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S.C. SUPREME COURT

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; Liollo 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.

APPENDIX VOLUME VII

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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, Appellant,

v.

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

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

Appellate Case No. 2021-001050

Appeal From Charleston County
Jennifer B. McCoy, Circuit Court Judge

Opinion No. 6099
Heard March 5, 2024 – Filed February 12, 2025
Withdrawn, Substituted, and Refiled May 21, 2025

AFFIRMED

Stephen P. Hughes and William Hewitt Cox, III, both of Howell Gibson & Hughes, PA, of Beaufort, for Appellant.

Thomas Frank Dougall, of Dougall & Collins, of Elgin, and Michal Kalwajtys, of Baker Ravenel & Bender, LLP, of Columbia, both for Respondent L&G Construction Group, LLC.

Edward Glenn Elliott, of Aiken Bridges Elliott Tyler & Saleeby, P.A., of Florence, for Respondent Pohlman Quality Exteriors, Inc.

W. McElhaney White and Todd Russell Flippin, of Holcombe Bomar, PA, of Spartanburg, for Respondent Hurley Services, LLC.

Kevin W. Mims, John Barnwell Fishburne, Jr., and William Chase McNair, all of Luzuriaga Mims, LLP, of Charleston, for Respondent AC Construction Inc.

Payton Dwight Hoover and James H. Elliott, Jr., both of Richardson Plowden & Robinson, PA, of Mount Pleasant, for Respondent Palmetto Trim and Renovation.

Francis Heyward Grimball and James H. Elliott, Jr., both of Richardson Plowden & Robinson, PA; Mark Shanter Chaparro, of Hall Booth Smith, PC; and L. Dean Best, of Best Law, P.A., all of Mt. Pleasant, for Respondent ECC Contracting, LLC.

Francis Heyward Grimball and James H. Elliott, Jr., both of Richardson Plowden & Robinson, PA, of Mt. Pleasant, for Respondent East Coast Carpentry.

John Phillips Linton, Jr. and Jennifer Sue Ivey, both of Walker Gressette & Linton, LLC, of Charleston, for Respondent WS Contractors, LLC.

MCDONALD, J.: Builders FirstSource-Southeast Group, LLC (BFS) appeals eight orders granting summary judgment or partial summary judgment to various subcontractors. BFS argues the circuit court erred in (1) applying the clear and unequivocal standard of *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018); (2) finding the indemnity provisions of BFS's subcontracts violate South Carolina law and public policy; (3) finding BFS's indemnity claims are collaterally estopped; (4) failing to address severability or finding the court lacked authority to sever; and (5) deeming the subcontracts unconscionable and unenforceable. We affirm all eight orders.

Facts and Procedural History

This appeal stems from complex construction defect litigation filed by The Retreat at Charleston National Country Club Home Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime (collectively, Plaintiffs). In this underlying case, Plaintiffs sought damages for deficiencies in the original construction of a multi-family development consisting of thirty-two buildings containing 129 townhome units (the Project). According to Plaintiffs' fourth amended complaint, BFS "provided materials and/or labor, including but not limited to the framing, the windows and doors and all related components at all or a portion of the Project."¹

Plaintiffs claimed, among other things, that BFS's framing and window installation services were deficient and that these deficiencies resulted in water intrusion and corresponding damages. Plaintiffs' forensic expert opined the windows had inadequate design pressure (DP) ratings;² were installed using fasteners of an improper type and inadequate length to assure the embedment of the fasteners into the framing; and were installed using fasteners at spacing intervals exceeding those required by the manufacturer's installation criteria.

BFS contracted with several subcontractors for work on the Project. After litigation began, BFS filed crossclaims or third-party claims against many of its subcontractors, asserting causes of action for negligence, breach of express and implied warranty, breach of contract, and contractual or equitable indemnity.

Respondents filed motions for summary judgment and supporting memoranda throughout 2019 and 2020. In May 2021, the circuit court issued Form 4 orders granting, or granting in part, summary judgment to Palmetto Trim and Renovation (Palmetto), Hurley Services, LLC (Hurley), ECC Contracting, LLC (ECC), East Coast Carpentry (East Coast), AC Construction, Inc. (ACC), WS Contractors, LLC

¹ BFS holds an unlimited commercial general contractor's license. The circuit court found it "is undisputed that BFS furnished the framing lumber, housewrap, windows, doors, related flashings, and caulk" as well as "superintendents to oversee and inspect the installation of such materials for construction of the Project on Buildings 5-21, 2200, 2300, 2500, 2600, 2700, 2800, and 2900."

² DP ratings address the pressure a window can withstand without failing.

(WSC), and Pohlman Quality Exteriors, Inc. (Pohlman).³ Formal orders followed, and the circuit court denied BFS's motions to reconsider.⁴ BFS timely filed eight separate notices of appeal. Over BFS's objection, this court consolidated these eight appeals.

Standard of Review

"Rule 56(c) of the South Carolina Rules of Civil Procedure provides that the moving party is entitled to summary judgment 'if the [evidence before the court] show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 459, 892 S.E.2d 297, 297 (2023) (alterations by the court) (quoting Rule 56(c), SCRCP).

Analysis

Among the orders before us, two different versions of BFS's master subcontract are at issue. Two orders address the 2005 version of BFS's master subcontract (the

³ "Palmetto served as a subcontractor of BFS and in that capacity performed window installation work on Units 500, 700 and 1000." "Hurley was a labor-only subcontractor to BFS BFS sold and provided for installation windows, doors, weather-resistant materials, and other building components for some of the buildings." "ECC served as a subcontractor of BFS and in that capacity performed deck repair work on Unit 2001, and installed windows and doors on Units A1 & A2." No deficiencies have been documented by Plaintiffs at Unit 2001. "East Coast served as a subcontractor of BFS and in that capacity performed window installation on Buildings 6, 8, 9, 12, 13, 14, 16, 17, 18." ACC "served as a subcontractor of BFS and in that capacity performed framing services on Buildings 5 through 22. [ACC] did not perform any other work on the Project." "WSC served as a subcontractor of BFS and performed work on Buildings 22 through 31 at the Project that were constructed between 2012 and late 2014. WSC did not perform any work on other buildings at the Project." Pohlman was a labor-only contractor on Buildings 11 and 21; BFS supplied building materials for Pohlman's use.

⁴ The circuit court also granted L&G Construction's motion to join in ECC and WSC's motions for partial summary judgment. In this order, the circuit court explains, "BFS supplied all materials and hired several subcontractors to perform its scope of work. L&G, a residential framer, was one of those subcontractors."

2005 Contracts); the other six involve a later version of this master agreement (the Later Contracts).

The 2005 Contracts govern BFS's relationships with Palmetto and East Coast (collectively, the 2005 Subcontractors). These contracts contain the following relevant clauses, including the indemnification language of Section 6(b)(2):

SECTION 1. Introduction.

Work. This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**"). TIME IS OF THE ESSENCE. . . . In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor ("**Contract Documents**") and incorporated into the Agreement by this reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

. . . .

SECTION 2. Materials and Workmanship. Subcontractor agrees to commence Work on Projects upon request by Contractor.

Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

....

c. Protection of Work. Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

....

SECTION 3. Warranty and Service. All Work shall be unconditionally guaranteed by Subcontractor for a period of two years, or such longer period as may be required by law or for which Owner requires Contractor to warrant such Work, from the date following Owner's acceptance of the Work. Subcontractor shall correct at its own expense all defects that appear during such period, and all damage (whether to the Work or other components of the Project) arising out of, caused by or in any way related to said defects or repair, within twenty-four (24) hours after written notice or within the time agreed to in writing by Contractor (Saturdays and Sundays excluded). *The determination as to what constitutes a defect will be within the sole discretion of Contractor and Owner.* If Subcontractor fails to promptly commence and complete the correction of defects, Contractor or Owner may do so. In such event, Subcontractor shall promptly reimburse Contractor for the cost of such work, plus a sum of fifteen percent (15%) thereof (for supervision and overhead). Contractor may, at its option, elect to charge such amounts against the next Partial Payment (defined in **Section 8**) or the final payment. Subcontractor will maintain a published phone number or an answering service during normal working hours.

....

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:

....

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.*

....

SECTION 8. Payment to Subcontractor.

....

i. Indemnification. Subcontractor hereby agrees to indemnify, defend, and save Contractor and Owner harmless 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 Contractor and Owner from liens, claims, and encumbrances. 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 Contractor and Owner from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities that Subcontractor may have against Contractor or Owner that arise directly or indirectly from curing any such liens, claims, encumbrances, or demands.*

SECTION 9. Miscellaneous.

....

f. Other. This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The prevailing party to any dispute shall

have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. *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.

(Italics added for emphasis).

The Later Contracts govern BFS's relationships with Hurley, ECC, ACC, WSC, Pohlman, and L&G (the Later Subcontractors). These contain similar language, including the indemnification language of Section 5, which BFS contends is the relevant indemnification language in the Later Contracts:

SECTION 1. Introduction.

a. Work. This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**"). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor's customer (the "**Owner**"). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the "**Contract Documents**") and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with

additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contract[] Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

....

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

....

c. Protection of Work. Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, *protect all of its labor, materials (regardless of who supplied such materials),* supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

....

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor *guarantees the Work against defects in design, workmanship, and*

materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. . . . This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third-party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

. . . .

SECTION 5. INDEMNITY.

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 FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES

(SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, *BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE 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 INDEMNIFICATION HEREUNDER.

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'S 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 SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED

HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

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 DAMAGE THAT IS (a) CAUSED BY OR RESULTS 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.

....

SECTION 8. Payment to Subcontractor.

....

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 ENCUMBRANCES. 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, ENCUMBRANCES, OR DEMANDS.*

SECTION 9. Miscellaneous.

....

f. Other. This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute

shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. *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.

(Italics added for emphasis).

I. Clear and Unequivocal Standard

BFS argues the circuit court erroneously applied the clear and unequivocal standard articulated in *Concord & Cumberland* to the relevant contractual language because BFS was not seeking indemnity for its own negligence. We disagree, as BFS's position is inconsistent with the language of its own claims as well as the convoluted language within the challenged indemnity provisions.

Courts consistently define indemnity as "'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'" *Concord & Cumberland*, 424 S.C. at 646–47, 819 S.E.2d at 170 (quoting *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003)). "Typically, courts will construe an indemnification contract 'in accordance with the rules for the construction of contracts generally.'" *Id.* (quoting *Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993)).

"[O]ur supreme court has generally held that a contract of indemnity may require a party to indemnify an indemnitee against its own negligence if the 'intention is expressed in clear and unequivocal terms.'" *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018) (quoting *Laurens Emergency Med. Specialists, PA*, 355 S.C. at 111, 584 S.E.2d at 379). "[T]he clear and unequivocal standard applies any time an indemnitee is seeking indemnification for its negligence, whether sole or concurrent." *Concord & Cumberland*, 424 S.C. at 649, 819 S.E.2d at 172.

In *Concord & Cumberland*, a condominium regime and several unit owners sued a general contractor (Superior) for construction defects. 424 S.C. at 643, 819 S.E.2d

at 168. Superior then brought claims against its window and door subcontractor (Muhler), seeking contractual and equitable indemnification. *Id.* Superior settled with the plaintiffs "for \$775,000 and also claimed approximately \$630,000 in attorney's fees and expenses related to its defense of the window and door claims." *Id.* at 644–45, 819 S.E.2d at 169. When Superior sought to recoup these funds from Muhler, it became necessary for this court to examine the subcontract's indemnity provisions. Superior urged the court to apply general rules of contract interpretation, rather than the "clear and unequivocal" standard, to its contractual indemnity claim, alleging it sought indemnity for its concurrent negligence, not its sole negligence. *Id.* at 646, 819 S.E.2d at 170. Rejecting that argument, this court found the clear and unequivocal standard applied whether the contractor "sought indemnification for its sole or concurrent negligence." *Id.*⁵

Here, Plaintiffs' fourth amended complaint alleges:

88. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence

⁵ In a footnote, the *Concord & Cumberland* court noted even the American Institute of Architects (AIA) form indemnity clause utilized at that time did not satisfy the clear and unequivocal standard:

We recognize the challenges lawyers often face in drafting indemnity provisions that can meet the strict "clear and unequivocal" test. In fact, none of our precedents appear to have found a provision that has met the standard. The provision here derived from an . . . AIA[] form. The AIA is a respected organization, and its forms are used regularly in the construction industry. Nevertheless, the indemnity clause at issue here may have been influenced by the "clear and unequivocal" standard. As the Texas Supreme Court has observed, this strict construction test has caused drafters of indemnity provisions to write them in a way that can be read as indemnifying the indemnitee for its own negligence, "yet be just ambiguous enough to conceal that intent from the indemnitor." *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 707–08 (Tex. S. Ct. 1987). What results are law suits that burden courts with deciding whether the parties' intent was camouflaged or "clear and unequivocal."

Id. at 658 n.6, 819 S.E.2d at 176 n.6.

of the Subcontractor Defendants [BFS and Respondents], and each of them individually, in one or more of the following particulars:

- a. in failing to properly construct the Project by deviating from the plans and specifications and by failing to employ practices and methods of construction conforming with accepted industry standards; and/or using defective material; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturer's instructions;
- b. in failing to properly supervise their work and the work of other trades in order to ensure that all work proceeded in accordance with the plans and specifications and in conformity with the customary and ordinary standards of the construction industry;
- c. in accepting non-conforming or defective material;
- d. in using and supplying defective materials;
- e. in installing materials not in accordance with the plans and specifications;
- f. by installing materials in violation of manufacturer's instructions;
- g. in accepting and performing deficient and/or defective workmanship and/or materials without proper inspection to ensure that the work was correct and in conformity with industry standards and in accordance with the plans and specifications and the manufacturer's instructions;
- h. in constructing the Project in violation of the applicable building codes; and
- i. in failing to inform the architect, owner or general contractor of defects in the plans and specifications

The particulars of negligence alleged at subparts b, c, d, g, and i speak to BFS's duties in its role as a supplier of Project materials as well as the duties of BFS and any subcontractors responsible for supervising, inspecting, and approving the work.

BFS's contractual indemnification claim is found within the following paragraphs of its amended answer to the fourth amended complaint and asserted crossclaim:

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.

(emphasis added). Similar language addresses the third-party defendants:

163. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Amended Complaint.

. . . .

167. 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, and/or representations of the Third-Party 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.

168. *That BFS is entitled to full contractual and common law indemnification from the Third-Party 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 Third-Party Defendants, entitling BFS to recover from the Third-Party Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, *and further entitling BFS to recover from the Third-Party 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.

(emphases added). BFS alleges in its contractual indemnification claims, as well as in conjunction with other claims not at issue on appeal, that it seeks recovery for any sums for which BFS may be held liable to the Plaintiffs or others, in addition to attorneys' fees and costs from Respondents. In our view, the wording of paragraphs 138 and 168 leaves little doubt that BFS's pleadings also seek indemnification for its own negligence.

A. 2005 Contracts

The sections of the two orders addressing the *Concord & Cumberland* arguments are identical—both found the Section 6 indemnity "language is inherently confusing" and "the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS's own negligence." Additionally, both orders provide "the indemnity and duty to defend provisions of the Master Agreement . . . are neither clear nor unequivocal and, thus, fail as a matter of law."

We view the language in Section 6 as 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. Thus, we agree with the circuit court that the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS's own negligence. Accordingly, we affirm the circuit court's rulings that the indemnity provisions of the 2005 Contracts are neither clear nor unequivocal, and that BFS's contractual indemnity claims against Palmetto and East Coast fail as a matter of law.

B. Later Contracts

In the current case, BFS contends it is not seeking indemnity for loss or damage arising from its own negligence, but rather indemnity only against liability for loss or damage arising from the sole or concurrent negligent acts or omissions of its subcontractors in the performance of their work. Thus, BFS asserts the clear and unequivocal standard of *Concord & Cumberland* should not apply. However, our review of the indemnification and defense provisions in Sections 3 and 5 of the Later Contracts—as well as the language of BFS's crossclaims—reveals this not to be so. Sections 3 and 5 of the Later Contracts neither require any finding of fault on the part of the Later Subcontractors nor exclude any fault of BFS. Instead, these sections expressly reference indemnification for the sole negligence of BFS.

Moreover, the 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. Because this indemnity provision is hidden among warranty and guaranty language, we agree with the circuit court that it fails to satisfy the clear and unequivocal standard.

Section 5 of the Later Contracts contains multiple indemnity clauses. The first paragraph of Section 5 is based in part on the same AIA form indemnification language stating "but only to the extent caused in whole or in part by any negligent act or omission on the part of subcontractor." *See Concord & Cumberland*, 424 S.C. at 643–44, 819 S.E.2d at 168–69. As the *Concord & Cumberland* court found, this language does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own negligence. *Id.* at 658 n.6, 819 S.E.2d at 176 n.6.

Additionally, the 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.⁶ The language of these two paragraphs cannot be reconciled. Further, the third paragraph of Section 5 is a disguised indemnity provision for defense costs. By claiming it is *not* seeking indemnification for its own negligence, BFS asks this court to ignore its pleadings and the Later Contracts' language, which it drafted, and to disregard controlling

⁶ In its crossclaims, BFS states:

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, e.g., Skull Creek Club Ltd. P'ship v. Cook & Book, Inc., 313 S.C. 283, 289, 437 S.E.2d 163, 166 (Ct. App. 1993) ("It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered[,], or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings[,], and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." (quoting *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992))).

authority. 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). Accordingly, we affirm the circuit court's rulings that the indemnity provisions of the Later Contracts are neither clear nor unequivocal and that BFS's claims must fail as a matter of law.

II. Section 32-2-10 and Public Policy

BFS argues the circuit court erred in finding the contractual language permitting BFS to recover for its subcontractors' negligence violates section 32-2-10 of the South Carolina Code (2007) and public policy. We disagree.

"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)). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Id.* (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (quoting *McGill*, 381 S.C. at 185, 672 S.E.2d at 574).

The statute at issue provides, in pertinent part:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees

against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.

S.C. Code Ann. § 32-2-10 (emphasis added).

A. 2005 Contracts

Although § 32-2-10 allowed BFS and the 2005 Subcontractors to agree the 2005 Subcontractors will indemnify BFS for damages caused by the 2005 Subcontractors or their subs, the 2005 Contracts also contain multiple provisions requiring the 2005 Subcontractors to indemnify (or defend) BFS for damages incurred as a result of BFS's sole negligence. For example, Section 6 calls for the 2005 Subcontractors to unconditionally defend and indemnify BFS in subsection (b)(1) and then calls for the 2005 Subcontractors to indemnify BFS for BFS's failure to supervise in subsection (b)(2). These provisions violate § 32-2-10 because they seek to require the 2005 Subcontractors to indemnify BFS for its sole negligence. *See D.R. Horton, Inc.*, 422 S.C. at 152, 810 S.E.2d at 46 ("The indemnification agreement in this case purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10. Because the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton."). And, Section 8(i) of the 2005 Contracts provides for indemnification of attorney's fees and expenses as well as amounts paid in settlement without regard to BFS's fault. Therefore, we affirm the circuit court's findings as to the public policy and statutory questions.

B. Later Contracts

While the statute allows BFS and the Later Subcontractors to agree that the Later Subcontractors will indemnify BFS for damages caused by the Later Subcontractors or their subs, 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.⁷

⁷ 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

Additionally, Section 8(i) of the Later Contracts provides for indemnification of attorney's fees and expenses as well as amounts paid in settlement without regard to the fault of BFS. So, the Later Contracts purport to require the Later Subcontractors to indemnify BFS for its own negligence in selecting the framing lumber, housewrap, windows, doors, related flashings, and caulk as well as overseeing and inspecting the installation of the materials it provided for use in constructing the Project. Such a provision violates § 32-2-10. *See D.R. Horton, Inc.*, 422 S.C. at 152, 810 S.E.2d at 46 ("The indemnification agreement in this case purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10. Because the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton."). Moreover, because the Later Contracts' indemnity provisions require the Later Subcontractors to indemnify BFS against liability for damages from bodily injury or property damage proximately caused by or resulting from the sole negligence of BFS, these provisions are unenforceable under § 32-2-10. For these reasons, we affirm the circuit court for this additional reason.

III. Collateral Estoppel⁸

BFS next argues the circuit court erred in finding the doctrine of collateral estoppel bars its indemnity claims because the prior judgments are both inapposite and not final because they have been appealed. We disagree.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was "actually litigated and determined by a valid and final judgment" in a previous action, "regardless of whether the claims in the first and subsequent suits are the same." *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) (quoting *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008)). Where the "illegality of the contract has been actually litigated and directly determined in the prior action and that issue was essential to the judgment," the application of offensive collateral estoppel is appropriate. *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403

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."

⁸ This issue is relevant only to the Later Contracts.

S.E.2d 625, 627 (1991). The party invoking collateral estoppel need not have also been a party in the prior action; the law requires only that the party against whom estoppel is applied have been a party with a full and fair opportunity to litigate the issue. *Id.* ("Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action . . .").

There is no dispute that BFS is the party seeking to enforce the indemnity clauses of the Later Contracts (which are identical to those previously litigated). It further cannot be disputed that BFS was the party litigating the issue of enforceability in other construction defect cases before the circuit court. The circuit court had previously addressed the Later Contracts' indemnity language in *MI Windows & Doors*, *Dag Pavic and Stela Susas-Pavic*, and *Six Fifty-Six Owners' Association*, *et al.* Although BFS had appealed these orders, the circuit court did not err in finding the same terms had been actually litigated and directly determined in a prior action. A judgment is final and remains final unless and until it has been overturned on appeal. *See Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) (finding finality of a court's judgment is not lost because appeal is pending unless and until reversed).

The rationale behind this rule is that if cases on appeal were not viewed as final judgments for collateral estoppel purposes, parties could simply refile in trial court while an appeal is pending and hope for a different result, thus subjecting courts (and parties) to inefficient duplicative litigation. *See generally Warwick Corp. v. Maryland Dep't of Transp.*, 573 F. Supp. 1011, 1014 (D. Md. 1983) ("Such a consequence would also be laughable. If a judgment was denied its *res judicata* effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation."), *aff'd Warwick Corp. v. Maryland Dep't of Transp.*, 735 F.2d 1359 (4th Cir. 1984). That appeals were pending at the time of the circuit court's rulings in these eight cases in no way changes the result: the prior findings have preclusive effect unless and until those dispositive findings are reversed. The indemnity clauses in the Later Contracts are the same clauses from the same agreement at issue in *MI Windows & Doors*, *Pavic*, and *Six Fifty-Six Owners' Association*. Because BFS had previously litigated the enforceability of its contractual indemnity provisions, the circuit court properly applied collateral estoppel.

IV. Severability

BFS next asserts the circuit court erred in failing to address the severability provision of the 2005 Contracts and the Later Contracts, and where the circuit court did address severability, it erred in holding it lacked authority to sever the offending provisions.⁹ Again, we disagree.

In both sets of contracts, the severability clause states, "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." However, because the indemnity provisions are replete with terms that violate South Carolina law and public policy, these terms cannot be effectively severed. Among other things, the contracts require the 2005 Subcontractors to indemnify BFS for claims of death, personal injury, and property damage—regardless of BFS's negligence—and require subcontractors to defend BFS in the case of BFS's sole negligence.

Because the indemnity provisions themselves violate South Carolina law, we reject BFS's invitation to rewrite them. *Cf. Concord & Cumberland*, 424 S.C. at 656, 819 S.E.2d at 175 ("Merging the indemnity clauses into one clause by replacing some language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term to which Muhler did not agree. In the absence of clear and express language in the 2007 Agreement instructing what phrases replace specific terms in the [s]ubcontract, we decline Superior's invitation to rewrite the indemnity clauses. The circuit court properly interpreted each indemnity clause according to its own terms."); *Doe v. TCSC, LLC*, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020) (noting "[c]ourts have discretion . . . to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive").

V. Unconscionable and Unenforceable

Finally, BFS argues the circuit court erred in finding the warranty, contractual indemnity, and duty to defend provisions of the Later Contracts are unconscionable and unenforceable as a matter of law. We disagree.

"[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007). In *Simpson*, our supreme court found an arbitration clause

⁹ The language of Section 9(f) is the same in the 2005 and Later Contracts.

in an adhesion contract with unconscionable terms "wholly unenforceable," despite the presence of a separate contractual severability clause, due to the "cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause." *Id.* at 33–36, 644 S.E.2d at 673–74. The contractual severability provision did not result in an exception to the general rule of unenforceability of illegal contracts, especially where the contract was one-sided, oppressive, or a contract of adhesion. *Id.* at 29–30, 644 S.E.2d at 671.

In *Damico v. Lennar Carolinas, LLC*, our supreme court emphasized the distinction between a contract of adhesion and the question of unconscionability:

[A]dhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed. Nevertheless, and regrettably, it is common practice for the sophisticated drafter of contracts to routinely argue that a particular contract is not one of adhesion when that is plainly untrue. Such a specious argument does not advance the party's position and instead detracts from other legitimate arguments the party may have. After all, unconscionability requires a finding of a lack of meaningful choice *coupled with* unreasonably oppressive terms. Thus, an adhesion contract with fair terms is certainly not unconscionable, and the mere fact a contract is one of adhesion does not doom the contract-drafter's case.

437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022).

The Later Subcontractors installed products for BFS, the regional division of Builders FirstSource, arguably a sophisticated drafter of contracts given its regional reach and its multiple subcontractor contracts on several Lowcountry projects. As discussed in sections I and II, *supra*, the warranty, guaranty, and indemnity provisions of the Later Contracts violate § 32-2-10, are ambiguous, conflict with each other, and do not meet the clear and unequivocal standard articulated in *Concord & Cumberland*.

The disparity in bargaining power along with the ambiguous terms in these adhesion contracts deprived the Later Subcontractors of any meaningful choice when entering the Later Contracts. The Later Contracts give the drafter expansive rights and remedies, while creating oppressive obligations or liabilities for the Later Subcontractors *and* limiting or waiving their rights. We find it inconceivable that a subcontractor with even a semblance of bargaining power who understood the implications of the language in these agreements would sign them

unless there existed a total absence of meaningful choice. Accordingly, we affirm the circuit court's findings that the pertinent provisions of the Later Contracts are unconscionable and unenforceable as a matter of law.

