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SC Court of Appeals

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)

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 ECC CONTRACTING, LLC'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 South Carolina's Anti-Indemnity Statute, S.C. Code Ann. §32-2-10 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 decide that severance of the unenforceable contractual indemnity provisions was not possible without judicial re-writing of the contract?

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 ECC 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. ECC served as a subcontractor of BFS and in

that capacity performed deck repair work on a single unit and installed windows and doors at two units. **(R. p. 59)**.

ECC executed a BFS "Master Subcontractor Agreement" dated February 26, 2008 (hereafter "Master Agreement"). The Master Agreement at issue here is a BFS contract form bearing "Version – 5/17/06." **(R. pp. 1477 - 1488)**. BFS seeks to recover from ECC 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)**.

BFS filed third-party claims against ECC Contracting, LLC ("ECC") on June 30, 2017. **(R. pp. 208-47)**. Subsequently, ECC was made a direct defendant by Plaintiffs and BFS then asserted cross-claims against ECC for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence. **(R. pp. 248-74) (R. pp. 275-309)**. Plaintiffs amended their complaint two more times and BFS's operative cross-claims are now contained in

[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).

BFS's Amended Answer, Cross-claims, and Third-Party Complaint that was filed in response to Plaintiffs' Fourth Amended Complaint on November 13, 2019. ECC timely answered all cross-claims asserted against it by BFS and raised relevant affirmative defenses.

On December 20, 2019, ECC filed a motion for summary judgment, which was amended on October 15, 2020, with regard to BFS's cross-claims. ECC argued its summary judgment before Circuit Court Judge, the Honorable Jennifer B. McCoy, on November 6, 2020. **(R. p. 58).** On July 7, 2021, Judge McCoy signed and filed an Order granting partial summary judgment in favor of ECC, and also issued similar orders for seven other subcontractor defendants. **(R. pp. 58 – 70).** On July 19, 2021, BFS filed a motion for reconsideration, which was denied on August 23, 2021. BFS appealed from those orders. **(R. pp. 122- 124).** 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 ECC for ECC'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 DECISION 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 ECC's negligence, as the Court of Appeals correctly found, 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 ECC'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 <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 Cross Claims 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 <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.

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

The claims BFS seeks are wholly unsupported by its Complaint. When paragraph 138 asks for full contractual indemnification for <u>any</u> liability and to be reimbursed by ECC for <u>any</u> sums for which BFS may be held liable, BFS is clearly seeking recovery from ECC 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 ECC'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 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 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 ECC's negligence as a distinct ground for relief. Instead, BFS 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 ECC'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 pleadings "leaves little doubt that BFS's pleadings also seek indemnification for its own negligence." Retreat at Charleston National 446 S.C. at 590.

[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)**.

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 Rule 8, 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 the Master Agreement, 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 PROPERLY FOLLOWED PRECEDENT WHEN IT AFFIRMED THE CIRCUIT COURT'S FINDING THAT BFS'S CONTRACTUAL INDEMNITY LANGUAGE 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 contractual indemnity 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 multiple indemnity provisions throughout the Master Agreement. In reviewing Section 5 INDEMNITY, the Court of Appeals correctly held that the provisions of Section 5 are ambiguous, conflict with each other, and do not meet the clear and unequivocal requirement. Retreat at Charleston National, 446 S.C. at 591-92.

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. 2008 Contract between BFS and ECC §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." 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 that 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 indemnification solely for ECC's negligence.

BFS, contending that it can rewrite the contract to seek merely indemnification for the sole negligence of ECC, would have the inquiry end here without regard to the remainder of Section 5 of the contract. 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**.

(*emphasis added*, all caps in the original) **(R. p. 1483)**.

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 its operative pleading, but rather is there a legal valid indemnity provision to enforce.

The Section 5 indemnity language fundamentally contradicts BFS's current assertion that its claims for contractual indemnity are limited to sums solely attributable to ECC's negligence. Instead, this contractual indemnity provision clearly calls for ECC to indemnify BFS for 100% of

its attorney's costs and fees *regardless of who is found to be at fault*. This contractual overreach unequivocally demonstrates an attempt to obtain indemnification for BFS's own negligence, which is plainly at odds with South Carolina law.

