

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jan 27 2026

S.C. 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.

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S.C. SUPREME COURT

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

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

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

Appellate Case No. 2025-001224

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

v.

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.....Defendants,

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

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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 EAST COAST CARPENTRY/EAST COAST CARPENTRY
COMPANY’S RETURN TO PETITIONER’S PETITION FOR WRIT OF
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COUNTER STATEMENT OF THE QUESTION PRESENTED

1. Did the Court of Appeals properly decide that Builders FirstSource – Southeast Group, LLC’s (“BFS” or “Petitioner”) contractual indemnity language violated the “clear and unequivocal” standard of Concord & Cumberland as well as the Anti-Indemnity Statute, S.C. Code Ann. §32-2-10?
2. Does the Anti-Indemnity Statute apply to BFS’s contractual indemnity claims for attorney’s fees and costs?
3. Did the Court of Appeals properly decide that severance of the unenforceable contractual indemnity provisions was not possible without judicial re-writing of the contract?
4. Are BFS’s Contractual Indemnity Claims barred by the Statute of Repose, S.C. Code Ann. §15-3-640?

COUNTER STATEMENT OF FACTS

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

Background of the Dispute

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

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

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

Procedural History

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

The claims BFS seeks are wholly unsupported by its Complaint. When paragraph 168 asks for full contractual indemnification for any liability and to be reimbursed by East Coast for any sums for which BFS may be held liable, BFS is clearly seeking recovery from East Coast for the full and complete amount of any verdict rendered against it, including any damages included in the verdict for BFS's own negligence. Settled precedent binds BFS to its operative pleadings seeking "full contractual indemnity" for "any liability" and "any sums" for which BFS may be held liable. BFS may not now take a contradictory position from the statements in its pleadings and argue that it only seeks contractual indemnity and recovery of any amount for East Coast's sole negligence. 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 South Carolina Rules of Civil Procedure, which, while promoting justice and liberal construction of pleadings, does not permit courts to expand pleadings beyond their plain language. BFS's assertion that its pleading should be construed as asserting an alternative theory of relief under Rule 8 misstates the purpose of that rule and amounts to an improper attempt to revise its pleading after the fact.

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

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

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

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

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

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

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

A. BFS’s Contract Does Not Support Its Argument

There are several indemnity provisions throughout the Master Agreement. In reviewing Section 6 titled “Waiver, Release, and Indemnification, the Court of Appeals correctly held that the indemnity language is confusing and does not meet the clear and unequivocal requirement.

Retreat at Charleston National, 446 S.C. at 590. Section 6 of the Master Agreement states:

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

Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors. Subcontractor will indemnify, defend, and hold Contractor harmless against any such injuries and claims.

a. Waiver [refers to workers comp and is thus omitted]

b. Release and Indemnity,

(1) Subcontractor hereby agrees to release, indemnify, defend, and hold harmless Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees (each an “Indemnitee”), to the fullest extent permitted by law from any costs, expenses, demands, causes of action, claims, damage, liability, loss, or costs (“Claims”) (together with attorneys’ fees) arising out of, resulting from, or connected with the death of or any injury to, or any damage to the property of, Subcontractor or its employees, agents, or subcontractors or any of their respective subcontractors, employees, officers, agents, or invitees.

(2) For all Claims not covered by (1) above and to the fullest extent permitted by law, Subcontractor agrees to release, 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.**

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

As BFS should well know, indemnification provisions calling for the Indemnitor to indemnify the Indemnitee “for damages caused by its [the Indemnitee’s] negligence or the negligence of its subcontractors” are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45-6 (Ct. App. 2018). Further, our Court of Appeals has held that “[A]n illegal contract is unenforceable.” Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, this Court held that the indemnification agreement “purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 832-2-10” and went on to conclude that “[b]ecause

the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.” Id. This case is no different.

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

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

In Concord & Cumberland, the Court of Appeals held that the "clear and unequivocal" standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018). Despite this clear precedent, BFS now asks this Court to disregard that conclusion and rewrite its Master Agreement to support indemnification solely for East Coast’s negligence. As this Court has made clear, “It is not the function of the court to rewrite contracts for parties.” Lewis v. Premium Inv. Corp., 351 S.C. 167,

171, 568 S.E.2d 361, 363 (2002) (citation omitted). BFS's Petition for Writ of Certiorari is premised on judicial reconstruction its Master Agreement, and, as such, it must be denied.

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

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

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

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

BFS's request to recast its contractual indemnity claims as one based on subcontractor "sole negligence" is not only improper, but unnecessary.

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

Contrary to BFS's alarmist framing, the Court of Appeals did not abrogate or contradict Concord & Cumberland. Rather, it correctly applied existing South Carolina law regarding the enforceability of contractual indemnity clauses that seek to relieve an indemnitee from the consequences of its own or concurrent negligence. When an indemnity clause purports to relieve an indemnitee from the consequences of its own negligence, South Carolina case law requires strict construction of the clause. Concord & Cumberland, 424 S.C. at 646. In other words, if the indemnity language in a 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 claim failed to meet this heightened standard.

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

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

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

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

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

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

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

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

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

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

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

(internal citations omitted). Thus, attorney's fees are an integral component of the damages an indemnitee seeks to recover when demanding indemnification.

BFS itself acknowledged this legal reality not only when BFS elected to include an indemnity provision for attorney's fees and costs in its Master Agreement, but also, in its pleadings, which seeks attorney's fees and costs as damages *under its contractual indemnity cause of action*. **(BFS Petition for a Writ of Certiorari at p. 23)**. South Carolina law permits recovery of attorney's fees by contract or statute (Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966)), but the contractual terms providing for such indemnification must still comply with all applicable South Carolina law, including S.C. Code Ann. § 32-2-10. Section 6 of the Master Agreement calls for East Coast to indemnify BFS for attorney's fees as it relates to omissions resulting from BFS's failure to supervise East Coast's operations. Because this is an explicit violation of S.C. Code Ann. §32-2-10, BFS's Master Agreement is illegal and, therefore, unenforceable.

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

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

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

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

South Carolina courts have emphasized that the permissibility of severability hinges upon the extent to which the unenforceable provisions permeate the entire agreement. As this Court explained, in Simpson v. MSA of Myrtle Beach, Inc., "if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 33–36, 644 S.E.2d 663, 673–74 (2007). That is precisely the case here.

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

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

VI. COLLATERAL ESTOPPEL

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

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

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

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

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

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

VIII. BFS'S PETITION FOR CERTIORARI DOES NOT MEET THE 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 Writ of Certiorari and affirm the Court of Appeals' decision in favor of East Coast.

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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

Appellate Case No. 2021-001050

Opinion No. 2025-6099

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

v.

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

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

RETURN TO PETITION FOR WRIT OF CERTIORARI, POHLMAN QUALITY
EXTERIORS, INC.

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COUNTER-STATEMENT OF THE CASE

The Retreat at Charleston National, located in Mount Pleasant, SC, is a multi-family development consisting of thirty-two (32) buildings that were constructed in four (4) phases. Campbell R. Campbell Construction, Inc. (Campbell) served as the General Contractor for phases I, II, & III. Appellant, Builders FirstSource-Southeast Group, LLC (hereinafter, BFS) entered into a subcontract with Campbell to provide labor and all materials to accomplish the erection of the rough framing for certain buildings, which included the installation of windows and exterior doors. BFS then sought out carpenters to hire to provide the labor necessary to meet the obligations of its contract with Campbell. One of the carpenters hired by BFS was Respondent, Pohlman Quality Exteriors, Inc. (hereinafter, Pohlman). Pohlman provided labor only to install windows on buildings 11 and 21 at the project. BFS supplied all materials to be used or installed by Pohlman, including the windows.

Plaintiffs filed the above-captioned lawsuit alleging, amongst other things, deficiencies in the windows BFS sold to the developer and in the installation of those windows. BFS then brought a third-party action against its subcontractors, including Pohlman. The Third-Party Complaint seeks recovery from the subcontractors on the theories of Contractual and Common Law Indemnity, Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract.

In late 2019 and early 2020, eight separate subcontractors, including Pohlman, moved for summary judgment. Pohlman filed its Motion for Summary Judgment against the claims of BFS on March 2, 2020. Pohlman then filed its Second Amended Motion for Summary Judgment against the claims of BFS on October 22, 2020. Pohlman filed its Memo in Support of Second Amended Motion for Summary Judgment as to the claims of BFS on October 29, 2020. BFS filed its

Memorandum in Opposition to Pohlman's Second Amended Motion for Summary Judgment on November 2, 2020. On May 10, 2021, Judge Jennifer B. McCoy issued an Order Granting Partial Summary Judgment to Pohlman on certain claims raised by BFS.

BFS filed its Motion for Reconsideration of Judge McCoy's Order Granting Partial Summary Judgment to Pohlman on July 19, 2021. On August 23, 2021, Judge McCoy denied BFS's Motion for Reconsideration without the necessity of a hearing and decided the matter on the record and briefs. BFS filed its Notice of Appeal of the Order of Judge McCoy granting Pohlman's Second Amended Motion for Summary Judgment on September 22, 2021. BFS also appealed the Order of Judge McCoy denying BFS's Motion for Reconsideration in the same Notice of Appeal.

In her Order, Judge McCoy

- granted Summary Judgment to Pohlman and dismissed BFS's causes of action for Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract, ruling those causes of action were merely disguised claims for Indemnification pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). BFS has not appealed that ruling.
- granted Partial Summary Judgment to Pohlman on BFS's causes of action for Contractual and Common Law Indemnity, ruling that the Indemnity provision of the form Subcontract drafted by BFS is ambiguous and in violation of Section 32-2-10 of the South Carolina Code, and therefore, against public policy and unenforceable, thereby leaving BFS with a cause of action for Common Law Indemnification against Pohlman. Those are the rulings which BFS has appealed.

The Court of Appeals issued its Opinion on February 12, 2025, affirming each of the trial court's rulings. Petitioners filed a Petition for Rehearing on February 27, 2025, but such was denied by the Court of Appeals on May 21, 2025.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. Whether the Court of Appeals properly affirmed the trial court's ruling that the indemnity provisions of the Later Contracts fail as a matter of law due to not meeting the "clear and unequivocal" standard promulgated by the Supreme Court in Concord v. Cumberland?**
- II. Whether the Court of Appeals properly affirmed the trial court's decision that it lacked authority to sever certain portions of the Later Contracts and "re-write" the provisions for BFS?**
- III. Whether the Court was correct in ruling that attorneys' fees are included within the types of indemnification damages barred by Section 32-2-10?**

ARGUMENT

Pohlman initially notes that certain Questions presented by Petitioner were not issues raised, discussed, or briefed by Pohlman in the lower courts. Therefore, Pohlman's Return does not provide substantive discussion in response to Petitioner's Question Six (6) regarding collateral estoppel.

- I. The Court of Appeals affirmation that the "clear and unequivocal" standard applies is proper and BFS has only itself to blame.**

Despite BFS's attempt to break down their argument against the trial's court's application of Concord v. Cumberland's "clear and unequivocal" standard into three separate "questions," (BFS Petition, Questions 1, 2, and 3), and the Court of Appeals subsequent affirmation of the application, the wording of the Later Contract and the provisions to be reviewed remain a single inquiry: "Does the indemnification provision of the Later Contract seek to require the subcontractor (Pohlman) to indemnify BFS for its sole or concurrent negligence." If so, the "clear and unequivocal" standard applies.

As is noted by virtually every party to this case, the Court of Appeals correctly stated the applicable precedent when it held that the “clear and unequivocal” standard must be applied when interpreting a contractor’s claim against a subcontractor seeking indemnification for alleged negligent construction of a condominium project, and that the “clear and unequivocal” standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. Concord v. Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018).

Turning to the BFS form subcontract which BFS forced its subcontractors to sign without negotiation, BFS drafted an ambiguous indemnity provision that identifies two separate and distinct standards for the subcontractor’s (Pohlman) indemnification exposure. The first paragraph of the indemnity provision purports to limit Pohlman’s indemnification responsibility to BFS to damages to the extent caused by Pohlman, but the second paragraph requires Pohlman to indemnify BFS for damages even if those damages are the result of the sole negligence of BFS. These are directly conflicting and cannot be reconciled, as noted by both reviewing Courts. By definition, the indemnity provision cannot be said to “clearly and unequivocally” state the intention of the parties that Pohlman agreed to indemnify BFS for its own negligence.

BFS blames the Court of Appeals for not parsing out each particular paragraph or phrase and applying a separate standard to each which, in their mind, would have permitted their claims for indemnity against the subcontractors for their sole or concurrent negligence to continue forward. The blame is sorely misplaced. BFS was the author of the indemnity provision, not the Court.

In an effort to dodge the Concord v Cumberland analysis altogether, BFS continues to assert, with yet another imaginative argument, that it only seeks recovery for the alleged negligence

of subcontractors. As Pohlman identified in its brief, and as echoed by the Court of Appeals in their Opinion, this position is clearly inconsistent with the claims BFS has asserted against Pohlman in its pleadings. Paragraph 167 of BFS's Third-Party Complaint¹ alleges that, in essence, if BFS is held liable to Plaintiffs, then that liability can only be the result of negligence of Pohlman or others. This stands in stark contrast to the claims alleged by Plaintiff in their Fourth Amended Complaint which speak clearly to duties owed by BFS in its roles as a supplier of materials for the project and as a subcontractor responsible for supervising, inspecting, and approving the work of its sub-subcontractors. These are all duties owed to the Plaintiff which a jury can find BFS breached on its own, without subcontractor involvement. Yet, contrary to the arguments BFS presents now, a plain reading of its Third-Party Complaint shows that BFS seeks indemnification from Pohlman for those negligent acts.²

BFS appears to state directly that the Court of Appeals misapplied the holding of Concord and Cumberland, where instead they should have only applied the standard to one portion of the indemnity provision. *See BFS Petition, pgs. 12-15*. The problem with that logic is that the trial court found that the indemnity provision, as a whole, could not remain because the paragraphs therein were so conflicting and ambiguous as to render the provision void. Because BFS did not

¹ Paragraph 167 of the BFS Third-Party Complaint reads as follows:

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. (R. p. 449)

² Paragraph 168 of the BFS Third-Party Complaint reads as follows:

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, entitled 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. **[emphasis added]** (R. p. 449)

adequately draft the indemnity provision in a way that could provide for the Court to analyze single portions of the provision (not to mention the segments that violated public policy), the Court had no choice but to apply the heightened standard to the entire provision. Again, this is the fault of BFS, and not the Court's interpretation of its prior ruling. Thus, the Court of Appeals properly affirmed the trial court's application of the "clear and unequivocal" standard to the indemnification provision at issue.

II. The Court of Appeals properly affirmed that the trial court is not tasked with "blue-penciling" the contract between the parties and could not utilize the severability clause as demanded by BFS.

Judge McCoy found that the language of the two paragraphs in the indemnity provision are in conflict and cannot be reconciled. (R. p. 119) The Court of Appeals agreed, and declined to "re-write" the Later Contract to BFS's benefit. This course of action was proper, and consistent with established, well-settled law to be applied when construing contracts.

Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect. C.A.N. Enterprises, Inc. v. South Carolina Health and Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1998). It is not the function of the Court to rewrite contracts for parties. See York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 90, 749 S.E.2d 139, 150 (Ct. App. 2013). The court is without authority to alter a contract by construction or to make a new contract for the parties. C.A.N Enterprises, 296 S.C. at 378, 373 S.E.2d at 587 (1988).

BFS wrote the Later Contract; the subcontractor did not. BFS chose to label the "Indemnity" provision as just that; one conglomerate provision made up of four paragraphs with differing indemnification language throughout. The provision does not include subtitles, instructions, or any other guide to which Pohlman, or the Court, could conclude which paragraph applies to which

particular circumstances in which the parties may find themselves. Instead, BFS left the Court with the conclusion that the provision is to be read and interpreted as a whole when faced with a claim of indemnification. The result of BFS's drafting is an overarching provision with different standards for indemnification which cannot be reconciled together.

Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007).

Both Judge McCoy and the Court of Appeals were clear that the indemnity provision, among other provisions in the Later Contract, was (1) not "clear and unequivocal" and (2) contained language violative of public policy. Severance in the manner BFS begs of the Court would require the Court to take out individual words, lines, and/or paragraphs, creating a mash-up of sentences and paragraphs containing no meaning. Not only would that be ineffective, it would stand in contrast to the duties and functions of the Court. York, 406 S.C. at 90, 749 S.E.2d at 150 (Ct. App. 2013). The only proper use of the severability clause, were it to be invoked, would be to remove both the first and second paragraphs of the indemnity provision which are "inextricably linked." This would leave BFS with its cause of action for Common Law Indemnification.

Instead, the Court of Appeals agreed that individual portions of indemnity provision could not be effectively severed due to the provision being "replete with terms that violate South Carolina law and public policy." It is within the court's discretion on how to sever certain provisions or to scrap the provision entirely. *See Doe v. TCSC, LLC*, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct.

App. 2020). The Court of Appeals properly affirmed the trial court’s decision to refrain from re-writing the indemnity provision.

III. The Court of Appeals properly affirmed the ruling that attorneys’ fees are among the damages included in the prohibition of certain indemnification claims imposed by Section 32-2-10.

BFS presses the Supreme Court in their Petition to review Section 32-2-10 and determine whether attorney’s fees are within the scope of “indemnity damages” considered by Section 32-2-10. This is the first time that BFS has raised this issue, and Pohlman submits that the Petition for Writ of Certiorari is not the appropriate time to present new arguments.

BFS attempts to make sense of this issue by misapplying language from an appellate decision that was focused on insurance coverage issues. BFS urges the Court use a definition of the word “indemnification” sometimes used in the insurance industry, and to ignore the common, well-recognized meaning used every day by parties, lawyers, and courts. Moreover, BFS presses the Court to “read into” Section 32-2-10 a distinction between the duty to indemnify and the duty to defend. Again, this distinction only applies when discussing certain insurance policy issues (e.g., interpretation or potential bad faith). If you take BFS’s argument to its logical conclusion, Section 32-2-10 does not prohibit claims to recover any dollars paid for anything except what is paid for “damages.” That means claims can be made to recover attorney’s fees, expert expenses, filing and service fees, travel expenses... and the list goes on. Not only does such an interpretation fly in the face of common sense, but it would also be ridiculous to suggest that interpretation was intended by the legislature.

CONCLUSION

BFS seeks now a third review of the language of the Later Contract and its enforceability, or lack thereof, as to the claims against Pohlman. However, BFS’s goal remains the same: BFS seeks

indemnification from Pohlman for BFS's own negligence and to walk away from this case without potentially suffering the consequences of its own actions. Due to the foregoing analysis above, Pohlman hereby requests that BFS's Petition for Writ of Certiorari be denied.

Respectfully submitted,

s/ E. Glenn Elliott

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Aug 18 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;
Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma
Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos
d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin
Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and
Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC;
Givair De Caris; and Mario Salgado;
Defendants,

Builders FirstSource-Southeast Group, LLC, Petitioner

v.

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

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

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



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REPLY

Respondents filed six separate Returns to the Petition for Writ of Certiorari. Because it is impossible to address every single argument raised or to correct every single misstatement made¹ by the six Returns within the fifteen pages allowed herein, Petitioner will focus on three main arguments: (1) although BFS cannot recover for its own negligence (whether sole or concurrent), it nonetheless has viable contractual indemnity claims against its subcontractors for damages arising out of the subcontractors' negligence (whether sole or concurrent); (2) Concord & Cumberland permits BFS to recover for the subcontractors' concurrent negligence even if BFS itself were (hypothetically) also concurrently negligent; and (3) as a matter of first impression, and in light of Section 32-2-10, attorneys' fees and general indemnification claims should be analyzed without regard to ultimate fault because a contractor may be compelled to incur fees to defend itself from claims against its subcontractor's work even if the claims are ultimately found to be meritless. As Petitioner stated in its opening brief, it will elaborate much more fully on the merits of this case should the Court grant certiorari.

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

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

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

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

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

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

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

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

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

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

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

134. That **BFS has denied the material allegations asserted against BFS** in the Plaintiffs' Fourth Amended Complaint.

...

137. That **to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of the Cross Claim Defendants**, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

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

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

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

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

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

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

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

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

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

[T]o the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend and hold harmless the Indemnitees for, and to save the harmless against, any and all Claims (together with reasonable attorneys' fees), **to the extent of liability resulting from Subcontractor's negligence or willful misconduct** incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) **any alleged defect or malfunction in any of the services or materials provided in connection with the Work**; or (iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations.

[R. p. 1456](emphasis added).

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

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

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

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

[R. p. 1506].

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

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

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

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

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶ Brief of ECC, p. 19.

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

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

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

CONCLUSION

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

Nov 14 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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.

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court Mistakenly Apply the Clear and Unequivocal Standard Articulated by Concord and Cumberland to the Relevant Contractual Language when Appellant was Not Seeking Indemnity for its own Negligence?**
- II. Does the Contractual Language Permitting Appellant to Recover for its Subcontractors' Negligence Violate South Carolina Code Section 32-2-10 and Public Policy?**
- III. Does the Doctrine of Collateral Estoppel Bar Appellant's Claims for Indemnity when the Relied-Upon Prior Judgments are both Inapposite and on Appeal, and thus not Final?**
- IV. Did the Trial Court Err in Failing to Address the Severability Provision of the Contract, and Where it did Address it, Did the Trial Court Err in Holding that it Lacked Authority to Sever Provisions of the Contract?**
- V. Was the Parties' Contract Unconscionable and Unenforceable as a Matter of Law?**

STATEMENT OF THE CASE

This Appeal is the result of a long and complex construction defect litigation originally filed by the Plaintiffs on July 22, 2016. In the underlying case, the Plaintiffs, The Retreat at Charleston National Country Club Homes Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime, have sought recovery of damages allegedly occasioned by deficiencies in original construction of the subject project, a multi-family development, located in Mount Pleasant, South Carolina. The complex consists of 32 buildings, containing a total of 129 townhome units.

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

BFS had contracted with several subcontractors who performed the allegedly problematic work at the project on behalf of BFS, and consequently BFS filed crossclaims or third-party claims, as the case may be, against its many subcontractors, including: ECC Contracting, LLC, Hurley Services, LLC, McDaniel

Construction Co¹, LLC, AC Construction Corp and/or AC Construction Inc., L&G Construction Group, LLC, WS Contractors, LLC, Pohlman Quality Exteriors, Inc., Palmetto Trim and Renovations, LLC, Edward Bruce Witham², and East Coast Carpentry Company. The claims of BFS included causes of action in negligence, breach of express and implied warranty, breach of contract, contractual indemnity and equitable indemnity.

Of the above-mentioned subcontractors, eight moved for summary judgment at various times during 2019 and/or 2020. Palmetto Trim filed a motion for summary judgment on December 20, 2019 and an amended motion for summary judgment on October 22, 2020. ECC Contracting, LLC filed a motion for summary judgment on December 20, 2019, and an amended motion for summary judgment on October 15, 2020. East Coast Carpentry filed a motion for summary judgment on January 7, 2020 and an amended motion for summary judgment on October 15, 2020. WS Contractors, LLC filed a motion for summary judgment on January 22, 2020, an amended motion for summary judgment on January 23, 2020, and a second amended motion for summary judgment on October 19, 2020. Hurley Services, LLC filed a motion for summary judgment on August 27, 2020 and an amended motion for summary judgment on October 7, 2020. L&G Construction Group, LLC filed a motion joining the motions for summary judgment

¹ Plaintiffs filed a Stipulation of Dismissal dismissing their claims with prejudice against McDaniel Construction Co, LLC on April 17, 2020. Therein, Plaintiffs stipulated that there are no defects in the work performed by McDaniel Construction Co, LLC on the project that is the subject of this suit. Premised upon Plaintiffs' stipulations, the Honorable Bentley D. Price granted McDaniel Construction Co, LLC summary judgment as to Builders FirstSource-Southeast Group, LLC claims on December 18, 2020. McDaniel Construction Co, LLC is not a party to this appeal.

² The Honorable Jennifer B. McCoy Ordered an Entry of Default against Edward Bruce Witham on June 12, 2020. Edward Bruce Witham is not a party to this appeal.

of East Coast Carpentry and WS Contractors on October 21, 2020. Pohlman Quality Exteriors, Inc. filed both a motion for summary judgment and an amended motion for summary judgment on October 22, 2020. And finally, AC Construction filed a motion for summary judgment on October 29, 2020.

All eight subcontractors' motions were heard on November 6, 2020 by the Hon. Jennifer McCoy. Each subcontractor argued its own motion, and the arguments forming the basis for the different motions varied from subcontractor to subcontractor. On May 10, 2021, Judge McCoy issued seven³ separate Form 4 Orders granting, or granting in part, as the case may be, summary judgment to the subcontractors and requesting that *each* subcontractor submit its own proposed order. 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. On July 26, 2021, the Court issued an order granting, in part, summary judgment to Palmetto Trim and Renovations. On July 29, 2021, the Court issued orders granting, or, as the case may be, granting in part, summary judgment to: East Coast Carpentry; and WS Contractors.

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.

