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SC Court of Appeals

STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

2021-001050

The Retreat at Charleston National County 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 Oliverira Construction, LLC; Solesmar Jesus De Oliverira; 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 ..... Third-Party Plaintiff, Appellant,

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,

FINAL BRIEF OF RESPONDENT, POHLMAN QUALITY EXTERIORS, INC.

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STATEMENT OF THE CASE

The Retreat at Charleston National, located in Mount Pleasant, SC, is a multi-family development consisting of thirty-two (32) buildings that were constructed in four (4) phases. Campbell R. Campbell Construction, Inc. (Campbell) served as the General Contractor for phases I, II, & III. Appellant, Builders FirstSource-Southeast Group, LLC (hereinafter, BFS) entered into a subcontract with Campbell to provide labor and all materials to accomplish the erection of the rough framing for certain buildings, which included the installation of windows and exterior doors. BFS then sought out carpenters to hire to provide the labor necessary to meet the obligations of its contract with Campbell. One of the carpenters hired by BFS was Respondent, Pohlman Quality Exteriors, Inc. (hereinafter, Pohlman). Pohlman provided labor only to install windows on buildings 11 and 21 at the project. BFS supplied all materials to be used or installed by Pohlman, including the windows.

Plaintiffs filed the above-captioned lawsuit alleging, amongst other things, deficiencies in the windows BFS sold to the developer and in the installation of those windows. BFS then brought a third-party action against its subcontractors, including Pohlman. The Third-Party Complaint seeks recovery from the subcontractors on the theories of Contractual and Common Law Indemnity, Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract.

In late 2019 and early 2020, eight separate subcontractors, including Pohlman, moved for summary judgment. Pohlman filed its Motion for Summary Judgment against the claims of BFS on March 2, 2020. Pohlman then filed its Second Amended Motion for Summary Judgment against the claims of BFS on October 22, 2020. Pohlman filed its Memo in Support of Second Amended Motion for Summary Judgment as to the claims of BFS on October 29, 2020. BFS filed its Memorandum in Opposition to Pohlman's Second Amended Motion for Summary Judgment on

November 2, 2020. On May 10, 2021, Judge Jennifer B. McCoy issued an Order Granting Partial Summary Judgment to Pohlman on certain claims raised by BFS.

BFS filed its Motion for Reconsideration of Judge McCoy's Order Granting Partial Summary Judgment to Pohlman on July 19, 2021. On August 23, 2021, Judge McCoy denied BFS's Motion for Reconsideration without the necessity of a hearing and decided the matter on the record and briefs. BFS filed its Notice of Appeal of the Order of Judge McCoy granting Pohlman's Second Amended Motion for Summary Judgment on September 22, 2021. BFS also appealed the Order of Judge McCoy denying BFS's Motion for Reconsideration in the same Notice of Appeal.

In her Order, Judge McCoy

- granted Summary Judgment to Pohlman and dismissed BFS's causes of action for Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract, ruling those causes of action were merely disguised claims for Indemnification pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). BFS has not appealed that ruling.
- granted Partial Summary Judgment to Pohlman on BFS's causes of action for Contractual and Common Law Indemnity, ruling that the Indemnity provision of the form Subcontract drafted by BFS is ambiguous and in violation of Section 32-2-10 of the South Carolina Code, and therefore, against public policy and unenforceable, thereby leaving BFS with a cause of action for Common Law Indemnification against Pohlman. Those are the rulings which BFS has appealed.

The case is now before this Honorable Court of Appeals. This case combines eight separate appeals into one omnibus appeal. Some issues are common amongst each appeal, while others

vary from one to another. Pohlman submits this brief in response to BFS's brief insomuch as said brief presents issues related to the Order Granting Partial Summary Judgment to Pohlman.

STANDARD OF REVIEW

An appellate court "reviews a grant of a summary judgment motion under the same standard as the [circuit] court." Montgomery v. CSX Transp., Inc., 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008). Rule 56(c) of the South Carolina Rules of Civil Procedure provides the circuit court shall grant a summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

ARGUMENTS

Pohlman will focus this brief solely on the issues raised by BFS that relate to Judge McCoy's Order Granting Partial Summary Judgment to Pohlman. Those issues are set forth as Arguments I, II, and IV in Appellant's Brief. More specifically, this discussion will focus on the Indemnity provision of the form Subcontract drafted by BFS, the 2006 Master Subcontract Agreement (hereinafter the "Subcontract") between BFS and Pohlman, which BFS refers to as the "Later Contract." (R. pp. 1519-1520) The outcome of this appeal turns on the Court's review and possible severance of the first two paragraphs of the Indemnity provision of the Subcontract.

