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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

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

v.

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

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

v.

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

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

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VOLUME IX

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

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

v.

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

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

FINAL BRIEF OF RESPONDENT ECC CONTRACTING, LLC

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COUNTER STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court correctly apply the clear and unequivocal standard to contractual indemnity provisions in the Master Agreement where the pleadings of BFS seek indemnity for any liability BFS is found to have to Plaintiffs?

II. Was the circuit court correct in finding that the indemnity provisions of the Master Agreement violate S.C Code Ann. 32-2-10 by requiring ECC to indemnify BFS for its sole negligence?

III. Was the circuit court correct in applying the doctrine of collateral estoppel as to bar BFS's contractual indemnity claims?

IV. Whether the circuit court erred in failing to sever the ambiguous, unlawful provisions of the master agreement when doing so would have frustrated the purpose of the agreement, or was the circuit court correct in not severing such provisions because res judicata prevented BFS from raising the severability provision?

V. Was the Master Subcontractor Agreement drafted by BFS a contract of adhesion which is unconscionable, oppressive, and unenforceable?

STATEMENT OF THE CASE

Plaintiffs in the underlying litigation filed suit on July 22, 2016, against the developer of the Project, Winston Carlyle Charleston National, LLC, and the general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually, alleging construction deficiencies in the common elements of the Retreat at Charleston National Country Club, a townhome community in Mount Pleasant, South Carolina ("the Retreat Project" or "the Project"). The Complaint specifically alleged causes of action for negligence, gross negligence, breach of express and implied warranties, and breach of fiduciary duty as to the developer.

Plaintiffs filed an Amended Complaint on May 1, 2017, setting forth causes of action against additional defendants, including Appellant Builders FirstSource-Southeast Group, LLC, (hereinafter "BFS" or "Appellant") for negligence, gross negligence, and breach of implied warranties. The Amended Complaint alleged, among other things, that BFS used and supplied defective materials, installed materials not in accordance with the plans and specifications, and constructed the project in violation of the applicable building codes.

BFS filed third-party claims against ECC Contracting, LLC ("ECC") on June 30, 2017. **(R. pp. 208-47)**. Subsequently, ECC was made a direct defendant by Plaintiffs and BFS then asserted cross-claims against ECC for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence. **(R. pp. 248-74) (R. pp. 275-309)**. Plaintiffs amended their complaint two more times and BFS's operative cross-claims are now contained in BFS's Amended Answer, Cross-claims, and Third-Party Complaint that was filed in response to Plaintiffs' Fourth Amended Complaint on November 13, 2019. ECC timely answered all cross-claims asserted against it by BFS and raised relevant affirmative defenses.

On December 20, 2019, ECC filed a motion for summary judgment with regard to BFS's cross-claims. On October 15, 2020, ECC filed an amended motion for summary judgment as to all cross-claims asserted against it by BFS. ECC's amended motion for summary judgment was argued in the circuit court on or about November 6, 2020. ECC submitted memoranda and exhibits in support of its position, BFS did not.

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. In her Order, Judge McCoy:

- Granted summary judgment in favor of ECC and dismissed BFS's cross-claims for breach of express and implied warranties, breach of contract, and negligence, ruling those causes of action were disguised equitable indemnity claims and were not viable as alternative causes of action pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015. BFS has not appealed this ruling.

- Granted partial summary judgment in favor of ECC and dismissed BFS's claim for contractual indemnity, ruling that the indemnity and duty to defend provision of the Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 5/17/06]") drafted by BFS were (1) unconscionable, ambiguous, conflicting, and unenforceable; (2) neither clear nor unequivocal, and thus, fail as a matter of law; (3) that such provisions violate South Carolina public policy and S.C. Code § 13-2-10, and thus, are illegal and unenforceable; and (4) that BFS was collaterally estopped by prior decisions from contending such provisions are clear and unequivocal, do not violate South Carolina public policy, and/or meet the requirements of South Carolina law. BFS has appealed these Rulings.

BFS filed a motion for reconsideration on July 19, 2021, which was denied by Judge McCoy on August 23, 2021. BFS 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. Some issues are common amongst the eight appeals, while others are not. ECC submits this brief in response

to BFS's brief insomuch as BFS's brief presents issues related to the Order Granting Partial Summary Judgment to ECC.

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), SCRCP 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), SCRCP. The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Manley v. Manley, 291 S.C. 325, 329, 353 S.E.2d 312, 314 (Ct. App. 1987).

Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001). However, it is not sufficient for a party to create an inference which is not reasonable or an issue of fact that is not genuine. Priest v. Brown, 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct. App. 1990). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

STATEMENT OF FACTS

The Project is a townhome community in Mount Pleasant, South Carolina consisting of thirty-one buildings. **(R. p. 59) (R. p. 344)**. BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services through its unlimited commercial

general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"). **(R. p. 59)**. 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 approximately twenty-four (24) of the thirty-one (31) buildings at the Project. **(R. p. 59) (R. p. 594)**.

Respondent ECC Contracting, LLC ("ECC") served as a subcontractor of BFS and in that capacity performed deck repair work on Unit 2001[1], and installed windows and doors on one two-unit building[2] – ECC did not perform any other work on the Project. **(R. p. 59)**. ECC was paid approximately $1,506.00 for its work on the Project. **(R. pp. 601-04)**. According to BFS, ECC's work at the Project was performed pursuant to "Version – 5/17/06" of a BFS "Master Subcontract Agreement" dated February 26, 2008 (hereafter "Master Agreement"). **(R. p. 59) (R. pp. 605-16)**.

In its cross-claims against ECC, BFS alleges in multiple places that ECC provided and warranted materials, had a duty of care in selecting materials, and was contractually obligated to for procuring adequate materials in connection with its work, even though ECC supplied no materials. **(R. pp. 436, 442, 444-45)**. BFS's cross-claims also allege that BFS is entitled to be indemnified in the amount which BFS "may pay in satisfaction" of Plaintiffs' claim "plus [BFS's] costs for defense, inclusive of attorneys' fees", without regard to the fault of either ECC or BFS. See **(R. pp. 441-55)**. Additionally, BFS seeks to recover from ECC full contractual indemnification "for any liability BFS is found to have to the Plaintiffs or to other in this action" as well as "any sums for which BFS may be held liable to the Plaintiffs or to others, or which [BFS] may pay in satisfaction of such claims," under the terms of the Master Agreement. **(R. p. 441) (R. p. 68) (R. pp. 605-16)**.

[1] No deficiencies have been documented by Plaintiffs at Unit 2001.
[2] Units 2200 & 2201 located at 3036 Fraserburg and 3038 Fraserburg Way, Mt. Pleasant SC.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY APPLIED THE CLEAR AND UNEQUIVOCAL STANDARD TO CONTRACTUAL INDEMNITY PROVISIONS IN THE MASTER AGREEMENT BECAUSE BFS'S PLEADINGS SEEK INDEMNITY FOR BFS'S SOLE OR CONCURRENT NEGLIGENCE:

Section I of BFS's arguments focus on the lower court's application of the clear and unequivocal standard enunciated in Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166, (Ct. App. 2018). Specifically, BFS argues that the lower court (1) should not have applied clear and unequivocal standard because BFS is not seeking indemnity for its sole or concurrent negligence, and (2) if the clear and unequivocal standard applies to the indemnification provisions in the Master Agreement, such provisions clearly and unequivocally provide for indemnification in favor of BFS. Br. of Appellant, pp. 9-14. As set forth below, BFS's position is unsupported by ignore the language of and relief requested in its own pleadings, the ambiguous and confusing provisions of the Master Agreement, the lower court's order, and well settled South Carolina case law.

a. The clear and unequivocal standard applies because BFS is bound by its operative pleading, which seeks full contractual indemnification from ECC for any liability BFS is found to have to Plaintiffs.

"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)). Here, BFS's operative pleading provides:

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

> 138. That **BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action**, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and **further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others**, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.
>
> (*emphasis added*) **(R. p. 441)**.

Essentially, Paragraph 137 of BFS's Amended Answer to Fourth Amended Complaint provides that, if BFS is held liable to Plaintiffs, then such liability could only be the result of the negligence of ECC and the other Cross-claim Defendants – BFS has adopted this position. (Br. of Appellant, p. 13). However, Paragraph 137 (and BFS's interpretation of said paragraph) ignores the many ways BFS may be held liable to Plaintiffs for its own negligence, including, *inter alia*:

- failing to properly supervises the work of its subcontractors to ensure that all work all work proceeded in accordance with the plans and specifications and in conformity with the customary and ordinary standards of the construction industry;
- in accepting non-conforming or defective material;
- in using and supplying defective materials;
- 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
- in failing to inform the architect, owner or general contractor of defects in the plans and specifications.

(R. pp. 366-67).

While BFS would have this Court read Paragraph 138 as stating, "if BFS is liable to the Plaintiffs, [ECC is] derivatively and contractually liable to BFS," Br. of Appellant, p. 13, the plain language of BFS's operative pleading does not allow for such an interpretation. Instead, the plain language Paragraph 138 signifies that BFS seeks **full contractual indemnification** from ECC for

any liability BFS is found to have to Plaintiffs and **recovery of any sums for which BFS may be held liable to Plaintiffs**. **(R. p. 441)**. Where an indemnitee alleges it is entitled to "full indemnity" from the indemnitor, which is true in the instant case, South Carolina courts have held the clear and unequivocal should be applied because such allegations show the indemnitee is seeking indemnification for its own negligence. See Concord and Cumberland, 424 S.C. at 642-50, 819 S.E.2d at 168-72 (explaining the circuit court correctly applied the clear and unequivocal standard where the indemnitee alleged it was entitled to "full indemnity" from the indemnitor because the allegation showed the indemnitee was seeking indemnification for its own negligence).

BFS may not now take a contradictory position from the statements in its pleadings by arguing that it "only" seeks contractual indemnity for ECC's own negligence to circumvent the application of the heightened clear an unequivocal standard. 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")).

It is also worth noting that Plaintiffs' expert has opined that there are issues with the materials supplied by BFS. Br. of Appellant, p. 1. Additionally, BFS has admitted partial fault by conceding that repairs to its work are necessary, by admitting its field superintendents supervised and inspected the work of ECC, and by its superintendent, who supervised the work of ECC testifying, that he had no complaints about ECC's work on this Project. **(R. pp. 596, 694, 701-07)**. Thus, with respect to contractual indemnification, BFS cannot obtain full contractual indemnification from ECC for any liability BFS is found to have to Plaintiffs and recovery of any

sums for which BFS may be held liable to Plaintiffs, unless ECC (or the other Cross-claim Defendants) indemnifies BFS for BFS's sole or concurrent negligence.

b. The indemnity provisions in the Master Agreement drafted by BFS are not clear and unequivocal and fail as a matter of law.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the heightened standard of being clear and unequivocal when an indemnitee seeks to recover for its own negligence; indemnification clauses that do not meet this standard are against public policy. See Concord & Cumberland, 424 S.C. 639, 819 S.E.2d 166 (affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity cross-claims of contractor based on application of the clear and unequivocal standard). Indemnity agreements are strictly construed, and ambiguous provisions are to be construed against the drafter of the provision. Id. at 647, 819 S.E. 2d at 171.

There are multiple indemnity provisions throughout the Master Agreement. For example, Section 5 INDEMNITY states:

> To the fullest extent permitted by Law, the subcontractor shall indemnify, defendant and hold harmless the contractor, the owner, and all of their officers, directors, agents, and employees from and **against any and all claims**, suits, losses, causes of action, damages, liabilities, fines, penalties, and expenses of any kind whatsoever, including, but not limited to, arbitration or court costs and attorney's fees (such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) arising out of or resulting from bodily injury or death of any person, or property damage, including loss of use of property, arising or alleged to arise out of or in any way related to this agreement or the subcontractor's performance of the work or other activities of the subcontractor, **but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor** or anyone for whose acts the subcontractor may be liable. The Contractor's insurance requirements are separate and distinct from the requirement of indemnification hereunder.
>
> **Notwithstanding the foregoing**, to the fullest extent permitted by law, the Subcontractor shall indemnify, defend, and hold harmless, the contractor, the Owner, and all of their officers, directors, agents, and employees (the "indemnitees"), from and against any and all claims, damages, losses, and expenses, including, but not limited to, Attorney's Fees (such legal expenses to

include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) **arising out of or resulting from bodily injury to, or sickness, disease or death** of, the subcontractor, any agent, employee, or representative of the subcontractor, or any of its subcontractors, **regardless of whether such claim, damage, loss, or expense is caused or is alleged to be caused in whole or in party, by the negligence of any of the Indemnitees**, it being the expressed intent of the contractor and the subcontractor that in such event the subcontractor is to indemnify, defend, and hold harmless the Indemnitees from the consequences of their own negligence, whether it is or is alleged to be the sole or concurrent cause of the bodily injury, sickness, disease, or death of the subcontractor, subcontractor's agent, employee, or representative, or the agent, employee, or representative of any of its subcontractors, the indemnification obligations under this paragraph shall not be limited by any limitation on the amount or type of damages, compensation, or benefits payable by or for Subcontractor under Workers Compensation acts, Disability Benefits Acts, or other employee Benefit acts, the subcontractor shall procure liability insurance covering its obligations under this Section 5.

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

The Defense and indemnification obligations under this agreement are not intended to and shall not require the subcontractor or others to indemnify or hold harmless a Registered Architect, Licensed Engineer, or an agent, Servant, or Employee of a Registered Architect or licensed Engineer from Liability for damage that is (1) caused by or results 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 the Rendition or conduct of Professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract, and (2) arises from personal injury or death, property injury, or any other expense that arises from personal injury, death, or property injury.

(*emphasis added*, all caps in the original) **(R. pp. 1482-83)**.

As the circuit court correctly held, the provisions of Section 5, as set forth above, are ambiguous, conflict with each other, and do not meet the elevated clear and unequivocal requirement.

Specifically, Paragraph 1 of Section 5 of the Master Agreement, which relates to property damage, is based on the AIA form indemnification language and the key phrase for ECC's arguments at the circuit court level was "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." The South Carolina Court of Appeals issued an opinion in Concord & Cumberland, 424 S.C. 639, 819 S.E.2d 166, that specifically recognized that this contract language fails as a matter of law where an indemnitee seeks indemnification for its own negligence because it does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own liability.

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

> The duty to defend under this Section 5 is independent and separate from the Duty to indemnify, and **the duty to defend exists regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees**. The duty to defend arises immediately upon presentation of a claim by any party indemnified hereunder and written notice of such claim being provided to subcontractor. **Subcontractor's obligation to indemnify, defend, and hold harmless under this Section 5 will survive the expiration or earlier termination of this agreement until it is finally determined by a Court of competent jurisdiction or arbitration panel that a claim against the contractor, the owner, and any of their officers, directors, agents, and employees for the matter indemnified hereunder is fully and finally barred by the applicable statute of limitations**.
>
> (*emphasis added*, all caps in the original) **(R. p. 1483)**.

