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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2025-001224
Case No. 2016-CP-10-03783

Opinion No. 2025-6099

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.; 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, Petitioner

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry, Third-Party Defendants,

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the Respondents.

PETITIONER BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC REPLY TO RESPONDENTS' RETURNS TO PETITION FOR CERTIORARI

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REPLY

Respondents filed six separate Returns to the Petition for Writ of Certiorari. Because it is impossible to address every single argument raised or to correct every single misstatement made[1] by the six Returns within the fifteen pages allowed herein, Petitioner will focus on three main arguments: (1) although BFS cannot recover for its own negligence (whether sole or concurrent), it nonetheless has viable contractual indemnity claims against its subcontractors for damages arising out of the subcontractors' negligence (whether sole or concurrent); (2) Concord & Cumberland permits BFS to recover for the subcontractors' concurrent negligence even if BFS itself were (hypothetically) also concurrently negligent; and (3) as a matter of first impression, and in light of Section 32-2-10, attorneys' fees and general indemnification claims should be analyzed without regard to ultimate fault because a contractor may be compelled to incur fees to defend itself from claims against its subcontractor's work even if the claims are ultimately found to be meritless. As Petitioner stated in its opening brief, it will elaborate much more fully on the merits of this case should the Court grant certiorari.

In order to comply with its duty of candor toward the tribunal, Petitioner must inform this Court that the parties reached settlements in the underlying construction defect case and corresponding coverage action. Contrary to the representations of Respondents, Petitioner has only sought indemnification from Respondents against liability for damages allegedly caused by the negligence of the Respondents, and not for damages occasioned by any negligence of the

[1] For example, many Respondents argued that Petitioner should not be able to raise its argument regarding appropriate construction of its pleading because such argument was not raised in the court of appeals. See, e.g., ECC Return p. 9. However, Petitioner raised this argument, challenging the courts' construction of its pleadings as part of its first question presented on appeal. See BFS Brief pp. 11-14. In fact, BFS provided additional arguments on the proper construction of its pleadings in its Reply Brief. See BFS Reply Brief pp. 2-5. BFS in its Petition for Rehearing provided further arguments on the proper construction of its pleadings. See BFS Petition for Rehearing pp. 4-6. Appellate Rule 242 explicitly authorizes that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari". Because the question and arguments regarding appropriate construction of BFS' pleading was raised at every stage on appeal, it is proper in this Petition.

Petitioner itself. To that end, after discovery yielded evidence potentially supporting some of Plaintiffs' allegations against Petitioner and some against Respondents, Petitioner and Respondents coordinated to negotiate a comprehensive settlement with Plaintiffs to resolve any and all claims between the parties. Respondents expressly approved of the settlement amount Petitioner agreed to pay Plaintiffs, and Petitioner expressly approved of the settlement amounts Respondents agreed to pay Plaintiffs, all in exchange for a release of all claims against and amongst Petitioner and Respondents. All parties agreed that the settlement was fair and reasonable, and all parties were represented by competent and proficient legal counsel. Petitioner resolved Plaintiff's claims relating to its own alleged negligence, including alleged deficiencies in windows and doors products it supplied. Respondents resolved Plaintiff's claims relating to their alleged negligence in the respective scopes of work, including their installation services and the fasteners Respondents supplied.

This Petition for Writ of Certiorari should nonetheless be granted because the settlement does not undo or invalidate the bad and confusing law created by the lower court's orders from which this appeal is taken. The legal conclusions, including the lower courts' determination that Petitioner cannot maintain an action against its subcontractors for its subcontractors' own negligence, and its determination that the contracts at issue here are invalid, have far-reaching consequences and mandate further appellate review and reversal. Moreover, similar, if not identical, issues have been presented in multiple sister cases, wherein Petitioner has sought review by this Court. No settlement has been achieved in those sister cases, and critical issues relating to defense and/or indemnity obligations remain viable. For these reasons, and the reasons outlined below, Petitioner asks the Court to grant certiorari.

