RECEIVED

Jul 31 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE 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 Feb. 12, 2025)

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.

RESPONDENT AC CONSTRUCTION, INC.'S RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

LUZURIAGA MIMS, LLP
Kevin W. Mims
W. Chase McNair
1156 King Street
Charleston, SC 29403
kmims@lmlawllp.com
cmcnair@lmlawllp.com

Attorneys for Respondent AC Construction, Inc.

TABLE OF CONTENTS

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals properly find that Builders FirstSource – Southeast Group, LLC's ("BFS" or "Petitioner") contractual indemnity language violated the "clear and unequivocal" standard of Concord & Cumberland as well as the Anti-Indemnity Statute S.C. Code Ann. §32-2-10?
2. Does the Anti-Indemnity Statute apply to BFS's contractual indemnity claims for attorney's fees and costs?
3. Did the Court of Appeals properly affirm the Circuit Court's finding that BFS's claim for contractual indemnity was barred by collateral estoppel?
4. Did the Court of Appeals properly find that severance of the unenforceable contractual indemnity provisions was not possible without judicial re-writing of the contract?

COUNTER STATEMENT OF FACTS

The matter before the Court is a case in which BFS seeks to recover contractual indemnity from AC Construction, Inc. ("AC Construction") for liability arising from BFS's own negligence. BFS and AC Construction entered into a subcontract dated November 7, 2007 "[Version 5/17/06]" containing indemnity provisions.[1] BFS argues its contract only seeks indemnity for AC Construction's negligence, but both the Circuit Court and the Court of Appeals correctly rejected that assertion. As both courts found, the indemnity provisions at issue sought to shift liability for BFS's own negligence without doing so in clear and unequivocal terms. As a result, BFS's contractual indemnity claim failed as a matter of law.

[1] The Court of Appeals notes two versions of BFS's master subcontracts are at issue, the 2005 version of BFS's master subcontract (2005 Contracts) and the other six involving a later version of BFS's master subcontract ("the Later Contracts")—one of which is Version 5/17/06 relative to AC Construction, among others. (Ct. App. Opinion p. 5-6).

The underlying litigation began on July 22, 2016, when Plaintiffs filed suit against the developer, Winston Carlyle Charleston National, LLC, and the general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually, alleging construction deficiencies in the common elements of the Retreat at Charleston National Country Club, a townhome community in Mount Pleasant, South Carolina ("the Retreat Project" or "the Project"). (R. pp. 174-186). The Complaint specifically alleged causes of action for negligence, gross negligence, breach of express and implied warranties, and breach of fiduciary duty as to the developer. (Id.) Plaintiffs filed an Amended Complaint on May 1, 2017, setting forth causes of action against additional defendants, including Appellant Builders FirstSource-Southeast Group, LLC, ("BFS") for negligence, gross negligence, and breach of implied warranties. (R. pp. 187-207). The Amended Complaint alleged, among other things, that BFS used and supplied defective materials, installed materials not in accordance with the plans and specifications, and constructed the project in violation of the applicable building codes. (Id.)

In their Second Amended Complaint, Plaintiffs allege direct claims against AC Construction and BFS for negligence/gross negligence and breach of implied warranties. (R. Vol. I, pp. 248-274). In its Answer to Plaintiffs' Second Amended Compliant, BFS asserts cross-claims against AC Construction for contractual indemnity, breach of express warranties, breach of implied warranties, negligence/gross negligence, and breach of contract. (Id. at 275-308). Plaintiffs amended the complaint two more times, and BFS asserted the same cross-claims against AC Construction in its responsive pleadings. (R. Vol. II, pp. 372–413). AC Construction timely answered BFS's claims and raised relevant affirmative defenses. (R. Vol. II, pp. 495-511). BFS's allegations against AC Construction are wholly derived from Plaintiffs' allegations against BFS.

