RECEIVED
Jan 27 2026
SC Court of Appeals

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's BRIEF

Stephen P. Hughes, Esquire
Bar No.: 002805
William H. Cox, III, Esquire
Bar No.: 101991
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
SPHughes@hghpa.com
WCox@hghpa.com

AND

Catherine L. Floeder, Esquire
Admitted in SC *pro hac vice*
MN Bar No.: 0398360
845 Cannon Avenue
Shoreview, MN 55126
Catherine.floeder@gmail.com

Attorneys for Petitioner Builders
FirstSource-Southeast Group, LLC

Table of Contents

Table of Authorities ii

Questions Presented on Certioari 1

Statement of the Case 1

Statement of Facts 4

Standard of Review 13

Argument 15

I. The court of appeals erred in holding that BFS's contractual indemnification claim sought recovery exclusively for BFS's own negligence and did not encompass a claim specifically for damages caused by the Respondent subcontractor's negligence 15

II. An indemnification provision, which limits indemnification to damages resulting from negligence of the subcontractor/indemnitor, relied upon in support of an indemnification claim should be construed under general rules of contract construction rather than under the heightened "clear and unequivocal" standard 20

III. The Court should restrict its inquiry to the relevant indemnity provisions, not other provisions for which no cause of action or claims have been asserted, and rules of contract construction require the Court to honor defined terms in the contracts 24

IV. Any potentially offending provisions are easily severable 36

VI. A trial court's order on appeal is not "final" for purposes of collateral estoppel or res judicata in South Carolina 40

Conclusion 43

Table of Authorities

Cases:

Am. Nat. Bank of Winter Haven, Fla., v. Caldwell,166 S.C. 194, 164 S.E. 613 (1932) 39

Arkansas Best Freight Sys., Inc. v. H.H. Moore, Jr. Trucking Co., 244 Va. 304, 421 S.E.2d 197 (1992) 42

Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 763 S.E.2d 19 (2014) 22

B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004)........................14
Beach Co. v. Twillman, Ltd., 351 S.C. 56 (Ct. App. 2002)....................................38, 39

Campbell v. Beacon Mfg. Co., 313 S.C. 451, 438 S.E.2d 271 (Ct. App. 1993)...........21, 23, 24

Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) 40

Camreta v. Greene, 563 U.S. 692, 131 S.Ct. 2020 (2011)...42

Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).................................19, 21, 22, 23, 38

Doe v. TCSC, LLC, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020) 38, 39

D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) 38

Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004)...................................14
Ex parte Celtic Life Ins. Co., 834 So.2d 766 (Ala. 2002) 38

Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975) 28

Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989) 21

Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005)...14
Healthcomp Evaluation Servs. Corp. v. O'Donnell, 817 So.2d 1095 (Fla. Dist. Ct. App. 2002) 38

Huskins v. Mungo Homes, LLC, 444 S.C. 592, 910 S.E.2d 474 (2024)...............................37

Judy v. Judy, 383 S.C. 1, 677 S.E.2d 213 (Ct. App. 2009)..41

Kristin v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006)..38

Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003) 22

McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009) 26, 27

Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004)...............14

Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005)......14

Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004)..................14

Mulherin—Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct.App.2005)..........................14

Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct.App.2004)..14

Pigot's Case, 77 ER 1177 (1614)...37

Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005).........................14

Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005)............14

Safranek v. Copart, Inc., 379 F.Supp.2d 927 (D. Ill. 2005) 38

Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 579 S.E.2d 132 (2003)...........26, 27, 31

Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003)..................................14

S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 135 S.E.2d 613 (1964) 24

S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210,
403 S.E.2d 625 (1991) 41

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) 38

Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 756 S.E.2d 148 (2014) 30

Town of Summerville v. City of N. Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008).............14

United States v. Bradley, 35 U.S. 343 (1836) 37

Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012)...........26, 27

Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 762 S.E.2d 705 (2014) 28

Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 826 S.E.2d 285 (2019)........................14

Other:

Restatement (Second) of Judgments § 13 Requirement of Finality (1982))................41, 42, 43

50 C.J.S. Judgments Section 940 42

Questions Presented on Certiorari

1. When a contractor files a general third-party claim against its subcontractor seeking to recover in contractual indemnity for all damages for which it might be held liable, does such claim include those damages for which the subcontractor is either solely or concurrently responsible?

2. Should a contract provision imposing an obligation to indemnify – specifically as it relates to a contractor's claim for damages for which its subcontractor is either solely or concurrently responsible – be construed in accordance with precedent and with the laws governing contracts generally, or should it for the first time be subject to the heightened "clear and unequivocal" standard that would be applicable if the contractor were solely seeking indemnity for its *own* negligence?

3. Should the court restrict its inquiry to the provision of the contract directly at issue, that is, the indemnification provision, rather than considering provisions under which no cause of action has been brought in this case, and should the inquiry into the meaning of the contract always give defined terms in the parties' contract the limited meaning ascribed to them in the contract?

4. Does the court's refusal to honor the severance language in this contract, and its consequent refusal to sever the offending language and thus save the contract, violate the Supreme Court's precedent?

6. Is a trial court's order that is on appeal, and thus on which judgment has not yet been finally entered, considered sufficiently "final" for collateral estoppel or res judicata purposes?

Statement of the Case

This appeal is the result of a long and complex construction defect litigation originally filed by the Plaintiffs on July 22, 2016. See A. pp. 174-186. The Plaintiffs, The Retreat at Charleston National Country Club Homes Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime, sought recovery of damages allegedly occasioned by deficiencies in original construction of the subject project, a multi-family development, consisting of 32 buildings, encompassing a total of 129 townhome units, located in Mount Pleasant, South Carolina. See Id.

The Plaintiffs' claims, as asserted against Petitioner Builders FirstSource – Southeast Group, LLC ("BFS" or "Petitioner"), allege, among other contentions, that the framing and window installation services of BFS were deficient, resulting in water intrusion and corresponding damages. See A. pp. 177-179. Plaintiffs' forensic expert has also opined: (a) that the windows at the project are characterized by inadequate DP ratings, requiring comprehensive replacement of those windows; (b) that installation was performed using incorrect fasteners, which were, both (i) of improper type, and (ii) of inadequate length to assure required embedment of the fastener into the framing; and (c) that fasteners were installed at spacing intervals which exceeded those required by the manufacturer's installation criteria. See A. pp. 1107, 1108, 1111.

BFS contracted with several subcontractors who performed the allegedly defective installation work at the project. BFS supplied the framing lumber, windows, and exterior doors among other material components for original construction. BFS's subcontractors were required to supply the fasteners utilized in installation of the material components as well as provide the tools and labor necessary to perform the installation services. Therefore, BFS filed cross-claims or third-party claims, against its subcontractors, including: ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co[1], LLC, AC Construction Corp and/or AC Construction Inc., L&G Construction Group, LLC, WS Contractors, LLC, Pohlman Quality Exteriors, Inc., Palmetto Trim and Renovations, LLC, Edward Bruce Witham[2], and East Coast Carpentry Company. See A. pp. 414-454. The claims of BFS included causes of action in negligence, breach

[1] Plaintiffs filed a Stipulation of Dismissal dismissing their claims with prejudice against McDaniel Construction Co, LLC on April 17, 2020. Therein, Plaintiffs stipulated that there are no defects in the work performed by McDaniel Construction Co, LLC on the project that is the subject of this suit. Premised upon Plaintiffs' stipulations, the Honorable Bentley D. Price granted McDaniel Construction Co, LLC summary judgment as to Builders FirstSource-Southeast Group, LLC claims on December 18, 2020. McDaniel Construction Co, LLC is not a party to this appeal.
[2] The Honorable Jennifer B. McCoy Ordered an Entry of Default against Edward Bruce Witham on June 12, 2020. Edward Bruce Witham is not a party to this appeal.

of express and implied warranty, breach of contract, contractual indemnity and equitable indemnity. See A. pp. 414-454.

