RECEIVED

Jun 09 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Bentley D. Price,
Circuit Court Judge

Appellate Case No. 2025-000783

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

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

And

D.R. Horton, Inc. is the **Respondent.**

RETURN TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The South Carolina Supreme Court should deny the Petition for Writ of Certiorari. The Court of Appeals held that it did not have a sufficient record on appeal to decide the merits, which is what the Writ seeks. Opinion February 19, 2025, p. 6-7.

This case does not meet any of the criteria for granting a Writ of Certiorari at this time. Rule 242, SCRAP. The Court of Appeals decision was unanimous, and the decision does not conflict with a prior decision of this Court. No constitutional issues are directly involved, there is no federal question included, and the Court of Appeals decision does not conflict with the United States Supreme Court. There also is no urgency that would warrant bypassing the normal legal process that aids the courts and litigants in a full flushing out of the issues. At this time, the case has been remanded to the Circuit Court where the posture is a denial of Petitioners' motions for summary judgment on Respondent's cross claims. Like other cases where summary judgment has been denied, the Circuit Court can handle the case in the ordinary course to allow a full and fair trial with procedural due process. Circuit Courts handle cases on remand routinely.

Procedural due process is the core of this appeal. Procedural due process matters to the integrity, fairness, and perception of fairness in the judicial system. Judge Price was reversed because he denied Respondent D.R. Horton procedural due process.

The Petition for a Writ of Certiorari relies on this Court deciding that procedural due process is a mere trifling nuisance that may be disregarded. It should not. This Court should deny Petitioners' request to impede due process and instead affirm the Court of Appeals' decision to overrule Judge Price's Orders and its remand of the case to the Circuit Court to try Respondent's cross-claims. The Court of Appeals agreed with Respondent that overarching procedural due process violations occurred during the trial. The Court wrote, "we hold Judge

Price could not dismiss D. R. Horton's contractual indemnity cross-claims based on a motion to bifurcate and motion for summary judgment, or a motion for directed verdict." Opinion February 19, 2025, p. 7. In the page after that, the Court of Appeals held that "Judge Price dismissed the cross-claims without notice to D. R. Horton" and that this violation of due process was error, too. *Id.* at 8.

The gravamen of the Petitioners' summary judgment motions was that the contractual indemnification and defense obligations in the business contracts between the parties were unenforceable.[1] The Hon. H. Steven DeBerry denied the motions on Friday, November 12, 2021, finding genuine issues of material facts existed. R.pp. 1-6.[2] Trial began on Monday, November 15, 2021 before the Hon. Bentley Price. During the second day of trial while the first witness was only partly through his testimony, just two business days after Judge DeBerry denied Petitioners' summary judgment motions, and at Petitioners' urging that he do so, Judge Price verbally dismissed Respondent's cross-claims *during a hearing to bifurcate and without*

---

[1] Section 11 of the contracts requires Petitioners to provide insurance for those obligations and to name appellant D. R. Horton as an additional insured. (All three contracts between appellant and respondents) R.pp. 942 – 948; R.pp. 904 – 935; R.pp. 879 – 893. Insurance is more than a theoretical part of these indemnifications and obligations. It is critical in this case because respondents Lather and Hutton's are out of business. (Defendant Lather Construction SC, Inc.'s Motion for Summary Judgment as to Claims of Plaintiffs and D. R. Horton, Inc., including Exhibits D and F) R.p. 79, paras. 6 & 9; R.pp. 614:23 – 618:10.

[2] Petitioners argue that there were no genuine issues of material fact; however, their briefs to the Court of Appeals belies that statement. For example, Petitioner Hutton's Brief contains 6 pages of "Counterfacts." The East Coast Brief is replete with disputed facts challenging whether it is a sophisticated business and what contract applied to it. All the Petitioners continue to assert that Respondent was the general contractor on the land phase (which is the only construction phase at issue at trial) while the contract with Lather hired Lather to be the general contractor for the land phase. Judge DeBerry was correct to find genuine material facts existed and Petitioners Briefs in the Court of Appeals clearly show that factual issues remain as to the issues among Petitioners and Respondents.

notice to Respondent. Not only did Respondent not know that Judge Price was hearing a substantive summary judgment motion during what was supposed to be Petitioners' procedural motion for bifurcation, Respondent also did not know that Petitioners had provided Judge Price briefing on the summary judgment issues in an *ex parte* communication. R.pp. 519-520. "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. *Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). This occurred *after* Judge Price confirmed that he could not *rehear* the summary judgment motions that had just been decided by another circuit court judge. R.pp. 676:23 – 677:6.

