

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
The Honorable Jennifer B. McCoy
Circuit Court Judge

Circuit Court Case No. 2016-CP-10-03783

Court of Appeals Case No. 2021-001050
Opinion No. 6099 (S.C. Ct. App. filed May 21, 2025)

Appellate Case No. 2025-001224

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; Liollo
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.; CollenBatissa; 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; 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.

**RESPONDENT WS CONTRACTORS, LLC'S RETURN TO BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP, LLC'S PETITION FOR WRIT OF
CERTIORARI**

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STATEMENT OF THE CASE

This is a case where a large material supplier and contractor, Petitioner Builders FirstSource – Southeast Group, LLC (“BFS”), asks our courts to enforce contractual provisions in its master subcontractor agreement requiring its subcontractors, including this Respondent, WS Contractors, LLC (“WSC”), to indemnify BFS against liability resulting from its sole negligence. BFS pled for this relief, but, more importantly, is seeking such relief as a matter of fact.

As the record reflects, almost 6 years ago, Respondent WSC and its subcontractors settled with the Plaintiffs. **(R. pp. 812-813)**. Together, WSC and its subcontractors paid Plaintiffs \$1,000,000.00 in exchange for not only a release of Plaintiffs’ direct claims against them, but releases of BFS, the general contractor, and developer from claims arising from or relating to WSC and its subcontractor’s errors, omissions, and scope of work (referred to as the “issue release”). **(R. pp. 811-825)**. The issue release specifically provides:

In consideration of the receipt of the Settlement Amount, Releasors hereby release, acquit, and forever discharge Builders FirstSource, Inc., Builders FirstSource Southeast Group, Winston Carlyle Charleston National, LLC, Colin R. Campbell Construction, Inc., C.R. Campbell Construction Co., Inc., Colin Campbell Construction, LLC, and their respective owners, parents, subsidiaries, directors, officers, shareholders, members, managers, principals, employees, agents, heirs, assigns, and Colin Campbell, individually (hereinafter collectively “Issue Releasees”) relating to or arising from (a) the scope of work for the Project identified in Exhibit A attached hereto involving Building Numbers 22 through 31, inclusive, and made a part hereof, including, without limitation, the acts, omissions, labor, materials, work, and involvement of Issue Releasees with respect to the scope of work for the Project identified in Exhibit A, and (b) the acts, omissions, labor, materials, work, or involvement of the Settling Defendants and Releasee(s) identified in Paragraph 2 at the Project known as The Retreat at Charleston National Country Club.

(R. p. 813).¹ It is settled as a matter of fact in this case that BFS will not bear any liability to Plaintiffs on account of WSC or its subcontractors alleged negligence.

WSC and its subcontractor's bearing of complete responsibility for their scope of work was not enough for BFS. BFS maintained its claims against WSC after this settlement (and throughout the last six years), resulting in the order that is on appeal that BFS requests this Court review. As these facts clearly show, BFS wants its subcontractors to cover BFS's own liability. Numerous circuit court judges have said no go and the Court of Appeals affirmed these decisions.

WSC filed a motion for summary judgment as to BFS's crossclaims against it² about a month after settling with Plaintiffs and procuring the issue release in BFS's favor. **(R. p. 708)**. The Honorable Jennifer B. McCoy heard WSC and the other subcontractor-Respondents' motions for summary judgment as to BFS's crossclaims on November 6, 2020. **(R. p. 1386)**. BFS admitted its causes of action for breach of express and implied warranties, breach of contract, and negligence failed as a matter of law and were subject to dismissal. **(R. p. 1393, lines 4-21; R. pp. 1083-1084; R. pp. 1182-1183)**. BFS has not appealed the dismissal of those claims. BFS's remaining claim, the claim at issue before the Court of Appeals, is for indemnity. BFS's indemnity claim relies upon certain provisions of "Version – 5/17/06" of BFS's form master subcontractor agreement; i.e., the "Later Contracts" as labeled by the Court of Appeals. **(R. pp. 785-798)**.

¹ WSC was one of several subcontractors providing labor-only installation services for BFS. **(R. pp. 822-825, 864)**. WSC's work was limited to Buildings 22 through 31. **(R. pp. 822-825)**.