Of the above-mentioned subcontractors, eight moved for summary judgment at various times during 2019 and/or 2020. All eight subcontractors' motions were heard on November 6, 2020, by the Hon. Jennifer McCoy. See A. pp. 1386-1450. Each subcontractor argued its own motion, and the arguments forming the basis for the different motions varied from subcontractor to subcontractor. See Id. On May 10, 2021, Judge McCoy issued seven[3] separate Form 4 Orders granting, or granting in part, summary judgment to the subcontractors, and requesting that *each* subcontractor submit its own proposed order. See A. pp. 1-21. As a result, Judge McCoy received eight different proposed orders, one from each subcontractor, with each outlining different legal and factual grounds for an award of summary judgment. Judge McCoy then adopted each of the eight proposed orders over the course of multiple days. On July 7, 2021, Judge McCoy issued orders granting, in part, summary judgment to: Hurley Services, ECC Contracting; AC Construction; L&G Construction; and Pohlman Quality Exteriors. See A. pp. 22-41, 58-83, 102-121. On July 26, 2021, Judge McCoy issued an order granting, in part, summary judgment to Palmetto Trim and Renovations. See A. pp. 50-57. On July 29, 2021, Judge McCoy issued orders granting, or, granting in part, summary judgment to: East Coast Carpentry; and WS Contractors. See A. pp. 42-49, 84-101.

BFS timely moved for reconsideration of each of the eight orders. See A. pp. 1208-1385. On August 23, 2021, Judge McCoy issued eight Form 4 Orders denying each of BFS's motions for reconsideration. See A. pp. 122-145. BFS separately filed eight notices of appeal – one for each order – on September 22, 2021. By letter dated October 7, 2021, the Clerk of Court for the

[3] The trial court did not issue a Form 4 Order addressing L&G's motion, however, it ultimately grant partial summary judgment to L&G in an order dated July 7, 2021.

court of appeals advised the parties to this action that it had consolidated the eight appeals filed by BFS. BFS responded by letter dated October 25, 2021, and later by motion dated November 22, 2021, setting forth its objections to consolidation of the appeals. Nonetheless, by letter dated January 28, 2022, the court of appeals reaffirmed the consolidation.

On appeal, this case was considered by a panel of judges composed of Judges McDonald, Thomas, and Verdin. BFS's final briefs were submitted on November 14, 2022, and oral arguments were held on March 5, 2024. The court of appeals issued its order as a published opinion on February 12, 2025, affirming the trial court's orders. BFS filed a petition for rehearing on February 27, 2025. On May 21, 2025, the court of appeals issued a substituted opinion denying the petition for rehearing. BFS then filed its Petition for Writ of Certiorari on June 20, 2025, which was granted on December 16, 2025. This appeal follows.

STATEMENT OF FACTS

Certain parts of BFS's pleadings and BFS's contracts with Respondent subcontractors are relevant to multiple arguments before the Court. For the Court's convenience, relevant portions of these documents are introduced here and then referenced throughout the Argument section.

Respondent subcontractors have argued, and the lower courts have mistakenly held, that BFS's pleadings seek indemnification from its subcontractors for BFS's own negligence. Thus, we must first turn to the original text of the allegations BFS asserted against the Respondent subcontractors.

BFS's operative pleading alleging its indemnification cause of action provides:

> 133. That the Plaintiff, The Retreat at Charleston National Country Club HOA, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime, have sued Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), asserting damages allegedly caused, inter alia, by deficiencies in framing, including but not limited

to deficiencies in the installation of windows, doors, and related components during original construction of the subject structures.

> 134. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Fourth Amended Complaint.
>
> 135. That the respective subcontracts between this Defendant and the Cross Claim Defendants, provide for contractual indemnification in favor of BFS.
>
> 136. That the Cross Claim Defendants served as subcontractors to BFS in connection with their services at the subject structures. Regardless, therefore, of any specific contractual obligation to indemnify, there exists a special relationship between this Defendant and the Cross Claim Defendants, sufficient to impose obligations of indemnity against the aforesaid Cross Claim Defendants, in favor of BFS.
>
> 137. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of the Cross Claim Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.
>
> 138. That BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

See A. pp. 440, 441 – BFS's Cross-claim for Indemnification. Similar language is used in BFS's Third-Party claim for Indemnification. See Paragraphs 162-168 at A. pp. 447-49.

Consistent with its pleadings, BFS has maintained since the filing of its initial pleading, and its counsel has reiterated multiple times on the record since, that it is not seeking to recover in indemnity for liability or damage that may have been caused by its own negligence, but only for liability or damage caused by the negligence of its subcontractors. See, e.g., A. p. 1422, ll. 20-25.

In addition to contesting BFS's pleadings, the Respondent subcontractors argued and the lower courts held that the indemnity provisions are neither clear nor unequivocal. Thus, we must next review the parties' contracts.

BFS entered into separate written contractual agreements with each of the Respondent subcontractors. See A. pp. 1451-1525. All of the contracts, including the defined terms, sections, and provisions therein, are nearly identical in form and substance. See Id. For example, all of the contracts begin with a "**SECTION 1. Introduction.**", which states, in relevant part, that the "Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") ...." See A. pp. 1451, 1464, 1477, 1489, 1501, 1514. The term Work, defined in SECTION 1 as the materials provided and/or services performed by the Subcontractor, is subsequently used throughout the contracts. See A. pp. 1451-1525. This defined term **"Work"** is critical to an appropriate reading of the contracts, because each Agreement, and all the contractual rights and obligations of the parties, is limited to the Subcontractor's Work. See Id.

The parties' contracts are different versions of a Master Agreement and were entered into at different times. Due, however, to the factual similarities, the parties and the lower courts have labeled them as the "2005 Contracts" and the "Later Contracts" respectively. BFS entered into the 2005 Contracts with Respondent subcontractors East Coast Carpentry Co. (A. pp. 1461-60) and Palmetto Trim & Renovations (A. pp. 1464-73). BFS entered into the Later Contracts with Respondent subcontractors ECC Contracting (A. pp. 1477-1488), WS Contractors (A. pp. 1489-

1500), Hurley Services (A. pp. 1501-1512), Pohlman Quality Exteriors (A. pp. 1514-1525), L&G Construction, and AC Construction.[4]

The relevant indemnity provision in the 2005 Contracts is as follows:

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. Accordingly:

a. **Waiver**. [Omitted - applies only to Subcontractor's workers' compensation claims]

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, indemnify, 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.

See A. pp. 1455-56, 1468-69.

The relevant indemnity provision in the Later Contracts is as follows:

SECTION 5. INDEMNITY.

[4] The Record on Appeal does not contain copies of the contracts for L&G Construction and AC Construction, however their contracts are identical in form and content to the "Later Contracts," and this explains why L&G and AC filed motions joining other parties' motions for summary judgment. See A. pp. 1156, 1205-1207.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DFEND, 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 LMIITED 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 ARISTE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACITIVITIES OF THE SUBCONTRACTOR, 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. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFCATION HEREUNDER.

See A. pp. 1482, 1494, 1506, 1519.

Here, where the underlying litigation arises out of alleged construction defects and resulting property damage claims, the Respondent 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." See A. p. 1455-56, 1468-69. Similarly, the Respondent subcontractors who are parties to the Later Contracts have agreed to indemnify BFS "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." See A. pp. 1482, 1494, 1506, 1519. Thus, contrary to Respondent subcontractors' arguments, the indemnification provisions in the 2005 Contracts and Later Contracts are not only completely consistent with the relief sought by BFS, but also explicitly authorized by law.

Lastly, some of the Respondent subcontractors argued and the court of appeals correspondingly held that other contractual provisions in the Later Contracts conflict with the relevant indemnity provision and/or violate South Carolina law.

Before setting forth the other contested provisions, BFS would emphasize, and will argue further below, that upon proper reading, i.e. when read in context and with appropriate consideration of defined terms, like "Work," the provisions do not stand for what the Respondent subcontractors argued and the court of appeals held. Equally importantly, the other provisions, specifically including provisions relating to warranty, bodily injury claims, and/or mechanic's liens, are (a) separate and distinct from the relevant indemnity provisions, (b) unrelated to the claims asserted here, and (c) not relied upon by BFS in the assertion of its claims against the Respondent subcontractors.