Conclusion

For the foregoing reasons, the circuit court's eight orders are

AFFIRMED.

THOMAS, J., and VERDIN, A.J., concur.

The South Carolina Court of Appeals

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; Liollo Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveira; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado; Defendants,

Builders FirstSource-Southeast Group, LLC, Third-Party Plaintiff, Appellant,

v.

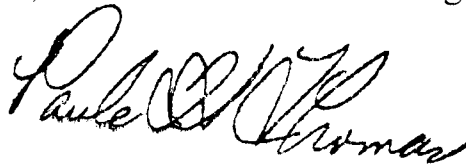
Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry, Third-Party Defendants,

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

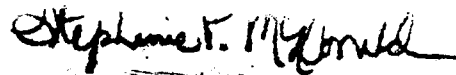
Appellate Case No. 2021-001050

ORDER

Appellant has filed a petition for rehearing. After careful consideration, the Court denied the petition. However, the Court substitutes the attached revised opinion to correct certain factual recitations at page 2, paragraph 2 and the identification of Pohlman Quality Exteriors, Inc. at page 3, footnote 3. No other changes were made to the previously-filed opinion.



J.



J.



A.J.

Columbia, South Carolina

cc:

FILED
May 21 2025

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The Honorable Jennifer B. McCoy

RECEIVED

Feb 27 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

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

2021-001050

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; Liollo
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, Appellant,

v.

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

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

Appellate Case No. 2021-001050

PETITION FOR REHEARING

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Builders FirstSource-Southeast Group, LLC

Appellant Builders FirstSource-Southeast Group, LLC (hereinafter “BFS”) respectfully petitions this Court for rehearing.

The Court’s February 12, 2025 Opinion (hereinafter “Opinion”) (a) overlooks multiple allegations in BFS’ pleadings limiting the contractual indemnity claims to recovery of damages resulting from the negligence of the subcontractors, (b) misapprehends the plain language of the contracts that limit the subcontractors’ obligations therein, (c) erroneously applied the “clear and unequivocal” standard to claims seeking indemnification against liability for the negligence of the subcontractors, (d) relies on factual findings which are completely without evidentiary support¹, (e) ignores authoritative statutory law, and (f) deviates from long-standing precedent to erroneously determine that the contracts and the indemnity provisions therein are unconscionable and unenforceable as a matter of law.

The Opinion, whether by design, or otherwise, ostensibly creates new and unprecedented law governing contractual relationships between parties. By ignoring Section 32-2-10’s explicit authorization of indemnity and abandoning the principles set forth in *Concord & Cumberland*, the Opinion has effectively created new and harmful law that will undo established relationships between parties far beyond this case: every construction related contract in South Carolina is now subject to challenge and potentially left without legal support. Because of the significant and adverse consequences of the Opinion’s ruling, and other considerations more fully set hereinafter,

¹ The Opinion in its recitation of the facts incorrectly states that “BFS used fasteners of an improper type and inadequate length to assure the embedment of fasteners into the framing; and that BFS installed the fasteners at spacing intervals exceeding those required by the manufacturer’s installation criteria.” The Opinion also incorrectly states in footnote 3, “BFS supplied building materials, including windows and window fasteners, for Pohlman’s use.” The Opinion in its footnote cites to the factual findings of the circuit court which does not include BFS supplying or installing fasteners. Contrary to the Court’s belief, the subcontractors supplied and installed the fasteners for any and all work the subcontractors performed. This is yet one more issue the Court has completely misapprehended and the Opinion and all of the Court’s analysis must be revised consistent with the actual facts of the case.

BFS requests that the Court carefully reconsider and revise the Opinion to be consistent with the considerations set forth hereinafter.

I. The Opinion overlooked multiple allegations in the relevant pleadings limiting the indemnity claims to damage resulting from the subcontractors' negligence, and thus erroneously applied the heightened *Concord & Cumberland* standard in evaluating and applying the relevant contractual indemnity provisions.

While the relevant contracts were drafted to encompass the broadest possible scope of circumstances the parties may encounter, their separate and distinct provisions, including the separate indemnity provisions, are subject specifically "to the fullest extent permitted by law." Pursuant to South Carolina law and the severance provisions of the contracts, any provision that is found to violate the law is to be severed accordingly. Equally importantly, the only indemnity provisions relied upon in pursuit of the instant claims are those imposing upon the subcontractors the obligation to indemnify BFS against property damage claims resulting from the subcontractors' negligence. Consistent therewith, BFS' indemnity claims, as set forth within the relevant pleadings, are premised upon BFS' contention that any damage suffered by the Plaintiffs necessarily resulted from the negligence of the subcontractors.

Specifically, Paragraphs 133 and 162 allege that the plaintiff has sued BFS for damages resulting from deficiencies in framing and installation of material components. These allegations are critical to BFS indemnity claims against the subcontractors because the subcontractors are the parties that supplied the fasteners and labor for installation of the material components. Paragraphs 134 and 163 allege that BFS has denied the material allegations asserted against BFS. Paragraphs 135 and 164 allege that the respective subcontracts between BFS and subcontractors provide for contractual indemnity in favor of BFS. Paragraphs 136 and 165 allege that there exists a special relationship between the parties to impose an indemnity obligation on the subcontractors in favor of BFS. Paragraphs 137 and 166 allege:

“[t]hat 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 [subcontractors], 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.”

The Court, despite citing to these specific allegations at pages 20-21 of the Opinion, somehow overlooks, or purposefully ignores, these allegations regarding BFS’ contractual indemnity claims for damages resulting from the subcontractors’ negligence. Instead, the Court focuses on Paragraphs 138 and 167 that allege:

“[t]hat BFS is entitled to full contractual and common law indemnification from the [subcontractors], 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 [subcontractors], entitling BFS to recover from the [subcontractors], its attorneys’ fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the [subcontractors] any sums for which BFS may be held liable to the Plaintiffs or to others, or which [BFS] may pay in satisfaction of such claims.”

Based on the aforesaid allegations, the Court determines that BFS is seeking indemnity, not only for the subcontractors’ negligence, but also for BFS’ negligence. However, in order to reach such a conclusion, the Court must necessarily overlook and ignore the allegations set forth in Paragraphs 133-137 and 162-166. When Paragraphs 138 and 167 are properly read in conjunction with Paragraphs 133-137 and 162-166, the pleadings are clear in limiting the BFS indemnity claims to damage occasioned by the negligence of the subcontractors.

Aside from the allegations limiting the extent of its claims, BFS has also stipulated multiple times on the record that it is only seeking indemnity for damages resulting from the negligence of its subcontractors.

Even if BFS had pled only paragraphs 138 and 167 as the Court suggests (by its analysis focusing solely thereon), nothing within the Rules of Civil Procedure precludes BFS from seeking more expansive recovery than the evidence might support. Rule 13(g), SCRCP specifically

authorizes that a “*cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.*” Moreover, Rule 8(e)(1), SCRCF states that “no technical form of a pleading is required.” Rule 8(e)(2), SCRCF provides that a party may set forth two or more statements of a cause of action alternatively or hypothetically either in one count or in separate counts. Further, Rule 8(e)(2), SCRCF provides that a pleading is not made insufficient by the insufficiency of one or more of the alternative statements. Rule 8(f), SCRCF provides “[a]ll pleadings shall be so construed as to do substantial justice to all parties.” The Court’s Opinion clearly ignores these foregoing rules of civil procedure and has effectively penalized BFS for the way in which it pled its contractual indemnity claims.

Nevertheless, having determined that BFS had sought recovery in indemnity for its own negligence and for the negligence of its subcontractors, the Court proceeded to evaluate both claims under the heightened “clear and unequivocal” standard set forth in *Concord & Cumberland*. Such application is in error, as the contractual provisions authorizing indemnity for the subcontractors’ negligence should have been evaluated in accordance with the rules of construction of contracts generally. Therefore, the Court should have recognized BFS’ right to recover in contractual indemnity against liability caused by the subcontractor’s negligence, while denying indemnity for damages which might ultimately be determined to have resulted from BFS’ negligence.

- A. In construing and applying indemnification language nearly identical to that at issue in this case, the Court in *Concord & Cumberland*, while precluding the general contractor from recovering indemnity for its own negligence, nonetheless allowed indemnity for damages caused by the subcontractor’s negligence.**

The Opinion found, based upon the Court’s misconstruction of the BFS’ pleadings, that BFS sought recovery not only for the negligence of its subcontractors, but also for its own negligence.

The Court then determined that all claims failed as a matter of law, because the contractual provisions were not sufficiently clear and unequivocal. As noted more fully hereinafter, such a broad application of the “clear and unequivocal” standard is contrary to established law, including this Court’s own precedent.

The general contractor in *Concord & Cumberland*, 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 occasioned by both the negligence of its subcontractor, and the negligence of the general contractor itself.

This Court, prior to its analysis, recognized specifically that “[t]ypically, courts will construe an indemnification contract ‘in accordance with the rules for the construction of contracts generally.’ ” *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170 (Ct. App. 2018) (*quoting Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. This Court also noted “ ‘the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.’ ” *Id.* (*quoting Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989).

As such, this Court, in applying the contractual provision at issue in *Concord & Cumberland*, which is virtually identical to the provision at issue here, determined that the language of the provision was not sufficiently clear and unequivocal to require the subcontractor to indemnify the

general contractor against liability for damages caused by the general contractor's own negligence. However, the Court nonetheless, in affirming the ruling of the trial court, specifically determined that the subcontractor's obligation to indemnify the general contractor encompassed claims and damages to the extent caused in whole or in part by any negligence of the subcontractor. *See Concord & Cumberland*, 424 S.C. at 652–53:

“Specifically, we agree with the *Mautz* and *Braegelmann* courts that the phrase, ‘to the extent caused ... in whole or in any part by any negligent act or omission of [Muhler],’ limits Muhler's obligation to indemnify to damages and losses but only to the extent they were caused by the negligence of Muhler and its subcontractors. Muhler's indemnity obligation extends to losses Muhler only causes in part, but does not clearly and unequivocally require Muhler to indemnify for the negligence of others that contributed to the same loss.”

Thus, despite overt representations by the general contractor that it was seeking indemnity for damages resulting from its own negligence, this Court, in *Concord & Cumberland*, nonetheless allowed the general contractor to recover from its subcontractor damages resulting from the work of the subcontractor.²

Here, the Opinion, contrary to the Court's own precedent, appears to have applied the heightened standard to all purported claims of BFS, when the relevant contractual indemnity provisions should have been evaluated under general rules of contract construction for BFS claims seeking indemnity for the subcontractors' negligence. The Opinion precludes BFS from any recovery in contractual indemnity, even if the jury determines that the subcontractor has been solely or concurrently negligent in causing the damages at issue.

² Later in its Opinion, this Court points to our warranty provision as a reason why BFS should not be able to recover from its subcontractors. Notably, the contract between the general contractor and subcontractor in *Concord & Cumberland* also contained a warranty provision which provided, in part, that “[t]he subcontractor warrants its work against all deficiencies and defects in materials and/or workmanship as called for in the Contract Documents.” The contract does not explicitly limit “defects in materials” to those materials provided by the subcontractor. Even despite this warranty provision, however, this Court still allowed the general contractor to recover for damages arising out of the subcontractor's negligence.

The rights sought by Builders FirstSource, under the relevant provisions of its respective contracts, are no different and no more expansive than those specifically afforded to the general contractor, by this Court, in *Concord & Cumberland*. The Court should amend the Opinion to follow *Concord & Cumberland* and allow BFS contractual indemnity claims for damages occasioned by the negligence of its subcontractors to proceed to trial.

II. In ruling that BFS' indemnity claims fail as a matter of law, the Court overlooked that §32-2-10 specifically allows agreements whereby the promisor/indemnitor agrees to indemnify the promisee/indemnitee against liability for damages resulting from the negligence, in whole or in part, of the indemnitor.

This Court has acknowledged that “§32-2-10 allowed BFS and the 2005 Subcontractors to agree the 2005 Subcontractors will indemnify BFS for damages caused by the 2005 Subcontractors or their subs” and “the statute allows BFS and the Later Subcontractors to agree that the Later Subcontractors will indemnify BFS for damages caused by the Later Subcontractors or their subs.” Opinion p. 25. As pled and redundantly set forth on the record, this is the exact recovery that BFS seeks here, and it is explicitly authorized for by §32-2-10.

The Court, however, has gone on to explain why other theories of recovery (which have not been asserted by BFS), might violate §32-2-10. Those other cited sections, as explained in greater detail below, do not violate the statute once properly understood. However, even if those separate sections did entail violations of the statute, they would not, and do not, affect the ability of BFS to recover from the subcontractors for damages occasioned by the subcontractors' negligence-such recovery is explicitly authorized by the statute, and contemplated by the relevant indemnity provisions at issue here.

III. The Court, in determining that the Appellant's claims were barred by the doctrine of collateral estoppel, overlooked the fact that the specific issue before the Court had not been previously resolved by any court judgment, and further overlooked that South Carolina law is silent regarding whether a decision on appeal is final for purposes of res judicata.

The issue of whether a trial court decision on appeal is sufficiently “final” for purposes of collateral estoppel is an issue of first impression in South Carolina. There are no cases on point. Even the cases cited by the parties herein have reached different conclusions. Because the issue is one of novel impression in South Carolina, it was inappropriate for the matter to be resolved by summary judgment.

Moreover, this Court has overlooked that no court has yet answered the question of whether BFS can recover, under the relevant indemnity provisions of the respective contracts, for the negligence of its subcontractors, regardless of whether BFS can recover for its own negligence. All prior cases cited by the Court as its basis for collateral estoppel have involved the lower courts’ consideration of BFS claims purportedly seeking indemnity against BFS negligence. No prior court has specifically addressed the issue – the specific claims as presented by BFS in this litigation. The doctrine of collateral estoppel is available *when the same issues of fact or law* are actually litigated and determined by valid and final judgment. 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 provisions for the 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. Therefore, this Court should answer the novel question, which is not precluded by collateral estoppel.

IV. The Court misapprehended and misconstrued relevant provisions of the contracts by failing to account for limitations imposed by defined terms.

The Court in its Opinion interprets the “warranty, guaranty, and indemnity” provisions of the contracts such that they “violate § 32-2-10, are ambiguous, conflict with each other, and do not

meet the clear and unequivocal standard articulated in *Concord & Cumberland*.” Opinion, p. 29. This conclusion is based on a flawed understanding of the contracts and on a failure to honor the given meaning of defined terms.

A. The “Section 3. Warranty” Provision of the Later Contracts limits the subcontractors’ warranties to the services or materials supplied by the subcontractor.

Throughout its Opinion, the Court quoted extensively from sections describing the relationship of the parties vis-à-vis the “Work.” However, *the Court never once acknowledged that “Work” is a defined term*, and by definition the Work is limited to the materials provided and/or services performed by the subcontractor. See Section 1 Work in 2005 and Later Contracts. The Work limitation brings the purportedly problematic sections well within the scope of §32-2-10 and allows for a harmonious reading of the contract, consistent with South Carolina law and the intention of the parties.

Specifically, regarding Section 3, 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.

Opinion pp. 22, 25 (emphasis in original).

The Court 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."

Opinion pp. 25-26, n. 7 (emphasis added).

This reading overlooks the definition of **Work** as a term that excludes such defective materials and building components provided by BFS. The subcontractor guarantees only the labor it performed or the materials it supplied. If the subcontractor provided no materials, Section 3 does not require the subcontractor to guarantee any materials, and certainly not any materials provided by BFS. Instead, the subcontractor guarantees only its **Work**, and its obligations to indemnify are limited to claims and damages resulting from its **Work – ie, the materials supplied and/or services performed by the subcontractor itself**³.

More importantly at this juncture, however, is that this Court overlooked the rightful, legitimate, and licit interpretation of the contracts. When such a licit interpretation exists, courts are compelled to adopt it. *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”**

³ As noted in Footnote 1, 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.

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. The warranty provisions of section 3, when properly construed, comply with the laws of South Carolina.

B. The Section 5 Indemnity Provisions are reconcilable because they address two separate situations.

Regarding Section 5, 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.

Opinion p. 23.

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

Here, there are no claims, much less any allegations, of bodily injury or property 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.

The Second paragraph of Section 5 deals with potential obligations to indemnify for losses not at issue here, has not been cited by BFS in support of its claims, and is irrelevant to the assertion of these claims.

The separate indemnity obligation imposed upon the subcontractor by Paragraph 1 of Section 5 is explicitly limited to liability for property damage caused by the negligence of the

subcontractor. This indemnity provision is expressly authorized by Section 32-2-10 and is what BFS relied upon in its contractual indemnity claims.

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

C. The Court has 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 its own subcontractors or suppliers for services and materials provided in conjunction with the Work performed by the subcontractor. More importantly, and as stated hereinabove, the indemnity obligations of Section 8(i) are imposed only to the “fullest extent permitted by law,” are set forth in a subsection of Section 8, *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.*

As more thoroughly detailed in following argument, the indemnity provisions of Subsection 8(i), to the extent those may be found to be inconsistent with law, can be severed without impacting the independent indemnity obligations as set forth in Paragraph 6 of the 2005 contracts and in Section 5 of the Later Contracts.

V. The two potentially offending indemnity provisions are easily severable once the Court’s misapprehension is corrected.

The Court 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.” Opinion p. 28. The majority of the Court’s 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.

The only two sections that might provide for potentially problematic indemnification - Section 6(b)(2)(iii) of the 2005 Contracts and Section 5, Paragraph 2 of the Later Contracts - could be cleanly and easily stricken from the respective contracts, leaving behind licit indemnity provisions in each set of contracts. Because the contracts are no longer “replete with terms that violate South Carolina law and public policy,” the Court may with confidence honor the severability provision and strike the offending language with no ramifications to the remaining terms of the contracts. Moreover, as authoritatively determined by the appellate courts, “whether an illegal provision in an otherwise valid contract may be separated from the contract is a matter of intent of the parties” *The Beach Company v. Twillman, Ltd.*, 351 S.C. 56, 64, 56 S.E.2d 63, 867 (Ct. App. 2002). 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 unenforceable language. *Jane Doe v. TCSC, LLC*, 430 S.C. 602, 615, 846 S.E.2d 874, 880-81 (Ct. App. 2020).

The severability provisions of the contracts unequivocally reflect the intention of both BFS and its subcontractors that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the contract may be invalid, this Court should honor the intent of the parties and sever any offending provision, leaving the remaining provisions intact.

VI. The Court’s conclusion that the indemnity provisions were unconscionable was based upon its misapprehension of the Contracts’ terms.

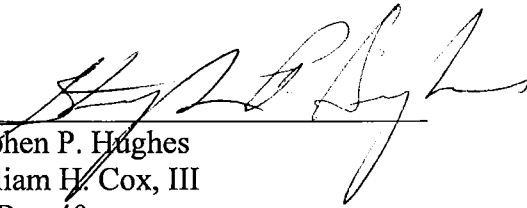
As noted, the Court has misconstrued specific contractual provisions which impose upon the subcontractors limited obligations which are completely consistent with state law. Moreover, the Court has determined, without any supporting basis, that there is a disparity in bargaining power between the parties. There is absolutely no evidence in the record to support such a finding by the lower court or this Court. The contracts comply with South Carolina law and public policy, and provide for a judicially-recognized form of indemnification.

The provisions highlighted by this Court are completely unrelated to this litigation, and, as explained above, are, contrary to the Court's misapprehension, in fact limited and licit. At issue in this litigation is **ONLY** the initial paragraph of the Section 5 indemnity provision (or the initial paragraph of Section 6 in the 2005 Contracts). However, by relying on irrelevant provisions to invalidate the entire contract, this Court has potentially placed *all* similar contracts of *numerous* contractors at issue. The Later Contracts contain provisions identical or remarkably similar to such provisions in numerous contracts currently in force, including contracts utilized by many subcontractors in South Carolina. By its wholesale invalidation of the entire contract, this Opinion will destabilize contractual relationships within the industry, unsettle established South Carolina law regarding contractual allocations of risk, compromise the integrity of virtually identical provisions relied upon by contracting parties throughout the State of South Carolina, invite a flood of litigation, and ultimately make it practically impossible for *any* contractor to recover from its subcontractors.

These provisions are not unreasonable; they are industry-standard provisions that echo the basics of South Carolina indemnity law – that one party can recover from a second party for damages the first party incurred, to a third party, as a result of the negligence of the second party.

BFS respectfully requests that this Court reconsider its opinion in light of the points articulated herein.

HOWELL, GIBSON & HUGHES, P.A.

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Southeast Group, LLC

Beaufort, South Carolina

February 27, 2025

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Feb 27 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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,

vs.

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; Liollo
Architecture, JC Construction d/b/a JC Construction, LLC a/k/a JC Constructors a/k/a JC
Contractors, LLC; Soto & Vasquez Construction LLC a/k/a Costa De Oliveria Contruction,
LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding, LLC, Royal Homes
of SC, Inc.; Coleen 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 and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva;
Garcia Roofing, LLC; Givair De Caris; and Mario
Salgado.....Defendants,

and

Builders FirstSource-Southeast Group, LLC.....Third-Party Plaintiff,

vs.

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

of which

Builders FirstSource-Southeast Group, LLC is.....Appellant,

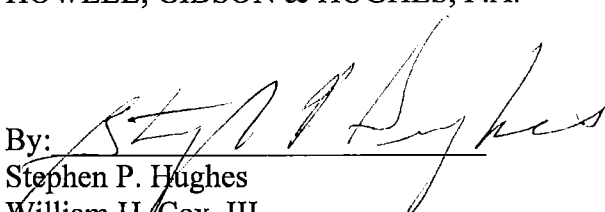
and

Palmetto Trim and Renovation is.....Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing *Petition for Rehearing* upon all counsel of record by last known email addresses on this 27th day of February, 2025.

HOWELL, GIBSON & HUGHES, P.A.

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February 27, 2025

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Feb 27 2025
SC Court of Appeals

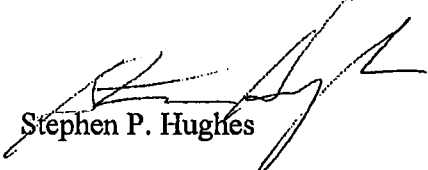
Re: Builders FirstSource- Southeast Group, LLC v. Palmetto Trim and Renovations
Civil Action No.: 2021-001050
Our File No.: 11981 5 SPH

Dear Sir or Madam:

Please find enclosed herewith for filing an original and one copy of the *Petition for Rehearing*, together with the Certificate of Service, with regard to the above referenced matter. Also enclosed please find the applicable filing fee in the amount of \$50.00. I would appreciate your filing the Petition for Rehearing and returning a filed clocked copy to me via email at spughes@hghpa.com, wcox@hghpa.com, and scombites@hghpa.com. If return of the clocked copy must be via U.S. Mail, please advise and I will provide a self-addressed, stamped envelope provided for same.

With kindest regards, I am
Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.


Stephen P. Hughes

SPH/sc
ENCLOSURES

cc: All Counsel of Record

The Supreme Court of South Carolina

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; Liollo Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveira; 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.

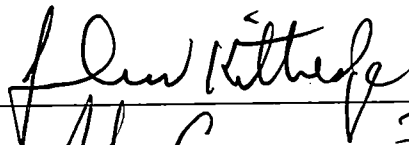
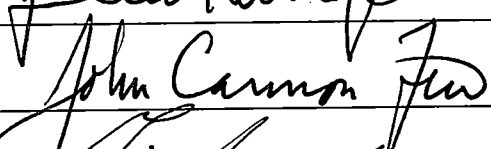
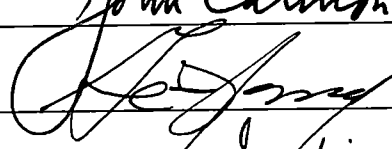
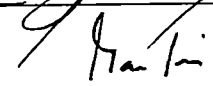
Pohlman Quality Contractors; Pohlman Quality
Exteriors; Palmetto Trim and Renovation; Edward Bruce
Witham; and East Coast Carpentry, Third-Party
Defendants,

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.

Appellate Case No. 2025-001224

ORDER

Petitioner Builders FirstSource-Southeast Group, LLC has filed a motion to stay in (1) *Builders FirstSource-Southeast, LLC v. MI Windows* (Appellate Case No. 2025-001176); (2) *Builders FirstSource-Southeast, LLC v. Hurley Services, LLC* (Appellate Case No. 2025-001495); and (3) *Builders FirstSource-Southeast, LLC v. Hurley Services, LLC* (Appellate Case No. 2025-001496), pending this Court's decision in the instant matter of *Builders FirstSource-Southeast, LLC v. Palmetto Trim and Renovation* (Appellate Case No. 2025-001224). The motion to stay is denied.

	_____	C.J.
	_____	J.
	_____	J.
	_____	J.

Verdin, J., not participating

Columbia, South Carolina
September 10, 2025

cc:

Kevin W. Mims
William Chase McNair
John Barnwell Fishburne, Jr.
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Jul 21 2025

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

S.C. SUPREME COURT

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; Liollo
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;
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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.

MOTION TO STAY

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Attorneys for Petitioner Builders
FirstSource-Southeast Group, LLC

Petitioner, Builders FirstSource-Southeast Group, LLC, respectfully moves this Court for an Order to Stay the following separate, but related appeals:

1. Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC,
 - Supreme Court Appellate Case No. 2025-001176
 - Court of Appeals Case No. 2020-000415
 - Unpublished Opinion No. 2025-UP-072
 - Heard March 15, 2023
 - Filed February 26, 2025
 - Court of Appeals Judges McDonald, Thomas, and Hewitt
 - “BFS Damico Appeal”
2. Builders FirstSource-Southeast Group, LLC v. Hurley Services, LLC and Charleston Exteriors, LLC,
 - Court of Appeals Case No. 2020-001328
 - Unpublished Opinion No. 2025-UP-078
 - i. Heard December 5, 2023
 - ii. Filed March 12, 2025
 - iii. Withdrawn, Substituted, Refiled June 25, 2025
 - iv. Court of Appeals Judges McDonald, Vinson, and Bromell Holmes
 - “BFS Six Fifty Six Appeal”
3. Builders FirstSource-Southeast Group, LLC v. Hurley Services, LLC,
 - Court of Appeals Case No. 2021-000290
 - Unpublished Opinion No. 2025-UP-082
 - i. Heard December 5, 2023
 - ii. Filed March 12, 2025
 - iii. Withdrawn, Substituted, Refiled June 25, 2025
 - iv. Court of Appeals Judges McDonald, Vinson, and Bromell Holmes
 - “BFS Pavic Appeal”

The primary basis for the Stay is to promote and preserve judicial economy. The secondary basis for the Stay is to promote and preserve the issues on appeal.