The procedural violations unjustly left Respondent as the only defendant at trial and dismissed Petitioners from the case.[3] The jury saw all the defendants on day one of the trial and by the end of day two, there was only D.R. Horton, which wrongly signaled to the jury that the Judge had determined that Respondent was the only wrongdoer. The procedural due process violations impacted Respondent's right to a fair trial and the dismissal of its cross claims caused substantive harm.

The Court of Appeals issued its Opinion reversing Judge Price's orders dismissing D.R. Horton's cross-claims. The Court held that Respondent was denied due process, that Judge Price did not have authority to grant the Petitioners summary judgment when he did, and that the record was insufficient to reach the merits. The Court held that

> this court cannot reach the merits of this case because the record is not sufficient for consideration on appeal . . . Judge Price verbally dismissed D.R. Horton's cross-claims, finding the indemnity provisions in the subcontractor's contracts

[3] The cross-claims were dismissed even though relevant factual questions remained outstanding, as Judge DeBerry had decided. R.pp. 1-6.

> with D.R. Horton were unenforceable, but [Judge Price] did not issue a written order. The Subcontractors raised the issue of the enforceability of the indemnity provisions when discussing their motion to bifurcate D.R. Horton's cross-claims. The record does not indicate whether Judge Price dismissed the cross-claims by granting the Subcontractors' motion to bifurcate, motion for summary judgment, or motion for directed verdict. D.R. Horton noted in its Rule 59(e), SCRCP, motion that Judge Price did not indicate his basis for the dismissal of the cross-claims, but Judge Price did not clarify his ruling when he denied the Rue 59(e) motion. Because this court cannot ascertain from the record on appeal what motion Judgment Price ruled on or the basis for his dismissal of D.R. Horton's cross-claims, we reverse the dismissal of D.R. Horton's cross-claims.
>
> Further, we hold Judge Price could not dismiss D.R. Horton's contractual indemnity cross-claim on a motion to bifurcate, a motion for summary judgment, or a motion for directed verdict. First, we hold Judge Price could not address substantive issues such as the enforceability of the Subcontractor's indemnity provision on a motion to bifurcate, which is a procedural motion. . . . (citation omitted). Second, we hold Judge Price could not grant a second motion for summary judgment on the issue of the enforceability of the indemnity provisions because Judge DeBerry had denied summary judgment on the same issue based on the same arguments and the Subcontractors' presented no new evidence to support the second motion. . . . (citation omitted). Third, although the issues raised in a motion for summary judgment that has been denied can be raised in a subsequent motion for a directed verdict, we hold a motion for a directed verdict was not proper at the time that Judge Price dismissed D.R. Horton's cross-claims. . . . (citation omitted). Additionally, Judge Price dismissed the cross-claims without notice to D.R. Horton because the Subcontractors never made a motion for a directed verdict and Judge Price never stated he was granting a motion for a directed verdict when he made his ruling. . . . (citation omitted). Therefore, we hold that Judge Price erred in dismissing D.R. Horton's cross-claims at that point in the trial, regardless of whether he did so by granting a motion to bifurcate, a motion for summary judgment, or a motion for directed verdict.

Court of Appeal Opinion, February 19, 2025, pp. 6-8.

Petitioners now want this Court to ignore the procedural due process violations and act as a trial court (or require the Court of Appeals to act as a trial court) to decide the case on the underlying merits. Doing so would (i) deprive Respondent of the procedural due process to which it was entitled in the Circuit Court, (ii) would overrule Judge DeBerry as the fact finder who determined that "the court finds genuine issues of materials facts exists" R.pp. 1-6, and (iii) would overrule the Court of Appeals' holding that there was such a lack of clarity as to what

Judge Price did that "this court cannot reach the merits of this case because the record is not sufficient for consideration on appeal." Opinion February 19, 2025, p. 6.

The Respondents did not ask the Court of Appeals to reconsider of any of its holdings in its Petition for Rehearing and/or Motion for Clarification. That alone is sufficient reason to deny their Petition.

Instead, Petitioners floated a new argument in their Petition for Rehearing and Motion for Clarification. Petitioners' new argument was that Judge DeBerry's Order was ambiguous and that provided the Court of Appeals with inherent authority that it must exercise to ignore such an order. Judge DeBerry denied the summary judgment motions because he decided genuine issues of material facts existed. R.pp. 1-6. There is nothing ambiguous about that. Failure to raise this issue in their Responsive Briefs in the Court of Appeals (any of the 3 that Petitioners filed) or their many filings with the Circuit Court is another reason why this Court should not grant the Petition for Writ of Certiorari. Rule 242(d)(1), SCRAP ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court").

