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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

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

Appellate Case No. 2025-001224

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

v.

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

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RESPONDENT ECC CONTRACTING, LLC'S INITIAL BRIEF

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2. Whether BFS is judicially bound by its pleadings, which sought "full" indemnity for "any liability" and "any sums" incurred, thereby asserting an unrestricted claim that encompasses BFS's own negligence?
3. Whether the Court of Appeals properly applied the "clear and unequivocal" standard to BFS's contractual indemnity claim, where the contract requires subcontractors to provide a defense regardless of any ultimate liability or negligence of BFS?
4. Whether under Concord and Cumberland a party is allowed to selectively enforce a legally deficient indemnity provision that is broad enough to implicate the indemnitee's own fault?
5. Did the Court of Appeals properly decide that severance of the unenforceable contractual indemnity provisions was not possible without judicial re-writing of the contract?
6. Whether the Court of Appeals correctly held that collateral estoppel bars BFS from relitigating the enforceability of identical indemnity provisions that were previously litigated and decided in prior circuit court actions involving the same contractual language?

COUNTER STATEMENT OF THE CASE

This appeal arises from the alleged construction defects at the Retreat at Charleston National Country Club, a townhome community in Mount Pleasant, South Carolina (hereinafter "Subject Property").[1] 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"). A. p. 879. It is undisputed that BFS furnished the framing lumber, house-wrap, windows, doors, related flashings, and caulk, and provided 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 29001. A. p. 59.

Respondent, ECC Contracting, LLC (hereinafter "ECC"), served as a subcontractor of BFS and in that capacity performed deck repair work at a single unit, Unit 2001,[2] and installed windows and doors at two units.[3] installed windows and doors at two units. A. p. 59. ECC did not perform any other work on the Project. Id. ECC was paid approximately $1,506.00 for its work on the project. A. pp. 601 – 604. 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 (hereinafter "Master Agreement"). A. pp. 1477-88.[4]

The Master Agreement contains the following relevant indemnification language:

SECTION 1. Introduction.

[1] Respondent, respectfully submits that a counter statement of the case is necessary to present the facts accurately and neutrally due to the argumentative nature of Petitioner, Builders FirstSource – Southeast Group, LLC (hereinafter "BFS"), Statement of the Case. See Rule 208(b)(1)(C), SCACR (requires that the Statement of the Case "shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters…").

[2] No deficiencies have been documented by Plaintiff at Unit 2001.

[3] Units 2200 & 2201 located at 3036 Fraserburg and 3038 Fraserburg Way, Mt. Pleasant, SC.

[4] The Court of Appeals refers to this Master Agreement as a 'Later Contract.'

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.

. . . .

a. Payment by Owner is Condition Precedent. Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work **("Cost of Work")** performed pursuant to Work Orders and that *Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner*. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accept Subcontractor's Work and Contractor received Payment from Owner for all payments to Subcontractor. *It is expressly agreed that any basis for non-payment by Owner, including the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner*. (*Italic* emphasis added bold and underlined in the original)

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). A. p. 1477 – 88.

In its claims against ECC, BFS alleges in its pleadings that ECC provided and warranted materials, had a duty of care in selecting materials, and was contractually obligated for procuring adequate materials in connection with its work. A. 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. A. 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. A. p. 441.

Procedural History

The underlying litigation began on July 22, 2016, when Plaintiffs filed suit against the developer, Winston Carlyle Charleston National, LLC, and the general contractor, Colin R.

Campbell Construction, Inc., and Colin Campbell, individually. The initial Complaint alleged negligence, gross negligence, breach of express and implied warranties against all Defendants, and breach of fiduciary duty as to the developer. A. pp. 174 – 186. Plaintiffs filed an Amended Complaint on May 1, 2017, setting forth causes of action against additional defendants, including BFS. The Amended Complaint alleged, among other things, that BFS used and supplied defective materials,[5] installed materials not in accordance with the plans and specifications, failed to supervise their work, and constructed the project in violation of the applicable building codes. A. pp. 187-207.

BFS filed third-party claims against ECC Contracting, LLC ("ECC") on June 30, 2017. A. 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. A. pp. 248-309. 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, which was amended on October 15, 2020, with regard to BFS's cross-claims. ECC argued its summary judgment before Circuit Court Judge, the Honorable Jennifer B. McCoy, on November 6, 2020. A. p. 58. On July 7, 2021, Judge McCoy signed and filed an Order granting partial summary judgment in favor of ECC, and also issued similar orders for seven other subcontractor defendants. A. pp. 58 – 70. On

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

July 19, 2021, BFS filed a motion for reconsideration, which was denied on August 23, 2021. BFS appealed from those orders. A. pp. 122- 124. Over BFS's objection, the Court of Appeals consolidated the eight appeals.

On February 12, 2025, the Court of Appeals affirmed all eight of the Circuit Court's Orders. Retreat at Charleston National Country Club Home Owners Association, Inc., v. Winston Carlyle Charleston National, LLC, et al., 446 S.C. 566, (Ct. App. May 21, 2025). BFS's Petition for Rehearing was denied on May 21, 2025. BFS filed its Petition for Writ of Certiorari on June 20, 2025, which was granted on December 16, 2025.