All of the foregoing appeals, including this one (Appellate Case No. 2025-001224, “BFS Retreat Appeal,”) relate to Petitioner’s claims seeking contractual indemnification from its respective subcontractors for damages allegedly resulting from deficiencies in the work performed by the subcontractors at construction projects in South Carolina.

Petitioner's claims against the respective subcontractors in the separate appeals are based primarily on the same contract provisions that are at issue in this appeal. In fact, Petitioner's claims against Respondent ECC Contracting, LLC in this appeal are based on contractual indemnity provisions identical to those at issue in the BFS Damico Appeal. See Exhibit A, BFS-ECC Agreements in Records on Appeal for BFS Retreat Appeal and BFS Damico Appeal. Additionally, Petitioner's claims against Respondent Hurley Services, LLC in this appeal are based on contractual indemnity provisions identical to those at issue in the BFS Six Fifty Six Appeal and BFS Pavic Appeal. See Exhibit B, BFS-Hurley Agreements in Records on Appeal for BFS Retreat Appeal, BFS Six Fifty Six Appeal, and BFS Pavic Appeal.

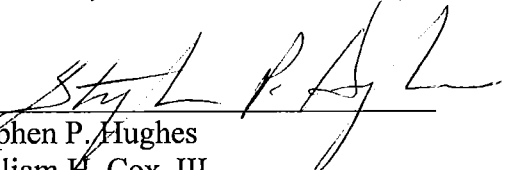
Further, Questions Presented by Petitioner in this BFS Retreat Appeal, while worded slightly differently, are substantively the same as the Questions Presented by Petitioner in the BFS Damico Appeal. See Exhibit C, BFS Petitions for Certiorari in BFS Retreat Appeal and BFS Damico Appeal. Moreover, the same will hold true for Petitioner's Petitions for Certiorari that are, absent any extension, due to be filed with this Court on July 25, 2025 for BFS Six Fifty Six Appeal and BFS Pavic Appeal.

Although the claims and contracts at issue in these separate appeals are substantively identical and most of the Questions Presented by Petitioner are or will be the same, consolidation of the appeals is not appropriate because there are multiple separate and distinct factual and legal issues that exist amongst the separate appeals that do not exist in this appeal. As such, Petitioner submits that consolidation of the appeals would distract from the Court's consideration of those primary issues common to each appeal, and also potentially cause the separate and distinct issues to be overlooked or confused by the Court of the parties.

Petitioner respectfully submits that a Stay of the separate appeals will promote judicial economy by allowing the Court and the parties to focus upon resolution of the significant issues common to each of the referenced appeals. The interests of both this Court and those of the parties are most effectively served by first resolving the issues in the BFS Retreat Appeal, which should resolve the issues common to each of the separate appeals. Additionally, a Stay of the separate appeals will preserve the separate and distinct issues on appeal while also promoting and preserving the primary issues on appeal that exist in all of the appeals.

Counsel for Respondents in BFS Damico Appeal, BFS Six Fifty Six Appeal, and BFS Pavic Appeal agree and consent to the Motion to Stay.

HOWELL, GIBSON & HUGHES, P.A.

By: 

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Attorneys for Petitioner Builders

FirstSource-Southeast Group, LLC

Beaufort, South Carolina

July 21, 2025

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Sep 02 2025

S.C. SUPREME COURT

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

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.; America 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; Liollo 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.

**MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS
AND THE HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA
FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER**

Pursuant to Rules 213 and 240 of the South Carolina Appellate Court Rules, the National Association of Home Builders (“NAHB”) and the Home Builders Association of South Carolina (“HBASC”) (“collectively “Amici”) respectfully move for leave to file the accompanying amici curiae brief in support of Builders FirstSource-Southeast Group, LLC’s (“BFS”) petition for a writ of certiorari.

NAHB is a nonprofit trade association that represents 140,000 builders and associate members organized into approximately 700 affiliated state and local associations, including 15 in South Carolina. NAHB is the voice of the American housing industry. NAHB promotes home ownership and policies supporting safe, decent, and affordable housing. Its members construct over 80% of the housing in the United States.

HBASC is the largest residential construction trade association in South Carolina, representing approximately 3,500 members, including contractors, subcontractors, developers, and other related occupations that build and develop houses, apartments, and condominiums in South Carolina. HBASC monitors legislation and legal developments affecting the homebuilding industry and works with communities to ensure building codes provide safe and affordable housing.

NAHB and HBASC have a strong interest in ensuring and preserving predictable and reliable law regarding contract enforcement and contractual risk allocation in South Carolina. Amici’s brief will assist the Court by showing that the decisions of the Court of Appeals and the circuit court in this case departed from binding precedent from the South Carolina Supreme Court,

see South Carolina Electric & Gas Co. v. Utilities Construction Company, 244 S.C. 79, 135 S.E.2d 613 (1964), and the policy concerns expressed therein, *see Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 763 S.E.2d 19 (2014) (explaining the policy rationale for the holding in *South Carolina Electric & Gas Co.*), and further explain that the decisions below misconstrued the holding of *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).

Amici's brief will also show that this misapprehension by Court of Appeals of binding precedent in South Carolina regarding contractual indemnity also caused the Court of Appeals to misconstrue contract terms that are widely-used in the construction industry and to rule that BFS's subcontract agreements with seven different subcontractors are unenforceable in South Carolina due to their unconscionability, thereby making findings of unconscionability regarding business-to-business contracts to a degree never seen in South Carolina and doing so without following the established legal framework regarding an unconscionability analysis.

The opinion of the Court of Appeals has created a conflict in contract law in South Carolina, which has caused confusion and uncertainty regarding enforcement of risk-allocation and risk-transfer provisions in construction contracts in accordance with long-standing principles of contract law and industry norms. Additionally, the legal framework employed by the Court of Appeals encourages motions for summary judgment seeking interpretation of contract provisions as applied to hypothetical factual scenarios—in essence, to obtain advisory contract interpretations, and this is unsound policy as it will result in a strain on judicial resources, both in the motion practice and the appeals that would follow any order granting the motions, and will cause the other litigants in the case to incur significant delays before the case is called to trial while these hypothetical contract interpretations are appealed.

Given their broad experience with these issues, which will continue to arise very frequently given the typicality of BFS's contract terms and claims at issue in this appeal, Amici are well situated to aid the Court by providing their perspective on these issues.

CONCLUSION

Because Amici have an identifiable interest in this matter satisfying South Carolina Appellate Court Rule 213, Amici respectfully ask that the Court grant this motion and accept Amici's accompanying brief which is conditionally filed herewith.

s/ Taylor H. Stair

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*Attorneys for Amici Curiae The National Association of
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Oct 08 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
The Honorable Jennifer B. McCoy
Circuit Court Judge

Circuit Court Case No. 2016-CP-10-03783

Court of Appeals Case No. 2021-001050
Opinion No. 6099 (S.C. Ct. App. filed Feb. 12, 2025)

Appellate Case No. 2025-001224

The Retreat at Charleston National County Club Home Owners Association, Inc., and
The Retreat at Charleston National Country Club Horizontal Property Regime.....Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollo Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliverira Construction, LLC; Solesmar Jesus De Oliverira; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado Defendants

Builders FirstSource-Southeast Group, LLC.....Third-Party Plaintiff, Appellant,

v.

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

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

**RESPONDENTS ECC CONTRACTING, LLC'S, EAST COAST CARPENTRY,
PALMETTO TRIM AND RENOVATION, AC CONSTRUCTION, INC., WS
CONTRACTORS, LLC, HURLEY SERVICES, LLC, AND POHLMAN QUALITY
EXTERIORS' OPPOSITION TO THE NATIONAL ASSOCIATION OF
HOMEBUILDERS AND THE HOME BUILDERS ASSOCIATION OF SOUTH
CAROLINA'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

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INTRODUCTION

Respondents, ECC Contracting, LLC, East Coast Carpentry, Palmetto Trim and Renovation, Hurley Services, Inc., AC Construction, Inc., WS Contractors, LLC, and Pohlman Quality Exteriors, Inc., (collectively the “Respondents”), oppose the Motion for Leave to file Amicus Curiae brief filed by the National Association of Home Builders (“NAHB”) and the Home Builders Association of South Carolina (“HBASC”). The motion filed by NAHB and HBASC should be denied because the proposed amicus brief merely restates the legal arguments made by Appellant, Builders FirstSource-Southeast Group (“BFS”), offers no unique information or perspective that has not or could not be raised by BFS itself, and NAHB and HBASC attempt to enter this matter as an advocate rather than as a neutral friend of the Court.

ARGUMENT

Rule 213 of the South Carolina Appellate Court Rules governs the filing of amicus curiae briefs. Rule 213 provides, in part, that:

A brief of an amicus curiae may be filed only by leave of the appellate court granted on motion, or at the request of the appellate court. The brief may be conditionally filed with the motion for leave to file. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. The brief shall be limited to argument of the issues on appeal as presented by the parties.

Rule 213, SCACR.

The traditional and long-held role of an amicus curiae is to “advise the judge of law not already known to the judge or brought to his attention by the parties.” See 16 S.C. Jur. Brief of Amicus Curiae § 2. As such, a desirable brief, brings matters to the Court’s attention that have not been, and could not be, fully explored by the parties. Conversely, leave should be denied when the proposed brief is merely repetitive, or when the amicus curiae act as an advocate for one party.

In this case, NAHB and HBASC's proposed amicus brief merely reiterates and extends BFS's arguments and seeks the same outcome through nearly identical reasoning. NAHB and HBASC's proposed amicus brief reveal that they are not an impartial friend of the court, but, rather, a proxy for BFS. Grant NAHB and HBASC's motion would prejudice the Respondents by effectively allowing BFS and its allies two briefs or double the page limits. For the reasons set forth below, NAHB and HBASC's Motion for leave to file an amicus curiae brief should be denied.

I. THE NATIONAL ASSOCIATION OF HOMEBUILDERS AND THE HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA'S PROPOSED AMICUS BRIEF IS DUPLICATIVE OF BFS'S ARGUMENTS

Although NAHB and HBASC identify their general industry interest in this case, they fail to distinguish their arguments from those already advanced by BFS in any substantive way. A proper amicus brief will bring matters to the court's attention that have not been fully explored by the parties. See, 16 S.C. Jur. Brief of Amicus Curiae § 2 ("At common law, the role of an amicus curiae was to advise the judge of law not already known to the judge or brought to his attention by the parties."); see, e.g., Sup. Ct. R. 37.1 (stating that an amicus brief should bring a relevant matter not addressed by the parties to the Court's attention and that lack of purpose is a burden to the Court). NAHB and HBASC's proposed amicus brief is, in reality, a repackaged version of BFS's legal arguments.

NAHB and HBASC contend that their brief will assist the Court by focusing on the following legal challenges to the Court of Appeals' Opinion: (1) misapplication and departure of indemnity precedent; (2) misinterpretation of the Concord and Cumberland decision; and (3) improper unconscionability framework. But these are the very issues which have been fully and vigorously briefed by BFS and Respondents. The proposed amicus brief adds nothing new for the Court's consideration. NAHB and HBASC cite the same precedent highlighted by BFS,

occasionally substituting a different case or example, but ultimately advancing a legal analysis that is functionally identical. To the extent the proposed amicus brief includes a case not found in BFS's Petition for a Writ of Certiorari, the point is cumulative, not additive, and could have easily been raised by BFS in its own briefs. See Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 545 (7th Cir. 2003) ("While the amicus briefs sought to be filed in this case contain a few additional citations not found in the parties' briefs and slightly more analysis on some points, essentially they cover the same ground the appellants, in whose support they wish to file, do.").

Moreover, despite claiming industry-wide impact, NAHB and HBASC fail to supply any real-world examples, data, or substantive analysis regarding the effect the Court of Appeals' decision will have on the construction industry. This case is particular to BFS's subcontractor agreement. The absence of supporting evidence underscores that their proposed amicus brief merely reiterates BFS's position, offering the same broad policy assertions already advanced by BFS.

NAHB and HBASC's motion and proposed brief presuppose that there is a possibility of a finding that Respondents were solely negligent in this case, such that BFS may recover from them in indemnity. There is no potential for such an outcome in this case. This case does not involve the types of relationships involved in the two cases NAHB and HBASC focus on, South Carolina Electric & Gas Co. v. Utilities Construction Company, 244 S.C. 79, 135 S.E.2d 613 (1964) (owner of electric utility franchise and contractor) and Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 409 S.C. 487, 763 S.E.2d 19 (2014) (former owner of property and current owner). The relationship between the parties here is subcontractor (BFS) and sub-subcontractor (Respondents); moreover, BFS is a licensed general contractor whereas most of Respondents are unlicensed

contractors.¹ Whereas a property owner has no hand in construction activities, an upstream contractor does, particularly where the upstream contractor is a licensed general contractor utilizing unlicensed subcontractors. A general contractor bears independent and concurrent liability to a property owner for construction defects.

The settlements among the parties to the underlying case and this appeal underscores the fact that BFS is seeking to be indemnified against its own negligence, prohibited by the Anti-Indemnity Statute, S.C. Code Ann. §32-2-10, or for its concurrent negligence, unsupported by its subcontractor agreement due to its failure to satisfy the “clear and unequivocal” standard. Respondent WS Contractors, LLC (“WSC”), for example, settled with plaintiffs in this matter and in doing so procured an issue release in favor of BFS. BFS has not and cannot bear any liability to plaintiffs on account of WSC’s negligence. In continuing to pursue indemnity from WSC in light of this settlement, BFS is necessarily seeking to be indemnified for its sole negligence which is not permitted under South Carolina law. This is not a position home builder associations should support, but, more importantly, it is a situation that the Legislature has said will not stand in South Carolina.

Not only are the primary cases which the proposed amicus curiae cite distinguishable, but also, they fail to address the full scope of the Court of Appeals’ Opinion, notably omitting any discussion on the Court of Appeals’ ruling on South Carolina’s Anti-Indemnity Statute, S.C. Code Ann. §32-2-10. This is further evidence that NAHB and HBASC’s contribution serves only as an unnecessary distraction from the primary arguments presented by the parties to this appeal.

¹ BFS bears full responsibility for any violations of the building code by its unlicensed subcontractors. S.C. Code Ann. §40-11-270(E) (“(E) Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee’s licensure group and license classification or subclassification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.”).

Furthermore, they spend an unnecessary amount of time arguing that the authors of the Concord & Cumberland opinion at both the Circuit Court and Court of Appeals have misinterpreted their own opinions.²

The role of amicus curiae is not to bolster a party's arguments, but to assist the Court by offering perspectives unavailable from the parties themselves. In this instance, the proposed brief submitted by NAHB and HBASC constitutes partisan advocacy that merely reiterates BFS's arguments. As courts have recognized, amicus briefs that merely duplicate a party's arguments "are an abuse" and add no value to judicial decision-making. See Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997). For the reasons stated above, the Respondents oppose NAHB and HBASC's Motion for leave to file an amicus curiae brief. The proposed brief does not offer independent or objective analysis that would aid the Court's considerations of the issues; rather, it functions as an additional advocacy brief for BFS under the guise of an amicus submission. Accordingly, NAHB and HBASC's Motion for leave to file an amicus curiae brief should be denied.

II. THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA ARE ADVOCATES OF BFS, NOT A FRIEND OF THE COURT

The Latin phrase *amicus curiae* means "friend of the court," not "friend of a party." Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974). At common law, the role of an amicus was to assist the court by presenting legal insights not otherwise raised by the parties. *See* 3B C.J.S. Amicus Curiae § 1 (explaining that an amicus provides neutral information "on some matter of law in regard to which the court might be doubtful or mistaken" rather than offering "a highly

² Judge Newman was the author of the Concord and Cumberland opinion at the Circuit Court level and the original Circuit Court opinion in the Builders First Source v MI Windows & Doors, et al., which is the basis of the Collateral estoppel ruling in this case. Judge Thomas was the author of the Concord and Cumberland Court of Appeals opinion and a concurring member of the Panel on this opinion.

partisan account of the facts”). Courts consistently reject amicus briefs that function as partisan advocacy rather than neutral assistance. See Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1063 (7th Cir. 1997) (“The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such amicus brief should not be allowed. They are an abuse.”); see also, United States v. Michigan, 940 F.2d 143, 164-65 (6th Cir. 1991) (defining a true amicus as “an *impartial* friend of the court – *not an adversary party in interest in the litigation*”).

The NAHB and HBASC are not friends of the Court; they are friends of BFS. BFS is a member of all local homebuilder associations in South Carolina:

The Charleston Homebuilders Association³

The Hilton Head Home Builders Association⁴

Horry Georgetown Builders Association⁵

The Building Industry Association of Central South Carolina (BIA), formerly the Home Builders Association of Greater Columbia⁶

The Homebuilders Association of Greenville⁷

All of which are affiliated with the National Association of Home Builders (NAHB) and the Home Builders Association of South Carolina (HBASC)⁸. Further as the Horry County Home Builder’s Association explains on their website, “Membership in the Horry Georgetown Home Builders Association is \$550.00. **This amount enrolls you as a member in three associations, HGHBA, Home Builders Association of South Carolina (HBA of SC) and the National**

³ [https://business.hbacharleston.com/list/member/builders-firstsource-923#:~:text=4451%20Arco%20Lane%20N%20Charleston,\(843\)%20696%2D8473](https://business.hbacharleston.com/list/member/builders-firstsource-923#:~:text=4451%20Arco%20Lane%20N%20Charleston,(843)%20696%2D8473)

⁴ <https://database.hhahba.com/list/member/builders-firstsource-2153#:~:text=Categories,www.blldr.com>

⁵ <https://hghba.com/directory/>

⁶ [https://business.biaofcentralsc.com/list/member/builders-firstsource-79340#:~:text=1827%20Augusta%20Hwy%20Lexington%20SC,\(803\)%20957%2D4362](https://business.biaofcentralsc.com/list/member/builders-firstsource-79340#:~:text=1827%20Augusta%20Hwy%20Lexington%20SC,(803)%20957%2D4362)

⁷ <https://members.hbaofgreenville.com/directory/Details/builders-first-source-2249277>

⁸ HHI: <https://hhahba.com/about-us/>

CHS <https://www.hbacharleston.com/meet-the-team/>

Columbia: <https://biaofcentralsc.com/about-the-bia/>

Greenville: <https://hbaofgreenville.com/affiliations/>

Association of Home Builders (NAHB). Staff members on all three levels are available to help you with your professional needs.”⁹

Here, NAHB and HBASC are clearly aligned with BFS. Their proposed brief mimics BFS’s arguments so closely that it could just as easily have been authored by BFS’s counsel. They expressly seek the same goal and relief—the Supreme Court to grant Writ of Certiorari and reverse the Court of Appeals’ decision—using nearly identical legal reasoning. By doing so, they reveal themselves as partisans advocating for BFS, not neutral amici offering independent assistance or objectively discussing the issues in this appeal.

While NAHB and HBASC claim to be concerned with preserving established principles of contract law and risk allocation mechanisms in the construction industry, their proposed amicus brief is a one-sided argument in favor of BFS. Courts have made clear that when an amicus acts as an advocate for a litigant rather than as an impartial advisor, leave to file should be denied. See Leigh v. Engle, 535 F.Supp 418, 420 (N.D. Ill. 1982) (“if the proffer comes from an individual with a partisan, rather than impartial view, the motion for leave to file an amicus brief is to be denied, in keeping with the principle that an amicus must be a friend of the court and not a friend of a party to the cause.”). Permitting NAHB and HBASC to file a proposed brief that is indistinguishable from BFS’s legal analysis transforms the amicus role into a lobbying tool rather than an instrument of judicial assistance. Their submission is neither neutral nor independent. It is, instead, a biased brief disguised as an amicus filing that merely serves to strengthen positions already advanced by BFS. This Court already has access to the relevant legal principles and industry standards through the parties’ briefs, making NAHB and HBASC’s participation unnecessary for this Court’s full understanding of the issues at stake in this specific dispute.

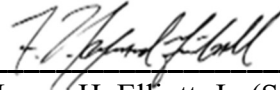
⁹ <https://hghba.com/membership/>

Because NAHB and HBASC's proposed amicus curiae brief is duplicative, partisan, and devoid of any neutral assistance to the Court, they do not qualify as proper amici. As such, their Motion for Leave to File an Amicus Curiae Brief should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the National Association of Home Builders and Home Builders Association of South Carolina's Motion for Leave to File Amicus Curiae Brief.

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

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.; America 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; Liollo 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.

**THE NATIONAL ASSOCIATION OF HOME BUILDERS’ AND THE
HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA’S
REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICI CURIAE**

The National Association of Home Builders (“NAHB”) and the Home Builders Association of South Carolina (“HBASC”) (“collectively “Amici”) filed a Motion for Leave to File an Amicus Curiae Brief, together with a conditional proposed amicus curiae brief, on September 2, 2025. On October 8, 2025, Respondents filed a return, arguing that Amici’s motion should be denied because their proposed amicus brief merely restates the legal arguments made by Appellant Builders FirstSource-Southeast Group (“BFS”) and offers no unique information or perspective that has not or could not be raised by BFS. Pursuant to Rule 240(f), Amici file this reply to show that Respondents’ opposition misconstrues both the role of an amicus curiae and the substance of Amici’s proposed brief. Accordingly, the Court should reject Respondents’ argument and grant Amici’s motion for leave to file an amicus brief.

I. Respondents’ Position Conflicts with the Governing Rules.

As an initial matter, Respondents’ argument that Amici’s motion should be denied because their arguments are too similar to the arguments of BFS is inconsistent with Rule 213 of the South Carolina Appellate Court Rules. Rule 213 expressly provides that an amicus brief must be “limited to argument of the issues on appeal as presented by the parties.” Thus, the mere fact that Amici address the same legal issues as BFS, and even if some of Amici’s arguments are the same or similar to a party in the case, this should not serve as a basis to deny the motion. If the Court adopted Respondents’ argument, it would effectively preclude nearly all amicus briefs, as amici must necessarily address the same issues already before the Court.

II. Amici's Proposed Brief Would Serve the Intended Purpose of an Amicus Brief.

Respondents themselves acknowledge, citing 16 S.C. Jur. Brief of Amicus Curiae § 2, that a function of an amicus curiae is to “advise the judge of law not already known to the judge or brought to his attention by the parties” and that “a desirable [amicus] brief . . . brings matters to the Court’s attention that have not been . . . fully explored by the parties.” This is precisely what Amici seek to do.

While Amici’s brief complies with Rule 213 by limiting its arguments to the issues presented on appeal, it also identifies caselaw not addressed or fully explored by the other parties in the case and explains that the Court of Appeals’ decision conflicts with long-standing case law of the Supreme Court of South Carolina (referring to *South Carolina Electric & Gas Company v. Utilities Construction Company*, 244 S.C. 79, 135 S.E.2d 613 (1964), and as more recently interpreted and endorsed in *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 763 S.E.2d 19 (2014)). As a result, Amici’s position is that the Court of Appeals’ decision created inconsistency and conflict in South Carolina law regarding contractual indemnity. Neither the Appellant (BFS), nor the Respondents cited or discussed *South Carolina Electric & Gas Company v. Utilities Construction Company*, 244 S.C. 79, 135 S.E.2d 613 (1964), or this aspect of *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 763 S.E.2d 19 (2014), in their submissions to this Court.

Accordingly, Amici’s proposed brief fulfills the precise purpose of a “desirable” amicus filing by alerting the Court to controlling precedent that bears directly on the issues presented that has not been fully explained or explored by the other parties in the case.

III. The Dispute Over the Merits of Amici’s Arguments Highlights the Need for the Amicus Brief.

In their return, Respondents argue (albeit briefly) that *South Carolina Electric & Gas Company v. Utilities Construction Company*, 244 S.C. 79, 135 S.E.2d 613 (1964) and *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 763 S.E.2d 19 (2014), are materially distinguishable from this case. This only underscores the need for Amici’s participation in this appeal. Amici respectfully disagree with Respondents’ characterization, but that disagreement illustrates why this issue, one with significant ramifications for contractual indemnity and risk allocation across South Carolina, should be addressed fully in the briefs briefing rather than summarily in a few sentences opposing Amici’s motion for leave to file.

IV. Amici Offer Perspectives Unavailable from the Parties

Respondents’ Return acknowledges that one role of an amicus curiae is to “assist the Court by offering perspectives unavailable from the parties themselves.” Amici’s proposed brief does exactly that.

NAHB is a nonprofit trade association representing approximately 140,000 builders and associate members through roughly 700 affiliated state and local associations nationwide, including 15 in South Carolina. HBASC is the largest residential construction trade association in South Carolina, representing approximately 3,500 members, including contractors, subcontractors, developers, and other related occupations that build and develop houses, apartments, and condominiums in South Carolina.

When Amici explain that the Court of Appeals’ decision threatens to “disrupt foundational risk-allocation mechanisms widely used in the construction industry,” they provide an industry-wide perspective unavailable to the parties. Similarly, when Amici note that the contract terms deemed unconscionable by the Court of Appeals are “standard, business-to-business indemnity

provisions” used throughout the construction industry, they present a broader view of the decision’s potential impact, one that cannot be offered by the parties.