² BFS's operative claims against WSC are set out in BFS's Amended Answer, Cross-Claims, and Third-Party Complaint that was filed in response to Plaintiffs' Fourth Amended Complaint on November 13, 2019. **(R. pp. 414-454)**. The general contractor and developer never asserted claims against WSC.

Judge McCoy granted summary judgment to WSC.³ On August 9, 2021, BFS filed a motion for reconsideration of Judge McCoy’s Order. **(R. pp. 1373-1385)**. Judge McCoy denied BFS’s motion for reconsideration on August 23, 2021. **(R. pp. 137-138)**. On September 22, 2021, BFS filed its Notice of Appeal of Judge McCoy’s Orders. **(Notice of Appeal to Court of Appeals)**.

On February 12, 2025, the Court of Appeals affirmed all eight of the Circuit Court’s Orders. BFS’s Petition for Rehearing was denied on May 21, 2025, and the Court issued a substituted opinion, still affirming all eight Orders. Retreat at Charleston National Country Club Home Owners Association, Inc., v. Winston Carlyle Charleston National, LLC, et al., 445 S.C. 566, 915 S.E.2d 736 (Ct. App. 2025). BFS filed its Petition for Writ of Certiorari on June 20, 2025.

STANDARD OF REVIEW

This Court only reviews final decisions of the Court of Appeals “where there are special and important reasons” to do so. Rule 242(b), SCACR. Factors bearing on this Court’s consideration of whether it should exercise its discretionary authority to issue a writ of certiorari are: (1) whether there are novel questions of law; (2) whether there is a dissent in the decision of the Court of Appeals; (3) where the Court of Appeals’ decision is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; or (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR.

³ Judge McCoy initially entered a Form 4 Order granting summary judgment to WSC on all causes of action but for BFS’s equitable indemnity crossclaim. **(R. p. 16-17)**. However, on July 29, 2021, Judge McCoy entered an 18-page formal order granting summary judgment to WSC on all claims asserted by BFS. **(R. pp. 84-101)**.

ARGUMENT

There are no considerations warranting certiorari in this case. The Court of Appeals properly applied existing statutory and case law to the facts of this case. Those facts show that BFS is seeking to enforce contractual provisions that require WSC and its other subcontractors to indemnify it for its own negligence. The Legislature has said such contracts are illegal. S.C. Code § 32-2-10. Our courts have followed suit by mandating in the situation where a contract calls for a party to indemnify the indemnitee for the indemnitee's concurrent negligence, this intent must be set out in "clear and unequivocal" terms. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018), reh'g denied (Oct. 18, 2018); Laurens Emerg. Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 378-79 (2003). BFS's master subcontractor agreement fails to meet this strict standard and contains provisions that run afoul of the Anti-Indemnity Statute, S.C. Code § 32-2-10. The circuit court and Court of Appeals were within their right to reject BFS's request for judicial rewriting of their illegal and unconscionable contract. There is no reason for this Court to review the Court of Appeals decision. This Court should deny BFS's Petition.

I. Certiorari is not appropriate under Rule 242, SCACR. The Court of Appeals correctly applied S.C. Code § 32-2-10 and the "clear and unequivocal standard" because as the circumstances particular to WSC show, BFS is seeking to be indemnified for its sole negligence as a matter of fact.

BFS attempts to create conflict between the Court of Appeals' opinion in this case and its prior opinion in Concord & Cumberland by suggesting that the claims, contracts, and facts in each case are on par. As simple comparison shows, they are not. The analysis begins by distinguishing the facts of this case.

A. The issue release WSC and its subcontractors procured in favor of BFS for the hefty sum of \$1 million dollars negates any question as to whether BFS is seeking indemnification for BFS's sole or concurrent negligence. WSC has

resolved BFS's liability on account of WSC's work. BFS can only be viewed as seeking indemnification from WSC for Petitioner's sole negligence

BFS's Petition completely ignores that BFS is, as a matter of law and fact, seeking to recover from WSC, under a theory of indemnity, for BFS's sole negligence. Instead, BFS indicates to this Court that it has pled alternative theories of indemnity in its pleading and argues that it should be permitted to cherry-pick some of the non-offending language in its master subcontract agreement and apply them to the one alternate theory BFS claims it can maintain.

