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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2021-001050
Case No. 2016-CP-10-03783

Opinion No. 2025-6099

The Retreat at Charleston National Country Club Home Owners Association, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime,
Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollio Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado;
Defendants,

Builders FirstSource-Southeast Group, LLC, Petitioner

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry, Third-Party Defendants,

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the Respondents.

PETITION FOR WRIT OF CERTIORARI

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Certification

Counsel for the Petitioner certifies that the petition for rehearing was made and finally ruled upon by the court of appeals on May 21, 2025.

Questions Presented

1. When a contractor files a general third-party claim against its subcontractor seeking to recover in contractual indemnity for all damages for which it might be held liable, does such claim include those damages for which the subcontractor is either solely or concurrently responsible?
2. Should a contract provision imposing an obligation to indemnify – specifically as it relates to a contractor's claim for damages for which its subcontractor is either solely or concurrently responsible – be construed in accordance with precedent and with the laws governing contracts generally, or should it for the first time be subject to the heightened "clear and unequivocal" standard that would be applicable if the contractor were solely seeking indemnity for its *own* negligence?
3. Should the court restrict its inquiry to the provision of the contract directly at issue, that is, the indemnification provision, rather than considering provisions under which no cause of action has been brought in this case, and should the inquiry into the meaning of the contract always give defined terms in the parties' contract the limited meaning ascribed to them in the contract?
4. Does the court's refusal to honor the severance language in this contract, and its consequent refusal to sever the offending language and thus save the contract, violate the Supreme Court's precedent?
5. Does S.C. Code Section 32-2-10 by its specific provisions apply only to agreements in indemnification, and does its silence regarding attorneys' fees reflect both legislative intent and a common law imperative that attorneys' fees do not fall within the scope of Section 32-2-10?

6. Is a trial court's order that is on appeal, and thus on which judgment has not yet been finally entered, considered sufficiently "final" for collateral estoppel or res judicata purposes?

Statement of the Case

The court of appeals' opinion, in applying a heightened standard to review of contractual provisions imposing obligations to indemnify against the negligence of the indemnitor, establishes new and unprecedented law governing contractual relationships, disrupting well-settled South Carolina precedent regarding risk allocation between parties. In departing from established decisions, the opinion creates legal uncertainty that extends far beyond this case, casting doubt on the enforceability of standard indemnity provisions across the entire construction industry. The indemnity provisions at issue – based on a standard AIA indemnity provisions used industry-wide – have historically been upheld under general contract principles. Never before has South Carolina law required that contract provisions, imposing the obligation to indemnify against liability for damages occasioned by the negligence of the indemnitor, meet a heightened "clear and unequivocal" standard to be enforceable. Yet, for the first time, the court of appeals applies that heightened standard and ignores Supreme Court precedent setting forth general principles of contract construction. This shift effectively renders standard indemnity provisions unenforceable, leaving contractors unable to recover from negligent subcontractors and forcing them to bear the costs of others' mistakes. Subcontractors, in turn, avoid accountability for their own negligence. The consequences are sweeping: two of the contracts at issue date back to 2005 – now, at-least two decades of construction work is implicated by the Opinion. Petitioner does not believe the court of appeals intended to rewrite industry norms and accordingly asks this Court to grant review.

Retreat at Charleston National Appeal

This appeal is the result of a long and complex construction defect litigation originally filed by the Plaintiffs on July 22, 2016. [R. pp. 174-186]. The Plaintiffs, The Retreat at Charleston National Country Club Homes Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime, sought recovery of damages allegedly occasioned by deficiencies in original construction of the subject project, a multi-family development, consisting of 32 buildings, encompassing a total of 129 townhome units, located in Mount Pleasant, South Carolina. [Id.].

The Plaintiffs' claims, as asserted against Builders FirstSource – Southeast Group, LLC ("BFS" or "Petitioner"), allege, among other contentions, that the framing and window installation services of Petitioner were deficient, resulting in water intrusion and corresponding damages. [R. pp. 177-179]. Plaintiffs' forensic expert has also opined: (a) that the windows at the project are characterized by inadequate DP ratings, requiring comprehensive replacement of those windows; (b) that installation was performed using incorrect fasteners, which were, both (i) of improper type, and (ii) of inadequate length to assure required embedment of the fastener into the framing; and (c) that fasteners were installed at spacing intervals which exceeded those required by the manufacturer's installation criteria. [R. pp. 1107, 1108, 11110].