V. Amici Have No Direct Stake and Seek Only to Aid the Court

Amici’s participation is also meaningful because, unlike the parties, they have no direct financial interest in the outcome of this case. Instead, Amici were compelled to mobilize and incur legal fees to file their motion and proposed amicus brief to bring to the Court’s attention how the Court of Appeals’ decision would affect the broader construction industry in South Carolina. This independence enhances the credibility of their views. Even if the parties purport to make similar arguments, these, in contrast, may be discounted as self-interested advocacy. Amici’s motives are instead aligned with assisting the Court’s understanding of industry context and potential implications.

VI. Respondents Will Suffer No Prejudice

Respondents claim of prejudice is unfounded. They argue that allowing Amici to file would effectively expand BFS’s briefing page limits. The opposite is true. Under Rule 213, if the Court grants leave, it will specify the period during which any response to the amicus brief may be filed. Because there are seven Respondents, each may respond separately if desired. Thus, far from prejudicing Respondents, granting leave provides them with an opportunity for additional responsive briefing, if they so desired.

//

//

CONCLUSION

Because Amici have an identifiable interest Under Rule 213 and because their proposed brief fulfills the purpose of an amicus brief filing, as explained by 16 S.C. Jur. Brief of Amicus Curiae § 2, Amici respectfully request that the Court grant their motion and accept Amici's accompanying brief conditionally filed with its motion on September 2, 2025.

s/ Taylor H. Stair

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Home Builders and the Home Builders Association of South
Carolina*

The Supreme Court of South Carolina

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; Liollo Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveira; 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.

Appellate Case No. 2025-001224

ORDER

The motion for leave to file a brief as Amicus Curiae on behalf of The National Association of Home Builders and The Home Builders Association of South Carolina is granted. The brief accompanying the motion is accepted as filed and ten bound copies are to be filed within 10 days of the date of this order.


FOR THE COURT C.J.

Verdin, J., not participating.

Columbia, South Carolina
November 18, 2025

cc: Kevin W. Mims
William Chase McNair
John Barnwell Fishburne, Jr.
Stephen P. Hughes
William Hewitt Cox, III
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Francis Heyward Grimball
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Michal Kalwajtys
Payton Dwight Hoover
Edward Glenn Elliott
Jennifer Sue Ivey
John Phillips Linton, Jr.
Weldon Lucas Coates

The Supreme Court of South Carolina

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 Oliveira; 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,

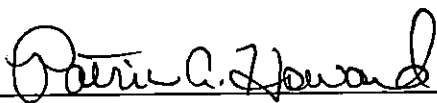
Of which Palmetto Trim and Renovation; Hurley
Services, LLC; ECC Contracting, LLC; East Coast
Carpentry; AC Construction, Inc.; WS Contractors, LLC;
Pohlman Quality Exteriors, Inc.; and L&G Construction
Group, LLC are the Respondents.

Appellate Case No. 2025-001224

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted as to
Petitioner's Questions 1–4 and Petitioner's Question 6 and denied as to Petitioner's
Question 5. The parties shall proceed to serve and file ten additional copies of the
appendix and ten copies of their briefs in the manner provided by Rule 242(i),
SCACR.

FOR THE COURT

BY 
CLERK

Verdin, J., not participating

Columbia, South Carolina
December 16, 2025

cc:

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The Honorable Jenny Abbgott Kitchings

RECEIVED

Jun 20 2025

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. 2021-001050
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; Liollo
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.

PETITION FOR WRIT OF CERTIORARI

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Certification

Counsel for the Petitioner certifies that the petition for rehearing was made and finally ruled upon by the court of appeals on May 21, 2025.

Questions Presented

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?
5. Does S.C. Code Section 32-2-10 by its specific provisions apply only to agreements in indemnification, and does its silence regarding attorneys' fees reflect both legislative intent and a common law imperative that attorneys' fees do not fall within the scope of Section 32-2-10?

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

The court of appeals' opinion, in applying a heightened standard to review of contractual provisions imposing obligations to indemnify against the negligence of the indemnitor, establishes new and unprecedented law governing contractual relationships, disrupting well-settled South Carolina precedent regarding risk allocation between parties. In departing from established decisions, the opinion creates legal uncertainty that extends far beyond this case, casting doubt on the enforceability of standard indemnity provisions across the entire construction industry. The indemnity provisions at issue – based on a standard AIA indemnity provisions used industry-wide – have historically been upheld under general contract principles. Never before has South Carolina law required that contract provisions, imposing the obligation to indemnify against liability for damages occasioned by the negligence of the indemnitor, meet a heightened "clear and unequivocal" standard to be enforceable. Yet, for the first time, the court of appeals applies that heightened standard and ignores Supreme Court precedent setting forth general principles of contract construction. This shift effectively renders standard indemnity provisions unenforceable, leaving contractors unable to recover from negligent subcontractors and forcing them to bear the costs of others' mistakes. Subcontractors, in turn, avoid accountability for their own negligence. The consequences are sweeping: two of the contracts at issue date back to 2005 – now, at-least two decades of construction work is implicated by the Opinion. Petitioner does not believe the court of appeals intended to rewrite industry norms and accordingly asks this Court to grant review.

Retreat at Charleston National Appeal

This appeal is the result of a long and complex construction defect litigation originally filed by the Plaintiffs on July 22, 2016. [R. 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. [Id.].

The Plaintiffs' claims, as asserted against Builders FirstSource – Southeast Group, LLC (“BFS” or “Petitioner”), allege, among other contentions, that the framing and window installation services of Petitioner were deficient, resulting in water intrusion and corresponding damages. [R. 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. [R. pp. 1107, 1108, 11110].

Petitioner contracted with several subcontractors who performed the allegedly defective installation work at the project. Therefore, Petitioner filed cross-claims or third-party claims, against its subcontractors, including: ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co¹, LLC, AC Construction Corp and/or AC Construction Inc., L&G Construction

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.

Group, LLC, WS Contractors, LLC, Pohlman Quality Exteriors, Inc., Palmetto Trim and Renovations, LLC, Edward Bruce Witham², and East Coast Carpentry Company. [R. pp. 414-454]. The claims of Petitioner included causes of action in negligence, breach of express and implied warranty, breach of contract, contractual indemnity and equitable indemnity. [Id.].

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. [R. pp. 1386-1450]. Each subcontractor argued its own motion, and the arguments forming the basis for the different motions varied from subcontractor to subcontractor. [Id.]. On May 10, 2021, Judge McCoy issued seven³ separate Form 4 Orders granting, or granting in part, summary judgment to the subcontractors, and requesting that *each* subcontractor submit its own proposed order. [R. pp. 1-19]. 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, the lower court issued orders granting, in part, summary judgment to: ECC Contracting, LLC; AC Construction; Hurley Service, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction. [R. pp. 22-41, 58-83, 102-121]. On July 26, 2021, the trial court issued an order granting, in part, summary judgment to Palmetto Trim and Renovations. [R. pp. 50-57]. On July 29, 2021, the trial court issued orders granting, or, granting in part, summary judgment to: East Coast Carpentry; and WS Contractors. [R. pp. 42-49, 84-101].

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.

³ For reasons that are unclear to Appellant, the lower court never issued an initial Form 4 Order addressing L&G's motion. It did, however, ultimately grant partial summary judgment to L&G in an order dated July 7, 2021.

Petitioner timely moved for reconsideration of each of the eight orders. [R. pp. 1208-1387]. On August 23, 2021, the trial court issued eight Form 4 Orders denying each of Petitioner's motions for reconsideration. [R. pp. 122-145]. Petitioner 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 court of appeals advised the parties to this action that it had consolidated the eight appeals filed by Petitioner. Petitioner 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. Petitioner'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. Petitioner 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. This petition for writ of certiorari follows.

Argument

I. In a marked departure from the Rules of Civil Procedure and common law precedent, the court of appeals held that Petitioner's general claim for contractual indemnification did not encompass a claim specifically for damages caused by the subcontractor's sole or concurrent negligence.

The first step in analyzing this case is identifying what type of contractual indemnification claim is before the court. It is well established that if a party seeks to recover for its own negligence, the language of the contract on which it relies for such recovery must articulate that right to recovery clearly and unequivocally. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). However, all other recovery in contractual indemnification – including the right to

recover from a subcontractor for that subcontractor's own negligence, whether sole or concurrent – is analyzed only in accordance with the rules of contractual interpretation generally; that is to say, the heightened "clear and unequivocal" standard does not apply. Id.

Thus, the issue here is the extent of the indemnity sought by the Petitioner: a) whether this Petitioner is seeking recovery for the subcontractors' negligence; b) solely for its own negligence; or c) potentially for both types of negligence. The answer to that question will determine the appropriate standard or standards to apply to the parties' contract.

Petitioner pled that if Petitioner were to be found liable to Plaintiff in the underlying action, that such liability would be the result of damages caused by its subcontractors. [R. pp. 440-41, 447-449]. It then pled that it was entitled to full indemnification for any amounts for which it was found to be liable to the Plaintiffs (i.e., if Petitioner is liable, it is due to the defective work of Petitioner's subcontractors, so if Petitioner is found liable for the acts or omissions of its subcontractors, then Petitioner's subcontractors are required to indemnify the Petitioner against such liability). [Id.]. The court of appeals held that because Petitioner sought indemnification for "any" amounts for which it may be liable, it was seeking indemnification for its own negligence. [Opinion p. 21]. Because the court dismissed the entire contractual indemnity claim on this ground, the implicit holding was that Petitioner sought recovery *only* for its own negligence, and somehow, in seeking recovery for "any" sums, Petitioner was *not* also seeking recovery for the negligence of its subcontractors.

Contrary to the determination of the court of appeals, Petitioner's pleadings, read in context, in fact *only* seek recovery for the alleged negligence of the subcontractors. Moreover at every stage of this litigation, Petitioner has insisted on the record that it is seeking recovery only for damages occasioned by its subcontractors' negligence. But even under the least generous

reading, “any” amounts cannot be determined inherently to exclude amounts that are attributable to the subcontractor’s negligence. When Petitioner is seeking recovery for “any” amounts, the use of the word “any” is meant in the sense of its definition: “used to express a lack of restriction in selecting one of a specified class.” The particular recovery is unrestricted: “any” amounts could be those amounts attributable to any source of negligence – whether by Petitioner or by Petitioner’s subcontractors, or by the concurrent negligence of both parties. By this Petition, Petitioner seeks the ability to pursue those claims against its subcontractors for the subcontractor’s negligence.

A. The court of appeals’ interpretation of Petitioner’s pleadings is in direct conflict with the Rules of Civil Procedure promulgated by this Court.

Failing to find that a cause of action, which seeks indemnity against the subcontractors, also encompasses claims arising from the negligence of those subcontractors (whether sole or concurrent) flies in the face of the rules for pleadings outlined in Rule 8 of the South Carolina Rules of Civil Procedure. For example, Rule 8(f) requires that pleadings be construed “as to do substantial justice to all parties.” The most just outcome in this case is one that allows Petitioner to seek recovery against its subcontractors for the negligent work of the subcontractors.

As this Court is aware, the purpose of the new pleading rules, effective July 1, 1985, was to move to a system of notice pleading. Petitioner’s pleadings were sufficient to place the subcontractors on notice that Petitioner was seeking damages from its subcontractors for the subcontractors’ negligence. Moreover, 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 they are entitled to.

Rule 8(a) allows a party to plead alternative theories of recovery. Rule 8(e)(1) requires parties to be concise, and Rule 8(e)(2) promotes conciseness by allowing parties to plead such alternative theories of recovery in the same count. Notably, when “one of [the theories] if made

independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.” S.C. R. Civ. P. 8(e)(2).

In seeking recovery of “any” amounts, Petitioner maintains it sought recovery only for the negligence of its subcontractors. However, even assuming the Court adopts a broader interpretation of Petitioner’s pleadings, it must acknowledge that “any” amounts, if it includes amounts resulting from Petitioner’s negligence, must equally encompass amounts resulting from the subcontractor’s negligence, whether sole or concurrent. Petitioner’s pleading, then, becomes an implicit pleading of alternatives, seeking recovery for “any” amounts – whether from Petitioner’s negligence, or, alternatively, from the negligence of the subcontractors.

Under Rule 8(e)(2), even if Petitioner fails on its alleged plea to recover for its own negligence, the alternative plea for damages related to the negligence of the subcontractor remains fully intact. Rather than adhering to the Rules of Civil Procedure and honoring the remaining claim, the court of appeals, contrary to the Rules, dismissed the plea for recovery for the subcontractor’s negligence merely because it found that the alternative claim for recovery for Petitioner’s own negligence could not stand.

Because the court of appeal’s Opinion contradicts the Rules promulgated by this Court, this Court should grant certiorari to correct the misapplication of Rule 8.

B. The court of appeal’s interpretation of Petitioner’s pleadings is in direct conflict with prior precedent.

This is not the first time that a contractor has sought complete contractual indemnification from its subcontractors before the appellate courts. In Concord & Cumberland, whose analysis on the merits will be discussed in greater detail below, a contractor sought recovery from its subcontractor in contractual indemnity for damages caused by both the contractor *and* the subcontractor. It pled:

104. Superior [the contractor] 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.

(emphasis added). Notably, the general contractor did not limit its contractual indemnity claims against the subcontractors. In moving for partial summary judgment, it explicitly sought recovery in indemnity against liability for damages occasioned by *both* the negligence of its subcontractor, and the negligence of the general contractor itself.

Petitioner draws this Court's attention to the way that the court of appeals in Concord & Cumberland handled the general contractor's claim for relief. The court ultimately allowed the general contractor to proceed to seek recovery for its subcontractor's negligence while dismissing the claim to the extent that it purported to seek recovery for the general contractor's own negligence. The Concord & Cumberland Court clearly recognized two types of claims present in the general contractual indemnification pleading: a claim for indemnity for damages to the extent caused by the general contractor itself and a claim for indemnity for damages to the extent caused by the subcontractor - even if such subcontractor's negligence is concurrent with the negligence of the general contractor. Here, the court of appeals, contrary to its own precedent, failed to distinguish these two types of claims in Petitioner's very similar pleadings. The effect is a completely contrary result to the one in Concord & Cumberland, where in this case Petitioner is precluded from *any* recovery in contractual indemnity, even if the jury determines that the subcontractors have been solely or concurrently negligent in causing the damages at issue.

II. The court of appeals failed to follow precedent when it erroneously applied the heightened "clear and unequivocal" standard to Petitioner's contractual indemnification claim seeking recovery of damages resulting from the subcontractors' negligence.

- A. In applying the heightened "clear and unequivocal" standard to Petitioner's claims seeking indemnity for the subcontractors' negligence, the court of appeals ran afoul of this Court's precedent.

South Carolina has 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). Our courts also recognize the basic rule that when a party seeks to be indemnified from its own negligent acts, 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, including Concord & Cumberland.

In Concord & Cumberland, Superior was a general contractor who hired Muhler as its subcontractor. When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to their contract. Superior claimed that the contractual provisions required Muhler to indemnify Superior, and that Superior’s right to indemnity included not only damages occasioned by Muhler’s negligence, but also liability for the negligence of Superior itself. Id. at 645. Muhler countered that the contract did not require it to indemnify Superior for Superior’s wrongdoing. 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. at 649. The court of appeals noted that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence (but notably not for Muhler's sole or concurrent negligence). Id.

Because the court 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.*" Concord & Cumberland at 645 (emphasis added). 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 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, not only did the Concord & Cumberland Court recognize that Superior's claims for contractual indemnification 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, but the court then also separately analyzed the two types of claims: 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 – it then applied the analysis used with contracts generally (i.e., *not* the heightened standard), and under such analysis the court allowed Superior to recover for damages caused by its subcontractor (regardless of whether Muhler's negligence was sole or concurrent).

The court of appeals in this case, under factual circumstances nearly identical to those presented in Concord & Cumberland, has nonetheless reached a diametrically opposed result. Rather than apply the heightened “clear and unequivocal” standard only to the portion of claims allegedly seeking recovery for Petitioner’s own negligence, the court applied the heightened standard to *every* contractual indemnity claim – including Petitioner’s claim to recover for the negligence of its subcontractors. Applying the heightened standard, the court then determined that Petitioner’s contractual indemnity claims failed as a matter of law, because the contractual provisions were not sufficiently clear and unequivocal to pass the heightened test. Such a broad application of the “clear and unequivocal” standard is contrary to established law, including the court’s own precedent.

Remarkably, the court of appeals in this case considered Concord & Cumberland to be good law, while simultaneously maintaining that the result it reached in this case – which is completely opposite that in Concord & Cumberland – is *also* good law. The two cases cannot stand simultaneously as precedent. Among the purposes of precedent is to protect those who have taken action in reliance on a past decision, to require that like cases be decided in a like manner, and to contribute to the integrity of the judicial process. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64, 142 S. Ct. 2228, 2261–62 (2022). Each of these aims is undermined if both Concord & Cumberland and the court of appeal’s opinion in this case are allowed to stand.

Nowhere did the court of appeals in this case attempt to distinguish its holding from that in Concord & Cumberland, and nowhere did the court criticize its previous analysis, its holding, or its results. Nonetheless, the court’s unexplained deviation has implicitly rejected established and recognized precedent regarding fundamental principles of contractual indemnity. See Coleman v. Page's Est., 202 S.C. 486, 25 S.E.2d 559, 560 (1943)(A decision which is to overrule

all former precedents and to establish a principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside.)

Unless the Supreme Court weighs in, the result of these two opinions is that the legal landscape will be filled with instability, unpredictability, and confusion regarding how to proceed in a situation where appellate courts are divided over whether or not a party may recover from its subcontractor in contractual indemnity for that subcontractor's negligence.

- B. The Supreme Court should take this case because the consequence of allowing the ruling of the court of appeals to stand will upend the entire construction industry in ways the court never intended.

The court of appeal's opinion creates new and unprecedented law governing contractual relations between parties. Specifically, it unsettles established South Carolina law regarding the allocation of risk between contractors and their subcontractors, and it upends the recognized contractual requirements for indemnity provisions. In ignoring and abandoning precedential cases, such as Laurens, Ashley II, and Concord and Cumberland, the court of appeal's opinion has effectively created new and harmful law that will cause turbulence to the relationships of parties far beyond this case; virtually every contract currently in effect in the industry is now subject to challenge and left potentially without support.⁴

The contractual indemnity provisions to which the court of appeals applied the heightened clear and unequivocal standard in this case are virtually identical to those provisions reviewed by

⁴ See **South Carolina Ruling Has Major Implications on Indemnity Provisions and Collateral Estoppel**
<https://www.idsupra.com/legalnews/south-carolina-ruling-has-major-9011993/>

the court of appeals in Concord and Cumberland, where the court found such provisions to be adequate to support the contractor's claim for indemnity against liability caused by the negligence of its subcontractor – these provisions were not subjected to the clear and unequivocal standard. Moreover, these provisions are based on provisions promulgated by the AIA. This means they are standard terms, and they are present in nearly *every single contract* used in the industry. Never before had a court required these provisions to withstand the heightened clear and unequivocal analysis in order for one party to recover from a second party for that second party's negligence; instead courts analyzed them under the rules governing contracts generally, and under that level of scrutiny, the indemnification provisions were found acceptable. Thus, year after year, they were incorporated into contracts and year after year, serve as the basis for a contractual indemnification claim.

Now, for the first time, the holding of the court of appeals will require that a party's entire contract must meet the clear and unequivocal standard in order for that party to recover in contractual indemnity *at all*. The court of appeals looked at this standard AIA indemnification language and, by this opinion, has already held that this language fails to meet the heightened standard. [Opinion p. 23]. While this opinion stands, no contractor who used AIA language will be able to recover from any negligent subcontractor for that subcontractor's negligence. Contractors will be left to bear the financial burdens of the mistakes of others, and subcontractors who performed negligently will face no consequences. To emphasize the magnitude of the situation, Petitioner points out that one of the contracts at issue to this litigation contains a version of this AIA language that dates back to 2005, which means that nearly 20 years of construction work is implicated in this upheaval.

Petitioner does not believe that the court of appeals intended to create new law or to upend an entire industry. It thus asks that the Supreme Court take this case to clarify (1) that Petitioner has preserved a claim for contractual indemnity for the negligence of its subcontractors; and (2) that this portion of the claim for contractual indemnity is subject only to the general rules of construction for contracts generally, and not to the heightened "clear and unequivocal" standard.

III. The manner in which the court of appeals indefensibly parsed the parties' contract violated the long-established rules of contract interpretation memorialized in the precedential opinions of this Supreme Court.

The court of appeals' misinterpretation of the contract language formed the basis of its holdings, including its holdings that: (1) Petitioner sought recovery only for its own negligence, which it did not have the requisite contractual language to pursue under Concord & Cumberland; (2) Petitioner's right to contractual indemnity ran afoul of Section 32-2-10; (3) the contracts' severance provisions were unenforceable; and (4) the contracts were unconscionable. All of these court of appeals' holdings rely on a misconstrued view of the contract in which both the warranty and the indemnity provisions allegedly permit Petitioner to recover for its own negligence. The court of appeals reached this view of the contracts by isolating provisions of the contracts, some of which are completely irrelevant to the issue in this case, and by refusing to give defined terms their explicit meaning – despite precedent from many Supreme Court cases to the contrary.

"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)). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (quoting McGill, 381 S.C. at 185, 672 S.E.2d at

574). When a contract is unambiguous, a court must construe its provisions according to the terms the parties used and as understood in their plain and ordinary meaning. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

Despite the explicit prohibition against creating an ambiguity by pointing out a single sentence or clause, the court of appeals has done exactly that. It points to the unrelated Warranty provision of the contract, 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 Petitioner, rather than the subcontractor, performed. 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*. [R. pp. 1451, 1464, 1477, 1489, 1501, 1514⁵]. When read with the proper definition, as the parties intended, the Warranty section no longer can be interpreted to require something illicit, and thus, the Warranty section can no longer be the basis of *any* the Court's holdings listed above.

The opinion evidences that the court of appeals failed to give credit to the defined term "Work" as required under the contracts. The court of appeals' failure to do so directly contradicts this Court's precedent on honoring terms used by the parties in the contract. See Schulmeyer, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (explaining courts must interpret a contract "according to the terms the parties used").

⁵ The Record on Appeal does not contain copies of BFS contracts for L&G Constuction and AC Construction, however the contracts are identical in form and content to the "Later Contracts," and why L&G and AC filed motions joining the other parties' motions for summary judgment. See R. pp. 1156, 1205-1207.

In addition to failing to acknowledge defined terms in the contract, the lower court and court of appeals reviewed terms and provisions of the contracts which have absolutely no relevance whatsoever to the claims pending before the court. For example, the court focused on the warranty provisions of the contract despite the fact that there is no *warranty* claim before the court⁶. Further, the court of appeals took issue with a provision within “SECTION 8. Payment to Subcontractor,” when there is no claim or issue regarding payments owed by Petitioner to subcontractors before the court. Moreover, the court of appeals inappropriately considered a provision in “SECTION 5. Indemnification,” that pertains only to bodily injury claims made by an agent, employee or representative of the subcontractor, which is absolutely not at issue or a claim before the court.

The court of appeals in picking and choosing select language from non-relevant provisions to create conflicting terms, directly contradicts this Court’s precedent that a court may not review isolated portions of a contract or single sentences or clauses to create ambiguities. See McGill, 381 S.C. at 185, 672 S.E.2d at 574; Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975); Williams v. Gov’t Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014). Because the court of appeal’s opinion conflicts with this Court’s precedent on basic rules of contract interpretation, this Court should grant certiorari.

IV. The failure of the court of appeals to sever any problematic language in the contract conflicts with this Court’s precedent regarding severance provisions and severability of contracts.

Contrary to the finding of the court of appeals, the contracts, when the terms and provisions are given their proper, reasonable, and plain meaning, are not replete with illegal or unconscionable terms. As such there is no basis to support the court’s failure to sever, when the provisions in fact

⁶ While Petitioner pled breach of warranty causes of action, Petitioner 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.

comply with relevant law. Petitioner is not asking any court to re-write the contracts; however, to the extent necessary, it is asking the Court to honor the intent of the parties and sever any provision that violates South Carolina law.

“Whether an illegal provision in an otherwise valid contract may be separated from the contract is a matter of intent of the parties” The Beach Company v. Twillman, Ltd., 351 S.C. 56, 64, 56 S.E.2d 63, 867 (Ct. App. 2002). 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 unenforceable language. Jane Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880-81 (Ct. App. 2020). Equally importantly, 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. Am. Nat. Bank of Winter Haven, Fla., v. Caldwell, 166 S.C. 194, 164 S.E. 613, 615 (1932).

The contracts at issue here contain separate distinct sections relating to separate matters, including, respectively, indemnity, warranty, payment, etc. [R. pp. 1451-1525]. Moreover, the section regarding indemnity, in addition to its initial paragraph upon which Petitioner 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. [R. 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.”

[R. pp. 1460, 1473, 1488, 1500, 1512, 1525].

In light of the format of the contracts and the severability provisions, there can be no dispute that the parties intended for any unenforceable provision be severed and 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.

The court of appeal’s opinion directly contradicts this Court’s precedent which acknowledges that for 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)(citing Pigot’s Case, 77 ER 1177, 1179 (1614); United States v. Bradley, 35 U.S. 343 (1836)). Moreover, our courts perform severance even where the parties may not have intended such action to take place. Id.

Accordingly, this Court must grant certiorari to review and correct the errors of the court of appeals.

V. Whether S.C. Code Section 32-2-10 prohibits a party’s ability to recover attorney’s fees is a novel issue in South Carolina, and the Supreme Court should hear this case to clarify that under strict statutory construction, Section 32-2-10, which is in derogation of common law and expressly applies only to indemnification, does not apply to attorneys’ fees, which are a separate form of recovery.

Section 32-2-10 governs agreements for indemnity against liability for damages; it is silent regarding attorneys’ fees, and no South Carolina Court has yet addressed the question of whether

the statute was intended to apply expansively to attorneys' fees or whether it was intended, as written, to apply only to indemnification for damages.

When approaching statutory interpretation, courts must assume that the legislature was aware of the common law, "and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Additionally, when, as here, a statute is "in derogation of the common law," it must be strictly construed. Id.