I. APPELLANT IS SEEKING INDEMNIFICATION FROM RESPONDENT FOR APPELLANT'S OWN NEGLIGENCE. THE TRIAL COURT WAS CORRECT IN APPLYING THE "CLEAR AND UNEQUIVOCAL" STANDARD IN ITS REVIEW OF THE INDEMNIFICATION PROVISION OF APPELLANT'S FORM SUBCONTRACT.

The trial court was correct in applying the "clear and unequivocal" standard in its review of the indemnification provision of the BFS form subcontract because

a) BFS has been sued for its own, separate negligence, and

b) in its Third-Party Complaint, BFS seeks from Pohlman "full indemnification for any liability" and for "any sums for which BFS may be held liable," which includes BFS's own negligence.

(R. pp. 450-453).

In its brief, BFS argues that the "clear and unequivocal" standard should not have been used in the review of its form Indemnity provision because BFS is not seeking to recover from Pohlman for its own negligence. (Br. of Appellant, pp. 10-12, 14, 17, 23, 26) However, that position is inconsistent with the claims BFS has asserted against Pohlman.

This Court has held that the "clear and unequivocal" standard must be applied when interpreting a contractor's claim against a subcontractor seeking indemnification for alleged negligent construction of a condominium project, and that the "clear and unequivocal" standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018).

The claims asserted by BFS against Pohlman (and others) are set forth in the Third-Party Complaint:

> 167. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the Third-Party Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

(R. p. 449).

Paragraph 167 of the BFS Third-Party Complaint alleges, in essence, that if BFS is held liable to Plaintiffs, then that liability can only be the result of the negligence of Pohlman and others. In wording the paragraph in that manner, BFS ignores the very real possibility that it may be held liable to Plaintiffs for its own negligence as alleged in Plaintiffs' Fourth Amended Complaint:

> a. in failing to properly construct the Project by deviating from the plans and specifications and by failing to employ practices and methods of construction conforming with accepted industry standards; and/or using defective material; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturer's instructions;
>
> b. in failing to properly supervise their work and the work of other trades in
> order to ensure that all work proceeded in accordance with the plans and
> specifications and in conformity with the customary and ordinary standards of the construction industry;
>
> c. in accepting non-conforming or defective material;
>
> d. in using and supplying defective materials;
>
> e. in installing materials not in accordance with the plans and specifications;
>
> f. by installing materials in violation of manufacturer's instructions;
>
> g. in accepting and performing deficient and/or defective workmanship and/or materials without proper inspection to ensure that the work was correct and in conformity with industry standards

> and in accordance with the plans and specifications and the manufacturer' s instructions;
>
> h. in constructing the Project in violation of the applicable building codes; and
>
> i. in failing to inform the architect, owner or general contractor of defects in the plans and specifications

(R. pp. 366-367).

The particulars of negligence alleged at subparts b, c, d, g, and i speak to duties owed by BFS in its roles as a supplier of materials for the project and as a subcontractor responsible for supervising, inspecting, and approving the work of its sub-subcontractors.

Further, in its Brief, BFS acknowledges that Plaintiffs' experts have opined that two of the building materials which it supplied for use by Pohlman (and others) – windows and window fasteners – were both improper for use at this project:

> Plaintiffs' forensic expert has also opined that the windows at the project are characterized by inadequate DP ratings, requiring comprehensive replacement of those windows; that installation was performed using incorrect fasteners, which were, both (a) of improper type, and (b) of inadequate length to assure required embedment of the fastener into the framing; and that fasteners were installed at spacing intervals which exceeded those required by the manufacturer's installation criteria.

(Br. of Appellant, p. 1).

BFS points to paragraph 167 of its Third-Party Complaint and says, "See, we allege that any potential liability to BFS can only exist as a result of the negligence of Pohlman, so that is all BFS seeks from Pohlman by way of indemnification." As is proven by Plaintiffs' allegations and expert opinions, there are several ways which a jury can find BFS liable for its sole negligence. And, as is proven by BFS's Third-Party Complaint, BFS is seeking indemnification from Pohlman for its own negligence.

Paragraph 168 of the BFS Third-Party Complaint reads as follows

> 168. **That BFS is entitled to full contractual and common law indemnification from the Third-Party Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action**, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Third-Party Defendants, entitling BFS to recover from the Third-Party Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further **entitling BFS to recover from the Third-Party Defendants any sums for which BFS may be held liable to the Plaintiffs or to others,** or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims. ***[emphasis added]***

(R. p. 449).

