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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. Versteegen,

PLAINTIFFS,

versus

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., 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.

**REPLY TO RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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ARGUMENT IN REPLY

At the crux of this appeal is whether D.R. Horton can impose upon Petitioners void and unenforceable contract terms violative of statutory law and public policy in seeking contractual indemnification against Petitioners. The issue of enforceability, a question of law for the court, must be determined before D.R. Horton can proceed upon these claims. Yet, at every turn, D.R. Horton seeks to prevent the courts from addressing whether the indemnification provisions are enforceable or not.

According to D.R. Horton, the only valid and controlling order in this case is Judge DeBerry's Form 4 order denying the motions for summary judgment which found only that genuine issues of material fact existed. [R.pp. 1-6.] Judge DeBerry's ruling was ambiguous because it gave no indication of what issues were addressed. The order stated issues of fact existed, but yet the question of enforceability is a legal question for the court to determine and not a factual issue for the jury. Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014). D.R. Horton contends Judge DeBerry must have found the indemnity provisions were enforceable, but that is mere speculation since the order does not address enforceability. Notably, Judge DeBerry's Form 4 order while not expressly finding the contractual provisions at issue were enforceable, determined that genuine issues of material fact existed. It is undisputed that Judge DeBerry's order does not specify which of the issues were premised on disputed factual issues, nor does it address the legal issues regarding validity and enforceability of the contracts. Judge DeBerry simply refrained from deciding the indemnification issue and his order was ambiguous because it conflated the issues before him when it stated there were issues of fact for the jury (indeed, it is error to submit the issue of enforceability of the contract provision to a jury because

it is a legal question for the court to decide).

According to D.R. Horton, this vague and unclear order of Judge DeBerry controls the case and is not subject to challenge. In the conclusion of its Return, D.R. Horton contends Petitioners are attempting to appeal Judge DeBerry's denial of summary judgment which Petitioners cannot do because denials of summary judgment are never appealable.

D.R. Horton therefore recognizes that Petitioners could not immediately appeal Judge DeBerry's order denying summary judgment and that it was not a final order. But when the case proceeded to trial, even though Judge DeBerry's order was not final and Petitioners had no means of appealing it, D.R. Horton wanted to nevertheless prevent the trial judge from having any authority in determining whether D.R. Horton's contractual cross-claims could proceed as a matter of law. This cannot be a correct proposition of law. Enforceability is an issue that must be determined before D.R. Horton can proceed against Petitioners on its cross-claims for contractual indemnification. During arguments with the trial judge, D.R. Horton's counsel at one point even agreed that the issue of enforceability was within the trial judge's purview. [R.p. 680, ll. 9-15.] It was also certainly not clear from Judge DeBerry's order if he had determined enforceability of the indemnity provisions, leaving this issue open for a ruling by the trial judge.

After the trial judge determined that the indemnity provisions which D.R. Horton sought to enforce were unenforceable, D.R. Horton convinced the Court of Appeals that the trial judge lacked the authority to determine the threshold issue of enforceability. D.R. Horton now argues this Court also cannot address the enforceability of the indemnity provisions or remand to the Court of Appeals for consideration of the merits of the appeal. D.R. Horton wraps its arguments in notions of procedural due process and issue preservation, but these arguments are unavailing.

D.R. Horton's claim that the trial judge denied it procedural due process by ruling during trial on an issue central to D.R. Horton's cross-claims is disingenuous. D.R. Horton knew throughout the case that enforceability of the indemnification provisions was a significant issue. During trial, when deciding whether the cross-claims should move forward due to the unenforceability of the contractual provisions, the trial judge gave D.R. Horton a full opportunity to respond. [R.pp. 699, ll. 4-5; 702, l. 24 – 722, l. 25; 724, l. 15 – 725, l. 2.] D.R. Horton was never deprived of any due process when the trial judge ruled during trial on a threshold issue critical to the contractual indemnification cross-claims which D.R. Horton brought against Petitioners.

D.R. Horton further contends that Petitioners have not preserved the issues they raised in their Petition for Writ of Certiorari. D.R. Horton first argues that Petitioners did not raise the ambiguity of Judge DeBerry's denial of summary judgment and the court's authority to construe his order, as well as the court's authority to rule upon contractual terms violative of public policy, in their Respondents' Briefs to the Court of Appeals and instead raised these issues for the first time in their Petition for Rehearing. As respondents in the appeal before the Court of Appeals, Petitioners were not under a duty to preserve issues. Cf. Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691-92 (Ct. App. 2001) (discussing appellant's duty to preserve issues on appeal). Only until the Court of Appeals' adverse opinion was issued were the Petitioners aware of the objections they needed to make to the Court of Appeals' opinion. Petitioners appropriately made those objections in their Petition for Rehearing.

In addition, the two errors of the Court of Appeals which Petitioners have raised to this Court – the Court of Appeals' error in holding the trial judge lacked authority to rule upon the enforceability of the indemnity provisions and its error in eschewing its independent duty to

consider whether the indemnity provisions contravened statutory law or public policy – were specifically raised to the Court of Appeals in the Petition for Rehearing and thus preserved for this Court’s review. [See Petition for Rehearing, pp. 4-8.]

Furthermore, the rules of issues preservation cannot defeat the inherent authority of a court to review *sua sponte* a question concerning the illegality of a contract. See Ward v. W. Oil Co., 387 S.C. 268, 274-75, 692 S.E.2d 516, 519-20 (2010) (reviewing merits of the illegality of a contract even though issue not preserved for appellate review). D.R. Horton attempts to distinguish Ward by stating that the gambling devices in that case were illegal and violated South Carolina statutory law. D.R. Horton ignores, however, that the indemnity provisions at issue here are also illegal and violate South Carolina’s Anti-Indemnity Statute, S.C. CODE ANN. § 32-2-10, and the public policy of this State. [See Petition for Writ of Certiorari, pp. 9-17.] The principle applicable in Ward likewise applies in this case – that a court will not enforce a contract when it violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions.¹

Finally, D.R. Horton argues the record on appeal is not sufficient for a court to decide the case on the merits. The contractual provisions are in the record. The indemnification terms therein can be analyzed under the Anti-Indemnity Statute and applicable case law. The record on appeal is therefore sufficient for the appellate court’s review of the enforceability of the indemnity

¹ D.R. Horton’s argument that this case is not about the indemnity provisions of the relevant contracts, but rather about insurance obligations to which the Anti-Indemnity Statute does not apply is misguided. The contracts at issue contain separate provisions regarding Petitioners’ obligations to provide certain insurance to D.R. Horton. Whether such insurers who are not parties to this action will provide liability coverage to D.R. Horton under the contracts of insurance is a distinct legal issue from the validity of D.R. Horton’s contractual indemnity claims against Petitioners.

provisions.

CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, Petitioners request this Court to grant their Petition for Writ of Certiorari and either (1) remand to the Court of Appeals with instructions to consider the merits of the appeal and enforceability of the indemnification provisions or, in the alternative, (2) review under this Court's inherent authority whether the circuit court correctly dismissed D.R. Horton's contractual indemnification claims which were based upon illegal and unenforceable indemnification provisions.

Respectfully submitted,

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