Petitioner contracted with several subcontractors who performed the allegedly defective installation work at the project. Therefore, Petitioner filed cross-claims or third-party claims, against its subcontractors, including: ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co[1], LLC, AC Construction Corp and/or AC Construction Inc., L&G Construction

[1] Plaintiffs filed a Stipulation of Dismissal dismissing their claims with prejudice against McDaniel Construction Co, LLC on April 17, 2020. Therein, Plaintiffs stipulated that there are no defects in the work performed by McDaniel Construction Co, LLC on the project that is the subject of this suit. Premised upon Plaintiffs' stipulations, the Honorable Bentley D. Price granted McDaniel Construction Co, LLC summary judgment as to Builders FirstSource-Southeast Group, LLC claims on December 18, 2020. McDaniel Construction Co, LLC is not a party to this appeal.

Group, LLC, WS Contractors, LLC, Pohlman Quality Exteriors, Inc., Palmetto Trim and Renovations, LLC, Edward Bruce Witham[2], and East Coast Carpentry Company. [R. pp. 414-454]. The claims of Petitioner included causes of action in negligence, breach of express and implied warranty, breach of contract, contractual indemnity and equitable indemnity. [Id.].

Of the above-mentioned subcontractors, eight moved for summary judgment at various times during 2019 and/or 2020. All eight subcontractors' motions were heard on November 6, 2020 by the Hon. Jennifer McCoy. [R. pp. 1386-1450]. Each subcontractor argued its own motion, and the arguments forming the basis for the different motions varied from subcontractor to subcontractor. [Id.]. On May 10, 2021, Judge McCoy issued seven[3] separate Form 4 Orders granting, or granting in part, summary judgment to the subcontractors, and requesting that *each* subcontractor submit its own proposed order. [R. pp. 1-19]. As a result, Judge McCoy received eight different proposed orders, one from each subcontractor, with each outlining different legal and factual grounds for an award of summary judgment. Judge McCoy then adopted each of the eight proposed orders over the course of multiple days. On July 7, 2021, the lower court issued orders granting, in part, summary judgment to: ECC Contracting, LLC; AC Construction; Hurley Service, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction. [R. pp. 22-41, 58-83, 102-121]. On July 26, 2021, the trial court issued an order granting, in part, summary judgment to Palmetto Trim and Renovations. [R. pp. 50-57]. On July 29, 2021, the trial court issued orders granting, or, granting in part, summary judgment to: East Coast Carpentry; and WS Contractors. [R. pp. 42-49, 84-101].

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[2] The Honorable Jennifer B. McCoy Ordered an Entry of Default against Edward Bruce Witham on June 12, 2020. Edward Bruce Witham is not a party to this appeal.

[3] For reasons that are unclear to Appellant, the lower court never issued an initial Form 4 Order addressing L&G's motion. It did, however, ultimately grant partial summary judgment to L&G in an order dated July 7, 2021.

Petitioner timely moved for reconsideration of each of the eight orders. [R. pp. 1208-1387]. On August 23, 2021, the trial court issued eight Form 4 Orders denying each of Petitioner's motions for reconsideration. [R. pp. 122-145]. Petitioner separately filed eight notices of appeal – one for each order – on September 22, 2021. By letter dated October 7, 2021, the Clerk of Court for the court of appeals advised the parties to this action that it had consolidated the eight appeals filed by Petitioner. Petitioner responded by letter dated October 25, 2021, and later by motion dated November 22, 2021, setting forth its objections to consolidation of the appeals. Nonetheless, by letter dated January 28, 2022, the court of appeals reaffirmed the consolidation.

On appeal, this case was considered by a panel of judges composed of Judges McDonald, Thomas, and Verdin. Petitioner's final briefs were submitted on November 14, 2022, and oral arguments were held on March 5, 2024. The court of appeals issued its order as a published opinion on February 12, 2025, affirming the trial court's orders. Petitioner filed a petition for rehearing on February 27, 2025. On May 21, 2025, the court of appeals issued a substituted opinion denying the petition for rehearing. This petition for writ of certiorari follows.

Argument

I. In a marked departure from the Rules of Civil Procedure and common law precedent, the court of appeals held that Petitioner's general claim for contractual indemnification did not encompass a claim specifically for damages caused by the subcontractor's sole or concurrent negligence.

