RECEIVED
Apr 28 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2018-CP-07-00911
Appellant Case No. 2022-000016

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

v.

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

Of Whom Sarmed and Jessica M. Shafi, Lather Construction, Inc., Lather Construction SC, 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 REPLY BRIEF OF APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. DID JUDGE PRICE HAVE SUBJECT MATTER JURISDICTION AND AUTHORITY TO OVERRULE JUDGE DEBERRY AND DECLARE UNENFORCEABLE THE PARTIES' CONTRACTUAL INDEMNITY AND DUTY TO DEFEND ONLY TWO BUSINESS DAYS AFTER ENTRY OF JUDGE DEBERRY'S WRITTEN SUMMARY JUDGMENT ORDER?
2. DID JUDGE PRICE EXCEED HIS AUTHORITY IN ATTEMPTING TO FORCE A SETTLEMENT OF THE CASE?
3. DID JUDGE PRICE INCORRECTLY READ INTO S.C. CODE ANN. § 32-2-10 A PROHIBITION ON A DUTY TO DEFEND, WHICH WAS NOT INCLUDED IN THAT STATUTE BY THE GENERAL ASSEMBLY?
4. DID JUDGE PRICE INCORRECTLY OVERRIDE THE PARTIES' CONTRACTUAL AGREEMENT BY RULING THAT THE RESPONDENTS' RESPECTIVE DUTIES TO INDEMNIFY AND DEFEND ARE NOT SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATIONS?
5. DID JUDGE PRICE INCORRECTLY RULE THAT THE PARTIES' CONTRACTUAL PROVISIONS CONCERNING INDEMNITY AND DUTY TO DEFEND WERE UNENFORCEABLE AS A MATTER OF LAW?

STANDARD OF REVIEW

Respondents East Coast Construction Cleanup Corp. ("East Coast") and Lather Construction, Inc. ("Lather") misconstrue the procedural posture of the case when they assert that the standard of review for this appeal is for a directed verdict decision. Respondents did not move for directed verdict.[1] The motion before Judge Price was a motion to bifurcate the cross-claims Appellant brought against Respondents East Coast, Lather, and Hutton's Landscapes, Inc. ("Hutton's). However, Judge Price did not bifurcate the cross-claims. Instead, while holding a hearing on a motion to bifurcate the claims, Judge Price reheard the very same motions for

[1]While the Court's decision overruling Judge DeBerry's summary judgment decision may seem like a premature directed verdict because no facts had yet been presented and Appellant had not yet presented its case, it was not. Respondents provided and argued their summary judgment motions and memos of law to the court, not a motion for directed verdict. See also, Appellant's Motion to Alter or Amend Judgment discussing the court's rehearing of a motion for summary judgment. P. 7 – 8. R.pp. 521-522

summary judgment based on the very same legal arguments that Judge DeBerry had denied just two business days before. Accordingly, *as Respondent Hutton's agrees*, the standard of review is one for summary judgment. Appellant addressed this standard in its opening brief. In any event, the Court reviews de novo a directed verdict based on a legal question and must view the evidence in the light most favorable to Appellant, as Hutton's agrees. Hutton's Br. P. 13.

Regardless of whether Judge Price's decision was pursuant to a directed verdict motion or a summary judgment motion, it was procedurally improper because Appellant was not provided (1) prior notice of such a motion, (2) any time to prepare to defend such a motion, or (3) allowed to present any evidence – apart from that presented to Judge DeBerry -- before the motion was decided. *Murdock v. Murdock,* 338 S.C. 322, 334, 526 S.E.2d 241, 248 (Ct. App. 1999) ("without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights").

SUMMARY OF FACTS

The facts relevant to this appeal are simple and fully encompassed in Appellant's Initial Brief.

Most of the facts recited by Respondents are not applicable to the appeal for several reasons. First, Judge Price did not rely on *any* facts presented at trial when he issued his summary judgment decision during a motion to bifurcate. Judge Price ruled as a matter of law based on contractual language and pure speculation out of thin air about contract negotiations.

Second, Hutton's argued first, and Judge Price held Section 10 of Hutton's ICA contract unenforceable as against public policy. After Judge Price made his ruling, East Coast asked for the ruling to apply to it as well. R.pp. 722:17 – 723:6 Therefore, East Coast waived its argument that a different type of contract applies to it. Factual questions were not determined. Indeed, on a

motion for summary judgment, it is wrong to decide factual matters. Also, arguments as to which contract applied was waived when Respondents Lather and East Coast asked for and accepted the court's decision regarding Section 10 of Hutton's ICA contract.