On October 29, 2020, AC Construction filed its motion for summary judgment as to BFS's cross claims. (R. Vol. V, pp. 1205-1207). The circuit court granted AC Construction's motion except as to BFS's equitable indemnity claims on July 7, 2021. (R. Vol. I, pp. 71-83, Order). The Hon. Jennifer B. McCoy also issued similar orders granting summary judgment in favor of seven other subcontractor defendants on crossclaims of BFS. In the July 7, 2021 Order, the circuit court granted partial summary judgment in favor of AC Construction and dismissed BFS's cross-claims for breach of express and implied warranties, breach of contract, and negligence, ruling those causes of action were disguised equitable indemnity claims and were not viable as alternative causes of action.[2] (R. pp. 71-83). BFS has not appealed this ruling. Judge McCoy granted partial summary judgment in favor of AC Construction and dismissed BFS's claim for contractual indemnity, ruling that the indemnity and duty to defend provisions of BFS's Master Agreement (i.e. "[Version 5/17/06]") drafted by BFS (1) are neither clear nor unequivocal, and thus, fail as a matter of law; (2) that such provisions violate South Carolina public policy and S.C. Code § 13-2-10, and thus, are illegal and unenforceable; and (3) BFS was collaterally estopped by prior decisions from contending such provisions are clear and unequivocal, do not violate South Carolina public policy, and/or meet the requirements of South Carolina law. BFS has appealed these rulings. BFS's motion to alter or amend filed on July 19, 202 was denied on August 23, 2021. (R. Vol. I, pp. 128-130). BFS appealed all eight circuit court orders on September 22, 2021. Over BFS's objection, the Court of Appeals consolidated the eight appeals.

On February 12, 2025, the South Carolina Court of Appeals issued and published Opinion No. 6066 affirming the trial court's decision of all eight orders. Retreat at Charleston National

[2] Pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015).

Country Club Home Owners Association, Inc., v. Winston Carlyle Charleston National, LLC, et al., 446 S.C. 566, (Ct. App. May 21, 2025) ("Ct. App. Opinion"). BFS filed a petition for a rehearing on February 27, 2025. On May 21, 2025, the Court of Appeals issued a substituted opinion denying the petition for rehearing. On June 20, 2025, BFS filed its Petition for Writ of Certiorari to the South Carolina Supreme Court. AC Construction files this Return in response.

ARGUMENT

At the core of BFS's appeal is the premise it can both rewrite its contract and reframe its pleadings after the fact. BFS's contractual indemnity claims are based on provisions that attempted to secure indemnification for its own negligence—provisions that were neither clear nor unequivocal, as required by Concord and Cumberland, and in violation of S.C. Code Ann § 32-2-10. As such, the Circuit Court properly concluded the contractual indemnity claim fails as a matter of law, which was affirmed by the Court of Appeals. Undeterred, BFS now asserts it can nonetheless pursue contractual indemnity from AC Construction for AC Construction's alleged sole negligence. But this argument finds no support in the plain language of the Master agreement or in the allegations of the operative Complaint. A contractual indemnity provision that is legally invalid cannot be resurrected or selectively enforced for a narrower purpose. To do so amounts to judicial revision of the Master Agreement. 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 (2002); Poynter v. Inves., Inc., v. Cent. Builders of Piedmont, Inc., 387 S.C. 583 (2010).

I. THE COURT OF APPEALS OPINION IS NOT IN DIRECT CONFLICT WITH THE PLEADINGS OR RULES OF CIVIL PROCEDURE

The Court of Appeals properly applied the South Carolina Rules of Civil Procedure and did not deviate from established pleading standards.

A. BFS is Bound by the Allegations of its Operative Pleadings

"It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (citing Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964)). "The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." Id. The plain wording of BFS's pleading leaves no question that BFS seeks indemnification for its own negligence.

Despite BFS's current argument it seeks only indemnity for AC Construction's negligence, the Court of Appeals correctly found the plain language of BFS's pleadings show BFS sought recovery for any sums for which BFS is held liable to Plaintiff or others, rather than only those sums which may be attributable to AC Construction's sole negligence. In fact, the word 'sole' is not in BFS's Complaint. Instead, BFS seeks the following:

> 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 others in this action**, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorney 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 may pay in satisfaction of such claims.

(R. p. 441, BFS's Complaint ¶138 (emphasis added).