I. BFS has a claim for contractual indemnity for the negligence of its subcontractors that is consistent with its pleadings and with its contract.

A central issue to the merits of the appeal is whether Petitioner is seeking to be indemnified for its own negligence or only for the negligence, whether sole or concurrent, of its subcontractors. Respondents have argued, and the lower courts have mistakenly held, that Petitioner's pleadings seek indemnification from its subcontractors only for Petitioner's own negligence. Nearly every subsequent holding flows from that premise – inappropriate application of the heightened standard of Concord & Cumberland; misconstruction of the provisions of Section 32-2-10; the unsupported finding of unconscionability of the agreement; and the issue of collateral estoppel – and each is based upon the lower courts' errant decision that Petitioner is seeking to recover in indemnity for, Petitioner's own negligence.

Despite the Respondents' multiple attempts to frame this position as something new,[2] Petitioner has maintained since the filing of its initial pleading, and has reiterated multiple times on the record since, that it is not seeking to recover in indemnity for damages that may have been occasioned by its negligence, but only for those damages occasioned by the negligence of its subcontractors. [See, e.g., R. p. 1422, ll. 20-25]. Both the Petitioner's pleadings and the parties' Agreements are consistent with this position.

A. The BFS Pleadings only seek recovery for the negligence of the subcontractors.

Respondents argue that Petitioner cannot maintain an action for the negligence of its subcontractors because Petitioner's pleadings seek recovery for "any" sums for which BFS might be held liable to the Plaintiff. As Petitioner argued in its opening brief, *even if* "any" sums could be construed to include sums for which BFS itself was liable, "any" sums would necessarily also include those sums for which Respondents are liable, and thus BFS should be allowed to proceed

[2] See, e.g., brief of AC Construction at p. 7: BFS **now** asserts it can pursue contractual indemnity from ACC for ACC's alleged sole negligence. (emphasis added).

on its contractual indemnity claim for those latter sums. But in fact, the text of the pleadings shows, when properly read in full context, that BFS is seeking indemnification only against damages arising from the negligence of its subcontractors. An excerpt from Petitioner's relevant pleading for contractual indemnification provides:

> 134. That **BFS has denied the material allegations asserted against BFS** in the Plaintiffs' Fourth Amended Complaint.
>
> ...
>
> 137. That **to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of the Cross Claim Defendants,** which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.
>
> 138. That BFS is entitled to **full contractual and common law indemnification** from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

[R. pp. 440, 441] (emphasis added).

Similar language is addressed to the Third-Party Defendants in Paragraphs 163, 167 and 168 [R. pp. 448, 449].

By the specific language of its pleading, Petitioner has sought recovery in indemnity to the extent authorized by either common law or by the relevant contract provisions. Claims in common law indemnity would clearly be barred by any established negligence on the part of the Petitioner. However, by significant contrast, claims seeking recovery in contractual indemnity are permitted to proceed notwithstanding any established negligence on the part of the Petitioner. The relevant contractual provisions here allow for Petitioner's recovery in indemnity only against damages

occasioned by the negligence of the Respondent subcontractors, whether such negligence be solely that of the Respondents or concurrent with that of the Petitioner. Such a contractual allocation of responsibility is expressly authorized by statute and precedent of this Court.

Petitioner's claims, and its pleadings, are premised upon the assumption that the Plaintiff's claims arise from the negligence of the Respondents, and seek indemnity only against claims for damages ("any sums") occasioned by such negligence. Therefore, notwithstanding any potential finding of negligence on the part of the Petitioner, Petitioner nevertheless is entitled to recover for such damages as resulted from the negligence of Respondent subcontractors, whether sole of concurrent.

B. The BFS Contract indemnity provisions applicable to this case provide for recovery in indemnity only for damages resulting from subcontractors' negligence.

Respondents also argue that the BFS Contracts do not support BFS's position that it is seeking recovery only for the negligence of its subcontractors. However, the relevant indemnity provisions of both the 2005 Contracts and the Later Contracts provide for indemnification only to the extent that the subcontractors are found to have been negligent. This is the exact indemnity sought by the Petitioner here.