Third, at the time Judge Price ruled, there was no testimony as to almost anything because the first witness had not even finished his direct examination, which, moreover, only focused on when the property was purchased by Appellant. Most of the facts as to what occurred during the trial are not relevant to this appeal because not only are factual disputes not to be decided on a motion for summary judgment, but also because the trial court *had not heard any testimony* other than a portion of the direct examination of the first witness and it had nothing to do with the judge's decision. The judge's comments about the contracts being adhesion contracts and his assuming there was unequal bargaining power were not based on facts because there had not been any testimony as to those matters. R.pp. 636 – 670

For example, Hutton's "factual" recitations, many of which were refuted at trial, beginning with the second paragraph on page 7 of its brief through the end of the first full paragraph on page 10, are irrelevant to this appeal. More importantly, the trial court did not rely on any of the alleged "facts" in Respondents' briefs because those facts had not been presented.[2]

Thus, Respondents' factual references to testimony, documents, and depositions not presented to Judge Price prior to his rehearing the motions for summary judgment are not properly before the Court of Appeals because they were not before the trial court when its decision was made.

[2]Additionally, Respondents are mistaken as to several facts. Contrary to East Coast's representation to this Court, East Coast had not settled with the Plaintiffs before the trial started, had not been provided a release of claims by Plaintiffs, and Plaintiffs had declined to provide such a release at that time. Compare R.pp. 684:14 – 685:3 with East Coast Brief at 1. Also, East Coast contradicts itself when it claims that it did not clean up the lots in one paragraph and then admits it did clean lots in another. East Coast Brief at 3. The contracts for all Respondents required them to inform Appellant if they saw any issues during the land development phase. East Coast had that obligation just as Lather and Hutton's did.

While Hutton's refers to Appellant as the general contractor, that is not accurate and not what the record shows. Witness Rob Bunner's unrebutted testimony confirmed that Lather – not Appellant -- was the general contractor for the land phase. R.p. 781:12 – 21 See also, Attorney Nail's statement that Lather was the general contractor. R.p. 691:14 – 15 The trial only applied to the land phase of the subdivision development.

All the Respondents reached monetary settlements with the Plaintiffs in this case and were not without fault as to the harms Plaintiff's suffered. This appeal concerns Appellant's rights under ICA, Section 10 to indemnification and Respondents' duty to defend Appellant, all of which are payable by Respondents' insurance companies for which Appellant is an additional insured as required by the terms of each of the contracts.

ARGUMENTS

1. DID JUDGE PRICE HAVE SUBJECT MATTER JURISDICTION AND AUTHORITY TO OVERRULE JUDGE DEBERRY AND DECLARE UNENFORCEABLE THE PARTIES' CONTRACTUAL INDEMNITY AND DUTY TO DEFEND ONLY TWO BUSINESS DAYS AFTER ENTRY OF JUDGE DEBERRY'S WRITTEN SUMMARY JUDGMENT ORDER?

Judge Price heard a bifurcation motion that turned into a new summary judgment hearing *after* the trial had started, after the jury was seated, after opening statements, and after the direct examination of one witness had begun. That was procedurally improper. The court then compounded its error when it also reached substantive issues. A motion to bifurcate is a motion on how to *procedurally* resolve a claim. Adjudicating the *merits* of the case is not appropriate on a motion to bifurcate. First the court is supposed to bifurcate if appropriate and only thereafter schedule a hearing or trial to consider the merits related to the bifurcated portion of the case. In *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019), the court bifurcated an equitable division case to consider whether the couple was common law married – but the court

did not reach the merits during the bifurcation hearing. The bifurcation hearing was held to decide whether to schedule a separate merits hearing – not to hold the merits hearing as part of the bifurcation hearing. In this case, Judge Price turned a bifurcation hearing into a substantive hearing on the merits without proper notice and without an opportunity to prepare. He then made factual findings as to adhesion contracts and bargaining power without first allowing any testimony, or having any facts, as to either issue.

Moreover, bifurcating the contractual and indemnification issues from the fault issues would never be proper in this case because the indemnification and fault issues overlap. "Where evidence relevant to the issues of both liability and damages overlap, bifurcation is inappropriate." *Creighton v. Coligny Plaza Ltd. P'ship,* 334 S.C. 96, 108, 512 516 S.E.2d 510, 516 (1998) (citing *Fortune v. Gibson,* 304 S.C. 279, 403 S.E.2d 674 (Ct. App. 1991)). The bifurcation motion had no support in the law or facts of this case, and was simply a ruse to then present the summary judgment motion – which had been denied – to a new judge. This was not proper. Whether the merits hearing was a rehearing of the same summary judgment motion or a directed verdict motion that no party had requested or properly noticed, it was procedurally improper and Judge Price's improper ruling prejudiced Appellant in the jury's eyes. When all the cross-defendants, which were in court at the outset of the trial, were relieved by him of their indemnification obligations and disappeared, Appellant was painted as the sole wrongdoer.