When paragraph 138 seeks full contractual indemnification for any liability and to be reimbursed by AC Construction for any sums for which BFS may be held liable, BFS is clearly seeking recovery from AC Construction for the full and complete amount of any verdict rendered against it, including any damages within the verdict for BFS's own negligence. Settled precedent binds BFS to its operative pleadings seeking "full contractual indemnity" for "any liability" and "any sums" for which BFS may be held liable. BFS may not now take a contradictory position from the statements in its pleadings and argue it only seeks contractual indemnity and recovery of any amount for AC Construction's sole negligence. See Johnson v. Alexander, 413 S.C.196, 202, 775 S.E.2d 697, 700 (2015) (citing Elrod, 243 S.C. at 436, 134 S.E.2d at 416 ("The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible")).

B. The Court of Appeals Correctly Applied South Carolina Rules of Civil Procedure, Rule 8.

BFS's argument rests on a mischaracterization of Rule 8 of the South Carolina Rules of Civil Procedure, which, while promoting justice and liberal construction of pleadings, does not permit courts to expand pleadings beyond their plain language. BFS's assertion its pleading should be construed as asserting an alternative theory of relief under Rule 8 misstates the purpose of the rule and amounts to an improper attempt to revise its pleading after the fact.

The Rules of Civil Procedure do not relieve parties of their obligation to clearly articulate the basis for each claim. Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," not a vague or ambiguous reference that might be interpreted to suggest alternative theories. Rule 8, SCRCP. BFS did not clearly articulate it was seeking

contractual indemnity based solely on its subcontractor's negligence as a distinct ground for relief. Instead, it ambiguously sought contractual indemnity for "any sums" for which BFS may be held liable. (R. p. 441).

BFS contends the word "any" should be interpreted in its ordinary sense: "used to express a lack of restriction in selecting one of a specified class." While correct, this definition actually reinforces – rather than undermines – the reasoning set forth by the Court of Appeals. The Court of Appeals noted BFS repeatedly claimed it was seeking recovery for "any sums" for which it might be held liable, rather than those attributable solely to AC Construction's negligence (Ct. App. Opinion p. 21, 23). An unrestricted claim for "any sums" that does not differentiate between BFS's own negligence and that of its subcontractors is precisely why the Court of Appeals concluded the circuit court did not err in finding BFS seeks indemnification for its own negligence as paragraph 138 of BFS's Complaint "leaves little doubt that BFS's pleadings also seek indemnification for its own negligence." (Ct. App. Opinion p. 21).

BFS cannot cure the substantive deficiencies in its contractual indemnity claim by invoking Rule 8. Although BFS frames the decision of the Court of Appeals as a procedural misapplication of the Rule, the decision is more accurately understood as a substantive determination that BFS's contractual indemnity claim, as pled and as informed by the language of its own contract, sought recovery for its own negligence, and, therefore, its contractual indemnity claim failed as a matter of law. Accordingly, granting BFS's petition for Writ of Certiorari would not serve to correct a misapplication under Rule 8.

II. THE COURT OF APPEALS DID NOT FAIL TO FOLLOW PRECEDENT WHEN IT AFFIRMED THE CIRCUIT COURT FINDING BFS SOUGHT INDEMNITY FOR ITS OWN NEGLIGENCE AND THUS ITS CONTRACTUAL INDEMNITY CLAIM FAILED AS A MATTER OF LAW SINCE IT DID NOT MEET THE HEIGHTENED "CLEAR AND UNEQUIVOCAL" STANDARD.

BFS now contends that it is not seeking indemnity for its own negligence, but rather for losses arising solely from its subcontractors' negligence. The Court of Appeals disagreed, finding BFS's own pleadings and contract language contradict this claim. This Court should deny BFS's Petition for Writ and affirm the Court of Appeals' holding.

A. BFS Contract Does Not Support Its Argument.

BFS requests this Court to judicially revise its own subcontractor agreement to provide indemnification for claims arising from the subcontractor's sole negligence. However, this is not what BFS's contract states. As South Carolina law makes clear, parties are free to contract as they see fit, and courts are not empowered to rescue parties from the consequences of the agreements they themselves drafted. *See* Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643 (1975); MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 369 (Ct. App. 2003).