Appellant Builders FirstSource timely moved for reconsideration of each of the eight orders. On August 23, 2021, the Court issued eight Form 4 Orders denying each of Appellant's motions for reconsideration. Appellant 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 Appellant Builders FirstSource – Southeast Group, LLC (“BFS”). Appellant responded by letter dated October 25, 2021, and later by motion dated November 22, 2021 that it objects to consolidation of the appeals. Nonetheless, by letter dated January 28, 2022, the Court of Appeals reaffirmed the consolidation of the appeals. This brief follows.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the Trial Court under Rule 56(c), SCRPC, which is that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In reviewing a motion for summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609

S.E.2d 565 (Ct.App.2005). Any triable issues must go to the jury. Mulherin–Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct.App.2005).

On an appeal from an order granting summary judgment, “the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.” Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct.App.2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).

ARGUMENTS

This brief presents the unique challenge of addressing eight separate court orders, with eight separate arguments, all at once. Between the eight orders, two different contracts are at issue; while six of the orders address one version of contractual language, two of the orders rely on a completely different version of

the contract, with completely different operative contractual language. Some of the orders address the issue of attorneys' fees, and others do not. Some of the Orders hold that the contractual language is unconscionable and that the contract is one of adhesion and thus unenforceable; others do not. Some of the Orders hold that the issues involved in this appeal are barred by collateral estoppel; others do not. Some of the Orders address the contract's warranty language; others do not. One of the Orders rules on the issue of the statute of repose; the rest do not. One of the Orders holds that Appellant's equitable indemnity claim fails; the remaining orders preserve the equitable indemnity claim. One of the Orders rules on the issue of contractual severance; the rest do not.

This brief will first address arguments common to all of the orders, and will then attempt to address arguments that may be specific to certain, but not all, Respondents. In order to address even the most common elements of this case, however, Appellant believes that a review of the two different contracts at issue would greatly assist the Court.

The contracts governing the relationships between (1) Appellant and East Coast Carpentry and (2) Appellant and Palmetto Trim contain indemnification language that mirrors each other but predates the indemnification language found in the relevant contracts that Appellant has with the remaining subcontractors. For ease of reference, Appellant will refer to its contracts with East Coast Carpentry and Palmetto Trim as "the 2005 Contracts." The relevant indemnification language in the 2005 Contracts provides as follows:

[T]o the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend and hold harmless the Indemnitees for,

and to save the harmless against, any and all Claims (together with reasonable attorneys' fees), **to the extent of liability resulting from Subcontractor's negligence or willful misconduct** incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations.

[R. p. 1456](emphasis added).

The contracts that followed with the remaining six subcontractors (referred to collectively as the "Later Contracts") contained completely different indemnity provisions from those found in the 2005 Contracts. In these Later Contracts, indemnity obligations were laid out under the heading "Section 5. Indemnity," which consisted of four paragraphs, although only three are relevant herein. The first paragraph governs indemnification in cases including those arising out of property damage, such as the underlying action. The second paragraph governs indemnification in cases arising out of bodily injury to the subcontractor, its agents, employees, or subcontractors. The third paragraph governs the subcontractor's separate duty to defend. Each is addressed here in turn.

Paragraph One provides, in relevant part, that Appellant may seek indemnification for losses arising out of, among other things, property damage:

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

[R. p. 1506].

This paragraph expressly permits Appellant to recover from its subcontractor for the negligent acts or omissions of said subcontractor in cases, such as the one before this Court, arising out of property damage. It bears emphasis that this paragraph is the only paragraph within Section 5 of the Master Subcontract Agreement which specifically provides for indemnification against loss resulting from property damage caused by the neglect or omission of the indemnitor.

Paragraph Two governs the relationship between the parties in cases arising out of claims of bodily injury to the subcontractor, its agents, employees, and/or subcontractors. This case does not arise out of bodily injury, and thus this paragraph is irrelevant and not currently before the Court. Nonetheless, Respondents have taken issue with this paragraph because, in cases involving bodily injury to the subcontractor, its agents, employees, and/or subcontractors, the contract allows Appellant, “to the fullest extent permitted by law,” to seek indemnification for losses “REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.” [R. p. 1506](emphasis added). Thus the provisions of paragraph two, by their specific terms, allow recovery in indemnity only as authorized by law, and, correspondingly, would not impose any indemnity obligation contrary to South Carolina law.

Moreover, (for those reasons discussed herein below), even assuming that this language may potentially be problematic if this were a case arising out of bodily

injury, it does not affect Appellant's right to pursue indemnification pursuant to Paragraph One in a case arising out of property damage.

Paragraph Three of the Indemnity Section governs the subcontractor's duty to defend. Paragraph Three provides that:

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR.

[R. p. 1507].

Appellant believes that Paragraph Three needs no further explanation, as the terms are abundantly clear and speak for themselves.

Some, but not all, of the Orders also address the Warranty Section and the Severance Section of these Later Contracts. Appellant will review these additional sections of the contract as appropriate when addressing the relevant arguments.

I. Each of the Eight Trial Court Orders Mistakenly Applied the Clear and Unequivocal Standard Articulated by Concord and Cumberland to the Relevant Contractual Language Even Though Appellant was only Seeking Indemnity for the Subcontractors' Negligence.

One of the things that each of the lower court orders has in common is that each inappropriately applies the heightened standard found in Concord & Cumberland to the contract language at issue because the lower court mistakenly assumed – and sometimes specifically found – that Appellant was seeking to be indemnified for its own negligence. Any such assumption or finding of the lower Court is without evidentiary support.

Typically, courts will construe an indemnification contract “in accordance with the rules for construction, and of contracts generally.” Concord & Cumberland

Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). Only when a party seeks contractual indemnification for its own negligence do our courts require that the language granting that indemnification meet a heightened standard of being “clear and unequivocal.” See id. Because Appellant is not seeking indemnification for its own negligence, the heightened standard of “clear and unequivocal” should not have been applied to its contracts.

In Concord & Cumberland, the Court of Appeals considered indemnification provisions which were virtually identical to those at issue in the Later Contracts. In that case, the general contractor, Superior Construction, sought indemnification from its window installation subcontractor, Muhler, against damages arising from both (a) the negligence of the subcontractor, and (b) the concurrent negligence of Superior (the general contractor) itself. The Circuit Court found that the indemnification provisions of the Subcontract Agreement were not sufficiently “clear and unequivocal” as to require Muhler to indemnify Superior for Superior’s own negligence. However, the Circuit Court specifically determined that those indemnity provisions did in fact obligate the subcontractor, Muhler, to indemnify the general contractor, Superior, against claims and damages caused by the negligent acts or omissions of Muhler. The Court of Appeals affirmed the determination of the Circuit Court, noting repeatedly within its opinion, that, although the indemnification provision of the relevant subcontract agreement was not sufficiently clear and unequivocal to require indemnification against the general contractor’s own negligence, such indemnification provision nonetheless obligated

the subcontractor to indemnify the general contractor against loss or damage caused by the negligent acts or omissions of the subcontractor. See generally, Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).

At the crux of Concord & Cumberland was the fact that the general contractor was trying to recover from its subcontractor for the general contractor's own negligence. That is not the case here. Appellant is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification, and corresponding damages, against liability for loss or damage arising from Respondents' negligence. When, as here, a contractor does not seek indemnity for its own negligence, the "clear and unequivocal" standard simply does not apply, and the indemnity provision is not subject to that heightened standard.

Certain orders of the lower court in this case erroneously found that Appellant was seeking indemnification for its own negligence. For example, the Order granting partial summary judgment to Hurley Services finds that "[i]n its crossclaims against Hurley, BFS seeks to recover the amount of any judgment in favor of Plaintiffs arising from its own negligence, and also all costs, expenses, and attorneys fees it incurs in defending the action, even if 100% of defense costs arise from the sole negligence of BFS." [R. p. 34]. There is nothing in the Record, including in the pleadings articulating BFS' claims against its subcontractors, that can support the finding of the trial court. In fact, a review of the relevant documents, which Appellant will address momentarily, reveals the exact opposite.

This entire appeal turns on whether Appellant is seeking to be indemnified for Appellant's own negligence or only for the negligence, whether sole or concurrent, of its subcontractors. As mentioned above, the lower Court repeatedly held that Appellant's pleadings seek indemnification from its subcontractors for Appellant's own negligence, and nearly every subsequent holding flows from that premise: the heightened standard of Concord & Cumberland, the language of 32-2-10, the unconscionability of the agreement, and the issue of collateral estoppel all matter only if Appellant is seeking to recover in indemnity for, or regardless of, Appellant's own negligence. As Appellant has reiterated countless times [R. p. 1422, ll. 20-25], Appellant is not seeking to recover in indemnity for damages that may have been occasioned by its negligence, but only those occasioned by the negligence of its subcontractor – and the pleadings support this position.

An excerpt of Appellant's relevant pleading for contractual indemnification follows.

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

...

137. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the Cross Claim Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

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

[R. pp. 440, 441] (emphasis added). Similar language is addressed to the Third-Party Defendants in Paragraphs 163, 167 and 168 [R. pp. 448, 449]. Broken down in simpler language, the paragraphs say the following:

134. BFS denies liability.

137. If BFS is found to be liable to the Plaintiff, it is only because the Cross Claim Defendants (or, as the case may be, the Third-Party Defendants) did something wrong.

138. Thus, if BFS is liable to the Plaintiffs, the Cross Claim Defendants (or, as the case may be, the Third-Party Defendants) are derivatively and contractually liable to BFS.

Appellant's pleading takes as a premise that Appellant has committed no negligence and has no liability. In this world constructed by Appellant's pleading, where Appellant has committed no negligence, the only possible way Appellant could be liable is if the negligence was committed by Appellant's subcontractor and not by Appellant itself. Thus, in this world, and in context, Respondents, as the sole source of the negligence, would be liable to Appellant for all damages, as plead in paragraphs 138 and 168, and Appellant, in seeking indemnity, is seeking recovery only for Respondents' negligence and not for Appellant's own negligence (because Appellant's negligence is nonexistent). Whether the facts later bear out

Appellant's worldview does not affect the analysis of what Appellant's pleadings seek.

Because Appellant's pleadings and consistent representations have been that it is seeking indemnification only for Respondents' negligence, the trial court should not have applied the elevated standard of "clear and unequivocal" articulated by Concord & Cumberland.

However, even if the heightened standard articulated in Concord & Cumberland *did* apply to the contracts at issue (which Appellant does not concede), the indemnification language found in both contracts is sufficiently clear and unequivocal to satisfy the standard and to allow Appellant to recover in indemnity.

A. The language of the 2005 Contracts clearly and unequivocally provides for indemnification in favor of Appellant.

The orders granting summary judgment to East Coast Carpentry and Palmetto Trim on the contractual indemnity claim ruled on the language found in the 2005 Contracts. The sections of the two orders addressing the Concord & Cumberland arguments are identical; both found that the indemnity "language is inherently confusing" and that "the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS's own negligence" (again, the latter statement, even if true, is irrelevant because BFS is not seeking indemnity for its own negligence but only for liability for damages caused by the negligence of its subcontractor). [R. pp. 46, 55]. The final holdings both provide that "the indemnity and duty to defend provisions of the Master Agreement . . . are neither clear nor unequivocal

and, thus, fail as a matter of law.” [R. pp. 48, 56].

The language, however, is clear and unequivocal. The Court in both orders quoted from the 2005 Contracts exactly as follows:

Section 6. Waiver, Release, and Indemnification. Subcontractor agrees that Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors. Subcontractor will indemnify, defend, and hold Contractor harmless against any such injuries and claims. Accordingly:

a. Waiver. [omitted because it applies to workers comp]

b. Release and Indemnity.

(1) [Omitted bc applies to personal injury]

(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 Indemnitees [defined as Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees in (1)] 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 Indemnitees failure to supervise Subcontractor’s operations.

[R. pp. 46, 54, 55] (All bracketed text original to the Orders). Once the Orders have finished quoting the above, they conclude, without referencing any specific text, that “This language is inherently confusing insofar as it calls for East Coast to indemnify BFS for BFS’s sole negligence while also claiming to limit the indemnity “to the extent” of East Coast’s negligence.” [R. pp. 46, 55].

The opening language of Section 6 limits the indemnification obligation to claims “arising from or relating in any way to the performance of the Work,” which

is a defined term that encompasses only the materials and/or services that the subcontractor undertook to perform or provide for Appellant [See R. p. 1451, Section 1(a)]; therefore, the language of the contract provides for indemnification in favor of Appellant in the event of claims, such as those here, arising from the subcontractor's work. [See Section 6 Waiver, Release and Indemnification, R. p. 1455]. The indemnification obligation is reiterated later in Section 6(b)(2) where, consistent with the opening language, the contract provides that the indemnification obligation is limited "to the extent of liability resulting from Subcontractor's negligence or willful misconduct . . ." [R. p. 1456]. This limitation then modifies and controls the remaining three subsections, labeled (i), (ii), and (iii). [R. p. 1456].

Section 6 of the 2005 Contracts consistently limits the indemnification obligation of the subcontractors to the liability that Appellant may face as a result of the Subcontractor's negligence in its Work. It does not attempt to award Appellant indemnity for Appellant's own negligence, nor is it in any way "inherently confusing." Contrary to the lower court's holdings, the Contracts are clear and unequivocal in providing for indemnity for liability occasioned by the negligence of the subcontractor, and thus, it was inappropriate for the lower court to grant summary judgment to East Coast Carpentry and Palmetto Trim on these grounds.

B. The Later Contracts are sufficiently clear and unequivocal to satisfy Concord and Cumberland.

The remaining six orders all hold that the indemnity provisions of the Later Contracts are not sufficiently clear and unequivocal to satisfy Concord & Cumberland. Certain orders go even further to hold that the warranty provisions of the Later Contracts also violate Concord & Cumberland. While noting again that these provisions are **not** subject to the heightened standard of Concord & Cumberland, Appellant addresses each provision below.

1. *The indemnity language of the “Section 5. Indemnity” provision is clear and unequivocal.*

The lower court’s orders that hold that the language of “Section 5. Indemnity” run afoul of Concord & Cumberland follow one of two different rationales. The first, which is articulated by the lower court’s order granting summary judgment to Hurley Services, is that the Concord & Cumberland Court considered nearly identical language and found as a matter of law that it was not sufficiently clear and unequivocal to impose an indemnification obligation on the subcontractor for liability caused by the general contractor’s own negligence. The lower court then reasoned that because Appellant was likewise attempting to recover for its own negligence on language that had already been ruled insufficient, the Concord & Cumberland precedent barred its recovery. The problem with the lower court’s reasoning, however, is that, as explained in detail above, Appellant is *not* seeking to recover for its own negligence but only for the negligence of its subcontractors. Based on the same language that barred the general contractor from recovering for its own negligence, the Concord & Cumberland Court

nevertheless specifically *allowed* the general contractor to recover from its subcontractor for the *subcontractor's* negligence. The lower court here should have come to the same conclusion, allowing Appellant to proceed on its claims to recover against its subcontractor for the subcontractor's negligence.

The second way in which the lower court approached the "Section 5. Indemnity" language was to actually analyze the language itself. In the orders granting partial or complete summary judgment to the remaining Respondents, the Court held that "[t]he indemnification provisions in 'Section 5. INDEMNITY' of the Master Agreement, as set forth above, are ambiguous, conflict with each other . . . and do not meet the elevated clear and unequivocal standard found in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018)." [R. pp. 63, 79, 94]. The Court's logic seems to be that the ambiguities apparently arise because the different paragraphs in the Indemnity Section impose different obligations in different circumstances. For example, the Court notes that Paragraph One imposes an indemnification obligation "ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR," while Paragraph Two imposes an indemnification obligation "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 [APPELLANT]," and Paragraph Three imposes an obligation to defend "REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF [APPELLANT]." [R. pp. 62, 63, 78, 79, 93, 94]. As explained at the outset of this

brief, these “inconsistencies” are resolved by looking at the context of the paragraphs containing the text.

Paragraph One applies to, among other things, claims, such as the one at bar, for property damage. [See first paragraph of Section 5 Indemnity, R. p. 1506]. In those situations, the liability of the subcontractor for indemnification will be limited to the extent that the underlying negligence was caused in whole or in part by the subcontractor. Paragraph Two applies to claims for bodily injury. [See second paragraph of Section 5 Indemnity, R. pp. 1506, 1507]. In such a context, the subcontractor may be liable to indemnify Appellant regardless of the negligence of Appellant if and only “to the fullest extent permitted by law”. These two paragraphs do not contradict each other, because it is abundantly clear when one paragraph governs the situation at issue. No one has attempted to argue that this is a personal injury case, and thus no one can seriously argue that Paragraph Two applies at all to the case at bar.

Appellant maintains that Paragraph Two is irrelevant to this litigation; however, to the extent that the Court would evaluate Paragraph Two in the context of Concord & Cumberland (because it may allow Appellant to recover in personal injury cases regardless of the negligence of Appellant), Appellant would argue that the language is clear and unequivocal. Any party to the contract would understand the plain language before it – that in personal injury cases, an obligation to indemnify would exist, “to the fullest extent permitted by law”, regardless of the negligence of Appellant. To the extent that the Court disagrees, precedent requires that Court sever the offending language, as discussed below, and leave

the language governing property damage claims intact. This outcome is still compatible with Appellant pursuing its claims pursuant to Paragraph One.

Finally, Paragraph Three applies to the Duty to Defend, which exists independently of the Duty to Indemnify and regardless of any ultimate liability or negligence of Appellant. [See third paragraph of Section 5 Indemnity, R. p. 1507]. The paragraph clearly and unequivocally applies only to the duty to defend, and by the terms of the contract this duty clearly and unequivocally exists regardless of the ultimate negligence of Appellant. There is no confusion as to when this paragraph (as opposed to Paragraph One or Two) would govern a situation, and there is no confusion as to what is expected from the subcontractor under this paragraph. Thus, the paragraph does not violate Concord & Cumberland. To the extent the Court may disagree, it is likewise required to sever the offending language and leave the remainder of the Contract intact.

In the context of Concord and Cumberland, the lower court's orders held only that the "provisions are ambiguous, conflict with each other . . . and do not meet the elevated clear and unequivocal standard." [See R. pp. 63, 79, 94]. As explained above, these provisions are not required to meet the heightened "clear and unequivocal" standard, but to the extent that the Court would thus analyze them anyway: the provisions are unambiguous; they do not conflict with each other because they explicitly apply to different circumstances; and they clearly and unequivocally set out the obligations of the subcontractors in those different situations. The holdings of the lower court that the indemnity provisions of the contracts violate Concord & Cumberland must therefore be reversed.

2. *The warranty language of the “Section 3. Warranty” provision is clear and unequivocal, and does not conflict with the “Section 5. Indemnity” provision.*

The lower court’s orders granting, in part or in full, summary judgment to ECC, Hurley Services, AC Construction, and WS Contractors additionally reference the “Section 3. Warranty” provision, attempting to turn it into an indemnity provision that purportedly conflicts with the “Section 5. Indemnity” provision (the L&G Order also mentions, without analyzing, the Warranty language, although it cites to Section 7 rather than Section 3). The analysis of Section 3 in each of the Orders is incredibly brief and unenlightening. In the Hurley Order, the Court said that “The indemnity provision buried in the fine print of Section 3 WARRANTY would allow BFS to seek indemnity for personal injuries and property damage arising from the sole negligence of BFS in selecting and selling products which it gives to Hurley for installation.” [R. p. 29]. In the ECC, AC Construction and WS Contractors Orders, the Court observed only that “Section 3. Warranty” contains a “buried” indemnification provision that conflicts with the indemnity provisions in Section 5. [R. pp. 63, 78, 79, 93, 94].

The entirety of the Warranty provision can be found in the Record at pages 1504 and 1505, but the relevant provisions for this analysis are as follows:

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 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 years for all Work except, (b) ten (10) years for all Work consisting of any

structural application of any home, building, or other structure... 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.

In its orders addressed to ECC, AC Construction, and WS Contractors, the lower court highlighted the language in the last sentence that provides that the subcontractor will “Indemnify Contractor and any other party for any costs incurred by any party relating to such demand.” [R. pp. 63, 78, 79, 93, 94]. The “demand” at issue is a demand that the subcontractor correct the Work under warranty that it performed for Appellant. [R. p. 1504]. The term “Work” as used in this section and throughout the Contracts is a defined term that specifically excludes materials provided by BFS and only includes materials and/or services provided or performed by the subcontractor. [See Section 1(a), R. p. 1501]. Understanding that “Work” relates only to materials and/or services provided or performed by the Subcontractor, this provision only requires Subcontractor to correct its own Work (or, as the case may be, any materials that Subcontractor may have provided) **and to indemnify other parties for costs incurred relating to the demand that Subcontractor correct its own Work.** A contractual provision whereby a subcontractor must indemnify the contractor for damages resulting from the subcontractor’s negligence is consistent with Concord & Cumberland.

The lower court’s order addressed to Hurley Services can likewise be rebutted by reading the warranty provision in the context of its defined term. In the Hurley Order, the lower court found that the warranty provision “allow[s] BFS to seek indemnity for personal injuries and property damage *arising from the sole*

negligence of BFS in selecting and selling products which it gives to Hurley for installation.” [R. p. 32] (emphasis added). It is not entirely clear what language the Court relied on when it drew this conclusion, but it is possible that it had in mind the language whereby “Subcontractor guarantees the Work against defects in design, workmanship, and *materials...*” [See R. p. 1504]. Again, however, the guarantee is limited to the “Work,” that is, the materials/services provided by the subcontractor. [See R. p. 1501]. If a Subcontractor provided materials, the Subcontractor guarantees them against defects in design, workmanship, and materials. If the Subcontractor performed services, “design” may be inapplicable in that specific situation, but the Subcontractor still guarantees its workmanship (and any materials that it does provide in tandem with its services). In this instance, Appellant is not alleging that Hurley supplied the materials in question; thus, by the very terms of the Contract, Hurley is not guaranteeing those materials against defects in design, workmanship, and materials. Because this warranty language does not require Hurley to assume liability for the materials provided by Appellant, it does not violate Concord & Cumberland.

In conclusion, it was an error for the lower court ever to apply the heightened standard of “clear and unequivocal” articulated in Concord & Cumberland to the various contracts at issue because Appellant is not seeking indemnity for its own negligence. It was further error for the Court to analyze the Indemnity and Warranty provisions and conclude that they were ambiguous, confusing, and failed to meet the clear and unequivocal standard.

II. The Contractual language does not violate South Carolina law and public policy, and the relief sought by Appellant is specifically authorized by Section 32-2-10.

In addition to holding that the Contracts violate Concord & Cumberland, the other element that all of the eight orders have in common is that they all at least mention South Carolina Code Section 32-2-10.

Section 32-2-10 provides 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, 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.

(Emphasis added). Section 32-2-10, by its specific language, states simply that an agreement to indemnify a party against liability for damages arising out of that party's sole negligence is against public policy, and thus unenforceable. None of the applicable sections of the contract violates this statute.

A. The 2005 Contracts do not violate Section 32-2-10.

Once again, the orders granting partial summary judgment to East Coast Carpentry and Palmetto Trim analyze an older version of Appellant's contracts. Notably, the lower court's order granting partial summary judgment to Palmetto Trim does not discuss Section 32-2-10 *at all* but only states, as bullet point number

three of its final recitation of its findings, that the contract violates the statute and public policy. [R p. 56]. The order granting partial summary judgment to East Coast Carpentry contains at least an analysis of the statute, and Appellant will address that analysis here.

The lower court held: “Section 6 explicitly calls for East Coast to unconditionally defend and indemnify BFS in subsection (1) and then calls for East Coast to indemnify BFS for BFS’ failure to supervise in subsection (2). These provisions explicitly violation of SC Code Ann. §32-2-10 as they require East Coast to indemnify BFS for BFS’ sole negligence.” [R. p. 47]. This Court may recall that subsection (1) applies only to personal injury cases – in fact, the lower court did not even reproduce the text of subsection (1) in any of its analysis because it knew it was irrelevant to the case (instead of including the text of subsection (1) when it quoted the contract, the lower court instead noted in brackets that the text was “Omitted bc applies to personal injury”). [R p. 46].

Subsection (2), by contrast, contains three separate subsections, including subsection (iii), which states that the subcontractor will indemnify Appellant for claims “to the extent of liability resulting from the Subcontractor’s negligence . . . which arise out of or related to . . . (iii) omissions resulting from Indemnitees failure to supervise Subcontractor’s operations.” [R. p. 1456]. By the very terms of the contract, subsection (iii) is necessarily modified by the language earlier in the sentence that limits East Coast’s liability to damages resulting from its own negligence. Even if this were not the case, subsection (iii) is likewise irrelevant to the current litigation, because Appellant is not seeking indemnification pursuant to

subsection (iii), but rather subsection (ii), which provides that the subcontractor will indemnify Appellant for claims “to the extent of liability resulting from the Subcontractor’s negligence . . . which arise out of or related to . . . (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work.” [R. p. 1456]. The language that limits East Coast’s liability to its own negligence falls squarely within Section 32-2-10.

After highlighting the language described above, the lower court then went on to discuss D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). The lower court described that case as follows:

In D.R. Horton, the 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.

[R. pp. 47, 48].

