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 Feb. 12, 2025)

Appellate Case No. 2025-001224

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

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RESPONDENT EAST COAST CARPENTRY/EAST COAST CARPENTRY COMPANY'S RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE QUESTION PRESENTED

1. Did the Court of Appeals properly decide 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 decide that severance of the unenforceable contractual indemnity provisions was not possible without judicial re-writing of the contract?
4. Are BFS's Contractual Indemnity Claims barred by the Statute of Repose, S.C. Code Ann. §15-3-640?

COUNTER STATEMENT OF FACTS

This case is not—as BFS frames it—a straightforward contractual indemnity claim by a general contractor seeking reimbursement from a subcontractor for only the subcontractor's own alleged negligence. Rather, it is a case in which BFS seeks to recover contractual indemnity from East Coast for liability arising from BFS's own negligence.

Background of the Dispute

This appeal arises from the alleged construction defects at the Retreat at Charleston National Country Club, a townhome community in Mount Pleasant, South Carolina (hereinafter "Subject Property"). It is undisputed that BFS furnished the framing lumber, house-wrap, windows, doors, related flashings, and caulk and BFS provided superintendents to oversee and inspect the installation of such materials for construction of the Subject Property on Buildings 5-21, 2200, 2300, 2500, 2600, 2700, 2800, and 2900. **(R. pp. 44).** East Coast served as a

subcontractor of BFS and in that capacity performed window installation on Buildings 6, 8, 9, 12, 13, 14, 16, 17, 18. East Coast did not perform any other work on the Project. Per BFS's records, this work was all completed in 2006. **Id.**

According to BFS, East Coast executed a BFS "Master Subcontractor Agreement" dated October 21, 2005 (hereafter "Master Agreement"). **(R. pp. 1451 – 1463).** The Master Agreement at issue here is a BFS contract form bearing "Version – 4/20/05." BFS seeks to recover from East Coast in indemnity under the terms of the applicable BFS Master Agreement.

Procedural History

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. The initial Complaint alleged negligence, gross negligence, breach of express and implied warranties, and breach of fiduciary duty as to the developer **(R. pp. 174 – 186).** Plaintiffs filed an Amended Complaint on May 1, 2017, setting forth causes of action against additional defendants, including BFS. The Amended Complaint alleged, among other things, that BFS used and supplied defective materials,[1] installed materials not in accordance with the plans and specifications, and constructed the project in violation of the applicable building codes. **(R. pp. 187-207).**

On November 13, 2019, BFS filed third-party claims against East Coast, asserting claims for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence. **(R. pp. 445-454)**. BFS claimed entitlement to indemnification for "any

[1] For example, Plaintiffs' forensic expert specifically contends that the windows selected have inadequate design pressure ratings which require replacement of the windows. (App. Br. P.1). BFS supplied the windows for the Subject Property. (R. p.864).

liability BFS is found to have" and recovery for "any sums for which BFS may be held liable**." (R. p. 449).**

On January 7, 2020, East Coast filed a motion for summary judgment, which was amended on October 15, 2020, with regard to BFS's third-party claims. **(R. pp. 516-519)**. East Coast argued its summary judgment before Circuit Court Judge, the Honorable Jennifer B. McCoy, on November 6, 2020. On July 7, 2021, Judge McCoy signed and filed an Order granting partial summary judgment in favor of East Coast, and also issued similar orders for seven other subcontractor defendants. **(R. pp. 42 – 49).** On July 19, 2021, BFS filed a motion for reconsideration, which was denied on August 23, 2021. **(R. pp. 125 – 127).** BFS appealed from those orders. Over BFS's objection, the Court of Appeals consolidated the eight appeals.

On February 12, 2025, the Court of Appeals affirmed all eight of the Circuit Court's Orders. Retreat at Charleston National Country Club Home Owners Association, Inc., v. Winston Carlyle Charleston National, LLC, et al., 446 S.C. 566, (Ct. App. May 21, 2025). BFS's Petition for Rehearing was denied on May 21, 2025. BFS filed its Petition for Writ of Certiorari on June 20, 2025.

ARGUMENT

At the core of BFS's appeal is the premise that 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 & Cumberland, and in violation of S.C. Code Ann. §32-2-10. As such, the Circuit Court properly concluded that its 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 East Coast for East Coast's alleged sole negligence.

