unenforceable under South Carolina's Anti-Indemnity Statute because these provisions require Hutton's Landscapes to defend D.R. Horton against all of the plaintiffs' claims, including claims based on D.R. Horton's sole negligence, or to reimburse D.R. Horton for all sums accrued on account of the claims, including those related to its sole negligence.
- III. The contractual indemnity provisions are not clear and unequivocal as to Hutton's Landscapes' obligations and thus void.
- IV. The contractual indemnity provisions are void and unenforceable as against public policy because the provisions require Hutton's Landscapes to indemnify D.R. Horton for its intentional acts.
- V. The contractual indemnity provisions between D.R. Horton and Hutton's Landscapes fail in their entirety and are not subject to severability.
- VI. D.R. Horton's argument that Judge Price exceeded his authority in urging a settlement is not preserved for review and further has no bearing upon whether the contractual indemnity provisions are enforceable which is a question of law for the court.

COUNTERSTATEMENT OF THE CASE

This construction defect action concerns Appellant D.R. Horton, Inc.'s ("D.R. Horton") attempt as the general contractor to seek contractual indemnification from Respondent Hutton's Landscapes, Inc. ("Hutton's Landscapes") as its subcontractor under indemnity provisions void under South Carolina's Anti-Indemnity Statute, S.C. CODE ANN. § 32-2-10, and prohibited by the public policy of this State.

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; Compl.] The plaintiffs collectively own fifteen (15) separate and unique parcels of property. A second amended complaint was eventually filed by the plaintiffs on November 20, 2019. [R.pp. 33-42; Second Am. Compl.]

The plaintiffs' action was filed against D.R. Horton, who served as developer and general contractor for the construction of the neighborhood, and multiple subcontractors, including Hutton's Landscapes. The plaintiffs complained of numerous issues pertaining to the alleged construction deficiencies, including "improper site preparation; improper and inadequate infrastructure installation; inadequate inspections and testing of the site during surveying, platting and subdividing; rusted metal, broken glass, and other hazardous debris strewn throughout the properties; premature erosion; water intrusion; improperly installed siding; [and] dead and dying trees." [R.pp. 35-36; Second Am. Compl., ¶ 7.] The plaintiffs asserted claims against the defendants for negligent misrepresentation, negligence/gross negligence, violation of South Carolina's Unfair Trade Practices Act, breach of express

and implied warranties, breach of contract, and fraud in the inducement. [R.pp. 37-41; Id. at ¶¶ 10-33.]

Hutton's Landscapes was a subcontractor of D.R. Horton for horizontal construction and performed flatwork and landscape installation at Tidewater Creek. On December 2, 2019, D.R. Horton brought a cross-claim against Hutton's Landscapes and other subcontractors, which was ultimately amended August 23, 2021. [R.pp. 43-76; 82-113; Cross-Claim; Am. Cross-Claims.] As against Hutton's Landscapes, D.R. Horton alleged that it and Hutton's Landscapes entered into an Independent Contractor Agreement pursuant to which Hutton's Landscapes agreed to provide labor and materials for "rough grade, final grade, turnkey landscaping, turnkey flatwork, slab backfill, turnkey house slab and related components." [R.pp. 98-99; Am. Cross-Claims, ¶ 88.]

D.R. Horton asserted claims for equitable and contractual indemnity against Hutton's Landscapes. [R.pp. 99-100; Id. at ¶¶ 90-96.] D.R. Horton also raised equitable and contractual indemnification claims against Respondents Lather Construction, Inc. ("Lather Construction") and East Coast Construction Cleanup Corp. ("East Coast Construction"). [R.pp. 96-98; 100-103 Id. at ¶¶ 75-85; 97-107.]

Hutton's Landscapes responded to D.R. Horton's amended cross-claims on August 31, 2021 and denied the materials allegations of the cross-claims. [R.pp. 126-134; Answer to Amended Cross-Claims.]

On October 19, 2021, Hutton's Landscapes filed a motion for summary judgment on the cross-claims of D.R. Horton and submitted a supporting memorandum of law as well as accompanying exhibits on October 26, 2021. [R.pp. 144-146; 298-356; Mtn. for Summary Judgment; Memo. and Exs.]

With respect to D.R. Horton's contractual indemnification claim, Hutton's Landscapes argued that the indemnity provisions contained in the Independent Contractor Agreement between D.R. Horton and Hutton's Landscapes were void and unenforceable under South Carolina's Anti-Indemnity Statute, S.C. CODE ANN. § 32-2-10, because the provisions required Hutton's Landscapes to defend D.R. Horton against all of the plaintiffs' claims, including those based on D.R. Horton's sole negligence. Additionally, Hutton's Landscapes argued that the indemnity provisions were void and unenforceable against public policy because the provisions required Hutton's Landscapes to indemnify D.R. Horton for its intentional acts. [R.pp. 145; 302-310; Mtn., p. 2; Memo., pp. 5-13.]

