

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Appellate Case No. 2021-001050

Opinion No. 2025-6099

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; Liollo 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, 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,

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RETURN TO PETITION FOR WRIT OF CERTIORARI, POHLMAN QUALITY  
EXTERIORS, INC.

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## **COUNTER-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 Court of Appeals issued its Opinion on February 12, 2025, affirming each of the trial court's rulings. Petitioners filed a Petition for Rehearing on February 27, 2025, but such was denied by the Court of Appeals on May 21, 2025.

### COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. **Whether the Court of Appeals properly affirmed the trial court's ruling that the indemnity provisions of the Later Contracts fail as a matter of law due to not meeting the "clear and unequivocal" standard promulgated by the Supreme Court in Concord v. Cumberland?**
- II. **Whether the Court of Appeals properly affirmed the trial court's decision that it lacked authority to sever certain portions of the Later Contracts and "re-write" the provisions for BFS?**
- III. **Whether the Court was correct in ruling that attorneys' fees are included within the types of indemnification damages barred by Section 32-2-10?**

### ARGUMENT

Pohlman initially notes that certain Questions presented by Petitioner were not issues raised, discussed, or briefed by Pohlman in the lower courts. Therefore, Pohlman's Return does not provide substantive discussion in response to Petitioner's Question Six (6) regarding collateral estoppel.

- I. **The Court of Appeals affirmation that the "clear and unequivocal" standard applies is proper and BFS has only itself to blame.**

Despite BFS's attempt to break down their argument against the trial's court's application of Concord v. Cumberland's "clear and unequivocal" standard into three separate "questions," (BFS Petition, Questions 1, 2, and 3), and the Court of Appeals subsequent affirmation of the application, the wording of the Later Contract and the provisions to be reviewed remain a single inquiry: "Does the indemnification provision of the Later Contract seek to require the subcontractor (Pohlman) to indemnify BFS for its sole or concurrent negligence." If so, the "clear and unequivocal" standard applies.

As is noted by virtually every party to this case, the Court of Appeals correctly stated the applicable precedent when it 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 v. Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018).

Turning to the BFS form subcontract which BFS forced its subcontractors to sign without negotiation, BFS drafted an ambiguous indemnity provision that identifies two separate and distinct standards for the subcontractor’s (Pohlman) indemnification exposure. 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. These are directly conflicting and cannot be reconciled, as noted by both reviewing Courts. By definition, 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 blames the Court of Appeals for not parsing out each particular paragraph or phrase and applying a separate standard to each which, in their mind, would have permitted their claims for indemnity against the subcontractors for their sole or concurrent negligence to continue forward. The blame is sorely misplaced. BFS was the author of the indemnity provision, not the Court.

In an effort to dodge the Concord v Cumberland analysis altogether, BFS continues to assert, with yet another imaginative argument, that it only seeks recovery for the alleged negligence

of subcontractors. As Pohlman identified in its brief, and as echoed by the Court of Appeals in their Opinion, this position is clearly inconsistent with the claims BFS has asserted against Pohlman in its pleadings. Paragraph 167 of BFS's Third-Party Complaint<sup>1</sup> alleges that, in essence, if BFS is held liable to Plaintiffs, then that liability can only be the result of negligence of Pohlman or others. This stands in stark contrast to the claims alleged by Plaintiff in their Fourth Amended Complaint which speak clearly 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. These are all duties owed to the Plaintiff which a jury can find BFS breached on its own, without subcontractor involvement. Yet, contrary to the arguments BFS presents now, a plain reading of its Third-Party Complaint shows that BFS seeks indemnification from Pohlman for those negligent acts.<sup>2</sup>

BFS appears to state directly that the Court of Appeals misapplied the holding of Concord and Cumberland, where instead they should have only applied the standard to one portion of the indemnity provision. *See* BFS Petition, pgs. 12-15. The problem with that logic is that the trial court found that the indemnity provision, as a whole, could not remain because the paragraphs therein were so conflicting and ambiguous as to render the provision void. Because BFS did not

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<sup>1</sup> Paragraph 167 of the BFS Third-Party Complaint reads as follows:

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)

<sup>2</sup> 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, entitled 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)

adequately draft the indemnity provision in a way that could provide for the Court to analyze single portions of the provision (not to mention the segments that violated public policy), the Court had no choice but to apply the heightened standard to the entire provision. Again, this is the fault of BFS, and not the Court's interpretation of its prior ruling. Thus, the Court of Appeals properly affirmed the trial court's application of the "clear and unequivocal" standard to the indemnification provision at issue.