The first step in analyzing this case is identifying what type of contractual indemnification claim is before the court. It is well established that if a party seeks to recover for its own negligence, the language of the contract on which it relies for such recovery must articulate that right to recovery clearly and unequivocally. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). However, all other recovery in contractual indemnification – including the right to

recover from a subcontractor for that subcontractor's own negligence, whether sole or concurrent – is analyzed only in accordance with the rules of contractual interpretation generally; that is to say, the heightened "clear and unequivocal" standard does not apply. Id.

Thus, the issue here is the extent of the indemnity sought by the Petitioner: a) whether this Petitioner is seeking recovery for the subcontractors' negligence; b) solely for its own negligence; or c) potentially for both types of negligence. The answer to that question will determine the appropriate standard or standards to apply to the parties' contract.

Petitioner pled that if Petitioner were to be found liable to Plaintiff in the underlying action, that such liability would be the result of damages caused by its subcontractors. [R. pp. 440-41, 447-449]. It then pled that it was entitled to full indemnification for any amounts for which it was found to be liable to the Plaintiffs (i.e., if Petitioner is liable, it is due to the defective work of Petitioner's subcontractors, so if Petitioner is found liable for the acts or omissions of its subcontractors, then Petitioner's subcontractors are required to indemnify the Petitioner against such liability). [Id.]. The court of appeals held that because Petitioner sought indemnification for "any" amounts for which it may be liable, it was seeking indemnification for its own negligence. [Opinion p. 21]. Because the court dismissed the entire contractual indemnity claim on this ground, the implicit holding was that Petitioner sought recovery *only* for its own negligence, and somehow, in seeking recovery for "any" sums, Petitioner was *not* also seeking recovery for the negligence of its subcontractors.

Contrary to the determination of the court of appeals, Petitioner's pleadings, read in context, in fact *only* seek recovery for the alleged negligence of the subcontractors. Moreover at every stage of this litigation, Petitioner has insisted on the record that it is seeking recovery only for damages occasioned by its subcontractors' negligence. But even under the least generous

reading, "any" amounts cannot be determined inherently to exclude amounts that are attributable to the subcontractor's negligence. When Petitioner is seeking recovery for "any" amounts, the use of the word "any" is meant in the sense of its definition: "used to express a lack of restriction in selecting one of a specified class." The particular recovery is unrestricted: "any" amounts could be those amounts attributable to any source of negligence – whether by Petitioner or by Petitioner's subcontractors, or by the concurrent negligence of both parties. By this Petition, Petitioner seeks the ability to pursue those claims against its subcontractors for the subcontractor's negligence.

A. The court of appeals' interpretation of Petitioner's pleadings is in direct conflict with the Rules of Civil Procedure promulgated by this Court.

Failing to find that a cause of action, which seeks indemnity against the subcontractors, also encompasses claims arising from the negligence of those subcontractors (whether sole or concurrent) flies in the face of the rules for pleadings outlined in Rule 8 of the South Carolina Rules of Civil Procedure. For example, Rule 8(f) requires that pleadings be construed "as to do substantial justice to all parties." The most just outcome in this case is one that allows Petitioner to seek recovery against its subcontractors for the negligent work of the subcontractors.

As this Court is aware, the purpose of the new pleading rules, effective July 1, 1985, was to move to a system of notice pleading. Petitioner's pleadings were sufficient to place the subcontractors on notice that Petitioner was seeking damages from its subcontractors for the subcontractors' negligence. Moreover, parties routinely plead claims seeking damages they may ultimately be unable to recover. Importantly, this overly expansive pleading does not preclude parties' recovery of damages they are entitled to.

Rule 8(a) allows a party to plead alternative theories of recovery. Rule 8(e)(1) requires parties to be concise, and Rule 8(e)(2) promotes conciseness by allowing parties to plead such alternative theories of recovery in the same count. Notably, when "one of [the theories] if made

independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements." S.C. R. Civ. P. 8(e)(2).

In seeking recovery of "any" amounts, Petitioner maintains it sought recovery only for the negligence of its subcontractors. However, even assuming the Court adopts a broader interpretation of Petitioner's pleadings, it must acknowledge that "any" amounts, if it includes amounts resulting from Petitioner's negligence, must equally encompass amounts resulting from the subcontractor's negligence, whether sole on concurrent. Petitioner's pleading, then, becomes an implicit pleading of alternatives, seeking recovery for "any" amounts – whether from Petitioner's negligence, or, alternatively, from the negligence of the subcontractors.