Again, there is no legal basis for separating a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement, and BFS claims its attorney's costs and fees as damages in its complaint. BFS cannot argue that its claims for contractual indemnity are for those sums that are solely attributable to the negligence of ECC when its contractual indemnity provisions clearly call for ECC for indemnify BFS for 100% of its attorney's costs and fees regardless of who is found to be at fault, and its pleadings seek to recover from ECC for "**any liability BFS is found to have to Plaintiffs or to others**" and "**any sums for which BFS may be held liable to the Plaintiffs or to others**." **(R. p. 441)**. "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 would also have this Court ignore that the indemnity provisions in Section 5 conflict with other indemnity provisions hidden throughout the Master Agreement, including, *inter alia*, those hidden in Section 2, Section 3, and Section 8. For purposes of brevity and to spare the court from reviewing duplicative arguments, ECC hereby adopts by reference the arguments set forth in Brief of Respondent Hurley Services, Arguments, Section I, to the extent such arguments are not inconsistent herewith, as additional or alternative sustaining grounds for the lower court's decision. Rule 208(b)(6), SCACR; I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

II. THE PROVISIONS OF THE MASTER AGREEMENT VIOLATE THE ANTI-INDEMNITY STATUTE, S.C. CODE ANN § 32-2-10:

The contract between BFS and ECC contains multiple indemnity provision including those which require ECC to indemnify BFS for damages incurred as a result of BFS's sole negligence in violation of S.C. Code Ann. § 32-2-10. The relevant indemnity provisions provided in Section 5 of the Master Agreement between BFS and ECC, are provided in full in the section above.

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 fact, neither the plain language of S.C. Code Ann. § 32-2-10 nor Concord & Cumberland, exclude attorney's fees from being within the scope of an indemnity provision. Indeed, the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10 speaks solely of "damages" while limiting the ability of the Indemnitor to indemnify the Indemnitee. The Anti-Indemnity statute bars indemnity agreements wherein the indemnitee seeks to be indemnified from "…damages arising out of bodily injury or property damage…" proximately caused by the indemnitee's soles negligence. S.C. Code Ann. §32-2-10. Further, BFS claims its attorney's costs and fees as damages in its operative pleading. **(R. pp. 441, 443-45)**.

Section 5 explicitly calls for ECC to pay BFS's attorney's fees "regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees." Master Agreement, "§5 INDEMNITY" (*emphasis added*, all caps in the original) **(R. pp. 1482-83)**. This is an explicit violation of S.C. Code Ann. §32-2-10 as it requires ECC to indemnify BFS for BFS's sole negligence. The fact that it limits the claimed damages to attorney's fees, as opposed to a judgment cost, is immaterial because under South Carolina law, recoverable damages may include attorneys' fees when so provided by contract or statute. See Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966). However, when recovery of attorneys' fee is by contract, the contractual terms providing for indemnification of such damages must still comply with South Carolina law and, here, the Master Agreement fails to do so. See S.C. Code Ann. § 32-2-10 (setting forth limitations of contracts for indemnity against liability for damages entered into in connection with construction projects).

Additionally, the middle paragraph calls for the Subcontractors to "indemnify, defend, and

hold harmless" BFS "…regardless of whether such claim, damage, loss, or expense is caused or is alleged to be caused in whole or in party, by the negligence of any of the Indemnitees." This provision also obviously violates S.C. Code Ann. §32-2-10.

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. See D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45-6 (Ct. App. 2018). Further, our Court of Appeals has held that "[A]n illegal contract is unenforceable." Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, this Court held that the indemnification agreement "purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10" and went on to conclude that "[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton." Id.

Because the indemnity provisions of the contracts between BFS and ECC require ECC to indemnify BFS for BFS's sole negligence, BFS's contracts are illegal, and thus unenforceable and ECC is entitled to summary judgment.

Moreover, because BFS cites no specific authority in its brief that attorney's fees cannot fall within the scope of indemnity, this argument should be considered abandoned. Rule 208(b)(l)(E), SCACR (requiring the citation of authority in the argument portion of an appellant's brief); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal).

a. South Carolina's legal contract construction rules support striking the Master Agreement's indemnification clauses in their entirety.

"[F]or a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement." Davis v. Greenwood Sch. Dist., 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). "A contract is read as a whole document…." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). 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. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). Any uncertainty as to the meaning of any term "should be resolved against the party who prepared the contract", which here, is BFS. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 368 S.C. 198, 687 S.E.2d 714, 718 (Ct. App. 2009). "Words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed." Id.; see also Erie Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011) ("It is not the function of the court to rewrite contracts for parties."). Accordingly, South Carolina courts will not "blue pencil" an agreement and rewrite a contract's terms to make it comply with the law. Poynter Invs., Inc. v. Cent. Builders, 387 S.C. 583, 587-588, 694 S.E.2d 15, 18 (2010). Under South Carolina law, contracts "must stand or fall on their own terms." Id. If part of the contract's covenant fails, the agreement is unenforceable. Id.

In this case, the indemnification clauses set forth in the Master Agreement must fail altogether. Because at least one of the indemnification clauses fails, they all must fail. And the Court cannot rewrite the contract to save the legally defective indemnity clauses. The Master Agreement's indemnification clauses are unenforceable as a matter of law. Thus, the Court should grant ECC's Motion for Summary Judgment.

ECC raises this matter now as an alternative sustaining ground for the lower court's decision. I'On L.L.C., 338 S.C. 406, 526 S.E.2d 716.

III. THE CIRCUIT COURT CORRECTLY HELD THAT APPELLANT'S CLAIM FOR CONTRACTUAL INDEMNITY AGAINST ECC WAS BARRED BY COLLATERAL ESTOPPEL.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984).

Here, the Concord and Cumberland argument against BFS's contractual indemnity claims are identical to those previously raised and ruled upon in a prior action: Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al., case number 2018-CP-08-02547, filed in the Berkeley County Court of Common Pleas (the "Prior Action"). **(R. pp. 665-75)** (the "Newman Order"). In that case, the issues were actually litigated, directly determined, and necessary to support the judgment. In striking down BFS's Master Agreement's indemnity clauses, Judge Newman determined that the indemnification provisions "are confusing at best and deceptive at worst." **(R. p. 670)**.

The Master Agreement and indemnity provisions that BFS now wishes to use to support its claims against ECC involve the same agreement and indemnity provisions that were at issue in the Prior Action. BFS has already litigated the issue of the enforceability of its indemnification provisions, so it should not be permitted to now relitigate the same exact issue on the same exact

form contract.

Furthermore, in asking Judge Newman to reconsider the court's grant of summary judgment, BFS admitted in the motion papers that it signed and filed with the court that Judge Newman correctly found that the Master Agreements do not comply with the clear and unequivocal standard imposed by South Carolina law. **(R. pp. 677)**. Under South Carolina law, a party is bound by an admission contained in a court filing prepared and signed by his attorney. See Young v. Martin, 254 S.C. 50, 58, 173 S.E.2d 361, 365 (1970) (finding that judicial admissions by counsel for a party apply to matters of law, as well as factual issues, and where such a mixed question is admitted by a party's attorney the conclusion of law has been waived). Thus, BFS is barred from arguing contrary to this admission. Because Judge Newman has already ruled on the issues of the Concord and Cumberland defenses, summary judgment should be granted in ECC's favor.

Judge Roger Young recently ruled, in the matter of Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al., Case No. 2016-CP-10-03455 (S.C. Com. Pl. April. 29, 2020), that Judge Newman's Amended Order constitutes a prior final judgment that determined BFS's Master Agreement was unenforceable as a matter of law, and that the Newman Order precludes BFS from relitigating those issues. **(R. p. 682-86)** (the "Young Order"). A similar ruling was set forth in Pavic v. Carolina Cottage Homes, LLC, et al., Case No. 2019-CP-10-00772, Appellate Case No. 2021-000290 ("Pavic").

To invoke collateral estoppel, a party need not have also been a party in the prior action; the law only requires that the party *against* whom estoppel is applied have been a party to that action and had a full and fair opportunity to litigate the issue in the prior action. South Carolina Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627

(1991). Thus, not only is BFS collaterally estopped by the Newman Order and the Young Order, or Pavic, but it is also collaterally estopped from arguing that the Newman Order does not support a finding of collateral estoppel in this matter.

Neither BFS's appeal of the Newman Order nor BFS's appeal the Young Order undermine each Order's status as a final judgment as 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 Corporation 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).

A final judgment is one that "finally determines the rights' of the parties." First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992). Rule 201(a) SCACR, provides that an: "[a]ppeal may be taken, as provided by law, from any final judgment or appealable order." The status of the Newman Order, the Young Order, and the Order in Pavic as a final judgment is what makes the orders appealable in the first instance. Accordingly, there is no reason BFS can provide this Court which supports a finding that Summary Judgment is not warranted based on collateral estoppel.

IV. THE CIRCUIT COURT DID NOT ERR IN FAILING TO SEVER INDEMNITY PROVISIONS IN THE MASTER AGREEMENT:

a. Severability is not appropriate.

BFS cites Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 34, 644 S.E.2d 663, 673–74 (2007) in support of its argument against the findings that its Contracts are unconscionable. However, BFS seems not to have considered the full text of that opinion or its ultimate holding with regard to severance. In Simpson, the Court stated:

At the same time, courts have acknowledged that severability is not always an

> appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration 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." Booker v. Robert Half Intn'l Inc., 413 F.3d 77, 84–85 (D.C.Cir.2005) (citations omitted). Similarly, the general principle in this State is that 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).
>
> Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 34, 644 S.E.2d at 673–74 (citations in the body).

The Simpson Court went on to rule that the arbitration provision in question had to be severed in its entirety because severing multiple unenforceable provisions would amount to "rewriting" the provision. Id. at 34-35, 644 S.E.2d at 674 ("While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions."). It is important to note that State and Federal Courts nationwide have a strong policy of favoring arbitration, but due to multiple unenforceable provisions the Court ruled the entire provision had to be severed. Id. at n. 9. In this case there is no strong public policy favoring indemnity – to the contrary all of the public policy and statutes in issue specifically limit parties' ability transfer liability via contract. See S.C. Code Ann. § 32-2-10; Concord and Cumberland, 424 S.C. 639, 819 S.E.2d 166. In this case, the Court would have to sever multiple portions of multiple provisions the Master Agreement in order to come up with some rough facsimile of a legal indemnity provision. Arguably finer linguistic surgery, than the Court was willing to do in Simpson and in a scenario where our Courts are less inclined to do so. In short, severance is not appropriate in this case.

ECC hereby adopts by reference the arguments set forth in Brief of Respondent Hurley

Services, Arguments, Section IV, and Brief of Respondent AC Construction, Arguments, Section III, to the extent such arguments are not inconsistent herewith, as additional or alternative sustaining grounds for the lower court's decision. Rule 208(b)(6), SCACR; I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

b. Res judicata prevents BFS from relying on the severability provision of the Master Agreement.

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.

Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (alteration in original) (citations omitted), cited with approval in Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). Res judicata may be applied if (1) a final, valid judgment was entered on the merits of the first suit; 2) the parties to both suits are the same; and 3) the subsequent action involves matters properly included in the first action. Plott v. Justin Ent., 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. App. 2007).

As discussed in Section III above, BFS and ECC were parties to BFS v. MI Windows, wherein Judge Newman granted ECC's motion for summary judgment as to BFS's cross-claim for contractual indemnity. Thus, the first and second requirements of res judicata are met. 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.); see e.g., Hapgood v. City of Warren, 127 F.3d 490 (6th Cir. 1997) ("the pendency of an appeal, however, does not prohibit application of claim preclusion. The prior state court judgment remains 'final' for preclusion purposes, unless or until overturned by the appellate

court."); Planned Parenthood of the Columbia/Willamette, Inc. v. Bray (In re Bray), 256 B.R. 708, 711 (Bankr. D. Md. 2000) (internal citations omitted) ("pendency of an appeal does not affect the finality of a judgment for purposes of res judicata or collateral estoppel.").

In determining whether second prong is satisfied, courts in South Carolina should consider: (1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action. Judy v. Judy, 393 S.C. at 173, 712 S.E.2d at 414 (holding these four elements should be considered merely as factors in a conceptual framework to ensure no one is twice sued for the same cause of action.")

Like the present case, in BFS v. MI Windows, BFS asserted a derivative cause of action against ECC for contractual indemnification pursuant to the terms of the Master Agreement, and BFS also sought "full indemnity" from ECC for any liability it was found to have to Plaintiffs' in the underlying case. Additionally, in both cases the question before the court was whether the contractual indemnification provisions in the Master Agreement met the clear and unequivocal standard set forth in Concord & Cumberland such that BFS could recover from ECC for BFS's own negligence where BFS sought "full indemnity" from ECC for any liability BFS was found to have to Plaintiffs. Moreover, the evidence – i.e., the Master Agreement between BFS and ECC – is the same in both cases, and both cases arise out of the same transaction or occurrence – i.e., BFS and ECC entering into the Master Agreement.

Given that the questions of law, facts, evidence, and subject matter at issue in BFS v. MI Windows are the same as those at issue in the present case, res judicata should apply and the court should not use the severability provision to re-write Master Agreement to bring its terms in

accordance with the clear and unequivocal standard as BFS could have raised the provision in BFS v. MI Windows but failed to do so.

ECC raises res judicata now as an alternative sustaining ground for the lower court's decision. I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

V. THE MASTER AGREEMENT IS A CONTRACT OF ADHESION, UNCONSIONABLE, AND OPPRESSIVE:

Finally, BFS argues that its contracts are not unconscionable and unenforceable. ECC joins in the arguments of the other Respondents as to why BFS' contracts are unconscionable and unenforceable. However, ECC, briefly, sets forth why it is entitled to benefit from this ruling if affirmed.

a. It will be the law of the case that BFS's Master Agreements are unconscionable if this court affirms.

If the lower court rulings are upheld, they will become the Law of the Case and will apply, to the extent the contracts are the same, to all parties regardless of whether or not the Lower Court rulings mentioned one issue or another in each order. See Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."); Hudson v. Lancaster Convalescent Ctr., 393 S.C. 1, 7, 709 S.E.2d 65, 68 (Ct. App. 2011) (stating a circuit court ruling that is appealed but subsequently withdrawn is the law of the case); see also Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (holding an un-appealed ruling, right or wrong, is the law of the case). Thus, the "discrepancies" in the various orders BFS focuses so heavily upon at various stages of its brief are immaterial.

CONCLUSION

It is clear that BFS seeks indemnification for its own negligence. The lower court's findings of facts and application of the "clear and unequivocal" standard was proper and is supported by the record on appeal. The indemnity provisions in the Master Agreement are confusing, ambiguous, irreconcilable, illegal, violate public policy and are unenforceable. The provisions were drafted by BFS such that they are inextricably linked, so it is impossible for the Court to use the Severability clause to remove one or more from the Subcontract without rewriting the subcontract. Thus, BFS' claims fail as a matter of law. Wherefore, ECC hereby requests that this Court AFFIRM the findings and Order of the lower court in favor of Respondent ECC.

Respectfully Submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

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

2021-001050

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

v.