Nowhere in paragraph 168, and nowhere in its Third-Party Complaint, does BFS state that it is not seeking indemnification from Pohlman for BFS's own negligence. And as demonstrated above, there are several ways which a jury can find BFS liable for its own, sole negligence. Given those facts, when in paragraph 168 BFS asks for "full indemnification for any liability", and to be reimbursed by Pohlman for "any sums for which BFS may be held liable", BFS is clearly seeking recovery from Pohlman for the full and complete amount of any verdict rendered against it, including any damages included in the verdict for BFS's own negligence.

In its Brief, BFS dreams of a world in which there can be no path to liability for BFS because of its own negligence. (Br. of Appellant, pp. 13-14) That world may exist in BFS's dreams, but that is not the reality of the world in which this case will be tried. As shown, if this case goes to trial, there are several ways by which BFS may be held liable for its own negligence. And, unlike the Indemnity provision of the Subcontract drafted by BFS, the wording of paragraph 168 of BFS's Third-Party Complaint is clear and unambiguous. There is no doubt that BFS is seeking indemnification from Pohlman for its own negligence.

II. BECAUSE THE INDEMNIFICATION PROVISION OF THE SUBCONTRACT DRAFTED BY APPELLANT IS INCONSISTENT AND AMBIGUOUS, THE INDEMNITY PROVISION DOES NOT SHOW THAT

THE PARTIES INTENDED IN CLEAR AND UNEQUIVOCAL TERMS FOR POHLMAN TO INDEMNIFY APPELLANT FOR ITS SOLE OR CONCURRENT NEGLIGENCE.

Below are the first two paragraphs of the Indemnity provision of the form Subcontract created by BFS. As used in these paragraphs, the word "SUBCONTRACTOR" refers to Pohlman and the word "CONTRACTOR" refers to BFS.

SECTION 5. INDEMITY

TO THE FULLEST EXTENT PERMITTED BY LAW, **THE SUBCONTRACTOR SHALL INDEMNIFY**, DEFEND, AND HOLD HARMLESS **THE CONTRACTOR**, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES **FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER,** INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) **ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.** THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW. **THE SUBCONTRACTOR SHALL INDEMNIFY**, DEFEND, AND HOLD HARMLESS, **THE CONTRACTOR**, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), **FROM AND AGAINST ANY AND ALL CLAIMS**, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE

INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) **ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES**, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE. WHETHER IT IS OR IS ALLEGED TO BE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFITS ACTS, OR OTHER EMPLOYEE BENEFITS ACTS. THESE SUBCONTRACTORS SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5. ***[emphasis added]***

(R. pp. 1519-1520).

A contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms. Concord & Cumberland, 424 S.C. at 171, 819 S.E.2d at 647 (Ct. App. 2018); citing Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989).

The first paragraph of the Indemnity provision purports to limit Pohlman's indemnification responsibility to BFS to damages to the extent caused by Pohlman, but the second paragraph requires Pohlman to indemnify BFS for damages even if those damages are the result of the sole negligence of BFS. Within the Indemnity provision of the form Subcontract it created, BFS states two different standards for Pohlman's indemnification exposure. These two paragraphs are in conflict with each other and cannot be reconciled. The conflict between these two paragraphs creates an ambiguity which then by definition means the Indemnity provision cannot be said to

"clearly and unequivocally" state the intention of the parties that Pohlman agreed to indemnify BFS for its own negligence.

BFS argues that the first two paragraphs of the Indemnity provision must be read separately, and that if read separately, no conflict or ambiguity exists. (Br. of Appellant, p. 20) It is likely that all ambiguities in contracts would disappear if the Court was allowed to put on blinders and interpret one paragraph at a time without having to concern itself with the language of other paragraphs. But, of course, that is not the law, and separate but conflicting paragraphs of contracts must be reconciled with each other. When interpreting a contract, the parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007), citing Thomas–McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); *see also* Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000).

BFS drafted the form Subcontract and it is responsible for the ambiguity created by the two different standards for indemnification stated in the paragraphs of the Indemnity provision. Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." Ecclesiastes Prod. Ministries, 374 S.C. at 499, 649 S.E. 2d at 502, citing Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (quoting 17A C.J.S. *Contracts* § 324).

Even if the conflicting language could be reconciled, the Indemnity provision of the subcontract is still invalid. Section 32-2-10 of the Code of Laws of South Carolina (1976, as

amended) provides that any promise or agreement related to the design or construction of a building which requires a party to indemnify another party even if the loss or damage was caused by the sole negligence of the indemnitee is "against public policy and unenforceable". S.C. Code Ann. 32-2-10 (1976, as amended).