Also absent from the Petition for Rehearing to the Court of Appeals is any request asking the Court of Appeals to reconsider its holding regarding any of the procedural due process violations that led the Court to overrule Judge Price's Orders and remand the case to the Circuit Court. That alone should cause this Court to deny Petitioners' Petition for Writ of Certiorari. The case also does not meet any of the criteria in Rule 242, SCARP.

STATEMENT OF THE CASE

This case was commenced on May 1, 2018. It sought damages for alleged deficiencies concerning construction and landscaping of the plaintiffs' homes and yards in the Tidewater Creek subdivision in Beaufort County. The plaintiffs are the owners of 15 homes there. The Petitioners are various contractors, with Lather as the general contractor (and therefore supervisor) for the land phase of the development. Respondent is D. R. Horton, Inc., the developer of the subdivision. D.R. Horton does not self-perform any of the construction work or any of the land phase work. Petitioners wrongly assert that D.R. Horton was the general contractor. Record on Appeal 781:12-21; 691:14-15. This was an open factual question both at the time Judge DeBerry denied Petitioners' motion for summary judgment and when Judge Price granted summary judgment two business days later. The trial and this appeal only concern the land phase of the development for which Lather was the general contractor.

Petitioner Lather moved for summary judgment on the cross-claims on October 8, 2021. Petitioner Hutton's so moved on October 19, 2021. The crux of Petitioners' motions was that the contractual indemnification and defense obligations were unenforceable. The Hon. H. Steven DeBerry heard these motions on October 29, 2021, and denied them on November 12, 2021. His orders denying the motions were filed within an hour after Petitioner East Coast filed its memorandum in support of its similar motion for summary judgment, which it filed on November 10, 2021. East Coast's legal arguments were the same as Lather's and Hutton's and were determined as a matter of law in the case by Judge DeBerry when he ruled on the same

legal issues on November 12, 2021.[4] East Coast also made factual arguments, which would render summary judgment unavailable.

Certain of the plaintiffs' claims were outstanding against the Respondent Horton and Petitioners when trial began on Monday, November 15, 2021. It was a jury trial before the Hon. Bentley Price. During the first two days of trial, the Petitioners argued that their contractual indemnification and defense obligations were unenforceable. On November 16, 2021, just two business days after Judge DeBerry denied Petitioners' summary judgment motions, and at Petitioners' urging that he do so, Judge Price verbally dismissed Respondent's cross-claims *during a hearing to bifurcate and without notice* and directed a verdict against it on its cross-claims. The three Petitioners settled with the plaintiffs (confirming Respondent Horton could not be determined solely negligent) but leaving Respondent as the only defendant at trial even though the equitable indemnification factual issues could not have been decided until after a jury verdict and even though Horton asserted that Lather was the general contractor on the land phase leaving nothing for which Respondent Horton could be negligent.

On November 24, 2021, pursuant to Rule 59, SCRCP, Respondent D. R. Horton moved to alter or amend Judge Price's verbal ruling dismissing its cross-claims. On November 29, 2021, Respondent moved for J.N.O.V., or in the alternative for a new trial absolute or new trial nisi remittitur. Judge Price denied the motions on December 3, 2021. Respondent's arguments included that Judge Price (1) lacked subject matter jurisdiction or authority to overrule Judge DeBerry's denial of the Petitioners' prior motions for summary judgment, (2) exceeded his authority in attempting to force a settlement, (3) incorrectly read a prohibition on a duty to

[4] East Coast did not argue otherwise before the trial court.

defend into section 32-2-10 (2007) of the South Carolina Code, (4) overrode the parties' contractual agreement in ruling the Petitioners' respective duties to indemnify and defend were not separate and distinct obligations, and (5) improperly ruled the separate provisions concerning indemnity and duty to defend in the parties' contracts were unenforceable as a matter of law. Respondent also argued that its procedural due process rights were violated when a procedural bifurcation hearing, which occurred during the middle of the plaintiff's first witness's testimony, was turned into a summary judgment, or directed verdict hearing without prior notice or opportunity to prepare and without an opportunity to present any evidence by Respondent. Notice of appeal was served December 30, 2021.