The relevant indemnification language in the 2005 Contracts provides as follows:

> [T]o the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend and hold harmless the Indemnitees for, and to save the 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. p. 1456](emphasis added).

Thus, where the underlying litigation has to do with alleged construction defects (as outlined in the emboldened section (ii) of the indemnity provision), the subcontractors who are parties to the 2005 Contracts have agreed to indemnify BFS "to the extent of liability resulting from [the] Subcontractor's negligence or willful misconduct." This agreement is completely consistent with the relief sought by BFS.

In the Later Contracts, indemnity obligations were set forth in "SECTION 5. INDEMNITY," which consists of four separate and distinct paragraphs.

The first paragraph provides, in relevant part, that Petitioner may seek indemnification against claims including those arising out of property damage:

> BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

[R. p. 1506].

The first paragraph allows Petitioner to recover in indemnity for property damage claims arising out of the negligent acts or omissions of its subcontractors (Respondents). The first paragraph is the only provision within Section 5 which specifically provides for indemnification against property damage, and this right of indemnity is explicitly limited to such property damage caused by the negligent act or omission of the subcontractor. The first paragraph in Section 5 is the only indemnity provision relied upon by the Petitioner in the assertion of its claims. More importantly, this indemnity provision is completely consistent, not only with the limited relief sought by the Petitioner here, but also with relevant statutory law and case precedent.

The second paragraph in Section 5 relates to claims for indemnity in cases arising out of bodily injury to the subcontractor, its agents, employees, and/or subcontractors. There are no bodily injury claims in this litigation, and thus this paragraph is not relevant and should not be

before the Court. Nonetheless, Respondents have taken issue with the second paragraph because, in cases involving bodily injury to the subcontractor, its agents, employees, and/or subcontractors, the provision allows Petitioner, "**TO THE FULLEST EXTENT PERMITTED BY LAW**," to seek indemnification "REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES." [R. p. 1506](emphasis added). Thus, the provisions of the second paragraph, by their specific terms, allow recovery in indemnity *only* as authorized by law, and, correspondingly, would not impose any indemnity obligation contrary to South Carolina law. More importantly, Petitioner does not seek any recovery pursuant to this provision of the Later Contracts, and thus, it is not at odds with Petitioner's cause of action for contractual indemnity based in alleged property damage arising from the negligence of the subcontractor Respondents.

The third paragraph of Section 5 addresses the subcontractor's duty to defend and provides in relevant part that:

> 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 PRSENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER** AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR.

[R. p. 1507](emphasis added).

Thus, the third paragraph provides the contractual right to tender defense of an indemnified claim or to bring a claim for defense expenses incurred against such an indemnified claim. The fourth paragraph of Section 5 provides that the defense and indemnification obligations do not extend to design professionals involved in the construction of a project. [R. p. 1507]. Petitioner

submits that there is nothing illegal about either the third or fourth paragraph provisions even though they provide contractual rights that are not contingent on a finding of fault.[3]

Moreover, the provisions of the second, third, and fourth paragraphs of Section 5, do not change the fact that Petitioner has valid contractual indemnity claims for the judgment(s) that may ultimately be entered against it arising out of the negligent work of the subcontractors, and that these claims are supported by (and not, as Respondents argue, inconsistent with) the respective contract terms and provisions.

Respondents, in challenging the validity of the indemnity provisions at issue here, also delve deep into several other unrelated provisions of the contract, including language in the Later Contracts found in Section 3 "Warranty", and "Liens," as set forth in Section 8(i) or 9(i) depending on the contract. More specifically, the Respondents assert that various provisions of these sections require the Respondents to indemnify the Petitioner against damages occasioned by defects in the materials or services provided by the Petitioner itself. The referenced provisions have been misconstrued by both the Respondents and the lower courts.

Petitioner would show that the provisions as referenced by the Respondents are neither relevant to the claims before the Court, nor have they been relied upon by Petitioner in its assertion of those claims. Moreover, even assuming such relevance, these provisions are not unconscionable, they are properly limited in their scope, and they imposed obligations upon Respondents only to the extent that their own acts or omissions have resulted in loss or in potential loss.