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

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

v.

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

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

FINAL BRIEF OF RESPONDENT, POHLMAN QUALITY EXTERIORS, INC.

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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 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. Pohlman submits this brief in response to BFS's brief insomuch as said brief presents issues related to the Order Granting Partial Summary Judgment to Pohlman.

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), SCRCP. 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).

ARGUMENTS

Pohlman will focus this brief solely on the issues raised by BFS that relate to Judge McCoy's Order Granting Partial Summary Judgment to Pohlman. Those issues are set forth as Arguments I, II, and IV in Appellant's Brief. More specifically, this discussion will focus on the Indemnity provision of the form Subcontract drafted by BFS, the 2006 Master Subcontract Agreement (hereinafter the "Subcontract") between BFS and Pohlman, which BFS refers to as the "Later Contract." (R. pp. 1519-1520) The outcome of this appeal turns on the Court's review and possible severance of the first two 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 Pohlman "full indemnification for any liability" and for "any sums for which BFS may be held liable," which includes BFS's own negligence.

(R. pp. 450-453).

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 Pohlman for its own negligence. (Br. of Appellant, pp. 10-12, 14, 17, 23, 26) However, that position is inconsistent with the claims BFS has asserted against Pohlman.

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 Pohlman (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 Pohlman 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 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 Pohlman (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.

(Br. of Appellant, 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 Pohlman, so that is all BFS seeks from Pohlman by way of indemnification." 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, as is proven by BFS's Third-Party Complaint, BFS is seeking indemnification from Pohlman 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 Pohlman 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 Pohlman for "any sums for which BFS may be held liable", BFS is clearly seeking recovery from Pohlman 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 dreams of a world in which there can be no path to liability for BFS because of its own negligence. (Br. of Appellant, pp. 13-14) That world may exist in BFS's dreams, but that is not the reality of the world in which this case will be tried. As shown, 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 Pohlman 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 are the first two paragraphs of the Indemnity provision of the form Subcontract created by BFS. As used in these paragraphs, the word "SUBCONTRACTOR" refers to Pohlman and the word "CONTRACTOR" refers to BFS.

SECTION 5. INDEMITY

TO THE FULLEST EXTENT PERMITTED BY LAW, **THE SUBCONTRACTOR SHALL INDEMNIFY**, DEFEND, AND HOLD HARMLESS **THE CONTRACTOR**, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES **FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER,** INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) **ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.** THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW. **THE SUBCONTRACTOR SHALL INDEMNIFY**, DEFEND, AND HOLD HARMLESS, **THE CONTRACTOR**, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), **FROM AND AGAINST ANY AND ALL CLAIMS**, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE

INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) **ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES**, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE. WHETHER IT IS OR IS ALLEGED TO BE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFITS ACTS, OR OTHER EMPLOYEE BENEFITS ACTS. THESE SUBCONTRACTORS SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5. ***[emphasis added]***

(R. pp. 1519-1520).

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).

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. Within the Indemnity provision of the form Subcontract it created, BFS states two different standards for Pohlman's indemnification exposure. These two paragraphs are in conflict with each other and cannot be reconciled. The conflict between these two paragraphs 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 Pohlman agreed to indemnify BFS for its own negligence.

BFS argues that the first two paragraphs of the Indemnity provision must be read separately, and that if read separately, no conflict or ambiguity exists. (Br. of Appellant, p. 20) It is likely that all ambiguities in contracts would disappear if the Court was allowed to put on blinders and interpret one paragraph 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 standards for indemnification stated in the paragraphs of the 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).

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 practically mirrors 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). Section 32-2-10 forbids the indemnification of an indemnitee for its own negligence.

Applying that same reasoning to the mirrored language in the Subcontract between BFS and Pohlman, 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 Pohlman 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. 119) BFS asserts that the solution for reconciliation is for the Court to sever the offending paragraph and leave the remainder of the contract intact. (Br. of Appellant, p. 39) BFS points to the Severability provision in the Subcontract as the tool which the Court can use to remove the second paragraph 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 well-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).

The Indemnity provision of the contract contains four paragraphs that are not labeled in any way other than the word "Indemnity" placed above the section. (R. pp. 1519-1520) 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 paragraphs dealing with indemnity under a single, broad heading without subtitles, instructions, or anything which would allow Pohlman, 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 two paragraphs thrown together 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" paragraphs of the Indemnity provision set forth two different standards for indemnification for similar claims and cannot be reconciled, those two paragraphs are inextricably linked, and they cannot be separated. If the Severability clause is invoked, then both the first and second paragraphs 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. (Br. of Appellant, 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 both the first paragraph and the second paragraph 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 allows the Court to conclude:

- had the Order included a discussion of the Severability clause, that discussion would not have changed the outcome of the motion; and
- 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 ground for granting a new trial or for setting aside a verdict or 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 or in any way affect 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

BFS is seeking indemnification from Pohlman 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. On one hand, the first and second paragraphs of the Indemnity provision are ambiguous, cannot be reconciled, and they violate public policy and are unenforceable. On the other hand, 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 the other from the Subcontract, then the Court would be re-writing the contract.

In the context of this appeal, BFS is, literally, the author of its own fate. BFS drafted the form Subcontract and the complicated, confusing, and ambiguous paragraphs of the Indemnity provision. Those paragraphs are either void and unenforceable, or both must be removed from the Subcontract. Either way, the result is the same - the only viable cause of action asserted by BFS against Pohlman which survives is the cause of action for Common Law Indemnification.

Due to the forgoing, Pohlman hereby requests that this Court AFFIRM the findings and Order of Judge McCoy Granting Partial Summary Judgment to Pohlman Quality Exteriors, Inc.

Respectfully submitted,

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RECEIVED
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
Honorable Jennifer B. McCoy, Circuit Court Judge

2021-001050

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; 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 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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CERTIFICATE OF COUNSEL

I, as the undersigned counsel for Respondent Pohlman Quality Exteriors, Inc., certify that the Final Brief of Respondent Pohlman Quality Exteriors, Inc. complies with the requirements of SCACR Rule 211(b).

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November 11, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

v.

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

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

FINAL BRIEF OF RESPONDENT EAST COAST CARPENTRY/ CARPENTRY COMPANY

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INTRODUCTION

The crux of this appeal is an inquiry into the ability of Appellant Builders FirstSource-Southeast Group, LLC ("BFS") to bring Contractual and Equitable Indemnity claims against its subcontractors ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co, LLC, AC Construction Corp and/or AC Construction Inc., L&G Construction Group, LLC, WS Contractors, LLC, Pohlman Quality Exteriors, Inc., Palmetto Trim and Renovations, LLC, Edward Bruce Witham, and East Coast Carpentry Company (also known as East Coast Carpentry)(herein after as "East Coast") (collectively as "Subcontractors"). BFS has conceded that its claims for Negligence, Breach of Contract, and Breach of Warranty fail as a matter of law pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 776 S.E.2d 434, (Ct. App. 2015) and has failed to appeal the dismissal of those claims. BFS also has tacitly conceded that its contractual indemnity provisions violate the "clear and unequivocal" standard of Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 176 (Ct. App. 2018), reh'g denied (Oct.

[2] Appellant's Argument III is not applicable to this Respondent.

18, 2018) as well as the Anti-Indemnity Statute SC Code §32-2-10, by abandoning, in its opposition to the Respondents' Motions – but not in its operative pleadings, the argument that it is entitled to indemnification for damages/legal fees from the Concurrent Negligence of BFS and Respondents. Instead, BFS now claims that it seeks indemnification only for the sole negligence of its subcontractors without running afoul of the confines on indemnity in a construction contract. Because BFS has failed to identify any basis upon which this Court should reverse the circuit court's grant of summary judgment in East Coast's favor on this issue, the circuit court's determination should be affirmed.

STATEMENT OF THE CASE

BFS filed third-party claims against East Coast on November 11, 2019. BFS Amended Answer to Fourth Amend. Compl. BFS asserted claims against East Coast for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence. Id. BFS's cross-claims allege that BFS is entitled to be indemnified in the amount which BFS "may pay in satisfaction" of Plaintiffs' claim "plus [BFS's] costs for defense, inclusive of attorneys' fees", without regard to the fault of either ECC or BFS. (R. pp. 441, 443, 444, 445).

STATEMENT OF FACTS[3]

This appeal arises from the construction and development of the Retreat at Charleston National alleged defects in that project. BFS is alleged to have supplied and installed the windows and doors on the Subject Property. BFS in turn alleged that the Subcontractors installed the windows and doors at the Subject Property. According to BFS, East Coast executed a BFS "Master Subcontractor Agreement" dated October 21, 2005 (hereafter "Master Agreement"). The Master

[3] For the sake of brevity, Counsel of East Coast adopts by reference, but does not repeat the arguments of and the full statement of the Case and the Facts as set forth by the other Respondents.

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. The Agreement is a "Hub and Spoke"[4] type agreements where the baseline contract does not commit anyone to anything (and, arguably, does not meet the basic requirements of a contract) until a purchase order is issued, accepted, and payment is made, but the Agreement sets the terms of the relationship in the event it is consummated/continued.

LEGAL STANDARD

This Court utilizes the same standard of review as the trial court to review the grant of summary judgment. See e.g., Knight v. Austin, 396 S.C. 518, 722 S.E.2d 802 (2012). In determining whether any triable issues of fact exist, "the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329–30, 673 S.E.2d 801, 804-805 (2009). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Manley v. Manley, 291 S.C. 325, 329, 353 S.E.2d 312, 316 (Ct. App. 1987). "[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to

[4] This is not a term of art but merely a description counsel has come up with to explain how the master trade agreement picks up purchase orders as the contractor-subcontractor relationship rolls forward.

establish the existence of an essential element of that party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

ARGUMENT

I. BFS'S CONTRACTS VIOLATE THE ANTI-INDEMNITY STATUTE, SC CODE § 32-2-10

At the heart of BFS's appeal is the contention that it can re-write its contract and its pleadings. The contract between BFS and East Coast contains multiple indemnity provision including those which require ECC to indemnify BFS for damages incurred as a result of BFS' sole negligence in violation of S.C. Code Ann. § 32-2-10. The relevant indemnity provision, which is provided in Section 6 of the contract between BFS and ECC, 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, indemnity, 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*)

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). Id. These provisions explicitly violation of SC Code Ann. §32-2-10 as they require East Coast to indemnify BFS for BFS' sole negligence.

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

Because the indemnity provisions of the contracts between BFS and East Coast require East Coast to indemnify BFS for BFS's sole negligence, BFS's contracts are illegal, and thus unenforceable.

Therefore, Respondents respectfully assert that no further inquiry is necessary with regard to the failure of Appellant's contractual indemnity claims.

II. BFS' CLAIMS FOR CONTRACTUAL INDEMNITY ARE BARRED BY THE CONCORD AND CUMBERLAND HOLDING.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to recover for an indemnitee's concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018), reh'g denied (Oct. 18, 2018) (affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity cross-claims of contractor based on application of the clear and unequivocal standard). The provision relevant to this argument section is set forth in full above. The key phrase, for our purposes is "to the extent of liability resulting from Subcontractor's negligence or willful misconduct". Though the wording is slightly different in our case, the key language is substantially the same.

The South Carolina Court of Appeals issued an opinion in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC that is directly on point to this case. That appeal dealt almost exclusively with the interpretation of contractual indemnity provisions. The Court of Appeals noted that the standard for upholding a Contractual Indemnity provision is "clear and unequivocal." In that case in the underlying Circuit Court Opinion, Judge Newman held that:

> In order for Superior and C&C to defeat Muhler's and Weather Shield's motions for summary judgment on the contractual indemnity issue, they have to meet the very high standard of eliminating any possibility that the contract language on which they rely can be read to limit indemnification to the indemnitor's own negligence. In other words, in order to prevail on their contract claims, Superior and C&C must 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. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contract claims as a matter of law.

Concord and Cumberland Horizontal Property Regime v Concord & Concord & Cumberland, LLC, No. 2010-CP-10-3026, 2014 WL 12783397, at *3 (S.C. Com. Pl. Oct. 06, 2014).

One of the two indemnity provisions interpreted by the Court was based on the AIA provision we are dealing with (the underlined provisions are identical to the AIA A201 Indemnity Provision):

> 12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that
>
> (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, **to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor** or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

(b) [omitted].

Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018), reh'g denied (Oct. 18, 2018).

If anything the language of BFS's indemnity provision is less clear than the language in Concord and Cumberland, because it does not have the qualifying phrase "caused in whole or in part". Regardless, the Court has already found this Indemnity language to be invalid.

III. ADRESSING APPELLANT'S ARGUMENTS I, AND II:

Sections I, and II of BFS's arguments both focus on the lower court's dismissal of the contractual indemnity claim. At the heart of all these argument subsections, is the contention that BFS is

seeking to be indemnified only for the sole negligence of its subcontractors.[5] BFS asserts that the trial court erred by dismissing the entire contractual indemnity claim and that such was an error of law contending that the question of whether or not the liability of BFS was the result of the sole negligence of Respondents is a genuine issue of material fact precluding grant of summary judgment on their claims for "full contractual and common law indemnification"…entitling BFS to recover from East Coast its attorney's fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from the East Coast any sums for which BFS may be held liable to the Plaintiffs, and/or to others in such action." (R. pp.449). BFS's position is unsupported by its contracts, its pleadings, South Carolina case law, and the relief it requests as is set forth below.

A. BFS'S CONTRACT DOES NOT SUPPORT THEIR ARGUMENTS

The above indemnity language is based on the AIA form indemnification language and the key phrase for East Coast's arguments at the Circuit Court level was "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." The South Carolina Court of Appeals issued an opinion in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 176 (Ct. App. 2018), reh'g denied (Oct. 18, 2018), that specifically recognized that this contract language fails as a matter of law because it does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own liability.

However, BFS, contending that it can rewrite the contract and its pleadings to seek merely indemnification for the sole negligence of ECC, would have the inquiry end here without regard to the first paragraph of this Section 6 of the contract. The first paragraph of Section 6 states:

[5] BFS also refers to its Subcontractors "own negligence" and "own sole negligence"

> 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.
> (R. pp.533).

Again, 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 says "Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages". The first sentence betrays BFS' true intentions - for 100% of its attorneys' costs and fees regardless of who is found to be at fault to be paid by its subcontractor. "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*)*.

B. BFS IS BOUND BY THE ALLEGATIONS OF ITS OPERATIVE PLEADING.

BFS claims its attorneys' costs and fees as damages in its operative complaint. "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. BFS seeks "full contractual indemnity for any liability BFS is found to have to the Plaintiffs" for "its attorneys' fees, costs, and other expenses incurred in defending this action" and "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.449). The

only way that BFS can achieve such as result is for the Subcontractors to indemnify BFS for its concurrent negligence (assuming BFS was not solely negligent). BFS's pleadings betray their current arguments and show the true character of their claims.