The other contested provisions of the Later Contracts are as follows:

A) 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 of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including

costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. 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.

See A. pp. 1480, 1492-93, 1504-5, 1517.

B) SECTION 5. INDEMNITY.
[Omitted – this first paragraph is set forth above as it is the indemnity provision upon which BFS relies in the assertion of its contractual indemnification claims against those Respondent subcontractors that were parties to the Later Contracts.]

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR' AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE

LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

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

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGES THAT IS (a) CAUSED BY OR RESULTING FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

See A. pp. 1482-83, 1494-95, 1506-7, 1519-20.

SECTION 8. Payment to Subcontractor.

a. **Payment by Owner is Condition Precedent.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

b. **Partial Payments.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

c. **Retainage.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

d. **Grounds for Withholding Parments.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

e. **Work Covered by Partial Payments.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

f. **Final Payment.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

g. **Release of Retainage.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

i. **INDEMNIFICATION FOR LIENS. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY**

> **THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBERANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBERANCES, OR DEMANDS.**

See A. pp. 1485-87, 1497-99, 1509-11, 1522-24.

Finally, and no less critical to an appropriate determination by this Court, the 2005 Contracts and Later Contracts include the following severability provision as follows:

> The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

See A. pp. 1460, 1473, 1488, 1500, 1512, 1525.

The foregoing are the many provisions that will be relevant to the Court's analysis of the questions presented in this case. For the reasons set forth herein and below, BFS requests that this honorable Court reverse the lower courts' errant holdings and remand BFS's contractual indemnification claims for liability or damage resulting from the Respondent subcontractors' negligence for trial.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP, which is that summary

judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In reviewing a motion for summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). Any triable issues must go to the jury. Mulherin—Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct.App.2005).

On an appeal from an order granting summary judgment on a question of law, this Court reviews the ruling de novo. Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019)(citing Town of Summerville v. City of N. Charleston, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008)). "The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct.App.2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot

differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).

ARGUMENT

I. The court of appeals erred in holding that BFS's contractual indemnification claim sought recovery exclusively for BFS's own negligence and did not encompass a claim specifically for damages caused by the Respondent subcontractor's negligence.

As more fully detailed in sub arguments A and B, the lower courts' determinations concerning the indemnity sought by BFS were inconsistent not only with BFS's pleadings, but also contrary to BFS's redundant representations before both the trial court and the court of appeals. Additionally, and to the extent that the court determined that the BFS contractual indemnification claims did not encompass indemnity against liability or damage resulting from the negligence of its subcontractors, such a determination was inconsistent with the precedent.

The court of appeals held that, because BFS sought indemnification for "any" sums for which it might be held liable, BFS was seeking indemnification for its own negligence, and thus its entire contractual indemnification claim was subject to dismissal. In so holding, the court of appeals overlooked that, even if "any" sums included those caused by the negligence of BFS, it also simultaneously included "any" sums caused by the derivative negligence of the subcontractors. Instead of dismissing the entire cause of action, the court of appeals should have allowed BFS to proceed on the portion of its contractual indemnification claim by which it seeks to recover from its subcontractors for the negligence of its subcontractors.

A. BFS pled a cause of action that, when read in context, seeks recovery only for liability or damage resulting from the negligence of the Respondent subcontractors.

As an initial matter, BFS maintains that its pleadings only seek indemnification for the negligence of the subcontractors. Specifically, BFS pled that if it were to be found liable to the Plaintiffs, that any

such liability would be the result of the wrongful acts, omissions, negligence, and/or representations of the Respondent subcontractors. See Paragraph 137, A. p. 441; Paragraph 167, A. p. 448. BFS then pled that it was entitled to full contractual and common law indemnification for any liability (i.e., any such liability resulting from the negligence of the Respondent subcontractors) which it is found to have to the Plaintiffs. See Paragraph 138, A. p. 441; Paragraph 168, A. p. 448.

Thus, a fair, impartial, and appropriate reading of the BFS pleadings clearly establishes that BFS contends that any liability on its part is the result of the negligent acts or omissions of its subcontractors, and that BFS is seeking contractual indemnity only against liability occasioned by such subcontractor negligence.

Despite citing to these specific allegations in the Opinion, the court of appeals erroneously determined that because BFS sought recovery for "any" sums for which it may be liable, it was seeking indemnification for its own negligence. See Opinion, A. p. 1552. However, to reach such a conclusion, the court of appeals must focus, exclusively, upon the allegations of Paragraphs 138 and 168, and by contrast, give no consideration whatsoever to the equally relevant allegations set forth in Paragraphs 137 and 167. Importantly, the allegations in Paragraphs 137 and 167 limit BFS's indemnification cause of action to damages resulting from the Respondent subcontractors' negligence. By the plain language in Paragraphs 137 and 167, BFS's indemnification cause of action is limited "to the extent, if any, that BFS may be held liable to the Plaintiffs," and to the extent that such liability is "a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of the [Respondent subcontractors]." Thus, for BFS to proceed on its indemnification cause of action against the Respondent subcontractors, it must first, be found liable to the Plaintiffs, AND second, such liability must be a direct and proximate result of the Respondent subcontractors' negligence.

None of the Respondent subcontractors have offered any rebuttal to the fact that the plain and unambiguous allegations of Paragraphs 137 and 167 expressly limit BFS's indemnification cause of action to liability or damage resulting from the Respondent subcontractors' negligence.

Further, BFS's indemnification cause of action is pled with an alternative statement of recovery for indemnification provided by the common law. See Paragraph 136, A. p. 441; Paragraph 166, A. p. 448. Because BFS's common law indemnity claim is pled in the same cause of action, it is necessarily premised on the exact same allegations as its contractual indemnity claim. See Id. Neither the Respondent subcontractors, nor the lower court, nor the court of appeals took issue with BFS's common law indemnity claim for *any* liability proceeding to trial. Moreover, neither the lower court nor the court of appeals provides any insight or explanation as to how BFS's common law indemnity claim for *any* liability may proceed to trial, but BFS's contractual indemnity claim for *any* liability may not. Such a result underscores the fact that court of appeals' selective analysis of BFS's pleadings and subsequent determination were improper and in error.

Contrary to the determination of the court of appeals, BFS sought recovery for "any" amount because the Respondent subcontractors agreed in their contracts to indemnify BFS for "any" liability and damage that is determined to have resulted from the Respondent subcontractors' negligence. See A. p. 1455-56, 1468-69, A. pp. 1482, 1494, 1506, 1519. Just as BFS's common law indemnification claim is allowed to proceed to trial, so too should BFS's contractual indemnification claim premised on the exact same allegations that limit its recovery to liability and damage that is found to have resulted from the Respondent subcontractors' negligence and not from BFS's own negligence. For these reasons, the Court must reverse and remand BFS's contractual indemnification claims to proceed to trial.

B. *Even if* BFS's pleadings could be construed to encompass recovery for BFS's own negligence, by seeking recovery for "any" amount, the pleadings would

nonetheless also encompass claims for damages caused by the negligence of the Respondent subcontractors.

In seeking recovery of "any" amounts, BFS maintains it sought recovery only for liability or damage determined to result from the Respondent subcontractors' negligence. When BFS is seeking recovery for "any" sums, the use of the word "any" is meant in the sense of its definition – it is used to express a lack of restriction in the amount of recovery sought. Thus, "any" used in the context of BFS's contractual and common law indemnity claims, which are limited to liability or damage resulting from the Respondent subcontractors' negligence, is intended to mean any sums attributable to the Respondent subcontractor's negligence.

The court of appeals erroneously determined that when BFS seeks recovery for "any" sums, the use of the word "any" is meant to express a lack of restriction in the source of causation. The court of appeals determined that BFS's use of "any" provides that the particular recovery is unrestricted in that "any" amounts could be those amounts attributable to any source of negligence — whether by BFS or by BFS's subcontractor, or by the concurrent negligence of both parties. However, in order to reach such result, the court of appeals must ignore the limiting language of Paragraphs 137 and 167.