Under Rule 8(e)(2), even if Petitioner fails on its alleged plea to recover for its own negligence, the alternative plea for damages related to the negligence of the subcontractor remains fully intact. Rather than adhering to the Rules of Civil Procedure and honoring the remaining claim, the court of appeals, contrary to the Rules, dismissed the plea for recovery for the subcontractor's negligence merely because it found that the alternative claim for recovery for Petitioner's own negligence could not stand.

Because the court of appeal's Opinion contradicts the Rules promulgated by this Court, this Court should grant certiorari to correct the misapplication of Rule 8.

B. The court of appeal's interpretation of Petitioner's pleadings is in direct conflict with prior precedent.

This is not the first time that a contractor has sought complete contractual indemnification from its subcontractors before the appellate courts. In Concord & Cumberland, whose analysis on the merits will be discussed in greater detail below, a contractor sought recovery from its subcontractor in contractual indemnity for damages caused by both the contractor *and* the subcontractor. It pled:

> 104. Superior [the contractor] is entitled by contractual provisions, to the fullest extent permitted by law, *full indemnity from the Subcontractors* and Suppliers, to include the assumption of Superior's defense, as a result of the allegations and claims made by the Plaintiff, if substantiated.

(emphasis added). Notably, the general contractor did not limit its contractual indemnity claims against the subcontractors. In moving for partial summary judgment, it explicitly sought recovery in indemnity against liability for damages occasioned by *both* the negligence of its subcontractor, and the negligence of the general contractor itself.

Petitioner draws this Court's attention to the way that the court of appeals in Concord & Cumberland handled the general contractor's claim for relief. The court ultimately allowed the general contractor to proceed to seek recovery for its subcontractor's negligence while dismissing the claim to the extent that it purported to seek recovery for the general contractor's own negligence. The Concord & Cumberland Court clearly recognized two types of claims present in the general contractual indemnification pleading: a claim for indemnity for damages to the extent caused by the general contractor itself and a claim for indemnity for damages to the extent caused by the subcontractor - even if such subcontractor's negligence is concurrent with the negligence of the general contractor. Here, the court of appeals, contrary to its own precedent, failed to distinguish these two types of claims in Petitioner's very similar pleadings. The effect is a completely contrary result to the one in Concord & Cumberland, where in this case Petitioner is precluded from *any* recovery in contractual indemnity, even if the jury determines that the subcontractors have been solely or concurrently negligent in causing the damages at issue.

II. The court of appeals failed to follow precedent when it erroneously applied the heightened "clear and unequivocal" standard to Petitioner's contractual indemnification claim seeking recovery of damages resulting from the subcontractors' negligence.

A. In applying the heightened "clear and unequivocal" standard to Petitioner's claims seeking indemnity for the subcontractors' negligence, the court of appeals ran afoul of this Court's precedent.

South Carolina has historically recognized that contractual indemnity provisions are to be construed in accordance with rules of construction of contracts generally. See Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989); Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). Our courts also recognize the basic rule that when a party seeks to be indemnified from its own negligent acts, the heightened "clear and unequivocal terms" standard will be applied to the indemnity provision. See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 490, 763 S.E.2d 19, 20 (2014); Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003).

In Concord & Cumberland, the court of appeals acknowledged and attempted to clarify those circumstances under which the respective standards are to be applied. However, here, the court of appeals' opinion runs afoul of and directly contradicts these precedential cases, including Concord & Cumberland.

In Concord & Cumberland, Superior was a general contractor who hired Muhler as its subcontractor. When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to their contract. Superior claimed that the contractual provisions required Muhler to indemnify Superior, and that Superior's right to indemnity included not only damages occasioned by Muhler's negligence, but also liability for the negligence of Superior itself. Id. at 645. Muhler countered that the contract did not require it to indemnify Superior for Superior's wrongdoing. Id.

The trial court found, and the court of appeals agreed, that in order for Superior to prevail on a claim seeking indemnity *for its own negligence* (as opposed to indemnity for the negligence of its subcontractor), it was required to show that the contract language granting that right was set

forth in clear and unequivocal terms. Id. at 649. The court of appeals noted that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence (but notably not for Muhler's sole or concurrent negligence). Id.