Further, BFS has sued eight subcontractors as well as the window manufacturer. See generally BFS's Summons and Complaint. It is, quite simply, impossible for us to be dealing with anything but concurrent negligence. BFS cannot recover from all of these parties without recovering purely for damages created by the concurrent negligence of BFS and its subcontractors. There is no way that East Coast will be found solely negligent and solely responsible for the sums BFS seeks to recover in indemnity.

In short, BFS's contract, pleadings, oral arguments, and the Lower Court's order all contemplate BFS seeking to recover in indemnity for damages resulting exclusively from the concurrent negligence of the parties. BFS admits that its contract language does not meet the heightened "clear and unequivocal" standard. The lower court's ruling should be affirmed.

C. BFS IS STATUTORILY RESPONSIBLE FOR THE WORK OF RESPONDENT.

It is undisputed that BFS holds an unlimited commercial general contractor's license (License No. 112969). SC Code Ann. § 40-11-270 allows licensed contractors to use unlicensed subcontractors to perform their work. However, it also requires the licensed contractor, here BFS, to be provide supervision and it says that the contractor is "fully responsible" for the actions of the unlicensed subcontractor. In this case, nine of the thirteen subcontractors, including East Coast, sued by BFS are not licensed. BFS is 'fully responsible' for its unlicensed subcontractors, thus it cannot be adjudged without fault and cannot succeed on its claims in indemnity. This is in keeping with the universal public perspective on hiring contractors. Consider what anyone, layperson or the most sophisticated construction company on the planet, would do if they hired a

contractor to install windows, for instance BFS, and that company hires a subcontractor (or sub-subcontractor) to perform the labor, and something goes wrong with the installation. The layperson, the construction lawyer, or the sophisticated construction company, always calls the contractor, here BFS, that they initially hired – not the subcontractor.

IV. ADRESSING APPELLANT'S ARGUMENT IV:

In Section IV, BFS argues that the Lower court erred by holding that it lacked the authority to sever provisions of the contract which are illegal or otherwise unenforceable. To the extent that this was an erroneous holding, it was a harmless error because the contractual indemnity provisions are "so infected with unconscionability that [they] must be scrapped entirely…" Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020). Finally, Counsel for Pohlman Quality Contractors and Palmetto Trim and Renovation have done an excellent job briefing the issue of severance. East Coast adopts their arguments (on that issue and all others) and offers the following in addition to their positions:

A. BFS HAS NOT PRESERVED THE ISSUE OF SEVERANCE FOR THE 2005 CONTRACT ON APPEAL.

Section 4(A) of BFS' initial brief deals with the issue of severability. BFS' argument seems to mix provisions of the 2005 and 2008 Contracts. It cites the severability provision of the 2005 Contracts and the 2008 indemnity provision and argues that various portions of the Later Contract could be severed and BFS would still be entitled to pursue its claim for contractual indemnity. However, at no point does BFS argue a 'severed version' of the 2005 Contract which could be potentially viable. Because BFS has failed to propose a potentially viable 'severed version' of its Indemnity Provision with East Coast to the Trial Court or in its Initial Brief, this argument and its contractual indemnity claims must fail. Hunter v. Staples, 335 S.C. 93, 103, 515 S.E.2d 261, 267 (Ct. App. 1999) citing Creech v. South Carolina Wildlife & Marine Resources Dep't, 328

S.C. 24, 491 S.E.2d 571 (1997) (It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.) Id. citing Continental Ins. Co. v. Shives, 328 S.C. 470, 492 S.E.2d 808 (Ct.App.1997) (An appellant may not use the reply brief to argue issues not argued in the initial brief.)

B. SEVERANCE IS NOT POSSIBLE WITHOUT RE-WRITING THE CONTRACT.

BFS cites Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 34, 644 S.E.2d 663, 673–74 (2007) in support of its argument against the findings that its Contracts are unconscionable. However, BFS seems not to have considered the full text of that opinion or its ultimate holding with regard to severance. In Simpson, the Court stated:

> At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration 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." Booker v. Robert Half Intn'l Inc., 413 F.3d 77, 84–85 (D.C.Cir.2005) (citations omitted). Similarly, the general principle in this State is that 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).

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 34, 644 S.E.2d 663, 673–74 (2007)(citations in the body)

The Simpson Court went on to rule that the arbitration provision in question had to be severed in its entirety because severing multiple unenforceable provisions would amount to "rewriting" the provision. Id. ("While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions." It is important to note that State and Federal Courts nationwide have a strong policy of favoring

arbitration, but due to multiple [3] unenforceable provisions the Court ruled the entire provision had to be severed. Id. at Fn. 9. In this case there is no strong public policy favoring indemnity – to the contrary all of the public policy and statutes in issue specifically limit parties' ability transfer liability via contract. See generally S.C. Code Ann. § 32-2-10 & Concord and Cumberland. In this case, the Court would have to sever multiple portions of multiple provisions BFS' Contracts in order to come up with some rough facsimile of a legal indemnity provision. Arguably finer linguistic surgery, than the Court was willing to do in Simpson and in a scenario where our Courts are less inclined to do so. In short, Severance is not appropriate in this case.

V. ADDRESSING APPELLANT'S ARGUMENT V:

Finally, BFS argues that its contracts are not unconscionable and unenforceable. East Coast joins in the arguments of the other Respondents as to why BFS' contracts are unconscionable and unenforceable. However, East Coast, briefly, sets forth why it is entitled to benefit from this ruling if affirmed.

A. IT WILL BE THE LAW OF THE CASE THAT BFS'S CONTRACTS ARE UNCONSCIONABLE IF THIS COURT AFFIRMS

If the lower court rulings are upheld, they will become the Law of the Case and will apply, to the extent the contracts are the same, to all parties regardless of whether or not the Lower Court rulings mentioned one issue or another in each order. See Segarra v. Farm Bur. Ins. Co., No. 2012-UP-090, 2012 WL 10830188, at *1 (S.C. Ct. App. Feb. 22, 2012) citing Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."); Also citing Hudson v. Lancaster Convalescent Ctr., 393 S.C. 1, 7, 709 S.E.2d 65, 68 (Ct.App.2011) (stating a circuit court ruling that is appealed but subsequently withdrawn is the law of the case); see

also Buckner v. Preferred Mut. Ins. Co., 255 S .C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (holding an unappealed ruling, right or wrong, is the law of the case). Thus the 'discrepancies' BFS in the various orders BFS focuses so heavily upon at various stages of its brief are immaterial.

CONCLUSION

Ironically, it is clearer that BFS seeks indemnification for its own negligence, than the language it relies upon to do so. The Lower Court's application of the "clear and unequivocal" standard was proper. The Indemnity provisions are confusing, ambiguous, irreconcilable, illegal, violate public policy and are unenforceable. The provisions were drafted by BFS such that they are inextricably linked, so it is impossible for the Court to use the Severability clause to remove one or more from the Subcontract without rewriting the subcontract. Thus, BFS' claims fail as a matter of law. Wherefore, East Coast hereby requests that this Court AFFIRM the findings and Order of the Lower Court in favor of Respondent East Coast. Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge
Civil Action No. 2016-CP-10-03783

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.; CollenBatissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado, ……Defendants,

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

v.

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

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

FINAL BRIEF OF RESPONDENT WS CONTRACTORS, LLC

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VI. Whether Builders FirstSource-Southeast Group, LLC's master subcontractor agreement and/or the indemnity and duty to defend provisions found therein are unconscionable.

STATEMENT OF THE CASE

This litigation arises out of alleged construction defects at The Retreat at Charleston National Country Club, a third-one building townhome community in Mount Pleasant, South Carolina (hereinafter referred to as "the Project").

Plaintiffs initiated suit against the developer, Winston Carlyle Charleston National, LLC, the general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually, on July 22, 2016, alleging negligence, gross negligence, breach of express and implied warranties

as to all defendants as well as breach of fiduciary duties with respect to the developer. **(R. pp. 174-186).**

The developer and/or general contractor subcontracted a portion of the work on the Project to Appellant Builders FirstSource-Southeast Group, LLC ("BFS"). **(R. p. 380, ¶ 9 – R. p. 381, ¶ 10; R. p. 374, ¶ 3).** BFS is a Delaware limited liability company who furnishes building materials and provides turn-key contracting and installation services. **(R. p. 374, ¶ 3; R. p. 875, lines 11-16).** While BFS did not serve as the general contractor on this Project, it holds an unlimited general contractor's license issued by the South Carolina Department of Labor, Licensing, and Regulation. **(R. p. 875, lines 11-16; R. p. 879).**

On May 1, 2017, Plaintiffs filed an amended complaint adding BFS as an additional defendant. **(R. p. 202, ¶ 57 – R. p. 207, ¶ 64).** Plaintiffs allege BFS provided the framing, window, and door materials, including all related components, and to have installed such elements of the Project. **(R. p. 351, ¶ 9 – R. p. 352, ¶ 10).** Plaintiffs allege BFS supplied defective materials[1] and failed to install the materials in accordance with the plans, specifications, and applicable building codes. **(R. p. 202, ¶ 57 – R. p. 207, ¶ 64).**

BFS responded by denying Plaintiffs' allegations and bringing its subcontractors into this suit as third-party defendants. **(R. p. 208).** Respondent WS Contractors, LLC ("WSC") served as one of BFS' subcontractors on the Project and performed work on certain buildings between 2012 and late 2014.[2] **(R. pp. 811-825).**

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[1] By way of example, Plaintiffs' forensic expert specifically contends that the windows selected have inadequate design pressure ("DP") ratings which require replacement of the windows. **(App. Br. p. 1).** BFS supplied the windows for the Project. **(R. p. 864).**

[2] WSC was only involved in the construction of Buildings 22 through 31 at the Project. **(R. pp. 822-825).**

Through subsequent amended pleadings, Plaintiffs asserted direct claims against WSC and other third-party defendants. **(R. p. 366, ¶ 86 – R. p. 368, ¶ 93).** Accordingly, BFS's claims against WSC and its other subcontractors, including the Respondents to this appeal, are cast as crossclaims which sound in contractual and common-law indemnity, breach of express and implied warranties, breach of contract, and negligence. **(R. p. 437, ¶ 124 – R. p. 445, ¶ 155).**

Respondent WSC is uniquely situated among other Respondents to this appeal in that it settled with Plaintiffs in December 2019 and, in doing so, procured from Plaintiffs an issue release in favor of BFS, the developer, and the general contractor relating to or arising from WSC's scope of work on the Project and for WSC's acts, omissions, labor, materials, work, or involvement with the Project. **(R. p. 813, ¶ 6).** WSC and its subcontractors paid Plaintiffs $1,000,000.00 to resolve Plaintiffs' claims against them and as consideration for an issue release in favor of BFS. **(R. p. 812, ¶ 2).**

WSC filed a motion for summary judgment as to BFS's crossclaims on January 22, 2020. **(R. p. 708).** WSC amended its motion for summary judgment twice, providing additional arguments and exhibits with each amended notice and motion.[3] **(R. p. 737; R. p. 781).** WSC further supported its motion for summary judgment by way of its memorandum of law filed on October 30, 2020. **(R. p. 848).** BFS did not file a memorandum or brief in opposition to WSC's motion for summary judgment or any affidavits or exhibits.

The Honorable Jennifer B. McCoy heard WSC and the subcontractor-Respondents' motions for summary judgment as to BFS's crossclaims on November 6, 2020. **(R. p. 1386).** BFS admitted its causes of action for breach of express and implied warranties, breach of contract, and

[3] WSC made the applicable BFS Master Subcontractor Agreements, its Settlement Agreement, General Release, and Issue Release with the Plaintiffs, and certain circuit court orders part of the record by filing the same as exhibits to its October 19, 2020 amended motion for summary judgment. **(R. pp. 785-845).**

negligence failed as a matter of law and were subject to dismissal. **(R. p. 1392, lines 4-21; R. p. 1081; R. pp. 1182-1183).** The dismissal of those claims is not part of this appeal. BFS solely appeals the dismissal of its contractual indemnity claim.

At the hearing on November 6, 2020, BFS's counsel announced, repeatedly, that BFS was only seeking indemnity against liability from subcontractors for damages occasioned by its subcontractors. **(R p. 1416, lines 11-16; R. p. 1417, lines 12-14; R. p. 1422, lines 20-25; R. p. 1424, lines 7-13).** BFS's counsel characterized attorney's fees as "a consequence of damages occasioned by a claim of indemnity" and explained BFS's "claim for attorney's fees is for attorney's fees arising out of the negligence that we contend Freeman (sic.) and the other subcontractors were guilty of, which has redoubted (ph) to our detriment in the form of liability to third parties." **(R. p. 1422, lines 8-14).** BFS's counsel argued BFS was entitled to seek an imposition of attorney's fees under the contractual indemnity provisions contained in BFS's master subcontractor agreement, even if certain contractual indemnity provisions of the master subcontract agreement violate South Carolina law. **(R. pp. 1426-1428).**

WSC argued that BFS's limitation of its claimed damages to attorney's fees and costs incurred in its defense does not change that the contractual indemnity provisions upon which BFS relies require WSC to indemnify BFS for their attorney's fees and costs even if BFS is solely at fault, which violates South Carolina law. **(R. p. 1409).** WSC joined in and adopted the arguments made by counsel for Respondents ECC Contracting and East Coast Carpentry, to the extent those arguments apply to the claims against WSC. **(R. p. 1404).**

Judge McCoy granted summary judgment to WSC on May 10, 2021 via a Form 4 Order on all of BFS's crossclaims but its equitable indemnity claim. **(R. p. 16).**

On July 29, 2021, Judge McCoy entered an 18-page formal order granting summary judgment to WSC on *all* claims asserted by BFS. **(R. pp. 84-101).** Because these same indemnity issues have been adjudicated, adversely to BFS, in multiple other lawsuits against its subcontractors, Judge McCoy found that BFS had a full and fair opportunity to litigate identical issues in those prior cases and that in each of those cases, the contract terms were actually litigated, directly determined, and the issues were essential to the judgments rendered therein. **(R. pp. 89-92).** Therefore, the doctrine of collateral estoppel precludes BFS from re-litigating the issues determined in those prior cases, including whether the indemnity provisions contained in its master subcontractor agreements fail to meet the clear and unequivocal standard, violate South Carolina public policy, and/or fail to meet the requirements of South Carolina law. **(R. pp. 89-92).**

In addition to finding the doctrine of collateral estoppel was applicable and barred BFS's claims, Judge McCoy also independently found the indemnity and duty to defend provisions of the BFS master subcontractor agreement are unclear, unconscionable, unintelligible, conflicting, and are unenforceable as a matter of law. **(R. p. 99).** Judge McCoy specifically found the indemnity and duty to defend provisions violate South Carolina public policy and S.C. Code § 32-2-10, making them illegal and unenforceable. **(R. p. 99).**

With respect to the equitable indemnity claim, Judge McCoy found the claim fails as a matter of law because the issue release absolves and releases BFS from all liability stemming from any acts or omissions of WSC; therefore, any prospective liability of BFS to Plaintiffs relative to the Project would necessarily be derived from BFS's negligence or fault without any reference to WSC. **(R. p. 99).**

On August 9, 2021, BFS filed a motion for reconsideration of the July 29, 2021 order. **(R. pp. 1373-1385).** In its motion for reconsideration, BFS states it is "seeking only recovery of

attorney's fees and costs, expended in defending against the plaintiffs claims." **(R. p. 1379).**[4]

Judge McCoy denied BFS's motion for reconsideration on August 23, 2021. **(R. pp. 137-138).** On September 22, 2021, BFS filed its Notice of Appeal of the July 29, 2021 order granting summary judgment to WSC and the August 23, 2021 order denying BFS's motion for reconsideration. **(Notice of Appeal).**

BFS has not amended its pleadings to conform to the position that it took at the hearing and in its Motion for Reconsideration. It has not released or stipulated to the partial dismissal of its claims other than what it stated in writing in its Motion for Reconsideration. **(R. p. 1379).**

STATEMENT OF THE FACTS

BFS's opening Brief does not discuss certain facts in the record that are relevant to the issues presented for review with respect to BFS's claim against WSC for indemnity. Those facts relate to three subjects, which are addressed in this section: (1) WSC's settlement with Plaintiffs and procurement of an issue release in favor of BFS; (2) the indemnity provisions contained in "Version – 5/17/06" of BFS's master subcontractor agreement; and (3) other circuit court orders considering the enforceability of the same indemnity provisions in this case and in other cases.