According to BFS, AC Construction's work at the Project was performed pursuant to "Version – 5/17/06" of a BFS "Master Subcontract Agreement" dated November 7, 2007 ("Master Agreement" or "Later Contract" or "Version 5/17/06"). (R. pp. 73). There are multiple indemnity provisions throughout the Master Agreement. In reviewing Section 5 INDEMNITY, the Court of Appeals correctly held the provisions of Section 5 are ambiguous, conflict with each other, and do not meet the clear and unequivocal requirement. (Ct. App. Opinion pp. 17, 22, 23-24). Paragraph 1 of Section 5 INDEMNITY of the Master Agreement relates to property damage. That provision states:

> To the fullest extent permitted by Law, the subcontractor shall indemnify, defendant 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 for whose acts the subcontractor may be liable. The Contractor's insurance requirements are separate and distinct from the requirement of indemnification hereunder.

(Ct. App. Opinion p. 12-16, Later Contract, §5 ¶1 INDEMNITY (emphasis added, all caps in the original).

This language, based on the AIA form indemnification language, contains the key phrase "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." Id. The Court of Appeals, in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 176 (Ct. App. 2018), reh'g denied (Oct. 18, 2018), specifically found that such language is legally insufficient. It concluded this type of indemnity provision fails to meet the heightened standard for contracts seeking to relieve an indemnitee of the consequences of its own liability. Despite this clear precedent, BFS now asks this Court to disregard that conclusion and rewrite its Master Agreement to support a claim of indemnification solely for AC Construction's sole negligence.

BFS, contending that it can rewrite the contract to seek merely indemnification for the sole negligence of AC Construction, would have the inquiry end here without regard to the remainder of Section 5 of the contract. However, the third paragraph of Section 5 states (all caps omitted for ease of reading):

> 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**.

(Ct. App. Opinion p. 12-16, Later Contract, §5 ¶3 INDEMNITY) (emphasis added, all caps in the original).

Indemnification provisions calling for the Indemnitor to indemnify the Indemnitee "for damages caused by its [the Indemnitee's] negligence **or** the negligence of its subcontractors" are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45-6 (Ct. App. 2018) (emphasis added). Further, our Court of Appeals has held that "an illegal contract is unenforceable." Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, this Court held the indemnification agreement "purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10" and went on to conclude that "[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton." Id. This case is no different. BFS attempts to draw a distinction between the present case and D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC by claiming it is not seeking indemnification for its own negligence, whether sole or concurrent. However, the question is not what relief counsel for BFS claims his client now seeks, in contravention to the problematic indemnity language in BFS' contracts and the allegations of his operative pleading, but rather is there a legal valid indemnity provision to enforce.

The Section 5 indemnity provision fundamentally contradicts BFS's current assertion its claims for contractual indemnity are limited to sums solely attributable to AC Construction's negligence. Instead, this contractual indemnity provision clearly calls for AC Construction to

indemnify BFS for 100% of its attorney's costs and fees *regardless of who is found to be at fault*. This contractual overreach, combined with BFS's pleadings seeking recovery from AC Construction for "*any liability* BFS is found to have to Plaintiffs or to others" and "*any sums* for which BFS may be held liable to the Plaintiffs or to others" (R. p. 441) (emphasis added), unequivocally demonstrates an attempt to obtain indemnification for BFS's own negligence, which is plainly at odds with South Carolina law.

In Concord and Cumberland, the Court of Appeals held 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). Despite this clear precedent, BFS now asks this Court to disregard that conclusion and rewrite its Master Agreement to support indemnification solely for AC Construction's negligence. As this Court has previously held, "[i]t is not the function of the court to rewrite contracts for parties." Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) (internal citations omitted). BFS's Petition for Writ of Certiorari is premised on judicial reconstruction of both its Master Agreement and operative Complaint, and, as such, it must be denied.