Because the court found that the language in Superior's contract did not meet the heightened standard, it held that the contract did not require Muhler to indemnify Superior for Superior's own negligence, and instead affirmed the trial court's decision that "*limited indemnification to damages resulting from the work Muhler performed.*" Concord & Cumberland at 645 (emphasis added). Thus, despite overt representations by the general contractor that it was seeking indemnity for damages resulting from both its own negligence and the negligence of its subcontractor, the court in Concord & Cumberland nonetheless allowed the general contractor to recover from its subcontractor for damages resulting from the work of the subcontractor. To arrive at this conclusion, not only did the Concord & Cumberland Court recognize that Superior's claims for contractual indemnification encompassed both a claim to be indemnified for its own negligence as well as a claim to be indemnified for the negligence of the subcontractors, but the court then also separately analyzed the two types of claims: to the claim for indemnification for Superior's own negligence, the court applied the heightened clear and unequivocal standard and found that the contract could not meet that heightened standard; however, for the second type of claim – Superior's claim to recover for its subcontractor's negligence – it then applied the analysis used with contracts generally (i.e., *not* the heightened standard), and under such analysis the court allowed Superior to recover for damages caused by its subcontractor (regardless of whether Muhler's negligence was sole or concurrent).

The court of appeals in this case, under factual circumstances nearly identical to those presented in Concord & Cumberland, has nonetheless reached a diametrically opposed result. Rather than apply the heightened "clear and unequivocal" standard only to the portion of claims allegedly seeking recovery for Petitioner's own negligence, the court applied the heightened standard to *every* contractual indemnity claim – including Petitioner's claim to recover for the negligence of its subcontractors. Applying the heightened standard, the court then determined that Petitioner's contractual indemnity claims failed as a matter of law, because the contractual provisions were not sufficiently clear and unequivocal to pass the heightened test. Such a broad application of the "clear and unequivocal" standard is contrary to established law, including the court's own precedent.

Remarkably, the court of appeals in this case considered Concord & Cumberland to be good law, while simultaneously maintaining that the result it reached in this case – which is completely opposite that in Concord & Cumberland – is *also* good law. The two cases cannot stand simultaneously as precedent. Among the purposes of precedent is to protect those who have taken action in reliance on a past decision, to require that like cases be decided in a like manner, and to contribute to the integrity of the judicial process. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64, 142 S. Ct. 2228, 2261–62 (2022). Each of these aims is undermined if both Concord & Cumberland and the court of appeal's opinion in this case are allowed to stand.

Nowhere did the court of appeals in this case attempt to distinguish its holding from that in Concord & Cumberland, and nowhere did the court criticize its previous analysis, its holding, or its results. Nonetheless, the court's unexplained deviation has implicity rejected established and recognized precedent regarding fundamental principles of contractual indemnity. See Coleman v. Page's Est., 202 S.C. 486, 25 S.E.2d 559, 560 (1943)(A decision which is to overrule

all former precedents and to establish a principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside.)

Unless the Supreme Court weighs in, the result of these two opinions is that the legal landscape will be filled with instability, unpredictability, and confusion regarding how to proceed in a situation where appellate courts are divided over whether or not a party may recover from its subcontractor in contractual indemnity for that subcontractor's negligence.

B. The Supreme Court should take this case because the consequence of allowing the ruling of the court of appeals to stand will upend the entire construction industry in ways the court never intended.

The court of appeal's opinion creates new and unprecedented law governing contractual relations between parties. Specifically, it unsettles established South Carolina law regarding the allocation of risk between contractors and their subcontractors, and it upends the recognized contractual requirements for indemnity provisions. In ignoring and abandoning precedential cases, such as Laurens, Ashley II, and Concord and Cumberland, the court of appeal's opinion has effectively created new and harmful law that will cause turbulence to the relationships of parties far beyond this case; virtually every contract currently in effect in the industry is now subject to challenge and left potentially without support.[4]

The contractual indemnity provisions to which the court of appeals applied the heightened clear and unequivocal standard in this case are virtually identical to those provisions reviewed by

4 See **South Carolina Ruling Has Major Implications on Indemnity Provisions and Collateral Estoppel** https://www.jdsupra.com/legalnews/south-carolina-ruling-has-major-9011993/

the court of appeals in Concord and Cumberland, where the court found such provisions to be adequate to support the contractor's claim for indemnity against liability caused by the negligence of its subcontractor – these provisions were not subjected to the clear and unequivocal standard. Moreover, these provisions are based on provisions promulgated by the AIA. This means they are standard terms, and they are present in nearly *every single contract* used in the industry. Never before had a court required these provisions to withstand the heightened clear and unequivocal analysis in order for one party to recover from a second party for that second party's negligence; instead courts analyzed them under the rules governing contracts generally, and under that level of scrutiny, the indemnification provisions were found acceptable. Thus, year after year, they were incorporated into contracts and year after year, serve as the basis for a contractual indemnification claim.