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[4] BFS was clear in its Motion for Reconsideration that it is only seeking to recover a portion of its attorney's fees and costs from WSC.

However, BFS does not reaffirm its limitation of claims against WSC in its opening Brief. To the contrary, BFS asserts that it is seeking indemnification, and corresponding damages, against liability for loss or damage arising from Respondents' negligence (with no distinction as to WSC). **(App. Br. p. 11).** Its prior limitation of its claims against WSC are not separately addressed in BFS's Statement of the Case. **(App. Br. pp. 1-4).** Mere reference to BFS's opening Brief would give no indication that BFS has, in fact, limited its claim for indemnification from WSC to the defense costs.

As such, the facts relative to BFS's claim for indemnity against WSC are fully addressed herein; however, the issues in this appeal should be limited to whether BFS can recover the attorney's fees and costs it expended in defending against the Plaintiffs' claims arising out of the performance of WSC's work under a theory of indemnity. See Argument Section IV, infra.

I. WSC's Settlement with the Plaintiffs and the Issue Release in Favor of BFS

In December 2019, WSC settled with the Plaintiffs. **(R. pp. 811-825).** WSC paid the Plaintiffs $500,000.00 in consideration for Plaintiffs' release of their direct claims against WSC and its subcontractors and for Plaintiffs to release BFS, the developer, and general contractor from liability arising from any of WSC's errors, omissions, and scope of work on the Project (the later hereinafter referred to as the "issue release"). **(R. pp. 811-825).** The issue release provides:

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

(R. p. 813).

Surprisingly, after WSC paid to procure a release for BFS, BFS did not amend, withdraw, or dismiss its crossclaims against WSC. BFS's Fourth Amended Answer, Crossclaims, and Third-Party Complaint remains its operative pleading. In that pleading, BFS seeks indemnification from WSC for the amounts that BFS "may pay in satisfaction" of Plaintiffs' claims against it "plus BFS's costs for defense, inclusive of attorneys' fees." **(R. p. 441; R. pp. 443-445).** BFS asserts it is entitled to be indemnified by WSC based on common-law indemnity and contractual indemnity theories of liability. **(R. p. 440).**

II. The Indemnity Provisions in the Master Subcontractor Agreement

BFS's contractual indemnity against WSC relies upon certain provisions of "Version – 5/17/06" of BFS's form master subcontractor agreement. **(R. pp. 785-798).** BFS alleges WSC entered into this version of its master subcontractor agreement on September 24, 2012, and again on December 31, 2014. **(R. pp. 785-810).**

Section 5 of the master subcontractor agreement contains indemnity language which reads as follows:

> TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY DEFENDANT AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.
>
> NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES") FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR

DEATH OF THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTORS, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

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

(R. pp. 790-791) (all caps emphasis in original).

The master subcontractor agreement also contains indemnity language buried in the fine print of "Section 3. Warranty", which reads as follows:

> **Section 3. Warranty.**
> … subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns … 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 … including, without limitation, property damage to the homes or properties into which the Work is incorporated …"

(R. p. 788).

More indemnity language is found within Section 9.i:

> INDEMNIFICATION FOR LIENS. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACT, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMENS' LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMETN, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS.
> . . .

(R. p. 796).

III. Prior Litigation Concerning the Subject Indemnity Provisions

BFS has attempted, unsuccessfully, to seek indemnity against its subcontractors in this case, and in other cases, based upon the same indemnity language within the same master subcontractor agreement (i.e., "Version – 5/17/06"). The prior litigation in this case is addressed first.

A. Prior, Unappealed Order in this Case, Concerning the Indemnity Language at Issue in this Appeal.

On September 6, 2019, McDaniel Construction Co. ("McDaniel"), another one of BFS's

subcontractors and a co-defendant in this case, moved for summary judgment as to BFS's indemnity crossclaim. **(R. pp. 1532-1537).** At the time McDaniel's motion for summary judgment came before the circuit court, Plaintiffs had conceded there were no issues as to McDaniel's work and stipulated to dismissal of its claims against McDaniel with prejudice. **(R. p. 1569).** "In spite of this stipulation, which specifically identifies McDaniel's scope in broad terms and concedes there are no defects, BFS refuse[d] to dismiss its [then] baseless cross-claims." **(R. p. 1569).**

BFS sought to recover from McDaniel pursuant to the indemnity language in "Version – 5/17/06" of its master subcontractor agreement (i.e., the same form agreement WSC allegedly entered). **(R. p. 1572; R. pp. 1577-1600).** McDaniel argued that its liability was not in question in light of the Plaintiffs' dismissal of claims against it, that the issues relating to the enforceability of the indemnity language had been previously ruled upon in the cases discussed infra, and that BFS's contractual indemnity language, including the "defend and hold harmless" language contained therein, violates the South Carolina Anti-Indemnity Statute codified at S.C. Code § 32-2-10 and are neither clear nor unequivocal under Concord & Cumberland, Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018). **(R. pp. 1569-1575).**

BFS filed an extensive memorandum in opposition to McDaniel's motion for summary judgment. **(R. pp. 1538-1566).** BFS asserted McDaniel's liability was still in question and that Plaintiffs' stipulation of dismissal of McDaniel did not preclude Plaintiffs from pursuing claims against BFS regarding McDaniel's defective work. **(R. p. 1553).** As BFS put it, "[b]ecause Plaintiffs had not released their claims relating to alleged improper framing installation implemented by McDaniel, summary judgment is not proper at this time." **(R. p. 1553).** BFS further argued:

> Even if McDaniel secured an issue release or Plaintiffs stipulated there are no defects in McDaniel's scope, BFS still has a viable claim for contractual indemnity that obligates McDaniel to pay the defense costs incurred by BFS in defending against Plaintiffs' claims regarding McDaniel's alleged improper scope of work. Until such a release or stipulation is executed, BFS will continue to incur defense costs arising out of or relating to the acts or omissions of McDaniel's scope of work.

(R. p. 1554).

BFS argued that its indemnity claim against McDaniel was not subject to collateral estoppel and did not run afoul of Concord & Cumberland or the South Carolina Anti-Indemnity Statute[5] because BFS was only seeking indemnity against liability for damages occasioned by the negligent acts or omissions of its subcontractor McDaniel. **(R. p. 1565).**

The Honorably Bentley D. Price granted McDaniel's motion and rejected BFS's arguments.[6] **(R. pp. 1601-1603; R. p. 1565).** BFS did not move for reconsideration, alteration, or amendment of the Form 4 Order. Nor did it appeal the order. That order was a final order and is now the law of the case. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

B. Litigation Regarding the Indemnity Language in Other Cases

At the time WSC's second amended motion for summary judgment was heard, South Carolina circuit courts had considered the enforceability of the indemnity provisions contained in the "Version – 5/17/06" master subcontractor agreement in three prior actions: (1) in Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al. case number 2018-CP-

[5] The South Carolina Anti-Indemnity Statute is codified at S.C. Code § 32-2-10. It is hereinafter cited by Code section or referred to as the "Anti-Indemnity Statute."

[6] This is the same argument BFS makes on this appeal. **(App. Br. p. 11)** ("Appellant is not seeking indemnification for its own or sole concurrent negligence, but is only seeking indemnification, and corresponding damages, against liability for loss or damage arising from Respondents' negligence.").

08-02547, filed in the Berkeley County Court of Common Pleas ("MI Windows")[7]; (2) in Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al., case No. 2016-CP-10-03455, filed in Charleston County Court of Common Pleas ("Six Fifty Six")[8]; and (3) in Pavic v. Carolina Cottage Homes, LLC, et al., case number 2019-CP-10-00772, filed in the Charleston County Court of Common Pleas ("Pavic").[9] **(R. pp. 826-847).** In each case, the circuit court concluded the indemnity language in the master subcontract agreement was not enforceable as a matter of law. **(R. pp. 90-92; R. pp. 146-173).**[10]

The Honorable Clifton Newman was the first circuit court judge to consider the enforceability of the indemnity provisions of the BFS "Version – 5/17/06" master subcontractor agreement. **(R. pp. 826-836).** In MI Windows, Judge Newman determined the indemnity language presented the prospect of BFS's subcontractors being forced to indemnify BFS for BFS's sole negligence and, as a result, applied the "clear and unequivocal" standard set out in Concord & Cumberland, Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018). **(R. pp. 826-836).** In evaluating the indemnity language contained within the master subcontractor agreement under this standard, Judge Newman found the language "is confusing at best and deceptive at worst" and therefore was not enforceable. **(R.**

[7] The subject order, discussed further infra, was entered by the circuit court on February 3, 2020. It is contained within the record as Exhibit D to WSC's Second Amended Motion for Summary Judgment. **(R. pp. 826-836).**

[8] The subject order in this case was entered by the circuit court on April 29, 2020. It is Exhibit E to WSC's Second Amended Motion for Summary Judgment. **(R. pp. 837-842).**

[9] The subject order in this case was entered on January 25, 2021. **(R. pp. 162-173).**

[10] At the time of filing this Brief, BFS's appeal of the orders entered in MI Windows (appellate case no. 2020-000415), Six Fifty Six (appellate case no. 2020-001328), and Pavic (appellate case no. 2021-000290) are all pending.

p. 831).

The Honorable Roger M. Young, Sr., considered the same issues a month later in the case of Six Fifty-Six. **(R. pp. 837-842).** Judge Young applied collateral estoppel to BFS's claims for contractual indemnity based upon Judge Newman's prior ruling, but also independently concluded that BFS's contractual indemnity crossclaim was based on language in its master subcontractor agreement that was "neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law." **(R. p. 840).**

The Honorable Jennifer B. McCoy was the next circuit court judge to consider the issues in Pavic. **(R. pp. 162-173).** In Pavic, Judge McCoy held that BFS's master subcontractor agreement is a contract of adhesion; that BFS's master subcontractor agreement contains multiple indemnity provisions, including multiple provisions in "Section 5. INDEMNITY" and another "buried in the fine print of "Section 3. Warranty"; that the indemnity language in BFS's master subcontractor agreement are unconscionable within the meaning of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644, S.E.2d 663 (2007); and that the indemnification provisions in Section 5 of BFS's master subcontractor agreement are unclear, conflict with each other and the provisions found in Section 3, do not meet the clear and unequivocable standard of Concord & Cumberland, and violate South Carolina public policy and the Anti-Indemnity Statute. **(R. pp. 162-173).**

Judge McCoy also found and ruled that the orders entered by Judge Newman in MI Windows and Judge Young in Six Fifty Six are final orders that collaterally estop BFS from contesting the findings in Pavic, as BFS had a full and fair opportunity to litigate the issues in those cases, and that the contract terms were "actually litigated, directly determined in the prior [actions], and the issues were essential to the [judgments] such that collateral estoppel should apply." **(R. p.**

170). Judge McCoy decided Pavic on January 25, 2021. **(R. pp. 162-173).**

Accordingly, this case was the second occasion in 2021 in which Judge McCoy considered the indemnity provisions contained in "Version – 5/17/06" of BFS's master subcontractor agreement,[11] and BFS's second chance at convincing her the indemnity provisions contained therein were enforceable.

STANDARD OF REVIEW

This Court applies the same standard applied by the circuit court when reviewing a grant of summary judgment. Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 211-212, 826 S.E.2d 285, 290 (2019). That standard is set by Rule 56(c) of the South Carolina Rules of Civil Procedure, which provides a circuit court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). On a motion for summary judgment, "the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009).

[11] It is undisputed that the contractual indemnification provisions before Judge Newman in MI Windows, Judge Young in Six Fifty Six, and Judge McCoy in Pavic are found in "Version – 5/17/06" of BFS's master subcontractor agreement. **(App. Br. pp. 36-37).**

ARGUMENT

I. BFS CANNOT RECOVER IN INDEMNITY FROM WSC BECAUSE BFS WILL NOT BEAR ANY LIABILITY TO PLAINTIFFS FOR ANY OF WSC'S ALLEGED CONDUCT BASED UPON THE ISSUE RELEASE WSC PROCURED IN BFS'S FAVOR.

This appeal is different than others. WSC is in a unique position among Respondents. BFS has limited its claim against WSC to contractual indemnification. The circuit court granted WSC complete summary judgment, including summary judgment on BFS's equitable indemnity claim, in addition to those non-indemnity causes of action BFS conceded. BFS has limited the damages it is seeking on its sole remaining claim against WSC, a contractual indemnity claim, to attorney's fees and costs. The issue in this appeal should be limited to whether BFS can use the indemnity provisions contained in its master subcontractor agreement to recover a portion of its defense costs from WSC where BFS's damages, if any, are a result of its own negligence.

BFS cannot as a result of the issue release, which should be dispositive of this appeal. As part of WSC and its subcontractors' $1,000,000.00 settlement with Plaintiffs, WSC procured an issue release from Plaintiffs in favor of BFS. According to the terms of the issue release, Plaintiffs released BFS from liability arising from any of WSC's errors, omissions, and scope of work on the Project. **(R. pp. 811-825).** BFS has not, cannot, and will not bear any liability on account of WSC's acts, omissions, or work on the Project based upon the issue release.

BFS has previously acknowledged that an issue release settles the question of its potential liability to Plaintiffs in absolute terms. In BFS's opposition to co-defendant McDaniel's motion for summary judgment, BFS admits summary judgment as to its claim for indemnity for liability is proper where a subcontractor obtains an issue release in favor of BFS, thereby eliminating the question of BFS's liability for the subcontractor's negligence. **(R. p. 1553).** McDaniel had not procured an issue release in BFS's favor. BFS was arguing that its liability on McDaniel's account remained

uncertain because the issue release was not in place. The issue release here resolves any question of fault. If BFS is held liable to the Plaintiffs, it will not be on WSC's account.