B. AC Construction cannot be solely at fault for the claims against BFS.

BFS has admitted responsibility for supervising and inspecting the work performed by its subcontractors. (R. pp. 596, 688-689, 694). Given BFS's admitted supervisory role, any negligence found on AC Construction's part, which is denied, would inherently establish concurrent negligence by BFS by and through its failure to properly supervise. Accordingly, BFS cannot be entirely free of responsibility for any alleged deficiencies in AC Construction's work. BFS's

attempt to disguise claims of concurrent negligence as subcontractor sole-negligence contractual indemnity is unavailing and unsupported.

Even if AC Construction is found to be solely negligent, which, again, it denies, BFS can still seek indemnity from AC Construction in equity – a claim it still maintains. (R. pp. 81-82, Judge McCoy's July 7, 2021 Order). Therefore, BFS's request to recast its contractual indemnity claims as one based upon the "sole negligence" of a subcontractor is not only improper, but unnecessary.

C. The Court of Appeals' Ruling is consistent with its own precedent and will not upend the construction industry.

Contrary to BFS's alarmist framing, the Court of Appeals did not abrogate or contradict Concord & Cumberland. Rather, it correctly applied existing South Carolina law regarding the enforceability of contractual indemnity clauses that seek to relieve an indemnitee from the consequences of its own or concurrent negligence. South Carolina courts have consistently held that indemnity language for one's own or concurrent negligence must be "clear and unequivocal." This is not a novel standard.

BFS's assertion the Court of Appeals has effectively rendered "virtually every contract currently in effect…subject to challenge," is not only hyperbole, but also inaccurate. (BFS Pet. for Writ of Cert. p. 16). If any such contracts are indeed vulnerable, it is because they, like the one at issue here, contain indemnity provisions which do not meet the long-standing "clear and unequivocal" standard for shifting responsibility for a party's own fault. This is a consequence of existing legal principles, not a deviation from them.

The clear and unequivocal standard applies whether BFS is seeking indemnification for its sole or concurrent negligence. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland. LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct. App. 2018). When an indemnity

clause purports to relieve an indemnitee from the consequences of its own negligence, South Carolina case law requires strict construction of the clause. Id. If the indemnity clause(s) in the contract involve the contractor's negligence, even partially, the heightened "clear and unequivocal" standard governs the interpretation of the indemnity clause. If that standard is not met, the indemnity claim fails as a matter of law.

The Court of Appeals, properly following the reasoning in Concord and Cumberland, held the clear and unequivocal standard applies because BFS sought indemnification that encompassed its own negligence. Since the indemnity provisions in BFS's subcontracts did not meet the clear and unequivocal standard, which BFS conceded, the Court of Appeals upheld the Circuit Court's ruling that the indemnity provisions in BFS's contract fail as a matter of law under South Carolina law.

The Court of Appeals' decision is entirely consistent with Concord & Cumberland. BFS's claims of conflicting precedent and industry upheaval are without merit, and BFS's Petition for Writ of Certiorari should be denied.

III. THE COURT OF APPEALS PROPERLY APPLIED SETTLED SOUTH CAROLINA LAW REQUIRING CONTRACTS TO BE INTERPRETED AS A WHOLE

Contrary to BFS's assertion, the Court of Appeals did not improperly isolate provisions of the subcontract or overlook defined terms. Rather, the Court of Appeals applied the cardinal rule of contract interpretation: to ascertain and give legal effect to the parties' intentions as determined by the contract language. Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012), and properly recognized a contract is to be read as a whole document to avoid creating ambiguity by isolating provisions or single sentences. Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014); McGill, 381 S.C. at 185, 672 S.E.2d at 574. As

such, the Court of Appeals undertook a holistic review of the contracts, reading the agreements as a whole and giving effect to the relevant provisions within their full contractual and factual context.

The Court of Appeals analyzed Sections 3, 5, and 8(i) of the Later Contracts, provisions that, when read together, contain the operative indemnity and defense language. The Court's thorough analysis revealed the indemnity provisions do not simply allocate responsibility for the subcontractors' own work. Instead, they contain broad and conflicting indemnity obligations that purport to shift liability to the subcontractors for personal injury and property damage arising directly from BFS's own negligence in supplying and selecting defective materials and overseeing their installation.