Section 32-2-10 specifically states that it governs agreements for *indemnity* against liability for damages. As noted by Concord & Cumberland, our courts "have consistently defined *indemnity* as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'" Concord & Cumberland, 424 S.C. at 646-47. Attorneys' fees do not fall within the scope of indemnity because they are not paid by a first party to "a second party for loss or damage the second party incurs to a third party." Rather, they are consequential damages of an indemnity claim. Because Section 32-2-10 imposes restrictions unknown at common law, it must be strictly construed. Because it uses the term "indemnify," a term that "has a well-recognized meaning in the law," it must be read only to apply to agreements governing indemnification; its meaning may not be expanded by the court to include agreements governing attorneys' fees.

While Section 32-2-10 addresses agreements governing the duty to indemnify, the statute is silent as to agreements imposing a duty to defend. The duty to defend and the duty to indemnify are two separate and distinct contractual obligations. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). "Although these duties are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the

judgment, the duty to defend exists regardless of the [indemnitor's] ultimate liability to the [indemnitee]." Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977). As such, this Court should grant certiorari to review the Record on Appeal which will confirm that Paragraph Three of the Later Contracts is neither addressed nor prohibited by Section 32-2-10.

VI. Whether a trial court's order on appeal is "final" for purposes of collateral estoppel or res judicata is a novel issue in South Carolina and a split issue in the Fourth Circuit; the South Carolina Supreme Court should hear this case to resolve the uncertainty and clarify the state of the law in South Carolina.

The issue of whether a trial court decision on appeal is sufficiently "final" for purposes of collateral estoppel is an issue of first impression in South Carolina. There are no cases on point. Even the cases cited by the parties herein have reached different conclusions, and the issue is split amongst states in the Fourth Circuit. Compare Arkansas Best Freight Sys., Inc. v. H.H. Moore, Jr. Trucking Co., 244 Va. 304, 307, 421 S.E.2d 197, 198 (1992) ("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.") to Warwick Corp. v. Maryland Dep't of Transp., 573 F. Supp. 1011, 1014 (D. Md. 1983) ("Such a consequence would also be laughable. If a judgment was denied its *res judicata* effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation.") Because the issue is one of novel impression in South Carolina, the Court should grant certiorari to provide clarity on this issue.

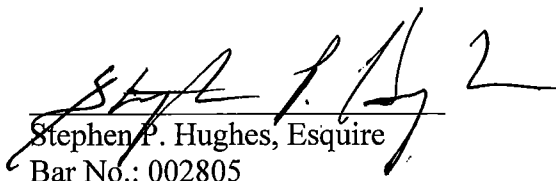
Moreover, the court of appeals overlooked that no trial court has yet answered the question of whether Petitioner can recover, under the relevant indemnity provisions of the respective contracts, for the negligence of its subcontractors, regardless of whether Petitioner can recover

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 Petitioner's claims purportedly seeking indemnity against Petitioner's negligence. No prior court has specifically addressed the issue – the specific claims Petitioner contends that it is seeking in litigation – of whether Petitioner may recover indemnity for the subcontractors' negligence.

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. 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 provisions for the 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. Therefore, this Court should answer the novel question, which is not precluded by collateral estoppel.

Conclusion

Because the opinion of the court of appeals in this case contradicts the rules promulgated by this Court, flies in the face of precedent, and will unwittingly upend the entire construction industry, the Supreme Court should grant certiorari in this case and provide guidance to the courts, the parties, and the industry on the correct analysis of contractual indemnification claims.


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June 20, 2025

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Jun 20 2025

SC Court of Appeals

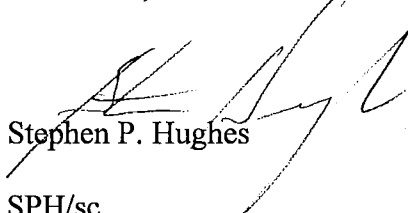
Re: Builders FirstSource- Southeast Group, LLC v. Palmetto Trim and Renovations
Civil Action No.: 2021-001050
Our File No.: 11981.5 SPH

To Whom It May Concern:

Please find enclosed herewith for filing an original and one copy of the *Petition for Writ of Certiorari*, together with the Certificate of Service, with regard to the above referenced matter. Also enclosed please find the applicable filing fee in the amount of \$250.00. I would appreciate your filing the Petition for Rehearing and returning a filed clocked copy to me via email at sphughes@hghpa.com, wcox@hghpa.com, and scombites@hghpa.com. If return of the clocked copy must be via U.S. Mail, please advise and I will provide a self-addressed, stamped envelope provided for same.

With kindest regards, I am
Yours truly,

HOWELL, GIBSON AND HUGHES, P.A


Stephen P. Hughes

SPH/sc

Enclosures

cc: Court of Appeals
Counsel of Record

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Jul 31 2025

S.C. SUPREME COURT

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

Civil Action No. 2016-CP-10-03738
Appellate Case No. 2025-001224

The Retreat at Charleston National Country Club Home Owners Association, Inc. and The Retreat
at Charleston National Country Club Horizontal Property Regime, ...Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin
Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.;
Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee
Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, individually; Charleston
Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC;
AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollo
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.; Colleen 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,

of which Hurley Services, LLC is a ... Respondent,

AND

Builders FirstSource-Southeast Group, LLC is the Petitioner.

**RESPONDENT HURLEY SERVICES, LLC'S RETURN TO BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC'S PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

Plaintiffs, a homeowners association and a horizontal property regime, filed suit in July of 2016 against the developer, Winston Carlyle Charleston National, LLC, and general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually alleging construction deficiencies in the common elements of a multi-family project known as The Retreat at Charleston National Country Club. The complaint alleged causes of action for negligence, gross negligence, breach of express and implied warranties, and breach of fiduciary duty as to the developer.

Plaintiffs' First Amended Complaint named additional defendants including Builders FirstSource-Southeast Group, LLC ("BFS"), and alleged negligence, gross negligence, and breach of implied warranties. BFS is a large supplier of building materials that sold windows, doors, and other materials to the general contractor and/or developer and contracted to install these materials for the project. BFS holds an unlimited general contractor's license. It hired Hurley Services, LLC ("Hurley"), as a labor-only subcontractor for the installation of windows, doors, and weather-resistant materials on four, two-story buildings at the project. Hurley was paid \$5,319.50 for its work. (R. p. 1037.) Plaintiffs' expert found deficiencies in the windows provided by BFS for installation by Hurley. Hurley provided no materials or components in connection with its work, all of which was performed pursuant to a Master Subcontractor Agreement drafted by BFS.

In its answer to the Amended Complaint, BFS asserted third-party claims against Hurley and other subcontractors alleging claims for contractual and common-law indemnity, breach of express and implied warranties, negligence, and breach of contract.

In June of 2018, Plaintiffs filed a Second Amended Complaint naming BFS, Hurley, and others as direct defendants and reasserting their claims for construction deficiencies and defective materials. BFS answered Plaintiffs' Second Amended Complaint, in which it denied supplying

building materials, and asserted crossclaims against Hurley substantially identical to the claims in its third-party complaint. In its crossclaims against Hurley, BFS repeatedly alleged that Hurley provided and warranted materials, had a duty of care in selecting materials, and was contractually obligated for procuring adequate materials in connection with its work. This is despite Hurley's status as a labor-only subcontractor.

In August of 2020, Hurley filed a motion for partial summary judgment with regard to the crossclaims of BFS. (R. pp. 895-935.) Two months later, Hurley filed an amended motion for summary judgment as to all crossclaims asserted by BFS. (R. pp. 936-1075.) Hurley argued the motion in November of 2020. (R. p. 1386.) On July 7, 2021, the Honorable Jennifer B. McCoy, Circuit Court judge, signed and filed an order¹ granting partial summary judgment in favor of Hurley. (R. pp. 22-41.)

On February 12, 2025, the Court of Appeals affirmed all eight of the Circuit Court's Orders. BFS's Petition for Rehearing was denied on May 21, 2025, and the Court issued a substituted opinion, still affirming all eight Orders. *Retreat at Charleston National Country Club Home Owners Association, Inc., v. Winston Carlyle Charleston National, LLC*, et al., 445 S.C. 566, 915 S.E.2d 736 (Ct. App. 2025). BFS filed its Petition for Writ of Certiorari on June 20, 2025.

STANDARD OF REVIEW

This Court only reviews final decisions of the Court of Appeals "where there are special and important reasons" to do so. Rule 242(b), SCACR. Factors bearing on this Court's consideration of whether it should exercise its discretionary authority to issue a writ of certiorari are: (1) whether there are novel questions of law; (2) whether there is a dissent in the decision of

¹ The trial court also issued orders granting summary judgment in favor of seven other subcontractor defendants on crossclaims of BFS. BFS has appealed from those orders. The South Carolina Court of Appeals subsequently consolidated all appeals of BFS in this case.

the Court of Appeals; (3) where the Court of Appeals' decision is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; or (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR.

ARGUMENTS

I. The Court of Appeals Correctly Applied the Clear and Unequivocal Standard to the Contractual Indemnity Provisions Drafted by BFS Where its Pleadings Seek Indemnification for its Own Negligence.

BFS argues that the elevated clear and unequivocal standard enunciated in *Concord & Cumberland* does not apply in this case because it does not seek indemnity for its own negligence. It asserts that it is only seeking indemnification for loss or damage arising from Hurley's negligence, whether that negligence is sole or concurrent. However, the Court of Appeals correctly applied the *Concord & Cumberland* standard and BFS' arguments to the contrary rely on a fundamental misunderstanding: by seeking indemnification for Hurley's concurrent negligence, BFS is necessarily pursuing recovery for its own negligence. Absent clear and unequivocal indemnification terms in the Master Subcontractor Agreement, such recovery is prohibited.

BFS asserts that under *Concord & Cumberland*, the "heightened 'clear and unequivocal' standard does not apply" to the contract terms giving BFS "the right to recover from a subcontractor for that subcontractor's own negligence, whether sole *or concurrent*." (Petition, pp. 8-9.) BFS' argument belies a fundamental misunderstanding of the meaning of "concurrent negligence" in the context of claims for contractual indemnification. Under this circumstance, a subcontractor's concurrent negligence is, and can only be, a tort combining with the general contractor's own concurrent negligence to proximately cause an indivisible injury to the plaintiff.

Accordingly, BFS' admission that it is seeking to recover damages attributable to Hurley's concurrent negligence necessarily means that it seeks indemnification for BFS' own negligence.

Concurrent negligence describes the situation where the proximate cause of a third-party's injury is the joint and concurrent negligence of the indemnitee and the indemnitor. *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707 (Tex. 1987) (setting aside the clear and unequivocal test in favor of the express negligence standard). "That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, ... to a liability which is both joint and several, is a proposition recognized and approved in this state...." *Bridge v. Orange Crush Bottlers*, 164 S.C. 351, 162 S.E. 325, 328 (1932). "[C]oncurring causes operate contemporaneously² to produce the injury, so that it would not have happened in the absence of either." *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (quoting *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972)); see 57A Am. Jur. 2d Negligence § 497 ("'Concurrent negligence' consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury.").

While BFS is correct that the fundamental issue "is the extent of the indemnity sought by the Petitioner," it errs by insisting that remedy it seeks should be discerned from its briefs and

² This Court has recognized that two parties' negligence may be concurrent even if it does not occur contemporaneously. "We can conceive of no logical reason why acts of negligence committed by two or more persons at different times and places may not follow their separate ways and finally meet and concur in producing an event which causes injury which gives to the injured one a single cause of action predicated upon the joint liability of those who set in motion the train of acts of negligence which culminated in the injury." *Bridge*, 164 S.C. 351, 162 S.E. at 328. In *Bridge*, the court examined whether a single cause of action against two defendants for a single injury was sustained by alleged conduct by the two at different times and different places. The appealing defendant argued that concurrent negligence required the two defendants "acted contemporaneously; that is, 'co-operated' at the same time and place and together produced the injury." *Id.* This Court disagreed.

arguments. (Petition, p. 9.) Instead, the true scope of the indemnification BFS sought must be discerned from the terms it carved into the Later Contract, as written and as a whole. Moreover, BFS clouds the “issue” so identified by describing three scenarios under which BFS seeks recovery: for Hurley’s negligence, for BFS’ *sole* negligence, or for “both” types of negligence. (Petition, p. 9.) This matters because BFS is attempting to distinguish itself from the central holding of *Concord*: that the clear and unequivocal standard applies where the indemnitee seeks contractual indemnification for the losses caused by the concurrent negligence of the indemnitee and the indemnitor.

As a result of the Court of Appeals’ opinion, BFS complains that it “is precluded from any recovery in contractual indemnity, even if the jury determines that the subcontractors have been solely or concurrently negligent in causing the damages at issue.” (Petition, p. 12.) (emphasis supplied.) However, a contractual indemnification term allowing the BFS to recover for a subcontractor’s concurrent negligence is prohibited if the term does not meet the clear and unequivocal standard. For instance, in *Ethyl Corp.*, the Texas “court of appeals found the ... indemnity provision did not clearly and unequivocally require Daniel to indemnify Ethyl for Ethyl's own negligence or for the parties' concurrent negligence.” *Ethyl Corp.*, 725 S.W.2d at 707 (emphasis supplied). Once again, BFS wants to ensure that it can recover from Hurley damages caused by the concurrent negligence of BFS and Hurley despite the Master Subcontractor Agreement’s failure to meet *Concord & Cumberland’s* heightened standard.

A. Petitioner’s Pleadings Demonstrate that Its Claims for Indemnification Against Hurley Include Recovery for Losses Caused by BFS’ Own Negligence.

The recovery BFS seeks is exclusively for losses caused by the alleged concurrent negligence of BFS and Hurley. This is evident on the basis of Plaintiff’s claims against the subcontractor defendants and as repeated verbatim in the Court of Appeals’ opinion. (Opinion, p.

19, quoting the Fourth amended complaint, ¶ 88 (a)-(i)). BFS' own duties to Plaintiffs to supply materials for installation by Hurley, and to supervise, inspect, and approve Hurley's work, mean that any injury to Plaintiff resulting from deficiencies related to Hurley's scope of work per force implicate the concurrent negligence of BFS. As it relates to Hurley's activities at the building site, any negligence by Hurley would require BFS' own, concurrent negligence to cause injury to Plaintiffs.

Petitioner's pleadings take as a premise that Petitioner has committed no negligence and has no liability. In this world constructed by Petitioner's pleading, where Petitioner has committed no negligence, the only possible way Petitioner could be liable is if the negligence was committed by Petitioner's subcontractor and not by Petitioner itself. Thus, in a world, and in context, Respondents, as the sole source of the negligence, would be liable to Petitioner for all damages, as plead in paragraphs 138 and 143, and Petitioner, in seeking indemnity, is seeking recovery only for Respondent's negligence and not for Petitioner's own negligence (because Petitioner's negligence is nonexistent). (R. pp. 441-42.) Whether the facts later bear out Petitioner's worldview does not affect the analysis of what Petitioner's pleadings seek.

Petitioner's tutorial ignores the allegations against it contained in the complaint. It ignores the language of its own pleadings and subcontractor agreements which it drafted, and it also ignores undisputed facts which have been developed in this case.

Plaintiffs allege in paragraphs 9 and 10 of their Fourth Amended Complaint that BFS furnished materials at the project. They also allege in paragraphs 88(a) and 88(d) that BFS is negligent and grossly negligent in "failing to properly supervise their work and the work of other trades..." and "in using and supplying defective materials". (R. pp. 346, 366.) In paragraphs 3, 4, and 26 of its Amended Answer to Plaintiff's Fourth Amended Complaint, BFS denies that it

furnished any materials. (R. pp. 416, 420.) It asserts in its crossclaims against Hurley, that Hurley supplied the materials in connection with its work. BFS seeks indemnity “for any liability BFS is found to have to Plaintiffs or others in this action...” (R. p. 441.)

BFS is a division of one of the largest building supply corporations in the United States. At Retreat, BFS was a turnkey contractor which provided both labor and material. (R. p. 976, line 1 – p. 981, line 15.) It sold windows to the developer and/or general contractor and gave those windows to its subcontractor Hurley for installation in 4 of the 32 buildings in the project. (R. p. 943.) (R. pp. 951-969.) It is undisputed that Hurley supplied no materials in connection with its work at the project. (Final Brief of Appl., p. 23.)

BFS was the installation manager, and the holder of an unlimited general contractor’s license. As such, it also had nondelegable statutory and common law duties to inspect and supervise the work of its subcontractors. S.C. Code § 40-11-270(E); *Fields v. J. Haynes Waters Builders*, 376 S.C. 545, 658 S.E.2d 80, 88 (2008); *Fountain v. Fred’s, Inc.*, 429 S.C. 533, 553, 839 S.E.2d 475, 486 (Ct. App. 2020). BFS inspected the work of Hurley as it progressed. The Master Subcontractor Agreement also required Hurley to follow the directions of BFS. (R. pp. 905-906.) (R. p. 944.)

That Hurley furnished no materials except for those given to it by BFS for installation has been known to BFS since the inception of this lawsuit. Nevertheless, BFS has asserted a third-party complaint and multiple crossclaims against Hurley alleging that Hurley provided and warranted materials, that Hurley had a duty of care in selecting materials, and that Hurley was contractually obligated for procuring adequate materials and services in connection with its work. Paragraphs 126, 140, 141, 149, and 153 from its most recent crossclaim are as follows:

126. That this [BFS] ... is further **informed and believes that Hurley Services, LLC provided materials and services** in connection with framing,

including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures

- 140. That [Hurley Services, LLC] **made express warranties that materials, services, and/or workmanship**, provided in conjunction with their services at the subject structures, would be as required by and in accordance with the contract documents, applicable building codes, and industry standards.
- 141. That the respective sub-contract agreements ... include provisions, by which [Hurley Services, LLC] **expressly undertook to provide materials and services in accordance with the contract documents**.
- 149. That [Hurley Services, LLC] **owed a duty of due care in providing services and materials** in connection with construction and/or repair of the subject structures.
- 153. That [Hurley Services, LLC was] **contractually responsible for provision of adequate materials and services** in connection with [its] respective undertakings regarding construction of the subject structures.
(emphasis supplied) (R. pp. 436-45.)

It is obvious that BFS is trying to transfer to Hurley the risk associated with potential defective products which it selected and sold for use at the project. BFS denies in its pleadings that it provided materials, and it alleges in substance that any deficiencies in materials are the responsibility of Hurley. BFS admits in its Statement of the Case that Plaintiffs' forensic expert has opined that the windows at the project are characterized by inadequate DP ratings requiring comprehensive replacement of those windows. (Final Brief of Appl. p. 1.)

These unfounded claims of BFS against Hurley are not the result pleading errors, but represent a course of conduct which BFS has also employed in other cases. BFS relies upon the unconscionable and oppressive language hidden in the fine print of the Master Subcontractor Agreements to obtain indemnity for its sole or concurrent negligence.

B. BFS's Master Subcontractor Agreement Repeatedly Asserts BFS' Rights for Indemnification Against Hurley for Losses Caused by BFS' Own Negligence.

Of the two different versions of BFS's Master Subcontractor Agreement, Hurley was a party to the later version (following the Court of Appeals' verbiage, the "Later Contract"). (R. pp. 1501-12.) The relevant portions of the Later Contract are quoted in full in the Court of Appeals' Opinion. (Op., at 10-17.)

Buried in the fine print of **SECTION 3 Warranty** of the Subcontractor Agreement are disguised indemnity provisions in favor of BFS relating to materials selected and sold by BFS. That section reads as follows:

SECTION 3. Warranty.

[I]n addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor **guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor** and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) **ten (10) years for all Work consisting of any structural applications** ... If demand is made upon Subcontractor to perform under this warranty, **Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, 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, materials, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners ... and personal injury damages to persons residing at or visiting the properties** into which the Work is incorporated (emphasis added) (R. pp. 901-902.)

The language in **SECTION 3 Warranty** that "subcontractor guarantees the work against defects in design... and materials" only makes sense if the word "design" refers to manufactured

materials provided by BFS. Hurley had no responsibility for the design of the project or any of its components. Hurley's work was limited to installation of Tyvek house wrap, windows, and doors in a few buildings.

In addition, **SECTION 3** requires Hurley to give a guarantee and indemnity for ten years on any "structural applications." The only structural applications are the windows and doors which BFS selected and sold and gave to Hurley for installation. Plaintiffs' expert opined that the design pressure ratings on the windows do not meet applicable codes. This provision requires Hurley indemnify BFS for its sole negligence in selecting and selling the applicable windows. **SECTION 3** also exposes Hurley to liability and indemnity claims arising from property damage and personal injury relating to defects of design and materials.

BFS argued on appeal that the warranty and indemnity provisions under **SECTION 3** do not apply because under **SECTION 1** of the Agreement, the "**Work**" is defined as materials and/or services provided by Hurley. **SECTION 1** reads as follows:

"SECTION 1. Introduction.

- a. **Work.** "[T]his Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**")"

However, **SECTION 2** of the Master Subcontractor Agreement expands the definition of work as follows:

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on the Projects upon request by Contractor. **Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.**

- c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project

and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, **protect all of its labor, materials (regardless of who supplied such materials)**, supplies, tools, and equipment ... against any damage, injury, destruction, theft, or loss.” (R. p. 899.) (emphasis supplied)

BFS argues that **SECTION 2 (c)** merely describes the duties of a bailee. (Final Brief of Appl. p. 36.) However, the bailment argument and the interpretation BFS now places on Sections 1, 2, and 3 do not explain why BFS asserted crossclaims for materials against Hurley when Hurley furnished no materials. It is obvious from its pleadings that BFS has interpreted Sections 1, 2, and 3 to mean that the **Work** includes materials supplied by BFS so that it can assert indemnification claims against its subcontractors for the materials it selects and sells for use at the project. Parties are bound by their pleadings and are precluded from advancing arguments contrary to those assertions. *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015).

Additional evidence of the interpretation BFS places on these contract provisions which it drafted, is found in **SECTION 8(i)**, which BFS argues applies only to indemnification of BFS by its subcontractors in connection with mechanic’s and materialmen’s liens. (Final Brief of Appl. pp. 10-11.) It provides, in pertinent part, for indemnification of BFS for “[A]ttorney’s 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 ...”. (emphasis supplied). BFS is, however, the supplier of materials for Hurley to install at the project. If BFS were to file a mechanic’s lien, and if it suffered an adverse judgment for costs and attorney’s fees under S.C. Code § 29-5-10, *et seq.* as a result of supplying and selling defective products, it could seek indemnification for these attorney’s fees and costs from its subcontractors, even though BFS would be 100% at fault. **SECTION 8(i)** is in conflict with

SECTION 5, paragraph 1, where indemnity for costs and attorney's fees are only triggered upon the negligence of the subcontractor. (R. pp. 903, 908.)

In asserting its contractual indemnity claims against Hurley, BFS relies primarily upon **SECTION 5 Indemnity**, paragraph 1. The Court of Appeals correctly applied the standard in *Concord & Cumberland*, 424 S.C. at 645, 819 S.E.2d at 170, in holding that BFS could not recover against Hurley for its own negligence under the language of that paragraph.

BFS contends, however, that dicta in *Concord & Cumberland* regarding the liability of the subcontractor Muller permits BFS to recover from Hurley to the extent of its own negligence. *Concord & Cumberland*, 424 S.C. at 652-653, 819 S.E.2d at 173-174. However, the facts in that case are distinguishable from those in this case. Here, there are multiple conflicting, deceptive, unconscionable, and oppressive indemnity provisions which were not considered by the court in *Concord & Cumberland* but would have affected the decision of the court.

Although BFS selects **SECTION 5 INDEMNITY**, paragraph 1, as the controlling paragraph for indemnification of BFS, a contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. *Williams v. Gov't Emps. Ins. Co.*, 409 S.C. 586, 762 S.E.2d 705, 710 (2014). The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, "from the four corners of the instrument" alone. *McPherson v. J.E. Serrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945).

SECTION 5, paragraph 1 clearly conflicts with the language of **SECTIONS 1, 2, 3**, and **8 (i)** which provide for indemnification of BFS for its sole negligence in selecting and selling building supplies. It is undisputed that Hurley furnished no materials to the project except those given to it by BFS.

SECTION 5, paragraphs 1 and 2 are also in conflict. Paragraph 1 deals with both personal injury and property damage claims whereas paragraph 2 only deals with personal injury claims. Paragraph 1 only allows indemnification based upon the negligence of the subcontractor. Paragraph 2 allows indemnification even if BFS is solely negligent. Even though this is not a personal injury action, paragraph 2 is relevant because it demonstrates how BFS has intentionally drafted the Master Subcontractor Agreement in a conflicting, confusing and deceptive manner in furtherance of its own purposes. These paragraphs drafted by BFS should be read together and strictly construed against BFS.

SECTION 5, paragraph 3, is a disguised indemnity provision for defense costs in favor of BFS even if BFS is solely at fault. It conflicts with **SECTION 5**, paragraph 1, where attorney's fees and costs are payable only upon the fault of the subcontractor. BFS argues that attorney's fees do not fall within the scope of an indemnity clause because they are not paid by the first party to the second party for loss or damage the second party incurs to the third party. However, BFS elected to include this paragraph in the bold print **SECTION 5 Indemnity** section of the contract. Paragraph 3 is in effect an indemnity provision for attorney's fees and defense costs. There is nothing in South Carolina law that separates a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of contractual indemnification.

All of these conflicting paragraphs were drafted by BFS, and any uncertainty as to the meaning of the terms should be resolved against BFS. *Springs & Davenport, Inc. v. AAG, Inc.*, 385 S.C. 320, 683 S.E.2d 814, 817 (Ct. App. 2009). The conflicting, ambiguous, and deceptive language drafted by BFS fails to meet the clear and convincing standard for contractual indemnity.

II. The Contractual Indemnity Provisions Drafted by BFS Violate S.C. Code Ann. § 32-2-10 by Requiring Hurley to Indemnify BFS for Losses Arising from its Sole Negligence.

South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10, provides, in pertinent part, that:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, ... purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately **caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable ...** (emphasis added).