But this case IS different. In that case, D.R. Horton was seeking to be indemnified for its *own* negligence. In this case, Appellant is not seeking to be indemnified for its own negligence.

Perhaps even more importantly, the lower court seems to have missed the important nuance of the D.R. Horton holding whereby the Court voided the portion of the indemnity provision that allowed the contractor to recover for its own negligence but specifically affirmed and left intact the portion of the indemnity provision that allowed the contractor to recover from the subcontractor for the *subcontractor’s* negligence. The D.R. Horton Court spoke as follows:

This statute [Section 32-2-10] allows D.R. Horton and BFS to agree that BFS will indemnify D.R. Horton for damages caused by BFS or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree. However, we agree that the indemnification clause is void as against public policy *to the extent* it purports to require BFS to indemnify D.R. Horton for damages caused by its negligence or the negligence of its subcontractors.

D.R. Horton, 422 S.C. at 152, 810 S.E.2d at 45 (emphasis added). Analogously, to the extent that the indemnity provisions contained in Appellant's contracts provide that the subcontractor shall indemnify Appellant for the subcontractor's negligence, that language is authorized by Section 32-2-10 and public policy, and should not be disturbed by the Court. Any invalid provisions may be severed, as contemplated by D.R. Horton and as explained below, but Appellant must be allowed to pursue its claims against its subcontractors for the subcontractors' own negligence.

B. The Relevant Indemnity Provision(s) of the Later Contracts are Likewise Specifically Authorized by Section 32-2-10.

In addressing the Later Contracts, the orders of the lower court again diverge into at least two completely different sets of analysis depending on which party's attorney wrote the respective proposed order for the Court.

Both of the orders granting partial summary judgment to L&G Construction and to Pohlman Quality Exteriors mention in passing Section 32-2-10 as an alternative sustaining ground for summary judgment but provide absolutely no analysis of the statute. Thus, Appellant is unable to mount a challenge to the lower court's holdings with any kind of specificity in these two instances and instead incorporates, generally, the arguments against such a holding outlined below.

The order granting partial summary judgment to ECC Contracting contains a discussion of Section 32-2-10 that shows up verbatim in the orders granting complete or partial summary judgment to AC Construction and WS Contractors. The order granting partial summary judgment to Hurley Services makes some of the same arguments and then diverges.

Among these collective four orders, the lower court criticized the first, second, and third paragraphs of the indemnity provision as running afoul of South Carolina Code Section 32-2-10. All three paragraphs are addressed here in turn.

1. *Paragraph One of the Indemnity Provision, which is the only paragraph under which Appellant seeks indemnification for damages in this action, is explicitly authorized by Section 32-2-10.*

In the Order granting partial summary judgment to Hurley Services, the lower court makes a unique finding – one that is not repeated or supported by any of its other orders. In that Order, the lower court held that “The first and second paragraphs in Section 5 INDEMNITY also purport to indemnify BFS for its sole negligence in violation of the statute [Section 32-2-10].” [R. p. 37]. To Appellant’s knowledge, nowhere else has an order concluded that *Paragraph One* in Section 5 Indemnity allows Appellant to recover in indemnity for its own negligence.

Paragraph One of the indemnity provision explicitly does not require Respondent to indemnify Appellant against liability for damages arising out of Appellant’s sole negligence. Rather, it limits indemnification only to damages “TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACOR;” thus, Section 5, Paragraph One requires Respondent to indemnify Appellant against liability or damages for *Respondent’s*

negligence (whether sole or concurrent). [R. p. 1506]. This arrangement is the exact type of agreement authorized by the second half of the statute: Section 32-2-10 specifically authorizes agreements whereby the promisor shall indemnify or hold harmless the promisee against liability for damages resulting from the negligence, in whole or in part, of the promisor. The indemnity provision of Section 5 Paragraph One is, therefore, specifically authorized by Section 32-2-10 because by that provision Respondents undertook to indemnify Appellant for Respondents' own negligence (as opposed to Appellant's own negligence). Additionally, a contractual provision authorized by statute cannot logically be against public policy. Thus, the indemnity provision does not violate Section 32-2-10 or public policy, and provides no basis for an award of summary judgment in favor of Respondents.

2. Paragraph Two of the Indemnity Provision is Not Currently Before this Court, but to the Extent that the Court finds that it may Violate Section 32-2-10, the Court is Compelled to Sever it.

All four of the orders outlined above hold that Paragraph Two violates Section 32-2-10. Paragraph Two of the indemnity provision outlines the subcontractor's indemnification obligations in the event that a personal injury claim is at issue. This is not the case here. Appellants are not seeking to recover under Paragraph Two, and no one on either side of this litigation has even attempted to argue that Paragraph Two governs the relevant claims in this case. It is simply irrelevant to this case, and Appellant does not believe that it is properly before the Court for review (nor was it properly before the lower court).

Should the Court decide to consider this superfluous provision, however, the outcome should follow the holding of D.R. Horton, discussed at length above. If the Court finds that Paragraph Two does not comply with Section 32-2-10, then the indemnity provision is invalid only *to the extent* that Paragraph Two provides for recovery for Appellant's own negligence. However, *to the extent* that the remainder of the "Section 5. Indemnity" provision provides for recovery for liability for damages incurred as a result of the subcontractor's negligence, that language must be upheld as valid. The Court can reach this result by severing the purportedly offending language in Paragraph Two. The Court's obligation to sever problematic language as opposed to invalidating the entire contract is discussed further below.

3. Paragraph Three of the Contract is Neither Addressed nor Prohibited by Section 32-2-10.

The lower court's Orders also find that Paragraph Three of the Indemnity Provision violates South Carolina Code Section 32-2-10 because Appellant may seek reimbursement of attorney's fees regardless of any ultimate liability or negligence of Appellant. However, the statute addresses general damages and not recovery of attorneys' fees; thus, the statute does not apply to this portion of the Contract.

The very terms of the statute limit its application to agreements for indemnification against liability 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 must be strictly construed, and 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).

Finally, even if the Court were to determine for some reason that the contractual provision regarding attorneys’ fees violated Section 32-2-10, the Court should sever the offending provision, as discussed below; then, Appellant’s claim for attorneys’ fees would instead be fully encompassed by Paragraph One of the indemnity provision. Paragraph One provides that Respondents would indemnify Appellant for all losses, “including, but not limited to . . . attorney’s fees” arising out of claims for property damage, but “ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OF THE SUBCONTRACTOR” [R. p. 1506]. Because recovery under Paragraph One is limited to attorneys’ fees incurred in defending against the negligence of the subcontractor, it is not covered by the alleged prohibition of Section 32-2-10; in fact, it is specifically authorized by the statute, because the statute says that it does not affect or void “a promise or agreement whereby the promisor shall indemnify or hold harmless the promise . . . against liability for damages resulting from the negligence, in whole or in part, of the promisor” As noted above, Paragraph One of the indemnity provision is the exact type of agreement authorized by the statute.

4. The Warranty Provision of the Contract does not Violate Section 32-2-10.

Finally, in a move again unique to the Order addressing Hurley Services, the lower court held that the contract’s “Section 3. Warranty” provision violates Section 32-2-10 because, as summarized by the Court, under that section “Hurley warrants, guarantees, and agrees to indemnify BFS for its sole negligence in

selecting and selling materials and building components for installation in the project.” [R. p. 37].

The lower court has grossly mischaracterized the Contract’s Warranty provision, which has already been discussed at length above. Nowhere in Section 3 does the language include anything about the “sole negligence” of Appellant. As previously noted, all warranties, guarantees, and indemnity obligations stem from claims regarding defects in “the Work,” which is a defined term limited to the materials provided by and/or services rendered by the subcontractor. [See R. pp. 1501, 1504]. Because the entire section relates to “the Work” of the subcontractor, it is impossible to reach the Trial Court’s conclusion that the Contract forces the subcontractor to warrant materials that may have been selected or sold by Appellant. Due to the definition of “the Work,” any recovery based on a breach of the warranty provision would be limited to defects in the materials provided by or the services rendered by the subcontractor; in this case, because Hurley provided labor, recovery based on a breach of warranty is limited to the labor it provided.

To the extent that Section 32-2-10 may apply to a warranty provision, agreements such as this one, where the recovery is limited to the negligence of the indemnitor, are explicitly authorized by the statute. Thus, the warranty provision does not violate Section 32-2-10 nor public policy.

III. Because the Specific Issue Here has not been Addressed by a Court Before, and Because the Cited Judgments are on Appeal, the Doctrine of Collateral Estoppel does not Bar Appellant's Claims for Indemnity in the Present Case.

The Orders granting complete or partial summary judgment to ECC, Hurley, L&G, AC, and WS all hold some version of “[BFS] is collaterally estopped from enforcing the contractual indemnity claims” because of the holdings of different combinations of cases that considered the language at issue in the Later Contracts, all of which are currently on appeal. [R. pp. 36, 68, 77, 92, 112].

The orders cite to different combinations of the following cases: Builders FirstSource - Southeast Group, LLC v. ECC Contracting LLC, MI Windows and Doors, Inc., Hurley Services, LLC, Charleston Exteriors LLC (Appellate Case No. 2020-000415); Six Fifty Six Owners Association, Inc., et al., v. Winsor South, LLC, et al. (Appellate Case No. 2020-001328); and Pavic v. Carolina Cottage Homes, LLC, et al. (Appellate Case No. 2021-000290).

In the first of these cases, Judge Newman issued an order holding that:

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question as to BFS seeking indemnification **for its own negligent acts or omissions**. BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee **for the indemnitee's own negligence**.

[R. pp. 152, 153] (emphasis added). This same order was also adopted by Judge Young in Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455. [See “Decision 2,” R. p. 159]. In addition, Judge Young held, in a single sentence at the end of the order, that the contracts violated South Carolina law and public policy. [See “Decision 4,” R. p. 159]. In

Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, Judge McCoy held that the orders of Judge Newman and Judge Young collaterally estop BFS “from contending that the indemnity provisions contained in its Master Subcontractor Agreement are clear and unequivocal [sic] and meet the requirements of South Carolina law.” [R. p. 172]. Despite the dispositive nature of such a holding, Judge McCoy’s Order nonetheless went on to make a variety of other unprecedented holdings about the contract. All three of these orders are currently on appeal.

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 Appellant may recover from its subcontractors pursuant to its contract 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.

As evidenced by the language of the order, Judge Newman only ruled on the issue of whether BFS could recover for *its own* negligence, finding that:

- (a) BFS was seeking to be indemnified for its own negligence, and
- (b) the relevant contract provision was not sufficiently clear and unequivocal to require the subcontractor to indemnify BFS for BFS’s own negligence.

[See R. pp. 152, 153.]

However, the issue before this Court is whether Appellant can recover for the negligence of its subcontractor, which is a separate issue from the one ruled

upon by Judge Newman (and consequently, by Judge Young, and later, by Judge McCoy). This issue has not yet been “actually litigated” within the context of collateral estoppel. Here, because Appellant is not seeking to be indemnified against Appellant’s own negligence, but only against liability for damages caused by the negligence of its subcontractor, none of the prior orders can, as a matter of law, operate to estop Appellant from seeking indemnification for its subcontractors’ negligence in this action.

Counsel for Respondent ECC has tried to evade this distinction in the order it drafted for Judge McCoy in this case by framing the collateral estoppel holding as follows:

In the present case, the Master Agreement and indemnity provisions that BFS now wishes to assert against ECC as part of its contractual indemnification cross-claim involve the same master subcontractor agreement and indemnity provisions that were at issue in all three cases referenced above (i.e., BFS Master Subcontractor Agreement “[Version 5/17/06]”). Moreover, BFS seeks full contractual indemnification from ECC for any liability BFS is found to have to Plaintiffs or others in this action, which is identical to the relief sought by BFS in BFS v. MI Windows, Six Fifty Six, and Pavic.

[R. p. 68; see also, R. pp. 77, 78 and R. p. 92, both with nearly identical language].

Counsel for Hurley attempted something similar by stating that “[t]he contractual indemnity terms drafted by BFS have been litigated and directly determined in the prior actions, and collateral estoppel should apply.” [R. p. 36]. This framing of collateral estoppel by both parties ignores the plain language of South Carolina law, which requires neither that the contractual provisions be identical, nor that the relief sought be identical, but rather that the *issue* be identical to the one previously litigated. The issue being litigated in this case is whether those same contractual

provisions, which courts have previously held do not provide for recovery against one's own negligence, nonetheless provide for recovery against the negligence of one's subcontractors.

Additionally, as mentioned before, all three of the orders referred to are currently on appeal, and until they are finally disposed of on appeal, they should not be considered "final" judgments for purposes of collateral estoppel.

Finally, the Orders drafted by parties that were not privy to BFS v. MI Windows, Six Fifty Six, and/or Pavic nonetheless assume that the collateral estoppel arguments made by Hurley and ECC should likewise protect them. [R. p. 112; R. pp. 89-92; R. pp. 75-78]. However, as pointed out by many of the lower court's orders, "the law . . . requires that the party against whom estoppel is applied have . . . had a full and fair opportunity to litigate the issue in the prior action." South Carolina Property & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). Again, not only are the issues completely different between the prior cases and the one at bar, but even if that were not the case, until the final resolution by an appellate court, BFS will not have exhausted its "full and fair" opportunity to litigate those holdings relied upon by the lower court in this case. Thus, collateral estoppel does not bar the claims of Appellant in this case.

IV. The Trial Court Erred Both in Failing to Address the Severability Provision of the Contract and in Holding that it Lacked Authority to Sever Provisions of the Contract.

Appellant argued repeatedly to the trial court that to the extent that the court held that any language in the contract violated South Carolina law, the Court was

obligated to sever that language pursuant to the severance language in the parties' contracts. However, in the eight orders it issued, the court was either silent on the issue of severance or held that it lacked the authority to sever the contract. In its silence, the trial court abdicated its necessary duty; in holding it lacked authority, it misinterpreted the law.

A. The Court had an obligation to honor the severability provision of the Contract(s)

BFS does not concede that any provisions of its contracts contain problematic language; nonetheless, to the extent that the Trial Court took issue with any specific language, it should have simply severed such language and left the remainder of the Contract intact. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

South Carolina law provides that "[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." Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020). "Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). The presence of a severability clause should be treated as strong evidence of the parties' intent to sever unenforceable language. See Doe, 430 S.C. at 615, 846 S.E.2d at 880-81 (determining that

parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable).

The severability provision of the Contract here demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

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

[See Section 9(f), R. p. 1512 and R. p. 1460]. This language, which is present in both the 2005 Contracts and the Later Contracts, unequivocally reflects the intention of all of the parties that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the Contract may be invalid, the Court should honor the intent of the parties and sever any offending provision, leaving the remaining provisions intact.

As discussed above, the lower court appeared to take issue, for various reasons, with “Section 5. Indemnity,” Paragraphs Two (Bodily Injury) and Three (Duty to Defend); as well as, in some instances, “Section 3. Warranty.” While BFS maintains that all of these provisions are valid, the Court could sever all of them, and BFS would still be entitled to pursue its claim for contractual indemnity under Section Five Paragraph One (Property Damage).⁴ Thus, it was an error for the Court to grant summary judgment on the contractual indemnity claims.

⁴ As discussed above, only one of the eight orders goes so far as to say, in passing, that Paragraph One is problematic. Because the order makes no argument, nor can Appellant fathom any, as to why this is so, Appellant will not address it here.

- B. The Order granting partial summary judgment to Hurley Services misapplied the law when it came to the mistaken conclusion that the court lacks the “authority” to sever parts of the contract.

In the Order granting partial summary judgment to Hurley Services, the lower court cites Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 694 S.E.2d 15, 18 (S.C. 2010), and claims that it has no authority to rewrite contractual indemnity provisions. As discussed above, there is ample precedent giving courts authority and instruction to sever contracts.

The Court is correct that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy. See Poynter. However, the Trial Court fails to recognize that BFS is not asking for any provision to be rewritten. BFS is only asking that, to the extent necessary (which BFS contends is not), the Court sever any offending provisions and give credence to the parties' intention: appropriate application of the applicable indemnity provision.

Moreover, the Poynter case involved an overly broad non-compete agreement. The issue before the Court of Appeals was whether the trial court had authority to decrease a geographical limitation imposed by the parties' contract. The Poynter Court determined that it would violate public policy to allow a court to decrease the geographical limitation agreed upon by the parties, by which action the Court would have effectively rewritten the parties' contract. The Poynter Court held that in South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms and therefore, that the trial judge erred in rewriting the territorial

restriction in the parties' contract. See Poynter, 387 S.C. at 588, 694 S.E.2d at 18 (2010).

Here, we are not dealing with a non-compete agreement, but a contract for construction services. Moreover, the agreement specifically includes an indemnity provision which has been recognized as valid by the Concord & Cumberland Court. More importantly, Appellant is not asking the Court to re-write the content of its contract, but it is asking the Court to honor the intentions of the parties and for Hurley to do the same. Due to the extensive amount of case law condoning and requiring severance of invalid provisions, the lower court should have followed precedent and severed any invalid provisions of the parties' Contract.

V. The Parties' Contract was Neither a Contract of Adhesion nor Unconscionable

Four of the eight lower court orders conclude that the contract is unconscionable and therefore unenforceable. Those orders are the ones granting full or partial summary judgment to Hurley, ECC, WS, and Palmetto Trim. The orders that make no finding as to unconscionability are those granting partial summary judgment to L&G, AC, Pohlman, and East Coast Carpentry. Notably, L&G and AC were parties to the same "Later Contracts" as Hurley, ECC, WS, and Palmetto. It is wildly inconsistent that the trial court would conclude that the same contract was unconscionable and unenforceable against some subcontractors but not against other, similarly-situated subcontractors. This – as well as the many other inconsistencies facing the Court on this consolidated appeal – highlights the problematic nature of the proceedings at the lower court level.

Of the four orders that hold that the contract is unconscionable, only one even attempts to explain why. The Palmetto Trim Order does not discuss it, and the ECC and WS Orders only discuss unconscionability in the context of summarizing Judge McCoy's holding in Pavic, but the orders never apply it to the current case. Only the author of the Hurley Order reiterates, for the purposes of this case, the arguments that Hurley made in the Pavic case.

The Hurley Order holds that the Contract is a contract of adhesion and that it is unconscionable and oppressive. "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided 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." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). Neither Hurley Services nor the lower court pointed to any evidence to support the conclusion that (1) the subcontractor lacked meaningful choice, nor (2) that the terms of the contract are so oppressive that no reasonable person would make them.

Hurley voluntarily entered into the Master Subcontractor Agreement in May 2012, and found the terms favorable enough that it entered into a second one in December 2014. Hurley was free to terminate the May 2012 agreement, but instead chose to execute a second agreement incorporating identical terms in December 2014. The agreement is written such that Hurley is free to provide services thereunder, at its discretion, on a case by case basis, and there is no evidence that Hurley was not equally free to contract with other entities to provide

similar services. In fact, Hurley is not obligated to perform any services under the May 2012 agreement unless it accepts a Work Order. Even then, Hurley is free to terminate its performance obligations as to any Work Order should BFS amend terms of the Work Order that materially increases the cost or difficulty of performance for Hurley. Any finding that the Contract is unconscionable is simply not supported by the provisions of the Contract itself or the actions of Hurley.

The Court cites to Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 670 (2007), to bear the entire weight of its holding. But Simpson does not make for a clean comparison. In that case, the court was considering the language of an arbitration agreement, which is subject to a unique set of state and federal considerations, weights, and presumptions that are completely inapplicable to the indemnification provisions at issue in this case.

The Hurley Order cites that, in finding an agreement unconscionable, the Simpson Court considered important the absence of meaningful choice from the contract, the disparity in bargaining power, and the inconspicuous nature of the challenged language. The Order then goes on to state that “BFS does not specifically address the issue of unequal bargaining power. There is no evidence that Hurley was sophisticated or was represented by legal counsel.” [R. p. 27]. However, it is equally true that there is no evidence that Hurley was **not** sophisticated or represented by legal counsel, and any trial court determination to the contrary is simply unfounded.

The Hurley Order then takes judicial notice of the fact that the “Master Subcontract Agreement is so one-sided, that a subcontractor executing the

agreement, more than likely lacks any meaningful bargaining power.” [R. p. 27]. The Court cited Smith v. D.R. Horton, where that court took judicial cognizance of the fact that a modern buyer of a residential home is normally in an unequal bargaining position as against the multi-state seller. 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016). The Court’s analogy was both erroneous and inappropriate, inasmuch as the typical residential home purchaser has relatively little, if any, experience when dealing with large corporate building contractors. By contrast, the record here clearly demonstrates significant and longstanding business dealings between Hurley and BFS over the course of a number of years. Moreover, those business dealings were mutually beneficial to both Hurley and BFS. Thus, Smith v. D.R. Horton does not provide the authority for such “judicial notice,” and it was inappropriate here.

Finally, the author of the Order takes the reader through a wild goose chase through multiple provisions of the Contract to attempt to support the proposition that the Contract “obligates 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.” [R. p. 27]. To the extent that this argument seems out-of-place, that is because this portion of the text of this Order has been copied from Hurley’s brief in the Pavic appeal.

Hurley’s argument, as adopted by the lower court in its Order, is that the Contract is unconscionable because, despite the very conspicuous “Section 5. Indemnity” provisions, one can allegedly piece together from Sections 1, 2, and 3

a separate, clandestine indemnification obligation by which the subcontractor must indemnify BFS for materials selected and/or supplied by BFS. It is the allegedly “secret” nature of this obligation that makes the contract unconscionable.

Throughout Sections 1, 2, and 3, the obligations placed on the subcontractor are limited to the “Work” of the subcontractor. [See R. pp. 1501, 1502, 1503 and 1504]. In order to reach its conclusion, the Hurley Order attempts to redefine “Work” to include not only work or materials performed or supplied by the subcontractor but also any materials designed, selected, or provided by Appellant. Appellant has addressed this argument already in the context of the Concord & Cumberland and Section 32-2-10 analysis. Because the Hurley Order reiterates the arguments here, quoting at length from the Contract, Appellant will again refute them.

The plain meaning of the term “Work” is clear from the face of the contract. Section 1(a) of the Contract provides as follows:

- 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**”).

[R. p. 1501] (emphasis in original). This is the only definition of “the Work” found in the Contract. Because this is a master subcontract agreement between the parties, it was drafted to cover the rights and relationships of the parties for any project for which Appellant hired Hurley. For the Project at issue in this case, the parties agree that Hurley did not provide the materials in question. Thus, the Work in this instance does not include materials provided by others, but only any materials and/or services that *may have been* provided or performed by Hurley.

The Hurley Order then quotes from Section 2, which provides:

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.

[R. p. 1502]. The Order's argument and analysis regarding this section is only one sentence long: "In SECTION 2(c), BFS drafted the contract language to read that 'work' includes materials supplied by others, which in this case is BFS." [R. p. 29]. However, nowhere does the above language attempt any further definition of the term "Work." In fact, the only mention of "materials" at all is the section that the Order underlines, which provides that the Subcontractor undertakes to protect the materials, regardless of who supplied them. This simply means that if and when Appellant provides its subcontractors with the materials for installation, and the materials are physically in the subcontractor's care, the subcontractor is responsible for protecting the materials from damage, injury, etc. This undertaking has no effect on the definition of the term "Work." Nonetheless, the Order holds that this undertaking to protect materials within the subcontractor's care is unconscionable. However, South Carolina law is clear that a bailee must use

ordinary care to protect the materials with which it is provided, and there is nothing unconscionable about such an obligation. Hadfield v. Gilchrist, 343 S.C. 88, 98, 538 S.E.2d 268, 273–74 (Ct. App. 2000).

The Hurley Order then turns and quotes in detail from the warranty provision, which has been discussed at length above. Here, the Court holds that “Under Section 3 WARRANTY, the subcontractor unknowingly warrants to BFS the design and suitability of products BFS supplies and sells and also unknowingly agrees to indemnify BFS and others for those products.” [R. p. 29]. For purposes of the unconscionability argument, the problem appears to be that the subcontractor both warrants the products and agrees to indemnify BFS “unknowingly.” However, as discussed at great length above, pursuant to Section 3 of the Contract the subcontractor neither warrants products BFS supplies nor indemnifies BFS for issues with those products – and it cannot do these things “unknowingly” if it does not do them at all.

The Hurley Order goes on to find that “The language in Section 3 WARRANTY ‘subcontractor guarantees the work against defects in design ... and materials’ only makes sense if the word ‘design’ refers to manufactured materials provided by BFS,” and “Hurley is not responsible for the design of the buildings in this project.” [R. p. 30]. Appellant was not responsible for the design of the buildings in this project either, so that part of Hurley’s argument is irrelevant. Furthermore, because “the Work” is a defined term that specifically excludes materials provided by BFS and only includes materials and/or services provided or performed by the subcontractor, the Court’s reading of the sentence is impossible.

However, if we substitute “the Work” with its definition, the sentence now reads that “Subcontractor guarantees the materials and/or services provided or performed by the Subcontractor against defects in design, workmanship, and materials.” [See R. pp. 1501, 1504]. As explained above, if a subcontractor provided materials, the Subcontractor guarantees them against defects in design, workmanship, and materials. If the Subcontractor performed services, “design” may be inapplicable in that specific situation, but the Subcontractor still guarantees its workmanship (and any materials that it does provide in tandem with its services). Because this warranty language does not require a subcontractor to assume liability for the design of any materials provided by Appellant, it is not a secret indemnity provision and it does not make the agreement unconscionable.