Respondent Hutton's and Lather led the court down this improper procedural path and now argue that they had no other means to overcome Judge DeBerry's denial of their summary judgment motions. That is not correct. Respondents could have asked Judge DeBerry to reconsider his decision in a timely motion to reconsider or moved for a directed verdict at the

appropriate time.[3] They did not do so. They could also have filed post-trial motions and appealed the question of whether the indemnity provision was unenforceable as against public policy after the trial. A second summary judgment hearing on the same legal issues after trial started with a new judge just two business days after the initial decision and without proper notice is not the proper procedure and will lead to countless similar sharp practices if this practice is allowed.

Respondents claim that Appellant's counsel did not object to the bifurcation motion being heard in the middle of trial. Appellant's counsel *did* object at the time the bifurcation motion was presented and in post-trial motions. Appellant's counsel, "Ms. Peterson: As a general matter, we believe that the motion to bifurcate is not proper to bring procedurally at this time." R.p. 710:14 – 16 Appellant's counsel also objected to Judge Price rehearing the summary judgment motions that Judge DeBerry had ruled upon.[4] "We do not think it is procedurally appropriate. Again, once again, be arguing the enforceability of the contract provisions given that the Court has already found that these provisions are not unenforceable as a matter of law." R.p. 710:17 – 20

Appellant again objected to the procedurally improper bifurcation motion and summary judgment hearing in its Motion to Alter or Amend Judgment. Appellant argued, "It was procedurally improper for the Court to take up the Motion during trial and it was further improper for the Court to receive re-argument of the already denied motion for summary judgment in the guise of the bifurcation argument, because in addition to rehearing and reversing

[3]Respondents argue that because a denial of summary judgment is not appealable, does not finally determine the merits of the case, and does not have the effect of striking any defenses, Judge Price could overrule Judge DeBerry two days later after trial began and without proper notice. But that is not right, and no Respondent has cited to a single case that reaches that result.

[4]East Coast claims that Judge DeBerry did not rule on its summary judgment motion. While that is technically true, Judge DeBerry did rule on the exact same legal arguments regarding Section 10 of the ICA contract's enforceability of the indemnification, duty to defend, and ability of Appellant to defend itself and he did not find the provisions to be unenforceable. Judge DeBerry did find there was a factual question, which is the only difference raised by any of the Respondents. Judge DeBerry only reached the factual question because he had concluded that Section 10 was not unenforceable regarding public policy. It is axiomatic that judges do not reach issues unnecessarily.

the Court's ruling on Summary Judgment the Court effectively heard a Directed Verdict motion by [Respondents] before any evidence (much less [Appellant's] case-in-chief) on the issue was presented. Before [Appellant] could present its case in chief, its cross-claims were dismissed perfunctorily." P. 7 – 8. R.pp. 521 – 522 Appellant objected and preserved the issue for appeal.

Respondent East Coast misunderstood or has mischaracterized the meaning in the discussion between Ms. Peterson and Ms. Lucey regarding the court's ability to rehear the summary judgment decision. East Coast Br. 11. In that discussion, Appellant's attorney Ms. Peterson confirmed that "a judge has already decided as a matter of law that it's not unenforceable." R.p. 680:5 – 6 That statement encompasses the notion that the contract is not unenforceable for public policy reasons, i.e., S.C. Code Ann. § 32-2-10. Then Ms. Peterson says: "the only issue that is a matter of law is is it enforceable as a matter of law." R.p. 680:10 – 11 Then she finishes, "the judge can say "No, it's not. Go to the jury." R.p. 680:14 – 15 East Coast has represented this as Ms. Peterson agreeing the court could rehear the summary judgment motion; however, that is not what she said, and it is not what the judge understood either. As discussed in Appellant's Initial Brief, Judge Price agreed with Appellant's counsel that he could not rehear the summary judgment motion. R.pp. 676:23 – 677:6 What Ms. Peterson was saying here is that the contract could be (1) unenforceable for public policy reasons (which Judge DeBerry had decided it was not unenforceable); (2) enforceable as a matter of law, meaning based on the four corners of the contract and the parties' signature it was enforceable; or (3) something factually was unclear and that factual question would go to the jury. R.p. 677:7 – 15 Appellant repeatedly objected to the court rehearing the motion for summary judgment. East Coast is simply confused at best or attempting to mislead at worst. The court's procedure and decision left the jury thinking that the other defendants had been exonerated by Judge Price and

that the Appellant was the only one responsible for the Plaintiffs' claims because first there were lots of defendants/cross-defendants and then there was one, Appellant. Of course, Appellant objected. Appellant was prejudiced.