The Court of Appeals issued its Opinion reversing Judge Price's verbal order dismissing D.R. Horton's cross-claims and Judge Price's written orders denying D.R. Horton's Rule 59(e), SCRCP, motion and motion for JNOV, or in the alternative, for a new trial absolute or a new trial nisi remittitur. The Court held that Respondent was denied due process, that Judge Price did not have authority to grant the Petitioners summary judgment when he did, and that the record was insufficient to reach the merits. Court of Appeals, Opinion February 19, 2025.

Petitioners filed a joint Petition for Rehearing and/or Motion for Clarification, March 2, 2025, to which Respondent responded and Petitioners replied. The Court of Appeals denied the Petition and Motion.

ARGUMENTS

1. PETITIONERS NEW ARGUMENT THAT JUDGE DEBERRY'S ORDERS WERE AMBIGUOUS AND THAT SAID AMBIGUITY REQUIRES AN APPELLATE COURT TO EXERT INHERENT AUTHORITY TO TAKE THE CASE AWAY FROM THE CIRCUIT COURT AND DECIDE IT ON THE MERITS ITSELF HAS NO BASIS IN THIS CASE

The Court of Appeals held "this court cannot reach the merits of this case because the record is not sufficient for consideration on appeal." Opinion February 19, 2025, p.6. In the absence of a sufficient appellate record, Petitioners want the Court of Appeals to act like a trial court. It cannot do this for two reasons. The first is that reversal of Judge Price means that Judge DeBerry's order is now controlling. That order found factual issues and denied summary judgment to the Respondents. R.pp. 1-6. The second is that the enabling legislation for the Court of Appeals explicitly states that its "jurisdiction is appellate only." S.C. Code 14-8-200(a). The third is that this new theory was first presented to the Court of Appeals in the Petition for Rehearing.

Raised for the first time in the petition for rehearing in the Court of Appeals, Petitioners now argue that Judge DeBerry's Orders were ambiguous and that therefore allows an appellate court to exert inherent authority to take the case away from the Circuit Court and decide it on the merits itself. Petition for Rehearing and/or Motion for Consideration, March 2, 2025. Petitioners framed the issue in their Petition for Rehearing and/or Motion for Clarification as:

> Consequently, this Court should grant rehearing . . . because the first order [Judge DeBerry's Order] considering the issues was ambiguous, this Court has the inherent authority to resolve the legal issues now.

Petition for Rehearing and/or Motion for Clarification, filed March 6, 2025, p. 6.[5]

---

[5] The other issues raised in the Petition for Rehearing are not present in the Petition for Writ of Certiorari, except a short discussion of a case Petitioners stated was new. That case was decided before the Court of Appeals issued it decision, but Petitioners did not supplement their citations. Nonetheless, *The Retreat at Charleston Nat'l Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC*, No. 2021-001050, 2025 WL 466562 (S.C. Ct. App. Feb. 12, 2025) is of no help to the Petitioners. First, it does not authorize the Court of Appeals to act like a trial court, especially to rule as a matter of law in the face of an order denying summary judgment because of factual issues. Second, the present case was decided by the Court of Appeals on procedural grounds, not present in *Retreat*. Third, the contracts are different. In *Retreat*, the contract covers 12 pages of the Court's opinion. In this case, it covers one page in Petitioner Hutton's brief, (p.11) and a page and a half in Petitioner Lather's brief (pp. 10-11). Fourth, in this

Petitioners could have made this argument in their Responsive Briefs, *but all three of them failed to do so*. See Lather, Hutton's, and East Coast Responsive Briefs in the Court of Appeals. They should not be allowed to raise this issue for the first time in their Petition for Rehearing and/or Motion for Clarification or in this Petition for Writ of Certiorari. Accordingly, the Petition for Writ of Certiorari should be denied, and the case should proceed in the ordinary course in the Circuit Court as the Court of Appeals ordered. Court of Appeals Opinion, February 19, 2025.

Moreover, there was nothing ambiguous about Judge DeBerry's Orders. He denied Petitioners' summary judgment motions because he determined genuine issues of material facts existed. R.pp. 1-6. There is nothing ambiguous about that Order. Judge DeBerry had before him the entirety of the summary judgment motions, including the additional insured (AI) issue[6] – both as to matters of law and issues of fact. He declined to find for the Petitioners on any issue. ***To consider the factual issues, he first would have decided that the contract was enforceable as a matter of law. If it were not enforceable as a matter of law, he would have had no reason to***

---

case, the Petitioners conceded that their contractual duty to indemnify did not extend to the Respondent D. R. Horton's sole negligence. (Final Reply Brief of Appellant, p. 17). That is the opposite of the facts in *Retreat*, Id. p. 33. Fifth, in *Retreat*, the Appellant supplied the building materials. In this case, it did not. Sixth, insurance and the contractual obligation of the Petitioners to name D. R. Horton as an "Additional Insured" are central to the present case. They are absent in *Retreat*. Seventh, likewise, the Petitioners separate obligation to defend and defense costs are central to the present case, but rest on an entirely different footing in *Retreat*.