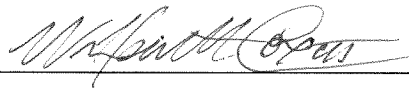
The Order does not stop there, however. The second warranty provision that the Hurley Order highlights provides that “[t]his guarantee will commence upon the Subcontractor’s completion of the Work and will continue for a minimum of (a) three years for all Work except, (b) ten (10) years for all Work consisting of any structural application of any home, building, or other structure...” [R. p. 28]. The Order takes issue with the fact that although BFS provided the product, Hurley guarantees “all Work consisting of any structural application.” [R. p. 30]. Again, the definition of “Work” matters here. This contractual language provides that the subcontractor is guaranteeing the materials and/or services provided or performed by the subcontractor consisting of any structural application. If the subcontractor did not provide a material, it is not guaranteeing that material, but only the services

and/or materials that the subcontractor *did* perform or provide. Again, there is nothing secret nor unconscionable about this provision.

CONCLUSION

Because the lower court erroneously applied the heightened “clear and unequivocal” standard to language by which Appellant sought recovery against its subcontractors for its subcontractors’ negligence; because the lower court mistakenly held that South Carolina Code Section 32-2-10 barred Appellant’s recovery for its subcontractors’ negligence; because the lower court incorrectly held that identical issues had been ruled upon by previous court decisions that therefore estopped Appellant from pursuing its claims; because the lower court either failed to address the Contract’s severance clause or alternatively mistakenly held that it was without the authority to do so; and because the lower court misinterpreted the Contract as unconscionable and one of adhesion, Appellant hereby requests that this Court REVERSE the holdings in all eight orders issued by the lower court.

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Nov 14 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

The eight Respondents in this matter have filed seven¹ different Briefs, arguing various combinations of the following, (all of which are contested by the Appellant):

- Appellant's pleadings and contracts support the position that Appellant is seeking indemnification for its own negligence, and the heightened standard of Concord & Cumberland was thus correctly applied.
- Appellant is collaterally estopped from arguing this case by the prior trial court rulings, regardless of the fact that Appellant is seeking a different remedy than the one ruled on by those courts, and regardless of the fact that those rulings are on appeal and thus not sufficiently "final."
- The Contracts at issue violate South Carolina Code Section 32-2-10, despite the fact that the statute specifically authorizes the relief sought by Appellant and despite the fact that the statute does not apply to attorneys' fees.
- The Contracts at issue are unconscionable, even though the Contracts inure to the benefit of both parties, and even though no evidence has been presented regarding the bargaining power of the relevant parties.
- The Contracts at issue are not subject to severance, despite the presence of a valid severance clause, and despite South Carolina law favoring the practice of severance.

Appellant has attempted to respond comprehensively to the unusually wide scope of arguments leveled against it. To that end, Appellant sought and was granted leave by the Court to exceed the 25-page limit typically imposed on reply briefs by

¹ Respondent L&G Construction Group, LLC, did not file its own brief but joined in the brief of Respondent Hurley Services, LLC.

Rule 208 of the South Carolina Rules of Appellate Practice.² Additionally, Appellant incorporates herein by reference all arguments made in its opening brief.

I. Both the pleadings and the relevant contractual provisions establish that Appellant is seeking recovery against its subcontractors ONLY for the subcontractors' negligence, and thus the heightened standard articulated in Concord and Cumberland was improperly applied by the lower court.

Respondents acknowledge that Appellant has repeatedly represented that it is not seeking indemnification for its own negligence but only for the negligence, whether sole or concurrent, of its subcontractors. However, Respondents have argued that, despite these representations, Appellant's crossclaims and/or contracts necessitate a finding that Appellant is seeking recovery for its own negligence.

A. Appellant's crossclaims limit Appellant's recovery to liability for damages caused by its subcontractors.

Appellant's crossclaims were cited and discussed in detail in Appellant's opening brief. To reiterate, Appellant plead:

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

...

137. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, 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.

² The Court, in its Order, instructed Appellant that the Reply Brief should not exceed 40 pages; this brief complies with said limitation.

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

[R. pp. 440, 441] (emphasis added). In these paragraphs, Appellant has denied all wrongdoing. The pleadings nonetheless acknowledge that, even though Appellant is faultless, Appellant may still end up being liable to the Plaintiff on a theory of vicarious liability due to the work of its subcontractors. And because Appellant denies all wrongdoing, Appellant could be liable to Plaintiffs only on a theory of vicarious liability. Thus, when Appellant's pleadings state that the subcontractors are liable to Appellant for any sums which Appellant may pay to Plaintiffs, those sums are necessarily the result only of Appellant's vicarious liability arising from the negligence and/or other deficiency in the work of its respective subcontractors.

Respondents argue that Appellant's explanation of its pleadings "ignores the very real possibility that [Appellant] may be held liable to Plaintiffs for its own negligence as alleged in Plaintiffs' Fourth Amended Complaint" [See, e.g., Pohlman Brief, p. 5.] But Respondents have confused the function of the pleading at this stage of the analysis. The question that the Court must answer is: "By its crossclaims, is Appellant seeking recovery for its own negligence?"; the question is **not** whether the facts later bear out Appellant's worldview. In determining the

relief sought by Appellant, facts that will develop or come to light later in the case are irrelevant. Thus, Plaintiff's allegations and its expert's opinion are irrelevant, as is whether a jury would ultimately find Appellant liable on Plaintiff's claims.

Consider the pleadings filed in the Concord & Cumberland case so frequently cited by parties to this action. Superior Construction, the general contractor, plead:

The Plaintiff has alleged in its Complaint a number of allegedly improper and/or defective items of workmanship and materials, and various resulting damages regarding the Subject Property that directly arises out, or, relates to the respective scope of work of, or materials supplied by, the Subcontractors. While Superior has denied these allegations, the claims and allegations by the Plaintiff, if proven substantiated, **entitle Superior to full recovery** pursuant to the various claims in law and equity enumerated below.

[Superior Construction's Answer, Cross Claims, and Third-Party Complaint, ¶ 103] (emphasis added). Superior plead that it was entitled to "full recovery," not simply recovery limited to the negligence of the subcontractors. ***And despite this pleading, the Concord & Cumberland Court allowed Superior to recover in indemnity for the negligence of its subcontractors.*** Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 645, 819 S.E.2d 166, 169–70 (Ct. App. 2018) (affirming the Circuit Court's finding limiting "indemnification to damages resulting from the work [subcontractor] performed.").

Appellant's pleading is limited to seeking recovery for the negligence of its subcontractors because its crossclaims are premised solely upon vicarious liability. However, even if, like Superior Construction in Concord & Cumberland, Appellant's pleading could be read to be seeking indemnity for its own negligence,

Appellant is nonetheless entitled to the same relief granted to Superior – that is, indemnification limited to the negligence of its subcontractors.

B. Appellant's contracts limit Appellant's recovery in this case to liability for damages caused by its subcontractors.

The applicable language in both the 2005 Contracts and in the Later Contracts limits Appellant's rights to indemnification to damages arising out of the negligence of its subcontractors.

1. The 2005 Contracts

Respondent East Coast argues in its brief that the language of the 2005 Contract contradicts Appellant's contention that it is not seeking indemnification for its own negligence. Specifically, East Coast points to the following language:

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.

[Brief of East Coast, p. 13] (emphasis in East Coast's Brief). East Coast then argues that "BFS cannot argue that its claims for contractual indemnity are for those sums that are solely attributable to the negligence of East Coast when its contractual indemnity provisions clearly say 'Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages.'" *Id.* The problem is that East Coast only considers half of the sentence in its analysis. The text of the contract clearly says that the Subcontractor "shall be responsible for all injuries, losses, or damages . . . **relating in any way to the performance of the Work . .**

. **of Subcontractor**” [R. p. 1455] (emphasis added). In the 2005 Contract, “Work” is a defined term limited to the materials provided by and/or services performed by the subcontractor. [R. p. 1451]. Thus, in this case, the indemnification obligation extends only to the services provided by East Coast. Understanding this nuance, the Contract actually supports *Appellant’s* position that Appellant is seeking indemnification only for damages arising from the negligent work of its subcontractors (and not from its own negligence).

2. The Later Contracts

Other Respondents have pointed to Section 3, Section 5, and/or Section 8 of Appellant’s Later Contracts as containing indemnification language that demonstrates that Appellant is seeking to be indemnified for its own negligence in this case. Appellant here addresses each section in turn.

i. Section 3. Warranty

Respondent Hurley argues that Appellant is seeking indemnification for its own negligence because Section 3 of the Later Contracts “contains indemnity provisions in favor of BFS relating to materials selected and sold by BFS.” [Hurley’s Brief, p. 8]. Specifically, Respondent alleges that three provisions of the warranty section have the effect of making Respondent liable for Appellant’s negligence.

First, Respondent highlights the language that provides that “Subcontractor guarantees the Work against defects in design, workmanship, and materials.” Respondent alleges that the only possible interpretation of this sentence is that it requires the subcontractor to guarantee materials provided by BFS against defects

in design. Respondent reaches this interpretation because it avers that Hurley had no part in the “design” of the project.

Hurley’s interpretation of the contract ignores the limited definition of “Work” and results in what Hurley later argues is an illegal provision. However, a more logical and more licit interpretation exists. And when a Court has a “choice of alternative interpretations, with one interpretation saving the contract and the other voiding it, [the issue] should be resolved in favor of the interpretation that saves the contract.” Stevens Aviation, Inc. v. DynCorp Int’l LLC, 407 S.C. 407, 416, 756 S.E.2d 148, 152 (2014) (internal quotations omitted).

Throughout the Later Contracts, “Work” is a defined term that specifically excludes materials provided by BFS and only includes materials and/or services provided or performed by the subcontractor; thus, Respondent’s reading --- that “Subcontractor guarantees the Work against defects in design, workmanship, and materials” could require the subcontractor to guarantee materials provided by BFS --- ignores the limiting definition of Work. Substituting “the Work” with its true definition, the obligation reads that “Subcontractor guarantees **the materials and/or services provided or performed by the Subcontractor** against defects in design, workmanship, and materials.” [R. pp. 1501, 1504] (emphasis added). If a subcontractor provided materials, the Subcontractor guarantees them against defects in design, workmanship, and materials. If the Subcontractor performed services, “design” may be inapplicable in that specific situation, but the Subcontractor still guarantees its workmanship (and any materials that it does provide in tandem with its services). Thus, this provision does not require the

subcontractor to warrant any materials provided by Appellant and does not support Respondents' theory that Appellant is improperly seeking indemnification for its own negligence.

The second warranty provision that Respondent challenges provides that "This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three years for all Work except, (b) ten (10) years for all Work consisting of any structural application of any home, building, or other structure..." [R. p. 1504]. Here, Respondent challenges the fact that although BFS provided the product, Respondent guarantees "all Work consisting of any structural application." Again, the definition of "Work" matters here. [See "Work," R. p. 1501]. This contractual language provides that Respondent is guaranteeing the materials and/or services provided or performed by Respondent consisting of any structural application. Respondent did not provide the windows, so it is not guaranteeing the windows, but only the services and/or materials that Respondent *did* perform or provide.

The third provision at issue is what Respondent has termed the hidden indemnity language, whereby: "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." [R. p. 1504]. Again, understanding that "Work" relates only to materials and/or services provided or performed by the Subcontractor, this provision only requires Subcontractor to correct its own work (or, as the case may

be, any materials that Subcontractor may have provided) and to indemnify other parties for costs incurred relating to the demand that Subcontractor correct its own work. This provision does not provide any support for the contention that Appellant is illicitly seeking indemnification for its own negligence.

ii. Section 5. Indemnity

Neither does Section 5 support Respondents' contention that Appellant is seeking indemnification for its own negligence in this case. Section 5 is comprised of four paragraphs, only two of which are relevant to this litigation.

Paragraph One sets forth the applicable indemnity language for property damage claims caused by the subcontractor's negligence. [R. p. 1506]. By the specific provisions of the first paragraph, the subcontractor has undertaken to defend and indemnify BFS ("to the fullest extent permitted by law") against liability or loss ***arising out of the negligent acts or omissions of the subcontractor*** in the performance of its work for BFS. [R. p. 1506] (emphasis added).

By contrast, the indemnification provisions of the second paragraph of Section 5 relate only to claims "...arising out of or resulting from bodily injury to, or sickness, disease, or death of, the subcontractor, any agent, employee, or representatives of the subcontractor, or any of its subcontractors..." [R. p. 1506] (emphasis added). The liability obligations of the second paragraph exist, "to the fullest extent permitted by law," regardless of the ultimate liability of the subcontractor. [R. p. 1506]. The instant litigation, however, does not involve claims arising out of bodily injury to the subcontractor, and thus Paragraph Two is

irrelevant; no one can claim that Appellant is attempting to use Paragraph Two in this litigation to recover for its own negligence.

Paragraph Three provides that the duty to defend exists regardless of the ultimate liability of the subcontractor. [R. p. 1507]. In this paragraph, Appellant is not seeking indemnification for its own negligence, but rather is seeking attorneys' fees incurred in defending itself in actions arising from the subcontractors' work. As discussed at length in the following section, indemnification for damages is distinctly separate from demands for attorneys' fees.

Paragraph Four makes clear that the defense and indemnification obligations do not require the subcontractor to indemnify anyone for claims resulting from defects in plan or design. [R. p. 1507]. This paragraph is not at issue in this litigation.

None of the four paragraphs of "Section 5. Indemnity" support Respondents' proposition that the Contract itself shows that Appellant is seeking indemnification for its own negligence in this litigation.

iii. Section 8(i). Liens

Respondents identify Section 8(i) as further proof that Appellant is seeking to recover for its own negligence. Section 8(i) is entitled "Indemnification for Liens" and pertains specifically to mechanics' and materialmen's liens. [R. p. 1511]. It provides, in relevant part, as follows:

To the fullest extent permitted by law, subcontractor hereby agrees to indemnify, defend, and hold harmless the contractor . . . 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.

[R. p. 1511] (bold and caps removed for ease of reading). As with the other contractual provisions addressed hereinabove, this section provides for indemnification against loss arising from the services and/or materials provided by the subcontractor, and specifically protects the contractor from liens arising from the subcontractor's failure to pay its own employees, subcontractors, and/or suppliers. Moreover, any "amounts paid in settlement" under this provision are specifically limited to damages "arising out of the services, labor, equipment, or materials furnished by subcontractor, or its employees, suppliers, or subcontractors." [R. p. 1511]. This section does not address negligence at all, and it does not support the proposition that Appellant is seeking indemnification for its own negligence.

II. The Contracts at issue do not violate South Carolina Code Section 32-2-10, and Appellant has properly preserved all such arguments.

Respondents attempt to wield South Carolina Code Section 32-2-10 to invalidate the respective contracts or portions thereof. The different parties argue some combination of the following arguments: (1) that Appellant is seeking indemnification for its own negligence in violation of Section 32-2-10; (2) that Appellant's claims for attorneys' fees violates Section 32-2-10, and any argument to the contrary has been abandoned; and (3) that if one provision violates the statutes, the entire section or contract is unenforceable. Each argument is refuted in turn below.

A. Because Appellant is seeking indemnification for damages caused by its subcontractors, Section 32-2-10 specifically authorizes its claims.

Without citing to any specific contractual provision, Respondent Hurley's Brief generally concludes that "BFS is seeking indemnification for its sole or concurrent negligence in violation of S.C. Code Ann. 32-2-10 (2007)." [Hurley Brief p. 12]. Interestingly, the only problematic action alleged by Hurley is that Appellant is violating the statute by "seeking indemnity for materials when it is undisputed that Hurley provided no materials." Id. Both this brief and Appellant's opening brief have discussed in detail that Appellant is not seeking indemnification for its own negligence, nor indemnification from Hurley for materials provided by any other party, including Appellant. As argued above, Appellant's pleading does not seek such recovery, nor does Appellant's contract provide an avenue for such recovery. All such arguments are incorporated in their entirety herein by reference.

Appellant is only seeking indemnification for damages caused by its subcontractors. Section 32-2-10 "allows [a contractor] and [a subcontractor] to agree that [the subcontractor] will indemnify [the contractor] for damages caused by [the subcontractor] or its subcontractors." D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018). Appellant and its subcontractors entered into contracts agreeing that the subcontractors would indemnify Appellant for damages caused by the subcontractors. Thus, the contracts are authorized by Section 32-2-10 and Appellant is entitled to seek indemnification for damages caused by its subcontractors.

- B. As Appellant argued extensively in its opening brief, Attorneys' fees are not encompassed by the statute.

Some Respondents have argued that Paragraph Three of the Indemnity Provision, which governs the payment of attorneys' fees, violates Section 32-2-10. However, Section 32-2-10 is silent as to attorneys' fees, governing only agreements providing for indemnification for damages.

As an initial matter, Respondent ECC argues that "because BFS cites no specific authority in its brief that attorney's fees cannot fall within the scope of indemnity, this BFS argument should be considered abandoned." [ECC Brief p. 14]. Respondent ECC relies for this proposition on the First Savings Bank case, which observed that a single conclusory statement, unsupported by argument or citations, was considered abandoned. First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994).

Appellant's brief argues *in detail* over the course of multiple pages, and with several citations to authority, that attorneys' fees do not fall within the scope of indemnity. [See Brief of Appellant, pp. 30-32]. Specifically, Appellant argued the following:

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."

[Appellant's Brief, p. 31]. And again, Appellant argued:

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 [indemnatee].” Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977).

[Appellant’s Brief, pp. 31-32]. Regardless of whether this Court ultimately agrees with Appellant’s arguments, it cannot find that Appellant abandoned them on appeal.

Section 32-2-10 only governs agreements for indemnification. Indemnity is well understood to mean “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. As quoted by the South Carolina Supreme Court, “[i]t is generally held that where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys’ fees, ***should be treated as the legal consequences of the original wrongful act*** and may be recovered as damages. Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) (emphasis added). Thus, attorneys’ fees are tied not to indemnity but rather to the “original wrongful act.” In other words, attorneys’ fees are a separate element of damages recoverable in conjunction with an indemnity claim, but they are separate from the indemnity claim itself. And Section 32-2-10 only governs the indemnification obligation; it is completely silent as to the separate obligation to pay attorneys’ fees. Because this statute is in derogation of the common law practice, it must be strictly construed. Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d

693, 696 (2012). As such, the restrictions of Section 32-2-10 cannot be extrapolated to extend to agreements regarding payment of attorneys' fees, and Appellant should be allowed to continue to pursue such claims against its subcontractors.

C. Even if one paragraph in the indemnity provision violated Section 32-2-10, the remainder of the contract would remain enforceable.

Respondents have taken different positions regarding whether the failure of one portion of the "Section 5. Indemnity" Provision invalidates the entire contract. Writing about Section 32-2-10, Respondent Pohlman's brief states: "If Pohlman could be required to indemnify BFS for BFS's own negligence, the **Paragraph** requiring such is unenforceable under the laws of this State." [Pohlman's Brief, p. 12 (emphasis added)]. ECC, on the other hand, claims (without any citation to authority) that the indemnity clauses must fail altogether – that is, if one paragraph violates Section 32-2-10, all four paragraphs in the indemnity section must fail. [ECC's Brief, p. 15 (emphasis added)]. Respondents WS Contractors and East Coast Carpentry take an even more extreme position, saying that if the attorneys' fees provision violates Section 32-2-10, the entire contract is unenforceable. [WS Contractors Brief, p. 27; East Coast Carpentry Brief, p. 10].

Appellant does not concede that any portion of its contracts violates Section 32-2-10; Section 32-2-10 specifically authorizes contracts, such as the one at issue, where the indemnitee may recover for the negligence, whether sole or concurrent, of the indemnitor. However, even if a part of the "Section 5. Indemnity" provision *did* violate the statute, only the problematic language – and not the entire Section (or Contract) – would be unenforceable. This Court in D.R. Horton said

that an indemnity provision was unenforceable “to the extent” that it violated Section 32-2-10, but explicitly disagreed with the lower court that the remainder of the indemnity provision – the part that would allow D.R. Horton to recover from BFS for damages caused by BFS’s own negligence – was void:

This statute allows D.R. Horton and BFS to agree that BFS will indemnify D.R. Horton for damages caused by BFS or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree. However, we agree that the indemnification clause is void as against public policy to the extent it purports to require BFS to indemnify D.R. Horton for damages caused by its negligence or the negligence of its subcontractors.

D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018). Likewise, in this case, the agreement would only be void to the extent that it may violate Section 32-2-10. Appellant would still be allowed to pursue recovery for damages occasioned by the subcontractors’ negligence, in accordance with the statute.

Respondent Hurley would have this Court dismiss the above language from the D.R. Horton case as mere dicta simply because it is inconvenient to Hurley. However, D.R. Horton is the only South Carolina appellate case to have considered Section 32-2-10, and as such, its treatment of contractual indemnity provisions vis-à-vis the statute is instructive. Additionally, the D.R. Horton Court’s treatment of the indemnity clause – voiding it only to the extent that it violates existing law – is consistent with logic, general contract interpretation, and South Carolina precedent. See D.R. Horton, 422 S.C. 144; see also Concord & Cumberland, 424 S.C. 639 (affirming the Circuit Court’s finding limiting “indemnification to damages resulting from the work [subcontractor] performed.”);

One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

III. Appellant is not collaterally estopped from arguing its position in this case, and it has properly preserved all arguments in support thereof.

In its opening brief, this Appellant argues that, contrary to the lower court's relevant holdings, collateral estoppel does not bar its recovery because (1) the present issue --- whether the contract's language allows Appellant to recover for Respondent's negligence --- has never been addressed by a court; and (2) the cases cited by the lower court's order are on appeal and thus not sufficiently final to provide the requisite foundation for collateral estoppel.

Respondents have leveled several challenges at both the procedural and substantive propriety of Appellant's position, which are addressed in turn below.

A. Appellant has properly preserved its Collateral Estoppel Arguments.

All of the orders cited by Respondents and the lower court as grounds for collateral estoppel held that Appellant could not recover for its own negligence. See, generally, Amended Order of Judge Newman filed February 3, 2020 in Builders FirstSource – Southeast Group, LLC v. MI Windows and Doors et al., Civil Action No. 2018-CP-08-02547 [R. p. 146]; Order of Judge Young filed April 29, 2020 in Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455 [R. p. 157]; and Order of Judge

McCoy filed January 25, 2021 in Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772 [R. p. 162]. In this case, Appellant is seeking only to recover for the negligence of its subcontractors. Thus, the issue in the prior cases is not the same as the issue before the lower court in this case, as required by collateral estoppel.

In its brief, Respondent Hurley Services argues that Appellant did not preserve its argument that the issues of law and fact differ *in the memorandum that Appellant filed with the lower court prior to oral arguments*. This observation erroneously suggests that Appellant did not properly preserve the issue. Respondent Hurley wrote:

BFS filed a memorandum in opposition to Hurley's amended motion for summary judgment on November 2, 2020. With respect to the collateral estoppel issue, BFS argued only that the orders of Judges Young and Newman were not final orders. It did not raise the issue of whether the same issues of fact or law were decided in those orders.

To the extent that BFS failed to properly raise this issue as to the Pavic appeal during oral arguments on November 6, 2020, the issue cannot be raised for the first time on a motion for reconsideration. Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of relief under Rule 59(e), SCRCP, and the issues are waived.

Even if the identical issue question were properly raised in the court below...

[Hurley Brief pp. 15-16 (internal citations omitted)]. The wording of Hurley's brief duplicitously implies that the "identical issue question" was *not* properly raised in the court below. Hurley knows this to be false. Counsel for Appellant made this argument as to all defendants' motions at oral arguments:

The specific determination of both Judges Young and Newman was that my client was seeking indemnification from its subcontractors for my client's own negligence. That was the specific factual finding of the court. And the Court went on to say, as a matter of law, that, under those circumstances, the contractual provisions at issue here were not sufficiently clear and unequivocal under the doctrine enunciated by Concord and Cumberland to impose that obligation upon the clients. ***Those issues are simply radically different from those before the Court today. . . .*** The rulings of Judge Young and Judge Newman, under the circumstances, are simply not relevant. ***They do not address the same factual issues. They don't even (indiscernible) to the same legal issues we're relying upon here, and they are simply inadequate to establish a barrier of collateral estoppel.***

[R. p. 1423 l. 22 – p. 1424 l. 19] (emphasis added). Counsel's argument did not address Judge McCoy's order in the Pavic case for the simple reason that, at the time of oral arguments, Judge McCoy had not yet issued her order in the Pavic case. When counsel for Respondents drafted their proposed orders for Judge McCoy, however, some of the proposed orders, all of which were later adopted by the lower court in their entirety, included references to the Pavic case. Thus, some of Appellant's subsequent motions to reconsider also contained references to the Pavic case, as did Appellant's opening brief. To the extent that references to Pavic are inappropriate, the fault lies with Respondents' counsel and the lower court, not with Appellant – Appellant was simply responding the arguments and holdings against it.