The Court of Appeals recognized that Section 3, though styled as a "Warranty" provision, includes hidden indemnity language. (Ct. App. Opinion pp. 11-12, 22). This provision requires subcontractors to indemnify BFS for damages arising from "design, workmanship, and materials." This specific phrasing—particularly the references to "design" and "materials"—is critical. Subcontractors like AC Construction had no design responsibility, nor did they supply materials; their role was solely to install materials provided by BFS. Accordingly, the Court of Appeals rightly concluded this language could only refer to BFS's own conduct. (Ct. App. Opinion p. 22). Consequently, requiring indemnity in such circumstances directly violates S.C. Code Ann. § 32-2-10, South Carolina's anti-indemnity statute. Furthermore, Section 8(i) expressly provides for indemnification of attorney's fees and settlement costs *without regard to BFS's fault*, further illustrating the agreements attempt to hold subcontractors liable for BFS's own negligent acts. These provisions were not viewed in isolation; they were meticulously examined alongside Section 1's definition of "Work" and Section 5 "Indemnity," whose definitions and structural relationships were carefully considered in light of the entire contract.

BFS incorrectly asserts the Court of Appeals ignored the defined term "Work" set forth in Section 1 of the Master Agreement when analyzing the warranty and indemnity provisions under Section 3. The Court of Appeals' comprehensive analysis of the contract explicitly relied upon the definition of "Work" in Section 1. Rather than disregarding this definition, the court used it to confirm the subcontractor's scope of work did not include design or material selection. This appropriate conclusion, derived from reading the contract as a whole, demonstrated the indemnity obligations embedded in Sections 3 and 5 were overreaching and unenforceable. The approach utilized by the Court aligns with South Carolina law requiring that a contract be interpreted "from the four corners" and read as a whole. See McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204 (1945) (The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, "from the four corners of the instrument" alone); see also McGill v. Moore, 381 S.C. 179, 185 (2009) ("A contract is read as a whole document....").

By considering Section 1's definition of "Work" in relation to the warranty and indemnity provisions in later sections, both the Circuit Court and Court of Appeals correctly concluded the Master Agreement contains ambiguous, conflicting, and deceptive clauses that improperly require indemnification for BFS's own negligence. For example, Section 5, paragraph 1 purports to require subcontractor fault, while Section 5, paragraph 2 requires indemnity even for BFS's sole fault. Under South Carolina law, any uncertainty as to the meaning of any term "should be resolved against the party who prepared the contract", which, in this case, is indisputably BFS. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 687 S.E.2d 714, 718 (S.C. Ct. App. 2009).

Far from ignoring defined terms or cherry-picking language, the Court of Appeals applied well-established principles of South Carolina contract interpretation: reading the contract as a whole, resolving ambiguities against the drafter, and rejecting efforts to rewrite contracts

retroactively. The Court of Appeal's conclusion—that the multiple indemnity provisions set forth in the contract fail to meet the clear and unequivocal standard set forth in Concord and Cumberland and violate § 32-2-10—was based on a reasoned and comprehensive review of the entire agreement, not on selective parsing of clauses or a failure to honor defined terms. BFS is simply asking this Court to reweigh the evidence and re-interpret a contract that the Court of Appeals carefully and properly construed. That is not a proper basis for certiorari, and, therefore, BFS's Petition for Writ of Certiorari should be denied. The Court of Appeals also properly found the Later Contracts are adhesion contracts and are therefore unenforceable.

IV. THE ANTI-INDEMNITY STATUTE, S.C. CODE ANN. § 32-2-10, APPLIES TO BFS'S CONTRACT AND CLAIMS FOR ATTORNEY'S FEES AND COSTS.

BFS concedes it cannot use its Master Agreement to require its subcontractors to indemnify it from its own negligence. BFS admits it cannot recover in indemnity for its sole negligence under South Carolina law; however, it argues the same law does not restrict its right to recover, in indemnity, its attorney's fees and costs – even if such costs were incurred because of its sole negligence or the negligence of other subcontractors. This argument is a misreading of the statute and precedent.