Petitioner, in contesting the Respondents' assertions, would initially direct the Court's attention to the definition of the term "Work", as set forth in Section 1(a) at the very beginning of

[3] That the third paragraph's provisions and duty to defend obligations do not run afoul of Section 32-2-10 will be argued in Section III below.

the 2005 and Later contracts. [See, e.g., R. pp. 1451, 1501]. As defined in Section 1(a), the term "Work", which is used throughout the contract, is limited to **services performed and/or the materials provided by the subcontractor**. Id. (emphasis added). There is no evidence that any of the lower courts either considered the impact of the definition of "Work," or gave deference to that definition in their determinations of the issues. Any mention of the term "Work" in the trial orders was, rather, the direct result of the trial court's wholesale adoption of orders drafted by Respondents' counsel. Moreover, although the appellate court quoted – among many other provisions – the section containing the definition of "Work," as a contract term, it conducted no analysis of that term, and, more tellingly, failed to utilize the definition in determining the validity of the various indemnity provisions for which it took issue.

Obligations in warranty and/or corresponding indemnity, as set forth in Section 3, are specifically limited to defects in the "Work" provided by the subcontractor. [R. p. 1504]. Any such obligations are, therefore, under the specific definition of "Work" as set forth in Section 1, limited to and arise only out of defects in the materials provides and/or services performed by the subcontractors, and are completely consistent with relevant law.

The Petitioner would also direct the Court's attention to sub-paragraphs h) and i) of Section 8 (or 9) of the Later Contracts. Provision 8(h) simply requires that the subcontractor pay "all charges **owed by it** for labor, services, materials, equipment, tools, and supplies" used by the subcontractor to implement its Work. [R. p. 1510](**emphasis added**). Provision 8(i), requires in turn that the subcontractor indemnify the contractor if the subcontractor fails to make its required payments under 8(h). [R. p. 1511]. Any such duty to indemnify under Section 8 arises **only** when the subcontractor fails to satisfy its obligations owed by the subcontractor to a third-party. Thus,

all of the relevant contractual terms support, rather than contradict, Petitioner's position that it seeks recovery only for its subcontractors' negligence.

II. Concord & Cumberland prohibits a contractor from recovering for its own negligence (whether sole or concurrent), but does not prohibit a contractor from recovering for the negligence of its subcontractors (whether sole or concurrent).

Some of the Respondents argue that Petitioner cannot recover in contractual indemnity even for the concurrent negligence of its subcontractors (as opposed to its own concurrent negligence) unless the language of the contract satisfies the heightened "clear and unequivocal" standard.[4] No analysis of concurrent versus sole negligence was ever undertaken before the trial court or the court of appeals, and thus consideration of this issue is arguably inappropriate here. Moreover, as Respondents note, at this stage Petitioner's pleadings control Petitioner's claims, and the pleadings allege that any damage is the result of the negligence of its subcontractors.[5] Nevertheless, Petitioner would also be able to recover for even the concurrent negligence of its subcontractors.

This Court has previously confirmed that "contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties." Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005).

The Concord & Cumberland court also recognized correctly that "typically, courts will construe an indemnification contract 'in accordance with the rules for the construction of contracts generally'" Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170 (Ct. App. 2018) (quoting Campbell v. Beacon Mfg. Co.,

[4] See, e.g., Brief of Hurley at p. 5: "a contractual indemnification term allowing the BFS to recover for a subcontractor's concurrent negligence is prohibited if the term does not meet the clear and unequivocal standard."

[5] Respondents' arguments that Petitioner is inherently subject to negligence as a matter of law vis-à-vis its unlicensed subcontractors is flawed. It is entirely possible for an unlicensed subcontractor to be solely negligent notwithstanding any duty of BFS to supervise its subcontractors. For example, a subcontractor could fraudulently misrepresent its Work, including the type, length, and spacing of the fasteners that the subcontractor supplied for its installation Work.

