

Mar 25 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

APPELLATE CASE NO. 2022-000016

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

PLAINTIFFS,

v.

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

DEFENDANTS,

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

RESPONDENTS,

And

D.R. Horton, Inc. is the

APPELLANT.

Reply to Return to Petition for Rehearing and/or Motion for Clarification

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Respondents Hutton's Landscapes, Inc., East Coast Construction Cleanup Corp., and Lather Construction, Inc. (together, "Respondents" or "Subcontractors"), by and through their undersigned counsel, respectfully submit this Reply to the Return to Petition for Rehearing and/or Motion for Clarification (the "Return").

Appellant's Return mischaracterizes Respondents' Petition, unnecessarily confuses the issues, and is premised on unfounded statements that Respondents caused "due process violations" and that the request for instructions from the Court is "designed to unjustly benefit Respondents on remand." However, regardless of Respondents' arguments, it is clear that both Respondents and Appellant agree on two key issues: (1) the procedural irregularities below created confusion regarding the controlling trial court's summary judgment order(s); and (2) the parties will most likely be back in this Court if this Court declines to rule on the validity and enforceability of contracts that are part of the record, or declines to provide instructions to the trial court on remand.

In the interests of judicial efficiency, Respondents simply request this Court either (a) decide the narrow issue of the validity of the contractual indemnification provision on rehearing, or (b) provide further instructions to the trial court on remand. Respondents are not asking this Court to assume the role of a trial court. Rather, Respondents seek a clear and efficient resolution of a narrow legal question regarding the contracts, which will provide finality to all parties or, in the alternative, guidance on how to interpret this Court's opinion on remand. This Court has inherent power to both decide the legal question and to instruct the trial court and should do so in this unique circumstance.

Appellant's Return first argues that Judge DeBerry's order (finding "factual issues" and denying summary judgment) is now controlling, thereby cutting off this Court's authority to act as a factfinder. Yet, Appellant does not clarify what, if any, "factual issues" apply to the legal question

of whether the contractual indemnification provision is valid and enforceable. The relevant contract provision was presented to Judge DeBerry and again, repeatedly at trial to Judge Price. Appellant had notice of Respondents' arguments that the indemnification provision was void and unenforceable, and Appellant had adequate opportunity to be heard on the issue.

The contracts are in the record and Appellant makes no argument now that relevant facts are in dispute nor that additional facts would impact the legal question here. Judge DeBerry's comment regarding "factual issues" could not, as a matter of law, supplant the legal question of contract enforceability. Thus, Judge Price had authority to rule on the validity of the contract provision to manage his docket and because Judge DeBerry's order was ambiguous. *See Milliken & Co. v. Morin*, 399 S.C. 23, 731 S.E.2d 288 (2012). Further, this Court has the authority to resolve the purely legal issue now. *Dupree v. Younger*, 598 U.S. 729, 143 S.Ct. 1382 (2023) (a post-trial motion is not required to preserve for review a purely legal issue after denial of a summary judgment motion).

Appellant's attempts to distinguish the holding set forth in *Ward v. West Oil Co., Inc.* on the basis that the gambling machines at issue in *Ward* were per se illegal, while indemnity and defense obligations may be legal. 387 S.C. 268, 692 S.E.2d 516 (2010). This is a distinction without a difference. The *Ward* Court analyzed and incorporated precedent relating to the long-held principal that, prior to enforcing rights under a contract, a court must first determine whether the subject matter of that contract violates public policy or is otherwise unenforceable. *See e.g. McMullen v. Hoffman*, 174 U.S. 639, 651, 669, 19 S.Ct. 839, 844, 851 (1899) ("enforcing an old rule" that a court may not permit recovery or enforce rights under a contract that is illegal or against public policy); *White v. J.M. Brown Amusement Co., Inc.*, 360 S.C. 366, 601 S.E.2d 342 (2004) (finding subsequent performance under a contract originally legal, but later made illegal due to

change in law, is against public policy). Appellant's arguments that the contracts are factually different, or that D.R. Horton strenuously opposed suggestions that its contracts violate the law, are irrelevant. The issue is whether or not the contracts, that are part of the record, are void and unenforceable as a matter of law and public policy, which is inherently within this Court's jurisdiction.

Appellant likewise argues this Court's recent decision in *The Retreat at Charleston Nat'l Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC* should be disregarded because the facts are different. No. 2021-001050, 2025 WL 466562 (S.C. Ct. App. Feb. 12, 2025). Respectfully, this Court is eminently qualified to apply its legal holdings to cases with factual differences and may do so here. *The Retreat* opinion does, in fact, address Respondents' argument that a contract clause requiring a subcontractor to defend a builder for its sole negligence violates the Anti-Indemnity Statute and is against public policy. *The Retreat* opinion finds that such a clause is a disguised indemnity provision for defense costs and further finds clauses for indemnification for attorneys' fees and expenses without regard to fault violate the Anti-Indemnity Statute and are unenforceable as a matter of law. *Id.*

Similarly, Appellant alleges without any support, that "Respondents' previous procedural maneuvers...led to this appeal and reversal" in support of the argument that clarifying instructions on remand are unnecessary. If anything, Appellant's arguments further buttress the confusion and need for clarification: two trial court judges declined to provide clear written orders on the issue raised on appeal. Judge DeBerry ruled there were "factual issues," which Appellant argues somehow apply to the legal question presented here. Judge Price subsequently ruled on the legal issue regarding the enforceability of the contracts, but this Court found his order was procedurally improper. Appellant and Respondents likely disagree now on what Judge DeBerry's order decided,

if anything, as to the validity of the indemnification provision. This Court's opinion reversed the dismissal of Appellant's crossclaims against Respondents in a case that was decided at trial, on the merits, without participation from Respondents, where the jury found fault as to Appellant without allocating any fault to subcontractors.

Judge DeBerry's pre-trial order is now prevailing, yet the order provides no clarity as to the legal question presented here nor how the trial court can decide the dispositive issue. Respondents merely ask this Court, in the interests of judicial efficiency and expedient resolution of litigation, to provide clarity and finality to this issue that both sides agree is murky and requires resolution by the Court to avoid further appeal. This Court is in the best position to do so now.

For all of the foregoing reasons, and those set forth in the Petition, Respondents respectfully request rehearing or clarification of this Court's opinion.

RECEIVED

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PROOF OF SERVICE

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

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Dated: March 25, 2025