But this argument finds no support in the plain language of the Master agreement or in the allegations of the 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.

Here, despite BFS's argument that it seeks only indemnity for East Coast's negligence, the plain language of BFS's pleadings show that BFS seeks recovery for any sums for which BFS is held liable to Plaintiff or others, rather than only those sums which may be attributable to East Coast's sole negligence. In fact, the word 'sole' is not in BFS's Third-Party Complaint. Instead, BFS seeks the following:

> 168. That **BFS is entitled to full contractual and common law indemnification from the Thid-Party Defendants, for <u>any liability</u> 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 Third-Party Defendants, entitling BFS to recover from the Third-Party Defendants, its attorney fees, costs, and other expenses incurred in defending this action, and **further entitling BFS to recover from the Third-Party Defendants <u>any sums</u> 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.

(emphasis added) **(R. pp. 449).**

The claims BFS seeks are wholly unsupported by its Complaint. When paragraph 168 asks for full contractual indemnification for <u>any</u> liability and to be reimbursed by East Coast for <u>any</u> sums for which BFS may be held liable, BFS is clearly seeking recovery from East Coast for the full and complete amount of any verdict rendered against it, including any damages included in 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 that it only seeks contractual indemnity and recovery of any amount for East Coast's sole negligence. <u>See</u> <u>Johnson v. Alexander</u>, 413 S.C.196, 202, 775 S.E.2d 697, 700 (2015) (citing <u>Elrod</u>, 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. <u>The Court of Appeals Correctly Applied South Carolina Rules of Civil Procedure</u>

BFS's argument rests on a mischaracterization of Rule 8[2] of 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 that its pleading should be construed as asserting an alternative theory of relief under Rule 8 misstates the purpose of that 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.

BFS contends that the word "any" should be interpreted in its ordinary sense: "used to express a lack of restriction in selecting one of a specified class." **(BFS Petition for a Writ of Certiorari at p. 10).** While correct, this definition actually reinforces – rather than undermines – the Court of Appeals' reasoning. BFS is seeking recovery for "any sums" for which it might be held liable, rather than those attributable solely to East Coast's alleged negligence. 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 that the language of BFS's

[2] BFS's argument regarding Rule 8, SCRCP, 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, SCRCP, argument in its briefs filed in the Court of Appeals. See **(BFS Final Brief and Reply filed Nov. 14, 2022)**.

pleadings "leaves little doubt that BFS's pleadings also seek indemnification for its own negligence." Retreat at Charleston National 446 S.C. at 590.

BFS cannot cure the substantive deficiencies in its contractual indemnity claim by invoking Rule 8. Although BFS frames the Court of Appeals' decision as a procedural misapplication of the Rule, the decision is more accurately understood as a substantive determination that BFS's contractual indemnity claim, as pleaded and as informed by the language of its own contract, sought recovery for its own negligence, and, therefore, its contractual indemnity claim fails 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 PROPERLY FOLLOWED PRECEDENT WHEN IT AFFIRMED THE CIRCUIT COURTS FINDING THAT BFS SOUGHT INDEMNITY FOR ITS OWN NEGLIGENCE IN VIOLATION OF S.C. CODE ANN. §32-2-10 AND FAILED TO MEET THE HEIGHTENED "CLEAR AND UNEQUIVOCAL" STANDARD SET FORTH IN CONCORD & CUMBERLAND

BFS 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 that BFS's own pleadings and contract language contradicted this claim. This Court should deny BFS's Petition for Writ and affirm the Court of Appeals' holding.

A. BFS's Contract Does Not Support Its Argument

There are several indemnity provisions throughout the Master Agreement. In reviewing Section 6 titled "Waiver, Release, and Indemnification, the Court of Appeals correctly held that the indemnity language is confusing and does not meet the clear and unequivocal requirement. Retreat at Charleston National, 446 S.C. at 590. Section 6 of the Master Agreement states:

> SECTION 6. Waiver, Release, and Indemnification. Subcontractor agrees that Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or relating in any way to the performance of the

> Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors. Subcontractor will indemnify, defend, and hold Contractor harmless against any such injuries and claims.
>
> a. Waiver [refers to workers comp and is thus omitted]
>
> b. Release and Indemnity,
>
> (1) Subcontractor hereby agrees to release, indemnify, defend, and hold harmless Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees (each an "Indemnitee"), to the fullest extent permitted by law from any costs, expenses, demands, causes of action, claims, damage, liability, loss, or costs ("Claims") (together with attorneys' fees) arising out of, resulting from, or connected with the death of or any injury to, or any damage to the property of, Subcontractor or its employees, agents, or subcontractors or any of their respective subcontractors, employees, officers, agents, or invitees.
>
> (2) For all Claims not covered by (1) above and to the fullest extent permitted by law, Subcontractor agrees to release, indemnity, defend, and hold harmless the Indemnitees for, and to save them harmless against, any and all Claims (together with reasonable attorneys' fees), **to the extent of liability resulting from Subcontractor's negligence or willful misconduct** incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) **omissions resulting from Indemnitee's failure to supervise Subcontractor's operations**.

(R. pp. 533-534) (emphasis added).

As BFS should well know, 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). Further, our Court of Appeals has held that "[A]n 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 that 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 that it is not seeking indemnification for its own negligence, whether sole or concurrent. However, BFS puts the cart before the horse. The question is not what relief Counsel for BFS claims his client 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.

BFS cannot argue that its claims for contractual indemnity are for those sums that are solely attributable to the negligence of East Coast when its contractual indemnity provisions contradict that assertion. Section 6 explicitly calls for East Coast to unconditionally defend and indemnify BFS in subsection (1) and then calls for East Coast to indemnify BFS for BFS' failure to supervise in subsection (2). The Court of Appeals properly found this indemnity language "confusing" because it calls for East Coast to indemnify BFS for BFS's sole negligence, but at the same time claims to limit the indemnity "to the extent" of East Coast's own negligence.

In Concord & Cumberland, the Court of Appeals held that the "clear and unequivocal" standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018). Despite this clear precedent, BFS now asks this Court to disregard that conclusion and rewrite its Master Agreement to support indemnification solely for East Coast's negligence. As this Court has made clear, "It 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) *(*citation omitted*)*. BFS's Petition for Writ of Certiorari is premised on judicial reconstruction its Master Agreement, and, as such, it must be denied.

B. <u>East Coast cannot be solely at fault for the claims against BFS</u>

BFS has admitted responsibility for supervising all of the work performed by East Coast and BFS's other subcontractors. **(R. pp. 688-689).** Given BFS's admitted supervisory role, any negligence found on East Coast's part, which is denied, would inherently establish concurrent negligence by BFS. It's simply impossible for BFS to be entirely free of responsibility for any alleged deficiencies in East Coast's work. BFS's attempt to disguise claims of concurrent negligence as subcontractor sole-negligence contractual indemnity is unavailing and unsupported.

Furthermore, BFS bears statutory responsibility for East Coast's work. BFS holds an unlimited commercial general contractor's license (License No. 112969). While S.C. Code Ann. §40-11-270 permits licensed contractors to use unlicensed subcontractors, it simultaneously mandates that the licensed contractor, in this case BFS, provide supervision and be "fully responsible" for the actions of these unlicensed subcontractors. It is undisputed that nine of the thirteen subcontractors BFS sued, including East Coast, are unlicensed. Because BFS is "fully responsible" for its unlicensed subcontractors, it cannot claim to be without fault and, therefore, cannot succeed on its contractual indemnity claim. This aligns with the fundamental public understanding of contractor accountability: if you hire a contractor for, say, window installation, and they hire a subcontractor whose work goes awry, you naturally contact the primary contractor you hired—not the subcontractor.

Even if East Coast is found to be solely negligent, which, again, it denies, BFS can still seek indemnity from East Coast in equity – a claim it still maintains. **(R. pp. 42-49).** Therefore,

BFS's request to recast its contractual indemnity claims as one based on subcontractor "sole negligence" 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. 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. Concord & Cumberland, 424 S.C. at 646. In other words, if the indemnity language in a contact involves 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. This is not a novel standard.

The Court of Appeals, properly following the reasoning in Concord & Cumberland, held that the clear and unequivocal standard applied since BFS's contractual indemnity language sought indemnification that encompassed its own negligence; however, BFS's contractual indemnity claim failed to meet this heightened standard.

BFS's assertion that the Court of Appeals' decision has effectively rendered "virtually every contract currently in effect…subject to challenge," is not only hyperbole, but also inaccurate. **(BFS's Petition for a Writ of Certiorari at p. 16).** If any such contracts are indeed vulnerable, it is because they, like the one at issue here, contain indemnity provisions that 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 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 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 Master Agreement 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 that 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 v. Moore, 381 S.C. 179, 185, 672 S.E.2d 574 (2009).