This argument is wrought with issues,⁴ but the argument has no legs whatsoever against WSC. We are not at a stage where we are examining in the abstract whether BFS is seeking to be indemnified for WSC's sole negligence, WSC and BFS's concurrent negligence, or BFS's sole negligence. BFS has not, cannot, and will not bear any liability on account of WSC's acts, omissions, or work on the project based upon the issue release. **(R. pp. 811-825)**. This is a matter of undisputed fact.

BFS previously acknowledged in this case that an issue release settles the question of its potential liability to Plaintiffs on account of a subcontractor's scope of work in absolute terms. In BFS's opposition to another subcontractor-Defendant's motion for summary judgment (McDaniel Construction Co. LLC), BFS admitted summary judgment as to its claim for indemnity for liability is proper where a subcontractor obtains an issue release in favor of BFS, thereby eliminating the question of BFS's liability for the subcontractor's negligence. See **(R. p. 1553)**. McDaniel Construction Co. LLC had not procured an issue release in BFS's favor. **(R. pp. 1552-1537)**. BFS

⁴ Among other issues, BFS's argument regarding Rule 8, SCRCF, is not properly included in its Petitioner for a Writ of Certiorari. "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be include in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(1), SCACR. BFS did not raise its Rule 8, SCRCF, argument in its briefs filed in the Court of Appeals. See **(BFS Final Brief and Reply filed Nov. 14, 2022 in the Court of Appeals)**.

was arguing that its liability on McDaniel's account remained uncertain because the issue release was not in place. **(R. p. 1553)** ("Because Plaintiffs had not released their claims relating to alleged improper framing installation implemented by McDaniel, summary judgment is not proper at this time."). The issue release here resolves any question of fault. If BFS is held liable to the Plaintiffs, it will not be on WSC's account, but on account of its own negligence or that of unrelated subcontractors.

WSC has pointed to the issue release in its briefing and argument before the Court of Appeals. See (WSC Final Brief). BFS does not dispute the fact that it is now in a position of seeking indemnity from WSC for BFS's own negligence.

These facts totally undercut BFS's argument that it is not seeking to recover in indemnity solely for its subcontractor's negligence. The circumstances between BFS and WSC clearly reveal that BFS is, in fact, seeking to recover from its subcontractors in indemnity for BFS's sole and concurrent negligence.

B. The Court of Appeals properly determined S.C. Code § 32-2-10 and public policy considerations prevent BFS from recovering damages, including attorney's fees and costs, from WSC occasioned by BFS's own negligence.

The issue release is also dispositive of BFS's contractual indemnity claim against WSC because the Anti-Indemnity Statute, S.C. Code § 32-2-10, renders a promise or agreement in connection with the construction of a building purporting to indemnify the promise against liability for damages arising out of property damages proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and enforceable. That's exactly what the BFS's master subcontractor agreement purports to do and precisely the relief BFS is seeking from WSC. It also should be

dispositive of BFS's claims against all of its other subcontractors from whom it is seeking indemnity from because the illegality renders the contract unenforceable. See Section II. A infra.

This Court does not need to take review of a case where the underlying contract indisputably violates the Anti-Indemnity Statute.

C. The Court of Appeals properly considered Petitioner's pared-down request for attorney's fees and costs from Respondent as elements of damages attendant to Petitioner's only remaining claim, its contractual indemnity claim, and appropriately rejected Petitioner's strained interpretation of S.C. Code § 32-2-10 and its own pleadings.

The Anti-Indemnity Statute, S.C. Code § 32-2-10, applies to BFS's claims for attorney's fees and costs as elements of damages of its contractual indemnity claim. As noted above, BFS does not challenge that it cannot use its master subcontractor agreement to require its subcontractors to indemnify it from its own negligence due to the Anti-Indemnity Statute. See generally (**BFS Pet. for Writ of Certiorari**). However, BFS argues that the same law does not restrict its right to recover, under a theory of indemnity, its attorney's fees and costs. This argument is illogical and a misreading of the statute and precedent.