COUNTER STANDARD OF REVIEW

This Court utilizes the same standard of review as the trial court to review the grant of summary judgment. Williams v. Jeffcoat, 444 S.C. 224, 233, 906 S.E.2d 588, 593 (2024). In Kitchen Planners, this Court recently clarified "that the 'mere scintilla' standard does not apply under Rule 56(c)." Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). "Rather the proper standard is the 'genuine issue of material fact' standard set forth in the text of the Rule." Id.

To survive summary judgment, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Id. at 462, 892 S.E.2d at 301 (quoting Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). 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). 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 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). "Additionally, the interpretation of a statute is a question of law for the Court to review de novo." S.C. Pub. Int. Found. v. Calhoun Cnty. Council, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021).

ARGUMENT

At its core, BFS's appeal rests on the untenable premise that it may rewrite both its contract and its pleadings after the fact to avoid the legal consequences of its own drafting. BFS's contractual indemnity claims arise from provisions that attempt to secure indemnification for BFS's own negligence; provisions that are neither clear nor unequivocal as required by Concord and Cumberland and that run afoul of South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10. For the foregoing reasons, and based on additional oppressive one side provisions, many of which functioned as disguised indemnity provisions, BFS's contracts are also unconscionable. For that reason, the Circuit Court correctly concluded that BFS's contractual indemnity claim fails as a matter of law, and the Court of Appeals properly affirmed that ruling.

Undeterred, BFS now attempts to recharacterize its claim as one seeking indemnity only for ECC's alleged sole negligence. That argument finds no support in either the language of the Master Agreement or the allegations of BFS's own pleadings. A contractual indemnity provision that is legally invalid cannot be resurrected through post-hoc narrowing of the theory of recovery. Nor may a court selectively enforce portions of an otherwise unlawful contract or indemnity scheme. To do so would require judicial revision of the parties' agreement, which is something South Carolina courts have repeatedly refused to do. See Lewis v. Premium Inv. Corp., 351 S.C.

167, 171 (2002); Poynter Inves., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010).

This appeal therefore presents a straightforward application of settled South Carolina law. BFS drafted an indemnity framework that reaches its own conduct, pleaded a claim seeking indemnification for "any liability" and "any sums" it may incur, and now attempts to retreat from the breadth of those choices on appeal. South Carolina law does not permit such revision. The Court of Appeals correctly applied the governing legal standards and properly concluded that BFS's contractual indemnity claim fails as a matter of law. Finally, the Court of Appeals opinion need not be disturbed because BFS has failed to appeal the Court of Appeals conclusion that it's Contracts are unconscionable, which renders this appeal moot.

I. BFS HAS FAILED TO APPEAL THE COURT OF APPEALS RULING THAT ITS CONTRACTS ARE UNCONSCIONABLE, WHICH IS DISPOSITIVE OF THIS SUBSEQUENT APPEAL

Notably, BFS did not address the Court of Appeals' findings that the Master Subcontractor Agreement contains oppressive and one-sided provisions characteristic of an adhesion contract. The Court of Appeals expressly concluded that the warranty, guaranty, and indemnity provisions were "ambiguous, conflict with each other, and do not meet the clear and unequivocal standard." As such the Court of Appeals concluded "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." A. p. 1477 – 88.

Yet BFS's Petition for Writ of Certiorari and its merits brief devote seem to skip this ruling entirely. Instead, BFS focuses almost exclusively on its interpretation of the indemnity provisions

while ignoring the broader structural defects in the agreement identified by the lower court. Issues not meaningfully challenged on appeal are deemed abandoned. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (citation omitted)("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."). "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (citation omitted). "Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal." Id. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance. Id. BFS has not appealed the Court of Appeals Judgment that its Later Contracts are unconscionable, accordingly, it stands as the law of the case. Our appellate rules reflect this rationale. "Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR.

Because BFS has failed to address the Court of Appeals' unconscionability findings or demonstrate any error in that analysis, those findings provide an independent basis for affirmance. Even if this Court were to disagree with portions of the Court of Appeals' reasoning regarding indemnity, the judgment may still be affirmed on the alternative ground that the Master Subcontractor Agreement is an unconscionable adhesion contract containing oppressive and one-sided provisions. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating appellate court need not address remaining issues when disposition of prior issue is dispositive).

II. THE LATER CONTRACTS ARE UNCONSCIONABLE

Under South Carolina law, unconscionability exists when there is "an absence of meaningful choice on the part of one party together with contract terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004); An adhesion contract is a standard-form agreement offered on a "take-it-or-leave-it" basis with nonnegotiable terms. Munoz v. Greentree Financial Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001).

Here, the record reflects a significant disparity in bargaining power. ECC is a South Carolina Limited Liability Company, while BFS is a regional division of one of the nation's largest building supply companies. This imbalance in sophistication and bargaining power is precisely the type of circumstance South Carolina courts consider when evaluating whether a contract deprives one party of a meaningful choice. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007).