Apart from these striking factual differences, *Retreat* does not create any new law. It simply applies existing law, which the Petitioners have already argued in their briefs. *Retreat* is not only different on the facts, it changes nothing in the law. It is irrelevant to the Petitioners' Petition.

[6] Respondent Horton attached the insurance contract to its response to Petitioners' motions for summary judgment. The AI coverage each Petitioner was required to provide to Horton covers the duty to defend and the duty to indemnify, which is critical because Petitioners Hutton's and Lather are no longer in business. At its heart, this is an insurance claim case.

consider whether there were any factual issues. Judges know how they are supposed to analyze whether summary judgment is appropriate. This was brought to Judge Price's attention by Respondent's counsel.

> MS. PETERSON: . . . A judge has already decided as a matter of law that it's not unenforceable. R.p. 680:5 – 6

Judge Price apparently recognized this and acknowledged earlier that he did not have the power to rule on the matter that Judge DeBerry had already ruled on. R.pp. 676:23 – 677:6

> MS. PETERSON: If this case is to go forward with the trial and the jury deciding, then we believe it's wholly improper for the summary judgment to be re-heard.
>
> THE COURT: I agree with that. I don't think I can do that. So I'm agreeing with you 100% on that. That is what we talked about. I don't think that is something I can do. You don't get to just bring it back up again, because a prior circuit judge has already ruled on that. So I am with you on that. R.p. 676:23 – 677:6

There was nothing ambiguous about Judge DeBerry's orders denying summary judgment and there is nothing to support Petitioners' assertion that the Court of Appeals eschewed its independent duty to consider whether the indemnity provisions contained illegal terms which contravened statutory law or public policy. The Court of Appeals specifically held that "This court cannot reach the merits of this case because the record is not sufficient for consideration on appeal." Court of Appeals Opinion, February 19, 2025, p. 6. Petitioners ask this Court to ignore the Court of Appeals' assessment of the lack of clarity and require the Court of

Appeals to reach the merits despite the lack of clarity and the procedural due process violations that denied Respondent a fair trial.

Moreover, the entirety of Petitioners' argument relies on them being correct that the contracts in this case are the same type of illegal contracts discussed in *Ward v. West Oil Co., Inc.*, 387 S.C. 268, 692 S.E. 2nd 516 (2010) that Petitioners assert would require a court to act. *Ward* is no help to the Petitioners. That case involved gambling machines that used "pull-tabs." The question was whether a "pull-tab" was a "pull-board" in violation of S. C. Code 12-21-2710. In saying "Yes" the Supreme Court relied upon the Appellant R & B's incriminating view of its own device. "Significantly, at no point during these proceedings has R & B disputed that the game cards at issue are pull-tabs." *Ward*, Id. at 277. Gambling devices are per se illegal and Section 12-21-2710 carries criminal penalties. In contrast, indemnities and defense obligations are lawful and routine in commercial transactions; and in this case, the Petitioners were required by contract to name D. R. Horton as an "Additional Insured" so that there would be insurance for their obligations. Unlike R & B in *Ward*, D. R. Horton has strenuously opposed any suggestion that these indemnification and defense provisions in its contracts with the Petitioners violate the law.

Petitioners miss the point when they argue that due process does not matter. They argue that Judge Price had authority to rule on the legality of the contracts regardless of the procedural due process violations. But process is how the judicial system provides fairness, an opportunity to be heard, and for the facts and law to be fully flushed out. That process should not be ignored, shortened, or abolished. There is no urgency here that should lead this Court to eschew the normal remand to the Circuit Court process.

2. 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?

This was the threshold issue in the appeal before the Court of Appeals. Understanding the breadth of the due process denied to D.R. Horton provides perspective as to why Petitioners' request to have the appellate courts also deny Respondent due process is specious. For its desired remedy, D.R. Horton argued in its briefs to the Court of Appeals that if the Court agrees with D.R. Horton that Judge Price did not have authority to overrule Judge DeBerry, the Court could remand the case to the trial court for a trial on appellant's cross-claims. That is what the Court of Appeals did.