BFS's claim that attorney's fees and costs are damages that fall outside the scope of the Anti-Indemnity Statute is without merit. As established by this Court, in McCoy v. Greenwave Enterprises, Inc., "reasonable attorney's fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses." 408 S.C. 355, 360, 759 S.E.2d 136, 156 (2014) (internal citations omitted). However, while South Carolina law permits recovery of attorney's fees by contract or statute, the contractual terms providing for such indemnification must still comply with all applicable South Carolina law, including the Anti-Indemnity Statute codified at S.C. Code § 32-2-10. Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966).

BFS bases its right to recover attorney's fees and costs on the following language contained within the Section 5 "Indemnity" section of its master subcontractor agreement:

THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES.

(R. p. 791) (all caps emphasis in original, bold and underline emphasis added). Section 5 of the master subcontractor agreement explicitly calls for BFS's subcontractors to pay BFS's attorney fees "regardless of any ultimate liability or negligence of the contract." **(R. pp. 790-791)**. This is an explicit violation of the Anti-Indemnity Statute, and BFS's master subcontractor agreement is illegal and, therefore, unenforceable. The fact that these claimed damages are limited to attorney's fees, as opposed to a judgment cost, is immaterial.

BFS itself acknowledged this legal reality not only when BFS elected to include an indemnity provision for attorney's fees and costs in its master subcontractor agreement, but also, in its pleadings, through which BFS seeks attorney's fees and costs as damages *under its contractual indemnity cause of action*.⁵

BFS's primary argument is that: "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.'" **(BFS Pet. for a Writ of Certiorari at p. 23)**. BFS latches onto the Court of Appeals' definition of the noun "indemnity" in its Concord & Cumerland opinion and omits from its discussion that the Anti-Indemnity Statute does not use the word "indemnity." **(Id.)**. The verb "indemnify" and phrase "hold harmless" are contained within the Anti-Indemnity Statute.

⁵ BFS has abandoned all of its causes of action against WSC but for its contractual indemnity cause of action. Accordingly, BFS is maintaining that its sole cause of action, contractual indemnity, is not subject to laws governing contractual indemnity. The argument is illogical and far from presenting a novel issue of law.

S.C. Code § 32-2-10. To “indemnify” and “hold harmless” are synonymous with each other and the well-understood meaning of each verb is to make immune from liability.⁶ The statute does not limit or qualify its application to compensation paid by a first party to a second party for loss or damage that the second party incurs to a third party as BFS would have it, nor does the ordinary meaning of the language contained therein.

The lower court was correct in giving the words “indemnify” and “hold harmless” their “plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation,” and there is no error in the Court of Appeals affirming these rulings. CFRE, LLC v. Greenville Cnt’y Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting Sloan v. Hardee, 371 S.C. 495, 640 S.E.2d 457, 459 (2007)).

It is also proper to consider BFS’s efforts to construe the language in the Anti-Indemnity Statute in conjunction with the purpose of the whole statute and the policy of the law, which disfavors indemnity provisions that are “overly broad.” See Keith v. River Consulting, Inc., 365 S.C. 500, 600 S.E.2d 302 (Ct. App. 2005); see also Rorrer v. P.J. Club, Inc., 347 S.C. 560, 569, 556 S.E.2d 726 (Ct. App. 2001), citing S.C. Coastal Council v. S.C. State Ethics Comm’n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). The object of the Anti-Indemnity Statute is to prevent the enforcement of agreements that require a subcontractor to indemnify a general contractor for damages caused by the general contractor’s negligence or the negligence of its subcontractors.

⁶ Black’s Law Dictionary defines “indemnify” as: “**1.** To reimburse (another) for a loss suffered because of a third party’s or one’s own act or default; **HOLD HARMLESS.** **2.** To promise to reimburse (another) for such a loss. **3.** To give (another) security against such a loss” and “hold harmless” to mean “[t]o absolve (another party) from any responsibility for damage or other liability arising from the transaction; **INDEMNIFY.**” Black’s Law Dictionary 11th Ed. (2019); see also New York & Presbyterian Hosp. v. United States, 881 F.3d 877, 883-87 (Fed. Cir. 2018) (holding “indemnify” was commonly understood to mean “to compensate” and “to reimburse” after examining various definitions of the word).