The provisions of the Master Subcontractor Agreement further demonstrate its one-sided nature. The contract repeatedly shifts risk to the subcontractor while granting BFS expansive protections and remedies. Among other things, the agreement requires subcontractors to indemnify and defend BFS, even in connection with materials and products supplied by BFS; imposes sweeping warranty obligations relating to design and materials over which subcontractors had no control; limits subcontractor remedies; waives various rights and claims against BFS; and conditions payment on receipt of payment from the owner. Several of these provisions, including the "pay-if-paid" clause, are expressly prohibited by South Carolina statute. [6] See S.C. Code Ann.

[6] **SECTION 8. Payment to Subcontractor.**
a. Payment by Owner is Condition Precedent. Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("**Cost of Work**") performed pursuant to Work Orders and that *Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor*

§ 29-6-230 ("The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is not enforceable.") (emphasis added).

The agreement also contains provisions that obscure the true scope of subcontractor liability. For example, the warranty provisions require subcontractors to warrant "design, workmanship and materials," even though ECC merely installed products selected and supplied by BFS. The agreement is replete with oppressive, one-sided, provisions which relieve BFS of nearly all responsibility and leave ECC with very limited rights and remedies. See *Infra* and *Supra*.

Taken together, these provisions illustrate the cumulative effect of oppressive and one-sided drafting that South Carolina courts have found sufficient to render adhesion contracts unenforceable. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 33–36, 644 S.E.2d at 673–74. When a contract is structured to transfer virtually all project risk to the subcontractor, including risks associated with products supplied by the contractor, the resulting imbalance deprives the subcontractor of any meaningful choice in accepting the agreement. Accordingly, the Later Contracts are unconscionable and unenforceable as a matter of law.

III. PUBLIC POLICY WARRANTS AFFIRMANCE OF THE COURT OF APPEALS DECISION

South Carolina courts have consistently expanded legal protections for homebuyers, often departing from traditional common law doctrines to achieve this policy goal. One of the foundational cases establishing this approach is Lane v. Trenholm Building Co., where the South

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has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accept Subcontractor's Work and Contractor received Payment from Owner for all payments to Subcontractor. *It is expressly agreed that any basis for non-payment by Owner, including the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner*. A. p. 1485. (*Italic* emphasis added)

Carolina Supreme Court adopted the doctrine of caveat venditor, holding that "when new building is sold there is implied warranty of fitness for its intended use which springs from sale itself." Lane v. Trenholm Bldg. Co., 267 S.C. 497 (1976). The court's commitment to homebuyer protection was expanded in Kennedy v. Columbia Lumber & Manufacturing Co., where the court rejected the Court of Appeals' decision in Carolina Winds, stating that it "reaches a result which is repugnant to the South Carolina policy of protecting the new home buyer"—namely, that "a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions." Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 346 (1989). The court emphasized that "it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce" and committed to "expanding our rules to provide the innocent buyer with protection." Id. (1989).

South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers. Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 621, 879 S.E.2d 746, 760 (2022) citing Kennedy at 341-44. "Generally, courts will not enforce contracts that violate public policy." Id. (citation omitted). Public policy may be expressed in constitutional or statutory authority or in judicial decisions. Id. (citation omitted); see also 17A Am. Jur. 2d *Contracts* § 238 (2016) (explaining courts may consider, *inter alia*, the subject matter of the contract, the strength of the public policy, and the likelihood that refusal to enforce the challenged term in the contract will further public policy).

This case represents the logical progression of the same public policy. Our Courts have expressed for over 50 years a desire to protect innocent home buyers from defective products. If contractors, such as BFS, are allowed to force their subcontractors, like ECC, to bear 100% of the

risk of construction defect litigation, then contractors, like BFS, do not have any incentive to properly supervise the work of their subcontractors even though they are ultimately responsible to the Homeowner. In practice, allowing BFS to save the indemnity provisions at issue in this appeal "to the fullest extent permitted by law" would actually function to *incentivize* Contractors like BFS to cut corners and place defective homes into the stream of commerce because such Contractors would be able to force their subcontractors to bear 100% of the responsibility for inevitable litigation that results. This is the same logic is demonstrated by both the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10, and the 'Clear and Unequivocal" standard (also known as the "Negligence Rule") articulated by the Concord and Cumberland Court.

IV. BFS'S PLEADINGS SEEK INDEMNITY FOR LIABILITY THAT INCLUDES BFS'S OWN NEGLIGENCE

BFS's central premise that its pleadings seek contractual indemnity solely for damages caused by its subcontractor's negligence is irreconcilable with the plain language of its own pleadings. By seeking indemnification for "any liability" it incurs without limitation or exception, BFS seeks indemnification broad enough to encompass liability arising from its own conduct. South Carolina law does not permit a litigant to selectively reinterpret its pleadings to impose limitations that do not appear in the pleading itself.

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

BFS contends that its pleadings seek indemnity solely for damages caused by its subcontractors' negligence. That assertion is contrary to the plain language of its pleadings and the contractual provisions it invokes. Under South Carolina law, "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). Accordingly, BFS is bound by the scope of indemnity it chose to plead.