It is settled law in South Carolina that one trial judge may not overrule another trial judge because doing so is reserved to the appellate courts. "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). "The rule is well settled that the prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge, except in cases when the right to do so has been reserved to the succeeding Judge, when it is allowed by rule of Court or statute or when the subsequent order does not alter or substantially affect the ruling or decision represented by the previous order." *Dinkins v. Robbins,* 203 S.C. 199, 202, 26 S.E.2d 689, 690 (S.C. 1943) (citing *Mut. Bldg. Loan Ass'n of Sumter v. Hewson,* 196 S.C. 181, 12 S.E.2d 715 (S.C. 1940)); *see also Charleston Co. Dep't Soc. Serv. V. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (S.C. 1995) (citing *Tisdale*, 216 S.C. at 13 and *Dinkins*, 203 S.C. at 202), ("There is a long-standing rule in this State that one judge of the same court cannot overrule another. . . . Accordingly, we hold a successor judge may not substitute his own judgment for that of the trial judge.").

The question in *Dinkins* was: "Does a Circuit Judge have jurisdiction and power to grant a compulsory order of reference as to certain equitable issues raised by the pleadings when a former Circuit Judge has refused a general order of reference, from which there has been no appeal?" 203 S.C. at 202. The *Dinkins* Court decided that the prior judge's decision to not refer any issues on a general order of reference embraced all matters that could have been referred. *Id*. Thus, a subsequent circuit judge could not parse out equitable issues for referral.

In *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546 (S.C. 1986), the court confirmed that "[O]ne Circuit Court Judge does not have the authority to set aside the order of another (citing Circuit Court Rule 60 and *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (S.C. 1979)). "The effect of Judge Pyle's order was to reverse the earlier substantive order, clearly an impermissible act." Petitioners erred under the rules of civil procedure when they repeatedly asked the court to revisit Judge DeBerry's decision. Rule 41(l), SCRCP, prohibits repeat motions on the same facts. "If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in the action." *Id.*

Similarly, in this case, Judges DeBerry and Price are both Circuit Judges. Judge DeBerry had before him the entirety of the summary judgment motions, including the additional insured (AI) issue – both as to matters of law and issues of fact. He declined to find for the respondents on any issue. To consider the factual issues, he first would have decided that the contract was enforceable as a matter of law. If it were not enforceable as a matter of law, he would have had no reason to then consider factual issues. This was specifically brought to Judge Price's attention by appellant's counsel.

MS. PETERSON: . . . A judge has already decided as a matter of law that it's not unenforceable. R.p. 680:5 – 6.

Judge Price apparently recognized this and acknowledged earlier that he did not have the power to rule on the matter that Judge DeBerry had already ruled on. R.pp. 676:23 – 677:6.

MS. PETERSON: If this case is to go forward with the trial and the jury deciding, then we believe it's wholly improper for the summary judgment to be re-heard.

THE COURT: I agree with that. I don't think I can do that. So I'm agreeing with you 100% on that. That is what we talked about. I don't think that is something I can do. You don't get to just bring it back up again, because a prior circuit judge has already ruled on that. So I am with you on that. R.p. 676:23 – 677:6.

Petitioners counsel then proceeded to re-argue their summary judgment motions under the guise of a motion to bifurcate. R.p. 678:12 – 723:6. In doing so, they put front and center exactly the same matter that Judge DeBerry had decided on the motions for summary judgment, namely the enforceability of the contractual indemnity and duty to defend.[7]

---

[7] At the pretrial summary judgment hearing before Judge DeBerry, Petitioners argued that as a matter of law the indemnity and duty to defend provisions violated public policy and were therefore unenforceable as to S.C. Code Ann. § 32-2-10 and under the "clear and unequivocal" standard when an indemnitee will be indemnified for its concurrent negligence. Judge DeBerry declined to find for Petitioners. It is not surprising that Judge DeBerry did not find for Petitioners because neither the indemnity provision nor the separate duty to defend provision violate public policy, as discussed in D.R. Horton's Brief and Reply filed with the Court of Appeals. The contracts also involve insurance. Additionally, the indemnity language is clear and unequivocal and follows the language the court suggested in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 658 n. 6, 819 S.E.2d 166, 176 n. 6 (S.C. App. 2018). The same arguments based on the same legal theories were then raised before Judge Price two business days after Judge DeBerry's ruling.

MS. LUCEY: A lot of uncertainty for us in terms of trying to resolve the claim. . . . Another alternative, Your Honor, is for Hutton's and likely Lather to raise a motion – in an effort to expedite the trial, raise a motion to bifurcate the cross-claims.