In Concord and Cumberland, this Court analyzed an indemnity provision that practically mirrors the one in the present case. Concord and Cumberland, 424 S.C. at 652, 819 S.E.2d at 173. The Concord and Cumberland Court found that the subcontractor did broadly agree to indemnify the general contractor for any damages resulting from the scope of work in the Subcontract, which was installation and doors. Id. The Court also recognized that the phrase that followed this broad agreement to indemnify, "to the extent caused . . . in whole or in any part by any negligent act or omission of [subcontractor]," limited the subcontractor's obligation to indemnify to damages and losses but only to the extent they were caused by the negligence of the subcontractor and its subcontractors. Id.

The indemnity provisions of the BFS form Subcontract contain both the broad and limiting indemnity language as the subcontract at issue in Concord and Cumberland. That subcontract, which failed to "clearly and unequivocally" require the subcontractor to indemnify the indemnitee for losses the indemnitee may have contributed to, could be read to "relieve an indemnitee from the consequences of its own negligence." Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 378-79 (2003). Section 32-2-10 forbids the indemnification of an indemnitee for its own negligence.

Applying that same reasoning to the mirrored language in the Subcontract between BFS and Pohlman, the indemnity provision is unenforceable and violates the public policy of this State. As Concord and Cumberland provides, "the clear and unequivocal" standard applies any

time an indemnitee is seeking indemnification for its negligence, whether sole or concurrent. The Indemnity provision fails to "clearly and unequivocally" require the subcontractor to indemnify the indemnitee for losses the indemnitee may have contributed to. For that reason, the Indemnity provision can be read to relieve an indemnitee from the consequences of its own negligence. If Pohlman could be required to indemnify BFS for BFS's own negligence, the Paragraph requiring such is unenforceable under the law of this State.

III. APPELLANT CANNOT USE THE SEVERABILITY CLAUSE TO SAVE ITSELF FROM THE AMBIGUITY WHICH IT CREATED. APPLICATION OF THE SEVERABILITY CLAUSE AS SUGGESTED BY BFS WOULD REQUIRE THE COURT TO RE-WRITE THE SUBCONTRACT AND THE FAILURE TO DISCUSS THE SEVERABILITY CLAUSE IN THE ORDER IS, AT MOST, HARMLESS ERROR.

Judge McCoy held that the language of the two paragraphs in the Indemnity provision are in conflict and cannot be reconciled. (R. p. 119) BFS asserts that the solution for reconciliation is for the Court to sever the offending paragraph and leave the remainder of the contract intact. (Br. of Appellant, p. 39) BFS points to the Severability provision in the Subcontract as the tool which the Court can use to remove the second paragraph of the Indemnity provision, thereby allowing BFS pursue its claim for Contractual Indemnity. However, in this instance, use of the Severability clause in that manner would result in the Court running afoul of two well-settled rules to be applied when construing contracts.

Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect. C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586(1988). It is not the function of the court to rewrite contracts for parties. *See* York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 90, 749 S.E.2d 139, 150 (Ct. App. 2013). The court is without authority to alter a contract by

construction or to make a new contract for the parties. C.A.N Enterprises, 296 S.C. at 378, 373 S.E.2d at 587 (1988).

The Indemnity provision of the contract contains four paragraphs that are not labeled in any way other than the word "Indemnity" placed above the section. (R. pp. 1519-1520) BFS could have chosen to break the paragraphs up and label them appropriately as to which sections apply to which particular circumstances, but it chose not to do so. Most importantly, BFS could have "clearly and unequivocally" laid out the terms of indemnification. Instead, BFS put all of the paragraphs dealing with indemnity under a single, broad heading without subtitles, instructions, or anything which would allow Pohlman, or the Court, to come to any conclusion other than the entire provision must be read, and interpreted, as a whole when faced with a claim for indemnification. The result of BFS's "style" of drafting are two paragraphs thrown together which state different standards for indemnification which cannot be reconciled with each other.