Respondent Lather Construction also filed a motion for summary judgment on D.R. Horton's cross-claims on October 8, 2021. [R.pp. 140-143; Lather Mtn. for Summary Judgment.]

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

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, while not finding that the contractual provisions at issue were enforceable, determined that genuine issues of material fact existed. [R.pp. 1-6; Form 4 Orders.]

The Trial Court ordered that separate trials would be held for each of the fifteen (15) properties at issue. The plaintiffs selected the home located at 4892 Breeze Way (Lot 18) in the Tidewater Creek neighborhood, 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; Nov. 15, 2021 Tr., p. 1.] During the trial, the issue arose of whether the contractual indemnification cross-claims of D.R. Horton against Hutton's Landscapes, Lather Construction, and East Coast Construction should be bifurcated from the trial of the Shafis' direct claims against D.R. Horton and the subcontractors. Counsel for Hutton's Landscapes also argued that in determining whether such claims should be bifurcated, the threshold issue of whether the indemnity provisions at issue 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; Nov. 16, 2021 Tr., pp. 8, ll. 12-21; 27, 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; Id. at pp. 32, l. 24 – 33, l. 4.] Hutton's Landscapes argued that the court should first decide as a matter of law the threshold issue of whether the indemnity provisions at issue 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; Id. at pp. 33, l. 12 – 39, l. 25.]

Judge Price ruled that the indemnity provisions at issue were unenforceable and violated public policy; therefore, he dismissed D.R. Horton's contractual indemnity claim against Hutton's Landscapes. [R.pp. 722, ll. 17-25; 724, l. 15 – 725, l. 2; Id. at pp. 52, ll. 17-25; 54, l. 15 – 55, l. 2.]

The trial of the direct claims against D.R. Horton and the subcontractors continued. The plaintiffs resolved their claims with Hutton's Landscapes, Lather Construction, and East Coast Construction during the trial. [R.pp. 742, ll. 18-21; 771, ll. 7-22; Nov. 17, 2021 Tr., p. 272, ll. 18-21; Nov. 18, 2021 Tr., p. 358, ll. 7 – 22.]

The jury returned a verdict against D.R. Horton on November 19, 2021, finding that (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; Nov. 19, 2021 Tr., pp. 644, l. 5 – 646, l. 3; Verdict Form.]

On November 24, 2021, D.R. Horton moved to alter or amend the Trial Court's dismissal of its cross-claims against the subcontractors, including Hutton's Landscapes. [R.pp. 515-538; Mtn. to Alter.] Additionally, on November 29, 2021, D.R. Horton filed a post-trial motion for a judgment notwithstanding the verdict or a new trial with respect to the jury's verdict in favor of the Shafis. [R.pp. 539-555; Post-Trial Mtn.] The Trial Court denied both motions on December 3, 2021. [R.pp. 8-10; 11-13; Orders.]

D.R. Horton filed and served a Notice of Appeal on or about December 30, 2021.

COUNTERSTATEMENT OF FACTS

The twenty-nine (29) plaintiffs who filed this action are each residents of the Tidewater Creek neighborhood located in Beaufort County, South Carolina and are the owners of fifteen (15) separate homes located in the neighborhood. [R.p. 34; Second Am. Compl., ¶ 1.] For a period spanning approximately October 2015 through July 2017, the plaintiffs purchased their homes from D.R. Horton. [R.p. 35; Id. at ¶ 6.]

After moving into their homes, the plaintiffs began to notice several alleged deficiencies with their homes, including debris such as rusted metal, broken glass, and roof shingles strewn throughout and buried in the yards of their homes. [R.pp. 35-36; 731, l. 16 – 732, l. 2; 732, ll. 8-20; 872, l. 5 – 873, l. 20; Id. at ¶ 7; Nov. 16, 2021 Tr., pp. 83, l. 16 – 84, l. 2; 84, ll. 8-20; Nov. 19, 2021 Tr., pp. 601, l. 5 - 602, l. 20.] Eventually, the plaintiffs brought this lawsuit against D.R. Horton and the subcontractors seeking damages for these purported defects, including the removal of debris buried in their yards.

D.R. Horton was the developer and general contractor for the Tidewater Creek neighborhood. [R.pp. 762, ll. 6-8; 773, ll. 14-23; 784, ll. 13-17; 791, ll. 22-23; 793, ll. 3-6; Nov. 17, 2021 Tr., p. 342, ll. 6-8; Nov. 18, 2021 Tr., pp. 398, ll. 14-23; 417, ll. 13-17; 431, ll. 22-23; 435, ll. 3-6.] It purchased the raw land for the property that would become the Tidewater Creek neighborhood in 2013 from Robert Duncan O’Quinn, III. [R.p. 636, ll. 10-21; Nov. 15, 2021 Tr., p. 135, ll. 10-21.] Mr. O’Quinn testified during the Shafis’ trial that while he owned the property, trespassers would dump trash and debris on the property, including glass, shingles, old lawnmowers, and construction debris. [R.pp. 644, l. 1 – 645, l. 1; 667, l. 19 – 668, l. 10; Id. at pp. 143, l. 1 - 144, l. 1; 166, l. 19 – 167, l. 10.]