BFS's Third-Party Complaint leaves no ambiguity regarding the breadth of its claim. BFS alleges:

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

(emphasis added) A. p. 441.

This language is broad and notably devoid of limiting language. The pleading does not limit indemnification to damages caused solely by subcontractors, nor does it exclude liability arising from BFS's own conduct. The word "sole" appears nowhere in the operative demand. Instead, BFS sought the broadest possible relief: "full indemnification" for "any liability" and "any sums." By demanding full reimbursement for "any sums" it may be required to pay, BFS has pleaded a claim that encompasses the entirety of any judgment entered against it, including damages attributable to its own independent negligence.

B. <u>BFS is Bound by Its Demand for Indemnification of "Any Liability"</u>

South Carolina courts evaluate pleadings as a whole. <u>Witherspoon v. Stogner</u>, 182 S.C. 413 (1937). The scope of a claim is determined by considering both the allegations and the relief requested. <u>BEI Beach, LLC v. Christman</u>, 440 S.C. 98, 889 S.E.2d 601 (Ct. App. 2023). When BFS's Third-Party Complaint is read in its entirety, it plainly seeks indemnification broad enough to encompass BFS's own liability. The Court of Appeals correctly recognized this point, concluding that the wording of the pleadings, specifically Paragraph 138, "leave little doubt that BFS's pleadings also seek indemnification for its own negligence." See Opinion, A. p. 1552.

The ordinary meaning of the language BFS chose confirms this result. BFS contends that the word "any" means without restriction. Pet. Br. p. 18. That meaning confirms, rather than limits, the scope of BFS's pleadings. As such, "any liability" and "any sums" means liability and damages without limitation. BFS cannot now selectively interpret the word "any" to exclude its own liability while preserving recovery for subcontractor caused damages. Courts apply the plain meaning of the words written, and the language BFS employed contains no internal limitation and no qualifier restricting indemnity to solely subcontractor fault.

Because BFS chose this broad language in its pleadings, it is now bound by the consequences of that choice. As the South Carolina Supreme Court has held, "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." 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). Facts admitted in a pleading must be taken as true against the pleader, and evidence contradicting those allegations is inadmissible. Id.

Courts evaluate pleadings as written, not as a party later wishes they had been drafted. Having asserted a claim for indemnification covering "any liability" and "any sums," BFS cannot recast that claim as a limited request for damages caused solely by subcontractor negligence.

C. Paragraph 137 Alleges Causation, but Paragraph 138 Defines the Scope of Indemnity

BFS relies heavily on Paragraph 137 of its pleadings in an effort to narrow its indemnity claim. That paragraph alleges that "to the extent, if any, that BFS may be held liable… such liability would be a direct and proximate result of the wrongful acts … of the Cross Claim Defendants." A. p. 441. This allegation reflects BFS's theory of causation that subcontractors caused the underlying damages. It does not limit the scope of the indemnity BFS seeks.

Paragraph 138, by contrast, defines the scope of BFS's requested relief. It demands "full contractual indemnification" for "any liability" BFS incurs and "any sums" it may be required to pay. A. p. 441. That language contains no limitation restricting indemnification to damages caused solely by subcontractors and no exclusion for liability arising from BFS's own independent duties, including supervision of its subcontractors, or supplying materials to be installed by its subcontractors. If BFS intended to limit indemnification to subcontractor caused damages, it could easily have pleaded that it sought recovery only "to the extent caused by subcontractors." It did not. Instead, BFS demanded indemnification for "any liability" it may incur.

South Carolina law binds a party to the claims it asserts in its pleadings. A party cannot plead expansive relief and later attempt to narrow that claim to avoid its legal consequences. Because BFS's pleadings seek indemnification broad enough to encompass its own liability, the Court of Appeals correctly rejected BFS's attempt to recast its claim on appeal.

V. BFS'S INDEMNITY PROVISIONS ARE UNENFORCEABLE UNDER THE SOUTH CAROLINA ANTI-INDEMNITY STATUTE S.C. CODE ANN. §32-2-10

Before reaching questions of contractual interpretation, this case is governed by South Carolina's Anti-Indemnity Statute. The statute declares that construction agreements requiring a subcontractor to indemnify a contractor for the contractor's own negligence to be against public policy and unenforceable. See S.C. Code Ann. §32-2-10. BFS's Master Agreement violates that prohibition and cannot be enforced.

Section 5 of the Master Agreement governs indemnification. Paragraph 1 provides:

> 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.

(emphasis added, all caps in the original). A. p. 1482.

Subsequent provisions of the same section expand the subcontractor's obligations.

Paragraph 2 and 3 state:

> 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**.

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

Taken together, these provisions require subcontractors to not only indemnify BFS for claims arising from BFS's own negligence, but also to defend BFS regardless of BFS's fault. By its plain terms, the Master Agreement shifts liability for BFS's own negligence onto its subcontractors.

South Carolina's Anti-Indemnity Statute prohibits precisely this type of contractual arrangement. See S.C. Code Ann. §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). Critically, the statute does not provide that only specific clauses are void. Rather, it declares the agreement itself is against public policy and unenforceable as a matter of law. If there is any doubt as to the absolute nature of this rule, the statute provides this rule is true "notwithstanding any other provision of law." Id.