D.R. Horton, Inc. v. Builders First-Source-Southeast Group, LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018).

BFS seeks an interpretation of the statutory language that is not consistent with the plain language of the statute, its ordinary meaning, and the overall purpose of the statute and South Carolina law. Its argument should be rejected for these additional reasons.

BFS also attempts to distinguish agreements imposing a duty to defend from indemnity agreements. BFS cites to two cases, City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009) and Sloan Constr. v. Centr. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977), for the proposition that the duty to defend and the duty to indemnify are two separate and distinct contractual obligations. **(BFS Petition for Writ of Certiorari at pp. 23-24)**. These cases involve an insurer's duty to defend and/or indemnify its insured against third-party liability claims. City of Hartsville, 382 S.C. at 544; Sloan Constr., 269 at 186. The juxtaposition of the parties and the contract at issue is completely different here, but, moreover, what we are dealing with is not a breach of contract claim by BFS for an alleged failure to defend them against Plaintiffs' claims. BFS's claim against WSC is confined to the following:

133. That the Plaintiff, The Retreat at Charleston National Country Club HOA, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime, have sued Builders FirstSourceSoutheast Group, LLC (hereinafter sometimes "BFS"), asserting damages allegedly caused, inter alia, by deficiencies in framing, including but not limited to deficiencies in the installation of windows, doors, and related components, during original construction of the subject structures.

134. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Fourth Amended Complaint.

135. That the respective subcontracts between this Defendant and the Cross Claim Defendants, provide for contractual indemnification in favor of BFS.

136. That the Cross Claim Defendants served as subcontractors to BFS in connection with their services at the subject structures. Regardless, therefore, of any specific contractual obligation to indemnify, there exists a special relationship

between this Defendant, and the Cross Claim Defendants, sufficient to impose obligations of indemnity against the aforesaid Cross Claim Defendants, in favor of BFS.

137. 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, gross negligence, and/or representations of the Cross Claim 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.

138. That BFS is entitled to full contractual and common law indemnification from the Cross Claim 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 Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the Cross Claim 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.

(R. pp. 440-441).

The Court of Appeals' application of the Anti-Indemnity Statute to BFS's contractual indemnity claim, which includes BFS's requests for attorney's fees, costs, and other expenses incurred in defending this action, was correct, entirely consistent with the Anti-Indemnity Statute, and presents no novel issue of law.

BFS should not be entitled to recover sums from WSC or its other subcontractors on account of its own negligence and the attorney's fees and expenses it incurs defending against its own liability. The circuit court and Court of Appeals were proper in rejecting its claims seeking to do just that. There is no basis in law or fact to review these sound decisions. BFS's Petition for Writ of Certiorari should be denied.

II. The Court of Appeals did not deviate from its own precedent in Concord & Cumberland or create conflicting law. The facts of the cases are different and the Court of Appeals' conclusion here that the BFS master subcontractor agreement is replete with terms that violate South Carolina law and public policy and therefore cannot be severed out or rewritten is well supported.

For the reasons analyzed above, which BFS has fairly well admitted,⁷ BFS's master subcontractor agreement violates the Anti-Indemnity Statute. In addition to including provisions that require its subcontractors to indemnify it against its own negligence, BFS included language purporting to have its subcontractors indemnify BFS for its concurrent negligence that were not stated in "clear and unequivocal" terms. Each of these issues alone warrants the dismissal of BFS's contractual indemnity claims against its subcontractors, including the subcontractors who have not settled and obtained an issue release in BFS's favor.⁸

A. BFS's master subcontractor agreement is illegal and unenforceable under S.C. Code § 32-2-10 because it requires BFS's subcontractors to indemnify BFS for BFS's sole negligence. This issue was not present in Concord & Cumberland.