Even assuming the Court adopts a broader interpretation of BFS's pleadings, it must acknowledge that "any" amounts, if it includes amounts resulting from BFS's negligence, must equally encompass amounts resulting from the Respondent subcontractors' negligence, whether sole or concurrent.

If the Court adopts a broader interpretation of BFS's pleadings, it must recognize that parties routinely plead claims seeking damages they may ultimately be unable to recover. Importantly, this overly expansive pleading does not preclude parties' recovery of damages to

which they are otherwise entitled. The propriety of such pleading was implicitly recognized by the court of appeals in its disposition of the Concord & Cumberland case.

In Concord & Cumberland, the general contractor pled one paragraph of allegations for its contractual indemnity claim:

"104. Superior is entitled by contractual provisions, to the fullest extent permitted by law, full indemnity from the Subcontractors and Suppliers, to include the assumption of Superior's defense, as a result of the allegations and claims made by the Plaintiff, if substantiated."

Notably, the general contractor **did not** limit its contractual indemnity claims against the subcontractors whatsoever. Moreover, the general contractor, by its motion for partial summary judgment, *explicitly* sought recovery in indemnity against liability for damages caused by *both* the negligence of its subcontractor, and the negligence of the general contractor itself. Thus, despite the expansive indemnification cause of action as pled by the general contractor, and despite overt representations by the general contractor that it was seeking indemnity for damages resulting from its own negligence, the court of appeals in Concord & Cumberland affirmed the trial court's decision that *"limited indemnification to damages resulting from the work Muhler performed."* Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 645, 819 S.E.2d 166, 169–70 (Ct. App. 2018) (emphasis added).

Here, even if BFS fails on its "alleged plea to recover for its own negligence," the alternative plea for damages related to the negligence of the Respondent subcontractors should remain fully intact. Therefore, at trial, notwithstanding any potential finding of negligence on the part of BFS, BFS nevertheless is entitled to recover for such damages which a jury may find to have resulted from the negligence of the Respondent subcontractors.

To the extent that the court of appeals determined that the BFS indemnification cause of action did not encompass claims seeking contractual indemnity for damages resulting from the

subcontractors' negligence, (whether sole or concurrent), such determination is inconsistent with the rules for pleadings outlined in the South Carolina Rules of Civil Procedure and contradicts the court of appeals' own precedent. As such, this Court should reverse and remand BFS's contractual indemnification claims for liability and/or damage resulting from the Respondent subcontractors' negligence to proceed to trial.

II. An indemnification provision, which limits indemnification to damages resulting from negligence of the subcontractor/indemnitor, relied upon in support of an indemnification claim should be construed under general rules of contract construction rather than under the heightened "clear and unequivocal" standard.

BFS recognizes that, under common law, asserting a claim for contractual indemnity seeking recovery against liability for damages caused by the negligence of BFS itself would require that the relevant indemnity provision be subjected to the heightened "clear and unequivocal" standard. BFS also recognizes and has admitted on the record that the relevant indemnity provisions at issue here are not sufficiently clear and unequivocal to impose such an obligation upon the Respondent subcontractors. However, BFS is not seeking this type of indemnity from the Respondent subcontractors in the instant litigation, and the application of the clear and unequivocal standard is thus inappropriate and inconsistent with precedent.

As demonstrated hereinabove, BFS has pled a cause of action in contractual indemnity to recover for liability and/or damage caused by the negligence of the Respondent subcontractors. Under the circumstances, the relevant contractual provisions authorizing such indemnity should have been analyzed in accordance with the general rules of contract construction. Such claims should, moreover, have withstood summary judgment as there have been no findings of fact pertaining to Plaintiffs' claims and purported damages. The court of appeals was in error in failing

to recognize the existence of such valid indemnity claims, and in its failure to apply the appropriate standard in analyzing the relevant contractual provisions relied upon in support of such claims.

In several instances, the court of appeals appears to acknowledge that BFS pled an indemnification cause of action seeking recovery for the Respondent subcontractors' negligence. See Opinion, A. p. 1552 ("In our view, the wording of paragraphs 138 and 168 leaves little doubt that BFS's pleadings **also** seek indemnification for its own negligence.")(emphasis added); Opinion, A. p. 1555 ("We find the relevant provisions of the Later Contracts are not sufficiently clear and unequivocal to require the Later Subcontractors to indemnify BFS for BFS's own negligence **(to the extent BFS seeks such indemnification)**.")(emphasis added).

If the court of appeals appreciated that BFS had in fact pled an indemnification cause of action for the Respondent subcontractors' negligence, it nonetheless erred by applying the heightened "clear and unequivocal" standard to both BFS's contractual indemnification claim for the subcontractor's negligence and BFS's alleged contractual indemnification claim for its own negligence. The court of appeals held that such claims failed as a matter of law because the indemnity provisions were not sufficiently "clear and unequivocal." See Opinion, A. pp. 1553, 1555. Prior to the court of appeals' Opinion, such application of the heightened "clear and unequivocal" standard, had never been made by a South Carolina court. Moreover, the court of appeals, while acknowledging the similarities between this case and that of Concord & Cumberland, nevertheless reached a diametrically opposite result without providing any explanation for the different result.

Our courts have historically recognized that contractual indemnity provisions are to be construed in accordance with rules of construction of contracts generally. See Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989); Campbell v. Beacon Mfg. Co., 313 S.C.

451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). The exception to this basic rule arises **only** when a party seeks to be indemnified from its own negligent acts, and in such instance, the heightened "clear and unequivocal terms" standard will be applied to the indemnity provision. See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 490, 763 S.E.2d 19, 20 (2014); Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003).

In Concord & Cumberland, the court of appeals acknowledged and attempted to clarify those circumstances under which the respective standards are to be applied. However, here, the court of appeals' opinion runs afoul of and directly contradicts these precedential cases.

In Concord & Cumberland, Superior was a general contractor who hired Muhler as its subcontractor. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643, 819 S.E.2d 166, 168 (Ct. App. 2018). When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to their contract. See Id. at 645, 169. Superior claimed that the contractual provisions required Muhler to indemnify Superior, and that Superior's right to indemnity was not lessened by any concurrent negligence of or causation by Superior. Id. Muhler countered that the relevant contract provisions did not require it to indemnify Superior for Superior's "own wrong-doing." Id. The trial court found, and the court of appeals agreed, that in order for Superior to prevail on a claim seeking indemnity *for its own negligence* (as opposed to indemnity for the negligence of its subcontractor), it was required to show that the contract language granting that right was set forth in clear and unequivocal terms. Id. Further, the court of appeals found that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence. Id. at 646, 170. Notably, the court of appeals in Concord & Cumberland did not hold that the heightened standard applied to Superior's claim seeking indemnification for Muhler's sole or

concurrent negligence. Id. Because the court of appeals found that the language in Superior's contract did not meet the heightened standard, it held that the contract did not require Muhler to indemnify Superior for Superior's own negligence and instead affirmed the trial court's decision that *"limited indemnification to damages resulting from the work Muhler performed."* Id. at 645 (emphasis added), 657. Thus, despite overt representations by the general contractor that it was seeking indemnity for damages resulting from both its own negligence and the negligence of its subcontractor, the court of appeals in Concord & Cumberland nonetheless allowed the general contractor to recover from its subcontractor for damages resulting from the work of the subcontractor.

To arrive at this conclusion, the Concord & Cumberland Court recognized that Superior's contractual indemnification claim encompassed both a claim to be indemnified for its own negligence as well as a claim to be indemnified for the negligence of the subcontractors. Further, the court recognized that the two types of claims are subject to two different standards of review. To the claim for indemnification for Superior's own negligence, the court applied the heightened clear and unequivocal standard and found that the contract could not meet that heightened standard; however, for the second type of claim — Superior's claim to recover for its subcontractor's negligence — the Court recognized that the contract provision allowing for such indemnification would be construed "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., 313 S.C. at 453, 438 S.E.2d at 272).