Now, for the first time, the holding of the court of appeals will require that a party's entire contract must meet the clear and unequivocal standard in order for that party to recover in contractual indemnity *at all*. The court of appeals looked at this standard AIA indemnification language and, by this opinion, has already held that this language fails to meet the heightened standard. [Opinion p. 23]. While this opinion stands, no contractor who used AIA language will be able to recover from any negligent subcontractor for that subcontractor's negligence. Contractors will be left to bear the financial burdens of the mistakes of others, and subcontractors who performed negligently will face no consequences. To emphasize the magnitude of the situation, Petitioner points out that one of the contracts at issue to this litigation contains a version of this AIA language that dates back to 2005, which means that nearly 20 years of construction work is implicated in this upheaval.

Petitioner does not believe that the court of appeals intended to create new law or to upend an entire industry. It thus asks that the Supreme Court take this case to clarify (1) that Petitioner has preserved a claim for contractual indemnity for the negligence of its subcontractors; and (2) that this portion of the claim for contractual indemnity is subject only to the general rules of construction for contracts generally, and not to the heightened "clear and unequivocal" standard.

III. The manner in which the court of appeals indefensibly parsed the parties' contract violated the long-established rules of contract interpretation memorialized in the precedential opinions of this Supreme Court.

The court of appeals' misinterpretation of the contract language formed the basis of its holdings, including its holdings that: (1) Petitioner sought recovery only for its own negligence, which it did not have the requisite contractual language to pursue under Concord & Cumberland; (2) Petitioner's right to contractual indemnity ran afoul of Section 32-2-10; (3) the contracts' severance provisions were unenforceable; and (4) the contracts were unconscionable. All of these court of appeals' holdings rely on a misconstrued view of the contract in which both the warranty and the indemnity provisions allegedly permit Petitioner to recover for its own negligence. The court of appeals reached this view of the contracts by isolating provisions of the contracts, some of which are completely irrelevant to the issue in this case, and by refusing to give defined terms their explicit meaning – despite precedent from many Supreme Court cases to the contrary.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (quoting McGill, 381 S.C. at 185, 672 S.E.2d at

574). When a contract is unambiguous, a court must construe its provisions according to the terms the parties used and as understood in their plain and ordinary meaning. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

Despite the explicit prohibition against creating an ambiguity by pointing out a single sentence or clause, the court of appeals has done exactly that. It points to the unrelated Warranty provision of the contract, where the subcontractor agrees to provide a warranty for the Work the subcontractor performed on the project. The court of appeals found this provision unconscionable because, by the court's interpretation, the provision purports to require the subcontractor to warrant work that Petitioner, rather than the subcontractor, performed. But this erroneous interpretation was reached only because the court read this provision in isolation AND the court ignored and did not address the fact that "Work" is a defined term, limited, by *the explicit provisions of the contract*, to the *materials provided and/or services performed by the subcontractor*. [R. pp. 1451, 1464, 1477, 1489, 1501, 1514[5]]. When read with the proper definition, as the parties intended, the Warranty section no longer can be interpreted to require something illicit, and thus, the Warranty section can no longer be the basis of *any* the Court's holdings listed above.

The opinion evidences that the court of appeals failed to give credit to the defined term "Work" as required under the contracts. The court of appeals' failure to do so directly contradicts this Court's precedent on honoring terms used by the parties in the contract. See Schulmeyer, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (explaining courts must interpret a contract "according to the terms the parties used").

[5] The Record on Appeal does not contain copies of BFS contracts for L&G Constuction and AC Construction, however the contracts are identical in form and content to the "Later Contracts," and why L&G and AC filed motions joining the other parties' motions for summary judgment. See R. pp. 1156, 1205-1207.