The debris, according to Mr. O'Quinn, was fairly obvious. [R.p. 669, ll. 15-23; Id. at p. 168, ll. 15-23.]

D.R. Horton contracted with Lather Construction to perform the site development work for the Tidewater Creek neighborhood. [R.pp. 797, ll. 17-19; 841, ll. 6-16; 857, ll. 12-14; Nov. 18, 2021 Tr., p. 450, ll. 17-19; Nov. 19, 2021 Tr., pp. 510, ll. 6 – 16; 528, ll. 12-14.] Lather Construction's work involved clearing the entire property, preparing the building pads, and installing drainage, curbs and gutters, paving, water and sewer, and other utility work. [R.pp. 798, ll. 11-17; 978, ll. 12-20; Nov. 18, 2021, p. 451, ll. 11-17; Deposition of Sean Higgs, p. 51, ll. 12-20.] As part of its contractual duties, Lather Construction was required to remove any debris it discovered on the property during the land development process. [R.pp. 816, l. 22 – 817, l. 2; 863, l. 6 – 864, l. 4; Nov. 18, 2021 Tr., pp. 476, l. 22 – 477, l. 2; Nov. 19, 2021 Tr., pp. 534, l. 6 – 535, l. 4.]

D.R. Horton also retained Hutton's Landscapes as a subcontractor to perform rough and fine grading, slab work, and landscaping for the homes in the Tidewater Creek neighborhood. [R.pp. 98-99; Am. Cross-Claims, ¶ 88.] The work of Hutton's Landscapes did not begin until after the overall mass-grading for the site as a whole was done by Lather Construction, or in other words, after the land for the homes had been stripped and cleared except for a few trees and the lots were ready for the homes to be built on them. [R.pp. 626, l. 4 – 635, l. 7; 757, l. 21 – 758, l. 5; 978, ll. 12-20; 990, ll. 5-10; Nov. 15, 2021 Tr., pp. 121, l. 4 – 130, l. 7; Nov. 17, 2021 Tr., pp. 337, l. 21 – 338, l. 5; Higgs Dep., p. 51, ll. 12-20; Deposition of Matt Hutton., p. 15, ll. 5-10.]

At that point, Hutton's Landscapes prepared and poured the slab foundations for the homes. To form the slabs, footers were dug which created dirt piles outside the slabs.

Once the slabs were prepared, Hutton's Landscapes would perform rough or knock-down grading where it would knock down these piles of dirt to be taken away and spread out in the yard. After Hutton's Landscapes completed the slabs and knock-down grading, the houses would be constructed on the properties and Hutton's Landscapes would return afterwards to pour the driveways, install irrigation for the yards, and fine grade or hand rake the yards to prepare the yards for sod. [R.pp. 626, l. 4 – 635, l. 7; 757, l. 21 – 758, l. 21; 1015, ll. 15-21; 1019, ll. 17-22; 1021, l. 10 – 1022, l. 2; 986, ll. 4-22; 991, l. 1 – 992, l. 21; 994, l. 8 – 996, l. 24; 998, ll. 3-19; 1004, l. 13 – 1005, l. 3; Nov. 15, 2021 Tr., pp. 121, l. 4 – 130, l. 7; Nov. 17, 2021 Tr., pp. 337, l. 21 – 338, l. 21; Deposition of Kevin Ciccarella, pp. 38, ll. 15-21; 78, ll. 17 – 22; 84, l. 10 – 85, l. 2; Hutton Dep., pp. 10, ll. 4-22; 16, l. 1 – 17, l. 21; 21, l. 8 – 23, l. 24; 25, ll. 3-19; 44, l. 13 – 45, l. 3.]

Other than digging footers for the slab foundations and installing irrigation lines, Hutton's Landscapes did not do any digging on the properties. [R.pp. 998, l. 23 – 999, l. 4; Hutton Dep., pp. 25, l. 23 – 26, l. 4.] Hutton's Landscapes did not bring any fill dirt onto the properties. [R.p. 629, ll. 19-21; Nov. 15, 2021 Tr., p. 124, ll. 19-21.] When Hutton's Landscapes began its work, the lots were already fairly-well graded, clear, and ready for the construction of the homes. [R.pp. 1017, ll. 4-9; 1018, l. 23 – 1019, l. 5; Ciccarella Dep., pp. 76, ll. 4-9; 77, l. 23 – 78, l. 5.] Hutton's Landscapes' scope of work did not include the cleaning up of any construction or other debris. [R.pp. 1000, l. 15 – 1001, l. 20; Hutton Dep., pp. 27, l. 15 – 28, l. 20.]