Here, the trial court erred by precluding BFS from proceeding to trial on its claims seeking contractual indemnity from the subcontractors' negligence. IF BFS were found to be liable for Plaintiffs' damages, the jury would then determine if the liability resulted from BFS's negligence, the negligence of the subcontractors, or both. IF the jury determined that Plaintiffs' damages resulted from both BFS's

negligence and the negligence of the subcontractors, BFS should have been allowed to proceed on its contractual indemnification claim for such damages as are found to result from the subcontractor's negligence. Such a result is not novel in South Carolina. See e.g. Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993)(where indemnitor security company was required to indemnify indemnitee warehouse lessee for any liability it may have to warehouse owners for fire set by security company employee even if lessee was negligent and thus contributed to its own damage since security company agreed to indemnify the lessee for damages arising "in whole or in part" from acts of its employees, and it remained undisputed that damage arose "in part" from employee's act of setting fire.); S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 135 S.E.2d 613 (1964) (affirming judgment for full recovery of contractual indemnity for damages arising from defective construction based on contract requiring indemnity for "any and all claims for damages to persons and/or property arising out of or in any way connected with the performance of any work covered by this contract").

Moreover, as detailed more thoroughly in Argument III, contrary to the court of appeals' determination, the contract provisions at issue limit the Respondent subcontractor's obligation to indemnify BFS for damages resulting from the negligent acts or omissions of the subcontractor. Such provisions should have been construed in accordance with rules for construction of contracts generally, and not under the heightened clear and unequivocal standard.

III. The Court should restrict its inquiry to the relevant indemnity provisions, not other provisions for which no cause of action or claims have been asserted, and rules of contract construction require the Court to honor defined terms in the contracts.

Here, where the underlying litigation arises out of alleged construction defects and resulting property damage claims of the Plaintiffs, the Respondent 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." See Section 6(b)(2) of the 2005 Contracts, A. pp. 1455-56, 1468-69. Similarly, the Respondent subcontractors who are parties to the Later Contracts have agreed to indemnify BFS "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." See the first paragraph of Section 5 of the Later Contracts, A. pp. 1482, 1494, 1506, 1519. These are the provisions relevant to the underlying claims of the Plaintiffs, and it is pursuant to these provisions that BFS seeks recovery. There was no reason for the lower courts to look beyond these provisions in analyzing the recovery sought and due in this case.

In an attempt to avoid all liability – even liability for damages for which they may be found to be ultimately and justly responsible – the Respondent subcontractors that were parties to the Later Contracts argued that other contract provisions, unrelated to the litigation pending before the court, are ambiguous, conflict with the relevant indemnity provisions, and/or are outright illegal. However, as explained in detail below: to achieve the Respondent subcontractors' result, one must read select language from the unrelated provisions out of context, in isolation, and without deference to defined terms in the contracts. Further, the Respondent subcontractors argued, with the fantasy contract provisions in mind, that there is a disparity in bargaining power between the parties, that the contracts are of adhesion and therefore unconscionable. Lastly, the Respondent subcontractors argued that the court should not honor the severability provisions in the contracts and instead find the contracts unenforceable. Notwithstanding BFS's efforts to dissuade the lower courts of the Respondent subcontractors' unsupported contentions, the trial court wholesale adopted the Respondent subcontractors' arguments, and the court of appeals errantly affirmed the same. As explained herein, the Respondent subcontractors' arguments are without merit, and the court of appeals erred by ignoring the basic rules of contract construction. Thus, this Court must

reverse the court of appeals' Opinion and remand BFS's contractual indemnification claims to trial.

A. The general rules of contract construction require the Court to honor the defined terms of the contracts.

BFS, in contesting the Respondent subcontractors' assertions, would initially direct the Court's attention to the definition of the term "Work," which is set forth in Section 1(a) at the very beginning of the 2005 and Later contracts. See A. pp. 1451, 1464, 1477, 1489, 1501, 1514. As defined in Section 1(a), the term "Work" is limited to **services performed and/or the materials provided by the subcontractor**. Id. (emphasis added). The term "Work" is used throughout the parties' contracts. See A. pp. 1451-1525.

"The cardinal rule of contract interpretation is 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) (quoting McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). Moreover, courts must interpret a contract "according to the terms the parties used." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

Here, 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 court orders was, rather, the direct result of the trial court's wholesale adoption of orders drafted by Respondent subcontractors' counsel.

Throughout its Opinion, the court of appeals quoted extensively from contract sections describing the relationship of the parties vis-à-vis the "Work." The court of appeals even quoted – among many other provisions – the section containing the definition of "Work." However, ***the court of appeals never once acknowledged that "Work" is a contractually defined term or that***

by definition the Work is limited to the materials provided and/or services performed by the subcontractor. The Opinion's findings evidence that the court of appeals conducted no analysis of the term "Work," and, more tellingly, failed to utilize the definition of Work in determining the validity of the various indemnity provisions with which it took issue. Such analysis contradicts the cardinal rules of contract construction. See Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012); McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009); Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

The "Work" limitation allows for a harmonious reading of the contract, is consistent with South Carolina law and the intention of the parties. Because the court of appeals failed to honor the defined term "Work" in its analysis, the Court must reverse and remand BFS's contractual indemnification claim to proceed to trial.

B. The other provisions are unrelated to BFS's indemnification for property damage claims and should not be considered by the Court. Nevertheless, the other provisions are not illegal, ambiguous, or conflict with the relevant indemnity provisions.

In addition to failing to acknowledge defined terms in the contract, the lower court and court of appeals reviewed provisions of the contract which have absolutely no relevance whatsoever to the claims pending before the court. For example, the court of appeals focused on the warranty provisions of the contracts despite the fact that there is no *warranty* claim before the court[5]. Further, the court of appeals analyzed indemnity provisions exclusively relating to bodily injury claims by the subcontractors and mechanic's liens filed by the subcontractors' suppliers or

[5] While BFS pled breach of warranty causes of action, BFS conceded during oral arguments at the trial court that Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630 (Ct. App. 2015) is valid law and renders the warranty claims as disguised indemnity claims and thus it did not appeal the trial court's ruling granting summary judgment on such basis.

subcontractors. None of these types of claims has been brought before the lower court, and BFS submits that review of such unrelated provisions was in itself error.

Nevertheless, the court of appeals further erred by analyzing select language from the non-relevant provisions and by ignoring limiting language in the non-relevant provisions to create ambiguities and conflicting provisions. Such analysis directly contradicts this Court's instructions that a court may not review isolated portions of a contract or single sentences or clauses to create ambiguities. See Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014); Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975).

1. **SECTION 3 Warranty does not call for the Respondent subcontractors to indemnify BFS for materials supplied by BFS.**

The court of appeals takes issue with the SECTION 3 Warranty provision of the Later Contracts, where the subcontractor agrees to provide a warranty for the Work the subcontractor performed on the project. The court of appeals found this provision unconscionable because, by the court's interpretation, the provision purports to require the subcontractor to warrant work that BFS, rather than the Respondent subcontractors, performed.

Specifically, regarding Section 3 Warranty, the Opinion states that:

> [T]he indemnity provision buried in the fine print of Section 3 of the Later Contracts contains a warranty provision that would allow BFS to seek indemnity for personal injuries and property damage arising from the sole negligence of BFS in selecting and selling the products **BFS provided** to the Later Subcontractors for installation[,]

and further that:

> Sections 3 and 5 of the Later Contracts obligate the Later Subcontractors not only to warrant the design and suitability of the defective materials and building components at the Project but also to indemnify and defend BFS from any property damage or personal injury resulting from the water intrusion issues related to the provided materials and building components.

See Opinion, A. pp. 1553, 1556 (emphasis in original).

The court of appeals reaches this conclusion by adopting Respondents' position that:

> The language in Section 3 of the Later Contracts stating, "Subcontractor guarantees **the Work** against defects in design, workmanship, and materials" only makes sense if the words "design, workmanship, and materials" refer to the defective materials and building components provided by BFS because the Later Subcontractors had no responsibility for the design of the Project or any of its components—including the materials. Further, even though BFS provided the structural components, the Later Contracts appear to require the Later Subcontractors to provide a ten-year warranty on "structural applications."