When Judge Price reheard the summary judgment motions there had been no change in law or facts in the intervening two business days' time[5] making his decision improper. "It is axiomatic . . . a Circuit Judge does not have the power to reverse the ruling of another Circuit Judge." *Tisdale v. Am. Life Ins. Co.,* 216 S.C. 10, 13, 56 S.E.2d 580, 581 (S.C. 1949). While respondents argue and cite case law for the proposition that the denial of summary judgment decides nothing and is not the law of the case, it remains that the procedure to overcome a denial of summary judgment requires a party to file a motion to reconsider with the judge who made the summary judgment decision or move for a directed verdict. Respondents did neither and Judge Price agreed he could not rehear the summary judgment motion. R.pp. 676:23 – 677:6 None of Respondents' cases allow a second judge to overrule another judge's decision two days later when nothing has changed except who the judge is.

Respondent Lather misunderstands Appellant's position and its argument to the court in its Motion to Alter or Amend when Lather asserts that Appellant called the court's decision a directed verdict and quotes a small portion out of context; however, that was not the case. Appellant's Motion to Alter or Amend Judgment, 7 – 8. R.pp. 521 - 522 Appellant likened what

[5]East Coast attempts to use its factual dispute as to which contract applied to East Coast as a basis for there being "new facts" for a second summary judgment hearing; however, Judge Price did not make any ruling based on new facts. Judge Price only held that Section 10 of the ICA applicable to all three Respondents was unenforceable as against public policy. Every legal argument about that provision that East Coast made had already been heard and decided by Judge DeBerry when the very same arguments were made by Lather and Hutton's. Also, East Coast abandoned its argument that Section 10 of the ICA did not apply to it when it asked the court to confirm that its ruling finding Section 10 of the ICA violative of public policy applied to East Coast as well. R.pp. 722:17 – 723:6 East Coast waived its argument that Section 10 did not apply to it, abandoned the argument and factual position, and, under the doctrine of judicial estoppel, cannot argue that position on appeal. *Hayne Federal Credit Union v. Bailey,* 327 S.C. 242, 251, 489 S.E.2d 472,477 (1977). Any of the foregoing moots East Coast's claims.

the court did to effectively hearing a directed verdict motion before Appellant was allowed to present any evidence – Appellant never said it was a directed verdict motion. Such a motion would have been entirely improper at that stage of the trial. Nonetheless, if it was a directed verdict motion, then it is equally improper to impose such a judgment without proper notice, an opportunity to be heard, and testimony and other evidence. The Court found that the contract was an adhesion contract and that there was unequal bargaining power without any testimony to support either conclusion. Judge Price never indicated he made his decision based on anything other than those two theories. But no testimony or evidence had been received and Appellant was deprived of any opportunity to present any testimony.

The time frame from when Hutton's raised the motion to bifurcate on the morning of the second day of trial to the time the Court decided to rehear the summary judgment motions as part of the motion to bifurcate was about an hour and forty minutes, but that was not preparation time for the motion to bifurcate because the *judge ordered the parties to spend that time discussing settlement and if a settlement was not reached, the Court would hear the motion*. "We will take about an hour and 40 minutes to see if you-all can work something out." R.p. 698:20 – 22 There was no meaningful time for counsel to prepare and no adequate notice. Additionally, Appellant understood a procedural motion was being heard, not a substantive rehearing of Respondents' motions for summary judgment, which Judge Price had earlier stated he could not rehear. R.pp. 676:23 – 677:6 It only became evident to Appellant that Respondents preplanned to have Judge DeBerry's summary judgement decision revisited when Appellant's counsel learned shortly before the motion to bifurcate hearing began that Respondents had provided their summary judgment motions to Judge Price in an ex parte delivery to the court. Appellants Motion to Alter or Amend Judgment, 5-6. R.pp. 519 – 520 Respondent Hutton's bifurcation motion, improper as

to timing, notice, and in violation of the prohibition to bifurcate when there are overlapping issues coupled with Respondents' ex parte delivery of their summary judgment papers to the judge in advance, was a subterfuge to have the court rehear Respondent's summary judgment motions. Then Judge Price overruled Judge DeBerry during the procedural motion to bifurcate hearing.[6]

2. DID JUDGE PRICE EXCEED HIS AUTHORITY IN ATTEMPTING TO FORCE A SETTLEMENT OF THE CASE?

Respondents assert that Appellant failed to preserve this issue; however, they misapprehend the nature of Appellant's concerns and the way the concerns manifested as the trial continued. Appellant became increasingly aware that the court appeared to have a motive to find the cross-claims unenforceable to quicken the trial's conclusion. Moreover, there really is no way to preserve an issue of a judge's motivation. The transcript bears out Appellant's concerns about the way Judge Price conducted the trial, the untimely bifurcation turned summary judgment hearing, the pressure to settle, the invasion of attorney client privilege, the allowance of settlement details over Appellant's objection, and the threat of additur – all discussed in detail in Appellant's initial brief. There was no possibility of the trial extending into another week – the judge was unhappy it lasted as long as it did and blamed Appellant's cross-claims for the situation.