Regardless of whether Pavic is included in the collateral estoppel analysis, Appellant properly preserved the "identical issue question" for this Court's review by raising it to the Court during its oral arguments. See Pikaart v. A & A Taxi, Inc., 393 S.C. 312, 324, 713 S.E.2d 267, 273 (2011) (observing that an issue is properly

preserved for appeal when it has been raised to and ruled upon by the court below).

B. While no binding authority exists in this jurisdiction regarding the finality of an order on appeal for purposes of collateral estoppel, this Court should follow the example of other jurisdictions and hold that an order on appeal cannot be grounds for collateral estoppel.

The second reason that the doctrine of collateral estoppel does not bar Appellant's claims for relief is because the previous orders relied upon by the trial court and Respondents are currently on appeal. Logic would dictate that by its very nature, an issue on appeal has not been finally resolved, as required by collateral estoppel.

Respondent AC Construction argues in its brief that because Appellant cited no authority for this position, Appellant has abandoned it. Respondent relies upon First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994). In First Savings Bank, however, the Court held that a position was considered abandoned when Appellant failed "to provide **arguments or supporting authority** for his assertion." Id. at 363 (emphasis added). Likewise, South Carolina courts have considered positions abandoned when "[o]n the last page of his brief, [Appellant] mentions the issue of the seven days' unpaid compensation **in a single sentence without argument or supporting authority**," Matthews v. City of Greenwood, 305 S.C. 267, 270, 407 S.E.2d 668, 669 (Ct. App. 1991), and likewise when an "argument is embraced **in a single sentence** on the last page of his brief, is **not supported by any authority whatever**, and is **found in the formal conclusion to his brief**," Williams v. Leventis, 290 S.C. 386, 390, 350 S.E.2d 520, 523 (Ct. App. 1986).

All of these cases recognize that abandoned positions are those which lack both arguments and supporting authority. Appellant in this case provided ample argument for its position. Additionally, the question that Appellants are asking this Court to consider is novel in this jurisdiction, and as such there is no binding authority to cite.

Neither South Carolina Courts nor the Fourth Circuit have considered the issue of whether an order that is considered “final” for purposes of appeal is also sufficiently “final” for the purposes of collateral estoppel. For this reason, not even AC Construction can point the Court to binding authority on this position.

“Authorities differ as to whether a judgment from which an appeal is pending has the finality requisite for the application of claim preclusion by res judicata.” 50 C.J.S. Judgments § 940. “By one standard, the pendency of an appeal from the judgment deprives the judgment of the finality necessary to be effective for claim preclusion by res judicata. By another standard, the pendency of an appeal does not affect a judgment’s finality and conclusive effect in bar of a second action.” *Id.* If this Court does not resolve the collateral estoppel arguments on the “identical issue question” argued above, then this Court must consider this issue of first impression in South Carolina.

Other states have considered the issue. Within the geographic bounds of the Fourth Circuit, the Virginia Supreme Court has held that “[a] judgment, to be relied upon for the application of the doctrine of res judicata, must be final, and a judgment which is being appealed is not final for res judicata purposes.” Arkansas

Best Freight Sys., Inc. v. H.H. Moore, Jr. Trucking Co., 244 Va. 304, 307, 421 S.E.2d 197, 198 (1992) (internal citations omitted).

Corpus Juris Secundum advises that “the pendency of an appeal from a judgment is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded.” 50 C.J.S. Judgments § 940. Regardless of whether this Court adopts the Virginia Supreme Court’s rationale or the advice of CJS, the issue of collateral estoppel should not have been resolved against Appellant, and the lower court’s holding should be reversed.

IV. The Contract can and should be validly severed under the mutually-agreed-upon severance provision.

Respondents have offered many arguments against severing any potentially problematic language. At the heart of many of these arguments is the contention that the contract is *too* problematic and cannot be saved even by severance. Appellant maintains that its contracts are valid in their entirety, but even if the court were to find part of the contract problematic, the allegedly problematic language could be cleanly severed. Such severance honors the intent of both parties when the contract was entered into.

A. Respondents’ contention that the entire contract is full of invalid provisions is without merit.

Respondents Hurley Services and ECC contend that severance is inappropriate because the contract is so full of invalid provisions that it cannot be saved. In support of this contention, they identify problems with “Section 5.

Indemnity,” “Section 3. Warranty,” and Section 8(i), “Liens,” all of which have been defended at length above.

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

App. 2002) (severing a provision in an arbitration clause that violated state law by not permitting the parties to appeal or review an arbitration award)); see also D.R. Horton, 422 S.C. at 144 (severing indemnity provision “to the extent” it was against public policy); see also Concord & Cumberland, 424 S.C. at 639 (allowing partial recovery under the valid portion of an indemnity provision that otherwise did not completely comport with South Carolina law).

The Court in Simpson distinguished itself from the above precedent by pointing out that the contract before it contained *numerous* unenforceable provisions and thus could not be effectively severed. In order to bring themselves more in line with the Simpson Court, Respondents have attempted to identify multiple provisions of the contracts here that violate South Carolina law. Among them are Sections 3, 5, and 8 of the Contract. These sections have been discussed in great detail above, and those arguments are incorporated herein by reference; additionally, they are again briefly examined here in the context of severance.

Neither Section 3 nor Section 8 is implicated by this litigation – BFS has made no warranty claims or claims related to mechanics’ liens. Nonetheless, Hurley argues that “Section 3. Warranty” is theoretically an invalid provision because it could attempt to force Hurley to warrant materials provided by BFS. This reading ignores the fact that “Work” is a defined term limited to the materials provided by or the services rendered by the subcontractor. In Section 3, the subcontractor warrants its Work. If the subcontractor provided no materials, then

it is not warranting materials. Nothing about Section 3 violates South Carolina law, and thus it does not need to be severed.

Section 8 of the Contract provides for indemnification against loss arising from the services and/or materials provided by the subcontractor, and specifically protects the contractor from liens arising from the subcontractor's failure to pay its own employees, subcontractors, and/or suppliers. Nothing about this provision, by which recovery is limited to "loss arising from the services and/or materials provided by the subcontractor," is unconscionable or inconsistent with South Carolina law.

The most universally-attacked section of the contract is Section 5, Paragraph Two which, ironically, is irrelevant to this litigation because it deals with the unique situation of cases arising out of bodily injury to the subcontractor, its employees, and its representatives (which is not the case here). Appellant would argue that the issue of whether Section Five Paragraph Two violates Section 32-2-10 and South Carolina law is not yet ripe as there is no underlying controversy surrounding the indemnification obligations articulated by this paragraph. Nevertheless, the Court could strike Paragraph Two and it would not change a single indemnity obligation of *any* of the respondents.

Some Respondents suggest that the only proper use of the severance clause would be to strike both Paragraphs One and Two of Section 5 because the paragraphs are inextricably linked. The two paragraphs, however, govern completely different situations – property damage versus bodily injury to the subcontractor, its employees, and its representatives. One can absolutely stand

without the other. As stated above, Paragraph two could be struck and Paragraph One would still be valid. No Respondent has articulated an independent legal justification for striking any part of Paragraph One.

Paragraph Three governs the payment of attorneys' fees, which is not addressed either by 32-2-10 or by Concord & Cumberland. Nevertheless, to the extent the Court may hold to the contrary, the Court could sever this stand-alone paragraph without effecting any change as to the underlying duty to indemnify articulated in Paragraph One.

Based on Respondents' arguments, the Court in this case could be faced with severing one – *maybe* two – paragraphs of the four-paragraph indemnity provision. This distinguishes the case at bar from Simpson, in which the Court would have had to sever three or more illegal provisions, and puts this case more in line with the cases cited by the Simpson Court in which a single invalid provision was successfully severed.

As a final note, the South Carolina Supreme Court recently issued an opinion in Damico v. Lennar, Appellate Case No. 2020-001048 (filed September 14, 2022), in which it declined to sever unconscionable provisions of an arbitration agreement. The Court clearly articulated that it based its decision on several important factors: first, that severance would leave “essentially nothing left” of the arbitration provision; second, that the disparity between the parties indicated that this provision had not been negotiated; and third, that the contract governed a consumer transaction, and South Carolina has a long history of public policy that protects new home buyers. Id. at pp. 20-21. These factors are simply not relevant

here. As discussed below, severing potentially problematic language in this contract would still leave a robust indemnity provision; any possible disparity between the parties in this case, both of whom operate professionally in the world of construction, is much less pronounced than the disparity in Damico between a large construction company and an individual consumer; and finally, the public policy protecting consumers in Damico simply does not apply to the relationship between Appellant and its Respondents in this case – rather, the applicable public policy in this case favors the ability of one party to recover from its subcontractor for the subcontractor’s own negligence, as enshrined in South Carolina Code Section 32-2-10.

B. Severing the offending provision does not amount to re-writing the contract.

Respondents often allege that severing the contract in any capacity would be akin to “re-writing” the contract – something that South Carolina Courts are allegedly loathe to do. However, the simple act of invoking the severance clause to strike a portion of the contract is *not* the same as “re-writing” the contract. The Simpson Court quoted that “[i]f 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, 373 S.C. at 34 (internal citations omitted). As Appellant argued above, if this Court were to sever Section 5, Paragraph Two – and even Section 5, Paragraph Three – a robust indemnity provision would still exist at Section 5, Paragraph One. Rather than leaving “a disintegrated fragment,” severance would leave the clear articulation of the rights of the parties in cases

such as the one at bar. In asking the Court to consider severance, Appellant is not asking the Court to re-write the contract between the parties, but rather to honor the intent of the parties such that the strong and valid contract remains in place.

C. No Procedural Hurdles bar the Court's ability to sever the Contracts.

1. Contrary to the assertion of certain Respondents, the issue of severability should be considered by this court.

Respondent AC Construction argues in its brief that that Court should not address the severability issue because “resolution of other issues” “dispose[s] of the appeal.” [AC Construction Brief, p. 13]. In fact, the other issues are NOT dispositive of the appeal because, even if the Court determines that a portion of the contract is unenforceable, it does not follow that the entire contract is void. As argued above, other provisions could survive if the court finds, for example, that Section 32-2-10 invalidates only a portion of the contract. Thus, if the Court determines that any part of the contracts at issue is problematic, the Court must then determine whether those problematic portions are severable.

2. The issue is properly preserved as to the 2005 Contracts

In its brief, Respondent East Coast Carpentry argues that Appellant has failed to properly preserve its arguments regarding severance as to the 2005 Contracts. East Coast makes the specific argument that because Appellant did not offer an example of a version of the 2005 contract that could survive severance, the severance argument should be considered abandoned. In support of its position, East Coast relies *not* on cases requiring that such a specific, proposed contract be reproduced, but rather on cases that stand for the propositions that an

argument cannot be made for the first time on appeal, or, alternatively, for the first time in a reply brief.

Appellants argued the issue of severance extensively both before the lower court and in Appellant's opening brief. [See, e.g., BFS Motion to Reconsider Order granting partial summary judgment to East Coast, pages 10-12, found at R. p. 1335-1337; see also Appellant's opening brief, p. 39]

The argument that the 2005 Contracts are subject to severance was argued in detail in the opening brief, with many citations to authority. Specifically, this Appellant argued:

The severability provision of the Contract here demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

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.

[Master Subcontract Agreement, Section 9, Paragraph (f); **2005 Contract, Section 9, Paragraph (f).**] This language, ***which is present in both the 2005 Contracts*** and the Later Contracts, unequivocally reflects the intention of all of the parties that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the Contract may be invalid, the Court should honor the intent of the parties and sever any offending provision, leaving the remaining provisions intact.

[Opening Brief of Appellant, p. 39] (emphasis added). This argument specifically addressed the severance provision of the 2005 Contracts.

East Coast argues that because Appellant did not reproduce an example of a version of the 2005 Contract that could survive severance, the severance argument should be considered abandoned. This position is problematic for two reasons. First, East Coast cites to no authority requiring appellant to replicate a specific example of what the 2005 Contract would look like in order to properly preserve its argument. Second, Appellant *did* provide a framework for arriving at a successfully severed 2005 Contract. Appellant cited to the relevant severance provision and argued that “to the extent that any portion of the Contract may be invalid, the Court should honor the intent of the parties and **sever any offending provision, leaving the remaining provisions intact.**” [Opening Brief of Appellant, p. 39] (emphasis added).

In the 2005 Contracts, East Coast has challenged Section 6, subsection (b)(1), and Section 6, subsection (b)(2)(iii). The Court could sever either or both, “leaving the remaining provisions intact,” and a valid 2005 Contract would still provide for recovery.

The first provision challenged by East Coast is Section 6, subsection (b)(1), which requires the subcontractor to indemnify Appellant, to the fullest extent permitted by law, in actions arising out of bodily injury or property damage *sustained by the subcontractor and arising out of the subcontractor’s Work.* [R. p. 1455, 1456] (emphasis added). As argued above, this paragraph is valid, but even if it were not, the Court, as outlined in Appellant’s opening brief, could sever this provision and the indemnification obligation at issue in this case would still stand. Similarly, if the Court found that Section 6, subsection (b)(2)(iii), which allows

Appellant to recover even for its failure to supervise, violated South Carolina law, the Court could cleanly sever that language. [R. p. 1456]. Even without these two provisions, under the remaining indemnification language, East Coast would still be required to indemnify Appellant “to the extent of liability resulting from Subcontractor’s negligence” for “any alleged . . . property damage arising from or connected with the Work” performed by the Subcontractor – which is the exact recovery sought in this case. [See Section 6(b)(2)(i), R. p. 1456].

Appellant properly preserved the severance argument as to the 2005 Contracts both before the lower court and in its opening brief. This Court should thus consider the issue of severance as applied to the 2005 Contracts and, if the Court finds any language incompatible with South Carolina law, the Court should honor the intent of the parties and sever such language, leaving the remaining portions of the indemnity provision intact.

3. Res Judicata does not impede Appellant’s ability to argue severance

Respondent ECC argues in its brief for the first time that res judicata should bar Appellant’s ability to request that the Court consider severing any offending provisions because Appellant did not make a similar request of the court in the MI Windows case. Once again, Respondent makes an argument explicitly contradicted by the facts.

ECC was party to the MI Windows case, and as it should remember, at the trial court level, severance was not discussed because no one at that time was attempting to argue that any contractual provisions were unconscionable or violated Section 32-2-10 (these arguments came later). The analysis at that point

in time was whether the contractual provisions were required to satisfy the heightened standard imposed by Concord and Cumberland, and if so, whether the provisions did so satisfy. Judge Newman's order contained no mention of Section 32-2-10.

Respondents in the MI Windows appeal – including ECC – raised for the first time the issue of the contract violating Section 32-2-10. In response to this novel argument, Appellant in its reply brief argued the following:

“Should the Court decide to consider paragraph two, and should it hold that paragraph two does violate the statute (which Appellants do not concede), the severability provisions of the contract would compel the Court to sever paragraph two and leave the rest of the contract intact.”

[Appellant's Final Reply Brief in MI Windows, pp. 5-6]. Appellants went on to cite case law and contractual provisions in support of its argument. Because severance was not relevant until Respondents first argued on appeal that the provisions themselves violated South Carolina law, the law cannot have required Appellant to have raised the severance argument earlier, when it would have been completely irrelevant.

V. **Neither evidence nor contractual provisions support Hurley's claim and the lower court's finding that the Contract is unconscionable.**

Respondent Hurley Services argues that the Contract is one of adhesion and is unconscionable. Many other Respondents adopt by reference Hurley's argument.

In its brief, Hurley does not engage with the arguments made by Appellant; instead Hurley simply reiterates its position. Appellant will again explain why Hurley's arguments that the Contract is unconscionable are unfounded.

- A. The available evidence does not enable the Court to make a judicial finding that the contract was so one-sided that Hurley likely had no bargaining power.

Hurley asked the lower court for the same favor that it now puts before this Court: 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.” Under South Carolina law, a judicially noticed fact must be “either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” SCRE 201.

The only evidence that Hurley offers in support of its request for a finding that it lacked meaningful bargaining power are purchase orders showing that Hurley was compensated for its work. Respondent maintains that the value of the purchase orders “reflect[] a lack of bargaining power.” [Hurley Brief, p. 21]. However, Appellant maintains that the value of the purchase orders reflects that Hurley was paid a competitive wage for its work. The truth is that there is *no* evidentiary context for the purchase orders that would allow this Court (or the lower court) to determine one way or another whether or not the payments Hurley received reflect that Hurley was in a disparate position when entering the contract.

Thus, Hurley's request, and the lower court's ensuing adoption thereof, are entirely inappropriate.

B. The Contractual provisions highlighted by Hurley are not deceptive.

Respondent Hurley Services has argued ad nauseum that the Contract is unconscionable because it is replete with deceptive terms, particularly Sections 1, 2, 3, 5, and 8. The validity and conscionability of these sections has been addressed above. In this context, however, Hurley's brief highlights Section 3 and Section 2(c), and Appellant will address these sections in turn.

1. Section 3. Warranty

Hurley alleges that "Section 3. Warranty" contains a "buried" indemnity provision that is not in bold type, and notes that the Simpson Court invalidated an arbitration provision written in small print that "functioned to contract away certain significant rights and remedies otherwise available to Simpson by law." See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007).

Section 3 operates in a limited scope and requires Hurley to indemnify Appellant when a warranty demand is made on faulty work performed by Hurley. [R. p. 1504]. No warranty demand is at play in this case. Moreover, because the indemnification obligation in Section 3 is limited to damages resulting from Work performed by Hurley, the terms of Section 3 are protected by law. See S.C. Code § 32-2-10. Thus, Section 3 is fundamentally distinguishable from the problematic language in Simpson. In that case, the language "contract[ed] away certain significant rights and remedies otherwise available to Simpson by law." Simpson,

373 S.C. at 28. Here, the language enshrines significant rights and remedies protected by South Carolina law.

Hurley goes on to argue that the content of Section 3 is deceptive because it obligates Hurley to indemnify Appellant for defects in design, workmanship, materials, and structural application “which obviously relates to manufactured products selected and sold by BFS.” Hurley offers no explanation for why this statement is “obvious.” Appellant argued at length both above and in its opening brief that Section 3 does NOT require Hurley to make any warranty or incur any indemnification obligation regarding products provided by any other entity. Appellant walked the Court through Section 3 of the contract and illustrated how different terms apply in different situations. *Hurley’s Brief refutes none of that.* Hurley does not engage with Appellant’s argument and does not point to anything in the Contract that supports its reading of Section 3 to include an obligation to indemnify Appellant for defects in “manufactured products selected and sold by BFS.” Thus, Section 3 does not provide any support for the argument that the contract at issue is unconscionable.

2. *Section 2(c). Protection of Work.*

Hurley’s arguments rely in large part upon its expansion of the meaning of the defined term “Work.” Under Section 1(a), “Work” is laid out as a defined term encompassing only materials provided by or services rendered by the subcontractor. [R. p. 1501]. In a scenario where a subcontractor installed, but did not supply, the windows, the “Work” would consequently be limited to the subcontractor’s installation. Hurley alleges that Section 2 (c) of the contract

expands the definition of “Work” to include materials supplied by BFS. However, nowhere in its brief does Hurley explain why this is so. On page 10 of its brief, Hurely quotes Section 2(c) but does not analyze it. Hurley emphasized the language that requires the subcontractor to protect its labor and materials “(regardless of who supplied such materials),” but it does not explain why this language is problematic, nor how it expands the definition of “Work.” Hurley acknowledges, but does not refute, Appellant’s argument that this provision is consistent with the duties of a bailee. Instead, Hurley points to the crossclaims articulated in Appellant’s pleading. Not only does Hurley’s strategy violate the basic principles of contract interpretation, but it also does nothing to advance Hurley’s position.

“Contract interpretation begins with the plain language of the agreement.” Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 416, 756 S.E.2d 148, 152 (2014) (quoting Gould Inc. v. United States, 935 F.2d 1271, 1274 (Fed.Cir.1991)). As stated once already, “[c]ourts are to assume that the parties intended that a binding contract be formed, and [t]hus, any choice of alternative interpretations, with one interpretation saving the contract and the other voiding it, should be resolved in favor of the interpretation that saves the contract.” Id. (internal quotations omitted). Additionally,

If a contract's language is clear and capable of legal construction, this [c]ourt's function is to interpret its lawful meaning and the intent of the parties as found in the agreement. A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense. Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract. However,

where a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties.”

Cullen v. McNeal, 390 S.C. 470, 481–82, 702 S.E.2d 378, 384 (Ct. App. 2010).

Because the term Work is clearly and unambiguously defined within the four corners of the contract, Hurley cannot point to extrinsic evidence such as Appellant’s pleading to try to obfuscate its definition.

Even if Appellant’s pleadings could be properly considered in the analysis, the cross-claims do not indicate that Appellant is attempting to hold Hurley liable for any materials it did not provide. Initial pleadings often precede the close of discovery. The exact nature of the alleged damage, and the responsible parties, are still often unknown. Appellant’s pleading broadly covers a host of possible scenarios that could play out – if Hurley provided materials, even materials other than windows, and those materials are found to have been faulty, Appellant’s pleading covers that situation. If Hurley truly only provided labor, Appellant’s pleading covers that situation. If it is later found that Hurley did not provide materials, the language relating to materials becomes irrelevant.

C. The Contract contains terms that inure to the benefit of both parties.

Respondent has, on appeal, compiled a laundry list of twenty contractual terms to which it now objects. This list was never before the lower court. Appellant does not believe that it would be a helpful or efficient use of the limited space available in this brief, or of the Court’s time, for Appellant to attempt to refute or explain each and every allegation (although Appellant is prepared to do so at the Court’s request). However, many of these contractual provisions have already been discussed herein and do not stand for the propositions articulated by

Respondent (see, e.g., complaints numbered 2, 6, 7, 9, 17, and 20). Many of the remaining items are twisted or taken out of context. Some of the complained-about provisions actually benefit Respondent.

In entering into the Agreement, both Respondent and Appellant contracted for many rights – some of which inure to the benefit of one, some to the other. Respondent, for example, has the right to be paid for its work, the right to work in OSHA-compliant conditions, the right to withdraw from the contract, the right to renegotiate the contract, etc. The fact that Appellant also has some rights under the Contract does not make it oppressive or unenforceable.

VI. Nothing prohibits Appellant's recovery of Attorney's fees from W.S. Contractors.

Respondent W.S. Contractors is in the unique position of having obtained an issue release from the Plaintiffs in favor of Appellant with respect to the scope of work of WS Contractors. Thus, Appellant has agreed that, as to W.S. Contractors, Appellant is only pursuing its claims for attorneys' fees.

Respondent W.S. Contractors has argued that Appellant cannot recover against it because the claim for attorneys' fees is barred by Section 32-2-10. This argument has been addressed at length above.

Respondent W.S. Contractors also argues that an unappealed order granting summary judgment to another subcontractor, McDaniel, in the underlying Retreat case can now collaterally estop Appellant from recovering from W.S. Contractors. In opposing McDaniel's motion for summary judgment, one of the many arguments made by Appellant was that it was allowed to seek attorneys' fees from McDaniel under the contract. McDaniel's motion was granted by a Form

4 Order without any indication of the grounds upon which the court relied in making its decision. Collateral estoppel requires 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.” Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct. App. 2013). A Form 4 Order that provides no analysis of the Court’s reasoning fails both the second and third elements required for collateral estoppel. The Court made no explicit ruling on the specific issue of attorneys’ fees, and thus the issue was never “directly determined.” Likewise, it is unclear that arguments made by McDaniel regarding attorneys’ fees were “necessary” to support the judgment. Thus, collateral estoppel cannot be invoked here to prevent Appellant from pursuing its claims against W.S. Contractors.

CONCLUSION

Because Appellant is not seeking indemnification for its own negligence, because Appellant is not collaterally estopped from pursuing its arguments, because Section 32-2-10 does not bar the relief sought, because the contracts are not unconscionable, and because any invalid contractual provisions are subject to severance, Appellant respectfully requests that this Court reverse the lower court's orders and allow Appellant to proceed on its contractual indemnity claims.

SIGNATURE PAGE TO FOLLOW

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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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

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.

**BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF HOME
BUILDERS AND THE HOME BUILDERS ASSOCIATION OF SOUTH
CAROLINA IN SUPPORT OF PETITIONER**

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

The National Association of Home Builders (“NAHB”) and the Home Builders Association of South Carolina (“HBASC”) respectfully adopt the questions presented for review as stated in the Petition for Certiorari of the Appellant.

STATEMENT OF INTEREST

NAHB and HBASC have substantial interests in this matter. NAHB is a nonprofit trade association that represents approximately 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 the preservation of predictable and reliable law regarding contract enforcement and risk allocation in South Carolina. The decisions of the Court of Appeals and the circuit court depart from well-established legal principles of contract law in this state, which could disrupt foundational risk-allocation mechanisms widely used in the construction industry.