See Opinion pp. 1556-1557, n. 7 (emphasis added).

But this erroneous interpretation was reached only because the court read this provision in isolation AND the court ignored and did not address the fact that "Work" is a defined term, limited, by *the explicit provisions of the contract*, to the *materials provided and/or services performed by the subcontractor*. See A. pp. 1451, 1464, 1477, 1489, 1501, 1514.

Here, BFS contracted with Respondent subcontractors to perform services which included installation of framing, windows, doors and other related components[6]. Stated differently, BFS did not contract with Respondent subcontractors to provide the lumber, windows, or doors. Accordingly, there is no obligation by Respondent subcontractors to guarantee against the lumber, window, or door products themselves, nor against the design thereof. The only guarantee Respondent subcontractors made relates to the workmanship Respondent subcontractors performed in the installation of the framing, windows, or doors. Correspondingly, any obligation to indemnify under Section 3 Warranty is also limited to claims and damages resulting from the subcontractor's **Work – ie, the materials supplied and/or services performed by the**

[6] The subcontractors were responsible for providing appropriate fasteners for use in the implementation of their services, and for compliance with relevant manufacturer installation instructions in installation of materials. It should be noted that the Opinion, in its recitation of particulars of negligence set forth by Plaintiff's Fourth Amended Complaint, sets forth numerous allegations implicating the materials and/or services provided by the subcontractor, including Paragraph 88 subparagraphs d) -in using and supplying defective materials; f) -by installing materials in violation of manufacturer's instructions; and h) -in constructing the project in violation of applicable building codes.

subcontractor itself. Therefore, the warranty provision and contractual indemnity claim remain well within the bounds of South Carolina public policy and statutory law.

More importantly at this juncture, however, is the fact that the court of appeals overlooked the rightful, legitimate, and licit interpretation of the contracts. When such a licit interpretation exists, courts are compelled to adopt it. See Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 416–17, 756 S.E.2d 148, 153 (2014)(quoting that "[b]ecause it must be assumed that the parties intended to form a binding contract, the court should favor an interpretation that saves the contract instead of voiding it," and further, that "an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous"). **"Work"** is a defined term used throughout the contracts, including in Section 3 Warranty. Because **Work** is a defined term, this Court must honor a reading of the contract that limits warranty of **Work** to materials supplied and/or services performed by the subcontractors. As noted herein and above, the warranty provisions of Section 3, when properly construed, comply with the laws of South Carolina.

Again, the warranty provisions of Section 3 of the Later Contracts are neither relevant to nor relied upon by BFS in the assertion of its indemnity claims against the Respondent subcontractors. To the extent the Court chooses to consider the provision, however, it must apply the definition of the term "Work" agreed to by the parties; once properly interpreting "Work," the Court will see that the interpretation of the court of appeals was in error.

2. The relevant indemnity sections of the contracts are not ambiguous, do not conflict with each other, and are not illegal.

As it relates to the 2005 Contracts, the court of appeals determined that the "the language in Section 6 [i]s inherently confusing insofar as it calls for the 2005 Subcontractors to indemnify

BFS for BFS's sole negligence while also claiming to limit the indemnity 'to the extent' of the 2005 Subcontractors' own negligence." See Opinion, A. p. 1553. The court of appeals further determined that the 2005 Contracts "contain multiple provisions requiring the 2005 Subcontractors to indemnify (or defend) BFS for damages incurred as a result of BFS's sole negligence." See Opinion, A. p. 1556. The court of appeals noted that Section 6(b)(1) calls for the Respondent subcontractors to unconditionally defend and indemnify BFS and that Section 6(b)(2) calls for the Respondent subcontractors to indemnify BFS for BFS's failure to supervise. See Id.

However, the court of appeals' determinations were erroneous in several particulars.

First, the court of appeals ignores the fact that by the express language in Section 6(b)(1), the indemnification in Section 6(b)(1) only relates to claims arising out of bodily injury or property damage sustained by the "Subcontractor or the Subcontractor's employees, agents, or subcontractors or any of their respective subcontractors, employees, officers, agents, or invitees." As noted extensively in this appeal, there are no such claims at issue between the parties and thus, this provision should not be before the Court. Second and equally importantly, the court of appeals ignores the fact that by the express language in Section 6(b)(1), the indemnification therein is limited "**to the fullest extent permitted by law.**" The court must interpret a contract "according to the terms the parties used." See Schulmeyer, 353 S.C. at 495, 579 S.E.2d at 134. Here, the parties agreed that indemnification under Section 6(b)(1) would only apply to claims for bodily injury or property damage sustained by the subcontractor AND that any indemnification would only apply "to the fullest extent permitted by law." Thus, any indemnification obligation under Section 6(b)(1) must be 1) permitted by law AND 2) must relate to bodily injury or property damage sustained by the Subcontractor. If the parties are dealing with a situation in which neither of these conditions exist, there is no indemnification obligation or right for the parties to exercise.

Similarly, by its express language, Section 6 (b)(2) only applies to indemnification "[f]or all Claims not covered by [Section 6(b)](1) above and to the fullest extent permitted by law." Moreover, by its express language, Section 6(b)(2) only provides for indemnification **"to the extent of liability resulting from Subcontractor's negligence or willful misconduct**." See A. pp. 1456, 1468-69 (emphasis added). Thus, any indemnification obligation under Section 6(b)(2) must be:

1) not related to bodily injury or property damage sustained by the Subcontractor,
2) must be permitted by law, AND
3) only to the extent of liability resulting from the Subcontractor's negligence or willful misconduct.

Again, if the parties are dealing with a situation in which any one of these express limitations is missing, then there is no indemnification obligation or right for the parties to exercise.

Here, where Plaintiffs' property damage claims allegedly result from construction defects in the Work performed by the Respondent subcontractors, Section 6(b)(1) does not operate, is not at issue, and should not be before the Court. Moreover, Section 6(b)(1) is expressly limited "to the fullest extent permitted by law," so where such indemnification does not comply with the law, the provision does not operate and a party may not rely upon it or enforce any indemnification obligation therein.

However, where, as here BFS seeks indemnification for any of Plaintiffs' property damage allegedly result from construction defects in the Work performed by the Respondent subcontractors, Section 6(b)(2) operates but only "to the fullest extent permitted by law" AND only **"to the extent of liability resulting from Subcontractor's negligence or willful misconduct**." See A. p. 1456, 1468-69(emphasis added). Thus, BFS may rely upon subsection (i) for indemnification for property damage arising from or connected with the Work, subsection (ii) for indemnification for any alleged defect or malfunction in any of the services or materials

provided in connection with the Work, or subsection (iii) for indemnification for omissions resulting from BFS's failure to supervise the Subcontractor's operations. BFS may rely upon any or all of the three subsections for indemnification because all three subsections are limited explicitly "to the fullest extent permitted by law." Equally importantly, all three subsections only provide for indemnification "to the extent of liability resulting from the Subcontractor's negligence." Thus, when read correctly, i.e. in full context and with proper deference being afforded to the terms of the contract provision, there is nothing illegal orr "inherently confusing" about the indemnification provisions in the 2005 Contracts. However, as explained in Argument IV below, to the extent that this Court disagrees, it should honor the intent of the parties and sever subsection (iii).

Regarding Section 5 of the Later Contracts, the Opinion states that:

> [T]he second paragraph of Section 5 contradicts the first paragraph by purportedly requiring the Later Subcontractors to indemnify BFS (and others) even if it is alleged that the loss was caused by BFS. The language of these two paragraphs cannot be reconciled.

See Opinion, A. p. 1554.

The court of appeals here has overlooked that the first paragraph of Section 5, insofar as relevant to the BFS claims in this matter, applies only to losses arising out of third-party property damage claims, while the second paragraph applies only to bodily injury sustained by the subcontractor, its employees, agents, or representatives.