Additionally, Respondent's claim that there was no issue with Hutton's attorney providing the court specific dollar amounts regarding settlement or the Respondents positioning

[6]East Coast argues that it performed minimal work in comparison to the other Respondents and that it made factual arguments that the ICA did not apply to it. None of that is relevant to this appeal. Judge Price looked at only one contract, the ICA. Judge Price did not rule on any other contract. East Coast asked Judge Price to apply the ICA contractual ruling to East Coast so it cannot now disavow that contract. Finally, summary judgment is not proper if there are factual matters at issue, so East Coast's argument about its version of the facts only underscores the error of Judge Price granting summary judgment.

Appellant as obstructive or unreasonable in settlement discussions misses the point. None of those things were appropriate *because* the judge was the decision-maker on the legal issue of the cross-claims before the court. Respondents' sharp practices and the judge insinuating himself so deeply into the settlement discussion was no different than giving that same information to the jury and then having the jury determine the case. In both cases, the decision-maker is not supposed be involved in the details of settlement discussions.

Respondents misunderstand Rule 408, SCRE. This a rule of evidence. The Respondents' smear of the Appellant was not offered as evidence. It had nothing to do with the contractual language. Also, the exclusion of some evidence by Rule 408 does not mean that prejudicial evidence can come in. Rule 102 SCRE states that "these rules shall be construed to secure fairness." More to the point is the Code of Judicial Conduct, Rule 501, S.C. App. Ct. R., especially Canons 1, 2, and 3.

3. DID JUDGE PRICE INCORRECTLY READ INTO S.C. CODE ANN. § 32-2-10 A PROHIBITION ON A DUTY TO DEFEND, WHICH WAS NOT INCLUDED IN THAT STATUTE BY THE GENERAL ASSEMBLY?

In order to confuse, Respondents deliberately conflate a duty to indemnify and a duty to defend. The two concepts are distinct, as the South Carolina Legislature has repeatedly recognized and shown. The South Carolina Legislature considered and *declined* to add a duty to defend to the very statute at issue, S.C. Code Ann. § 32-2-10, when it considered an amendment to that statute. S. 422, 124th Sess. (2021) (included in the designations on the Record on Appeal). R.pp. 1023 – 1025 The proposed amendment, in paragraph (D) would have expressly prohibited a duty to defend in construction contracts that include design professional services. Additionally, the proposed amendment *would not* have prohibited a duty to defend in construction contracts that did not include design professional services *such as this very contract*.

See Paragraph (B), S. 422, 124th Sess. (2021). R.p. 1024 The legislature chose not to amend S.C. Code Ann. § 32-2-10 and the proposed amendment clearly shows the legislature knows how to include a duty to defend when it wants to – *and it decided it does not want to*. The legislature has clearly spoken on this issue. [7]

The legislature has shown in other legislation as well that it knows how to draft a statute that includes separately both a duty to indemnify and a duty to defend. See e.g., H. 4048, 2022, 124th Sess. (S.C. effective date May 13, 2022) (discussed and quoted in Appellant's initial brief); S.C. Code Ann. § 1-11-440 (repealed May 13, 2022); S.C. Code Ann. § 12-4-325 (repealed May 13, 2022) (passing legislation providing a duty to indemnify and a duty to defend). R.pp. 1026 – 1028; R.pp. 1030 – 1032; R.pp. 1034 – 1037

Black's Law Dictionary defines indemnity as a "duty to make good any loss, damage, or liability incurred by another. (9th ed. 2009). An indemnity clause is a "contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur. *Id.* A duty to defend is different. A duty to defend is the obligation to assume the defense obligations and costs. The Massachusetss's Court in *Herson v. New Boston Garden Corp.*, 40 Mass. App. Ct. 779, 787, 667 N.E.2d 907, 915 (1996), recognized this difference when it declined to apply its anti-indemnification statute to the duty to defend provision in a construction case. The *Herson* court held, "Section 29C makes no reference to 'duty to defend' undertakings by subcontractors, but is limited to subcontract provisions which require a subcontractor 'to indemnify.' Had the legislature wished to encompass the often utilized 'duty to defend' provisions within the protective ambit of § 29C, it presumably would have said so

[7]Other state legislatures have separated duty to indemnify and duty to defend, as well. For example, the North Carolina Legislature amended its Chapter 22B, to prohibit a duty to defend in design professional contracts. N.C. §22-B-1(c). R.p. 1036

expressly." *Id.* Likewise, the South Carolina Legislature also would have expressly included it had it desired to do so.