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, 424 S.C. at 649. Despite this clear precedent, BFS now asks this Court to disregard that conclusion and rewrite its Master Agreement to support indemnification solely for ECC'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 of both its Master Agreement and operative pleading, and, as such, it must be denied.

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

BFS has admitted responsibility for supervising all of the work performed by ECC and BFS's other subcontractors. **(R. pp. 688-689)**. Given BFS's admitted supervisory role, any negligence found on ECC'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 ECC's work. BFS's attempt to disguise claims of concurrent negligence as subcontractor sole-negligence contractual indemnity is unavailing and unsupported.

Even if ECC is found to be solely negligent, which, again, it denies, BFS can still seek indemnity from ECC in equity – a claim it still maintains. **(R. pp. 69, Judge McCoy's Order dated July 7, 2021)**. 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 contract 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 clauses 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 REGARDING CONTRACT INTERPRETATION

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 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). 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 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 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 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, cleverly includes hidden indemnity language.[3] This provision requires subcontractors to indemnify

[3] **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,

BFS for damages arising from "design, workmanship, and materials." This specific phrasing—particularly the references to "design" and "materials"—is critical. Subcontractors like ECC had no design responsibility, nor did they supply materials; their role was solely to install materials provided by BFS. Accordingly, the Court of Appeals recognized that this language could only refer to BFS's own conduct. Consequently, requiring indemnity in such circumstances directly violates S.C. Code Ann. § 32-2-10. Furthermore, Section 8(i) expressly provides for indemnification of attorney's fees and settlement costs *without regard to BFS's fault*, further illustrating that 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 asserts that 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. This assertion is baseless. The Court of Appeals' comprehensive analysis of the Master Agreement accounted for and utilized the definition of "Work" in Section 1. Rather than disregarding this definition, the Court used it to correctly interpret that the subcontractor's scope of work did not include design or material selection. This accurate interpretation, derived from reading the contract as a whole, demonstrated that the indemnity obligations embedded in Sections 3 and 5 were overreaching and

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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-incidental 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.

unenforceable. The Court of Appeals approach 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, 381 S.C. at 185 ("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 that the Master agreement contained ambiguous, conflicting, and deceptive clauses that improperly require indemnification for BFS's own negligence. For example, Section 5, paragraph 1 requiring subcontractor fault, while Section 5, paragraph 2 allows 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., 386 S.C. 198, 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 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, S.C. CODE ANN §32-2-10, APPLIES TO BFS'S CLAIM 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 5 of the Master Agreement explicitly calls for ECC 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. As a result, BFS's Master 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.

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 ECC'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 ECC 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 ECC.

Contrary to BFS's assertion, the indemnification language of BFS's Master agreement is intertwined and not susceptible of 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 that the indemnity provisions were "replete with terms that violate South Carolina law and public policy," and, thus unenforceable. Retreat at Charleston National, 446 S.C. at 597.

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.

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 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, "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 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. BFS'S CONTRACTUAL INDEMNITY CLAIMS ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL

BFS's current attempt to reframe the same claim—now limited to ECC's alleged sole negligence—ignores that the operative contractual language and the underlying factual predicate that 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 first and later cases are different. Id. The party asserting collateral estoppel must demonstrate that 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 that BFS had a full and fair opportunity to litigate, and did litigate, the enforceability of these specific indemnity clauses in prior actions before the Circuit Court.

BFS's central argument, that its pending appeals negate the finality of 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 said appeals undermine each Orders' status 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, 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.

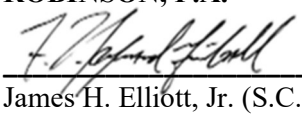
Additionally, BFS, is attempting to raise issues for the first time, in its Petition for a Writ for Certiorari. Those issues include, but are not limited to, BFS's arguments regarding Rule 8 of the South Carolina Rules of Civil Procedure and that the Court of Appeals' ruling creates new law and will 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 a Writ of Certiorari and affirm the Court of Appeals' decision in favor of ECC.

RICHARDSON PLOWDEN & ROBINSON, P.A.



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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 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; Liollio 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.

PROOF OF SERVICE

The undersigned hereby certifies that on this 31st day of July, 2025, a copy of RESPONDENT ECC CONTRACTING, LLC'S RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI was served on counsel of record, by Electronic Mail, addressed to the following:

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