In the underlying litigation, Petitioner Builders FirstSource-Southeast Group, LLC (“BFS”) asserted claims for contractual indemnity against its subcontractors similar to claims

routinely made by home builders, general contractors, and others in construction defect cases, and BFS's claims are based on indemnity provisions not materially different from those governing countless construction projects in South Carolina. Specifically, after being sued by a property owner alleging construction defects, BFS denied the allegations but simultaneously brought claims for contractual indemnity against Respondents. BFS alleged that, to the extent it is found liable to the homeowners, it is entitled to contractual indemnity because the Respondents agreed in their contracts to indemnify BFS *for liability resulting from the subcontractor's negligence*. BFS should have been allowed to proceed to trial to allocate liability and recover the portion attributable to the Respondents' negligence.

This type of claim was enforced by the South Carolina Supreme Court in *South Carolina Electric & Gas Co. v. Utilities Construction Company*, 244 S.C. 79, 135 S.E.2d 613 (1964), and in numerous subsequent cases. Nevertheless, the circuit court granted summary judgment against BFS *before any evidentiary hearing or findings of fault*, and the Court of Appeals affirmed. These rulings fundamentally misapplied South Carolina's well-established law governing contractual indemnity.

The Court of Appeals relied on the negligence rule, which provides 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." *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 490, 763 S.E.2d 19, 20 (2014) (referring to the so-called "clear and unequivocal standard"). While this rule has been part of South Carolina law since at least 1934, *see Murray v. Texas Co.*, 172 S.C. 399, 174 S.E. 231, 232 (1934), it has never been applied to preclude contractual indemnity as a matter of law for liability arising from the indemnitor's negligence.

In fact, the Court stated in *Ashley II* that the negligence rule does not bar contractual indemnity when “the only negligence chargeable to the indemnitee was the negligence of the indemnitor-independent contractor itself.” 409 S.C. at 491, 763 S.E.2d at 21 (citing *S.C. Elec. & Gas Co.*, 244 S.C. at 82–90, 135 S.E.2d at 613). Here, if BFS is found liable, it should be permitted to proceed to trial to show, as in *S.C. Elec. & Gas Co.*, that the only fault of BFS was the negligence of the Respondents that was imputed upon BFS or, if fault for the damages is allocated between BFS and the Respondents, to seek recovery of the amount apportioned to the Respondents’ negligence. Summary judgment foreclosed that possibility, ignoring decades of contract law and prematurely disposing of BFS’s claims.

The Court of Appeals also misconstrued *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). That case addressed whether a contract satisfied the clear and unequivocal standard for indemnity resulting from the indemnitee’s own negligence. It did not address whether the general contractor could recover indemnity for damages caused by the subcontractor.

Additionally, the Court of Appeals incorrectly characterized the contracts between BFS and the Respondents as unconscionable. These are standard, business-to-business indemnity provisions routinely enforced in South Carolina. The Court of Appeals’ decision threatens the freedom to contract and undermines widely-used risk allocation mechanisms that are prevalent in nearly all construction contracts.

For these reasons, NAHB and HBASC urge this Court to grant certiorari and clarify, by reversing the Court of Appeals, that a contract that does not satisfy the clear and unequivocal standard may still be enforced to recover indemnity for liability not caused by the indemnitee’s own negligence or, as in *S.C. Elec. & Gas Co.*, for liability imposed on the indemnitee solely based

on the imputed negligence of the indemnitor. Without such clarification, the Court of Appeals' opinion creates a direct conflict in the law, resulting in confusion and uncertainty regarding the enforceability of indemnity agreements in South Carolina.

THE COURT SHOULD GRANT CERTIORARI DESPITE SETTLEMENT

BFS's Reply indicates that there have been settlements reached between BFS and Respondents. Even if it is argued that such settlements may render this appeal moot, this Court should still grant certiorari in order to resolve the important questions of law presented. The legal issues in this appeal are and will continue to be prevalent in countless construction defect and other cases in this state featuring claims for contractual indemnity, and the current conflict in case law described herein has created uncertainty regarding the applicable law for such claims.

"First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc. v. Alexander*, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015).

The Court of Appeals' decision will govern construction defect litigation across South Carolina, and most such cases resolve through settlement before appellate review, making the issue capable of repetition yet evading review. Even if the settlement below resolved the immediate dispute, leaving the Court of Appeals' ruling unreviewed will create uncertainty regarding the applicable law for nearly all construction defect lawsuits filed in our State and in other cases with claims for contractual indemnity. Accordingly, the Court should grant certiorari to provide

guidance on this recurring and important issue and prevent the continuation of inconsistent and potentially harmful precedent.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE NEGLIGENCE RULE WAS GROUNDS TO AFFIRM SUMMARY JUDGMENT AGAINST BFS.

The circuit court granted summary judgment against BFS on the grounds that the indemnity provisions did not clearly cover BFS's own negligence. This pretrial ruling deprived BFS of its right to seek contractual indemnity for liability arising from the Respondent's negligence. The Court of Appeals affirmed and found that *Concord & Cumberland* mandated this result. This was an error of law as it misapplied South Carolina's well-established law governing contractual indemnity and misconstrued the holding of *Concord & Cumberland*.

BFS's claims should have been permitted to proceed to trial so that a fact finder could determine whether BFS incurred liability to the underlying plaintiff within the scope of its indemnity agreements with the Respondents. Under long-standing South Carolina law, this inquiry is guided by ordinary principles of contract interpretation. The clear and unequivocal standard referenced in *Concord & Cumberland* has no application to BFS's claims for contractual indemnity unless BFS is found liable to the plaintiff for damages resulting from BFS's own negligence. In that circumstance, BFS would be entitled to recover indemnity for those damages if the indemnity agreement clearly and unequivocally provides for such coverage. Even then, any claim for contractual indemnity for other damages not attributable to its own negligence would remain subject to ordinary principles of contract interpretation.

The entry of summary judgment against BFS based on the negligence rule represents a significant departure from decades of established contract law in South Carolina. This Court should clarify that a contract that does not satisfy the clear and unequivocal standard must still be

construed according to ordinary principles of contract interpretation with respect to indemnity for liability not caused by the indemnitee's own negligence. Such clarification would preserve established principles of contract law, safeguard the foundational risk-allocation mechanisms critical to the construction industry (and other industries), and prevent a sweeping disruption of longstanding industry norms. Moreover, to preserve judicial resources, this Court should advise that pretrial determinations under the clear and unequivocal standard generally should be avoided unless and until there has been a finding of negligence on the part of the indemnitee.

A. The Law of Contractual Indemnity in South Carolina

The law governing contractual indemnity in South Carolina is well-established. “A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally.” *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). South Carolina courts have routinely enforced contractual indemnity based on indemnity agreements and factual scenarios materially similar to those alleged by BFS in this case. *See, e.g., S.C. Elec. & Gas Co. v. Utilities Const. Co.*, 244 S.C. 79, 135 S.E.2d 613 (1964) (affirming judgment for full recovery of contractual indemnity for damages arising from defective construction based on contract requiring indemnity for “any and all claims for damages to persons and/or property arising out of or in any way connected with the performance of any work covered by this contract”).

An exception to this general rule is the negligence rule or clear and unequivocal standard, which provides that a contract of indemnity will not be construed to cover losses resulting from the indemnitee's own negligent acts unless the contract expresses that intent in clear and unequivocal terms. *See Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989); *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 649, 819 S.E.2d 166, 171 FN3 (Ct. App. 2018) (“The clear and unequivocal

standard is also known as the negligence rule.”). Under the negligence rule, a party that incurs liability for its own negligence cannot recover contractual indemnity for that liability unless the indemnity agreement clearly and unequivocally provides for such coverage. *See, e.g., Ry. Co. v. Springs Mills, Inc.*, 625 F.2d 496, 498 (4th Cir. 1980) (affirming judgment for contractual indemnity for liability caused by the indemnitee’s negligence based on a finding the clear and unequivocal standard was met and stating, that “[t]he contract in this case clearly contemplated indemnification against the [indemnitee’s] negligent conduct.”) (applying South Carolina law).

As the Court explained in *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, “the policy basis for the negligence rule is simple—barring indemnification when the indemnitee is at fault for the damages serves to deter negligent conduct in the future, for the indemnitee will know that the indemnification agreement will not save it from liability if it fails to act with due care.” 409 S.C. 487, 490–91, 763 S.E.2d 19, 21 (2014). The negligence rule has been part of South Carolina jurisprudence for many decades. *See Murray v. Texas Co.*, 172 S.C. 399, 174 S.E. 231, 232 (1934) (“[T]he provision of a contract relieving one of the parties thereto from liability for his or its own negligence should be clear and explicit.”); *see also Shealy v. S. Ry. Co.*, 287 F. Supp. 713, 714 (D.S.C. 1968) (applying South Carolinian law) (“It is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts, where the contract does not express such an intention in unequivocal terms.”) (citing *Murray v. Texas Co.*).

However, long-standing South Carolina law also makes clear that a contract that does not meet the clear and unequivocal standard can still be enforced to recover indemnity for damages not caused by the indemnitee’s negligence. As explained in detail below, this principle was applied

in *Concord & Cumberland*, and is further illustrated in *S.C. Elec. & Gas Co.*, 244 S.C. 79, 135 S.E.2d 613.

Other jurisdictions apply the negligence rule similarly. *See, e.g., Blackshare v. Banfield*, 367 Ill. App. 3d 1077, 1079, 857 N.E.2d 743, 745 (2006) (“In order for an indemnity agreement to include indemnification for the indemnitee’s own negligence, that indemnification must be provided by clear and explicit language. *If that language is not present, indemnification will be limited to the liability arising out of the indemnitor’s negligence only.*”) (emphasis added); *Jones v. Holiday Inns, Inc.*, 407 So. 2d 1032, 1034 (Fla. Dist. Ct. App. 1981) (“Because of the disfavor in which Florida courts hold agreements to indemnify parties against their own wrongful acts, enforcement of such agreements is denied in the absence of clear and unequivocal contractual expression of such an intent; *without such an expression, a contractual indemnitor’s obligation is negated by any fault of the indemnitee which was the legal cause of its own loss.*”) (emphasis added).

B. The Court of Appeals Misconstrued *Concord & Cumberland*

Contrary to the Court of Appeals’ ruling, *Concord & Cumberland* does not stand for the proposition that BFS’s claims fail as a matter of law simply because its indemnity agreements do not satisfy the clear and unequivocal standard. The Court of Appeals misconstrued that decision. In *Concord & Cumberland*, the court held only that, because the contract in that case did not satisfy the clear and unequivocal standard, the general contractor seeking indemnity could not recover for liability ultimately determined to result from its own negligence. The court did not address whether the general contractor could recover for liability caused by the subcontractors, as that portion of the case was stayed during the appeal.

Nothing in the Court of Appeals’ opinion suggests an intent to rewrite established law. Instead, the Court of Appeals misapplied *Concord & Cumberland* by misunderstanding the case’s

procedural posture. In *Concord and Cumberland*, summary judgment had been entered in favor of two subcontractors on a general contractor's claims for contractual indemnity, and that order was affirmed on appeal based on a finding that the indemnity agreement did not satisfy the clear and unequivocal standard. *Id.* at 642, 819 S.E.2d at 168. However, the subcontractors' motions were for *partial* summary judgment, addressing only those portions of the sums the general contractor sought for indemnity that could be attributable to the general contractor's own negligence rather than the fault of the subcontractor. *Id.* at 642, 819 S.E.2d at 168. The case did not dispose of the entirety of the general contractor's claim.

The record on appeal in *Concord and Cumberland* confirms this. The subcontractors' motion for partial summary judgment sought only to preclude indemnity for the general contractor's own negligence: "For the reasons stated herein, this Court should grant Muhler's Motion for Partial Summary Judgment, and hold, as a matter of law, that: 1) neither the Subcontract nor the 2007 Agreement indemnifies Superior or C&C for their own wrongdoing." Case No. 2016-000076, R. 593. During the motion hearing, counsel for the moving subcontractor explained:

This is partial summary judgment. If you rule that there no clear and unequivocal language in either of these contracts, and there not, there you simply --- *the scope of the indemnity that is provided to Superior and Concord and Cumberland is simply indemnity for Muhler's negligence and Muhler's negligence alone.*

Case No. 2016-000076, R. 1229–1230 (emphasis added).

The circuit court's order granting partial summary judgment did not affect the general contractor's claims for damages attributable to subcontractor negligence. Case No. 2016-000076, R. 62–63. ("Muhler's and Weather Shield's motions for partial summary judgment are GRANTED to the extent that they seek to have the Court find as a matter of law that neither the Subcontract

nor the 2007 Agreement clearly and unequivocally provides indemnification for Superior's and/or C&C's own negligence."").

Instead of proceeding to trial to seek indemnity solely for the amounts determined to be the subcontractors' responsibility, the general contractor appealed the partial summary judgment orders. All other aspects of the case were stayed during the pendency of the appeal. The Court of Appeals affirmed the circuit court's decision, holding that the contracts did not meet the clear and unequivocal standard. *Concord & Cumberland*, 424 S.C. at 642, 819 S.E.2d at 168 ("Appellant appeals the circuit court's partial grant of summary judgment . . . , arguing the circuit court erred by misconstruing its argument and finding the relevant contracts between the parties did not require Muhler to indemnify Superior for Superior's own concurrent negligence. We affirm."").

Concord & Cumberland did not dispose of, or even directly relate to, the general contractor's right to recover contractual indemnity for any damages that a fact finder may ultimately attribute *to the subcontractor* rather than to the general contractor's own negligence. However, the *Concord & Cumberland* opinion does endorse the principle that its ruling does not preclude the general contractor from recovering indemnity for liability caused by the subcontractor's negligence. *Concord & Cumberland* cites with approval cases from two other states applying the negligence rule, and in both cases the courts held that, because the indemnity agreement in question provided indemnity "to the extent" caused by the indemnitor's negligence, the clear and unequivocal standard was not satisfied and, as a result, *recovery was limited to damages resulting from the indemnitor's negligence as specified in the agreement*. *Id.* at 652–55, 819 S.E.2d at 173–74 (citing *Braegelmann v. Horizon Development Co.*, 371 N.W.2d 644 (Minn. Ct. App. 1985) ("The additional phrase, 'to the extent caused,' however, suggests a 'comparative negligence' construction under which each party is accountable 'to the extent' their negligence

contributes to the injury.”); and *Mautz v. J.P. Patti Co.*, 298 N.J.Super. 13, 688 A.2d 1088, 1090–91 (1997) (“We agree with the ‘comparative negligence’ analogy”) (quoting and referring to *Bragelmann*)). Following the appeal, the case ultimately settled in full before trial.

Like in *Concord & Cumberland* and the cited out-of-state cases, BFS’s subcontracts with Respondents limit recoverable indemnity “to the extent of liability resulting from Subcontractor’s negligence.” As in those cases, BFS should have been permitted to pursue contractual indemnity for any liability arising from the Respondents’ negligence or fault, in accordance with the terms of those subcontracts.

Respondents argued below that *Concord & Cumberland* mandates summary judgment against the entirety of BFS’s claim for contractual indemnity if the clear and unequivocal standard was not satisfied, relying on the statement: “[T]he clear and unequivocal standard applies any time an indemnitee is seeking indemnification for its negligence, whether sole or concurrent.” That argument was misplaced, as that passage from *Concord & Cumberland* has no bearing on the right of a claimant to recover contractual indemnity for damages *arising from the indemnitor’s negligence*. As explained above, a closer review of the procedural history of the case shows that the claimant’s contractual right to pursue indemnity for liability caused by the indemnitor’s negligence was not affected by the decision. Rather, the statement quoted above was a response to, and to reject, an argument made by the general contractor in that case the clear and unequivocal standard should not apply when the liability is caused *only in part* by the indemnitee and concurrently by the indemnitor.

A full review of *Concord & Cumberland* demonstrates that the Court of Appeals’ misapplied the case in finding that it supported Respondent’s arguments that BFS’s claims for contractual indemnity fail as a matter of law. The Court of Appeals should have reversed the circuit

court's orders granting summary judgment as they held *Concord & Cumberland* mandated entry of summary judgment against BFS's claim for contractual indemnity in its entirety.

C. BFS Was Entitled to Pursue Indemnity for Damages Resulting from Respondents' Negligence

BFS's subcontracts with the Respondents provide for indemnity resulting from Subcontractor's negligence.¹ The Court of Appeals erred by applying the clear and unequivocal standard at the summary judgment stage to bar BFS from seeking indemnity for damages that may be returned against BFS resulting from Respondents' negligence.

At trial, BFS may be found liable to the underlying plaintiffs for damages caused by Respondents' negligence or misconduct and not caused by negligence on the part of BFS. For example, the fact finder could determine that BFS is not liable for negligence but still hold it liable under an implied warranty of workmanlike services for defective work performed by the Respondents.² In such an event, BFS's indemnity agreements would require the negligent Respondents to indemnify BFS for those damages. For purposes of summary judgment, the circuit court should have assumed such a result at the trial of the underlying claims against BFS, consistent with the requirement to construe disputed material facts in the light most favorable to the non-moving party.

¹ The 2005 Subcontracts apply to certain specified liability "resulting from Subcontractor's negligence or willful misconduct." The Later Subcontracts apply to certain specified liability "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor" or those acting under the subcontract.

² This is just one example of how the trial could unfold, and numerous outcomes are possible. For instance, the fact finder could find BFS negligent but allocate only a portion of the fault to BFS, with the remaining liability attributed to the negligence of the Respondents, or like in *S.C. Elec. & Gas Co. v. Utilities Const. Co.*, find BFS negligent but only based on the negligence of the Respondents.

By preemptively applying the clear and unequivocal standard to dispose of BFS's claim in its entirety, the circuit court short-circuited the fact-finding process and improperly decided before trial that BFS could never recover indemnity for such damages. That was an error of law. Under South Carolina precedent, the duty to indemnify depends on the factual findings at trial, not speculation at the summary judgment stage. *Ellett Bros., Inc. v. U.S. Fidelity & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001) (“[U]nder South Carolina law . . . the duty to indemnify is based on evidence found by the factfinder.”); *Porcella v. TJX Companies, Inc.*, No. 4:18-CV-03115-SAL, 2020 WL 1892097, at *4 (D.S.C. Apr. 16, 2020) (same). Only after trial, once the basis for BFS's liability is established, can the court determine whether Respondents' indemnity obligations are triggered.

The proper framework is straightforward: BFS must present evidence of liability or loss, and the trial court must then construe each indemnity agreement under ordinary contract principles to decide whether that liability falls within its scope. *Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993) (“A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally.”).

The clear and unequivocal standard would come into play only in the limited circumstance where: (1) BFS's negligence is found to be a concurrent cause of liability alongside a Respondent's negligence; and (2) BFS seeks indemnity from that Respondent *for the portion of damages attributable to BFS's own negligence*. In that limited circumstance, the indemnity agreement would be construed to cover those damages only if it clearly and unequivocally expresses the parties' intent to do so. Even then (and BFS has stated it will not make such an argument here, because the indemnity agreements apply only to damages arising from Respondents' negligence), BFS's ability to recover contractual indemnity for any other damages (that is, those not found to

have resulted for BFS's own negligence) would still be evaluated under ordinary principles of contract interpretation.

The case of *South Carolina Electric & Gas Co. v. Utilities Construction Company*, 244 S.C. 79, 135 S.E.2d 613 (1964), provides a clear illustration of why BFS's claims for contractual indemnity should have been allowed to proceed to trial for fact-finding and allocation of fault regarding any liability BFS incurred to the underlying plaintiffs. *See also Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 491, 763 S.E.2d 19, 21 (2014) (describing *S.C. Elec. & Gas Co.* as a case "rejecting an independent contractor's attempt to invoke the negligence rule where the only negligence chargeable to the indemnitee was the negligence of the indemnitor-independent contractor itself").

In *S.C. Elec. & Gas Co.*, a utility company entered into a master trade agreement with a contractor establishing terms applicable to future work orders. *Id.* at 83, 135 S.E.2d at 614. This agreement included an indemnity provision, which provided:

The Contractor hereby agrees to indemnify and to hold the Company harmless from any and all claims for damages to persons and/or property arising out of or in any way connected with the performance of any work covered by this contract.

Id., 135 S.E.2d at 614.

Pursuant to a town ordinance, if the utility company made a destructive opening in a public sidewalk to install or maintain its infrastructure, the utility company had a legal duty to repair and restore the sidewalk. *Id.* at 82–83, 135 S.E.2d at 614. It issued a work order to the contractor to remove and replace a pole that had been installed in an area of public sidewalk and to patch and repair the surrounding sidewalk. *Id.* at 83, 135 S.E.2d at 614. Four years later, a pedestrian was injured in that area and sued both the contractor and utility company. *Id.* at 84, 135 S.E.2d at 614–15. After the contractor refused to defend or indemnify the utility company, the utility company

settled the claims and filed for contractual indemnity against the contractor for the settlement amount, attorneys' fees, and interest. *Id.* 135 S.E.2d at 615.

The claim proceeded to trial, where evidence was introduced regarding whether the contractor's work was defective and whether the utility company knew or should have known of any defects. *Id.* at 84–87, 135 S.E.2d at 615–16. The master made findings that the contractor's defective work caused the sidewalk to sink but that, at the time the utility company inspected and accepted the work, the work would have appeared to have been done properly. *Id.* at 85–86, 135 S.E.2d at 615. Based on these findings, the master awarded the utility company full recovery under the indemnity agreement. *Id.* at 84, 135 S.E.2d at 615.

On appeal, the contractor argued that the negligence rule barred indemnity, contending that the indemnity provision did not satisfy the clear and unequivocal standard and that the utility company's own negligence contributed to the injuries. *Id.* at 87, 135 S.E.2d at 616. The South Carolina Supreme Court rejected this argument, noting that the utility company's only negligence was that of the contractor's. *Id.* at 88, 135 S.E.2d at 616 ("Here the plaintiff was chargeable as a matter of law, by virtue of the franchise ordinance, with the negligence of the defendant in improperly repairing the sidewalk and failing to restore the same to its prior condition. We see no evidence in this case, however, of any other negligence on the part of the plaintiff."). Therefore, the Court affirmed the judgment for full contractual indemnity, including interest and attorneys' fees. *Id.* at 92, 135 S.E.2d at 619.

This case illustrates the error of the Court of Appeals in this case. If the rule espoused by the Court of Appeals had been applied to *S.C. Elec. & Gas Co.*, summary judgment would have been entered against the utility company before it ever had a chance to present evidence to the trial judge. This is because (1) the utility company sought full indemnity rather than limiting recovery

to damages caused by the contractor's negligence; (2) the indemnity agreement did not expressly mention an obligation to indemnify the utility company for liability from by the utility company's own negligence; (3) the utility company was chargeable for the negligence for the contractor's negligence as a matter of law, and (4) the underlying injured party alleged separate negligence by the utility company. Each of these arguments mirrors those advanced by the Respondents here in support of summary judgment.

Despite these facts, the utility company was permitted to proceed to trial to present evidence regarding indemnity, and the factfinder determined that the utility company's liability arose from the contractor's sole negligence. The trial court entered judgment accordingly, and the South Carolina Supreme Court affirmed.

Like the utility company in *S.C. Elec. & Gas*, BFS should have been allowed to proceed to trial on its claim for contractual indemnity, presenting evidence and permitting the fact finder to determine the relative fault of BFS and Respondents for any liability to the underlying plaintiffs. This case underscores that the summary judgment orders against BFS, and the Court of Appeals' opinion affirming the same, were errors of law and must be reversed and vacated.

D. Policy and Practical Concerns of a Pretrial Application of the Clear and Unequivocal Standard

The framework adopted by the Court of Appeals forces parties asserting contractual indemnity claims into a dilemma that directly conflicts with the Rules of Civil Procedure and well-established practice. Indemnity clauses are often drafted broadly to cover all claims and damages arising from a party's performance of the contract. This is a standard and accepted risk allocation mechanism in commercial transactions. It is equally standard for a party seeking contractual indemnity to assert that claim alongside the underlying claims against it, alleging a right to full indemnification for all damages awarded against the indemnitee. Pleading broadly for full recovery

is not only common, it is the norm in cases where damages are uncertain and the indemnitee has limited information about the substance of the underlying allegations at the time of filing.

The approach adopted by the Court of Appeals disrupts this practice. It requires a claimant, at the outset of litigation, to speculate about whether an indemnity clause will later be construed to meet the clear and unequivocal standard—even though no facts have been established. This forces the indemnitee into a gamble: either plead broadly and risk dismissal of the entire indemnity claim at summary judgment, or plead narrowly and forfeit indemnity for damages later found to have been caused solely by the indemnitor. In no other area of law must a claimant make such a speculative wager at the pleading stage.

Moreover, the framework encourages premature litigation over indemnity provisions. Unless and until: (1) the indemnitee is found liable for damages partly attributable to its own negligence, and (2) the indemnitee seeks indemnity for that portion of damages, any determination of whether the contract satisfies the clear and unequivocal standard is hypothetical. Such rulings amount to advisory opinions—precisely the kind of premature adjudication that courts avoid. And they risk producing the perverse result that an indemnitor could escape its obligations entirely, even if trial later shows that all of the damages resulted from the indemnitor’s negligence alone. That result runs directly contrary to the policy basis for the negligence rule, which the Supreme Court has explained is to deter negligent conduct in the future. *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.*, 409 S.C. 487, 491, 763 S.E.2d 19, 21 (2014).