In this case, Section 10 of ICA includes a duty to defend. Appellant and the Respondents expressly agreed that the "contractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify . . ." Section 10 of the ICA contract. Likewise, in the *Herson* case, the duty to defend was also a separate duty. When the duty to defend is a separate duty, it performs as a separate duty and is not subsumed into the indemnity provision – nor is it prohibited under the anti-indemnification statute. The *Herson* court recognized this when it explained:

> Mass. Eletric maintains that, in noninsurance contracts, the obligation to indemnify includes the obligation to defend and that, because the defense obligation is thereby integral to the indemnity obligation, § 29C applies. It has been held that when a right to indemnify is conferred, but no provision had been made as to defense costs, the indemnitee may also recover reasonable and necessary defense costs incurrred in resisting a claim within the compass of the indemnity, ... However, this has no application to circumstances where, as here, the indemnity clause expressly imposes a separate obligation to defend the indemnitee. *Id. (citation omitted).*

That is exactly this case. In this case, the duty to defend is separate and is not subject to S.C. Code Ann. § 32-2-10. Respondents have not cited a single South Carolina case or statute that says otherwise.

Additionally, the ICA contract requires the Respondents to provide Appellant an insurance contract and name it as an additional insured. Insurance contracts are expressly excluded from S.C. Code Ann. § 32-2-10's application.

The insurance provision relieves the Respondents of financial risk and places it on insurance companies, so the real parties in interest here are the insurance companies. Appellant tendered the defense to each Respondent and their insurance companies consistent with the duty to defend and insurance provisions. R.p. 715:13 – 18; R.p. 718:17 – 22

In an attempt at a new basis for overcoming their contractual obligations, Respondent Hutton's for the first time on appeal, claims Appellant has a "reimbursement clause" in the contract that somehow violates S.C. Code Ann. § 32-2-10 itself. Hutton's Br. P. 17-26. Appellant thinks Respondent is referring to the clause that allows Appellant to defend itself and recapture those costs. ICA Contract, § 10.2. r.p. 882 Respondents attempt to argue that provision 10.2 requires Respondents to pay for Appellant's sole negligence; however, that provision does not require Respondents to pay anything towards any judgment or settlement in any Plaintiff's favor. Nor does the provision require any Respondent to pay any Plaintiff any sums for any intentional wrongdoing by Appellant. It is simply a provision that provides that Appellant may provide its own defense. And when Respondents try to make defense costs part of their indemnification obligation they run squarely into the contractual provision that *excludes* indemnification for Appellant's sole fault. Under the "general" provision of the indemnity the contract provides, "Notwithstanding the foregoing, nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnitee." Section 10.1 ICA. R.p. 882 Sole negligence is expressly excluded.

As discussed previously, Appellant was forced to defend itself after each Respondent and their insurance carriers refused to provide the contracted for defense and denied Appellant its rights as an additional insured under each insurance policy. Appellant had no other choice after the insurance companies for each Respondent acted in bad faith and ignored Appellant's repeated tender of the lawsuit. R.p. 715:13 – 18; R.p. 718:17 – 22 Hutton's attempt to paint that contractual provision as an improper indemnity provision, is a misguided atttempt to stretch § 32-2-10 beyond all reasonable bounds of statutory interpretation. It is a duty to pay for a defense provision that provides Appellant a safeguard in the event that (i) a subcontractor breaches the contract and fails to obtain the insurance it is required to obtain with Appellant as an additional insured, (ii) an insurance company refuses the tender (as happened in this case), (iii) an insurance company acts in bad faith, or (iv) an insurance company attempts to provide a half-hearted defense. There is nothing in S.C. Code Ann. § 32-2-10 that prohibits such a provision. Had the legislature intended to prohibit such provisions, it knew how to do so expressly. It did not do so.

4. DID JUDGE PRICE INCORRECTLY OVERRIDE THE PARTIES' CONTRACTUAL AGREEMENT BY RULING THAT THE RESPONDENTS' RESPECTIVE DUTIES TO INDEMNIFY AND DEFEND ARE NOT SEPARATE, DISTINCT, AND INDEPENDENT OBLIGATIONS?