BFS's claim that attorney's fees and costs are "consequential damages of an indemnity claim" and fall outside the scope of "damages" under § S.C. Code Ann. 32-2-10 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." McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 360, 759 S.E.2d 153, 156 (2014) (internal citations omitted). Thus, attorney's fees are an integral component of the damages an indemnitee may seek to recover when demanding indemnification.

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 Agreement, but also, in its pleadings, which seeks attorney's fees and costs as damages under its contractual indemnity cause of action. South Carolina law permits recovery of attorney's fees by contract or statute (Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966)), but the contractual terms providing for such indemnification must still comply with all applicable South Carolina law, including S.C. Code Ann. § 32-2-10. Section 5 of the Master Agreement explicitly calls for AC Construction to pay BFS's attorney fees "regardless of any ultimate liability or negligence of the contract." This is an explicit violation of S.C. Code Ann. § 32-2-10, and BFS's Master Agreement is illegal as a result and therefore, unenforceable. The fact these claimed damages are limited to attorney's fees as opposed to a judgment cost is immaterial.

Further, there is nothing in South Carolina law that separates a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement in a manner that would exempt defense costs from the Anti-Indemnity Statute. As set forth in BFS's Petition, BFS relies on two cases to support its position AC Construction's duty to defend BFS is separate from its duty to indemnify. (BFS Pet. for Writ of Cert. p. 23-24). However, the cases are easily distinguishable. They contemplate an underlying insurer, whose duty to defend is separate and distinct from the duty to indemnify. AC Construction is not an insurer. The posture of the contract at issue in this case versus the contractual obligations of an insurance carrier are completely different with different regulations, rules, and laws that apply to an insurer as opposed to a subcontractor.

The Court of Appeals' application of § 32-2-10 to BFS's contractual indemnity claim, which includes BFS seeking recovery of attorney's fees, was correct, entirely consistent with

precedent, and poses no unsettled legal question. BFS's argument is not only unsupported by South Carolina law, but, also, contradicted by its own Master Agreement and operative pleadings. BFS cannot claim the benefit of a contractual right to attorney's fees while simultaneously arguing that such damages are exempt from the very statute limiting the enforcement of those provisions. As a result, the Petition for Writ of Certiorari should be denied.

V. BFS'S WRIT OF CERTORARI SHOULD BE DENIED BECAUSE SEVERANCE OF THE INDEMNITY LANGUAGE WOULD REQUIRE JUDICIAL REWRITING OF THE MASTER AGREEMENT BETWEEN BFS AND AC CONSTRUCTION.

BFS contends its severability clause should compel severance of the unenforceable indemnity provisions because doing so would honor the intent of the parties. However, this argument misapprehends the nature and extent of the violations within BFS's contractual indemnity provisions. BFS's Petition for Writ of Certiorari should be denied because severance of the indemnity language would require an impermissible judicial rewriting of the Master Agreement between BFS and AC Construction.

Contrary to BFS's assertion, the indemnification language of BFS's Master Agreement is intertwined and not susceptible to division. This Court, in Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002), held that "[a] severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be." As discussed above, the indemnity framework as a whole—including Section 3 (Warranty), Section 5 (Indemnity), and Section 8(i) (Attorney's Fees)—is riddled with conflicting, ambiguous, and deceptive language. BFS's argument that the indemnity terms are independent and severable ignores that these provisions form a unified and intertwined indemnity scheme. In reading the deceptive language and conflicting indemnity

provisions together, the Court of Appeals properly found the indemnity provisions were "replete with terms that violate South Carolina law and public policy," and thus unenforceable. (Ct. App. Opinion p. 28).

South Carolina courts have emphasized 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. The indemnity provisions at issue seek to shift liability for BFS's own negligence, an objective flatly prohibited by South Carolina 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. Ratcliff, 387 S.C. 580, 588, 694 S.E.2d 15, 18 (2010) (holding that courts may not blue-pencil unlawful terms to render them enforceable). As the Court of Appeals aptly observed in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, "[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).

Here, the unlawful provisions were drafted by BFS such that they are inextricably linked and interwoven throughout the Master Agreement. This intricate entanglement makes 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. There is no basis for further review of this settled principle, and the Petition for Writ of Certiorari should be denied.