Here, there are no claims for, or any allegations, of, bodily injury damage sustained by the subcontractors. Instead, the claims in this matter are for property damages allegedly sustained by the Retreat at Charleston National Property Owners Association and which they allege resulted from both BFS' and the subcontractors' negligence. As such, the first paragraph in <u>SECTION 5</u>

is the only indemnity provision relied upon by BFS in the assertion of its claims in this litigation because it is the only indemnity provision that relates to Plaintiffs' claims for property damage.

Moreover, the separate indemnity obligation imposed upon the subcontractor by the first paragraph of SECTION 5 provides that BFS may seek indemnification against Respondent subcontractors for property damage claims **BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR.** See A. pp. 1482, 1494, 1506, 1519 (emphasis in original). The first paragraph indemnity provision is expressly authorized by and consistent with S.C. Code Section 32-2-10.

Contrary to the court of appeals' determination, the second paragraph of Section 5 deals only with potential obligations to indemnify for bodily injury losses sustained by the Subcontractor or the Subcontractor's employees, agents, or subcontractors. Thus, the factual circumstances, for which the second paragraph of SECTION 5 addresses, are not at issue here. Moreover, BFS has not cited the second paragraph as being in support of its claims, as it is irrelevant to the assertion of these claims, and should not have been considered by the court of appeals.

To claim that these two separate and distinct indemnity provisions cannot be reconciled, is simply incorrect; they cover different factual scenarios and do not contradict each other. Accordingly, the Court must reverse the court of appeals' Opinion to be consistent with the aforementioned South Carolina law.

The Respondent subcontractors and the court of appeals also take issue with the third paragraph of SECTION 5. 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 third paragraph also provides that the duty to defend is independent and separate from the duty to indemnify.

BFS submits that there is nothing illegal about any of these provisions as they are all limited "to the fullest extent permitted by law." Moreover, the provisions of the second, third, and fourth paragraphs of SECTION 5, do not change the fact that BFS 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.

3. SECTION 8(i) does not call for the Respondent subcontractors to indemnify BFS for liens placed on the project for failure of BFS to make payments owed to BFS's suppliers or subcontractors.

The court of appeals failed to recognize that the indemnification obligation imposed by Section 8(i) applies only to the "fullest extent permitted by law," and relates only to liability for damages occasioned by mechanics and materialmen's liens, arising out of the services, labor, equipment, or materials furnished by subcontractors. The clear intent of Section 8(i) is for the subcontractor to indemnify BFS against damages arising from the failure of the subcontractor to satisfy liens resulting from the subcontractor's failure to pay the subcontractor's own subcontractors or suppliers for the services and materials they provided to the subcontractor in conjunction with the Work performed by the subcontractor.

Before reading the indemnity provision in 8(i), one must read the preceding provision 8(h). 8(h) begins with: "*Subcontractor will promptly pay when due all charges* ***owed by it****....*" This opening language speaks to the Subcontractor's agreement to pay which is also the title of subsection 8(h). See A. pp. 1485-87, 1497-99, 1509-11, 1522-24. 8(h) also provides that "[i]f Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by

Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion." Id. This provision allows BFS to pay any party the Subcontractor owes payment to for the other party's labor, services, materials, equipment, tools, and supplies provided to the Subcontractor. See Id. The indemnity provision in 8(i) further provides that the Subcontractor will hold BFS harmless from any mechanics' or materialmen's liens arising out of the services, labor, equipment, or materials furnished by the Subcontractor or its suppliers or subcontractors.

When properly read, 8(i) does not stand for what Respondent subcontractors' counsel contends – i.e. that the subcontractor must hold BFS harmless from mechanics' or materialmen's liens placed on the project from any non-payment owed by BFS. Equally importantly, and as stated hereinabove, the indemnity obligations of Section 8(i) are imposed only to the "fullest extent permitted by law," **have not been relied upon by BFS in the pursuit of its contractual indemnity claims in this matter, and are completely irrelevant to the assertion of the contractual indemnity claims here that pertain to Plaintiffs' alleged property damage resulting from deficiencies in installation work performed by Respondent subcontractors.**

Nevertheless, as more thoroughly detailed in following argument, the other unrelated provisions of the contracts, to the extent they may be found to be inconsistent with law, can be severed without impacting on the independent indemnity obligations as set forth in Paragraph 6 of the 2005 contracts and in Section 5 of the Later Contracts.

IV. Any potentially offending provisions are easily severable.

The court of appeals misapprehended the basic provisions of the contracts and declined to sever the purportedly offending provisions that provide for indemnification regardless of the

negligence of BFS, reasoning that "because the indemnity provisions are replete with terms that violate South Carolina law and public policy, these terms cannot be effectively severed." See Opinion, A. p. 1559.

The court of appeals declined to sever allegedly problematic provisions of the contract because it thought the offending provisions were too numerous; however, as explained above, the majority of the court of appeals' concerns regarding offending provisions should be eliminated once the Court takes into account that *Work* is a defined term used throughout the contract, and necessarily limits the terms and provisions of the contracts accordingly to only the materials provided or services performed by the Respondent subcontractors.

Moreover, the purportedly problematic provisions - Section 6(b)(1) and Section 6(b)(2)(iii) of the 2005 Contracts and the second paragraph of Section 5 of the Later Contracts – all include limiting language "to the fullest extent permitted by law." Thus, when properly read, all of the contract provisions comply with relevant law and thus, there is no need to sever. However, to the extent necessary, BFS urges the Court to honor the intent of the parties and, consistent with precedent, sever any provision that it deems to violate South Carolina law.

The court of appeal's Opinion directly contradicts this Court's precedent which acknowledges that "[f]or centuries, the law has stricken illegal parts from contracts and upheld the legal parts, as long as the central purpose of the parties' agreement did not depend upon the illegal part." Huskins v. Mungo Homes, LLC, 444 S.C. 592, 595-96, 910 S.E.2d 474, 477-78 (2024)(quoting Pigot's Case, 77 ER 1177, 1179 (1614)("if some of the covenants ... are against law, and some good and lawful ... [then] the covenants or conditions which are against law are void *ab initio*, and the others stand good."). This Court noted that such view was transported to America in the case of United States v. Bradley, 35 U.S. 343 (1836). See Id.

Historically, "this Court generally would encourage severability of an unconscionable provision" as opposed to throwing out the entire clause, section or contract. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 35, n.9, 644 S.E.2d 663, 674 (2007). This is especially true when a contract (1) contains a severability clause, and (2) contains only one unenforceable or invalid provision. See Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002) (explaining that "[w]hether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties.); Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020) (determining that parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable); Simpson, 373 S.C. at 35, n.9 (citing the following cases for the proposition that courts have severed isolated unenforceable language in contracts: Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir.2006) (severing a provision in an arbitration clause that prohibited the award of treble damages); Safranek v. Copart, Inc., 379 F.Supp.2d 927 (D.Ill.2005) (severing a provision in an arbitration clause that violated Title VII by requiring each party to bear its own attorney's fees and costs); Ex parte Celtic Life Ins. Co., 834 So.2d 766 (Ala.2002) (severing a provision in an arbitration clause that was void as a violation of public policy by prohibiting the award of punitive damages); Healthcomp Evaluation Servs. Corp. v. O'Donnell, 817 So. 2d 1095 (Fla. Dist. Ct. App. 2002) (severing a provision in an arbitration clause that violated state law by not permitting the parties to appeal or review an arbitration award)); see also D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018)(severing indemnity provision "to the extent" it was against public policy); Concord & Cumberland, 424 S.C. at 639 (allowing partial recovery under the valid portion of an indemnity provision that otherwise did not completely comport with South Carolina law).

The contracts at issue here contain separate distinct sections relating to separate matters. See A. pp. 1451-1525. Moreover, the section regarding indemnity, in addition to its initial paragraph upon which BFS relies in support of its indemnity claims, is further characterized by separate paragraphs, each addressing separate and distinct circumstances under which an obligation to indemnify may arise. See A. pp. 1455-56, 1468-69, 1482-83, 1494-95, 1506-07, 1519-20. Each of these separate sections, and the distinct paragraphs within the respective sections, relate to separate rights and or responsibilities, and are all subject to severance, if needed, without compromising the goals of the contracting parties.