An analysis of the pleadings and the Master Subcontractor Agreements drafted by BFS, as well as the undisputed facts of the case, demonstrate that BFS is seeking indemnification for its sole negligence in violation of S.C. Code Ann. § 32-2-10. Actions speak louder than words. BFS has asserted numerous crossclaims against Hurley seeking indemnity for materials when it is undisputed that Hurley provided no materials. All materials were furnished by BFS including windows which are alleged by Plaintiffs to be defective. Hurley had no role in the selection and sale of these products, and despite its denial, BFS is seeking indemnity for its own negligence under the terms of the Master Subcontractor Agreement it drafted.

On appeal, BFS cited *D.R. Horton v. Builders FirstSource – SE Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) as authority for the proposition that the language of **SECTION 5**, paragraph 1, does not violate S.C. Code Ann. § 32-2-10. (Final Brief of Appl. pp. 26-27.) However, the holding in that case is not quite what BFS cites it for.³ The court held that D.R. Horton could not obtain indemnification from its subcontractor, BFS, for D.R. Horton's own negligence.

³ There is dicta in the case which opines that a portion of the indemnity agreement obligating BFS to indemnify D.R. Horton for its own negligence did not violate public policy. *D.R. Horton*,

Under **SECTION 5**, paragraph 3, Hurley's duty to defend arises out of a suit against BFS, without regard to whether BFS is solely at fault for claims alleged. Thus, because the Master Subcontractor Agreement purports to indemnify BFS for the indemnitee's sole negligence, it is an illegal contract under § 32-2-10 and "[a]n illegal contract is unenforceable." *D.R. Horton, Inc.*, 422 S.C. at 152.

The conflicting, confusing, oppressive, and deceptive language of the Master Subcontractor Agreement drafted by BFS has been discussed elsewhere in this brief. These provisions should be strictly construed against BFS. *Springs & Davenport, Inc.*, 683 S.E.2d at 817, and they clearly show that BFS is seeking indemnification for its own negligence.

The Master Subcontractor Agreements drawn by BFS are sophisticated documents. Each word was drafted with much thought and care in an effort to transfer all risk from BFS to its subcontractors. It is hard to imagine language that would more blatantly violate South Carolina law. Once the at-issue agreement is determined to violate § 32-2-10, the plain language of the statute provides that the "agreement ... is unenforceable." There is no provision whereby an indemnity agreement that runs afoul of the statute can be saved. The Court of Appeals correctly read the deceptive language and conflicting provisions together and properly concluded that they collectively violated S.C. Code Ann. § 32-2-10.

422 S.C. 144, 810 S.E.2d at 45. The opinion of the court was based upon an unusual and deficient arbitration award which made no findings of fact or conclusions of law. There is no evidence in that case that the arbitrator or the court considered conflicting, deceptive, and oppressive indemnity provisions which are similar to those present in the BFS Master Subcontractor Agreement.

III. The Master Subcontractor Agreement Drafted by BFS is a Contract of Adhesion, Which is Unconscionable and Oppressive.

The Court of Appeals correctly determined that the “warranty, guaranty, and indemnity provisions of the Later Contracts violate § 32-2-10, are ambiguous, conflict with each other, and do not meet the clear and unequivocal standard articulated in *Concord & Cumberland*.” (Opinion, p. 29). In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-side contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004); *Doe*, 430 S.C. at 612, 846 S.E.2d at 879.

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process. *Simpson*, 644 S.E.2d at 669. Among the factors considered by the court in determining whether a contract was tainted by an absence of meaningful choice are the nature of the injuries suffered by plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the party’s bargaining power; the party’s relative sophistication; whether there is an element of surprise in the inclusion of the challenged language; and the conspicuousness of the clause. *Simpson*, 644 S.E.2d at 669; *Doe*, 846 S.E.2d at 879.

Hurley was a local subcontractor in the Charleston area which installed products for BFS. BFS is the regional division of Builders FirstSource as appears from its name on the contract. The parent of BFS is one of the largest building supply companies in the United States. Respondent requests that this Court take judicial cognizance of the fact that the Master Subcontractor Agreement of BFS is so one-sided, that a subcontractor executing the agreement, more than likely lacks any meaningful bargaining power. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016) (Kittredge & Pleicones, JJ, dissenting) *quoting Kennedy v. Columbia Lumber & Mfg.*

Co., 299 S.C. 335, 343, 384 S.E.2d 730, 735-736 (1989) (taking judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller). The fact that Hurley was paid only \$5,319.50 for installing Tyvek, windows, and exterior doors on four two-story, multi-family buildings reflects a lack of bargaining power. (R. pp. 951-969.)

The contract provisions are also deceptive. Contract provisions result in unfair surprise when the real meaning of the terms are intentionally obscured by one of the parties. The master contract was carefully drafted by BFS in a way which would obligate its subcontractors to warrant the design and suitability of products provided by BFS, and further, for subcontractors to indemnify and defend BFS and others from any property damage or personal injury resulting from those products.

The deceptive nature of the definitional, warranty, guaranty, and indemnity provisions contained in Sections 1, 2, 3, 5 and 8 of the agreement have been discussed in detail elsewhere in this brief. It should be noted, however, that the disguised indemnity provisions in **SECTION 3 Warranty** were buried in fine print unlike the bold type found in **SECTION 5 Indemnity**.

In finding contract provisions unconscionable in Simpson, the court observed, in pertinent part, as follows:

“[W]hile certain phrases within other provisions of additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) ... We cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law ...”
Simpson, 644 S.E.2d at 670.

In addition, although Hurley provided no material in connection with the installation of windows, doors, and Tyvek, the fine print language of **SECTION 3 Warranty** obligates Hurley

for “defects in design, workmanship and materials” and “structural applications” which obviously relates to manufactured products selected and sold by BFS. Hurley was not involved in the design of any of the manufactured materials or any portion of the project. These provisions expose Hurley to liability for property damage and personal injury claims arising from deficient materials selected and sold by BFS.

Thus, it is clear that a disparity in bargaining power and the intentional use of deceptive language buried in the fine print of the agreement deprives Hurley of a meaningful choice in the execution of the agreement.

BFS continues to insist that under **SECTION 1 (a)**, “**Work**” is defined as including materials only provided by Hurley and Hurley provided no materials. However, BFS overlooks **SECTION 2 (c)** of the agreement it drafted expanding the definition of “**Work**” to include materials supplied by BFS. In addition, in its Initial Brief, BFS has offered no explanation whatsoever for why it has filed multiple crossclaims against Hurley relating to materials. It is abundantly clear that BFS interprets its contract language to include materials it provides to Hurley for installation as being within the definition of “**Work**”.

It is equally clear that the Master Subcontractor Agreement drafted by BFS is an adhesion contract which is drawn to the fullest extent possible in favor of BFS. BFS has expansive rights and remedies under the agreement it drafted. In contrast, most of the rights and remedies of Hurley are limited or waived. Most paragraphs of the agreement create obligations and liabilities for Hurley or a waiver or limitation of Hurley’s rights. The agreement drafted by BFS attempts to transfer all risks associated with the project to its subcontractors, including risks associated with the products and components furnished by BFS. The best evidence of this is the fact that BFS has

filed multiple crossclaims against Hurley alleging product deficiencies when BFS alone supplied materials for construction at the project.

Under general principles of state law, an adhesion contract is a standard form contract offered on a “take it or leave it basis” with terms that are non-negotiable. *Munoz v. Greentree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Although adhesion contracts are not per se unconscionable, the cumulative effect of these oppressive and one-sided provisions can cross a line which makes the contract unconscionable. *Simpson*, 644 S.E.2d at 674.

Examples of the oppressive and unconscionable nature of the Later Contracts are as follows:

1. In Section 1(a), limitation of Hurley’s remedies in the event of a change order which increases costs.
2. In Sections 1(a) and 2(c), deceptive language defining the “work”.
3. In Section 2(c), Hurley assumes risk of loss to the work.
4. In Section 2(d)(2)(C), indemnity of BFS in connection with environmental regulations.
5. In Section 2(d)(4), liquidated damages against Hurley for delay at \$200 per hour for a minimum of 10-hour day until project can be resumed.
6. In Section 3, fine print indemnity of BFS for its own products and negligence.
7. In Section 3, unfavorable warranty, guaranty, and indemnity provisions relating to products selected and sold by BFS.
8. In Section 4, waiver of subrogation rights and release of all claims in favor of BFS.
9. In Section 5, indemnification and defense of BFS for its own negligence.
10. In Sections 6 and 7(b)(2), misleading provisions regarding BFS’s right to direct and control work.
11. In Section 7(a), numerous events of default by subcontractor without any corresponding events of default on the part of BFS.

12. In Section 7(b)(1), waiver of claims and damages for delay in favor of BFS.
13. In Section 7(b)(2), liability of Hurley to BFS upon termination for all costs and damages of BFS plus 25% of all costs and damages of BFS.
14. In Section 7(c), fine print indemnity, defense, and hold harmless provisions in favor of BFS.
15. In Section 8(a), no obligation of BFS to pay Hurley until BFS receives payment from owner. If owner does not pay BFS, BFS does not pay and Hurley assumes risk of non-payment.
16. In Section 8(f), unreasonable conditions for obtaining final payment, including furnishing “as-built drawings” in Section 8(f)(3).
17. In Section 8(i), indemnification of BFS for liens and judgments including judgments arising from materials supplied by BFS.
18. In Section 8(i), waiver of rights against BFS.
19. In Section 9(e), Hurley waives the right to file a lien for its work.
20. In Section 9(f), buried fine print severability clause.

This Court is well aware that sophistication is another form of bargaining power. *See Smith*, 417 S.C. 49, 790 S.E.2d 4. The high degree of sophistication of BFS is obvious in the language of the aforementioned provisions Later Contracts. BFS has taken advantage of any asymmetry in sophistication to include provisions that are either concealed in fine print or that its subcontractors are unlikely to fully appreciate. A subcontractor such as Hurley who installs windows in two-story multi-family buildings for \$13 - \$15 each typically does not have a corporate lawyer standing by to review its installation contracts. (R. pp. 951-969.)

The oppressive, one-sided, and unconscionable terms of the Later Contracts are exemplified by the draconian release of any and all claims by Hurley hidden in the fine print of Section 10(f):

f. Release. 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 Subcont may have against the Contractor, the Owner, and all of their officers, directors, agents, and employees. Specifically, Subcontractor agrees that Subcontractor shall not file, or cause to be filed, any demand, claim, suit or cause of action against Contractor and all of its officers, directors, agents, and employees hereunder. (R. p. 922.)

It is simply inconceivable that a party who understood the implications of the language of these agreements would sign them unless there were a total absence of a meaningful choice on the part of the subcontractor. The combination of an absence of a meaningful choice on the part of Hurley, deceptive language, disparity in bargaining power and one-sided provisions in the adhesion contract drafted by BFS renders the warranty/indemnification provisions in **SECTION 3 Warranty** and the indemnity/duty to defend paragraphs in **SECTION 5 Indemnity** unconscionable and unenforceable. South Carolina courts will not enforce a contract which is violative of public policy or statutory law. *Carolina Care Plan, Inc.*, 361 S.C. 544, 606 S.E.2d 752; *D.R. Horton, Inc.*, 422 S.C. 144, 810 S.E.2d 41.

IV. The Court of Appeals Correctly Ruled That There Are So Many Unenforceable Clauses Throughout the Master Subcontractor Agreement that They Cannot Be Effectively Severed.

On appeal, Petitioner made four arguments regarding the ruling of the lower court relating to the severability clause in the Master Subcontractor Agreement.

The first is that the court failed to make a ruling on the severability issue. This assertion ignores numbered paragraph 14 on page 19 of the court's order:

14. That the Master Subcontractor Agreement contains so many provisions that are deceptive and unconscionable, fail to meet the clear and unequivocal standard, violate S.C. Code Ann. §32-2-10, and are against public policy, **that it would be impossible to sever**

and/or reform them without rewriting the Master Subcontractor Agreement, which this Court is not obligated to do.
(emphasis added) (R. p. 40.)

BFS discussed in detail the magnitude of these conflicting and unconscionable provisions which precludes severance of the offending provisions as a realistic option for the lower court. Second, Petitioner argued that the court stated that it lacked authority to sever provisions of the contract. Nowhere in the order does the court make such a statement. Rather, the court stated that it had no obligation or authority to rewrite the contractual indemnity provisions of BFS citing *Poynter Invest., Inc. v. Cent. Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15, 18 (2010); *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002). (R., p. 38.)

Petitioner's third argument was that the lower court was obligated to sever "problematic language" because of the existence of a severability clause in the contract of adhesion drafted by BFS. To the contrary, our courts have refused to sever oppressive contractual provisions when the sheer magnitude of unconscionability as is reflected in the BFS Master Subcontractor Agreement permeates the entire contract. *Simpson*, 373 S.C. at 644 S.E.2d at 673-674; *Smith*, 403 S.C. at 16, 742 S.E.2d at 41.

In support of its position, Petition cited *One Belle Hall Property Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). That case is distinguishable both on the facts and the law. It involved a determination of the unconscionability of an arbitration agreement embedded in a warranty contract which contained oppressive terms. It also involved the application of the *Prima Paint* doctrine which holds that an arbitration clause is separate from a contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). There is no requirement in this case that

each unconscionable, conflicting, and oppressive provision of the contract be interpreted separately from the contract as a whole.

In its final argument, Petitioner cited *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020), for the proposition that the presence of a severability clause in the agreement is strong evidence of the intent of the parties to sever unenforceable language. *Doe* is distinguishable because it also involved the validity of an arbitration provision and the application of the *Prima Paint* doctrine. The court also emphasized the strong South Carolina and federal policies favoring arbitration and that arbitration agreements are presumed valid. *Doe*, 430 S.C. at 607, 846 S.E.2d at 876. In addition, the decision in *Doe* did not discuss whether the severability clause in the agreement was conspicuous. However, in this case, the severability clause upon which Petitioner places so much reliance is buried in fine print in **SECTION 9 Miscellaneous (f) Other** on page 12 of the contract.

SECTION 9. Miscellaneous.

f. Other. This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. **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.
(emphasis added)

Our courts have refused to enforce contractual provisions inconspicuously buried in the fine print which were drafted by the superior party and which function to contract away impair the legal rights of the less sophisticated party. *See Simpson*, 644 S.E.2d at 670; *see also Doe*, 846 S.E.2d at 879.

V. The Contractual Indemnity Claims of BFS are Barred by the Doctrine of Collateral Estoppel.

In its petition, BFS argues that in South Carolina whether a trial court order that is the subject of a pending appeal is sufficiently "final" for purposes of collateral estoppel is an issue of first impression.⁴ In hopes of suggesting a conflict among this State's courts, BFS cites opinions from Maryland and Virginia. Even if this Court has not previously decided the issue, there are no "special and important reasons" to do so now. Rule 242(b), SCACR. Moreover, the trial court's application of collateral estoppel was cumulative to its holding, on the record then before it, that the Master Subcontractor Agreement failed to meet *Concord's* clear and unequivocal standard and violated the Anti-Indemnification Statute, among other things. (R. pp. 22-41.) Thus, granting BFS' petition on this issue would not alter the effect of the Court of Appeals' final opinion.

In its order granting summary judgment in favor of Hurley on the collateral estoppel issue, the lower court took judicial notice of two Circuit Court orders which have interpreted the

⁴ On appeal, BFS argued that these orders involved different issues of fact or law insofar as the issues decided in those cases were whether BFS could recover from its subcontractor for its own negligence whereas the issue in this case is whether Petitioner may recover from Hurley for Hurley's sole negligence. (Final Brief of Appl. pp. 17-20.) However, BFS did not preserve this argument for appeal. In its opposition to Hurley's summary judgment motion, BFS argued only that the orders of were not final and did not raise the issue of the commonality of fact or law. (R. pp. 1095-1097.)

contractual indemnity language found in **SECTION 5**, paragraph 1, of the Master Subcontractor Agreement. *See* Order of the Honorable Roger M. Young, Sr. in *Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC*, C/A No. 2016-CP-10-3455, and Amended Order of the Honorable Clifton Newman in *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc.*, et al., C/A No. 2018-CP-08-2547. (R. pp. 146-156.) (R. pp. 157-161.)

The Court of Appeals affirmed the trial court finding that issue preclusion doctrine bars BFS from attempting to challenge effect of the orders. “The indemnity clauses in the Later Contracts are the same clauses from the same agreement at issue in *MI Windows & Doors, Pavic*, and *Six Fifty-Six Owners' Association*. Because BFS had previously litigated the enforceability of its contractual indemnity provisions, the circuit court properly applied collateral estoppel.” (Opinion, pp. 26-27.) The Court of Appeals’ conclusion on this issue is supported by well-settled law that the pendency of an appeal has no effect on the finality of a trial court’s judgment, and poses no barrier to applying collateral estoppel. *See Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) (finding the finality of a court’s judgment is not lost because appeal is pending). The contractual indemnity terms drafted by BFS were extensively litigated and directly addressed in the prior orders, and collateral estoppel should apply. *First Union Nat’l Bank v. Hitman, Inc.*, 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991) (finding that a final judgment is one that finally determines the rights of the parties). Moreover, Rule 201(a), SCACR provides that an “appeal may be taken, as provided by law, from any final judgment or appealable order.” The fact that BFS appealed from the orders in *MI Windows & Doors, Pavic*, and *Six Fifty-Six Owners' Association* speaks to their finality.

CONCLUSION

The Court of Appeals' opinion is fully supported by the Record on Appeal and controlling legal authorities. Therefore, for all the reasons stated above, in addition to those set out in the Returns of Hurley's co-Respondents, the Petition for a Writ of Certiorari should be denied.

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Circuit Court Case No. 2016-CP-10-03783
Court of Appeals Case No. 2021-001050

Opinion No. 6099 (S.C. Ct. App. filed Feb. 12, 2025)

The Retreat at Charleston National County Club Home Owners Association, Inc., and The
Retreat at Charleston National Country Club Horizontal Property Regime.....Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin
Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource,
Inc; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy
C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually;
Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel
Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction
Group, LLC; Liollo Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC;
Costa De Oliverira Construction, LLC; Solesmar Jesus De Oliverira; Wilson Lucas Sales
d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa;
Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos,
individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually;
Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos
Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction;
Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado
.....Defendants,

Builders FirstSource-Southeast Group, LLC.....Third-Party Plaintiff, Appellant,

v.

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

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

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

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

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

COUNTER STATEMENT OF FACTS

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

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

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

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

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

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

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

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

ARGUMENT

At the core of BFS’s appeal is the premise it can both rewrite its contract and reframe its pleadings after the fact. BFS’s contractual indemnity claims are based on provisions that attempted to secure indemnification for its own negligence—provisions that were neither clear nor unequivocal, as required by Concord and Cumberland, and in violation of S.C. Code Ann § 32-2-10. As such, the Circuit Court properly concluded the contractual indemnity claim fails as a matter of law, which was affirmed by the Court of Appeals. Undeterred, BFS now asserts it can nonetheless pursue contractual indemnity from AC Construction for AC Construction’s alleged sole negligence. But this argument finds no support in the plain language of the Master agreement or in the allegations of the operative Complaint. A contractual indemnity provision that is legally invalid cannot be resurrected or selectively enforced for a narrower purpose. To do so amounts to judicial revision of the Master Agreement. This court has no obligation or authority to rewrite the contractual indemnity provisions of BFS. Lewis v. Premium Inv. Corp., 351 S.C. 167, 171 (2002); Poynter v. Inves., Inc., v. Cent. Builders of Piedmont, Inc., 387 S.C. 583 (2010).

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

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

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

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

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

138. That **BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or others in this action**, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorney fees, costs, and other expenses incurred in defending this action, and **further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs, or to others**, or which Builders FirstSource-Southeast Group may pay in satisfaction of such claims.

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

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

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

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

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

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

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

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

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

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

A. BFS Contract Does Not Support Its Argument.

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

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

To the fullest extent permitted by Law, the subcontractor shall indemnify, defendant and hold harmless the contractor, the owner, and all of their officers, directors, agents, and employees from and **against any and all claims**, suits, losses, causes of action, damages, liabilities, fines, penalties, and expenses of any kind whatsoever, including, but not limited to, arbitration or court costs and attorney's fees (such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) arising out of or resulting from bodily injury or death of any person, or property damage, including

loss of use of property, arising or alleged to arise out of or in any way related to this agreement or the subcontractor's performance of the work or other activities of the subcontractor, **but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor** or anyone for whose acts the subcontractor may be liable. The Contractor's insurance requirements are separate and distinct from the requirement of indemnification hereunder.

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

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

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

The duty to defend under this Section 5 is independent and separate from the Duty to indemnify, and **the duty to defend exists regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees.** The duty to defend arises immediately upon presentation of a claim by any party indemnified hereunder and written notice of such claim being provided to subcontractor. **Subcontractor's obligation to indemnify, defend, and hold harmless under this Section 5 will survive the expiration or earlier termination of this agreement until it is finally determined by a Court of competent jurisdiction or arbitration panel that a claim against the**

contractor, the owner, and any of their officers, directors, agents, and employees for the matter indemnified hereunder is fully and finally barred by the applicable statute of limitations.

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

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

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

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

In Concord and Cumberland, the Court of Appeals held the "clear and unequivocal" standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018). Despite this clear precedent, BFS now asks this Court to disregard that conclusion and rewrite its Master Agreement to support indemnification solely for AC Construction's negligence. As this Court has previously held, "[i]t is not the function of the court to rewrite contracts for parties." Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) (internal citations omitted). BFS's Petition for Writ of Certiorari is premised on judicial reconstruction of both its Master Agreement and operative Complaint, and, as such, it must be denied.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BFS’s claim that attorney’s fees and costs are “consequential damages of an indemnity claim” and fall outside the scope of “damages” under § S.C. Code Ann. 32-2-10 is without merit. As established by this Court in McCoy v. Greenwave Enterprises, Inc., “reasonable attorney’s fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.” McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 360, 759 S.E.2d 153, 156 (2014) (internal citations omitted). Thus, attorney’s fees are an integral component of the damages an indemnitee may seek to recover when demanding indemnification.

BFS itself acknowledged this legal reality not only when BFS elected to include an indemnity provision for attorney's fees and costs in its Master Agreement, but also, in its pleadings, which seeks attorney's fees and costs as damages under its contractual indemnity cause of action. South Carolina law permits recovery of attorney's fees by contract or statute (Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966)), but the contractual terms providing for such indemnification must still comply with all applicable South Carolina law, including S.C. Code Ann. § 32-2-10. Section 5 of the Master Agreement explicitly calls for AC Construction to pay BFS's attorney fees "regardless of any ultimate liability or negligence of the contract." This is an explicit violation of S.C. Code Ann. § 32-2-10, and BFS's Master Agreement is illegal as a result and therefore, unenforceable. The fact these claimed damages are limited to attorney's fees as opposed to a judgment cost is immaterial.

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

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

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

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

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

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

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

South Carolina courts have emphasized the permissibility of severability hinges upon the extent to which the unenforceable provisions permeate the entire agreement. As this Court explained in Simpson v. MSA of Myrtle Beach, Inc., “if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.” 373 S.C. 14, 33–36, 644 S.E.2d 663, 673–74 (2007). That is precisely the case here. The indemnity provisions at issue seek to shift liability for BFS’s own negligence, an objective flatly prohibited by South Carolina Code § 32-2-10. Severing such provisions would not simply involve striking unlawful language; it would require the Court to reconstruct the contract’s entire indemnity scheme to align it with lawful standards. Courts in South Carolina do not undertake such revisions. See Poynter v. Ratcliff, 387 S.C. 580, 588, 694 S.E.2d 15, 18 (2010) (holding that courts may not blue-pencil unlawful terms to render them enforceable). As the Court of Appeals aptly observed in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, “[m]erging the indemnity clauses into one clause by replacing some language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term to which [the party] did not agree.” 424 S.C. 639, 656, 819 S.E.2d 171, 175 (Ct. App. 2018).

Here, the unlawful provisions were drafted by BFS such that they are inextricably linked and interwoven throughout the Master Agreement. This intricate entanglement makes it impossible for the court to selectively employ the severability clause to remove one or more offending

provisions without embarking on an impermissible exercise of judicial revision. There is no basis for further review of this settled principle, and the Petition for Writ of Certiorari should be denied.

VI. THE COURT OF APPEALS CORRECTLY APPLIED COLLATERAL ESTOPPEL

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

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

actions, which led to dismissals.

BFS's central argument, that its pending appeal(s) negate the finality of the prior judgments for collateral estoppel purposes, directly contradicts established South Carolina law and well-settled precedent. A judgment is final and retains its preclusive effect even while on appeal, unless and until it is actually reversed. See Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941) (finding finality of a court's judgment is not lost because appeal is pending until and unless reversed). A final judgment is one that "finally determines the rights' of the parties." First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992). Rule 201(a) SCACR, provides that an: "[a]ppel may be taken, as provided by law, from any final judgment or appealable order." The status of the Newman Order, the Young Order, and McCoy Order as a final judgment is what makes the orders appealable in the first instance. None of BFS's respective appeals undermine the status of the associated order as a final judgment, and, therefore, is not a barrier to applying collateral estoppel.

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

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

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

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

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

CONCLUSION

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

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July 31, 2025

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jul 31 2025

S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
The Honorable Jennifer B. McCoy
Circuit Court Judge

Circuit Court Case No. 2016-CP-10-03783

Court of Appeals Case No. 2021-001050
Opinion No. 6099 (S.C. Ct. App. filed May 21, 2025)

Appellate Case No. 2025-001224

The Retreat at Charleston National Country Club Home Owners Association, Inc., and The
Retreat at Charleston National Country Club Horizontal Property Regime, ...Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin
Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.;
Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee
Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston
Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co.,
LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollo
Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira
Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding;
Miracle Siding, LLC; Royal Homes of SC, Inc.; CollenBatissa; Christopher Batissa; Norma
Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos
d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin
Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica
Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De
Caris; and Mario Salgado, ...Defendants,

Builders FirstSource-Southeast Group, LLC, ...Third-Party Plaintiff, Appellant,

v.