BFS asked the circuit court and then, the Court of Appeals, to do two things with respect to its master subcontractor agreement. First, it asked the Courts to sever out those provisions throughout the agreement that required BFS's subcontractors to indemnify BFS against its own

⁷ BFS represented to the lower court, in a writing signed by its counsel, that it was only seeking to recover the portion of its attorney's fees and costs incurred in defending the claims that arose out of WSC's work. BFS scaled-back its claim against WSC after WSC procured the issue release in BFS's favor.

In BFS's Motion for Reconsideration of the circuit court order granting WSC summary judgment on BFS's crossclaims, BFS stated repeatedly that it was only seeking to recover the defense costs it incurred in defending BFS from those of Plaintiffs' claims that arose out of WSC's work. **(R. p. 1376)** ("BFS is not seeking indemnification for its own negligent acts or omissions, but rather is seeking attorney's fees pursuant to the clear provisions of its agreement with WSC."); **(R. p. 1379)** ("BFS is, in fact, seeking only recovery of attorney's fees and costs, expended in defending against the plaintiff's claims, arising out of the performance of WSC's work."); **(R. p. 1381)** ("In this case, where BFS originally sought indemnity against liability resulting from the (sic.) WSC's negligence, those specific indemnity claims have been resolved. The sole remaining claims are those seeking attorney's fees pursuant to the BFS/WSC contract, claims which are not even addressed, much less prohibited by 32-2-10.") (emphasis in original).

⁸ To the extent not inconsistent with its positions set out herein, BFS joins in the subcontractor-Respondents' arguments.

negligence. Second, it asked the Courts to rewrite other parts that required BFS's subcontractors to indemnify BFS against the subcontractor's sole or concurrent negligence so that they read that the subcontractor only had to indemnify BFS against the subcontractor's sole negligence. The first request was aimed at curing the violation of the Anti-Indemnity Statute, S.C. Code § 32-2-10. The second request would cure the fact that the contract, as drafted by BFS, did not meet the strict "clear and unequivocal" standard set by Concord & Cumberland.

As it relates to the first issue, a plain reading of the Anti-Indemnity Statute supports the conclusion that the indemnity provisions contained in the master subcontractor agreement are *wholly enforceable*. See S.C. Code § 32-2-10 (a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promise . . . against liability for damages arising out of bodily injury or property damage is against public policy and unenforceable) (emphasis added). The statute does not provide that the specific clause, paragraph, or subsection of such agreements that run afoul of the statute are unenforceable. Id. It provides **the agreement** is against public policy and unenforceable as a matter of law. Moreover, if there's any doubt as to the absolute nature of this rule, the statute provides this rule is true "notwithstanding any other provision of law." S.C. Code § 32-2-10. Pursuant to the express terms of the Anti-Indemnity Statute, the fact that the agreement purports to have WSC indemnify BFS for its sole negligence renders the entire agreement unenforceable and void as against public policy.

This issue was not present in Concord & Cumberland. 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). Superior Construction Corporation ("Superior") was the general contractor in that case, who subcontracted the installation of windows and doors on the project to The Muhler Company, Inc. ("Muhler"). Id. at 642-43. There was a written subcontract between Superior and

Muhler that contained a indemnification provision in favor of Superior, as well as the owner, and architect. Id. at 643.

12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that

(a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, to the extent caused or alleged to be caused in whole or in any 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, regardless of whether it is caused in part by a party indemnified hereunder.

(b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this [a]rticle [12.1].

Id. at 643-644. Section (a) of the foregoing agreement purported to require the Muhler, as the subcontractor, to indemnify Superior and other indemnitees against loss caused by Muhler. The issue in that case was whether this language, paired with some other language made applicable by a subsequent remedial agreement after issues arose,⁹ was whether the contractual language clearly

⁹ After water intrusion around the windows and doors presented, Superior and Mohler entered into an agreement whereby Mohler agreed to remedy any defects in the installation of the windows. Id. at 644. This agreement contained the following indemnification clause: "11. In the event either Superior or Concord and Cumberland, LLC are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended [c]ontract [d]ocuments, or are defectively installed[,] Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable [attorney's] fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration, liability incurred by either or both as consequence including, but not limited to, costs and [attorney's] fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred." Id.

and unequivocally required Muhler to indemnify Superior for Superior's concurrent negligence. Id. at 645-657.