Moreover, the contracts also include severability provisions that explicitly state:

> "The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law."

See A. pp. 1460, 1473, 1488, 1500, 1512, 1525.

This Court has long since held that the primary purpose in the construction of contracts is to discover the intention of the parties, which, when discovered, will be given effect regardless of technical forms of expression. See Am. Nat. Bank of Winter Haven, Fla., v. Caldwell, 166 S.C. 194, 164 S.E. 613, 615 (1932). "Whether an illegal provision in an otherwise valid contract may be separated from the contract is a matter of intent of the parties." Beach Company v. Twillman, Ltd., 351 S.C. 56, 64, 56 S.E.2d 63, 867 (Ct. App. 2002). Equally importantly, the presence of a severability clause, such as the clause incorporated within each of the contracts at issue here, should be treated as strong evidence of the parties' intent to sever any unenforceable language. See Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880-81 (Ct. App. 2020).

In light of the format of the contracts and the severability provisions, there can be no dispute that the parties intended that any unenforceable provision be severed and that the remainder of the contract be left intact and in effect. Moreover, the court of appeals' Opinion declining to honor the severance provision defies reason as certainly no party to the contract intended that the contract be rendered wholly unenforceable, as all parties to the contract relied upon the contract for business purposes and their livelihood. Accordingly, this Court must reverse and sever any illegal provision from the contract per the parties' intent and severance provisions of the 2005 and Later Contacts.

VI. A trial court's order on appeal is not "final" for purposes of collateral estoppel or res judicata in South Carolina.

In holding that the parties were collaterally estopped from litigating the issue that forms the basis for this appeal, the court of appeals' Opinion overlooked the fact that no trial court has yet answered the question of whether BFS can recover, under the relevant indemnity provisions of the respective contracts, for the negligence of the Respondent subcontractors, regardless of whether BFS can recover indemnity for its own negligence. All prior cases cited as the basis for the lower court's collateral estoppel have involved the lower courts' consideration of BFS's claims purportedly seeking indemnity against BFS's own negligence. No prior court has specifically addressed the issue – the specific claim BFS contends that it is seeking in this litigation – of whether BFS may recover indemnity for Respondent subcontractors' negligence in the window and exterior door installation work performed by Respondent subcontractors.

The doctrine of collateral estoppel is only available *when the same issues of fact or law* are actually litigated and directly determined by valid and final judgment. See Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) (emphasis

added). The issue before the trial court in this case was *whether BFS may recover under the relevant indemnity provision for Respondent subcontractors' negligence* (whether sole or concurrent). This issue has not been ruled upon by a single court to date, and thus, it is not subject to collateral estoppel.

In addition to failing to appreciate that the issue before the lower court has not been litigated, the court of appeals' Opinion erred in finding that a judgment on appeal is final for collateral estoppel purposes. The Opinion cites to S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) for the point that the application of offensive collateral estoppel is appropriate because the legality of the contract was actually litigated and directly determined in a prior action and the issue was essential to the judgment. The Opinion also cites to Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) for the point that collateral estoppel prevents a party from relitigating an issue that was litigated and "determined by a valid and **FINAL** judgment" in a previous action. Emphasis added. BFS has repeatedly argued to the lower courts that the lower court's judgment on appeal is not *final* for res judicata or collateral estoppel purposes.

In S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., this Court officially adopted the general rules as set forth in the Restatement (Second) of Judgments. See 304 S.C. at 213. Consistent with what BFS has argued, the Restatement provides:

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

Restatement (Second) of Judgments § 13 (1982).

The Restatement's commentary on *finality* provides, "[i]t has often been suggested that finality for appellate review is the same as finality for purposes of res judicata, but that has probably never been quite true." Restatement (Second) of Judgments § 13 Requirement of Finality (1982). The Restatement commentary continues that, "a judgment will ordinarily be considered final in respect to a claim" if "it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular kind of adjudication." Id. Further, the Restatement commentary notes that "the test of finality" is "whether the conclusion in question is procedurally definite." Id.

The Restatement's definition of *finality* and test thereof are consistent with the approach taken by the United States Supreme Court which has noted that a decision of a lower court is not binding precedent in either a different or the same lower court or even on the same judge in a different case. See Camreta v. Greene, 563 U.S. 692, 709, 131 S. Ct. 2020, 2033, 179 L. Ed. 2d 1118 (2011).

Within the geographic bounds of the Fourth Circuit, the Virginia Supreme Court has held that "[a] judgment, to be relied upon for the application of the doctrine of res judicata, must be final, and a judgment which is being appealed is not final for res judicata purposes." Arkansas Best Freight Sys., Inc. v. H.H. Moore, Jr. Trucking Co., 244 Va. 304, 307, 421 S.E.2d 197, 198 (1992) (internal citations omitted).

Corpus Juris Secundum advises that "the pendency of an appeal from a judgment is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded." 50 C.J.S. Judgments § 940.

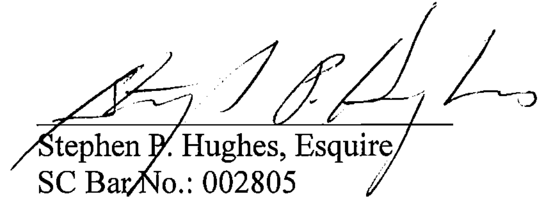
Here, the trial court invoked collateral estoppel using a judgment which is not final because it has been and remains subject to pending appellate review. Here, consistent with the Restatement, BFS argued to the lower courts that it was inappropriate to consider such judgment for purposes of collateral estoppel. Restatement (Second) of Judgments § 13 Requirement of Finality (1982) ("The pendency of a motion for new trial or to set aside a judgment, or of an appeal from a judgment, is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded.").

Because the orders relied upon by the trial court did not litigate the issue pending before the trial court, and because the judgment relied upon by the trial court are pending appellate review, the Court should reverse and provide clarity consistent with this Court's prior adoption of the Restatement Second of Judgments that an order subject to appeal is not final for application of collateral estoppel and remand BFS's contractual indemnification cause of action to trial.

Conclusion

In conclusion, it was error for the court of appeals to ignore BFS's contractual indemnification claim for damages resulting from the Respondent subcontractors' negligence; it was error for the court of appeals to apply the heightened standard of "clear and unequivocal" to the various contracts at issue because BFS is not seeking indemnity for its own negligence; it was error for the court of appeals to not give proper evaluation to the defined terms and provisions of the contracts; it was error for the court of appeals to analyze provisions that were separate and distinct and conclude that they were ambiguous, confusing, and failed to meet the clear and unequivocal standard; it was error for the court of appeals to decline to sever the few purportedly offensive provisions; it was error for the court of appeals to conclude that the parties were

collaterally estopped from litigating the issue of contractual indemnity for damages resulting from the Respondent subcontractors' negligence.



Stephen P. Hughes, Esquire
SC Bar No.: 002805
William H. Cox, III, Esquire
SC Bar No.: 101991
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
SPHughes@hghpa.com
WCox@hghpa.com

AND

Catherine L. Floeder, Esquire
Admitted in SC *pro hac vice*
MN Bar No.: 0398360
845 Cannon Avenue
Shoreview, MN 55126
Catherine.floeder@gmail.com

Attorneys for Petitioner Builders
FirstSource-Southeast Group, LLC

Beaufort, South Carolina

January 26, 2026

RECEIVED
Jan 27 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Court of Common Pleas

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

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, Third-Party Plaintiff, 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.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing ***Petitioner's Brief and Appendix*** upon all counsel of record by last known email addresses on this 26th day of January, 2026.

Stephen P. Hughes
Bar No.: 002805
William H. Cox, III
Bar No.: 101991
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
SPHughes@hghpa.com
Wcox@hghpa.com

Attorneys for Petitioner Builders FirstSource -Southeast Group, LLC

Beaufort, South Carolina