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

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

**RESPONDENT WS CONTRACTORS, LLC'S RETURN TO BUILDERS
FIRSTSOURCE-SOUTHEAST GROUP, LLC'S PETITION FOR WRIT OF
CERTIORARI**

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STATEMENT OF THE CASE

This is a case where a large material supplier and contractor, Petitioner Builders FirstSource – Southeast Group, LLC (“BFS”), asks our courts to enforce contractual provisions in its master subcontractor agreement requiring its subcontractors, including this Respondent, WS Contractors, LLC (“WSC”), to indemnify BFS against liability resulting from its sole negligence. BFS pled for this relief, but, more importantly, is seeking such relief as a matter of fact.

As the record reflects, almost 6 years ago, Respondent WSC and its subcontractors settled with the Plaintiffs. **(R. pp. 812-813)**. Together, WSC and its subcontractors paid Plaintiffs \$1,000,000.00 in exchange for not only a release of Plaintiffs’ direct claims against them, but releases of BFS, the general contractor, and developer from claims arising from or relating to WSC and its subcontractor’s errors, omissions, and scope of work (referred to as the “issue release”). **(R. pp. 811-825)**. The issue release specifically provides:

In consideration of the receipt of the Settlement Amount, Releasors hereby release, acquit, and forever discharge Builders FirstSource, Inc., Builders FirstSource Southeast Group, Winston Carlyle Charleston National, LLC, Colin R. Campbell Construction, Inc., C.R. Campbell Construction Co., Inc., Colin Campbell Construction, LLC, and their respective owners, parents, subsidiaries, directors, officers, shareholders, members, managers, principals, employees, agents, heirs, assigns, and Colin Campbell, individually (hereinafter collectively “Issue Releasees”) relating to or arising from (a) the scope of work for the Project identified in Exhibit A attached hereto involving Building Numbers 22 through 31, inclusive, and made a part hereof, including, without limitation, the acts, omissions, labor, materials, work, and involvement of Issue Releasees with respect to the scope of work for the Project identified in Exhibit A, and (b) the acts, omissions, labor, materials, work, or involvement of the Settling Defendants and Releasee(s) identified in Paragraph 2 at the Project known as The Retreat at Charleston National Country Club.

(R. p. 813).¹ It is settled as a matter of fact in this case that BFS will not bear any liability to Plaintiffs on account of WSC or its subcontractors alleged negligence.

WSC and its subcontractor's bearing of complete responsibility for their scope of work was not enough for BFS. BFS maintained its claims against WSC after this settlement (and throughout the last six years), resulting in the order that is on appeal that BFS requests this Court review. As these facts clearly show, BFS wants its subcontractors to cover BFS's own liability. Numerous circuit court judges have said no go and the Court of Appeals affirmed these decisions.

WSC filed a motion for summary judgment as to BFS's crossclaims against it² about a month after settling with Plaintiffs and procuring the issue release in BFS's favor. **(R. p. 708).** The Honorable Jennifer B. McCoy heard WSC and the other subcontractor-Respondents' motions for summary judgment as to BFS's crossclaims on November 6, 2020. **(R. p. 1386).** BFS admitted its causes of action for breach of express and implied warranties, breach of contract, and negligence failed as a matter of law and were subject to dismissal. **(R. p. 1393, lines 4-21; R. pp. 1083-1084; R. pp. 1182-1183).** BFS has not appealed the dismissal of those claims. BFS's remaining claim, the claim at issue before the Court of Appeals, is for indemnity. BFS's indemnity claim relies upon certain provisions of "Version – 5/17/06" of BFS's form master subcontractor agreement; i.e., the "Later Contracts" as labeled by the Court of Appeals. **(R. pp. 785-798).**

¹ WSC was one of several subcontractors providing labor-only installation services for BFS. **(R. pp. 822-825, 864).** WSC's work was limited to Buildings 22 through 31. **(R. pp. 822-825).**

² BFS's operative claims against WSC are set out in BFS's Amended Answer, Cross-Claims, and Third-Party Complaint that was filed in response to Plaintiffs' Fourth Amended Complaint on November 13, 2019. **(R. pp. 414-454).** The general contractor and developer never asserted claims against WSC.

Judge McCoy granted summary judgment to WSC.³ On August 9, 2021, BFS filed a motion for reconsideration of Judge McCoy's Order. **(R. pp. 1373-1385)**. Judge McCoy denied BFS's motion for reconsideration on August 23, 2021. **(R. pp. 137-138)**. On September 22, 2021, BFS filed its Notice of Appeal of Judge McCoy's Orders. **(Notice of Appeal to Court of Appeals)**.

On February 12, 2025, the Court of Appeals affirmed all eight of the Circuit Court's Orders. BFS's Petition for Rehearing was denied on May 21, 2025, and the Court issued a substituted opinion, still affirming all eight Orders. Retreat at Charleston National Country Club Home Owners Association, Inc., v. Winston Carlyle Charleston National, LLC, et al., 445 S.C. 566, 915 S.E.2d 736 (Ct. App. 2025). BFS filed its Petition for Writ of Certiorari on June 20, 2025.

STANDARD OF REVIEW

This Court only reviews final decisions of the Court of Appeals "where there are special and important reasons" to do so. Rule 242(b), SCACR. Factors bearing on this Court's consideration of whether it should exercise its discretionary authority to issue a writ of certiorari are: (1) whether there are novel questions of law; (2) whether there is a dissent in the decision of the Court of Appeals; (3) where the Court of Appeals' decision is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; or (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR.

³ Judge McCoy initially entered a Form 4 Order granting summary judgment to WSC on all causes of action but for BFS's equitable indemnity crossclaim. **(R. p. 16-17)**. However, on July 29, 2021, Judge McCoy entered an 18-page formal order granting summary judgment to WSC on all claims asserted by BFS. **(R. pp. 84-101)**.

ARGUMENT

There are no considerations warranting certiorari in this case. The Court of Appeals properly applied existing statutory and case law to the facts of this case. Those facts show that BFS is seeking to enforce contractual provisions that require WSC and its other subcontractors to indemnify it for its own negligence. The Legislature has said such contracts are illegal. S.C. Code § 32-2-10. Our courts have followed suit by mandating in the situation where a contract calls for a party to indemnify the indemnitee for the indemnitee's concurrent negligence, this intent must be set out in "clear and unequivocal" terms. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018), reh'g denied (Oct. 18, 2018); Laurens Emerg. Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 378-79 (2003). BFS's master subcontractor agreement fails to meet this strict standard and contains provisions that run afoul of the Anti-Indemnity Statute, S.C. Code § 32-2-10. The circuit court and Court of Appeals were within their right to reject BFS's request for judicial rewriting of their illegal and unconscionable contract. There is no reason for this Court to review the Court of Appeals decision. This Court should deny BFS's Petition.

I. Certiorari is not appropriate under Rule 242, SCACR. The Court of Appeals correctly applied S.C. Code § 32-2-10 and the "clear and unequivocal standard" because as the circumstances particular to WSC show, BFS is seeking to be indemnified for its sole negligence as a matter of fact.

BFS attempts to create conflict between the Court of Appeals' opinion in this case and its prior opinion in Concord & Cumberland by suggesting that the claims, contracts, and facts in each case are on par. As simple comparison shows, they are not. The analysis begins by distinguishing the facts of this case.

A. The issue release WSC and its subcontractors procured in favor of BFS for the hefty sum of \$1 million dollars negates any question as to whether BFS is seeking indemnification for BFS's sole or concurrent negligence. WSC has

resolved BFS's liability on account of WSC's work. BFS can only be viewed as seeking indemnification from WSC for Petitioner's sole negligence

BFS's Petition completely ignores that BFS is, as a matter of law and fact, seeking to recover from WSC, under a theory of indemnity, for BFS's sole negligence. Instead, BFS indicates to this Court that it has pled alternative theories of indemnity in its pleading and argues that it should be permitted to cherry-pick some of the non-offending language in its master subcontract agreement and apply them to the one alternate theory BFS claims it can maintain.

This argument is wrought with issues,⁴ but the argument has no legs whatsoever against WSC. We are not at a stage where we are examining in the abstract whether BFS is seeking to be indemnified for WSC's sole negligence, WSC and BFS's concurrent negligence, or BFS's sole negligence. BFS has not, cannot, and will not bear any liability on account of WSC's acts, omissions, or work on the project based upon the issue release. **(R. pp. 811-825)**. This is a matter of undisputed fact.

BFS previously acknowledged in this case that an issue release settles the question of its potential liability to Plaintiffs on account of a subcontractor's scope of work in absolute terms. In BFS's opposition to another subcontractor-Defendant's motion for summary judgment (McDaniel Construction Co. LLC), BFS admitted summary judgment as to its claim for indemnity for liability is proper where a subcontractor obtains an issue release in favor of BFS, thereby eliminating the question of BFS's liability for the subcontractor's negligence. See **(R. p. 1553)**. McDaniel Construction Co. LLC had not procured an issue release in BFS's favor. **(R. pp. 1552-1537)**. BFS

⁴ Among other issues, BFS's argument regarding Rule 8, SCRCp, is not properly included in its Petitioner for a Writ of Certiorari. "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be include in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(1), SCACR. BFS did not raise its Rule 8, SCRCp, argument in its briefs filed in the Court of Appeals. See **(BFS Final Brief and Reply filed Nov. 14, 2022 in the Court of Appeals)**.

was arguing that its liability on McDaniel's account remained uncertain because the issue release was not in place. **(R. p. 1553)** ("Because Plaintiffs had not released their claims relating to alleged improper framing installation implemented by McDaniel, summary judgment is not proper at this time."). The issue release here resolves any question of fault. If BFS is held liable to the Plaintiffs, it will not be on WSC's account, but on account of its own negligence or that of unrelated subcontractors.

WSC has pointed to the issue release in its briefing and argument before the Court of Appeals. See (WSC Final Brief). BFS does not dispute the fact that it is now in a position of seeking indemnity from WSC for BFS's own negligence.

These facts totally undercut BFS's argument that it is not seeking to recover in indemnity solely for its subcontractor's negligence. The circumstances between BFS and WSC clearly reveal that BFS is, in fact, seeking to recover from its subcontractors in indemnity for BFS's sole and concurrent negligence.

B. The Court of Appeals properly determined S.C. Code § 32-2-10 and public policy considerations prevent BFS from recovering damages, including attorney's fees and costs, from WSC occasioned by BFS's own negligence.

The issue release is also dispositive of BFS's contractual indemnity claim against WSC because the Anti-Indemnity Statute, S.C. Code § 32-2-10, renders a promise or agreement in connection with the construction of a building purporting to indemnify the promise against liability for damages arising out of property damages proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and enforceable. That's exactly what the BFS's master subcontractor agreement purports to do and precisely the relief BFS is seeking from WSC. It also should be

dispositive of BFS's claims against all of its other subcontractors from whom it is seeking indemnity from because the illegality renders the contract unenforceable. See Section II. A infra.

This Court does not need to take review of a case where the underlying contract indisputably violates the Anti-Indemnity Statute.

C. The Court of Appeals properly considered Petitioner's pared-down request for attorney's fees and costs from Respondent as elements of damages attendant to Petitioner's only remaining claim, its contractual indemnity claim, and appropriately rejected Petitioner's strained interpretation of S.C. Code § 32-2-10 and its own pleadings.

The Anti-Indemnity Statute, S.C. Code § 32-2-10, applies to BFS's claims for attorney's fees and costs as elements of damages of its contractual indemnity claim. As noted above, BFS does not challenge that it cannot use its master subcontractor agreement to require its subcontractors to indemnify it from its own negligence due to the Anti-Indemnity Statute. See generally (BFS Pet. for Writ of Certiorari). However, BFS argues that the same law does not restrict its right to recover, under a theory of indemnity, its attorney's fees and costs. This argument is illogical and a misreading of the statute and precedent.

BFS's claim that attorney's fees and costs are damages that fall outside the scope of the Anti-Indemnity Statute is without merit. As established by this Court, in McCoy v. Greenwave Enterprises, Inc., "reasonable attorney's fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses." 408 S.C. 355, 360, 759 S.E.2d 136, 156 (2014) (internal citations omitted). However, while South Carolina law permits recovery of attorney's fees by contract or statute, the contractual terms providing for such indemnification must still comply with all applicable South Carolina law, including the Anti-Indemnity Statute codified at S.C. Code § 32-2-10. Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966).

BFS bases its right to recover attorney's fees and costs on the following language contained within the Section 5 "Indemnity" section of its master subcontractor agreement:

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.

(R. p. 791) (all caps emphasis in original, bold and underline emphasis added). Section 5 of the master subcontractor agreement explicitly calls for BFS's subcontractors to pay BFS's attorney fees "regardless of any ultimate liability or negligence of the contract." **(R. pp. 790-791)**. This is an explicit violation of the Anti-Indemnity Statute, and BFS's master subcontractor agreement is illegal and, therefore, unenforceable. The fact that these claimed damages are limited to attorney's fees, as opposed to a judgment cost, is immaterial.

BFS itself acknowledged this legal reality not only when BFS elected to include an indemnity provision for attorney's fees and costs in its master subcontractor agreement, but also, in its pleadings, through which BFS seeks attorney's fees and costs as damages *under its contractual indemnity cause of action*.⁵

BFS's primary argument is that: "Attorneys' fees do not fall within the scope of indemnity because they are not paid by a first party to 'a second party for loss or damage the second party incurs to a third party.'" **(BFS Pet. for a Writ of Certiorari at p. 23)**. BFS latches onto the Court of Appeals' definition of the noun "indemnity" in its Concord & Cumerland opinion and omits from its discussion that the Anti-Indemnity Statute does not use the word "indemnity." **(Id.)**. The verb "indemnify" and phrase "hold harmless" are contained within the Anti-Indemnity Statute.

⁵ BFS has abandoned all of its causes of action against WSC but for its contractual indemnity cause of action. Accordingly, BFS is maintaining that its sole cause of action, contractual indemnity, is not subject to laws governing contractual indemnity. The argument is illogical and far from presenting a novel issue of law.

S.C. Code § 32-2-10. To “indemnify” and “hold harmless” are synonymous with each other and the well-understood meaning of each verb is to make immune from liability.⁶ The statute does not limit or qualify its application to compensation paid by a first party to a second party for loss or damage that the second party incurs to a third party as BFS would have it, nor does the ordinary meaning of the language contained therein.

The lower court was correct in giving the words “indemnify” and “hold harmless” their ““plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation,”” and there is no error in the Court of Appeals affirming these rulings. CFRE, LLC v. Greenville Cnty Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting Sloan v. Hardee, 371 S.C. 495, 640 S.E.2d 457, 459 (2007)).

It is also proper to consider BFS’s efforts to construe the language in the Anti-Indemnity Statute in conjunction with the purpose of the whole statute and the policy of the law, which disfavors indemnity provisions that are “overly broad.” See Keith v. River Consulting, Inc., 365 S.C. 500, 600 S.E.2d 302 (Ct. App. 2005); see also Rorrer v. P.J. Club, Inc., 347 S.C. 560, 569, 556 S.E.2d 726 (Ct. App. 2001), citing S.C. Coastal Council v. S.C. State Ethics Comm’n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). The object of the Anti-Indemnity Statute is to prevent the enforcement of agreements that require a subcontractor to indemnify a general contractor for damages caused by the general contractor’s negligence or the negligence of its subcontractors.

⁶ Black’s Law Dictionary defines “indemnify” as: “**1.** To reimburse (another) for a loss suffered because of a third party’s or one’s own act or default; **HOLD HARMLESS.** **2.** To promise to reimburse (another) for such a loss. **3.** To give (another) security against such a loss” and “hold harmless” to mean “[t]o absolve (another party) from any responsibility for damage or other liability arising from the transaction; **INDEMNIFY.**” Black’s Law Dictionary 11th Ed. (2019); see also New York & Presbyterian Hosp. v. United States, 881 F.3d 877, 883-87 (Fed. Cir. 2018) (holding “indemnify” was commonly understood to mean “to compensate” and “to reimburse” after examining various definitions of the word).

D.R. Horton, Inc. v. Builders First-Source-Southeast Group, LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018).

BFS seeks an interpretation of the statutory language that is not consistent with the plain language of the statute, its ordinary meaning, and the overall purpose of the statute and South Carolina law. Its argument should be rejected for these additional reasons.

BFS also attempts to distinguish agreements imposing a duty to defend from indemnity agreements. BFS cites to two cases, City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009) and Sloan Constr. v. Centr. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977), for the proposition that the duty to defend and the duty to indemnify are two separate and distinct contractual obligations. **(BFS Petition for Writ of Certiorari at pp. 23-24)**. These cases involve an insurer's duty to defend and/or indemnify its insured against third-party liability claims. City of Hartsville, 382 S.C. at 544; Sloan Constr., 269 at 186. The juxtaposition of the parties and the contract at issue is completely different here, but, moreover, what we are dealing with is not a breach of contract claim by BFS for an alleged failure to defend them against Plaintiffs' claims. BFS's claim against WSC is confined to the following:

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 FirstSourceSoutheast 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.

(R. pp. 440-441).

The Court of Appeals' application of the Anti-Indemnity Statute to BFS's contractual indemnity claim, which includes BFS's requests for attorney's fees, costs, and other expenses incurred in defending this action, was correct, entirely consistent with the Anti-Indemnity Statute, and presents no novel issue of law.

BFS should not be entitled to recover sums from WSC or its other subcontractors on account of its own negligence and the attorney's fees and expenses it incurs defending against its own liability. The circuit court and Court of Appeals were proper in rejecting its claims seeking to do just that. There is no basis in law or fact to review these sound decisions. BFS's Petition for Writ of Certiorari should be denied.

II. The Court of Appeals did not deviate from its own precedent in Concord & Cumberland or create conflicting law. The facts of the cases are different and the Court of Appeals' conclusion here that the BFS master subcontractor agreement is replete with terms that violate South Carolina law and public policy and therefore cannot be severed out or rewritten is well supported.

For the reasons analyzed above, which BFS has fairly well admitted,⁷ BFS's master subcontractor agreement violates the Anti-Indemnity Statute. In addition to including provisions that require its subcontractors to indemnify it against its own negligence, BFS included language purporting to have its subcontractors indemnify BFS for its concurrent negligence that were not stated in "clear and unequivocal" terms. Each of these issues alone warrants the dismissal of BFS's contractual indemnity claims against its subcontractors, including the subcontractors who have not settled and obtained an issue release in BFS's favor.⁸

A. BFS's master subcontractor agreement is illegal and unenforceable under S.C. Code § 32-2-10 because it requires BFS's subcontractors to indemnify BFS for BFS's sole negligence. This issue was not present in Concord & Cumberland.

BFS asked the circuit court and then, the Court of Appeals, to do two things with respect to its master subcontractor agreement. First, it asked the Courts to sever out those provisions throughout the agreement that required BFS's subcontractors to indemnify BFS against its own

⁷ BFS represented to the lower court, in a writing signed by its counsel, that it was only seeking to recover the portion of its attorney's fees and costs incurred in defending the claims that arose out of WSC's work. BFS scaled-back its claim against WSC after WSC procured the issue release in BFS's favor.

In BFS's Motion for Reconsideration of the circuit court order granting WSC summary judgment on BFS's crossclaims, BFS stated repeatedly that it was only seeking to recover the defense costs it incurred in defending BFS from those of Plaintiffs' claims that arose out of WSC's work. (**R. p. 1376**) ("BFS is not seeking indemnification for its own negligent acts or omissions, but rather is seeking attorney's fees pursuant to the clear provisions of its agreement with WSC."); (**R. p. 1379**) ("BFS is, in fact, seeking only recovery of attorney's fees and costs, expended in defending against the plaintiff's claims, arising out of the performance of WSC's work."); (**R. p. 1381**) ("In this case, where BFS originally sought indemnity against liability resulting from the (sic.) WSC's negligence, those specific indemnity claims have been resolved. The sole remaining claims are those seeking attorney's fees pursuant to the BFS/WSC contract, claims which are not even addressed, much less prohibited by 32-2-10.") (emphasis in original).

⁸ To the extent not inconsistent with its positions set out herein, BFS joins in the subcontractor-Respondents' arguments.

negligence. Second, it asked the Courts to rewrite other parts that required BFS's subcontractors to indemnify BFS against the subcontractor's sole or concurrent negligence so that they read that the subcontractor only had to indemnify BFS against the subcontractor's sole negligence. The first request was aimed at curing the violation of the Anti-Indemnity Statute, S.C. Code § 32-2-10. The second request would cure the fact that the contract, as drafted by BFS, did not meet the strict "clear and unequivocal" standard set by Concord & Cumberland.

As it relates to the first issue, a plain reading of the Anti-Indemnity Statute supports the conclusion that the indemnity provisions contained in the master subcontractor agreement are *wholly enforceable*. See S.C. Code § 32-2-10 (a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promise . . . against liability for damages arising out of bodily injury or property damage is against public policy and unenforceable) (emphasis added). The statute does not provide that the specific clause, paragraph, or subsection of such agreements that run afoul of the statute are unenforceable. Id. It provides **the agreement** is against public policy and unenforceable as a matter of law. Moreover, if there's any doubt as to the absolute nature of this rule, the statute provides this rule is true "notwithstanding any other provision of law." S.C. Code § 32-2-10. Pursuant to the express terms of the Anti-Indemnity Statute, the fact that the agreement purports to have WSC indemnify BFS for its sole negligence renders the entire agreement unenforceable and void as against public policy.

This issue was not present in Concord & Cumberland. 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). Superior Construction Corporation ("Superior") was the general contractor in that case, who subcontracted the installation of windows and doors on the project to The Muhler Company, Inc. ("Muhler"). Id. at 642-43. There was a written subcontract between Superior and

Muhler that contained a indemnification provision in favor of Superior, as well as the owner, and architect. Id. at 643.

12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that

(a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

(b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this [a]rticle [12.1].

Id. at 643-644. Section (a) of the foregoing agreement purported to require the Muhler, as the subcontractor, to indemnify Superior and other indemnitees against loss caused by Muhler. The issue in that case was whether this language, paired with some other language made applicable by a subsequent remedial agreement after issues arose,⁹ was whether the contractual language clearly

⁹ After water intrusion around the windows and doors presented, Superior and Mohler entered into an agreement whereby Mohler agreed to remedy any defects in the installation of the windows. Id. at 644. This agreement contained the following indemnification clause: "11. In the event either Superior or Concord and Cumberland, LLC are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended [c]ontract [d]ocuments, or are defectively installed[,] Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable [attorney's] fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration, liability incurred by either or both as consequence including, but not limited to, costs and [attorney's] fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred." Id.

and unequivocally required Muhler to indemnify Superior for Superior's concurrent negligence. Id. at 645-657.

There is no language found in the subcontract or remedial agreement that purports to require Muhler to indemnify Superior for Superior's sole negligence like the language that is found in BFS's master subcontractor agreement.

Sections 3 and 5 of BFS's Later Contracts obligate BFS's subcontractors, WSC included, 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. Those provisions read as follows:

SECTION 3. Warranty. In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. . . . This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third-party beneficiaries of this Agreement and shall have the power to enforce this Agreement.

Subcontractor will maintain a published phone number or answering service during normal working hours.

....

SECTION 5. INDEMNITY. 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 FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE 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 INDEMNIFICATION HEREUNDER.

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'S 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 SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

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 DAMAGE THAT IS (a) CAUSED BY OR RESULTS 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.**

(R. pp. 790-792) (all caps and underline emphasis in original; italicized emphasis added).

Additionally, Section 9(i) of the Later Contracts provides for indemnification of attorney's fees and expenses as well as amounts paid in settlement without regard to the fault of BFS. **(R. p. 796).**

All of these provisions violate the Anti-Indemnity Statute, S.C. Code § 32-2-10. The Court of Appeals was proper in rejecting BFS's effort to enforce an illegal contract. D.R. Horton, Inc., 422 S.C. at 152, 810 S.E.2d at 46 ("The indemnification agreement in this case purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10. Because the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton."). "[A]n illegal contract is unenforceable." Id..

This case is not on all fours with Concord & Cumberland as BFS asserts. The language of the underlying contracts differs significantly; Superior did not require its subcontractors, including Muhler, to indemnify it against its own negligence. There was no question of whether the Anti-Indemnity statute renders the contract unenforceable as there is here. The Court of Appeals' decision in this case does not conflict with its prior opinion in Concord & Cumberland.

- B. BFS's master subcontractor agreement does not express BFS's intention for its subcontractors to indemnify BFS against its concurrent negligence in "clear and unequivocal" terms. The provisions that do not meet this strict standard cannot be severed out of the contract because they pervade them and would require a judicial rewriting of the agreement.**

BFS grossly distorts the holding of the Court of Appeals in Concord & Cumberland in its Petition. Repeatedly, BFS asserts that the Court of Appeals allows the general contractor to proceed to seek recovery for its subcontractor's negligence. See (BFS Pet. for a Writ of Certiorari at pp. 12, 14, and 15). The issue of Superior recovering damages, in indemnity, from its subcontractor, Muhler, was not appealed by Superior, hence, it was not an issue argued or decided on appeal. Muhler moved for partial summary judgment at the circuit court level, seeking a declaration that the applicable indemnification provisions found in the original subcontract and the remedial agreement that followed did not require Muhler to indemnify Superior for Superior's own negligence. 424 S.C. 639 at 645. The circuit court granted Muhler's motion and Superior appealed. Id.

Muhler did not seek to escape its obligation to indemnify Superior for damages resulting from the work Muhler performed. Id. That was not the issue before the Court on appeal. Accordingly, the Court of Appeals in Concord & Cumberland did not allow the general contract to recover from its subcontractor for damages resulting from the work of the subcontractor, nor was the distinction between the damages arising from Muhler's sole negligence as compared to Superior's concurrent negligence a theme of its opinion.¹⁰ It was not an issue because Muhler did not make it an issue.

WSC and BFS's other subcontractors raised different arguments here. They asserted that BFS should be precluded from recovering any form of indemnity from them because BFS's master subcontract was replete with illegal and unenforceable provisions, as well as confusing, contradictory, ambiguous, and unconscionable terms.

¹⁰ BFS's lack of citation to the opinion by pincite or quotation is telling of the differences between its characterization of the holdings and the actual opinion. See (BFS Pet. for Writ of Certiorari at pp. 11-15).