The Court of Appeals analyzed Sections 6 and 8(i) of the Master Agreement, provisions that, when read together, contain the operative indemnity and defense language. The Court's thorough analysis revealed that the indemnity provisions do not clearly allocate responsibility for only East Coast's work. Section 6, paragraph b(2)(i) requires subcontractor fault, while Section 6, paragraph b(2)(iii) allows indemnity even for BFS's own negligence. Section 6, paragraph b(2)(ii) addresses defects in "services and materials" provided in connection with the Work. Since East Coast only provided the labor for the installation of materials supplied by BFS, this subparagraph requires East Coast to indemnify BFS for its sole duties as the material supplier. Further, Section 8(i) provides for indemnification of attorney's fees and costs as well as amounts paid in settlement without regard to BFS's fault.

BFS drafted the Master Agreement and it is responsible for the ambiguity created by the different standards for indemnification. “Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage," which in this case is indisputably BFS. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483 (Ct. App. 2007), citing Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3 (1981) (quoting 17A C.J.S. Contracts § 324).

BFS asserts that the Court of Appeals ignored the defined term "Work" set forth in Section 1 of the Master Agreement. This assertion is baseless. The issue is whether the indemnity clause seeks to indemnify BFS for its *own negligence*. BFS’s indemnity provision calls for East Coast to indemnify BFS for “omissions resulting from indemnitees [BFS] failure to supervise subcontractor’s operations. Section 1 "Work" refers to the materials and/or services provided by East Coast. BFS's *supervision* of that "Work" and BFS selecting and supplying materials for East Coast to perform said “Work” is BFS's own responsibility. In considering East Coast’s scope of “Work,” which did not include supplying materials or taking over BFS’s supervisory duties as the upstream contractor, in relation to the indemnity provisions, both the Circuit Court and Court of Appeals correctly concluded that the Master Agreement contained ambiguous and conflicting, clauses that improperly require indemnification for BFS’s own negligence. Further, whether the Court of Appeals gave credit to the defined term "Work" does not alter its analysis on the enforceability of the indemnity provision when the plain language of said provision explicitly seeks East Coast to indemnify BFS for not doing its job.

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 Master Agreement fail to meet the clear and unequivocal standard set forth in Concord & Cumberland and violate S.C. Code Ann. §32-2-10—was based on a reasoned and comprehensive review of the entire agreement, not on selective parsing 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.

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

BFS does not challenge that 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 that 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 its 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 seeks 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*. **(BFS Petition for a Writ of Certiorari at p. 23)**. 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 6 of the Master Agreement calls for East Coast to indemnify BFS for attorney's fees as it relates to omissions resulting from BFS's failure to supervise East Coast's operations. Because this is an explicit violation of S.C. Code Ann. §32-2-10, BFS's Master Agreement is illegal and, therefore, unenforceable.

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, 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), to support its position that East Coast's duty to defend BFS is separate from its duty to indemnity. **(BFS Petition for Writ of Certiorari at pp. 23-24).** However, these cases address the relationship between an insurer's duty to defend and its duty to indemnify, and East Coast is not an insurer. The rules and regulations that apply to insurance contracts are different from those that apply to the subcontract in this case.

The Court of Appeals' application of S.C. Code Ann. §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 pleadings. BFS cannot claim the benefit of a contractual right to attorney's fees set forth in the contract's indemnity provisions while simultaneously arguing that such damages are exempt from the very statute limiting the enforcement of those provisions. The Petition for Writ of Certiorari should be denied.

V. SEVERANCE OF THE INDEMNITY LANGUAGE WOULD REQUIRE JUDICIAL REWRITING OF THE MASTER AGREEMENT

BFS contends that 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 East Coast.

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." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 33–36, 644 S.E.2d 663, 673–74 (2007). That is precisely the case here.

As discussed above, the indemnity framework as a whole is riddled with conflicting and ambiguous language. The indemnity provisions at issue seek to shift liability for BFS's own negligence, an objective flatly prohibited by S.C. Code Ann. §32-2-10. Severing such provisions would not simply involve striking unlawful language; it would require the Court to reconstruct the Master Agreement'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, "Merging 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." Concord & Cumberland 424 S.C. at 656.