The resolution of the question of fault is significant for two reasons. First, it is dispositive of BFS's equitable indemnity claim. In addition to establishing that a special relationship exists, a party seeking equitable indemnity must also prove the following elements: (1) the party from whom it is seeking indemnification is at fault in causing damages to the third party; (2) it has no fault for those damages; and (3) it incurred expenses that were necessary to protect its interests in defending against the third-party's claim. See Inglese v. Beal, 403 S.C. 290, 299, 742 S.E. 2d 687, 692 (Ct. App. 2013). The circuit court reasoned that because WSC had procured an issue release in favor of WSC, BFS was necessarily seeking to recover from WSC in indemnity for its sole negligence which is unlawful. **(R. p. 96).** The court further found that the issue release absolves and releases BFS from all liability stemming from any acts or omissions of WSC; therefore, any prospective liability of BFS to Plaintiffs relative to the Project would necessarily be derived from BFS's negligence or fault without any reference to WSC and there can be no equitable indemnity among mere joint tortfeasors. **(R. pp. 98-99).** In short, the issue release was dispositive of BFS's equitable indemnity claim. **(R. pp. 96-99).** That decision was proper in this case and not challenged by BFS.[12]

The issue release is also dipositive of BFS's contractual indemnity claim because the Anti-Indemnity Statute, S.C. Code § 32-2-10, renders a promise or agreement in connection with the construction of a building purporting to indemnify the promise against liability for damages arising

[12] The issue is not addressed in its Motion for Reconsideration or in its opening Brief. BFS has abandoned any claim of error in the lower court's dismissal of its equitable indemnity claim. See Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.").

out of property damages proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and enforceable. That's exactly what the BFS's master subcontractor agreement purports to do and precisely the relief BFS is seeking from WSC. BFS bases its right to recover attorney's fees and costs on the following language contained within the Section 5 "Indemnity" section of its master subcontractor agreement:

> THE DUTY TO DEFEND EXISTS **REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES**.

(R. p. 791) (all caps emphasis in original, bold and underline emphasis added).

Judge McCoy correctly found that the above-quoted language and the terms of Section 8.i of the master subcontractor agreement that call for WSC[13] to reimburse BFS for its attorney's fees

[13] The language quoted above, drawn from Section 5 of the master subcontractor agreement, is not the only indemnity provision that requires WSC to indemnify BFS for its attorney's fees and costs where BFS is solely negligent. See **(R. p. 790) (**"TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACT, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMENS' 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. pp. 790-791)** ("THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE 'INDEMNITEES') FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTORS, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES") (original in capitals, but some emphasis added).

and costs, regardless of fault, explicitly violate the Anti-Indemnity Statute. Judge McCoy was also correct in finding that the master subcontractor agreement was void against public policy.

The circuit court relied on these facts in granting WSC complete summary judgment as to BFS's crossclaims. **(R. pp. 92-99).** The court reasoned that because WSC had procured an issue release in favor of WSC, BFS was necessarily seeking to recover from WSC in indemnity for its sole negligence which is unlawful. **(R. p. 96).** The court further found that the issue release absolves and releases BFS from all liability stemming from any acts or omissions of WSC; therefore, any prospective liability of BFS to Plaintiffs relative to the Project would necessarily be derived from BFS's negligence or fault without any reference to WSC and there can be no equitable indemnity among mere joint tortfeasors. **(R. pp. 98-99).**

A plain reading of the Anti-Indemnity Statute, S.C. Code § 32-2-10, supports the circuit court's conclusion that the indemnity provisions contained in the master subcontractor agreement are wholly enforceable. See S.C. Code § 32-2-10 (a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promise . . . against liability for damages arising out of bodily injury or property damage is against public policy and unenforceable) (emphasis added).

The statute does not provide that the specific clause, paragraph, or subsection of such agreements that run afoul of the statute are unenforceable. It provides **the agreement** is against public policy and unenforceable as a matter of law. Moreover, if there's any doubt as to the absolute nature of this rule, the statute provides this rule is true "notwithstanding any other provision of law." Pursuant to the express terms of the Anti-Indemnity Statute, the fact that the

agreement purports to have WSC indemnify BFS for its sole negligence renders the entire agreement unenforceable and void as against public policy.

BFS does not address the implications of WSC procuring an issue release in favor of BFS in its motion for reconsideration or in its opening Brief. It didn't address it at all in the hearing. **(R. pp. 1386-1450).** BFS just asserts blanket, conclusory statements throughout its opening Brief that it is just seeking to be indemnified by its subcontractors for their sole or concurrent negligence. **(App. Br. pp. 9, 24, 35).** That is not the case as it relates to WSC. BFS is seeking to be indemnified by WSC for its sole negligence or the negligence of its other contractors. There's absolutely no possibility that BFS will bear any liability to Plaintiffs for loss or damage arising from WSC or its subcontractors' alleged negligence because of the issue release.

The circuit court was correct in finding the issue release serves as a unique and independent ground to find that BFS is seeking to recover in indemnity against WSC for its sole negligence and in finding the issue was dispositive of BFS's equitable and contractual indemnity claims. BFS has no right for WSC to indemnify it for the costs it has expended defending its own negligence or that of its other subcontractors for whom WSC is not liable.

II. BFS'S CLAIM FOR ATTORNEY'S FEES AND COSTS IS BASED ON INDEMNITY LANGUAGE CONTAINED IN ITS MASTER SUBCONTRACTOR AGREEMENT THAT IS ILLEGAL, UNENFORCEABLE, AND VOID AS AGAINST PUBLIC POLICY.

BFS's right to recover damages is based upon the indemnity language set out in its master subcontractor agreement. While attorney's fees and costs are generally recoverable elements of damages where a subcontractor has contractually agreed to indemnify a contractor or owner, see Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971), BFS cannot recover attorney's fees and costs from WCS in this case because such claims rely on the indemnity provision of the master

subcontractor agreement which is fatally flawed. Circuit courts have unanimously found the same indemnity language to be illegal, unenforceable, and void as against public policy.

A. The indemnity provisions in BFS's master subcontractor agreement are not clear and unequivocal as required by Concord & Cumberland, making those provisions unenforceable as a matter of law.

The indemnity provisions in BFS's master subcontractor agreement are not clear and unequivocal, as required by Concord & Cumberland, making those provisions unenforceable as a matter of law.[14] The contractual indemnity language contained in BFS's master subcontractor agreement are subject to Concord & Cumberland because the agreement calls for BFS's subcontractors to indemnity BFS for its sole or concurrent negligence. Paragraph Three of Section 5 of the "Version – 5/17/06" of the BFS master subcontractor provision is an example. **(R. p. 791).** The language of this paragraph provides:

> THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES.

(R. p. 791).

Where an indemnitee is seeking to be indemnified for his/her/its concurrent negligence, South Carolina courts require the contractual indemnity provisions expressing such intention to be stated in clear and unequivocal terms. Concord & Cumberland, 424 S.C at 643-644, 168-169 (affirming trial court's grant of summary judgment in favor of subcontractor dismissing

[14] BFS argues the indemnity provisions relating to its claim for attorney's fees and costs (which applies regardless of BFS's sole negligence) are not subject to S.C. Code § 32-2-10. **(App. Br. pp. 30-32).** BFS does not argue on appeal that these indemnity provisions are not subject to Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018) (reh'g denied). This issue should be considered abandoned on appeal, Fields v. Melrose, Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283 (Ct. App. 1993), but even if this Court interprets BFS's general arguments as to Concord & Cumberland to apply to its claims against WCS, these terms are subject to the clear and unequivocal standard and do not satisfy it.

contractual indemnity crossclaims of contractor based upon the application of the clear and unequivocable standard).

The circuit court properly found that the indemnity provisions in BFS's master subcontractor agreement are neither clear, nor unequivocal. The lower court analyzed the indemnity language in the master subcontractor agreements and concluded the indemnification provisions set out in "Section 5., INDEMNITY" are unclear, conflict with each other and the indemnification provision in the fine print of "Section 3. WARRANTY." and do not meet the elevated clear and unequivocal standard found in Concord & Cumberland. **(R. pp. 92-94).** With respect to attorney's fees and costs, the circuit court specifically found that the master subcontractor agreement contemplates BFS's subcontractors indemnifying it for all attorney's fees incurred in the defense of the BFS without any regard to the negligence of BFS in some sections and yet in other areas, qualifies the duty to defend and indemnify against attorney's fees and costs to the extent the loss is caused in whole or part by the negligence of the subcontractor. **(R. pp. 94-96).** In the court's words, "[t]he terms are confusing at best, contradictory at times, and arguably misleading." **(R. p. 94).** As such, the Master Agreement's indemnity clauses are unenforceable as a matter of law.

BFS attempts to explain away the ambiguities between the various indemnity provisions by "looking at the context of the paragraphs containing the text." **(App. Br. p. 19).** This misses the mark. If BFS has to explain to the Respondents and the Court what it meant to say, how it meant for various provisions to apply and interact with each other, and how one can interpret the ambiguities among the various conflicting provisions, the indemnity clause does not express the intention in clear and unequivocal terms. Concord & Cumberland, 424 S.C at 647, 171.

B. The trial court was proper to apply the doctrine of collateral estoppel to the issue of whether the indemnity provisions in BFS's master subcontractor agreement meet the Concord & Cumberland standard, comply with the Anti-Indemnity Statute, and South Carolina public policy.

Judge McCoy was proper to apply the doctrine of collateral estoppel to the issues of whether BFS's master subcontractor agreement met the Concord & Cumberland clear and unequivocal standard, complied with the Anti-Indemnity Statute, and South Carolina public policy because BFS has litigated these issues, in this case, and before Judge McCoy and other circuit courts in other cases. See infra. pp. 12-15. The circuit court orders should be affirmed in this regard.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was litigated and "determined by a valid and final judgment" in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). Where the "illegality of the contract has been actually litigated and directly determined in the prior action and that issue was essential to the judgment," the application of offensive collateral estoppel is appropriate. 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). The party invoking collateral estoppel need not have also been a party in the prior action; the law only requires that the party *against* whom estoppel is applied (here, BFS) have been a party to that action and had a full and fair opportunity to litigate the issue in the prior action. Id. ("Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action . . ."). In other words, parties can invoke collateral estoppel even in the absence of "mutuality." Id. BFS was a party to each of the prior orders. There is no dispute that BFS is the party seeking to enforce the subject indemnity clauses from its master subcontractor agreement and the party litigating the issue of enforceability in this case (the McDaniel order) and in the MI Windows, Six Fifty Six, and Pavic cases.

The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 at n. 1, 315 S.E.2d 186, 189–90 at n. 1 (Ct. App. 1984). BFS argues that the prior orders are on appeal and should not be considered "final judgments" for the purposes of collateral estoppel. **(App. Br. p. 37).** BFS does not cite any case, statute, or court rule in support of this argument. It also does not address that the prior order entered in this case was not appealed and therefore is final.[15]

Contrary to BFS's claims, a judgment is final and remains final unless and until it has been overturned on appeal. See Rule 201 (a) SCACR (stating that "[a]ppeal may be taken, as provided by law, from any final judgment or appealable order."). Additionally, as many courts have held,

[15] Even on BFS's own theory that an order granting summary judgment and ending a case is not a final judgment if appealed, the order entered in this case by Judge Price granting summary judgment to McDaniel, another BFS subcontractor, is certainly a final judgment. It ended the case as between BFS and McDaniel and was not appealed.

The McDaniel order is significant in other ways as well. BFS attempts to avoid the application of collateral estoppel by arguing the issues decided in MI Windows, Six Fifty Six, and Pavic are different than the issues here because BFS now just seeks indemnity occasioned by its subcontractors' negligence. That's all BFS sought as against McDaniel. Even closer to the facts of this appeal, the thrust of BFS's argument against McDaniel was that while Plaintiffs had dismissed their claims against McDaniel with prejudice (finding no deficiencies with its work), BFS "still has a viable claim for contractual indemnity that obligates McDaniel to pay the defense costs incurred by BFS in defending against Plaintiffs' claims regarding McDaniel's alleged improper scope of work." **(R. p. 1554).**

McDaniel, like WSC here, argued BFS's contractual indemnity provisions, including the "defend and hold harmless" clause contained therein, violates the Anti-Indemnity Statute and are neither clear nor unequivocal under Concord & Cumberland. The circuit court granted McDaniel's motion for summary judgment over BFS's arguments that its indemnity claim was not subject to collateral estoppel and did not run afoul of Concord & Cumberland or the Anti-Indemnity Statute.

BFS had litigated the exact issue – whether it can recover defense costs under its indemnity provisions where BFS bears no liability to Plaintiffs on the indemnifying subcontractor's account – in this very case, the answer was determined to be no, and the judgment rendered is final.

a judgment is final for purposes of collateral estoppel or res judicata unless and until it is overturned on appeal.[16]

Circuit courts have unanimously found the indemnity language in BFS's master subcontractor agreement to be illegal, unenforceable, and against public policy. The master subcontractor agreement at issue in this case includes the *same* language. BFS has already litigated the issue of the enforceability of its indemnification provisions. It should not be permitted to now relitigate the same exact issue. The circuit court was correct in holding that collateral estoppel applies to this matter and should be affirmed in that regard.

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[16] See B&B Hardware, Inc. v. Hargis Industries, Inc., 575 U.S. 138, 140, 135 S.Ct. 1293, 1298-99 (2015) ("Sometimes two different tribunals are asked to decide the same issue. When that happens, the decision of the first tribunal usually must be followed by the second, at least if the issue is really the same. Allowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring."); Lee v. Criterion Ins. Co., 659 F. Supp. 813, 819 (S.D. Ga. 1987) ("However, '[t]he established rule in the federal courts is that a final judgment retains all of its res judicata [or collateral estoppel] consequences pending decision of the appeal . . . .'" (internal citations omitted); In re Kramer, 543 B.R. 551, 554 (Bankr. E.D. Mich. 2015) ("that under Michigan law, collateral estoppel applies to judgments even when they are pending on appeal or the time for appeals has not yet expired."); Hapgood v. City of Warren, 127 F.3d 490, 494 (6th Cir. 1997) ("It is worth noting that when the district court granted defendant summary judgment, plaintiff's case in Ohio state court was on appeal. The pendency of an appeal, however, does not prohibit application of claim preclusion. The prior state court judgment remains 'final' for preclusion purposes, unless or until overturned by the appellate court."); 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4433, p. 308 (". . . it is likewise held in federal courts that the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided."). The rationale behind this rule is that if cases on appeal were not final judgments, parties could re-file cases in trial court while the appeal is pending in order to try and achieve a different result, thus subjecting courts to inefficient duplicative litigation. See generally, Warwick Corp. v. Maryland Dep't of Transp., 573 F. Supp. 1011, 1014 (D. Md. 1983), aff'd sub nom. Warwick Corp. v. Maryland Dep't of Transportation, 735 F.2d 1359 (4th Cir. 1984) ("Such a consequence would also be laughable. If a judgment was denied its res judicata effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation.").