Not only are the claims of the subcontractor parties different as between these cases, but so are the facts, particularly the subcontract contracts. Indemnity provisions are spread across BFS's master subcontract agreement, including Section 3 (Warranty), Section 5 (Indemnity), and Section 8(i) (Attorney's Fees). The indemnification language is intertwined across sections of the agreement and even within Section 5 and not susceptible of division. That was not true of the indemnification provisions in Superior's subcontract.

The Court of Appeals properly affirmed the circuit court's decision to not sever and substantially rewrite BFS's master subcontract agreement to its benefit. This court has no obligation or authority to rewrite the contractual indemnity provisions of BFS. Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); Poynter v. Inv., Inc., v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010).

South Carolina courts have emphasized that the permissibility of severability hinges upon the extent to which the unenforceable provisions permeate the entire agreement. As this Court explained in Simpson v. MSA of Myrtle Beach, Inc., "if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." 373 S.C. 14, 33–36, 644 S.E.2d 663, 673–74 (2007). That is precisely the case here and it was not a fact that was present in Concord & Cumberland. 424 S.C. 639, 819 S.E. 2d 166 (Ct. App. 2018). The indemnity provisions at issue seek to shift liability for BFS's own negligence, an objective flatly prohibited by the Anti-Indemnity Statute. S.C. Code § 32-2-10. Severing such provisions would not simply involve striking unlawful language; it would require the Court to reconstruct the contract's entire indemnity scheme to align it with lawful standards. Courts in

South Carolina do not undertake such revisions. See Poynter v. Inv., Inc., v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010) (holding that courts may not blue-pencil unlawful terms to render them enforceable). As the Court of Appeals aptly observed, in Concord & Cumberland, "[m]erging the indemnity clauses into one clause by replacing some language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term to which [the party] did not agree." 424 S.C. 639, 656, 819 S.E.2d 171, 175 (Ct. App. 2018).

The unlawful provisions were drafted by BFS such that they are inextricably linked and interwoven throughout the master subcontractor agreement. This intricate entanglement made it impossible for the Court to selectively employ the severability clause to remove one or more offending provisions without embarking on an impermissible exercise of judicial revision.

The Court of Appeals did not deviate from its own precedent in Concord & Cumberland in rendering this opinion. The subject contracts and the claims at issue are different as between the cases. The Court of Appeals' decision is thoroughly analyzed, well-supported in fact and law, and there is no basis for further review of the matter.

III. There is no other basis warranting certiorari under Rule 242, SCACR.

As analyzed above, there is no novel issue of law warranting this Court to exercise its discretion and power to further review the case. Further, there was no dissent at the Court of Appeals—the decision was unanimous. The decision of the Court of Appeals does not conflict with any prior decision of this Court—the Court of Appeals decision keeps with Court of Appeals decisions, including Concord & Cumberland. There are no constitutional issues involved in this appeal, nor are there any federal questions involved that conflicts with any decision of the United States Supreme Court.

The only other issue BFS addresses that it is not tethered to the language of its master

subcontractor agreement is the issue of whether a trial court's order that is on appeal should be considered "final" for res judicata or collateral estoppel purposes. This issue alone does not warrant review. As the Court of Appeals' decision and the underlying record shows, both the circuit court and the Court of Appeals conducted their own independent analysis. It only added to their conclusion that prior orders from other circuit court judges had reached the same result. From a practical perspective, this Court should not take up review only to address this question, as it will not resolve the case. From a legal perspective, there is no merit to the argument. A judgment is final and retains its preclusive effect even while on appeal, unless and until it is actually reversed. See Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941) (finding finality of a court's judgment is not lost because appeal is pending until and unless reversed). A final judgment is one that "finally determines the rights' of the parties." First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992). Rule 201(a) SCACR, provides that an: "[a]ppeal may be taken, as provided by law, from any final judgment or appealable order."

The status of the prior orders as a final judgment is what makes the orders appealable in the first instance. None of BFS's said appeals undermine each order's status as a final judgment, and, therefore, is not a barrier to applying collateral estoppel. While the decision to grant certiorari is discretionary and the reasons stated in the rule are not a controlling list of prerequisites to granting a petition, there is simply no reason certiorari is appropriate here.

CONCLUSION

Therefore, for all the reasons stated above, in addition to those set out in the co-Respondent's Returns, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully Submitted,

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July 31, 2025

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jul 31 2025

S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
The Honorable Jennifer B. McCoy
Circuit Court Judge

Circuit Court Case No. 2016-CP-10-03783

Court of Appeals Case No. 2021-001050
Opinion No. 6099 (S.C. Ct. App. filed Feb. 12, 2025)

Appellate Case No. 2025-001224

The Retreat at Charleston National County Club Home Owners Association, Inc., and
The Retreat at Charleston National Country Club Horizontal Property
Regime.....Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.;
Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders
FirstSource, Inc; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building
Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino
Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley
Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC
Construction, Inc.; L&G Construction Group, LLC; Liollo Architecture; JC
Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliverira
Construction, LLC; Solesmar Jesus De Oliverira; Wilson Lucas Sales d/b/a Miracle
Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher
Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos,
individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin,
individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin,
individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a
Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris;
and Mario Salgado
.....Defendants,

Builders FirstSource-Southeast Group, LLC.....Third-Party Plaintiff,
Appellant,

v.

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

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

**RESPONDENT ECC CONTRACTING, LLC'S RETURN TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

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COUNTER STATEMENT OF THE QUESTION PRESENTED

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

COUNTER STATEMENT OF FACTS

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

Background of the Dispute

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

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

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

Procedural History

The underlying litigation began on July 22, 2016, when Plaintiffs filed suit against the developer, Winston Carlyle Charleston National, LLC, and the general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually. The initial Complaint alleged negligence, gross negligence, breach of express and implied warranties, and breach of fiduciary duty as to the developer **(R. pp. 174 – 186)**. Plaintiffs filed an Amended Complaint on May 1, 2017, setting forth causes of action against additional defendants, including BFS. The Amended Complaint alleged, among other things, that BFS used and supplied defective materials,¹ installed materials not in accordance with the plans and specifications, and constructed the project in violation of the applicable building codes. **(R. pp. 187-207)**.

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

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

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

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

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

ARGUMENT

At the core of BFS's appeal is the premise that it can both rewrite its contract and reframe its pleadings after the fact. BFS's contractual indemnity claims are based on provisions that attempted to secure indemnification for its own negligence—provisions that were neither clear nor unequivocal, as required by Concord & Cumberland, and in violation of S.C. Code Ann §32-2-10. As such, the Circuit Court properly concluded that its contractual indemnity claim fails as a matter of law, which was affirmed by the Court of Appeals. Undeterred, BFS now asserts it can

nonetheless pursue contractual indemnity from ECC for ECC's alleged sole negligence. But this argument finds no support in the plain language of the Master Agreement or in the allegations of the Complaint. A contractual indemnity provision that is legally invalid cannot be resurrected or selectively enforced for a narrower purpose. To do so amounts to judicial revision of the Master agreement. This court has no obligation or authority to rewrite the contractual indemnity provisions of BFS. Lewis v. Premium inv. Corp., 351 S.C. 167, 171 (2002); Poynter v. Inves., Inc., v. Cent. Builders of Piedmont, Inc., 387 S.C. 583 (2010).

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

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

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

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

Here, despite BFS's argument that it seeks only indemnity for ECC's negligence, as the Court of Appeals correctly found, the plain language of BFS's pleadings show that BFS seeks recovery for any sums for which BFS is held liable to Plaintiff or others, rather than only those

sums which may be attributable to ECC's sole negligence. In fact, the word 'sole' is not in BFS's Complaint. Instead, BFS seeks the following:

138. That **BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or others in this action**, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of Cross Claims Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorney fees, costs, and other expenses incurred in defending this action, and **further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs, or to others**, or which Builders FirstSource-Southeast Group may pay in satisfaction of such claims.

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

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

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

BFS's argument rests on a mischaracterization of Rule 8² of the South Carolina Rules of Civil Procedure, which while promoting justice and liberal construction of pleadings, does not permit courts to expand pleadings beyond their plain language. BFS's assertion that its pleading should be construed as asserting an alternative theory of relief under Rule 8 misstates the purpose of that rule and amounts to an improper attempt to revise its pleading after the fact.

The Rules of Civil Procedure do not relieve parties of their obligation to clearly articulate the basis for each claim. Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," not a vague or ambiguous reference that might be interpreted to suggest alternative theories. Rule 8, SCRCF. BFS did not clearly articulate it was seeking contractual indemnity based solely on ECC's negligence as a distinct ground for relief. Instead, BFS ambiguously sought contractual indemnity for "any sums" for which BFS may be held liable.

BFS contends that the word "any" should be interpreted in its ordinary sense: "used to express a lack of restriction in selecting one of a specified class." (**BFS Petition for a Writ of Certiorari at p. 10**). While correct, this definition actually reinforces – rather than undermines – the Court of Appeals' reasoning. BFS is seeking recovery for "any sums" for which it might be held liable, rather than those attributable solely to ECC's alleged negligence. An unrestricted claim for "any sums" that does not differentiate between BFS's own negligence and that of its subcontractors is precisely why the Court of Appeals concluded that the language of BFS's pleadings "leaves little doubt that BFS's pleadings also seek indemnification for its own negligence." Retreat at Charleston National 446 S.C. at 590.

² BFS's argument regarding Rule 8, SCRCF, is not properly included in its Petitioner for a Writ of Certiorari. "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be include in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(1), SCACR. BFS did not raise its Rule 8, SCRCF, argument in its briefs filed in the Court of Appeals. See (BFS Final Brief and Reply filed Nov. 14, 2022).

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

II. THE COURT OF APPEALS PROPERLY FOLLOWED PRECEDENT WHEN IT AFFIRMED THE CIRCUIT COURT'S FINDING THAT BFS'S CONTRACTUAL INDEMNITY LANGUAGE SOUGHT INDEMNITY FOR ITS OWN NEGLIGENCE IN VIOLATION OF S.C. CODE ANN. § 32-2-10 AND FAILED TO MEET THE HEIGHTENED "CLEAR AND UNEQUIVOCAL" STANDARD SET FORTH IN CONCORD & CUMBERLAND

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

A. BFS's Contract Does Not Support Its Argument

There are multiple indemnity provisions throughout the Master Agreement. In reviewing Section 5 INDEMNITY, the Court of Appeals correctly held that the provisions of Section 5 are ambiguous, conflict with each other, and do not meet the clear and unequivocal requirement. Retreat at Charleston National, 446 S.C. at 591-92.

Paragraph 1 of Section 5 INDEMNITY of the Master Agreement relates to property damage. That provision states:

To the fullest extent permitted by Law, the subcontractor shall indemnify, defendant and hold harmless the contractor, the owner, and all of their officers, directors, agents, and employees from and **against any and all**

claims, suits, losses, causes of action, damages, liabilities, fines, penalties, and expenses of any kind whatsoever, including, but not limited to, arbitration or court costs and attorney's fees (such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) arising out of or resulting from bodily injury or death of any person, or property damage, including loss of use of property, arising or alleged to arise out of or in any way related to this agreement or the subcontractor's performance of the work or other activities of the subcontractor, **but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor** or anyone for whose acts the subcontractor may be liable. The Contractor's insurance requirements are separate and distinct from the requirement of indemnification hereunder. 2008 Contract between BFS and ECC §5 ¶1 INDEMNITY (*emphasis added*, all caps in the original)

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

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

The duty to defend under this Section 5 is independent and separate from the Duty to indemnify, and **the duty to defend exists regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees.** The duty to defend arises immediately upon presentation of a claim by any party indemnified hereunder and written notice of such claim being provided to subcontractor. **Subcontractor's obligation to indemnify, defend, and hold harmless**

under this Section 5 will survive the expiration or earlier termination of this agreement until it is finally determined by a Court of competent jurisdiction or arbitration panel that a claim against the contractor, the owner, and any of their officers, directors, agents, and employees for the matter indemnified hereunder is fully and finally barred by the applicable statute of limitations.

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

As BFS should well know, indemnification provisions calling for the Indemnitor to indemnify the Indemnitee “for damages caused by its [the Indemnitee’s] negligence or the negligence of its subcontractors” are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45-6 (Ct. App. 2018). Further, our Court of Appeals has held that “[A]n illegal contract is unenforceable.” *Id.* (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, this Court held that the indemnification agreement “purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section §32-2-10” and went on to conclude that “[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.” *Id.* This case is no different.

BFS attempts to draw a distinction between the present case and D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC by claiming that it is not seeking indemnification for its own negligence, whether sole or concurrent. However, BFS puts the cart before the horse. The question is not what relief Counsel for BFS claims his client seeks, in contravention to the problematic indemnity language in BFS’ contracts and the allegations of its operative pleading, but rather is there a legal valid indemnity provision to enforce.

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

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

In Concord & Cumberland, the Court of Appeals held that the "clear and unequivocal" standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. Concord & Cumberland, 424 S.C. at 649. Despite this clear precedent, BFS now asks this Court to disregard that conclusion and rewrite its Master Agreement to support indemnification solely for ECC's negligence. As this Court has made clear, "It is not the function of the court to rewrite contracts for parties." Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) (citation omitted). BFS's Petition for Writ of Certiorari is premised on judicial reconstruction of both its Master Agreement and operative pleading, and, as such, it must be denied.

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

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

Even if ECC is found to be solely negligent, which, again, it denies, BFS can still seek indemnity from ECC in equity – a claim it still maintains. (**R. pp. 69, Judge McCoy's Order dated July 7, 2021**). Therefore, BFS's request to recast its contractual indemnity claims as one based on subcontractor "sole negligence" is not only improper, but unnecessary.

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

Contrary to BFS's alarmist framing, the Court of Appeals did not abrogate or contradict Concord & Cumberland. Rather, it correctly applied existing South Carolina law regarding the enforceability of contractual indemnity clauses that seek to relieve an indemnitee from the consequences of its own or concurrent negligence.

When an indemnity clause purports to relieve an indemnitee from the consequences of its own negligence, South Carolina case law requires strict construction of the clause. Concord & Cumberland, 424 S.C. at 646. In other words, if the indemnity language in a contract involves the contractor's negligence, even partially, the heightened "clear and unequivocal" standard governs the interpretation of the indemnity clause. If that standard is not met, the indemnity claim fails as a matter of law. This is not a novel standard. The Court of Appeals, properly following the reasoning in Concord & Cumberland, held that the clear and unequivocal standard applied since BFS's contractual indemnity language sought indemnification that encompassed its own negligence; however, BFS's contractual indemnity clauses failed to meet this heightened standard.

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

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

III. THE COURT PROPERLY APPLIED SETTLED SOUTH CAROLINA LAW REGARDING CONTRACT INTERPRETATION

Contrary to BFS's assertion, the Court of Appeals did not improperly isolate provisions of the subcontract or overlook defined terms. Rather, the Court of Appeals applied the cardinal rule of contract interpretation: to ascertain and give legal effect to the parties' intentions as determined by the contract language. Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012), and properly recognized that a contract is to be read as a whole document to avoid creating ambiguity by isolating provisions or single sentences. Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014); McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 574 (2009). As such, the Court of Appeals undertook a holistic review of the contracts, reading the agreements as a whole and giving effect to the relevant provisions within their full contractual and factual context.

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

The Court of Appeals recognized that Section 3, though styled as a "Warranty" provision, cleverly includes hidden indemnity language.³ This provision requires subcontractors to indemnify

³ **SECTION 3. Warranty.** In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications . . . If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option,

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

BFS asserts that the Court of Appeals ignored the defined term "Work" set forth in Section 1 of the Master agreement when analyzing the warranty and indemnity provisions. This assertion is baseless. The Court of Appeals' comprehensive analysis of the Master Agreement accounted for and utilized the definition of "Work" in Section 1. Rather than disregarding this definition, the Court used it to correctly interpret that the subcontractor's scope of work did not include design or material selection. This accurate interpretation, derived from reading the contract as a whole, demonstrated that the indemnity obligations embedded in Sections 3 and 5 were overreaching and

any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. . . . This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incident third-party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

unenforceable. The Court of Appeals approach aligns with South Carolina law requiring that a contract be interpreted “from the four corners” and read as a whole. See McPherson v. J.E. Sitrine & Co., 206 S.C. 183, 204 (1945) (The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, “from the four corners of the instrument” alone); see also McGill, 381 S.C. at 185 (“A contract is read as a whole document....”).

By considering Section 1’s definition of “Work” in relation to the warranty and indemnity provisions in later sections, both the Circuit Court and Court of Appeals correctly concluded that the Master agreement contained ambiguous, conflicting, and deceptive clauses that improperly require indemnification for BFS’s own negligence. For example, Section 5, paragraph 1 requiring subcontractor fault, while Section 5, paragraph 2 allows indemnity even for BFS’s sole fault. Under South Carolina law, any uncertainty as to the meaning of any term “should be resolved against the party who prepared the contract,” which, in this case, is indisputably BFS. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 687 S.E.2d 714, 718 (S.C. Ct. App. 2009).

Far from ignoring defined terms or cherry-picking language, the Court of Appeals applied well-established principles of South Carolina contract interpretation: reading the contract as a whole, resolving ambiguities against the drafter, and rejecting efforts to rewrite contracts retroactively. The Court of Appeal’s conclusion—that the multiple indemnity provisions set forth in the Master Agreement fail to meet the clear and unequivocal standard set forth in Concord & Cumberland and violate S.C. Code Ann. §32-2-10—was based on a reasoned and comprehensive review of the entire agreement, not on selective parsing or a failure to honor defined terms. BFS is simply asking this Court to reweigh the evidence and re-interpret a contract that the Court of Appeals carefully and properly construed. That is not a proper basis for certiorari, and, therefore, BFS’s Petition for Writ of Certiorari should be denied.

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

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

BFS's claim that attorney's fees and costs are "consequential damages of an indemnity claim" and fall outside the scope of "damages" under S.C. Code Ann. §32-2-10 is without merit. As established by this Court, in McCoy v. Greenwave Enterprises, Inc., "reasonable attorney's fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses." McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 360, 759 S.E.2d 153, 156 (2014) (internal citations omitted). Thus, attorney's fees are an integral component of the damages an indemnitee seeks to recover when demanding indemnification.

BFS itself acknowledged this legal reality not only when BFS elected to include an indemnity provision for attorney's fees and costs in its Master Agreement, but also, in its pleadings, which seeks attorney's fees and costs as damages *under its contractual indemnity cause of action*. (**BFS Petition for a Writ of Certiorari at p. 23**). South Carolina law permits recovery of attorney's fees by contract or statute (Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966)), but the contractual terms providing for such indemnification must still comply with all applicable South Carolina law, including S.C. Code Ann. § 32-2-10. Section 5 of the Master Agreement explicitly calls for ECC to pay BFS's attorney fees "regardless of any ultimate liability or negligence of the contract." This is an explicit violation of S.C. Code Ann.

§32-2-10. As a result, BFS's Master Agreement is illegal and, therefore, unenforceable. The fact that these claimed damages are limited to attorney's fees, as opposed to a judgment cost, is immaterial.

Further, there is nothing in South Carolina law that separates a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement in a manner that would exempt defense costs from the Anti-Indemnity Statute. As set forth in BFS's Petition, BFS relies on two cases, City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009) and Sloan Constr. v. Centr. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977), to support its position that ECC's duty to defend BFS is separate from its duty to indemnify. **(BFS Petition for Writ of Certiorari at pp. 23-24).** However, these cases address the relationship between an insurer's duty to defend and its duty to indemnify, and ECC is not an insurer. The rules and regulations that apply to insurance contracts are different from those that apply to the subcontract in this case.

The Court of Appeals' application of S.C. Code Ann. §32-2-10 to BFS's contractual indemnity claim, which includes BFS seeking recovery of attorney's fees, was correct, entirely consistent with precedent, and poses no unsettled legal question. BFS's argument is not only unsupported by South Carolina law, but, also, contradicted by its own Master Agreement and pleadings. BFS cannot claim the benefit of a contractual right to attorney's fees set forth in the contract's indemnity provisions while simultaneously arguing that such damages are exempt from the very statute limiting the enforcement of those provisions. The Petition for Writ of Certiorari should be denied.

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

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

Contrary to BFS's assertion, the indemnification language of BFS's Master agreement is intertwined and not susceptible of division. This Court, in Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867(Ct. App. 2002), held that "A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be." As discussed above, the indemnity framework as a whole—including Section 3 (Warranty), Section 5 (Indemnity), and Section 8(i) (Attorney's Fees)—is riddled with conflicting, ambiguous, and deceptive language. BFS's argument that the indemnity terms are independent and severable ignores that these provisions form a unified and intertwined indemnity scheme. In reading the deceptive language and conflicting indemnity provisions together, the Court of Appeals properly found that the indemnity provisions were "replete with terms that violate South Carolina law and public policy," and, thus unenforceable. Retreat at Charleston National, 446 S.C. at 597.

South Carolina courts have emphasized that the permissibility of severability hinges upon the extent to which the unenforceable provisions permeate the entire agreement. As this Court explained, in Simpson v. MSA of Myrtle Beach, Inc., "if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts,

the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 33–36, 644 S.E.2d 663, 673–74 (2007). That is precisely the case here.

The indemnity provisions at issue seek to shift liability for BFS’s own negligence, an objective flatly prohibited by S.C. Code Ann. § 32-2-10. Severing such provisions would not simply involve striking unlawful language; it would require the Court to reconstruct the contract’s entire indemnity scheme to align it with lawful standards. Courts in South Carolina do not undertake such revisions. See Poynter v. Ratcliff, 387 S.C. 580, 588, 694 S.E.2d 15, 18 (2010) (holding that courts may not blue-pencil unlawful terms to render them enforceable). As the Court of Appeals aptly observed, in Concord & Cumberland, “Merging the indemnity clauses into one clause by replacing some language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term to which [the party] did not agree.” Concord & Cumberland, 424 S.C. at 656.

Here, the unlawful provisions were drafted by BFS such that they are inextricably linked and interwoven throughout the Master Agreement. This intricate entanglement makes it impossible for the Court to selectively employ the severability clause to remove one or more offending provisions without embarking on an impermissible exercise of judicial revision. There is no basis for further review of this settled principle, and the Petition for Writ of Certiorari should be denied.

VI. BFS’S CONTRACTUAL INDEMNITY CLAIMS ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL

BFS’s current attempt to reframe the same claim—now limited to ECC’s alleged sole negligence—ignores that the operative contractual language and the underlying factual predicate that the enforceability of the indemnification provisions have already been judicially determined in prior actions. Collateral estoppel, also known as issue preclusion, prohibits a party from

relitigating an issue that was actually litigated and determined by a valid and final judgment in a prior case, and which was essential to that judgment. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). This applies even if the claims in the first and later cases are different. Id. The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984).

The indemnity provisions at issue here are identical to those previously litigated in Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., et al., (R. pp. 665-675) (the “Newman” Order); Pavic v. Carolina Cottage Homes, LLC, et al., (R. pp. 826-847) (the “McCoy” Order) and Six Fifty-Six Owners’ Association, Inc., et al., v. Winsor South, LLC, et al., (R. pp. 682-86) (the “Young” Order) all of which involved BFS and the same indemnity language. The record unequivocally demonstrates that BFS had a full and fair opportunity to litigate, and did litigate, the enforceability of these specific indemnity clauses in prior actions before the Circuit Court.

BFS’s central argument, that its pending appeals negate the finality of prior judgments for collateral estoppel purposes, directly contradicts established South Carolina law and well-settled precedent. A judgment is final and retains its preclusive effect even while on appeal, unless and until it is actually reversed. See Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941) (Finding finality of a court’s judgment is not lost because appeal is pending until and unless reversed). A final judgment is one that “finally determines the rights’ of the parties.” First Union Nat’l Bank v. Hitman, Inc., 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992). Rule 201(a) SCACR, provides that an: “[a]ppel

may be taken, as provided by law, from any final judgment or appealable order.” The status of the Newman Order, the Young Order, and McCoy Order as a final judgment is what makes the orders appealable in the first instance. None of BFS’s said appeals undermine each Orders’ status as a final judgment, and, therefore, is not a barrier to applying collateral estoppel.

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

VII. BFS’S PETITION FOR CERTIORARI DOES NOT MEET THE REQUISITE STANDARDS UNDER RULE 242, SCARC.

This Court should deny BFS’s Petition for Certiorari because it fails to satisfy the certiorari requirements. Rule 242, SCACR, provides that a writ of certiorari “will be granted only where there are special and important reasons.” The following are generally accepted reasons for permitting certiorari: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the Court of Appeals’ decision conflicts with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision below conflicts with a decision of the United States Supreme Court. SCACR, Rule 242 (b). BFS’s Petition for Certiorari lacks any of these reasons granting certiorari.

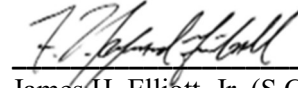
Additionally, BFS, is attempting to raise issues for the first time, in its Petition for a Writ for Certiorari. Those issues include, but are not limited to, BFS’s arguments regarding Rule 8 of the South Carolina Rules of Civil Procedure and that the Court of Appeals’ ruling creates new law and will upend the entire construction industry. “Only those questions raised in the Court of Appeals and in the petition for rehearing shall be include in the petition for writ of certiorari as a question presented to the Supreme Court.” Rule 242(d)(1), SCACR. BFS did not raise its Rule 8,

SCRCP, argument in its briefs filed in the Court of Appeals. See (BFS Final Brief and Reply filed Nov. 14, 2022).

CONCLUSION

BFS's Petition presents no unsettled legal question, no conflict among appellate decisions, and no misapplication of law. It is merely an attempt to relitigate settled matters and compel judicial rewriting of its own flawed Master Agreement and pleadings. The Court of Appeals' decision faithfully applies established standards for interpreting contracts and indemnity provisions, upholding existing law rather than creating new. BFS's petition does not meet the criteria for certiorari under Rule 242. Therefore, this Court should deny BFS's Petition for a Writ of Certiorari and affirm the Court of Appeals' decision in favor of ECC.

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