**II. The Court of Appeals properly affirmed that the trial court is not tasked with "blue-penciling" the contract between the parties and could not utilize the severability clause as demanded by BFS.**

Judge McCoy found that the language of the two paragraphs in the indemnity provision are in conflict and cannot be reconciled. (R. p. 119) The Court of Appeals agreed, and declined to "re-write" the Later Contract to BFS's benefit. This course of action was proper, and consistent with established, well-settled law 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 and Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1998). 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).

BFS wrote the Later Contract; the subcontractor did not. BFS chose to label the "Indemnity" provision as just that; one conglomerate provision made up of four paragraphs with differing indemnification language throughout. The provision does not include subtitles, instructions, or any other guide to which Pohlman, or the Court, could conclude which paragraph applies to which

particular circumstances in which the parties may find themselves. Instead, BFS left the Court with the conclusion that the provision is to be read and interpreted as a whole when faced with a claim of indemnification. The result of BFS's drafting is an overarching provision with different standards for indemnification which cannot be reconciled together.

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 v. Outparcel Assocs., LLC, 374 S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007).

Both Judge McCoy and the Court of Appeals were clear that the indemnity provision, among other provisions in the Later Contract, was (1) not "clear and unequivocal" and (2) contained language violative of public policy. Severance in the manner BFS begs of the Court would require the Court to take out individual words, lines, and/or paragraphs, creating a mash-up of sentences and paragraphs containing no meaning. Not only would that be ineffective, it would stand in contrast to the duties and functions of the Court. York, 406 S.C. at 90, 749 S.E.2d at 150 (Ct. App. 2013). The only proper use of the severability clause, were it to be invoked, would be to remove both the first and second paragraphs of the indemnity provision which are "inextricably linked." This would leave BFS with its cause of action for Common Law Indemnification.

Instead, the Court of Appeals agreed that individual portions of indemnity provision could not be effectively severed due to the provision being "replete with terms that violate South Carolina law and public policy." It is within the court's discretion on how to sever certain provisions or to scrap the provision entirely. *See* Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct.

App. 2020). The Court of Appeals properly affirmed the trial court’s decision to refrain from re-writing the indemnity provision.

**III. The Court of Appeals properly affirmed the ruling that attorneys’ fees are among the damages included in the prohibition of certain indemnification claims imposed by Section 32-2-10.**

BFS presses the Supreme Court in their Petition to review Section 32-2-10 and determine whether attorney’s fees are within the scope of “indemnity damages” considered by Section 32-2-10. This is the first time that BFS has raised this issue, and Pohlman submits that the Petition for Writ of Certiorari is not the appropriate time to present new arguments.

BFS attempts to make sense of this issue by misapplying language from an appellate decision that was focused on insurance coverage issues. BFS urges the Court use a definition of the word “indemnification” sometimes used in the insurance industry, and to ignore the common, well-recognized meaning used every day by parties, lawyers, and courts. Moreover, BFS presses the Court to “read into” Section 32-2-10 a distinction between the duty to indemnify and the duty to defend. Again, this distinction only applies when discussing certain insurance policy issues (e.g., interpretation or potential bad faith). If you take BFS’s argument to its logical conclusion, Section 32-2-10 does not prohibit claims to recover any dollars paid for anything except what is paid for “damages.” That means claims can be made to recover attorney’s fees, expert expenses, filing and service fees, travel expenses... and the list goes on. Not only does such an interpretation fly in the face of common sense, but it would also be ridiculous to suggest that interpretation was intended by the legislature.

**CONCLUSION**

BFS seeks now a third review of the language of the Later Contract and its enforceability, or lack thereof, as to the claims against Pohlman. However, BFS’s goal remains the same: BFS seeks

indemnification from Pohlman for BFS's own negligence and to walk away from this case without potentially suffering the consequences of its own actions. Due to the foregoing analysis above, Pohlman hereby requests that BFS's Petition for Writ of Certiorari be denied.

Respectfully submitted,

s/ E. Glenn Elliott

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