But I think the threshold issue and whether we can bifurcate the claims is to determine whether or not the contractual indemnity provision would remain enforceable. If they are enforceable – if they are not enforceable, which is our position, then there is no reason to bifurcate them, and they can be dismissed. And that's already been decided then, Your Honor. R.p. 678:9 – 22.

Petitioners' counsel objected because the matter had already been heard and decided by Judge DeBerry. R.p. 680:5 – 6. Judge Price allowed a motion to bifurcate after the trial had already commenced and then turned it into a rehearing of the summary judgment motions without notice to Respondent.

MS. LUCEY: At this time, may I make a motion to bifurcate the contractual and equitable indemnity claims that D.R. Horton has asserted against Hutton's?

THE COURT: Sure.

MR. ROSS: [Lather] would like to join, Your Honor.

MR. CLOUD: East Coast would join in that as well.

MS. PETERSON: For the record, I think any arguments that go to the enforceability of contracts and which contracts apply have already been dealt with on the summary judgment motion. They made the same arguments, and the Court did not rule in their favor. R.p. 702:24 – 703:10.

Over counsel's objection and against what Judge Price himself had correctly recognized earlier as settled law precluding him from overruling another Circuit Judge, R.p. 677:1 – 6, Judge Price then proceeded to rule on exactly the same issue that Judge DeBerry had previously decided.

Without subject matter jurisdiction or authority, Judge Price reversed Judge DeBerry. R.p. 722:17 – 18.

Petitioners caused Judge Price to rehear the summary judgment motions over Respondent's objections and with full knowledge of the procedural due process violations that they now try to diminish by calling them "irregularities." Those "irregularities" fundamentally altered the trial in Petitioners' favor.[8] Petitioners now want to circumvent Respondent's procedural due process rights again. The Court of Appeals agreed with D.R. Horton, reversed Judge Price on procedural due process grounds, and Petitioners did not challenge that decision in their Petition for Rehearing.

3. JUDGE PRICE DID NOT PROVIDE ANY BASIS FOR THE COURT OF APPEALS TO ASCERTAIN WHAT OR WHY HE RULED AS HE DID ON THE SEPARATE INDEMNIFICATION OBLIGATION AND DUTY TO DEFEND OBLIGATION IN SECTION 10 OF THE CONTRACTS

Judge Price did not cite a single fact, case or statute in support of his ruling that the Petitioners' contractual indemnity and defense obligations were unenforceable. This made briefing for the appeal difficult because the issues were not discussed or framed by Judge Price and Respondent had to anticipate and present its merits arguments in a vacuum. See D.R. Horton Brief and Reply Brief. Petitioners now want to have the briefing again occur in a vacuum

[8] Petitioners settled with Plaintiffs for the deficiencies in their work after Judge Price granted them summary judgment on Respondent's cross claims.

without any weighing by the Circuit Court and without resolution of the genuine material facts that Judge DeBerry held were present. This case should not be fast-tracked to the South Carolina Supreme Court before a procedurally proper opportunity for a full and fair judicial process has occurred. It was Petitioners who led Judge Price to subvert Respondent's due process rights and now they want to circumvent the judicial process again.

Judge Price's failure to follow procedure and provide the basis for his ruling led the Court of Appeals to conclude the record on appeal was not sufficient to ascertain the merits. Court of Appeals Opinion, February 19, 2025, p. 6-7. D.R. Horton repeatedly asked for that clarification, but none was forthcoming. All Judge Price said regarding his decision was the following:

> I think it's an adhesion contract. I think it's take-it-or-leave it. I think it's similar and likened to a non-compete in the sense that if the opposing party doesn't have a whole lot of negotiating power, then it can be deemed unenforceable. I don't think it's enforceable. I think it violates public policy. So I am going to grant the motion, and we are going to take an hour break so everybody can eat and we will come back. R.pp. 722:18 – 723:2.

Judge Price repeatedly called the contract an adhesion contract. "It's essentially an adhesion contract. It's a take-it-or-leave-it style contract . . . Essentially, you either sign this and you get the work, or you don't sign it and you have to indemnify us as to everything . . . ." R.p. 716:4 – 9. "Again, I think it's like an adhesion contract. You can take it or leave it." R.p. 719:7 – 8[9].

[9] Judge Price asserted the adhesion contract and noncompete theories *sua sponte* during what was supposed to be a bifurcation motion hearing– which he instead treated as a summary judgment motion hearing to reconsider Judge DeBerry's decision.