Critically, there was no evidence presented at trial that Hutton's Landscapes was aware of any debris on the properties before beginning its work for D.R. Horton or

discovered any debris while performing its work during the original construction process.¹ [R.pp. 727, ll. 5-8; 752, l. 12 – 753, l. 1; 757, ll. 3-9; 760, ll. 18-23; 773, ll. 14-23; 795, ll. 17-23; 976, ll. 5-24; 980, ll. 4-6; 984, ll. 12-14; 1001, l. 21 – 1002, l. 2; Nov. 16, 2021 Tr., p. 59, ll. 5-8 (previous owner of property testifying he never told anyone from Hutton’s Landscapes about the debris); Nov. 17, 2021 Tr., pp. 307, l. 12 – 308, l. 1; 337, ll. 3-9; 340, ll. 18-23 (plaintiffs’ expert testifying that he had not seen any documentation showing that Hutton’s Landscapes was aware during the original construction of any debris); Nov. 18, 2021 Tr., pp. 398, ll. 14-23; 437, ll. 17-23 (D.R. Horton’s Division Vice-President of Operations testifying that he had no evidence that Hutton’s Landscapes participated in concealing or burying any debris in the Tidewater Creek neighborhood); Higgs Dep., pp. 12, ll. 5-24; 170, ll. 4-6 (Lather Construction representative testifying that he had not informed anyone at Hutton’s Landscapes about any issues with trash or debris on the Tidewater Creek property); Hutton’s Dep., pp. 6, ll. 12-14; 28, l. 21 – 29, l. 2 (owner of Hutton’s Landscapes testifying that he was never made aware of debris).]

Central to this appeal is D.R Horton’s contractual indemnity cross-claim against Hutton’s Landscapes. On May 16, 2014, D.R. Horton and Hutton’s Landscapes entered into an Independent Contractor Agreement for Hutton’s Landscapes to perform the work as described above to D.R. Horton (the “Contract”). The Contract was entered into on a “blanket basis” and intended to govern all current and future work of Hutton’s Landscapes

¹ D.R. Horton contracted with Hutton’s Landscapes to remove debris in the Shafis’ yard after the Shafis moved into their home and began experiencing issues with debris. This was after the original construction process was complete. [R.pp. 747, l. 18 – 748, l. 6; 749, ll. 16-18; 1007, l. 9 – 1010, l. 4; Nov. 17, 2021 Tr., pp. 296, l. 18 – 297, l. 6; 298, ll. 16-18; Hutton’s Dep., pp. 55, l. 9 – 58, l. 4.] The homeowner inspected the yard after Hutton’s raked and did not observe any debris. The homeowner was satisfied with Hutton’s Landscapes work and gave Hutton’s Landscapes the approval to proceed with placing sod in the yard. [R.pp. 749, l. 24 – 751, l. 22; Nov. 17, 2021 Tr., pp. 298, l. 24 – 300, l. 22.]

performed for D.R. Horton. [R.pp. 317-348; Contract.] The Contract, which was drafted by D.R. Horton, was “non-negotiable.” [R.pp. 741, ll. 1-6; 986, l. 23 – 988, l. 2; Nov. 17, 2021, Tr. p., 269, ll. 1-6; Hutton’s Dep., pp. 10, l. 23 – 12, l. 2.]

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

10.1 Generally. To the fullest extent permitted by law, Contractor shall protect, defend, indemnify, and hold Owner . . . (“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; Contract, p. 4, § 10.1 (all caps removed for readability).]

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

10.2 Indemnity Not Exclusive Remedy. Any payments by Contractor under Section 10 to or on behalf of the Indemnatee shall be in an addition to all other legal remedies available to the Indemnatee and shall not be considered the Indemnatee’s exclusive remedy. Indemnatee shall have the right, if it 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; Id. at p. 4, § 10.2 (all caps removed for readability).]

Under its contractual indemnity claim, D.R. Horton alleged that Hutton’s Landscapes “agreed to defend, indemnify and hold [D.R. Horton] harmless” against any claims, losses, costs, and damages, including claims for property damage. [R.p. 100; Am. Cross-Claim, ¶ 94.] Consequently, D.R. Horton asserted that if the plaintiffs recovered damages against it, D.R. Horton would be entitled to contractual indemnity against Hutton’s Landscapes 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.p. 100; Id. at ¶ 96.] As admitted in its brief to this Court, D.R. Horton sought over \$1.5 million from Hutton’s Landscapes.