The problem is compounded in construction disputes, where indemnity provisions are often unique and litigation frequently arises years after the contract was signed. The contracts at issue here were executed as early as 2005, yet Respondents did not move for summary judgment until 2019. Contractors cannot meaningfully revise past agreements in response to shifting judicial

interpretations, and even if they could, disputes over older contracts will continue for years to come.

All of these concerns can be resolved with a straightforward clarification. The Court should reaffirm that an indemnity clause that does not satisfy the clear and unequivocal standard, meaning it does not extend to the indemnitee's own negligence, does not bar recovery for damages attributable to the indemnitor. Such claims remain subject to ordinary principles of contract interpretation, as South Carolina courts have long recognized. *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989).

II. THE COURT OF APPEALS ERRED IN FINDING THAT BFS'S CONTRACTS WERE UNCONSCIONABLE.

A. Misconstruction of Scope of Petitioner's Indemnity Provisions as Basis for Unconscionability

1. The Warranty Provisions

The Court of Appeals erred in finding that Sections 3 and 5 of BFS's Later Contracts "expressly reference indemnification for the sole negligence of BFS." Section 3 provides:

Section 3. Warranty.

...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. The 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 (Emphasis from Court of Appeals.)

Contrary to the court's interpretation, this provision does not require the subcontractor to indemnify BFS for its sole negligence.

Respondents argued, and both the circuit court and Court of Appeals accepted, that the requirement to "guarantee[] the Work against defects in design, workmanship, and materials for the benefit of the Contractor" required the Respondents "to indemnify BFS for its sole negligence in selling windows which it knew or should have known were defective," which would not be recoverable under S.C. Code Ann. § 32-2-10.³ But these warranty obligations extend only to the Respondents' own "Work," expressly defined as the materials and services the *Respondent* provides on any BFS project. The Court of Appeals erred in concluding that because the Respondent furnished no materials at the project, the provision instead applied to BFS's allegedly defective windows, an interpretation that impermissibly rewrites the contract and needlessly invokes S.C. Code Ann. § 32-2-10.

To comport with this reading, the Court of Appeals apparently overlooked that the contracts in question are Master Subcontract Agreements designed to govern a subcontractor's work on multiple projects at multiple locations. (R. 754 ("This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or perform services ... from time to time for Contractor on any project.")). Recognizing that each project would present different scopes and requirements, the Later Subcontracts provided that the "description, completion date, special conditions, and cost of Work to be performed on a Project [would] be set

³ S.C. Code Ann. § 32-2-10 provides that construction contract will not be enforced to require indemnity for bodily injury or property damage found to have been proximately caused by the sole negligence of the indemnitee

forth in the written purchase order or work order (together, “**Work Order**”) delivered by Contractor to Subcontractor relating to that Project.” *Id.* In this context, the Later Subcontracts’ broad reference to subcontractors supplying materials is not an attempt by BFS to require indemnity for liability arising from work or materials furnished by others, but instead reflects a standard contractual framework where a master agreement supplies uniform terms and project-specific work orders define each subcontractor’s project-specific responsibilities. This approach is common practice in the industry and mirrors the stated purpose of American Institute of Architects (AIA) Document A421, *Standard Form of Master Agreement Between Contractor and Subcontractor*, which explains that the master agreement format “is intended for use when the Subcontractor’s scope of Work will subsequently be specified through one or more Work Orders,” and “allows multiple scopes of Work to be issued quickly without renegotiating the terms and conditions of the Contract.” (See Summary: A421 - 2018, *Standard Form of Master Agreement Between Contractor and Subcontractor where Work is provided under multiple Work Orders* at <https://help.aiacontracts.com/hc/en-us/articles/1500010279581-Summary-A421-2018-Standard-Form-of-Master-Agreement-Between-Contractor-and-Subcontractor-where-Work-is-provided-under-multiple-Work-Orders>).

A similar mischaracterization occurred with respect to Section 3 Warranty, which requires the subcontractor to “guarantee the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... [for] (b) *ten (10) years for all Work consisting of any structural applications. . . .*” (R. 757). The Respondents argued that “BFS, not [the Respondents], provide[] structural components,” and that the ten-year structural warranty “exceeds the eight-year time limit in the applicable statute of repose found in S.C. Code Ann. § 15-3-640,” (R. 30), portraying this as evidence of unreasonableness. Yet the fact that “structural

applications” did not apply to the Respondents’ work on the project at issue reflects the nature of a master subcontract agreement arrangement; it does not evidence an attempt by BFS to shift responsibility for unrelated work to the Respondents.

Respondents argue that they did not provide structural work at the subject project and that a 10-year structural warranty, being longer than the statute of repose, reflects “a disparity in bargaining power and the intentional use of deceptive language buried in fine print” (R. 30). However, this contention overlooks the fact that the 10-year structural warranties are exceedingly common in the residential construction industry. (*See, e.g.,* 2-10 Home Buyers Warranty, American eBuilder Standard 10-Year New Home Warranty, Quality Builders Warranty, Residential Warranty Company 10 Year New Home Warranties for Builders (all readily available residential warranties providing 10-year structural warranties)).

The Court of Appeals also incorrectly concluded that the warranty provisions contained a hidden indemnity provision requiring Respondents to indemnify BFS “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.” The court found this language did not meet the clear and unequivocal standard because it was “hidden among warranty and guaranty language,” accepted Respondents’ argument that BFS was attempting to shift responsibility for its own allegedly defective windows. Adding its misapprehension of “Work” with this mischaracterization, the Court of Appeals concluded the Subcontract did not satisfy S.C. Code Ann. § 32-2-10 and was unconscionable.

This conclusion, however, collapses under the “plain and ordinary” meaning of the Subcontract, which the Court of Appeals was bound to employ. *Conner v. Alvarez*, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985). The Warranty requires only that the subcontractor correct “any

defective or nonconforming [materials and services it provided],” (R. 757), that is, its “Work” as expressly defined in the Subcontract. Framed this way, the provision is not a hidden indemnity at all. Instead, it reflects a straightforward obligation: the Subcontractor must stand behind its own Work, including defectively installed materials or services, but not beyond that scope.

2. The Indemnity Provisions

The Court of Appeals similarly misinterpreted Section 5. Its view that the Later Subcontracts’ indemnity provision do not meet the heightened clear and unequivocal standard, coupled with its mistaken conclusion that the provision contained irreconcilable contradictions, formed the basis for its determination that the Later Subcontract was unconscionable and unenforceable. The indemnity provision at issue provides:

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 ... 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 causes 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.***

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 any 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, or any of its subcontractors, ***regardless of whether such claim damage, loss, or expense is cause, 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 of any of its subcontractors...

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 other 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...

Section 5 is clear that the subcontractor's indemnification obligations are not intended to, and do not, require the subcontractor to indemnify or hold harmless a registered architect, licensed engineer, or an agent, servant, or employee of such professionals for damages arising from: (a) defects in plans, designs, or specifications prepared, approved, or used by the architect or engineer; or (b) the negligence of the architect or engineer in performing professional duties under the construction contract. This limitation confirms that the indemnity obligations are narrowly tailored to the Subcontractor's own "Work" and do not attempt to shift liability for unrelated parties' acts.

The Court of Appeals further erred in concluding that the first two paragraphs of Section 5 were irreconcilable. In fact, the paragraphs address separate and distinct circumstances, which is permissible under South Carolina law. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 65 (Ct. App. 2002) (finding a single paragraph may contain multiple discrete provisions where separate and distinct rights are implicated). The first paragraph governs the subcontractors' indemnity obligations for injury to any person or property damage, while the second paragraph governs indemnity obligations for claims arising from bodily injury to, sickness, disease, or death of, the subcontractor or its agents, employees, or representatives. (*See R. 759-60*).

Finally, the Court of Appeals mistakenly treated Section 5's third paragraph as "a disguised indemnity provision for defense costs." The court interpreted language stating that "the duty to defend exists regardless of any ultimate liability or negligence of the contractor" as evidence that BFS sought indemnification for its own negligence. ("By claiming it is *not* seeking indemnification for its own negligence, BFS asks this court to ignore ... the Later Contracts' language..."). This reading ignores the plain structure and purpose of the provision which separates the duty to defend from the duty to indemnify, ensuring that defense obligations arise immediately upon notice of a claim rather than after fault is determined. This design reflects a standard contracting practice that preserves enforceability and protects BFS in the event that fault is later allocated.

B. Bargaining Power and Unconscionability

The Court of Appeals erred by concluding that the subcontracts were unconscionable based on an assumed imbalance in bargaining power between BFS (as a "general contractor") and the Respondent subcontractors. South Carolina law sets a high bar for unconscionability, requiring both procedural and substantive unfairness. *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996). Unconscionability requires both (1) a lack of meaningful choice and (2) unreasonably oppressive terms. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614 (2022). To determine whether a party lacked meaningful choice, courts consider the nature of the injuries, the sophistication and bargaining power of the parties, and the conspicuousness of the clause. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25 (2007). Terms are unreasonably oppressive when "no reasonable person would make them and no fair and honest person would accept them." *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 908 S.E.2d 892, 898 (Ct. App. 2024)). The Court of Appeals failed to apply this standard.

First, the record contains no facts from which the Court of Appeals could properly conclude that there was an imbalance in bargaining power between BFS and each of the seven subcontractor

Respondents. It was therefore an error of law to presume such an imbalance solely based on the subcontractor/sub-subcontractor relationship. In reality, the dynamics of relative bargaining power would have varied for each subcontractor, depending on supply and demand at the time of contract formation, and would not necessarily favor one party over the other.

Respondents are experienced subcontractors who had entered into numerous subcontracts of this type and received both compensation and continuing work as consideration. Indemnity and warranty provisions of this nature are common in residential construction and plainly fall within industry norms. To equate such agreements with unconscionability disregards commercial reality and ignores this Court's precedent that unequal bargaining power, standing alone, does not invalidate a contract. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004).

The Court of Appeals' unconscionability finding was seemingly based on a perceived difference in the size of BFS relative to the Respondents; however, even if the record on appeal contained evidence establishing such a size differential, a mere disparity of size or resources is not the measure of unconscionability under South Carolina law. If it were, many commonplace business arrangements would be suspect, as entities of disparate size and resources routinely contract with one another. This approach would also risk inconsistent application of unconscionability, where the same party could be deemed "dominant" in one transaction and "subordinate" in another without factual support.

Freedom of contract permits parties to allocate risk in the manner provided in BFS's subcontracts, especially in commercial contexts where indemnities and warranties are standard risk-shifting devices. Respondents received the benefit of their bargain, payment and access to continuing work, and there is nothing unconscionable about enforcing those terms. By lowering

the bar for unconscionability to mere disparities of size, the Court of Appeals threatens to destabilize established contracting practices across the construction industry and invites courts to invalidate negotiated provisions that are essential to orderly risk allocation in commercial relationships.

CONCLUSION

For the foregoing reasons, NAHB and HBASC respectfully urge this Court to grant certiorari and clarify that indemnity provisions which do not satisfy the clear and unequivocal standard remain enforceable when limited to liability not caused by the indemnitee's own negligence, or, as in *S.C. Elec. & Gas Co.*, where liability arises solely from the imputed negligence of the indemnitor. Without such clarification, the decision below leaves South Carolina law in conflict, injecting uncertainty into the enforceability of indemnity agreements and disrupting established commercial expectations throughout the construction industry.

Accordingly, this Court should exercise its discretionary authority under Rule 242, SCACR, to grant the petition and reverse the Court of Appeals.

s/ Taylor H. Stair

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Nov 14 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2021-001050
Civil Action No. 2016-CP-10-03738

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 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.

FINAL BRIEF OF RESPONDENT PALMETTO TRIM AND RENOVATION

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STATEMENT OF ISSUES ON APPEAL

- I. APPELLANT IS SEEKING INDEMNIFICATION FROM RESPONDENT FOR APPELLANT'S OWN NEGLIGENCE. THE TRIAL COURT WAS CORRECT IN APPLYING THE "CLEAR AND UNEQUIVOCAL" STANDARD IN ITS REVIEW OF THE INDEMNIFICATION PROVISION OF APPELLANT'S FORM SUBCONTRACT.
- II. BECAUSE THE INDEMNIFICATION PROVISION OF THE SUBCONTRACT DRAFTED BY APPELLANT IS INCONSISTENT AND AMBIGUOUS, THE INDEMNITY PROVISION DOES NOT SHOW THAT THE PARTIES INTENDED IN CLEAR AND UNEQUIVOCAL TERMS FOR POHLMAN TO INDEMNIFY APPELLANT FOR ITS SOLE OR CONCURRENT NEGLIGENCE.
- III. APPELLANT CANNOT USE THE SEVERABILITY CLAUSE TO SAVE ITSELF FROM THE AMBIGUITY WHICH IT CREATED. APPLICATION OF THE SEVERABILITY CLAUSE AS SUGGESTED BY BFS WOULD REQUIRE THE COURT TO RE-WRITE THE SUBCONTRACT AND THE FAILURE TO DISCUSS THE SEVERABILITY CLAUSE IN THE ORDER IS, AT MOST, HARMLESS ERROR.

STATEMENT OF THE CASE

The Retreat at Charleston National, located in Mount Pleasant, SC, is a multi-family development consisting of thirty-two (32) buildings that were constructed in four (4) phases. Campbell R. Campbell Construction, Inc. (Campbell) served as the General Contractor for phases I, II, & III. Appellant, Builders First Source-Southeast Group, LLC (hereinafter, BFS) entered into a subcontract with Campbell to provide labor and all materials to accomplish the erection of the rough framing for certain buildings, which included the installation of windows and exterior doors. BFS then sought out carpenters to hire to provide the labor necessary to meet the obligations of its contract with Campbell. One of the carpenters hired by BFS was Respondent, Palmetto Trim and Renovation (hereinafter, "Palmetto"). Gemini documents produced by BFS show that Palmetto performed the following work: Lot 5 (building 500): window install (completed 12/27/05), punch work (completed 1/20/06); Lot 7 (building 700-701): window install (completed 1/24/06); and Lot 10 (building 1000-1001): window install (completed 1/25/06). Certificates of Occupancy were issued for building 500 on July 21, 2006; building 700 on July 25, 2006 and building 1000 on July 25, 2006. BFS supplied all materials to be used or installed by Palmetto, including the windows.

Plaintiffs filed the above-captioned lawsuit alleging, amongst other things, deficiencies in the windows BFS sold to the developer and in the installation of those windows. (R. pp. 187-207 and pp. 248-274 and pp. 318-371.) BFS then brought a third-party action against its subcontractors, including Palmetto. (R. pp. 372-454.) The Third-Party Complaint seeks recovery from the subcontractors on the theories of Contractual and Common Law Indemnity, Breach of Express Warranties, Breach of implied Warranties,

Negligence, and Breach of Contract. Id. In late 2019 and early 2020, eight separate subcontractors, including Palmetto, moved for summary judgment. Palmetto filed its Motion for Summary Judgment against the claims of BFS on December 20, 2020. (R. pp. 512-513.) It filed an Amended Motion for Summary Judgment on October 22, 2020 adopting the arguments and positions of East Coast Carpentry. (R. pp. 514-515.) On July 26, 2021, Judge Jennifer B. McCoy issued an Order Granting Partial Summary Judgment to Palmetto on certain claims raised by BFS. (R. pp. 7-9.)

BFS filed its Motion for Reconsideration of Judge McCoy's Order Granting Partial Summary Judgment to Palmetto. (R. pp. 1281-1325.) On August 23, 2021, Judge McCoy denied BFS's Motion for Reconsideration without the necessity of a hearing and decided the matter on the record and briefs. (R. pp. 131-133.) BFS filed its Notice of Appeal of the Order of Judge McCoy granting Palmetto's Amended Motion for Summary Judgment on September 22, 2021. BFS also appealed the Order of Judge McCoy denying BFS's Motion for Reconsideration in the same Notice of Appeal.

In her Order, Judge McCoy granted Summary Judgment to Palmetto and dismissed BFS's causes of action for Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract, ruling those causes of action were merely disguised claims for Indemnification pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). (R. pp. 7-9.) BFS has not appealed that ruling. Judge McCoy also granted Partial Summary Judgment to Palmetto on BFS's causes of action for Contractual Indemnity, ruling that the Indemnity provision of the form Subcontract drafted by BFS is ambiguous and in violation of Section 32-2-10 of the South Carolina Code, and therefore, against public policy and unenforceable,

thereby leaving BFS with a cause of action for Equitable Indemnification against Palmetto. (R. pp. 7-9.) Those are the rulings which BFS has appealed.

The case is now before this Honorable Court of Appeals. This case combines eight separate appeals into one omnibus appeal. Some issues are common amongst each appeal, while others vary from one to another. Palmetto submits this brief in response to BFS's brief insomuch as said brief presents issues related to the Order Granting Partial Summary Judgment to Palmetto.

STANDARD OF REVIEW

An appellate court "reviews a grant of a summary judgment motion under the same standard as the [circuit] court." Montgomery v. CSX Transp., Inc., 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008). Rule 56(c) of the South Carolina Rules of Civil Procedure provides the circuit court shall grant a summary judgment if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

ARGUMENT

Palmetto focuses this brief solely on the issues raised by BFS that relate to Judge McCoy's Order Granting Partial Summary Judgment to Palmetto. Those issues are set forth as Arguments I, II, IV and V in Appellant's Brief. More specifically, this discussion will focus on the Indemnity provision of the form Subcontract drafted by BFS, the "Master

Subcontract Agreement” (hereinafter the "Subcontract") between BFS and Palmetto, dated May 16, 2005, which Appellant refers to as “the 2005 Contract”. (R. pp. 1464-1476.) The outcome of this appeal turns on the Court's review and possible severance of the paragraphs of the Indemnity provision of the Subcontract.

I. APPELLANT IS SEEKING INDEMNIFICATION FROM RESPONDENT FOR APPELLANT'S OWN NEGLIGENCE. THE TRIAL COURT WAS CORRECT IN APPLYING THE "CLEAR AND UNEQUIVOCAL" STANDARD IN ITS REVIEW OF THE INDEMNIFICATION PROVISION OF APPELLANT'S FORM SUBCONTRACT.

The trial court was correct in applying the "clear and unequivocal" standard in its review of the indemnification provision of the BFS form subcontract because

- a) BFS has been sued for its own, separate negligence, and
- b) in its Third-Party Complaint, BFS seeks from Palmetto "full indemnification for any liability" and for "any sums for which BFS may be held liable," which includes BFS's own negligence.

(R. pp. 445-453.)

In its brief, BFS argues that the "clear and unequivocal" standard should not have been used in the review of its form Indemnity provision because BFS is not seeking to recover from Palmetto for its own negligence. However, that position is inconsistent with the claims BFS has asserted against Palmetto and the confusing language of the indemnity provision.

This Court has held that the "clear and unequivocal" standard must be applied when interpreting a contractor's claim against a subcontractor seeking indemnification for alleged negligent construction of a condominium project, and that the "clear and unequivocal" standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC,

424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018).

The claims asserted by BFS against Palmetto (and others) are set forth in the Third-Party 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.

(R. p. 449.)

Paragraph 167 of the BFS Third-Party Complaint alleges, in essence, that if BFS is held liable to Plaintiffs, then that liability can only be the result of the negligence of Palmetto and others. In wording the paragraph in that manner, BFS ignores the very real possibility that it may be held liable to Plaintiffs for its own negligence as alleged in Plaintiffs' Fourth Amended Complaint:

- 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

(R. pp. 366-367.)

The particulars of negligence alleged at subparts b, c, d, g, and i speak to the sole duties owed by BFS in its roles as a supplier of materials for the project and as a subcontractor responsible for supervising, inspecting, and approving the work of its sub-subcontractors.

Further, in its Brief, BFS acknowledges that Plaintiffs' experts have opined that two of the building materials which it supplied for use by Palmetto (and others) - windows and window fasteners- were both improper for use at this project:

Plaintiffs' forensic expert has also opined that the windows at the project are characterized by inadequate DP ratings, requiring comprehensive replacement of those windows; that installation was performed using incorrect fasteners, which were, both (a) of improper type, and (b) of inadequate length to assure required embedment of the fastener into the framing; and that fasteners were installed at spacing intervals which exceeded those required by the manufacturer's installation criteria.

BFS Final Brief, p. 1.

BFS points to paragraph 167 of its Third-Party Complaint and says, "See, we allege that any potential liability to BFS can only exist as a result of the negligence of Palmetto, so that is all BFS seeks from Palmetto by way of indemnification." (R. p. 449.) As is proven by Plaintiffs' allegations and expert opinions, there are several ways which a jury can find BFS liable for its sole negligence. And, the allegations contained in BFS's Third-Party Complaint

make it clear BFS is seeking indemnification from Palmetto for its own negligence.

Paragraph 168 of the BFS Third-Party Complaint reads as follows:

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. *[emphasis added]*

(R. p. 449.)

Nowhere in paragraph 168, and nowhere in its Third-Party Complaint, does BFS state that it is not seeking indemnification from Palmetto for BFS's own negligence. And as demonstrated above, there are several ways which a jury can find BFS liable for its own, sole negligence. Given those facts, when in paragraph 168 BFS asks for "full indemnification for any liability", and to be reimbursed by Palmetto for "any sums for which BFS may be held liable", BFS is clearly seeking recovery from Palmetto for the full and complete amount of any verdict rendered against it, including any damages included in the verdict for BFS's own negligence.

In its Brief, BFS wrongfully assumes there can be no path to liability for BFS because of its own negligence. BFS's Final Brief, p. 13-14. As shown above, if this case goes to trial, there are several ways by which BFS may be held liable for its own negligence. And, unlike the Indemnity provision of the Subcontract drafted by BFS, the wording of paragraph 168 of BFS's Third-Party Complaint is clear and unambiguous. There is no doubt that BFS is seeking indemnification from Palmetto for its own negligence.

II. BECAUSE THE INDEMNIFICATION PROVISION OF THE SUBCONTRACT DRAFTED BY APPELLANT IS INCONSISTENT AND AMBIGUOUS, THE INDEMNITY PROVISION DOES NOT SHOW THAT THE PARTIES INTENDED IN CLEAR AND UNEQUIVOCAL TERMS FOR POHLMAN TO INDEMNIFY APPELLANT FOR ITS SOLE OR CONCURRENT NEGLIGENCE.

Below is the language of the Indemnity provision of the form Subcontract created by BFS. As used in these paragraphs, the word "SUBCONTRACTOR" refers to Palmetto and the word "CONTRACTOR" refers to BFS.

Section 6. Waiver, Release, and Indemnification. Subcontractor agrees that Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors. Subcontractor will indemnify, defend, and hold Contractor harmless against any such injuries and claims. Accordingly:

a. Waiver. [omitted because it applies to workers comp]

b. Release and Indemnity.

(1) [Omitted because it applies to personal injury]

(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 Indemnitees [defined as Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees in (1)] 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 Indemnitees failure to supervise Subcontractor's operations.

(R. pp. 1468-1469.)

The opening paragraph is confusing in that it does not clearly and unequivocally define the performance of the "Work". Is this just the performance of the labor or does it

encompass supervision, scheduling, coordination, material supply and other items that would be purely in BFS's purview. Subsection B is equally confusing in that it is divided into two subsections. One section for "personal injury" and the other for "all claims" not covered under the previous subsection. Subsection (b)(2) initially calls for broad indemnity for "any and all claims", but then goes on to narrow those claims by limiting them "to the extent of liability resulting from Subcontractor's negligence or willful misconduct". The same subparagraph goes on to broaden the scope of indemnity again by stating "arising from or connected with the Work", which certainly could include BFS's own specific independent duties in performance of the "Work". The next subparagraph speaks to defects in the "services and materials" provided in connection with the work. Does this mean only the services and materials provided by Palmetto or all services and materials provided for in BFS's scope or work, including those for which BFS was solely responsible? The last subsection seem to attempt to broaden the indemnity agreement to cover BFS for its independent negligent supervision the project. Since negligence supervision is called out specifically in the indemnity agreement, does this mean the language before it does not cover and acts or omissions of BFS, including its supplying of allegedly defective materials, even though the broad language could potentially be read to encompass production of materials?

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. Concord & Cumberland, 424 S.C. at 171, 819 S.E.2d at 647 (Ct. App. 2018); citing Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). Within the Indemnity provision of the form Subcontract it created, BFS

states two potentially different standards for Palmetto's indemnification exposure. These provisions are in conflict with each other and cannot be reconciled. The conflict between these provisions creates an ambiguity which then by definition means the Indemnity provision cannot be said to "clearly and unequivocally" state the intention of the parties that Palmetto agreed to indemnify BFS for its own negligence.

BFS argues that the subparagraphs of the Indemnity provision must be read separately, and that if read separately, no conflict or ambiguity exists. It is likely that all ambiguities in contracts would cease to exist if the Court was allowed to interpret one subparagraph at a time without having to concern itself with the language of other paragraphs. But, of course, that is not the law, and separate but conflicting paragraphs of contracts must be reconciled with each other. When interpreting a contract, the parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501(Ct. App. 2007), citing Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); *see also* Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000).