There are a number of problems with such a ruling. Judge Price himself recognized at least one. After lunch, in response to a request from Respondent's counsel for clarification about his reliance upon adhesion as a basis for his ruling, he tried to fix what was an obvious error.

> MR. NAIL (D.R. Horton Attorney): I just wanted to clarify one thing about your ruling earlier. I didn't stand by Ms. Peterson's objection to the procedural nature of the ruling. If there was a ruling to the extent that there was and making a determination that the contract was one of adhesion –
>
> THE COURT: I said it was my thoughts on it. It's not part of the ruling.
>
> MR. NAIL: We were going to object based on the lack of facts.
>
> THE COURT: That is me talking out loud and working through it. No. I am not making that ruling. R.p. 724:15 – 25.

The problem for Judge Price, however, was that he had made that ruling; and he had made it with no facts and without appreciation of what is required under South Carolina law to find a contract unenforceable because it is one of adhesion.

That law is set out by the South Carolina Supreme Court in *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001), which upheld an arbitration clause against an attack that it was an unconscionable part of an adhesion contract.

> Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). Under state law, an adhesion contract is not per se unconscionable. *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996) (unconscionability is the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998) (fact that a contract is one of adhesion does not render it unconscionable). Further, a person who can read is bound to read an agreement before signing it. *Hood v. Life & Cas. Ins. Co.*

> *of Tennessee*, 173 S.C. 139, 175 S.E. 76 (1934). We find the arbitration clause is not unconscionable as an adhesion contract.

Munoz, 343 S.C. at 541 (citing *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. Ct. App. 1998); *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (S.C. 1996); *Hood v. Life & Cas. Ins. Co. of Tennessee*, 173 S.C. 139, 175 S.E. 76 (S.C. 1934)).

Judge Price considered no facts required by the law. Had he done so, he would have known that the Petitioners are sophisticated contractors and subcontractors who had freely contracted to work on various aspects of a 34-home subdivision. There was nothing about them or their contracts with the Respondent that made the contracts unconscionable and unenforceable as ones of adhesion.

Likewise, Judge Price's statement of the law of non-competes was plainly wrong. It is not the law that "if the opposing party doesn't have a whole lot of negotiating power, then it can be deemed unenforceable." R.pp. 722:21 – 22. That is especially not the law in the context of a commercial transaction rather than an employment agreement. The applicable law for a non-compete agreement in a commercial transaction, such as the parties' contract, is more relaxed than that in an employer/employee relationship. *Palmetto Mortuary Transport, Inc. v. Knight Systems, Inc*., 424 S.C. 444, 457-58, 818 S.E.2d 724 (S.C. 2018). That relaxed business relationship standard was not met here, by analogy or otherwise. The law of non-competes has nothing to do with the parties' contractual indemnity and defense provision, and it was error for Judge Price to twist it in a way to support his ruling. *Palmetto Mortuary* also describes public policy in a business-to-business noncompete context as something affecting the public interest in the procurement process. *Id.* at 458-61. Here, the public's procurement interest is unaffected by the parties' agreement concerning indemnity and defense.

Additionally, both the General Assembly and the South Carolina Supreme Court have approved indemnity and defense obligations. Here, the contracts expressly exclude any indemnification for Respondent's sole negligence, follow the clear and unequivocable standard for concurrent negligence, have a separate and distinct provision for a duty to defend and the contracts include additional insured provisions to provide the resources.

CONCLUSION

The South Carolina Supreme Court should deny the Petition for Writ of Certiorari. The Court of Appeals held that it did not have a sufficient record on appeal to decide the merits. The case does not meet any of the criteria for granting a Writ of Certiorari at this time. Rule 242, SCRAP. The Court of Appeals decision was unanimous, and the decision does not conflict with a prior decision of this Court. No constitutional issues are directly involved, there is no federal question included, and the Court of Appeals decision does not conflict with the United States Supreme Court. There is no novel question of law yet presented because the case status is a denial of summary judgment due to genuine issues of material facts. There also is no urgency that would warrant bypassing the normal legal process that aids the courts in a full flushing out of the issues. At this time, the case has been remanded to the Circuit Court where the posture is a denial of Petitioners' motions for summary judgment on Respondent's cross claims. Denials of summary judgment are not appealable – but that is essentially what Petitioners are seeking. The

Circuit Court can handle the case in the ordinary course to allow a full and fair trial with procedural due process. Circuit Courts routinely handle remands.

June 9, 2025

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.