In addition to failing to acknowledge defined terms in the contract, the lower court and court of appeals reviewed terms and provisions of the contracts which have absolutely no relevance whatsoever to the claims pending before the court. For example, the court focused on the warranty provisions of the contract despite the fact that there is no *warranty* claim before the court[6]. Further, the court of appeals took issue with a provision within "SECTION 8. Payment to Subcontractor," when there is no claim or issue regarding payments owed by Petitioner to subcontractors before the court. Moreover, the court of appeals inappropriately considered a provision in "SECTION 5. Indemnification," that pertains only to bodily injury claims made by an agent, employee or representative of the subcontractor, which is absolutely not at issue or a claim before the court.

The court of appeals in picking and choosing select language from non-relevant provisions to create conflicting terms, directly contradicts this Court's precedent that a court may not review isolated portions of a contract or single sentences or clauses to create ambiguities. See McGill, 381 S.C. at 185, 672 S.E.2d at 574; Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975); Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014). Because the court of appeal's opinion conflicts with this Court's precedent on basic rules of contract interpretation, this Court should grant certiorari.

IV. The failure of the court of appeals to sever any problematic language in the contract conflicts with this Court's precedent regarding severance provisions and severability of contracts.

Contrary to the finding of the court of appeals, the contracts, when the terms and provisions are given their proper, reasonable, and plain meaning, are not replete with illegal or unconscionable terms. As such there is no basis to support the court's failure to sever, when the provisions in fact

[6] While Petitioner pled breach of warranty causes of action, Petitioner conceded during oral arguments at the trial court that Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630 (Ct. App. 2015) is valid law and renders the warranty claims as disguised indemnity claims and thus it did not appeal the trial court's ruling granting summary judgment on such basis.

comply with relevant law. Petitioner is not asking any court to re-write the contracts; however, to the extent necessary, it is asking the Court to honor the intent of the parties and sever any provision that violates South Carolina law.

"Whether an illegal provision in an otherwise valid contract may be separated from the contract is a matter of intent of the parties" The Beach Company v. Twillman, Ltd., 351 S.C. 56, 64, 56 S.E.2d 63, 867 (Ct. App. 2002). The presence of a severability clause, such as the clause incorporated within each of the contracts at issue here, should be treated as strong evidence of the parties' intent to sever unenforceable language. Jane Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880-81 (Ct. App. 2020). Equally importantly, this Court has long since held that the primary purpose in the construction of contracts is to discover the intention of the parties, which, when discovered, will be given effect regardless of technical forms of expression. Am. Nat. Bank of Winter Haven, Fla., v. Caldwell, 166 S.C. 194, 164 S.E. 613, 615 (1932).

The contracts at issue here contain separate distinct sections relating to separate matters, including, respectively, indemnity, warranty, payment, etc. [R. pp. 1451-1525]. Moreover, the section regarding indemnity, in addition to its initial paragraph upon which Petitioner relies in support of its indemnity claims, is further characterized by separate paragraphs, each addressing separate and distinct circumstances under which an obligation to indemnify may arise. [R. pp. 1455-56, 1468-69, 1482-83, 1494-95, 1506-07, 1519-20]. Each of these separate sections, and the distinct paragraphs within the respective sections, relate to separate rights and or responsibilities and are all subject to severance if needed without compromising the goals of the contracting parties.

Moreover, the contracts also include severability provisions that explicitly state

> "The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect

the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law."

[R. pp. 1460, 1473, 1488, 1500, 1512, 1525].

In light of the format of the contracts and the severability provisions, there can be no dispute that the parties intended for any unenforceable provision be severed and the remainder of the contract be left intact and in effect. Moreover, the court of appeals opinion declining to honor the severance provision defies reason as certainly, no party to the contract intended that the contract be rendered wholly unenforceable, as all parties to the contract relied upon the contract for business purposes and their livelihood.

The court of appeal's opinion directly contradicts this Court's precedent which acknowledges that for centuries, the law has stricken illegal parts from contracts and upheld the legal parts, as long as the central purpose of the parties' agreement did not depend upon the illegal part. Huskins v. Mungo Homes, LLC, 444 S.C. 592, 595-96, 910 S.E.2d 474, 477-78 (2024)(citing Pigot's Case, 77 ER 1177, 1179 (1614); United States v. Bradley, 35 U.S. 343 (1836)). Moreover, our courts perform severance even where the parties may not have intended such action to take place. Id.

Accordingly, this Court must grant certiorari to review and correct the errors of the court of appeals.