During the trial of the Shafis’ home, Judge Price dismissed D.R. Horton’s contractual indemnity claim against Hutton’s Landscapes as void against public policy. [R.pp. 722, ll. 17-25; 724, l. 15 – 725, l. 2; Nov. 16, 2021 Tr., pp. 52, ll. 17-25; 54, l. 15 – 55, l. 2.] D.R. Horton now challenges that ruling.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004). Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” See Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). “In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment.” Id.; Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

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

Should this Court instead consider the Trial Court’s ruling as the grant of a directed verdict instead of a summary judgment, the standard of review is similar. From the appeal of the grant of a directed verdict, the appellate court must, like the trial court, view the evidence in a light most favorable to the non-movant. Miller v. FerrellGas, L.P., 392 S.C.

295, 297, 709 S.E.2d 616, 617 (2011). An “issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror.” Parrish v. Allison, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007).

However, “[a] directed verdict should be granted where the evidence raises no issue for the jury as to the defendant's liability.” Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). 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. Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014); see also Edward Pinckney Assocs., Ltd. v. Carver, 294 S.C. 351, 354, 364 S.E.2d 473, 475 (Ct. App. 1987).

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

ARGUMENT

I. Judge Price as the trial judge had the authority to rule that the contractual indemnity provisions between D.R. Horton and Hutton’s Landscapes were void and unenforceable as a matter of law.

D.R. Horton first argues in its appeal that Judge Price had no authority to rule upon the validity and enforceability of the indemnity provisions in the Contract between D.R. Horton and Hutton’s Landscapes. The basis of D.R. Horton’s argument is that Judge DeBerry had previously denied Hutton’s Landscapes’ motion for summary judgment seeking dismissal of the contractual indemnity claim due to the unenforceability of the

indemnity provisions. D.R. Horton contends that Judge Price could not revisit the Judge DeBerry's denial of the motion for summary judgment.

It has long been established under South Carolina law that the “denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial.” Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). This State's Supreme Court has emphasized that the denial of motion for 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. Id.; see also S.C. Pub. Int. Found. v. Wilson, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022) (observing that because the law of the case doctrine does not apply to interlocutory orders, such orders “may be reconsidered and corrected by the court before entering a final order on the merits.”) (internal citation omitted).

Furthermore, because the denial of a motion for summary judgment does not finally determine anything about the merits of the case, an order denying a motion for summary judgment is never appealable, even after trial or final judgment. Ballenger, 313 S.C. at 477-48, 443 S.E.2d at 380; 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.”).

Judge DeBerry's Form 4 Order denied Hutton's Landscapes' motion for summary judgment seeking a decision that the indemnity provisions were void and unenforceable, and he ruled in a one sentence order that issues of material fact existed on the matter at hand. [R.p. 4; Form 4 Order.] Judge DeBerry's denial decided nothing about the merits of the contractual indemnity cross-claim, including whether the indemnity provisions were

enforceable. Judge DeBerry's denial, which determined nothing and did not establish the law of the case, was not immediately appealable and in fact, can never be appealed by Hutton's Landscapes.

Therefore, Judge Price, as the trial judge, had full and complete authority to determine whether the indemnity provisions were enforceable or unenforceable as a matter of law. Indeed, Judge Price was required to make the threshold determination of whether such provisions were enforceable or not in deciding whether the contractual indemnity claim should proceed to the jury since the construction and enforceability of a clear and unambiguous contract is a question of law for the court to determine. Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014). During arguments with Judge Price regarding the issue, D.R. Horton's counsel at one point agreed that the issue of enforceability was within Judge Price's purview. [R.p. 680, ll. 9-15; Nov. 16, 2021 Tr., p., 10, ll. 9-15.]

If this Court were to accept D.R. Horton's argument that Judge Price could not revisit Judge DeBerry's denial of the motion for summary judgment, then Hutton's Landscapes would be precluded from ever being able to challenge whether the indemnity provisions were enforceable because the denial of a summary judgment is never appealable, even after a trial on the merits or final judgment. See Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). The law instead authorized Judge Price as the trial judge to rule on the enforceability of the indemnity provisions.

The case law cited by D.R. Horton that one trial judge may not overrule another trial judge is inapplicable. These cases each involved orders which were considered immediately appealable or otherwise not challenged as non-appealable and thus established

the law of the case when left unappealed. As such, in these cases, a subsequent judge could not overrule a prior judge because the previous order was the law of the case. See Tisdale v. Am. Life Ins. Co., 216 S.C. 10, 56 S.E.2d 580 (1949) (circuit court judge did not have power to reverse ruling of another circuit judge on an unappealed order denying a motion to change venue which was considered immediately appealable at the time); Dinkins v. Robbins, 203 S.C. 199, 26 S.E.2d 689 (1943) (where there was no appeal from former circuit judge's order refusing a general order of reference, subsequent circuit judge was not authorized to grant a compulsory order of reference as to certain equitable issues since the unappealed former order was the law of the case); Mut. Bldg. & Loan Ass'n of Sumter v. Hewson, 196 S.C. 181, 12 S.E.2d 715 (1940) (same as Dinkins); see also Charleston Cnty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995) (holding successor judge could not substitute his own judgment for that of the trial judge and could not grant a new trial unless certain conditions met); Enoree Baptist Church v. Fletcher, 287 S.C. 602, 340 S.E.2d 546 (1986) (one circuit judge cannot reverse a prior *substantive* order of another circuit judge); Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979) (same as Dinkins).