South Carolina courts have repeatedly enforced this statutory prohibition. As BFS is well aware, in D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, the Court of Appeals held that an indemnity provision requiring a subcontractor to indemnify a contractor for damages caused by the contractor's own negligence violated § 32-2-10 rendering the contract void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45–46 (Ct. App. 2018). Because the agreement violated the statute, the court

refused to require the indemnitor (BFS) to pay damages caused by the indemnitee's (D.R. Horton) negligence. Id. The Court reaffirmed the longstanding principle that "an illegal contract is unenforceable." Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)).

The same reasoning applies here. BFS's Master Agreement expressly requires subcontractors to indemnify and defend BFS for claims arising from BFS's own negligence. That is precisely the type of contractual risk-shifting § 32-2-10 prohibits. Once a contract purports to indemnify a contractor for its own negligence in violation of § 32-2-10, courts may not salvage it through selective enforcement or judicial revision. The Supreme Court has consistently held that "courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366 (2004) (citing Berkebile v. Outen, 311 S.C. 50, 53-54, 426 S.E.2d 760, 762 (1993) stating that "an illegal contract has always been unenforceable").

Nor can BFS avoid the statute by characterizing its claims as one for attorney's fees or defense costs. BFS has admitted that its attorneys fees are "consequential damages of an indemnity claim" in its briefing at the trial court level. A. p. 1380. Although attorney's fees may be recoverable by contract or statute, such provisions must still comply with South Carolina law. Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966). Nothing in South Carolina law permits a contractor to recover defense costs for claims arising from its own negligence where the Anti-Indemnity Statute would otherwise prohibit indemnification.

Because the Master Agreement purports to require ECC to indemnify BFS for liability arising from BFS's own conduct, in violation of S.C. Code Ann. §32-2-10, the entire agreement is

unenforceable as a matter of law. The Court of Appeals correctly applied the statute and properly declined to enforce a contractual provision that contravenes South Carolina public policy.

VI. THE COURT OF APPEALS CORRECTLY APPLIED THE HEIGHTENED "CLEAR AND UNEQUIVOCAL" STANDARD

Even if the Anti-Indemnity Statute did not independently invalidate the agreement, BFS's indemnity provisions still fail under South Carolina's clear and unequivocal standard governing contractual indemnification.

South Carolina courts strictly construe contractual provisions that purport to relieve a party from the consequences of its own negligence. Federal Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 27, 378 S.E.2d 56, 58 (1989). Such provisions are enforceable only when the parties' intent to shift liability for the indemnitee's own negligence is expressed in "clear and unequivocal" language. Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 409 S.C. 490, 501, 762 S.E.2d 696, 702 (2014); Concord and Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166 (Ct. App. 2018). This standard applies whenever a contract's scope is broad enough to encompass the indemnitee's own negligence. Courts look to the objective language of the agreement, rather than a party's later self-serving characterization of its claims. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language"). The Court of Appeals correctly applied that settled framework.

A. The Contractual Framework Implicates BFS's Own Negligence

The Master Agreement repeatedly contemplates claims arising from BFS's own conduct. Paragraph 2 of Section 5 requires subcontractors to indemnify BFS even where the loss is alleged

to have been caused by BFS. Paragraph 3 of Section 5 provides that the duty to defend "exists regardless of any ultimate liability or negligence of the contractor [BFS]." A. p. 1482.

Other provisions reinforce the expansive nature of the contractual scheme. Section 3, though styled as a warranty provision, requires subcontractors to "unconditionally warrant" the work against "defects in design... and materials." A. p. 1480. Because ECC's role was limited to installation, while BFS selected and supplied the windows and doors, this provision effectively operates as a disguised indemnity for BFS's own negligent selection of materials. Section 2 further expands the subcontractor's exposure by requiring protection of materials "regardless of who supplied such materials." A. pp. 1479-80. Section 8(i) similarly authorizes BFS to recover attorney's fees relating to materials furnished at the project, including materials supplied by BFS itself. A. p. 1487.

When read together, these provisions extend beyond damages attributable solely to subcontractor workmanship. Instead, they expose subcontractors to liability arising from BFS's own conduct. Because the contractual framework encompasses BFS's own negligence, the heightened clear and unequivocal standard governs the enforceability of the indemnity provisions.

B. The Indemnity Provisions Fail the Clear and Unequivocal Standard

The Master Agreement does not meet the clear and unequivocal standard as the indemnity provisions contain internally inconsistent indemnity obligations.

BFS relies primarily upon Paragraph 1 of Section 5, which purports to limit indemnity to damages "to the extent caused in whole or part" by the subcontractor. A. p. 1482. This language mirrors the standard AIA indemnity clause limiting indemnity to losses "caused in whole or in part" by the subcontractor. The Court of Appeals addressed this precise language in Concord and Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, holding that it does

not satisfy the heightened "clear and unequivocal" standard when an indemnitee seeks protection from its own negligence. 424 S.C. at 653–55, 819 S.E.2d at 174–75. BFS nevertheless asks this Court to treat the same language as though it clearly limits indemnity to subcontractor negligence.