III. THE COURT CANNOT SEVER CERTAIN LANGUAGE FROM THE INDEMNITY PROVISION OF THE MASTER SUBCONTRACTOR AGREEMENT BECAUSE ILLEGALITY PERVADES THE PROVISION, THE LANGUAGE OF THE INDEMNITY PROVISIONS IS INTERTWINED AND DEPENDENT ON EACH OTHER.

BFS argues the illegal and unenforceable language in its master subcontract agreement should be severed and this court should create an indemnity right where none currently exist (because the indemnity language is illegal and unenforceable). **(App. Br. pp. 37-41).** The circuit court in this case, and in the other cases involving the same indemnity provisions, was correct to not sever or re-write BFS's master subcontractor agreement because the illegality pervades the agreement and the indemnity language.

BFS asserts that certain portions of the indemnity provisions contained in its master subcontractor agreement are irrelevant to the analysis of whether it should be permitted to recover in indemnity for its subcontractor's negligence. **(App. Br. pp. 19-20).** The Court must interpret the agreement as a whole. See generally, McGill v. Moore, 672 S.E.2d 571, 574, 672 S.E.2d 571, 574 (2009) ("A contract is read as a whole document….").

The language of the master subcontractor agreement that provides BFS the purported right to recover its defense costs is contained within Section 5 of the agreement (labeled "Indemnity"). The language of Section 5, in part, calls for WSC to defend BFS even if BFS is solely liable for causing the loss that gave rise to the claim for defense. **(R. pp. 790-792).** Section 5 of the master subcontractor agreement provides that the defense costs obligation ends once it is finally proven in court that the claims against BFS are barred by the applicable statute of limitations but contains no exception to the extent the claims are the result of the negligence or sole negligence of BFS. **(Id.).** Although the end of Section 5 provides an exception for defense and indemnity for claims arising from design defects and the professional negligence of architects and engineers, it does not provide any exception relative

to the fault of BFS in whole or part. **(Id.).** Section 9.i. of the Master Subcontractor Agreement also provides for indemnification of attorneys' fees and expenses and amounts paid in settlement without regard to the fault of BFS. **(R. p. 796).** All of these purported indemnity rights disregard the negligence of BFS violate South Carolina law and are unenforceable. Moreover, when viewed against other parts of the same master subcontract agreement, they are conflicting and contradictory.

As a general rule, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) (quoting Berkebile v. Outen, 311 S.C. 50, 53, n. 2, 426 S.E.2d 760, 762 n. 2 (1993)). It is not the function of the court to rewrite contracts for parties. Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 694 S.E.2d 15, 18 (2010); Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002); ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011). Section 5 of the master subcontractor agreement, alone, is filled with indemnity provisions that do not conform to South Carolina law. Because the indemnity provisions violate South Carolina law in many respects, BFS's request that the Court rewrite the indemnity provisions must be rejected.

The South Carolina Supreme Court cautioned in Simpson v. MSA of Myrtle Beach, Inc., "if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007) (internal citations omitted).

It is also worth note that the language of Section 5 is not subdivided into sections, not separately enumerated by separate paragraphs (as Appellant's brief would suggest), and its language is intertwined and dependent on the language of the whole provision. See **(R. pp. 79-**

792). The second and third blocks of text within the indemnity provision begin with "NOTWITHSTANDING THE FOREGOING" and "THE DUTY TO DEFEND UNDER THIS SECTION 5," each referring to the provision as a whole. **(Id.)**. Eliminating portions of Section 5 as BFS suggests would require a rewriting of the whole section.

South Carolina courts do not "blue pencil" agreements and rewrite a contract's terms to make it comply with the law, as BFS would have it. See Poynter, 387 S.C. at 588, 694 S.E.2d at 18 (recognizing that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy). "Replacing some [illegal] language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term" to which WSC did not agree. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 175 (S.C. App. 2018) (declining appellant's invitation to rewrite the indemnity provisions of its contracts and replace language violative of South Carolina law).

BFS cites to the case of Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) in support of its argument for severability. Beach Co. is inapposite. There, a landlord brought suit against tenant for breach of lease agreement, and the landlord countersued for breach of contract. 351 S.C. 56, 566 S.E.2d 863. The contract at issue contained provisions that waived the tenant's right to a jury trial and to assert compulsory counterclaims. Id. at 64, 866. This Court held that "A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be." Id. at 64, 867. This Court ultimately held that the tenant's rights to a jury trial and to assert counterclaims were separate and distinct rights, and it severed the waiver of compulsory

of counterclaims. Id. at 65, 867.

Here, unlike Beach Co., the indemnification language of BFS's master subcontractor agreement is intertwined and not susceptible of division. BFS is not seeking to sever an illegal part of a contract. It is asking this court to cherry pick lines of a section of a contract to salvage its claim for indemnity. BFS should not be allowed to jumble multiple "confusing at best and deceptive at worst" indemnity provisions within the indemnification section of the master subcontractor agreement, and then ask this Court to cherry-pick terms to be enforced when confronted with the illegality of the indemnity language. **(R. p. 831).**

This Court's decision in Simpson is on point. In Simpson, the South Carolina Supreme Court found an arbitration agreement with unconscionable terms wholly unenforceable, despite the presence of a separate contractual severability clause, due to the "cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause." 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007). The contractual severability provision did not result in an exception to the general rule of unenforceability of illegal contracts, especially where the contract is one-sided, oppressive, or a contract of adhesion. Id.

BFS should not and cannot, as a matter of law, be saved from its own illegal contract, by a rewriting of its terms, especially rewriting by a court. Poynter, 387 S.C. at 588, 694 S.E.2d at 18; Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002), ERIE Ins. Co., 393 S.C. at 460, 713 S.E.2d at 321. For this reason, the circuit court should be affirmed.

IV. THE ANTI-INDEMNITY STATUTE APPLIES TO BFS'S CLAIMS FOR ATTORNEY'S FEES AND COSTS.

BFS does not challenge in this appeal that it cannot use its master subcontractor 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 illogical, against the letter and spirit of applicable law, and more importantly, was crafted by BFS after the circuit court fully granted WSC summary judgment.

A. Attorney's fees and costs are recoverable elements of damages of a contractual indemnity claim.

BFS argues "the [Anti-Indemnity] statute addresses general damages and not recovery of attorney's fees; thus, the statute does not apply to this portion of the Contract."[17] BFS's argument ignores that "general damages" may include attorney's fees and costs when the right to recover the same is provided by contract or statute, as it is here. See Townsend v. Singleton, 257 S.C. 1, 12, 183 S.E.2d 893, 988 (1971); Rimer v. State Farm, 248 S.C. 18, 27, 148 S.E.2d 742, 747 (1966); U.S. Rubber Co. v. White Tire Co., 231 S.C. 84, 96, 97 S.E.2d 403, 409-410 (1956).

The Anti-Indemnity Statute addresses "Hold harmless clauses in certain construction contracts." The text of the statute reads 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**. 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. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to

[17] BFS is referring specifically to Paragraph Three of Section 5 of the master subcontractor agreement. **(App. Br. p. 30).** BFS defines this designation ("Paragraph Three") in its opening Brief. The text of Section 5 of the master subcontractor agreement is not separately designated by sections and the paragraphs are not separately numbered as this designation would convey. See the text of Section 5 on pages 14-16, supra.

> any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

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

The circuit court was correct in concluding the Anti-Indemnity Statute is applicable to BFS's claim for attorney's fees and costs because the statute speaks of "damages" and attorney's fees and costs can only be recoverable in indemnity as damages. **(R. pp. 94-95).**

It is well-established under South Carolina law that "attorney's fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses" associated with a contractual indemnity claim. See McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) (citing Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971)); see also Fountain v. Fred's, Inc., 429 S.C. 533, 556–57, 839 S.E.2d 475, 488 (Ct. App. 2020), reh'g denied (Mar. 30, 2020), cert. granted (May 28, 2021); Sherlock Holmes Pub, Inc. v. City of Columbia, 389 S.C. 77, 697 S.E.2d 619 (Ct. App. 2020); 22 Am. Jur. 2d, Damages, § 166, pp. 235-236.

In fact, BFS pled it was entitled to attorney's fees and costs on its indemnity cause of action. **(R. p. 399)** ("The 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 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, of which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims."). BFS's own pleading acknowledges that attorney's fees and costs are recoverable items of damages on a contractual indemnity claim. There is no support for BFS's argument that S.C.

Code § 32-2-10's reference to "damages" does not include attorney's fees and costs.

BFS's other argument on appeal is that the Anti-Indemnity Statute, S.C. Code § 32-2-10, does not preclude the recovery of attorney's fees and costs as "consequential damages of an indemnity claim" because they are not damages that BFS will incur to a third-party. **(App. Br. p. 31).** This is an argument that BFS created after summary judgment was entered. As an initial matter, it is not properly preserved for appeal. It is also an argument that is wholly inconsistent with its agreement, pleadings, the plain and ordinary meaning of the statutory language, and the purpose of the statute and South Carolina law.

While this argument lacks substantive merit, it must first be addressed that BFS crafted this argument after the circuit court granted WSC summary judgment. BFS did not properly preserve these arguments for appeal, because these arguments were not raised prior to BFS's Motion for Reconsideration. See **(R. pp. 1386-1450); (R. pp. 1373-1385).**

It is well-established that a party cannot use a motion to reconsider, alter, or amend a judgment to present an issue that could have been raised prior to the judgment but was not. Kelaher, Connell & Connor, P.C. v. S.C. Workers' Comp. Comm'n, 435 S.C. 55, 61, 863 S.E.2d 842, 845 (Ct. App. 2021) (finding an issue that was first raised in a Rule 59(e) motion was unpreserved for appellate review) citing Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). This Court should find that BFS did not properly preserve this issue for appeal given that they were raised for the first time in BFS's Motion for Reconsideration and uphold the circuit court's orders granting summary judgment to WSC on this independent basis alone.

The argument must also be rejected because it conflicts with the language of both BFS's pleading and its master subcontractor agreement. See **(R. p. 441)** (quoted above). The language of BFS's master subcontractor agreement provides for BFS's recovery of attorney's fees and costs as

a form of indemnification:

> TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY DEFENDANT AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. . . . THE 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 HEREUNDUER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

(R. pp. 790-791) (all caps emphasis in original, underline emphasis added).

BFS's pleadings seek attorney's fees and costs on its contractual indemnity cause of action. **(R. p. 441).** In fact, the only cause of action that BFS has not abandoned is its contractual indemnity cause of action.

BFS attempts to support its argument against the application of the Anti-Indemnity Statute by reference to an explanation of what "indemnity" means in Concord & Cumberland, Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646-647, 819 S.E.2d 166, 170-171 (Ct. App. 2018). BFS cites to Concord & Cumberland not for the case holding, but rather for its description of "indemnity" as "that form of compensation in which a first party is liable to pay a second party for loss or damage to the second party incurs to a third party." **(App. Br. p. 31).** BFS argues that the attorney's fees and costs WSC would be required to reimburse BFS for are not damages BFS has incurred to a third party, therefore they are not "within the scope of indemnity." **(Id.).**

The Legislature's intent to prevent a situation where a subcontractor, such as WSC, must reimburse a general contractor, like BFS, for amounts BFS must pay in indemnity or to defend against its own negligence or the negligence of its other subcontractors, is clear and unambiguous from the language of the Anti-Indemnity Statute.

It is fundamental that:

> The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in language used construed in light of intended purpose. The legislature's intent should be ascertained primarily from the plain language of the statute. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation, and the court has no right to look for or impose another meaning.

Rorrer v. P.J. Club, Inc., 347 S.C. 560, 569, 556 S.E.2d 726, 730 (Ct. App. 2001).

The word "indemnity" is not found within the Anti-Indemnity Statute. See S.C. Code § 32-2-10. The word "indemnify" and phrase "hold harmless" are. Id. To "indemnify" and "hold harmless" are synonymous with each other and the well-understood meaning of each verb is to

make immune from liability.[18] The statute does not limit or qualify its application as BFS would have it, nor does the ordinary meaning of the language contained therein.

The lower court was correct in giving the words "indemnify" and "hold harmless" their "'plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" CFRE, LLC v. Greenville Cnt'y Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting Sloan v. Hardee, 371 S.C. 495, 640 S.E.2d 457, 459 (2007)).

It is also proper to consider BFS's efforts to construe the language in the Anti-Indemnity Statute in conjunction with the purpose of the whole statute and the policy of the law, which disfavors indemnity provisions that are "overly broad." See Keith v. River Consulting, Inc., 365 S.C. 500, 600 S.E.2d 302 (Ct. App. 2005); see also Rorrer v. P.J. Club, Inc., 347 S.C. at 569, citing S.C. Coastal Council v. S.C. State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). The object of the Anti-Indemnity Statute is to prevent the enforcement of agreements that require a subcontractor to indemnify a general contractor for damages caused by the general contractor's negligence or the negligence of its subcontractors. D.R. Horton, Inc. v. Builders First-Source-Southeast Group, LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018).

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

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

V. BFS CANNOT SEEK INDEMNITY AGAINST LIABILITY FROM WSC ON APPEAL WHEN BFS PREVIOUSLY LIMITED ITS CLAIM AGAINST WSC TO ATTORNEY'S FEES AND COSTS.

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

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

BFS waived its right to seek indemnity against liability arising from WSC's work by expressly relinquishing its claim. See Janasik v. Fairway Oaks Horizontal Property Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992) ("A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights

or of all the material facts upon which they depended. The doctrine of waiver does not necessarily imply that the party asserting waiver has been misled to his prejudice or into an altered position."). There is no question that BFS's waiver of its claim for indemnity against liability was knowing and intentional and that a party can waive its rights by its acts, omissions, and representations made during litigation. See, e.g., Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (examining whether a party waived its right to move for a new trial based upon its counsel's statement to the jury during closing arguments that he would not argue with the jury's verdict); Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (examining whether a party waived its right to compel arbitration based upon party's actions taken in case).

Further, the doctrine of judicial estoppel binds BFS to the positions it has previously taken in this case. See Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 251 489 S.E.2d 472, 477 (1997) ("Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation."); Hawkins v. Bruno Yacht Sales, Inc., 342 S.C. 352, 536 S.E.2d 698 (Ct. App. 2000) ("Courts invoke the doctrine [of judicial estoppel] to deter parties from playing 'fast-and-loose' with the facts of a case such that the judicial system is adversely impacted."); Quinn v. Sharon Corp., 343 S.C. 411, 422-23, 540 S.E.2d 474, 480 (Ct. App. 2000) (J. Anderson, concurrence) (discussing the history of the application of the judicial estoppel doctrine in South Carolina courts and maintaining that is immaterial whether the party who switched its position was successful or not in propounding the validity of its initial position).