BFS drafted the form Subcontract and it is responsible for the ambiguity created by the two different confusing and conflicting standards for indemnification stated in the subparagraphs of its Indemnity provision. Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." Ecclesiastes Prod. Ministries, 374 S.C. at 499, 649 S.E. 2d at 502, citing Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981)

(quoting 17A C.J.S. *Contracts* § 324).

As Judge McCoy ruled, even if the conflicting language could be reconciled, the Indemnity provision of the subcontract is still invalid. Section 32-2-10 of the Code of Laws of South Carolina (1976, as amended) provides that any promise or agreement related to the design or construction of a building which requires a party to indemnify another party even if the loss or damage was caused by the sole negligence of the indemnitee is "against public policy and unenforceable". S.C. Code Ann. 32-2-10 (1976, as amended).

In Concord and Cumberland, this Court analyzed an indemnity provision that is similar to the one in the present case. Concord and Cumberland, 424 S.C. at 652, 819 S.E.2d at 173. The Concord and Cumberland Court found that the subcontractor did broadly agree to indemnify the general contractor for any damages resulting from the scope of work in the Subcontract, which was installation and doors. Id. The Court also recognized that the phrase that followed this broad agreement to indemnify, "to the extent caused ... in whole or in any part by any negligent act or omission of [subcontractor]," limited the subcontractor's obligation to indemnify to damages and losses but only to the extent they were caused by the negligence of the subcontractor and its subcontractors. Id.

The indemnity provisions of the BFS form Subcontract contain both the broad and limiting indemnity language as the subcontract at issue in Concord and Cumberland. That subcontract, which failed to "clearly and unequivocally" require the subcontractor to indemnify the indemnitee for losses the indemnitee may have contributed to, could be read to "relieve an indemnitee from the consequences of its own negligence." Laurens Emergency Med Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 378-79 (2003). The last subparagraph of the indemnity provision attempts to do just

that for BFS's supervision of the project. As stated above, other sections can be read as an attempt to do the same. By way of example, since Palmetto only provided the labor for the installation of materials supplied by BFS, the subparagraph related to indemnity for the materials could be read as requiring Palmetto to indemnify BFS for its sole duties as the material supplier. Section 32-2-10 forbids the indemnification of an indemnitee for its own negligence.

Applying that same reasoning to the language in the Subcontract between BFS and Palmetto, the indemnity provision is unenforceable and violates the public policy of this State. As Concord and Cumberland provides, "the clear and unequivocal" standard applies any time an indemnitee is seeking indemnification for its negligence, whether sole or concurrent. The Indemnity provision fails to "clearly and unequivocally" require the subcontractor to indemnify the indemnitee for losses the indemnitee may have contributed to. For that reason, the Indemnity provision can be read to relieve an indemnitee from the consequences of its own negligence. If Palmetto could be required to indemnify BFS for BFS's own negligence, the Paragraph requiring such is unenforceable under the law of this State.

III. APPELLANT CANNOT USE THE SEVERABILITY CLAUSE TO SAVE ITSELF FROM THE AMBIGUITY WHICH IT CREATED. APPLICATION OF THE SEVERABILITY CLAUSE AS SUGGESTED BY BFS WOULD REQUIRE THE COURT TO RE-WRITE THE SUBCONTRACT AND THE FAILURE TO DISCUSS THE SEVERABILITY CLAUSE IN THE ORDER IS, AT MOST, HARMLESS ERROR.

Judge McCoy held that the language of the two paragraphs in the Indemnity provision are in conflict and cannot be reconciled. (R. p. 56.) BFS asserts that the solution for reconciliation is for the Court to sever the offending subparagraphs and leave the remainder of the contract intact. BFS Final Brief, p. 39. BFS points to the Severability provision in the Subcontract as the tool which the Court can use to remove the offending subparagraph sections of the Indemnity provision, thereby allowing BFS pursue its claim

for Contractual Indemnity. However, in this instance, use of the Severability clause in that manner would result in the Court running afoul of two settled rules to be applied when construing contracts.

Basic contract law provides that when a contract is clear and unambiguous, the language alone determines the contract's force and effect. C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). It is not the function of the court to rewrite contracts for parties. *See* York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 90, 749 S.E.2d 139, 150 (Ct. App. 2013). The court is without authority to alter a contract by construction or to make a new contract for the parties. C.A.N Enterprises, 296 S.C. at 378, 373 S.E.2d at 587 (1988).

Section 6 of the Subcontract is even labeled confusingly, encompassing “Waiver, Release, and Indemnification” in the same Section. (R. p. 1468.) BFS could have chosen to break the paragraphs up and label them appropriately as to which sections apply to which particular circumstances, but it chose not to do so. Most importantly, BFS could have "clearly and unequivocally" laid out the terms of indemnification. Instead, BFS put all of the subparagraphs dealing with indemnity under a single confusing heading without subtitles, instructions, or anything which would allow Palmetto, or the Court, to come to any conclusion other than the entire provision must be read, and interpreted, as a whole when faced with a claim for indemnification. The result of BFS's "style" of drafting are multiple subparagraphs and sub-subparagraphs which state different standards for indemnification which cannot be reconciled with each other.

In an effort to try and save itself from the ambiguity it created, BFS points to the Severability clause of the Subcontract. BFS argues that the Court should have used the

Severability clause to simply remove any "problematic" language, leaving the remainder of the Subcontract in place. However, in asking the Court to resolve the ambiguity in that manner, BFS is asking the Court to re-write the Subcontract. It is not the function of the court to rewrite contracts for parties. York, 406 S.C. at 90, 749 S.E.2d at 150 (Ct. App. 2013). Because the two "problematic" subparagraphs of the Indemnity provision set forth multiple potentially different scenarios/standards for indemnification for similar claims and cannot be reconciled, those subparagraphs are inextricably linked, and they cannot be separated. If the Severability clause is invoked, then all conflicting subparagraphs of the Indemnity provision must be removed. For the Court to do otherwise would result in the Court re-writing the Subcontract and construing the ambiguity in the Indemnity provision in favor of the party that drafted the document, both of which would violate boilerplate, long-held legal principles of contract construction. South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy. Poynter Invs. Inc. v. Cent. Builders of Piedmont, Inc., 386 S.C. 583, 588, 694 S.E.2d 15, 18 (2010). Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." Ecclesiastes Prod. Ministries, 374 S.C. at 499-500, 649 S.E. 2d at 502 (Ct. App. 2007).

During the hearing, Counsel for BFS "repeatedly" argued BFS's position on how the Court could use the Severability clause to give BFS the result it wanted. BFS Final Brief, p. 37. Although it is correct that the Order does not contain a discussion of the Severability clause, there is certainly no evidence to suggest that Judge McCoy did not consider BFS's argument,

or that she refused to consider the argument. Logically, the most that BFS can say on that point is that Judge McCoy did not address the Severability clause in her Order.

As explained above, in this instance, the only proper use of the Severability clause would be to remove all subparagraphs from the BFS form Subcontract, leaving BFS with its cause of action for Common Law Indemnification.

Even though the Order does not discuss the Severability clause, we know three things: 1) Counsel for BFS "repeatedly" argued BFS's position on how it believed the Severability clause should be applied; 2) If Judge McCoy had been convinced that BFS's position on the use of the Severability clause was correct, then she would have ruled in BFS's favor; and 3) Judge McCoy's eventual ruling is the same as it would have been had she discussed the Severability clause in her Order. Knowing these things the Court can conclude: (1) had the Order included a discussion of the Severability clause, that discussion would not have changed the outcome of the motion; and (2) the failure to include a discussion of the Severability clause in the Order does not deny or in any way affect a substantial right of BFS.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Rule 61, SCRCP.

Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of

the error must be determined from its relationship to the entire case. Error is harmless where it could not reasonably have affected the result of the trial. Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result. Judy v. Judy, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009), citing In re Harvey, 355 S.C. 53, 63, 584 S.E.2d 893, 897 (2003), State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985), and State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991).

The fact that the Order does not contain a discussion of the Severability clause does not change the outcome of the motion and does not deny a substantial right of BFS. As a result, the omission of a discussion of the Severability clause is, at most, harmless error which does not justify a reversal of the Order.

CONCLUSION

It is clear from BFS's allegations is seeking indemnification from Palmetto for BFS's own negligence. For that reason, Judge McCoy's application of the "clear and unequivocal" standard when reviewing the Indemnity Provision of the BFS form Subcontract was proper. The subparagraphs of the Indemnity provision are confusing, ambiguous, irreconcilable, violate public policy and are unenforceable. Additionally, because of the manner in which those paragraphs were drafted by BFS, they are inextricably linked such that, if the Court were to use the Severability clause to remove one or more from the Subcontract, the Court would be re-writing the subcontract.

BFS drafted the form Subcontract and the complicated, inconsistent, confusing, and ambiguous subparagraphs of the Indemnity provision. Those paragraphs are either void and unenforceable, or must be removed from the Subcontract. Either way, the only viable cause of action asserted by BFS against Palmetto which survives is the cause of action for Common

Law Indemnification. Wherefore, Palmetto hereby requests that this Court AFFIRM the findings and Order of Judge McCoy Granting Partial Summary Judgment to Palmetto Trim and Renovations.

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November 14, 2022

Mount Pleasant, South Carolina

RECEIVED

Nov 14 2022

SC Court of Appeals

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent Palmetto Trim and Renovation complies with Rule 211(b), SCACR.

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PALMETTO TRIM & RENOVATION

November 14, 2022

Mount Pleasant, South Carolina

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SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Respondent Palmetto Trim and Renovation, do hereby certify that I have this date served the foregoing Final Brief of Respondent Palmetto Trim and Renovation, dated November 14, 2022, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable)::

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November 14, 2022
Mt. Pleasant, South Carolina

Oct 26 2022

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

Civil Action No. 2016-CP-10-03738
Appellate Case No. 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; 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.; 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 the Respondent,

AND

Builders FirstSource-Southeast Group, LLC is the Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err in applying the clear and unequivocal standard to the contractual indemnity provisions drafted by BFS where the pleadings of BFS seek indemnity for its sole or concurrent negligence?
- II. Did the Circuit Court err in finding that the contractual indemnity provisions drafted by BFS violate S.C. Code Ann. 32-2-10 (2007) by requiring the subcontractors of BFS to indemnify it for its sole negligence, including its negligence in the selection and sale of products to third parties?
- III. Did the Circuit Court err in applying the doctrine of collateral estoppel as a bar to the contractual indemnity claims of BFS?
- IV. Did the Circuit Court err in finding that there are so many objectionable provisions that run throughout the Master Subcontractor Agreement that it is not possible to sever or reform them?
- V. Was the Master Subcontractor Agreement drafted by BFS a contract of adhesion which is unconscionable, oppressive, and unenforceable?

STATEMENT OF THE CASE

Plaintiffs filed suit on July 22, 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 filed an amended complaint on May 1, 2017 naming additional defendants including Builders FirstSource-Southeast Group, LLC, hereinafter “BFS”, for negligence, gross negligence, and breach of implied warranties. The amended complaint asserted, 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.

BFS is a large supplier of building materials and components who sold windows, doors, and other building materials to the general contractor and/or developer and agreed to install them in the project. BFS holds an unlimited general contractor's license. It hired Hurley Services, LLC, hereinafter “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. 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, and all work performed by Hurley was under a Master Subcontractor Agreement drafted by BFS.

In its answer to the amended complaint, BFS asserted a third-party complaint against Hurley and other subcontractors. The third-party complaint against Hurley alleges claims for

contractual and common-law indemnity, breach of express and implied warranties, negligence, and breach of contract.

On June 19, 2018, Plaintiffs filed a second amended summons and complaint naming both BFS and Hurley and others as defendants and alleging construction deficiencies and defective materials arising from negligence, gross negligence, and breach of implied warranties of defendants.

On July 3, 2018, BFS filed an answer to Plaintiffs' Second Amended Complaint. BFS denied it supplied materials and it asserted crossclaims against Hurley for contractual and common-law indemnity, breach of express and implied warranties, negligence, and breach of contract. These are the same claims BFS asserted against Hurley in its third-party complaint. In its crossclaims against Hurley, BFS alleges in multiple places 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.

Plaintiffs amended their complaint two more times, and BFS answered each complaint denying it supplied materials and reiterated the same crossclaims against Hurley even though Hurley supplied no materials. Hurley answered all of the aforementioned claims asserted against it by BFS.

On August 27, 2020, Hurley filed a motion for partial summary judgment with regard to the crossclaims of BFS. On October 7, 2020, Hurley filed an amended motion for summary judgment as to all crossclaims asserted by BFS.

Respondent's amended motion for summary judgment was argued in the Circuit Court on or about November 6, 2020. Both Appellant and Respondent submitted memoranda and exhibits in support of their respective positions.

On July 7, 2021, the Honorable Jennifer B. McCoy, Circuit Court judge, signed and filed an order granting partial summary judgment in favor of Hurley. BFS filed a motion for reconsideration on July 19, 2021, which was denied on August 23, 2021. Appellant filed a notice of appeal on September 22, 2021.

Judge McCoy 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.

STANDARD OF REVIEW

Summary Judgment is appropriate where there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRPC. The purpose of Summary Judgment is to obviate delay where there is no material issue of fact involved. Hammond v. Scott, 268 S.C. 137, 232 S.E.2d 336 (1977). Summary Judgment is appropriate in those cases in which plain, palpable, and undisputed facts exist on which reasonable minds cannot differ. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993).

The party “opposing a properly supported motion for summary judgment ... may not rest on mere allegations or denials of his pleadings but must set forth or point to specific facts showing that there is a genuine issue of material fact.” Bravis v. Dunbar, 316 S.C. 263, 264, 449 S.E.2d 495, 496 (Ct. App. 1994). However, it is not sufficient for a party to create an interference which is not reasonable or an issue of fact that is not genuine. Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990).

ARGUMENTS

I. The Trial Court Correctly Applied The Clear And Unequivocal Standard To The Contractual Indemnity Provisions Drafted By BFS Where Its Pleadings Seek Indemnity For Its Sole Or Concurrent Negligence.

BFS argues that the elevated clear and unequivocal standard enunciated in Concord & Cumberland does not apply in this case because it is not seeking indemnity for its sole or concurrent negligence. It asserts that it is only seeking indemnification for loss or damage arising from Hurley's negligence. Appellant goes on to explain its position in detail on pages 13 and 14 of its brief:

Appellant's pleading takes as a premise that Appellant has committed no negligence and has no liability. In this world constructed by Appellant's pleading, where Appellant has committed no negligence, the only possible way Appellant could be liable is if the negligence was committed by Appellant's subcontractor and not by Appellant itself. Thus, in a world, and in context, Respondents, as the sole source of the negligence, would be liable to Appellant for all damages, as plead in paragraphs 138 and 168, and Appellant, in seeking indemnity, is seeking recovery only for Respondents' negligence and not for Appellant's own negligence (because Appellant's negligence is nonexistent). Whether the facts later bear out Appellant's worldview does not affect the analysis of what Appellant's pleadings seek.

Appellant's tutorial on basic pleading is not persuasive. It 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. It is a merchant within the meaning of S.C. Code Ann. 36-2-104(1) (2007) which provides as follows:

“*Merchant*” means a person who deals in goods of the kind or otherwise by his occupation **holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction** or to whom such knowledge or skill may be attributed by his employment as an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
(emphasis added)

At Retreat, BFS is a turnkey contractor which provides 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. (Br. of Appellant, p. 23.)

BFS has an installation manager, and is the holder of an unlimited general contractor’s license. It also has superior knowledge regarding construction practices, installation means and methods, building code requirements, and industry standards. It also has nondelegable statutory and common law duties to inspect and supervise the work of its subcontractors. *S.C. Code 40-11-270(E)* (Supp. 2021); *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 requires Hurley to follow the directions of BFS. (R. pp. 905-906.) (R. p. 944.)

The fact 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: (R. pp. 436-445.)

126. That this Defendant is informed and believes that Hurley Services, LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant 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 within The Retreat at Charleston National Country Club townhome condominium complex.
(emphasis added)
140. That the Cross Claim Defendants **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.
(emphasis added)
141. That the respective sub-contract agreements between BFS and the Cross Claim Defendants include provisions, by which the **Cross Claim Defendants have expressly undertook to provide materials and services in accordance with the contract documents**.
(emphasis added)
149. That Cross Claim Defendants **owed a duty of due care in providing services and materials** in connection with construction and/or repair of the subject structures.
(emphasis added)

153. That the Cross Claim Defendants **were contractually responsible for provision of adequate materials and services** in connection with their respective undertakings regarding construction of the subject structures.
(emphasis added)

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. (Br. of Appellant, p. 1.)

These unfounded claims of BFS against Hurley are not the result of a mistake in pleading, 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 in an effort to obtain indemnity for its sole negligence.

Interestingly, BFS has designated for inclusion in the Record on Appeal the order granting partial summary judgment to Hurley on BFS crossclaims in the case of Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772. BFS has appealed from that order.

However, it is worth noting that in Pavic, BFS sold windows to the general contractor, which it knew or should have known were defective and which were the subject of a class-action lawsuit and settlement. BFS filed identical crossclaims against Hurley contending that Hurley was responsible for materials, when it is undisputed that Hurley furnished no materials to the residence except those which BFS gave to it for installation. The conduct of BFS in the Pavic case is further evidence that BFS routinely seeks indemnification under the terms of its Master Subcontractor Agreement for its sole negligence in selecting and selling defective products.

BFS drafted two Master Subcontractor Agreements as shown by its logo on the first page of the agreements. One is dated May 14, 2012, and the other, December 18, 2014. The 2012 agreement is the operative agreement although the 2014 agreement is relevant on the issue of disparity in bargaining power. (R. pp. 898-909.) (R. pp. 910-923.)

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. Stoneledge at Lake Keowee Owners' Ass'n. v. Builders FirstSource – SE Group, 413 S.C. 630, 776 S.E.2d 434, 439 (Ct. App. 2015). 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 (R. pp. 901-902.) (emphasis added)

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, 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 has opined that the design pressure ratings on the windows do not meet applicable codes. This provision provides indemnification for the sole negligence of BFS 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. If a window sold by BFS leaks or blows out because of inadequate design pressure resistance, the property could be damaged or occupants of the unit could be injured. This is but another outrageous example of BFS attempting to transfer the risk of its own negligent conduct to its subcontractors under the "design" or "structural application" language it drafted.

BFS argues 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 (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.” (R. p. 899.)
(emphasis added)

BFS argues that **SECTION 2 (c)** merely describes the duties of a bailee. 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. In fact, BFS offers no explanation whatsoever for these claims in its 49-page Initial Brief. 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)**. **SECTION 8(i)** deals with indemnification of BFS by its subcontractors in connection with mechanic’s and materialmen’s liens. 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 added)

BFS is a supplier of materials to 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 (2007) *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 lower court correctly applied the standard in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 645, 819 S.E.2d 166, 170 (Ct. App. 2018) 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 at 424 S.C. 652-653, 819 S.E.2d 173-174 regarding the liability of the subcontractor Muller permits BFS to recover from Hurley to the extent of its own negligence. 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.

As previously discussed, **SECTION 1(a) Work** conflicts with **SECTION 2(c) Protection of Work**, and **SECTION 1(a) Work** also conflicts with **SECTION 3 Warranty**.

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); Poynter Inves., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15, 17-18 (2010). 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 (2007) By Requiring Its Subcontractors To Indemnify It For Its Sole Negligence, Including Its Negligence In The Selection And Sale Of Products To Third Parties.

S.C. Code Ann. 32-2-10 (2007) provides, in pertinent part, as follows: “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 ...**” (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 or concurrent negligence in violation of S.C. Code Ann. 32-2-10 (2007). 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.

BFS cites 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 (2007). However, the holding in that case is the opposite of what BFS cites it for. The court held that D.R. Horton could not obtain indemnification from its subcontractor, BFS, for its own negligence.

There is dicta in the case which opines that a portion of the indemnity agreement obligating BFS to indemnify Horton for its own negligence did not violate public policy. D.R. Horton at 810 S.E.2d 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.

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 indemnity 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. The lower court correctly read the deceptive language and conflicting provisions together and properly concluded that they collectively violated S.C. Code Ann. 32-2-10 (2007).

III. The Contractual Indemnity Claims Of BFS Are Barred By The Doctrine Of Collateral Estoppel.

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 contractual indemnity language found in **SECTION 5**, paragraph 1, of the BFS Master Subcontractor Agreement. See order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC, 2016-CP-10-3455 and the amended order of the Honorable Clifton Newman filed February 3, 2020, in the Court of Common Pleas for Berkeley County in the case of Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al. as Civil Action No. 2018-CP-08-2547. (R. pp. 146-156.) (R. pp. 157-161.)

BFS argues that the orders of Judges Young and Newman involved different issues of fact or law from those in this case. BFS asserts that the issues decided in those cases were whether Appellant may recover from its subcontractor for its own negligence whereas the issue in this case is whether Appellant may recover from its subcontractor Hurley for Hurley's negligence.

BFS filed a memorandum in opposition to Hurley's amended motion for summary judgment on November 2, 2020. With respect to the collateral estoppel issue, BFS argued only that the orders of Judges Young and Newman were not final orders. It did not raise the issue of whether the same issues of fact or law were decided in those orders. (R. pp. 1095-1097.)

To the extent that BFS failed to properly raise this issue as to the Pavic appeal during oral arguments on November 6, 2020, the issue cannot be raised for the first time on a motion for reconsideration. Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of relief under Rule 59(e), SCRPC, and the issues are waived. Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481, 482 (Ct. App. 1990); Patterson

v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995); Miller Constr. Co., v. PC Constr. Greenwood, 418 S.C. 186, 206, 791 S.E.2d 321, 332 (Ct. App. 2016).

Even if the identical issue question were properly raised in the court below, it is clear that BFS is seeking indemnity for its own negligence based upon the following:

1. BFS filed an amended answer to the Fourth-Amended Complaint in November, 2019 after it had been a defendant in the case for more than two years;
2. The amended answer of BFS denies that it supplied any materials at the project;
3. The crossclaims BFS filed against Hurley allege that Hurley had the responsibility for selecting and supplying adequate materials for its work;
4. BFS now concedes that it alone supplied all materials and that Hurley provided no materials;
5. BFS gave Hurley windows, doors and Tyvek for installation at the project;
6. Plaintiffs' expert has opined that windows at the project are deficient;
7. BFS has offered no explanation whatsoever in its brief for asserting crossclaims against Hurley relating to materials, especially when BFS knew that Hurley furnished no materials;
8. The only reasonable explanation for the conduct of BFS is that BFS interprets the deceptive provisions of the Master Subcontractor Agreement it drafted as requiring Hurley to indemnify BFS for materials supplied by BFS.

BFS also argues that the orders of Judges Young and Newman are not final judgments for the purposes of the application of the doctrine of collateral estoppel. However, the appeals from these orders do not undermine their status as final judgments; the law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's judgment, and thus will not be a barrier to applying collateral estoppel. *See Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189, 61 S.Ct. 513, 515, 85 L.Ed. 725 (1941). (Finding finality of a court's judgment is not lost because appeal is pending until and unless reversed.)

The contractual indemnity terms drafted by BFS have been litigated and directly determined in prior actions, and collateral estoppel should apply. 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), *aff'd* 308 S.C. 421, 418 S.E.2d 545 (1992). Moreover, Rule 201(a), SCACR provides that an: "appeal may be taken, as provided by law, from any final judgment or appealable order." BFS could not have appealed those orders unless they were final orders.

IV. The Lower Court Correctly Ruled That There Are So Many Objectionable Clauses That Run Throughout The Master Subcontractor Agreement That It Is Not Possible To Sever Or Reform Them.

Appellant makes 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: (R. p. 40.)

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)

Section I of Respondent's Brief discusses 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.

The second argument of Appellant is 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.)

The third argument of Appellant is that the lower court is 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 v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 673-674 (2007); Smith v. D.R. Horton, Inc., 403 S.C. 10, 16, 742 S.E.2d 37, 41 (Ct. App. 2013), *aff’d* 417 S.C. 42, 790 S.E.2d 1 (2016).

In support of its position, Appellant cites 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, Appellant cites 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 at 430 S.C. 607, 846 S.E.2d 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 Appellant 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* at 644 S.E.2d 670; *see also Doe* at 430 S.C. 612, 846 S.E.2d 879.

V. The Master Subcontractor Agreement Drafted By BFS Is A Contract Of Adhesion Which Is Unconscionable And Oppressive.

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 at 430 S.C. 612, 846 S.E.2d 879.

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process. Simpson at 644 S.E.2d 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. *Cf.* 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 2012 Master Subcontractor Agreement 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 v. Horton* at 417 S.C. 49, 790 S.E.2d 4 (2016). The high degree of sophistication of BFS is obvious in the language of the aforementioned provisions of the 2012 contract. 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 Philadelphia lawyer standing by to review its installation contracts. (R. pp. 951-969.)

The 2014 agreement executed by Hurley is even more oppressive than the 2012 version because of the addition in 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. v. United Healthcare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004); D.R. Horton, Inc. v. Builders FirstSource-SE Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).

CONCLUSION

The findings of fact and conclusions of law of the lower court are fully supported by the Record on Appeal and controlling legal authorities. All issues were correctly decided, and justice requires that the order of the lower court granting partial summary judgment in favor of Hurley with regard to the crossclaims of BFS for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity be affirmed in full.

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