VI. THE COURT OF APPEALS CORRECTLY APPLIED COLLATERAL ESTOPPEL

BFS's current attempt to reframe the same claim—now limited to AC Construction's alleged sole negligence—ignores the operative contractual language and the underlying factual predicate as to the enforceability of the indemnification provisions have already been judicially determined in prior actions. Collateral estoppel, also known as issue preclusion, prohibits a party from relitigating an issue that was actually litigated and determined by a valid and final judgment in a prior case, and which was essential to that judgment. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). This applies even if the claims in the former and later cases are different. Id. The party asserting collateral estoppel must demonstrate the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984).

The indemnity provisions at issue here are identical to those previously litigated in Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., et al., (R. pp. 665-675) (the "Newman" Order); Pavic v. Carolina Cottage Homes, LLC, et al., (R. pp. 826-847) (the "McCoy" Order) and Six Fifty-Six Owners' Association, Inc., et al. v. Winsor South, LLC, et al., (R. pp. 682-86) (the "Young" Order) all of which involved BFS and the same indemnity language. The record unequivocally demonstrates BFS had a full and fair opportunity to litigate, and did actually litigate, the enforceability of these specific indemnity clauses in prior actions before the Circuit Court. The clauses were directly determined to be inadequate and unlawful in the former actions and such conclusions were necessary to support the prior judgments of the court in those respective

actions, which led to dismissals.

BFS's central argument, that its pending appeal(s) negate the finality of the prior judgments for collateral estoppel purposes, directly contradicts established South Carolina law and well-settled precedent. 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]ppeal may be taken, as provided by law, from any final judgment or appealable order." The status of the Newman Order, the Young Order, and McCoy Order as a final judgment is what makes the orders appealable in the first instance. None of BFS's respective appeals undermine the status of the associated order as a final judgment, and, therefore, is not a barrier to applying collateral estoppel.

Accordingly, the Court of Appeals' ruling on collateral estoppel was correct. There is no novel or unsettled question requiring clarification by the South Carolina Supreme Court, and BFS's Petition for Writ of Certiorari should be denied.

VII. BFS'S PETITION FOR CERTIORARI DOES NOT MEET THE REQUSITE STANDARDS UNDER RULE 242, SCACR.

This Court should deny BFS's Petition for Certiorari because it fails to satisfy the certiorari requirements. Rule 242, SCACR, provides that a writ of certiorari "will be granted only where there are special and important reasons." The following are generally accepted reasons for permitting certiorari: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the Court of Appeals' decision conflicts with a prior

decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision below conflicts with a decision of the United States Supreme Court. SCACR, Rule 242 (b).

BFS's Petition for Certiorari fails to satisfy any of these reasons for granting certiorari. The Court of Appeals decision was unanimous, and it does not conflict with prior decisions of this Court. No federal question is involved, and BFS's petition raises no novel or unsettled legal issue, nor does it present a conflict of authority or constitutional issue. Therefore, BFS's Writ of Certiorari should be denied.

CONCLUSION

BFS's Petition presents no unsettled legal question, no conflict among appellate decisions, and no misapplication of law. It is merely an attempt to relitigate settled matters and compel judicial reformation of its flawed Master Agreement and pleadings. The Court of Appeals' decision properly applies established standards for interpreting contracts and indemnity provisions, upholding existing law. BFS's petition does not meet the criteria for certiorari under Rule 242, SCACR. For the reasons set forth herein, this Court should deny BFS's Petition for Writ of Certiorari and affirm the Court of Appeals' decision in favor of AC Construction and the other respondents. AC Construction incorporates herein any other applicable arguments set forth by other Respondents to the extent not inconsistent with the arguments set forth by Respondent herein.

LUZURIAGA MIMS, LLP

Kevin W. Mims, Esq.
W. Chase McNair, Esq.
1156 King Street
Charleston, SC 29403
kmims@lmlawllp.com
cmcnair@lmlawllp.com
Attorneys for Respondent AC Construction, Inc.

July 31, 2025