The analysis, however, cannot end with Paragraph 1. Paragraph 2 of Section 5 expands the subcontractor's obligation to claims involving BFS's own negligence. Although Paragraph 2 addresses personal injury claims rather than the property damage claim at issue here, it reveals the drafting structure of the agreement: BFS simultaneously attempts to limit indemnity to subcontractor fault while elsewhere requiring protection even when BFS's own negligence is implicated. Paragraph 3 of Section 5 further compounds this inconsistency by requiring ECC to defend BFS regardless of fault.

These provisions cannot be reconciled with BFS's assertion that the agreement was intended to apply only to subcontractor negligence. As the drafter of these conflicting provisions, any uncertainty as to the meaning of the terms must be construed against BFS. Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 683 S.E.2d 814, 817 (Ct. App. 2009).

Such contradictory language cannot clearly and unequivocally establish an intent to indemnify BFS for its own negligence. The absence of clarity is precisely the circumstance in which South Carolina courts refuse to enforce indemnity provisions shifting liability for the indemnitee's negligence. Both courts below correctly recognized that these mutually inconsistent indemnity provisions fail the heightened standard.

C. BFS Cannot Avoid The Clear and Unequivocal Standard By Recasting Its Claim

BFS attempts to bypass the clear and unequivocal standard by retroactively narrowing its claim to encompass only its subcontractor's negligence. However, as the Court of Appeals

correctly recognized such characterization cannot override the language of the Master Agreement or its own pleadings. See Opinion, A. pp. 1554-55.

When the Master Agreement is read as a whole, the indemnity provisions are broad enough to reach claims involving BFS's own conduct. Under South Carolina law, once a contract implicates the indemnitee's negligence, the provision must satisfy a heightened standard of clarity to be enforceable. Federal Pac. Elec., 298 S.C. at 27, 378 S.E.2d at 58; Ashley II, 409 S.C. at 501, 762 S.E.2d 702. This standard is triggered by the objective scope of the contractual language, not by BFS's subjective litigation strategy or its current theory of recovery.

BFS essentially invites this Court to ignore precedent and "blue pencil" the agreement to limit indemnity solely to subcontractor negligence. Poynter, 387 S.C. at 583, 694 S.E.2d at 18. This Court has long resisted such invitations. Courts interpret contracts as written; they do not revise them to conform to a party's litigation strategy. As this Court has repeatedly held, "[i]t is not the function of the court to rewrite contracts for parties." Lewis., 351 S.C. at 171, 568 S.E.2d at 363.

Because BFS drafted a Master Agreement that implicates its own negligence yet fails to express, in clear and unequivocal terms, an intent to shift that specific liability to ECC, the indemnity provision is unenforceable as a matter of law. BFS nevertheless asks this Court to disregard the portions of the agreement that implicate its own negligence and enforce only the portions it now characterizes as limited to subcontractor fault. But that argument seeks more than interpretation, it seeks reformation of the contract BFS itself drafted. South Carolina law does not permit such judicial revision of a party's own drafting. The Court should therefore decline BFS's request and affirm the indemnity provision cannot be enforced as BFS proposes.

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

Even apart from the contractual language, BFS's attempt to characterize this case as involving only subcontractor negligence is also factually untenable. BFS admitted responsibility for supervising the work performed by ECC and other subcontractors. (R. pp. 688–689). Given that supervisory role, any negligence attributed to ECC would necessarily involve concurrent negligence by BFS. BFS therefore cannot transform a claim involving potential concurrent negligence into one involving sole subcontractor negligence in order to avoid the heightened standard.

E. Concord and Cumberland Supports Affirmance

BFS repeatedly asserts that, under Concord and Cumberland, a contractor may pursue indemnity against a subcontractor for subcontractor's negligence even when the indemnity clause itself fails the clear and unequivocal standard, and, therefore, the general rules of contract construction should apply to its claims. This argument mischaracterizes both the holding and scope of that decision.

In Concord and Cumberland, the subcontractor, The Muhler Company, Inc. ("Muhler"), moved for narrow partial summary judgment seeking a narrow declaration: that the indemnity provision did not require it to indemnify the general contractor, Superior Construction Corporation ("Superior"), for Superior's own negligence. Concord and Cumberland, 424 S.C. at 645, 819 S.E.2d at 170. The issue before the Court of Appeals was therefore specifically confined to whether the contractual language clearly and unequivocally expressed an intent to shift liability for the contractor's own negligence where the contractor's concurrent negligence was implicated. The court held it did not.

What the court in Concord and Cumberland did not decide is equally important. The question of whether a contractor could recover damages attributable solely to subcontractor negligence despite an otherwise unenforceable indemnity agreement was neither raised nor addressed. The subcontractor in that case did not dispute its obligation to indemnify the contractor for damages caused by its own workmanship.

BFS's reliance on Concord and Cumberland as a mechanism to bypass the "clear and unequivocal" standard is misplaced. That decision did not authorize the selective enforcement of a legally deficient indemnity provision. By applying the heightened standard to BFS's broad contractual language, the Court of Appeals in this case did not depart from precedent; it applied it.