In an effort to try and save itself from the ambiguity it created, BFS points to the Severability clause of the Subcontract. BFS argues that the Court should have used the Severability clause to simply remove any "problematic" language, leaving the remainder of the Subcontract in place. However, in asking the Court to resolve the ambiguity in that manner, BFS is asking the Court to re-write the Subcontract. It is not the function of the court to rewrite contracts for parties. York, 406 S.C. at 90, 749 S.E.2d at 150 (Ct. App. 2013). Because the two "problematic" paragraphs of the Indemnity provision set forth two different standards for indemnification for similar claims and cannot be reconciled, those two paragraphs are inextricably linked, and they cannot be separated. If the Severability clause is invoked, then both the first and second paragraphs of the Indemnity provision must be removed. For the Court to do otherwise would result in the Court re-writing the Subcontract and construing the ambiguity in the Indemnity provision in favor of the

party that drafted the document, both of which would violate boilerplate, long-held legal principles of contract construction. South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy. Poynter Invs. Inc. v. Cent. Builders of Piedmont, Inc., 386 S.C. 583, 588, 694 S.E.2d 15, 18 (2010). Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." Ecclesiastes Prod. Ministries, 374 S.C. at 499-500, 649 S.E. 2d at 502 (Ct. App. 2007).

During the hearing, Counsel for BFS "repeatedly" argued BFS's position on how the Court could use the Severability clause to give BFS the result it wanted. (Br. of Appellant, p. 37) Although it is correct that the Order does not contain a discussion of the Severability clause, there is certainly no evidence to suggest that Judge McCoy did not consider BFS's argument, or that she refused to consider the argument. Logically, the most that BFS can say on that point is that Judge McCoy did not address the Severability clause in her Order.

As explained above, in this instance, the only proper use of the Severability clause would be to remove both the first paragraph and the second paragraph from the BFS form Subcontract, leaving BFS with its cause of action for Common Law Indemnification.

Even though the Order does not discuss the Severability clause, we know three things: 1) Counsel for BFS "repeatedly" argued BFS's position on how it believed the Severability clause should be applied; 2) If Judge McCoy had been convinced that BFS's position on the use of the Severability clause was correct, then she would have ruled in BFS's favor; and 3) Judge McCoy's

eventual ruling is the same as it would have been had she discussed the Severability clause in her Order. Knowing these things allows the Court to conclude:

- had the Order included a discussion of the Severability clause, that discussion would not have changed the outcome of the motion; and
- the failure to include a discussion of the Severability clause in the Order does not deny or in any way affect a substantial right of BFS.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Rule 61, SCRCP.

Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless where it could not reasonably have affected the result of the trial. Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result. Judy v. Judy, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009), citing In re Harvey, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003), State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985), and State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).

The fact that the Order does not contain a discussion of the Severability clause does not change the outcome of the motion and does not deny or in any way affect a substantial right of BFS. As

a result, the omission of a discussion of the Severability clause is, at most, harmless error which does not justify a reversal of the Order.

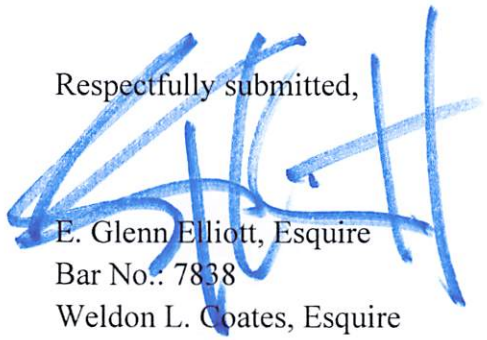
CONCLUSION

BFS is seeking indemnification from Pohlman for BFS's own negligence. For that reason, Judge McCoy's application of the "clear and unequivocal" standard when reviewing the Indemnity Provision of the BFS form Subcontract was proper. On one hand, the first and second paragraphs of the Indemnity provision are ambiguous, cannot be reconciled, and they violate public policy and are unenforceable. On the other hand, because of the manner in which those paragraphs were drafted by BFS, they are inextricably linked such that, if the Court were to use the Severability clause to remove one or the other from the Subcontract, then the Court would be re-writing the contract.

In the context of this appeal, BFS is, literally, the author of its own fate. BFS drafted the form Subcontract and the complicated, confusing, and ambiguous paragraphs of the Indemnity provision. Those paragraphs are either void and unenforceable, or both must be removed from the Subcontract. Either way, the result is the same - the only viable cause of action asserted by BFS against Pohlman which survives is the cause of action for Common Law Indemnification.

Due to the forgoing, Pohlman hereby requests that this Court AFFIRM the findings and Order of Judge McCoy Granting Partial Summary Judgment to Pohlman Quality Exteriors, Inc.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

2021-001050

The Retreat at Charleston National County 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; Costa De Oliverira Construction, LLC; Solesmar Jesus De Oliverira; 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 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 ..... Third-Party Plaintiff, Appellant,

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,

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CERTIFICATE OF COUNSEL

I, as the undersigned counsel for Respondent Pohlman Quality Exteriors, Inc., certify that the Final Brief of Respondent Pohlman Quality Exteriors, Inc. complies with the requirements of SCACR Rule 211(b).

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November 11, 2022

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