313 S.C. 451, 454, 438 S.E.2d 271, 272 (Ct. App. 1993)). The Concord & Cumberland court also noted, however, that "when an indemnity clause purports to 'relieve an indemnitee from the consequences of its **own** negligence,' our case law requires strict construction of the clause." Id. (quoting Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 378-79 (2003))(emphasis added). The Concord & Cumberland court also cited, with approval, "the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its **own** negligent acts unless such intention is expressed in clear and unequivocal terms" Id. (quoting Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989))(emphasis added).

In applying the aforesaid principles, the Concord & Cumberland court explicitly found **only** that the heightened clear and unequivocal standard "applies whether [a contractor] sought indemnification for **its** sole or concurrent negligence." See 424 S.C. at 646 (emphasis added). Despite Hurley's representation, the court of appeals *did not* subject recovery for losses arising from the concurrent negligence of the subcontractor to the heightened clear and unequivocal standard. In fact, Concord & Cumberland affirmed the trial court order that allowed recovery for the negligence of the subcontractor, despite the finding that the contract's indemnity provision did not satisfy the clear and unequivocal standard, and notwithstanding the admitted concurrent negligence of the contractor. See 424 S.C. at 645 ("The circuit court...limited indemnification to damages resulting from the work Muhler performed").

This Court has specifically recognized the rights of parties to transfer risks by means of contractual indemnity. Rock Hill Telephone Co. V. Globe Communications, Inc., 363 S.C. 385, 389, 611S.E. 2d 235, 237 (2005). The courts recognized that indemnification contracts are to be construed in accordance with the rules for the construction of contracts generally. See Campbell,

313 S.C. at 454. As demonstrated hereinabove, it is **only** when an indemnity clause purports to relieve an indemnitee from the consequences of its **own negligence**, whether sole or concurrent with that of its indemnitor, that the case law requires any such contractual provision to satisfy the clear and unequivocal standard. There is nothing within the appellate authority in this state, and no such authority has been cited, to extend such "clear and unequivocal" standard to claims seeking indemnity against damages occasioned by the negligence of the indemnitor subcontractor, whether sole or concurrent, and any such extension is, as noted, inconsistent with prevailing principles of contract construction.

More critically, the Concord & Cumberland court acknowledged, by footnote, the challenges faced in constructing indemnity provisions satisfying the clear and unequivocal standard, and conceded that no such provision has yet met that standard. The argument advanced by the Respondents, if validated by this court, would thus effectively eviscerate the contractual right to allocate risk based upon the respective negligence of the contracting parties. Such an outcome, which would effectively equate rights in contractual indemnity to those in equitable indemnity, is plainly inconsistent with precedent, (authorizing allocation of risk and responsibility premised upon fault, and with the plain provisions of Section 32-2-10).

Perhaps most troubling is Hurley's assertion on page 3 of its brief that: "by seeking indemnification for Hurley's concurrent negligence, BFS is necessarily pursuing recovery for its own negligence." Hurley notably provides no citation following this statement, nor any logical syllogism that would compel this conclusion. As Petitioner can best understand it, Hurley mistakenly conflates the relationship of joint tortfeasors with the relationship between a third-party plaintiff and a third-party defendant. Petitioner here seeks recovery not from a joint tortfeasor, but from a defendant who, due to the nature of that defendant's special relationship with Petitioner,

and by virtue of its contractual undertakings, "may be liable to him for all **or part** of the plaintiff's claim against him." S.C. R. Civ. P. 14 (emphasis added) (see also Rule 13(g) for similar language pertaining to cross-claim defendants). The Rules of Civil Procedure consider that a derivative defendant might be concurrently negligent with a third-party plaintiff, and the Rules allow a third-party plaintiff to recover for derivative, concurrent negligence by providing for partial recovery without any type of heightened burden.

III. Unlike indemnity claims, attorneys' fees are not subject to Section 32-2-10.

Whether or not attorneys' fees are governed by Section 32-2-10 would be an issue of first impression in South Carolina.