BFS should be judicially estopped from taking any positions in this appeal that run contrary to the positions it previously took in this case. Beyond the statements BFS made in its Motion for Reconsideration with respect to its express limitation of its indemnity claim against WSC, BFS made certain statements in its opposition to co-defendant McDaniel's motion for summary judgment that

are relevant to the analysis of the issues involved in this appeal. See **(R. pp. 1538-1566).** BFS admits its opposition to McDaniel's motion for summary judgment:

- Summary judgment as to indemnity for liability is proper where a subcontractor obtains an issue release in favor of BFS, thereby eliminating the question of BFS's liability for the subcontractor's negligence. See **(R. p. 1553)**;

- Where a subcontractor secures an issue release in favor of BFS, the only viable claim BFS has against the subcontractor is a claim for contractual indemnity that obligates the subcontractor to pay the defense costs BFS incurred in defending against Plaintiffs' claims regarding the subcontractors' alleged improper work. **(R. p. 1554)**;

- BFS should only incur defense costs arising out of or relating to the acts or omissions of its subcontractor's work until such time as a release is executed. **(R. p. 1554)**.

Therefore, while BFS should not be permitted to recover on any theory of indemnity for the reasons set out supra, there is absolutely no circumstance where WSC's liability should extend beyond a sliver of defense costs when BFS has expressly limited its claims to such recover.

VI. BFS'S MASTER SUBCONTRACTOR AGREEMENT DRAFTED IS A CONTRACT OF ADHESION AND SO ONE-SIDED AND OPPRESSIVE THAT IT IS UNCONSCIONABLE.

Judge McCoy specifically found the indemnity and duty to defend provision of the BFS master subcontractor agreement to be unconscionable. **(R. p. 99).** In the event this Court finds BFS can enforce the contractual indemnification provisions contained in its master subcontractor agreement against WSC under the facts of this case, WSC maintains the trial court order should be affirmed on the grounds the master subcontractor agreement is unconscionable.

Unconscionability has been recognized 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." See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007), citing Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 554,

606 S.E.2d 752, 757 (2004). S.C. Code § 36-2-302 provides:

> If a court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or may enforce the remainder of the contract without to unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. unconscionable clause, or so limit its application so as to avoid any unconscionable result.

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness (or unfairness) of the bargaining process in the contract at issue. Simpson, 373 S.C. at 25. "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." Id. at 26-27. The fact that an agreement is an adhesion contract bears on the analysis of whether a contract or terms therein are unconscionable. Id. at 27.

It should be viewed as an undisputed fact that the BFS master subcontractor agreement containing the subject indemnity and duty to defend clause is a contract of adhesion. The agreements between BFS and its subcontractor-Respondents in this case and those involved in the decisions in other cases are all the same agreement. The indemnity provisions that are the subject of review are not different, they are all the same. The Respondents did not drive different deals based upon their respective bargaining power; nor is there any indication that any were successful in negotiating the provisions contained within the form agreement, including the indemnity and duty to defend provisions. This is typical in the context of the parties' relations. See, e.g., Kennedy v. Columbia Lumber & Mgf. Co., 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (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 indemnity provisions within the master subcontractor agreements are also one-sided and oppressive to BFS's contractors. The master subcontractor agreement was 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, 373 S.C. at 28.

In addition, although WSC provided no material in connection with the installation of windows, doors, and Tyvek, the fine print language of **SECTION 3 Warranty** obligates WSC for "defects in design, workmanship and materials" and "structural applications" which obviously relates to manufactured products selected and sold by BFS. WSC was not involved in the design of any of the manufactured materials or any portion of the project. These provisions expose WSC to liability for property damage and personal injury claims arising from deficient materials selected and sold by BFS. The agreement also requires WSC to assume the risk of loss to the work, provides indemnification of BFS for its own negligence, waives delay or damages claims in favor of BFS, mechanic's lien rights, in addition to other waivers of rights. **(R. pp. 785-798).** A party who appreciated the implications of the language of these agreements would not have signed them

unless they had no choice but to do so. The absence of a meaningful choice on the part of WSC and other subcontractors, fact that this is a contract of adhesion with deceptive language, and many one-sided, oppressive provisions should render the entire agreement unenforceable, or at the least, the indemnity and duty to defend clauses unenforceable and Judge McCoy's orders should be affirmed on this further basis.

CONCLUSION

For the reasons stated above and for any other reason stated in the record, to the extent not inconsistent with the argument set out herein, the circuit court's Order Granting Defendant WS Contractors, LLC's Motion for Summary Judgment Against the Claims of Builders FirstSource-Southeast Group, LLC and the Form 4 Order Denying Builders FirstSource-Southeast Group, LLC's Motion for Reconsideration and/or Alteration/Amendment should be **AFFIRMED**.

Respectfully Submitted,

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December 1, 2022
Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge
Civil Action No. 2016-CP-10-03758

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.; CollenBatissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado, ……Defendants,

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

v.

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

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

CERTIFICATE OF COUNSEL

I, the undersigned counsel for Respondent WS Contractors, LLC, certify that the Final Brief of Respondent WS Contractors, LLC complies with the requirements of SCACR Rule 211(b).

Respectfully submitted,

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Mar 30 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Judge

Civil Action No. 2016-CP-10-03738
Appellate Court 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 Oliveira; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado, ……...……...……Defendants,

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

v.

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

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting,

LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the…..…...Respondents

_____

RESPONDENT
L&G Construction Group, LLC's
NOTICE OF JOINDER
IN THE INITIAL BRIEF OF THE RESPONDENT
Hurley Services, LLC

_____

The respondent L&G Construction Group, LLC, in accordance with Rule 208(b)(6), SCACR, hereby joins in the brief of the respondent Hurley Services, LLC, and adopts its entire argument.

Respectfully submitted,

Michal Kalwajtys

_____
Thomas F. Dougall, SC Bar No. 1729
Michal Kalwajtys, SC Bar No. 100950
DOUGALL & COLLINS
1700 Woodcreek Farms Rd.
Elgin, SC 29045
(803) 865-8858
Attorneys for Respondent
L&G Construction Group, LLC

March 30, 2022
Columbia, South Carolina

CERTIFICATE OF SERVICE
Appellate Case No. 2020-001048

I certify that on March 30, 2022, I have served the respondent L&G Construction Group, LLC's Notice of Joinder in the Initial Brief of the Respondent Hurley Services, LLC—in accordance with this Court's August 25, 2021 Order re: Methods of Electronic Filing and Service under Rule 262 of the South Carolina Appellate Court Rules, Appellate Case No. 2020-000447 at § (d)(1)—on all counsel of record, sent to their AIS-registered email addresses.

Michal Kalwajtys

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

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

v.

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

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

Appellate Case No. 2021-001050

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

Opinion No. 6099
Heard March 5, 2024 – Filed February 12, 2025

AFFIRMED

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

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

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

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

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

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

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

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

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

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

Facts and Procedural History

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

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

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

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

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

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

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

Standard of Review

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

Analysis

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

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

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

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

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

> **SECTION 1. Introduction.**
>
> **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**"). TIME IS OF THE ESSENCE. . . . In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor ("**Contract Documents**") and incorporated into the Agreement by this reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.
>
> . . . .
>
> **SECTION 2. Materials and Workmanship.** Subcontractor agrees to commence Work on Projects upon request by Contractor.

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

. . . .

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

. . . .

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

. . . .

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

. . . .

b. Release and Indemnity.

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

(2) For all Claims not covered by (1) above and to the fullest extent permitted by law, *Subcontractor agrees to release, indemnify, defend, and hold harmless the Indemnitees for, and to save them harmless against, any and all Claims (together with reasonable attorneys' fees), to the extent of liability resulting from Subcontractor's negligence or willful misconduct incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations.*

. . . .

SECTION 8. Payment to Subcontractor.

. . . .

i. Indemnification. Subcontractor hereby agrees to indemnify, defend, and save Contractor and Owner harmless from and against any mechanics' and materialmen's liens upon the Project, attorneys' fees and expenses, amounts paid in settlement, and amounts paid to discharge judgments arising out of the services, labor, equipment, or materials furnished by Subcontractor or its employees, suppliers, or subcontractors. If Subcontractor fails to do so, Contractor may deduct from sums then or thereafter due to Subcontractor such amounts as Contractor deems appropriate in its sole discretion to indemnify Contractor and Owner from liens, claims, and encumbrances. Contractor may, in its sole discretion, cure any liens or satisfy any demands, and recover its costs related directly or indirectly thereto from Subcontractor. *Subcontractor hereby waives, releases, and forever discharges Contractor and Owner from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities that Subcontractor may have against Contractor or Owner that arise directly or indirectly from curing any such liens, claims, encumbrances, or demands.*

SECTION 9. Miscellaneous.

. . . .

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

have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. *The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof.* It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

(Italics added for emphasis).

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

SECTION 1. Introduction.

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

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

. . . .

SECTION 2. Materials and Workmanship.
Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

. . . .

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

. . . .

SECTION 3. Warranty.
In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor *guarantees the Work against defects in design, workmanship, and*

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

. . . .

SECTION 5. INDEMNITY.
TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND *AGAINST ANY AND ALL CLAIMS*, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES

(SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, *BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE*. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, *REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES,* IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR

AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

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

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

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

. . . .

SECTION 8. Payment to Subcontractor.

. . . .

i. INDEMNIFICATION FOR LIENS. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR,

EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. ***SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.***

SECTION 9. Miscellaneous.

. . . .

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

> shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. *The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof.* It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

(Italics added for emphasis).

I. Clear and Unequivocal Standard

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

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

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

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

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

Here, Plaintiffs' fourth amended complaint alleges:

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

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

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

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

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

a. in failing to properly construct the Project by deviating from the plans and specifications and by failing to employ practices and methods of construction conforming with accepted industry standards; and/or using defective material; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturer's instructions;

b. in failing to properly supervise their work and the work of other trades in order to ensure that all work proceeded in accordance with the plans and specifications and in conformity with the customary and ordinary standards of the construction industry;

c. in accepting non-conforming or defective material;

d. in using and supplying defective materials;

e. in installing materials not in accordance with the plans and specifications;

f. by installing materials in violation of manufacturer's instructions;

g. in accepting and performing deficient and/or defective workmanship and/or materials without proper inspection to ensure that the work was correct and in conformity with industry standards and in accordance with the plans and specifications and the manufacturer's instructions;

h. in constructing the Project in violation of the applicable building codes; and

i. in failing to inform the architect, owner or general contractor of defects in the plans and specifications

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

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

> 133. That the Plaintiff, The Retreat at Charleston National Country Club HOA, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime, have sued Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), asserting damages allegedly caused, inter alia, by deficiencies in framing, including but not limited to deficiencies in the installation of windows, doors, and related components, during original construction of the subject structures.
>
> 134. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Fourth Amended Complaint.
>
> 135. That the respective subcontracts between this Defendant and the Cross Claim Defendants, provide for contractual indemnification in favor of BFS.
>
> 136. That the Cross Claim Defendants served as subcontractors to BFS in connection with their services at the subject structures. Regardless, therefore, of any specific contractual obligation to indemnify, there exists a special relationship between this Defendant, and the Cross Claim Defendants, sufficient to impose obligations of indemnity against the aforesaid Cross Claim Defendants, in favor of BFS.
>
> 137. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of the Cross Claim Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.
>
> 138. That BFS is entitled to *full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Cross Claim Defendants*, entitling BFS to recover from

> the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, *and further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others*, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

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

> 163. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Amended Complaint.
>
> . . . .
>
> 167. That to the extent, if any, *that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the Third-Party Defendants*, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.
>
> 168. *That BFS is entitled to full contractual and common law indemnification from the Third-Party Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action*, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Third-Party Defendants, entitling BFS to recover from the Third-Party Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and *further entitling BFS to recover from the Third-Party Defendants any sums for which BFS may be held liable to the Plaintiffs or to others*, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

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

A. 2005 Contracts

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

We view the language in Section 6 as inherently confusing insofar as it calls for the 2005 Subcontractors to indemnify BFS for BFS's sole negligence while also claiming to limit the indemnity "to the extent" of the 2005 Subcontractors' own negligence. Thus, we agree with the circuit court that the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS's own negligence. Accordingly, we affirm the circuit court's rulings that the indemnity provisions of the 2005 Contracts are neither clear nor unequivocal, and that BFS's contractual indemnity claims against Palmetto and East Coast fail as a matter of law.

B. Later Contracts

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

Moreover, the indemnity provision buried in the fine print of Section 3 of the Later Contracts contains a warranty provision that would allow BFS to seek indemnity for personal injuries and property damage arising from the sole negligence of BFS in selecting and selling the products **BFS provided** to the Later Subcontractors for installation. Because this indemnity provision is hidden among warranty and guaranty language, we agree with the circuit court that it fails to satisfy the clear and unequivocal standard.

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

Additionally, the second paragraph of Section 5 contradicts the first paragraph by purportedly requiring the Later Subcontractors to indemnify BFS (and others) even if it is alleged that the loss was caused by BFS.[6] The language of these two paragraphs cannot be reconciled. Further, the third paragraph of Section 5 is a disguised indemnity provision for defense costs. By claiming it is *not* seeking indemnification for its own negligence, BFS asks this court to ignore its pleadings

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[6] In its crossclaims, BFS states:

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

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

and the Later Contracts' language, which it drafted, and to disregard controlling authority. We find the relevant provisions of the Later Contracts are not sufficiently clear and unequivocal to require the Later Subcontractors to indemnify BFS for BFS's own negligence (to the extent BFS seeks such indemnification). Accordingly, we affirm the circuit court's rulings that the indemnity provisions of the Later Contracts are neither clear nor unequivocal and that BFS's claims must fail as a matter of law.

II. Section 32-2-10 and Public Policy

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

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Id.* (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (quoting *McGill*, 381 S.C. at 185, 672 S.E.2d at 574).

The statute at issue provides, in pertinent part:

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

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

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

A. 2005 Contracts

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

B. Later Contracts

While the statute allows BFS and the Later Subcontractors to agree that the Later Subcontractors will indemnify BFS for damages caused by the Later Subcontractors or their subs, Sections 3 and 5 of the Later Contracts obligate the Later Subcontractors not only to warrant the design and suitability of the defective materials and building components at the Project but also to indemnify and defend BFS from any property damage or personal injury resulting from the water intrusion issues related to the provided materials and building components.[7]

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[7] The language in Section 3 of the Later Contracts stating, "Subcontractor guarantees the Work against defects in design, workmanship, and materials" only makes sense if the words "design, workmanship, and materials" refer to the defective materials and building components provided by BFS because the Later Subcontractors had no responsibility for the design of the Project or any of its

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

III. Collateral Estoppel[8]

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

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

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components—including the materials. Further, even though BFS provided the structural components, the Later Contracts appear to require the Later Subcontractors to provide a ten-year warranty on "structural applications."

[8] This issue is relevant only to the Later Contracts.

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

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

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

IV. Severability

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

In both sets of contracts, the severability clause states, "The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof." However, because the indemnity provisions are replete with terms that violate South Carolina law and public policy, these terms cannot be effectively severed. Among other things, the contracts require the 2005 Subcontractors to indemnify BFS for claims of death, personal injury, and property damage—regardless of BFS's negligence—and require subcontractors to defend BFS in the case of BFS's sole negligence.

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

V. Unconscionable and Unenforceable

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

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

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

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

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

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

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

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

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

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

Conclusion

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

AFFIRMED.

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