As explained above, Judge DeBerry's denial of Hutton's Landscapes motion for summary judgment did not establish the law of the case. Accordingly, Judge Price was not precluded from revisiting the issue of whether the indemnity provisions were enforceable or invalid.

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

The Indemnity and Reimbursement Clauses in the Contract between D.R. Horton and Hutton's Landscapes are unenforceable under South Carolina's Anti-Indemnity Statute because these clauses require Hutton's Landscapes to defend and/or pay damages, such as attorneys' fees and costs, for D.R. Horton's sole negligence. Accordingly, Judge Price correctly determined that D.R. Horton could not proceed on its contractual indemnity claim against Hutton's Landscapes.

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

Notwithstanding any other provision of law, **a promise or agreement** in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, **purporting to indemnify the promisee**, its independent contractors, agents, employees, or indemnitees **against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee**, its independent contractors, agents, employees, or indemnitees **is against public policy and unenforceable**. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

Id. (emphasis added).

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

Contractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify and is triggered immediately when any claim, demand, or other assertion of liability is made against Indemnitee which potentially or arguably is subject to Contractor's duty to indemnify **regardless of Contractor's ultimate liability for indemnity**. Contractor must defend Indemnitee even where the allegations against Indemnitee are ambiguous or incomplete with respect to the issue of Contractor's duty to indemnify. Once the duty to defend is triggered, **Contractor is obligated to defend the entire action, lawsuit, arbitration, or other litigation, including any claims therein not subject to indemnity by Contractor**.

[R.p. 320; Contract, p. 4, § 10.1 (emphasis added).]

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

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

[R.p. 320; Contract, p. 4, § 10.2 (emphasis added).]

The Indemnity Clause therefore requires Hutton's Landscapes to defend D.R. Horton against all of the plaintiffs' claims, including those based on D.R. Horton's sole negligence. The Reimbursement Clause requires Hutton's Landscapes to reimburse D.R. Horton for the entirety of its expenditures incurred on account of such claims without any

limitation. The plaintiffs asserted negligence claims against D.R. Horton and multiple subcontractors, including claims unrelated to Hutton's Landscapes' work and claims which could be attributed to solely D.R. Horton's negligence. In its cross-claim for contractual indemnity against Hutton's Landscapes, D.R. Horton sought to be fully reimbursed for the costs of the entire action pursuant to the terms of the Contract. [R.p. 100; Am. Cross-Claim, ¶ 96.]

The Indemnity and Reimbursement Clauses therefore violate the express prohibition under the Anti-Indemnity Statute which bars any promise to indemnify another for its sole negligence. See § 32-2-10. These indemnity provisions in the Contract between D.R. Horton and Hutton's Landscapes thus constitute an illegal contract which is unenforceable. See D.R. Horton, Inc. v. Builders FirstSource – Southeast Group, LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) (finding indemnification clause void as against public policy to the extent it purported to require subcontractor to indemnify contractor for its own sole negligence); see also Berkebile v. Outen, 311 S.C. 50, 54 n. 2, 426 S.E.2d 760, 762 n.2 (1993) (recognizing that an illegal contract is unenforceable and that South Carolina courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the constitution).

While the Anti-Indemnity Statute refers only to promises to “indemnify,” the term “indemnify” in a contractual indemnity context under South Carolina law encompasses a duty to defend as well. Under South Carolina law, the two duties are intimately related under the principles of contract indemnity. The right of indemnity under South Carolina law includes “the right to attorney's fees and litigation costs incurred in defending the underlying claim.” Fountain v. Fred's Inc., 429 S.C. 533, 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. Accordingly, the Anti-Indemnity Statute invalidates the Indemnity Clause in the Contract here because the Indemnity Clause requires Hutton’s Landscapes to defend D.R. Horton against all of the Plaintiffs’ claims, including those based on D.R. Horton’s own negligence. See Sunset Presbyterian Church 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 of the Contract explicitly violates the Anti-Indemnity Statute, regardless of whether the statute expressly refers to a duty to defend, because this provision obligates Hutton’s Landscapes to pay out sums to D.R. Horton for

all of its expenditures accrued on account of the claim, even for expenditures incurred by D.R. Horton due to its sole negligence.