If the court finds either the duty to defend (or pay defense costs in Section 10.2) violates public policy, the provision(s) could be severed from the duty to indemnify. The parties agreed each of those provisions is separate and distinct, which allows the Court to sever the provision(s). South Carolina courts enforce the valid provisions of a contract in accordance with the parties' intent at the time the contrct was executed. *See Beach Co. v. Twillman, Ltd.,* 351 S.C. 56, 59-60, 566 S.E.2d 863, 866-67 (S.C. Ct. App. 2002). If the court finds a provision unenforceable, "the next question becomes whether, under any appropriate circumstances, the . . . agreement can be reformed, or the identified illegal provisions . . . severed, thus

preserving . . . [the] agreement between the parties." *Hooters of Am., Inc. v. Phillips,* 39 F. Supp. 2d 582, 624 (D.S.C. 1998), *aff'd* 173 F.3d 933 (4th Circ. 1999). A provsion may be severed when it is susceptible to division, has two or more parts, is not dependent on other parts of the contract, and is not intended by the parties to be an interdependent clause. *Id.; see also Columbia Architectural Grp., Inc. v. Barker,* 274 S.C. 639, 641, 266 S.E.2d 428, 429 (S.C. 1980).

Respondents' arguments that the duty to defend provision is not severable from the duty to indemnify ignores all reasonable basis for interpreting a statute and contract provisions. The parties' contract *specifically* shows the parties' understanding and intent when it states that the "Contractor's duty to defend is a separate, distinct, and independent obligation from its duty to indemnify . . ." ICA §10. R.p. 882 Section 10.2 is its own provision, which is also severable. It could not be clearer that the parties intended the provisions to be separate, distinct, and independent. Such clauses are severable.

Respondents also attempt to merge all the provisions together to attempt to argue the provisions violate S.C. Code Ann. § 32-2-10 because they require Respondents to indemnify Appellant for intentional wrongful acts. However, their merger argument is defeated by the contractual provision prohibiting indemnification for Appellant's sole fault. Under the "general" provision of the indemnity the contract provides, "Notwithstanding the foregoing, nothing herein shall require indemnity for losses caused solely by fault or negligence of the indemnitee." Section 10.1 ICA. Sole negligence is expressly excluded. Also, as discussed above, a duty to defend is not the same as a duty to indemnify. Likewise a provision allowing Appellant to defend itself and to seek reimbursement is also not an indemnity provision. It is merely the mechanism by which Appellant may have the benefit of its duty to defend. As a practical matter, it is common in all types of commercial and insurance contracts that one party agrees to provide the

entire defense should things go awry. It make sense to have one party in charge of the litigation and to see it through all its stages. It is also why the additional insured provision is included in the contracts to expressly allocate which insurance company would handle the defense against a third-party claim. More importantly, the parties agreed how any necessary defense would be undertaken and the State of South Carolina honors businesses' contracts on such matters.

5. DID JUDGE PRICE INCORRECTLY RULE THAT THE PARTIES' CONTRACTUAL PROVISIONS CONCERNING INDEMNITY AND DUTY TO DEFEND WERE UNENFORCEABLE AS A MATTER OF LAW?

S.C. Code Ann. § 32-2-10

Judge Price did not make any ruling regarding the indemnity and duty to defend provisions being enforceable or unenforceable pursuant to S.C. Code Ann. § 32-2-10. His verbal order is silent on this issue. Hutton's conceded at the hearing on the motion for summary judgment that the duty to indemnify does not require Respondents to indemnify Appellant for its sole negligence. R.p. 705:5 – 7 The other Respondents joined Hutton's arguments to the court and each party joined the others' papers and arguments throughout the litigation. R.pp. 683:17 – 684:5 Accordingly, the Respondents agreed that the ICA Section 10.1 duty to indemnify provision does not include a duty to indemnify Appellant for its sole negligence. *That is the only form of indemnification that S.C. Code Ann. § 32-2-10 prohibits and Respondents agreed that the duty to indemnify does not violate the statute.*

The only way Respondents argued before the trial court that S.C. Code Ann. § 32-2-10 is violated is when the Section 10.1 duty to indemnify is conflated with the duty to defend. But as discussed previously, the two duties are distinct and the legislature chose not to prohibit a duty to defend. A duty to indemnify should not be conflated with a duty to pay defense costs. They are different duties as discussed previously and none of the duties violates public policy. *See e.g.,*