F. BFS's Reliance on the Phrase "To the Fullest Extent Permitted by Law" To Limit The Scope of The Indemnity Provisions Is Not Preserved and Fails as a Matter of Law

BFS repeatedly contends that the Court of Appeals erred in finding its indemnity provisions unenforceable because those provisions are prefaced by the phrase "to the fullest extent permitted by law." This argument fails for two independent reasons. First, it was never raised before the trial court or the Court of Appeals and is therefore not preserved for review. Second, even if considered, the argument fails as a matter of law because boilerplate qualifying language cannot cure indemnity provisions that violate South Carolina's Anti-Indemnity Statute or the clear and unequivocal standard.

BFS argues repeatedly that the Court of Appeals erred in ruling its provisions unenforceable because they are prefaced by the phrase "to the fullest extent permitted by law". This argument is not properly preserved on appeal because it was not raised at the Trial Court or Court of Appeals phase. Furthermore, it is vacuous boilerplate language, which if given the

meaning posited by BFS at this late hour, would render a meeting of the minds as to the meaning of the minds even more impossible for these 'contracts'.

a. The "to the fullest extent permitted by law" argument is not preserved for appellate review

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. Creech v. South Carolina Wildlife & Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). BFS now argues that its indemnity provisions should be enforced because they are prefaced by the phrase "to the fullest extent permitted by law." That argument, however, was not presented to the trial court, was not argued before the Court of Appeals, and was not raised in BFS's Petition for Writ of Certiorari. Because the argument was never raised and ruled upon in the courts below, it is not preserved for review and should not be considered by this Court.

b. The phrase "to the fullest extent permitted by law" does not save the indemnity provision and fails as a matter of law

Even if BFS's argument were properly before this Court, there is no binding or persuasive authority supporting BFS' interpretation of this phrase and BFS' interpretation would render a meeting of the minds impossible. The phrase "to the fullest extent permitted by law" is common boilerplate language appearing in many construction contracts, including the indemnity provisions discussed in cases such as Concord and Cumberland, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), and D.R. Horton, Inc., 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). Yet South Carolina courts have never treated this prefatory phrase as determinative in interpreting an indemnity provision or as a mechanism that rescues otherwise unlawful language. Notably, BFS cites no authority supporting its interpretation. That omission is glaring.

Indeed, the Court of Appeals rejected precisely that notion in D.R. Horton. There, the indemnification agreement began with the same prefatory language "to the fullest extent permitted by law," yet the court still concluded the provision violated South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10. D.R. Horton, 422 S.C. at 152, 810 S.E.2d at 45–46. The presence of that phrase did not cure the statutory violation or render the provision enforceable.

The same reasoning applies here. The Later Contract repeatedly attempts to impose defense and indemnity obligations on subcontractors for claims arising from BFS's own conduct. Because § 32-2-10 declares such provisions contrary to public policy and unenforceable, BFS cannot preserve them through generalized qualifying language. Nor does the phrase satisfy the separate requirement that indemnity for an indemnitee's negligence be expressed in "clear and unequivocal" terms.

Rather than clarifying the parties' obligations, the phrase introduces uncertainty by leaving courts to determine after the fact what obligations are "permitted by law." Such ambiguity is particularly problematic in the context of indemnity provisions, which must be drafted with precision when they purport to shift liability. See Section IV, infra.

South Carolina contract law likewise requires a meeting of the minds as to the essential terms of an agreement. Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 620, 879 S.E.2d 746, 759 (2022); Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) ("A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." (citation omitted)); *cf. id.* at 579, 762 S.E.2d at 701 (noting even when parties manifest an intent to be bound, an indefinite material term may invalidate the agreement (quoting 1 Corbin on Contracts § 2.8 (Rev. ed. 1993))). BFS's interpretation would undermine that fundamental requirement. If the scope of the parties'

obligations depends on what a court later determines to be "permitted by law," then neither party could know the meaning of the agreement at the time of contracting. Such an interpretation would render the parties' obligations indeterminate rather than definite.

Accordingly, the boilerplate phrase "to the fullest extent permitted by law" cannot rescue indemnity provisions that otherwise violate South Carolina law. Because the Later Contracts simultaneously conflicts with the Anti-Indemnity Statute and fails the heightened clear and unequivocal standard, the Court of Appeals correctly held the provisions unenforceable.

G. Campbell v Beacon Mfg. Co. and S.C. Elec. & Gas v Utilities Const. Co. Are Neither Binding Nor Even Persuasive Authorities

BFS relies on Campbell v. Beacon Mfg. Co., 313 S.C. 451, 438 S.E.2d 271(Ct. App.), and S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 125 S.E.2d 613 (1964) to argue that it "should have been allowed to proceed on its contractual indemnification claim for such damages as are found to result from the subcontractor's negligence. Such a result is not novel in South Carolina." Pet. Br. p. 24. Neither case supports that proposition.