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

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

Additionally, the language of a statute “must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.” Eagle Container Co., LLC v. Cty. of Newberry, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008) (internal citation omitted). The purpose of an anti-indemnity statute is to prohibit a general

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

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

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

In its brief, D.R. Horton points to another statute, S.C. CODE ANN. § 1-11-445(A) which requires the State of South Carolina to defend and indemnify state agencies, and

argues that when the Legislature wants to address the duty to defend in a statute, it will use the word defend. This argument is unconvincing because there are important differences between Section 1-11-445(A) and the Anti-Indemnity Statute. Section 1-11-445(A) imposes particular duties worded in the traditional formulation of an indemnity provision on the State. By contrast, the Anti-Indemnity Statute places limits on indemnity provisions in construction contracts and prohibits any provision in a construction contract which requires the indemnitee to bear the costs of the indemnitor's sole negligence.

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

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

indemnity is, thus, not the essence of the agreement creating the transactional relationship but is only one of its negotiated terms.” Id.

Moreover, “[t]he primary purpose of a liability insurance policy is to provide coverage to a policy holder for the policy holder’s own negligence.” Heat & Power Corp. v. Air Prods. & Chems., Inc., 578 A.2d 1202, 1208 (Md. Ct. App. 1990). A liability insurer is not an “unwary or uninformed promisor.” Id. Contrarily, the Legislature has determined as a matter of public policy that no construction contract may contain a promise by one to indemnify a promisee for the promisee’s sole negligence and that each party to a construction contract shall be responsible for its own sole negligence. S.C. CODE ANN. § 32-2-10. The Legislature even exempts insurance contracts from the Anti-Indemnity Statute, recognizing the differing nature of insurance contracts. Id.

Insurance contracts are also construed differently from construction indemnity contracts. Under insurance law, where an ambiguity is present, it is the court’s policy to construe the ambiguity against the insurer - the one giving the indemnity. Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co., 410 S.C. 175, 763 S.E.2d 598 (Ct. App. 2014) (“The court must construe ambiguous terms in an insurance policy liberally in favor of the insured and strictly against the insurer.”). Indemnity provisions in a construction contract are inversely strictly construed against the indemnitee – the party receiving the indemnity. Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018).

In light of the differing public policies behind contractual indemnity and insurance coverage, D.R. Horton’s attempt to draw from insurance jurisprudence is misplaced. The concepts regarding the duty to defend and the duty to indemnify as applied to insurance do

not pertain to construction indemnity contracts. The Supreme Court of South Carolina has long confirmed that common law contractual indemnification includes the duty to defend and that defense of an action is not separate and distinct from the act of indemnification in the context of contractual indemnity. Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971).

Correspondingly, D.R. Horton's argument that this case is not about the indemnity provisions of the Contract, but rather about insurance obligations to which the Anti-Indemnity Statute does not apply is also misguided. The Contract contains separate provisions regarding Hutton's Landscape obligations to provide certain insurance to D.R. Horton. Whether such insurers who are not parties to this action will provide liability coverage to D.R. Horton under the contracts of insurance is a distinct legal issue from the validity of D.R. Horton's contractual indemnity claim against Hutton's Landscapes.

An all-encompassing duty to defend provision, requiring the promisor to defend even claims for the promisee's sole negligence, contravenes public policy because of the unfairness occasioned by the shifting of all attorneys' fees, costs, and expenses to the promisor. The Indemnity Clause in the Contract contains such a duty to defend and violates South Carolina's Anti-Indemnity Statute. In addition, the Reimbursement Clause specifically requires Hutton's Landscapes to repay D.R. Horton for all expenditures accrued on account of the plaintiffs' claims and places no limitation on the reimbursement in violation of the Anti-Indemnity Statute's prohibition against an indemnitor's promise to pay for an indemnitee's sole negligence. Therefore, the Indemnity and Reimbursement Clauses, in which the duties to indemnify and defend are intertwined, are void and

unenforceable. D.R. Horton’s contractual indemnity claim against Hutton’s Landscapes accordingly fails as a matter of law, and the Trial Court correctly dismissed the claim.²

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

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

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

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

² In argument V of its brief, D.R. Horton contends that Judge Price erred in finding that the indemnity provisions in the Contract were unenforceable because they were part of an adhesion contract. Judge Price expressly clarified that his ruling was based upon the violation of public policy and not because the Contract was an adhesion contract. [R.pp. 722, ll. 17-25; 724, l. 15 – 725, l. 2; Nov. 16, 2021 Tr., pp. 52, ll. 17-25; 54, l. 15 – 55, l. 2.] Judge Price properly made his ruling after reviewing the Contract and hearing arguments from counsel regarding whether the indemnity provisions violated the Anti-Indemnity Statute and other public policy. [R.pp. 699, ll. 4-5; 702, l. 24 – 722, l. 25 Id. at pp. 29, ll. 4-5; 32, l. 24 – 52, l. 25.]