Sloan Constr. Co. v. Central Nat'l Ins. Co. of Omaha, 269 S.C. 183, 186-187, 236 S.E.2d 818, 820 (1977); *City of Hartsville v. South Carolina Municipal Insurance and Risk Financing Fund,* 382 S.C. 534, 535, 677 S.E.2d 574, 575 (2009); *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.,* 274 S.C. 468, 265 S.E.2d 38 (1980); *Concord & Cumberland Horiz. Prop. Regime v. Concord & Cumberland, LLC,* 424 S.C. 638, 646-47, 819 S.E.2d 166, 170 (S.C. App. 2018); *Herson v. New Boston Garden Corp.*, 40 Mass. App. Ct. 779, 787, 667 N.E.2d 907, 915 (1996); *Duty to Defend,* Black's Law Dictionary (9th ed. 2009); *Duty to Indemnify*, Black's Law Dictionary (9th ed. 2009). The South Carolina Legislature does not conflate the terms. See e.g., H. 4048, 2022, 124th Sess. (S.C. effective date May 13, 2022); S.C. Code Ann. § 1-11-440 (repealed May 13, 2022); S.C. Code Ann. § 12-4-325 (repealed May 13, 2022). R.pp. 1026 – 1028; R.pp. 1030 – 1032; R.pp. 1034 – 1037 Respondents have not cited a single South Carolina authority that says a court should conflate the two distinct and separate duties into one. Therefore, neither the duty to indemnify nor the duty to defend violate S.C. Code Ann. § 32-2-10.

Hutton's attempt to throw another provision into the mix, raised for the first time on appeal, the newly coined so-called "Reimbursment Clause" also does not violate S.C. Code Ann. § 32-2-10 because all that clause does is allow Appellant to defend itself and to be reimbursed its costs. ICA Section 10.2. That provision does not add any additional duty to indemnify. That provision also does not require Respondents to indemnify Appellant nor does it require Respondents to pay any damages to a third party – it is purely a defense clause.

Finally, as stated previously, if the duty to defend is embraced by the indemnity provision, the contractual provision prohibiting indemnification for Appellant's sole fault or negligence provides assurance that S.C. Code § 32-2-10 is respected.

Clear and Unequivocal

Judge Price made no finding or holding as to whether the duty to indemnify provision is clear and unequivocal. He simply never reached the issue; nor did he discuss it. For that reason, there is nothing on that issue to appeal.

The indemnity language is clear and unequivocal as to any concurrent negligence between Appellant and each Respondent. The duty to indemnify provision follows the language the court suggested in *Concord & Cumberland Horiz. Prop. Regime v. Concord & Cumberland, LLC,* 424 S.C. 638,658 n. 6, 819 S.E.2d 166, 176 n.6 (S.C. App. 2018). Respondents do not identify a single sentence that is not clear and unequivocal. The provisions clearly exempt sole negligence and fault from being indemnified and clearly state that concurrent negligence will be indemnified. Respondents' cases do not address the language in the contract between the parties and ignore that the language in the contract is the language this very Court of Appeals suggested as clear and uneqivocal. Additionally, should any provision be deemed not clear and unequivocal, as discussed previously, the provisions may be severed as the parties expressly stated the provisions are separate and distinct duties.

CONCLUSION

Appellant requests that the Court of Appeals reverse Judge Price's summary judgment order and remand the case for trial on D.R. Horton's cross-claims against the Respondents before a different trial judge, with the ruling by the Court of Appeals being additionally that the contractual indemnity and duty to defend obligations are (1) enforceable against Respondents as a matter of law, (2) separate and distinct obligations, as the contract states, and severable, and (3)

that Respondents waived and abandoned any argument the ICA contract with Section 10 does not apply to them.

April 28, 2023

Respectfully,

s/Carl F. Muller, SC Bar #4131
Carl F. Muller, Attorney-at-Law, P.A.
PO Box 1717
Greenville, SC 29602-1717
864-991-8904 Phone
864-751-2831 FAX
carl@carlmullerlaw.com
Attorney for Appellant
D. R. Horton, Inc.

John T. Crawford, Jr., (S.C. Bar No. 69355)
Kenison, Dudley & Crawford, LLC
704 McBee Ave.
Greenville, South Carolina 29601
(864) 242-4899
(864) 242-4844 (fax)
crawford@conlaw.com
Attorneys for Appellant
D. R. Horton, Inc.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2018-CP-07-00911
Appellant Case No. 2022-000016

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

v.

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

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief of Appellant complies with Rule

211(b), SCACR.

April 28, 2001

s/Carl F. Muller, SC Bar #4131
Carl F. Muller, Attorney-at-Law, P.A.
PO Box 1717
Greenville, SC 29602-1717
864-991-8904 Phone
864-751-2831 FAX
carl@carlmullerlaw.com
Attorney for Appellant
D. R. Horton, Inc.

John T. Crawford, Jr.,
S.C. Bar No. 69355)
Kenison, Dudley & Crawford, LLC
704 McBee Ave.
Greenville, South Carolina 29601
(864) 242-4899
(864) 242-4844 (fax)
crawford@conlaw.com
Attorneys for Appellant
D. R. Horton, Inc.