In this litigation, the Later Contracts create two separate means by which Petitioner can recover attorneys' fees incurred in defending against Plaintiff's property damage claims allegedly resulting from the negligent acts or omissions of the subcontractors. The first paragraph of Section 5 provides that Petitioner may be entitled to attorneys' fees as consequential damages of the indemnification claim, and this right exists only to the extent that the subcontractor is determined to be negligent. [R. p. 1506]. However, the third paragraph of Section 5 provides a specific contractual right for Petitioner to tender defense of an indemnified claim. [R. p. 1507]. The parties agreed that the subcontractor would defend against an indemnified claim because the subcontractor performed the Work at issue. Section 32-2-10 does not preclude the parties from agreeing to such arrangement.

Equally importantly, Section 32-2-10 relates only to agreements imposing an obligation to "indemnify". As noted by the Concord & Cumberland court, our courts have consistently defined indemnity as "that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." 424 S.C. at 646-647. Attorneys' fees are

not within the scope of indemnity because such fees are not paid by a first party to a second party **"for loss or damage the second party incurs to a third party."** Id. Rather, they are consequential damages of an indemnity claim. Section 32-2-10, in imposing limitations upon rights in indemnity, is in obvious derogation of the common law, and thus the statute must be strictly construed. Grier v. AMISUB of S.C., 397 S.C. 532, 536, 725 S.E. 2d 693, 696 (2012). Section 32-2-10 is silent as to "attorneys' fees". If the legislature had intended for the statute to encompass attorneys' fees, it could easily have included such fees within the statute; however, the legislature did not. Because Section 32-2-10 must be strictly construed, and because it utilizes the term "indemnify", a term that "has a well-recognized meaning in the law", the term must be read to apply only to indemnification agreements; any expansion by this Court to include attorneys' fees would be inappropriate as an undue encroachment upon the province of legislature.

Respondents have objected to the cases Petitioner cited for the proposition that the duty to defend is separate from the duty to indemnify, arguing that those cases govern insurance law and that "[t]he rules and regulations that apply to insurance contracts are different from those that apply to the subcontract in this case."[6] Respondents, however, cite to no authority as to why this is so or as to why these cases should not be instructive. Moreover, the court of appeals relies upon a case dealing specifically with contracts of insurance to support one of its findings regarding the parties' contracts here. See Opinion p. 22 (quoting USAA Prop. & Cas. Ins. Co.).

Because the statute is silent as to "attorneys' fees," the third paragraph provisions do not violate the statute and cannot be the basis, as argued by some Respondents, to invalidate the entire contract. Instead, while Petitioner does not believe that any of the aforementioned provisions are illegal, to the extent that the Court finds any of them to be, the Court must sever the provision,

[6] Brief of ECC, p. 19.

pursuant to the parties express intent, as evidenced by the severability provisions in the contracts. [R. pp. 1512].

In a sense, however, all of Respondents' arguments on this matter are just noise. Petitioner has a valid claim for indemnification for the negligent acts of its subcontractors. Whether Petitioner is allowed to collect attorneys' fees under an indemnified claim under the first paragraph or pursuant to a subcontractor's duty to defend as provided by the third paragraph of Section 5 is ancillary to the main point of this appeal and petition. For that matter, this Court could invalidate the third paragraph of Section 5 and sever it, limiting recovery of attorneys' fees to the first paragraph of Section 5. This result would be consistent with precedent in which the courts, rather than invalidating an entire contract, have limited the contractor's recovery to licit parts of the contract. See D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).

Moreover, as cited in the Petitioner's initial brief, the contention that attorneys' fees are encompassed within any prohibition imposed by Section 32-2-10 is an issue of novel impression in the state.

CONCLUSION

Petitioner has attempted to put forth various good-faith arguments for why this Petition should be granted under the criteria listed in Rule 242, and Petitioner believes this case fits squarely within the criteria. In addition, certiorari should be granted to correct the injustice imposed by the lower courts: namely, when properly read, that BFS pleadings seek indemnification for subcontractors' negligence via valid and enforceable contracts.