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

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

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

To the fullest extent permitted by law, **Contractor shall protect, defend, indemnify, and hold Owner . . . ("Indemnitee"), free and harmless from and against any and all claims, demands, lawsuits or other litigation, actions, causes of action, or other liabilities** of every kind and character (including all costs thereof and attorneys' fees) whether asserted by a purchaser or owner, contractor, or any third party . . . on account of bodily or personal injury, death, or damage to or loss of tangible or intangible property including the loss of use thereof **in any way occurring, incident to, arising out of, or in connection with:** . . . (4) **any negligent or intentional act of Indemnitee**, related in any way to the Work, excepting only liability or claims arising out of bodily injury to persons, death, or damage to property proximately caused by or resulting from the sole negligence or sole intentional act or omission of Indemnitee.

[R.p. 320; Contract, p. 4, § 10.1 (emphasis added).]

Additionally, the Reimbursement Clause requires Hutton's Landscapes to reimburse D.R. Horton for all expenditures accrued on account of the plaintiffs' claims. The Reimbursement Clause does not except intentional acts. [R.p. 320; Id. at p. 4, § 10.2.]

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

The public policy concerns are greater with respect to indemnification for intentional acts. Under the Indemnity and Reimbursement Clauses, D.R. Horton has sought to shift the burden and exposure for its intentional acts to Hutton's Landscapes, for which the plaintiffs have made claims for and sought punitive damages, under the second amended complaint [R.pp. 38-40; Second Am. Compl., ¶¶ 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”).

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

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

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

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

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

The indemnity provisions are not susceptible to division. Rather, the clauses present a series of interconnected purported obligations which D.R. Horton has imposed upon Hutton’s Landscapes. The Indemnity Clause begins by stating that Hutton’s Landscapes is required to “defend, indemnify and hold [D.R. Horton] free and harmless from” a series of conduct, including D.R. Horton’s intentional acts which is violative of public policy. Then the Indemnity Clause goes further to require Hutton’s Landscape to defend more than just the previous listed series of conduct and which in fact mandates that Hutton’s Landscapes defend D.R. Horton for the entirety of its own acts, including its sole negligence and intentional acts. Finally, under the Reimbursement Clause, Hutton’s Landscapes is required to reimburse D.R. Horton for all expenditures that D.R. Horton accrues on account of the plaintiffs’ claims without any limitation on the indemnity, which includes reimbursement for D.R. Horton’s sole negligence and intentional acts. [R.p. 320; Contract, p. 4, §§ 10.1, 10.2.]

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

to defend D.R. Horton for the entire claim, even as to its sole negligence and sole intentional acts, and reimburse D.R. Horton for all expenditures it incurred without any limitation.

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

VI. D.R. Horton’s argument that Judge Price exceeded his authority in urging a settlement is not preserved for review and further has no bearing upon whether the contractual indemnity provisions are enforceable which is a question of law for the court.

D.R. Horton additionally asks this Court to reverse Judge Price’s ruling that the indemnity provisions are void and unenforceable because it contends Judge Price allegedly exceeded his authority in attempting to force a settlement of the case.³

First, this issue is not preserved for appellate review. D.R. Horton neither raised this issue to the Trial Court during the trial or in a post-trial motion. “[W]here an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal.” Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993).

Second, D.R. Horton did not settle with anyone prior to the conclusion of trial. The trial continued and concluded with a jury verdict on the Shafis’ claims.

Finally, whether Judge Price urged a settlement or not has no bearing on the issue of whether the indemnity provisions are or are not enforceable. The issue of enforceability was a matter of law for the Trial Court and is also a matter of law for this Court. Judge Price was either correct on that issue or he was not and any extraneous matters, which may or may not have occurred at trial, do not affect the enforceability of the indemnity provisions at issue. D.R. Horton had a full opportunity to be heard on the enforceability of

³ D.R. Horton also wrongfully accuses Hutton’s Landscapes of revealing confidential settlement information to Judge Price. Only the amount of damages sought by D.R. Horton under its contractual indemnity claim was disclosed, which included over \$1 million in attorneys’ fees. [R.pp. 682, ll. 6-13; 700, ll. 18-25; Nov. 16, 2021 Tr., pp. 12, ll. 6-13; 30, ll. 18-25.] D.R. Horton readily admits to the amount of damages it seeks in its brief to this Court. [See Appellant’s Brief, p. 3 (“The estimated amount involved in this appeal . . . is well in excess of \$1,500,000.”).] Additionally, Rule 408, SCRE “does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.”

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; Nov. 16, 2021 Tr., pp. 29, ll. 4-5; 32, l. 24 – 52, l. 25; 54, l. 15 – 55, l. 2.]

CONCLUSION

For the reasons set forth herein, Respondent Hutton’s Landscapes respectfully requests this Court to affirm the Trial Court’s dismissal of D.R. Horton’s contractual indemnity claim. Additionally, pursuant to Rule 208(b)(6), SCACR, Hutton’s Landscapes joins in the arguments contained in the briefs of the other Respondents to the extent they are applicable and incorporates those arguments herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE SC Court of Appeals

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Respondent Hutton's Landscapes, Inc., do hereby certify that I have this date served the foregoing Final Brief of Respondent, dated May 18, 2023, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

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