Here, the unlawful indemnity provisions were drafted by BFS such that they are inextricably linked, making 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. COLLATERAL ESTOPPEL

Section VI of BFS's Petition for Writ of Certiorari deals with the issue of collateral estoppel. As noted by the Court of Appeals, this issue is relevant only to the "Later Contracts" and does not apply to East Coast. Retreat at Charleston National, 446 S.C. at 596.

VII. BFS'S CONTRACTUAL INDEMNITY CLAIMS AGAINST EAST COAST ARE BARRED BY THE APPLICABLE STATUTE OF REPOSE, S.C. CODE ANN. §15-3-640

Both Plaintiffs' and BFS's claims were filed long after the statute of repose expired, and, therefore, are legally barred. S.C. Code Ann. §15-3-640 sets the period of repose actions based upon defective or unsafe condition of improvement to real property at 8 years. As the South Carolina Supreme Court explained, in Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006), a statute of repose "creates a substantive right in those protected to be free from liability after a legislatively determined period of time." Unlike a statute of limitations, a statute of repose sets an absolute time limit for bringing a claim, regardless of when a defect is discovered. This "economic balance struck by the legislative body" is not subject to tolling for any reason. Id.

This principle extends to indemnity claims. In Columbia/CSA-HS Greater Columbia Healthcare System v. South Carolina Medical Malpractice Liability Joint Underwriting Ass'n, the South Carolina Supreme Court held that the six-year medical malpractice statute of repose barred a hospital's equitable indemnification claim against a physician and insurer. The Court reasoned that permitting such a claim would effectively expose the physician to liability for medical malpractice after the repose period had expired—contravening the legislature's intent to provide a definitive cutoff for liability. Columbia/CSA-HS Greater Columbia Healthcare System v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 411 S.C. 557, 769 S.E.2d 847 (2015). Although the case dealt with a med-mal claim, the Court analyzed the Construction Statute of Repose noting, "the construction statute of repose expressly defines what types of actions are included, listing nine discrete categories of actions. Id. S.C. Code Ann. §15–3–640(1) – (9) (2013). Included among these are "action[s] for contribution or indemnification for damages sustained on account of an action described in this section." Id. S.C. Code Ann. §15–3–640(6)." Similarly, in Capco of Summerville, Inc. v. J.H. Gayle Construction Co., Inc., the Court held that a contribution

claim was barred by the statute of repose, notwithstanding its timeliness under the Uniform Contribution Among Tortfeasors Act. The Court reiterated that the expiration of the repose period extinguishes all causes of action, including those that might accrue later. Capco of Summerville, 368 S.C. 137, 628 S.E.2d 38 (2006). The same rationale governs in this case.

East Coast's work was all done in the 2006 – 2007 timeframe. **(R. p. 522; 539 - 566).** BFS did not sue East Coast until 2019 – more than 12 years after the work was completed and long after the statute of repose had expired. **(R. pp. 414 - 454)**. Plaintiffs filed this lawsuit on July 22, 2016, so even measured against the initiation of this litigation the Statute of Repose ran against all claims related to East Coast's work. **(R. pp. 174-186).** Although gross negligence is an exception to the limitations of the Statute of Repose as set forth in S.C. Code Ann. §15-3-670(A), this exception to the Statute of Repose does not apply in this case as BFS has failed to assert any gross negligence allegations against East Coast. **(R. p. 452).** As such, BFS's claims are barred.

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

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 lacks any of these reasons granting certiorari.

Additionally, BFS, is attempting to raise issues for the first time, in its Petition for a Writ for Certiorari. Those issues include, but are not limited to, BFS's arguments regarding Rule 8 of the South Carolina Rules of Civil Procedure and that the Court of Appeals' ruling creates new law and will upend the entire construction industry. "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, SCRCP, argument in its briefs filed in the Court of Appeals. See **(BFS Final Brief and Reply filed Nov. 14, 2022)**.

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 rewriting of its own flawed Master Agreement and pleadings. The Court of Appeals' decision faithfully applies established standards for interpreting contracts and indemnity provisions, upholding existing law rather than creating new. BFS's petition does not meet the criteria for certiorari under Rule 242. Therefore, this Court should deny BFS's Petition for Writ of Certiorari and affirm the Court of Appeals' decision in favor of East Coast.

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