V. Whether S.C. Code Section 32-2-10 prohibits a party's ability to recover attorney's fees is a novel issue in South Carolina, and the Supreme Court should hear this case to clarify that under strict statutory construction, Section 32-2-10, which is in derogation of common law and expressly applies only to indemnification, does not apply to attorneys' fees, which are a separate form of recovery.

Section 32-2-10 governs agreements for indemnity against liability for damages; it is silent regarding attorneys' fees, and no South Carolina Court has yet addressed the question of whether

the statute was intended to apply expansively to attorneys' fees or whether it was intended, as written, to apply only to indemnification for damages.

When approaching statutory interpretation, courts must assume that the legislature was aware of the common law, "and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Additionally, when, as here, a statute is "in derogation of the common law," it must be strictly construed. Id.

Section 32-2-10 specifically states that it governs agreements for *indemnity* against liability for damages. As noted by Concord & Cumberland, our courts "have consistently defined *indemnity* as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." Concord & Cumberland, 424 S.C. at 646-47. Attorneys' fees do not fall within the scope of indemnity because they are not paid by a first party to "a second party for loss or damage the second party incurs to a third party." Rather, they are consequential damages of an indemnity claim. Because Section 32-2-10 imposes restrictions unknown at common law, it must be strictly construed. Because it uses the term "indemnify," a term that "has a well-recognized meaning in the law," it must be read only to apply to agreements governing indemnification; its meaning may not be expanded by the court to include agreements governing attorneys' fees.

While Section 32-2-10 addresses agreements governing the duty to indemnify, the statute is silent as to agreements imposing a duty to defend. The duty to defend and the duty to indemnify are two separate and distinct contractual obligations. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). "Although these duties are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the

judgment, the duty to defend exists regardless of the [indemnitor's] ultimate liability to the [indemnitee]." Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977). As such, this Court should grant certiorari to review the Record on Appeal which will confirm that Paragraph Three of the Later Contracts is neither addressed nor prohibited by Section 32-2-10.

VI. Whether a trial court's order on appeal is "final" for purposes of collateral estoppel or res judicata is a novel issue in South Carolina and a split issue in the Fourth Circuit; the South Carolina Supreme Court should hear this case to resolve the uncertainty and clarify the state of the law in South Carolina.

The issue of whether a trial court decision on appeal is sufficiently "final" for purposes of collateral estoppel is an issue of first impression in South Carolina. There are no cases on point. Even the cases cited by the parties herein have reached different conclusions, and the issue is split amongst states in the Fourth Circuit. *Compare* Arkansas Best Freight Sys., Inc. v. H.H. Moore, Jr. Trucking Co., 244 Va. 304, 307, 421 S.E.2d 197, 198 (1992) ("A judgment, to be relied upon for the application of the doctrine of res judicata, must be final, and a judgment which is being appealed is not final for res judicata purposes.") to Warwick Corp. v. Maryland Dep't of Transp., 573 F. Supp. 1011, 1014 (D. Md. 1983) ("Such a consequence would also be laughable. If a judgment was denied its *res judicata* effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation.") Because the issue is one of novel impression in South Carolina, the Court should grant certiorari to provide clarity on this issue.

Moreover, the court of appeals overlooked that no trial court has yet answered the question of whether Petitioner can recover, under the relevant indemnity provisions of the respective contracts, for the negligence of its subcontractors, regardless of whether Petitioner can recover

indemnity for its own negligence. All prior cases cited as the basis for the lower court's collateral estoppel have involved the lower courts' consideration of Petitioner's claims purportedly seeking indemnity against Petitioner's negligence. No prior court has specifically addressed the issue – the specific claims Petitioner contends that it is seeking in litigation – of whether Petitioner may recover indemnity for the subcontractors' negligence.

The doctrine of collateral estoppel is only available *when the same issues of fact or law* are actually litigated and directly determined by valid and final judgment. Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) (emphasis added). The issue before the trial court in this case was *whether BFS may recover under the relevant indemnity provisions for the subcontractors' negligence* (whether sole or concurrent). This issue has not been ruled upon by a single court to date, and thus, it is not subject to collateral estoppel. Therefore, this Court should answer the novel question, which is not precluded by collateral estoppel.

Conclusion

Because the opinion of the court of appeals in this case contradicts the rules promulgated by this Court, flies in the face of precedent, and will unwittingly upend the entire construction industry, the Supreme Court should grant certiorari in this case and provide guidance to the courts, the parties, and the industry on the correct analysis of contractual indemnification claims.

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