There is no language found in the subcontract or remedial agreement that purports to require Muhler to indemnify Superior for Superior's sole negligence like the language that is found in BFS's master subcontractor agreement.

Sections 3 and 5 of BFS's Later Contracts obligate BFS's subcontractors, WSC included, to warrant the design and suitability of the defective materials and building components at the project but also to indemnify and defend BFS from any property damage or personal injury resulting from the water intrusion issues related to the provided materials and building components. Those provisions read as follows:

SECTION 3. Warranty. In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. . . . This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incident third-party beneficiaries of this Agreement and shall have the power to enforce this Agreement.

Subcontractor will maintain a published phone number or answering service during normal working hours.

....

SECTION 5. INDEMNITY. 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 THE 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 BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND *THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES.* THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE

NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.....

(R. pp. 790-792) (all caps and underline emphasis in original; italicized emphasis added).

Additionally, Section 9(i) of the Later Contracts provides for indemnification of attorney's fees and expenses as well as amounts paid in settlement without regard to the fault of BFS. **(R. p. 796).**

All of these provisions violate the Anti-Indemnity Statute, S.C. Code § 32-2-10. The Court of Appeals was proper in rejecting BFS's effort to enforce an illegal contract. D.R. Horton, Inc., 422 S.C. at 152, 810 S.E.2d at 46 ("The indemnification agreement in this case purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10. Because the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton."). "[A]n illegal contract is unenforceable." Id.

This case is not on all fours with Concord & Cumberland as BFS asserts. The language of the underlying contracts differs significantly; Superior did not require its subcontractors, including Muhler, to indemnify it against its own negligence. There was no question of whether the Anti-Indemnity statute renders the contract unenforceable as there is here. The Court of Appeals' decision in this case does not conflict with its prior opinion in Concord & Cumberland.

B. BFS's master subcontractor agreement does not express BFS's intention for its subcontractors to indemnify BFS against its concurrent negligence in "clear and unequivocal" terms. The provisions that do not meet this strict standard cannot be severed out of the contract because they pervade them and would require a judicial rewriting of the agreement.

BFS grossly distorts the holding of the Court of Appeals in Concord & Cumberland in its Petition. Repeatedly, BFS asserts that the Court of Appeals allows the general contractor to proceed to seek recovery for its subcontractor's negligence. See (BFS Pet. for a Writ of Certiorari at pp. 12, 14, and 15). The issue of Superior recovering damages, in indemnity, from its subcontractor, Muhler, was not appealed by Superior, hence, it was not an issue argued or decided on appeal. Muhler moved for partial summary judgment at the circuit court level, seeking a declaration that the applicable indemnification provisions found in the original subcontract and the remedial agreement that followed did not require Muhler to indemnify Superior for Superior's own negligence. 424 S.C. 639 at 645. The circuit court granted Muhler's motion and Superior appealed. Id.

Muhler did not seek to escape its obligation to indemnify Superior for damages resulting from the work Muhler performed. Id. That was not the issue before the Court on appeal. Accordingly, the Court of Appeals in Concord & Cumberland did not allow the general contract to recover from its subcontractor for damages resulting from the work of the subcontractor, nor was the distinction between the damages arising from Muhler's sole negligence as compared to Superior's concurrent negligence a theme of its opinion.¹⁰ It was not an issue because Muhler did not make it an issue.

WSC and BFS's other subcontractors raised different arguments here. They asserted that BFS should be precluded from recovering any form of indemnity from them because BFS's master subcontract was replete with illegal and unenforceable provisions, as well as confusing, contradictory, ambiguous, and unconscionable terms.

¹⁰ BFS's lack of citation to the opinion by pincite or quotation is telling of the differences between its characterization of the holdings and the actual opinion. See (BFS Pet. for Writ of Certiorari at pp. 11-15).

Not only are the claims of the subcontractor parties different as between these cases, but so are the facts, particularly the subcontract contracts. Indemnity provisions are spread across BFS's master subcontract agreement, including Section 3 (Warranty), Section 5 (Indemnity), and Section 8(i) (Attorney's Fees). The indemnification language is intertwined across sections of the agreement and even within Section 5 and not susceptible of division. That was not true of the indemnification provisions in Superior's subcontract.

The Court of Appeals properly affirmed the circuit court's decision to not sever and substantially rewrite BFS's master subcontract agreement to its benefit. This court has no obligation or authority to rewrite the contractual indemnity provisions of BFS. Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); Poynter v. Inv., Inc., v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010).

South Carolina courts have emphasized that the permissibility of severability hinges upon the extent to which the unenforceable provisions permeate the entire agreement. As this Court explained in Simpson v. MSA of Myrtle Beach, Inc., "if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." 373 S.C. 14, 33–36, 644 S.E.2d 663, 673–74 (2007). That is precisely the case here and it was not a fact that was present in Concord & Cumberland. 424 S.C. 639, 819 S.E. 2d 166 (Ct. App. 2018). The indemnity provisions at issue seek to shift liability for BFS's own negligence, an objective flatly prohibited by the Anti-Indemnity Statute. S.C. Code § 32-2-10. Severing such provisions would not simply involve striking unlawful language; it would require the Court to reconstruct the contract's entire indemnity scheme to align it with lawful standards. Courts in

South Carolina do not undertake such revisions. See Poynter v. Inv., Inc., v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010) (holding that courts may not blue-pencil unlawful terms to render them enforceable). As the Court of Appeals aptly observed, in Concord & Cumberland, "[m]erging the indemnity clauses into one clause by replacing some language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term to which [the party] did not agree." 424 S.C. 639, 656, 819 S.E.2d 171, 175 (Ct. App. 2018).

The unlawful provisions were drafted by BFS such that they are inextricably linked and interwoven throughout the master subcontractor agreement. This intricate entanglement made it impossible for the Court to selectively employ the severability clause to remove one or more offending provisions without embarking on an impermissible exercise of judicial revision.

The Court of Appeals did not deviate from its own precedent in Concord & Cumberland in rendering this opinion. The subject contracts and the claims at issue are different as between the cases. The Court of Appeals' decision is thoroughly analyzed, well-supported in fact and law, and there is no basis for further review of the matter.

III. There is no other basis warranting certiorari under Rule 242, SCACR.

As analyzed above, there is no novel issue of law warranting this Court to exercise its discretion and power to further review the case. Further, there was no dissent at the Court of Appeals—the decision was unanimous. The decision of the Court of Appeals does not conflict with any prior decision of this Court—the Court of Appeals decision keeps with Court of Appeals decisions, including Concord & Cumberland. There are no constitutional issues involved in this appeal, nor are there any federal questions involved that conflicts with any decision of the United States Supreme Court.

The only other issue BFS addresses that it is not tethered to the language of its master

subcontractor agreement is the issue of whether a trial court's order that is on appeal should be considered "final" for res judicata or collateral estoppel purposes. This issue alone does not warrant review. As the Court of Appeals' decision and the underlying record shows, both the circuit court and the Court of Appeals conducted their own independent analysis. It only added to their conclusion that prior orders from other circuit court judges had reached the same result. From a practical perspective, this Court should not take up review only to address this question, as it will not resolve the case. From a legal perspective, there is no merit to the argument. A judgment is final and retains its preclusive effect even while on appeal, unless and until it is actually reversed. See Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941) (finding finality of a court's judgment is not lost because appeal is pending until and unless reversed). A final judgment is one that "finally determines the rights' of the parties." First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992). Rule 201(a) SCACR, provides that an: "[a]ppel may be taken, as provided by law, from any final judgment or appealable order."

The status of the prior orders as a final judgment is what makes the orders appealable in the first instance. None of BFS's said appeals undermine each order's status as a final judgment, and, therefore, is not a barrier to applying collateral estoppel. While the decision to grant certiorari is discretionary and the reasons stated in the rule are not a controlling list of prerequisites to granting a petition, there is simply no reason certiorari is appropriate here.

CONCLUSION

Therefore, for all the reasons stated above, in addition to those set out in the co-Respondent's Returns, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully Submitted,

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July 31, 2025

Charleston, South Carolina