First, Campbell v Beacon Mfg. Co., is readily distinguishable and was specifically analyzed and distinguished by the Court of Appeals in Concord and Cumberland. In Concord and Cumberland, the Court explained that reliance on Campbell is misplaced because the indemnity provision in that case contained "clear" contractual language allowing recovery even where the indemnitee was concurrently negligent. Concord and Cumberland, 424 S.C. at 649–50, 819 S.E.2d at 172. Although the Campbell court did not expressly reference the "clear and unequivocal" standard, the Court of Appeals recognized that it effectively applied that standard by enforcing indemnification only because the contract's terms were unmistakably clear. Id. Thus, Campbell reinforces the governing rule that indemnity for an indemnitee's negligence is enforceable only when the contract clearly and unequivocally expresses that intent. The provision in Campbell

satisfied that standard because its terms were unmistakably clear and supported indemnification even where Beacon was partially at fault. The 2005 Contracts here contain no such clarity.

BFS's reliance on S.C. Electric & Gas Co. v. Utilities Construction Co. fares no better. That decision predates South Carolina's Anti-Indemnity Statute for construction contracts, S.C. Code Ann. § 32-2-10, which was enacted in 1976. The statute reflects the Legislature's determination that construction agreements purporting to indemnify a party for its own negligence are contrary to public policy and unenforceable. Because S.C. Electric & Gas Co. was decided more than a decade before the enactment of § 32-2-10, it was decided under a materially different legal framework and provides little guidance in interpreting modern construction indemnity provisions governed by the statute.

In short, neither case advances BFS's position. Campbell reinforces the requirement that indemnity for an indemnitee's negligence must be expressed in clear and unequivocal terms, and S.C. Electric & Gas Co. predates the statutory prohibition that now governs construction indemnity agreements. Accordingly, neither decision undermines the Court of Appeals' conclusion that BFS's indemnity provisions are unenforceable under South Carolina law.

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

The Court of Appeals applied the cardinal rule of South Carolina contract interpretation: to ascertain and give legal effect to the parties' intentions as determined by the contract language. Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012). In doing so, courts must read a contract as a whole and avoid creating ambiguity by isolating provisions or single sentences. Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014); McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 574 (2009).

The Court of Appeals followed precisely that approach. Rather than isolating individual clauses, it examined the Master Agreement's indemnity framework as an integrated whole. The court correctly recognized that Section 3, although labeled a "Warranty" provision, contains language that functions as an indemnity clause. See Opinion, A. p. 1553. Section 3 requires subcontractors to guarantee the work against defects in "design, workmanship, and materials." A. p. 1480. This language is significant. ECC's role was limited to installation, while BFS selected and supplied the materials. The references to "design" and "materials" therefore necessarily implicate BFS's own conduct. Requiring subcontractors to indemnify BFS for defects in design or materials supplied by BFS effectively shifts liability for BFS's own decisions.

Section 8(i) reinforces that conclusion. That provision requires subcontractors to indemnify BFS for "attorneys' fees and expenses, amounts paid in settlement, and amounts paid to discharge judgments" arising from services, labor, equipment, or materials furnished at the project. A. p. 1487. Unlike Section 5, Section 8(i) contains no language tying indemnity to subcontractor negligence. Instead, it imposes a broad obligation to defend and reimburse BFS for litigation costs and settlements without regard to fault.

When these provisions are read together, as South Carolina law requires, the Master Agreement reveals a contractual framework that attempts to shift liability to subcontractors for damages arising from BFS's own conduct in selecting materials, supervising work, and administering the project. This holistic approach is exactly what South Carolina contract law requires. Courts must determine the parties' intent from the four corners of the document, not from isolated provisions. McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501 (1945). The Court of Appeals therefore properly considered the relationships among the Master

Agreement's warranty, indemnity, and fee-shifting provisions in determining the overall allocation of risk.

A. The Court of Appeals Did Not Misinterpret the Contractual Term "Work"

BFS argues that the Court of Appeals ignored the defined term "Work" in Section 1 of the Master Agreement. Pet. Br. pp. 26-27. But the Court did not overlook the definition. Instead, it recognized that the definition describes the scope of ECC's contractual duties, while the indemnity provisions describe the scope of ECC's potential liability.

South Carolina law requires courts to interpret contracts as a whole, not by isolating a single definition. Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014). Consistent with that rule, the Court of Appeals considered the Master Agreement in its entirety and identified the disconnect created by BFS's drafting.

Section 1 defines "Work" as the materials and services provided by the subcontractor. A. p. 1477. ECC's role was limited to installation[7]; it had no responsibility for the design or selection of windows and doors. A. pp. But the indemnity provisions in Sections 3, 5, and 8 extend well beyond that defined scope. Those provisions impose liability for defects in design and materials, matters controlled by BFS, and even require ECC to defend BFS regardless of BFS's own fault.

This mismatch between ECC's defined work and the liabilities imposed by the indemnity provisions is precisely what triggers the heightened clear and unequivocal standard under South Carolina law. The relevant question is not whether "Work" is defined; it is whether the indemnity framework, as drafted, attempts to shift liability for BFS's own conduct. When the Master Agreement is read as a whole, the answer is clear. Sections 3 and 8 impose liability relating to

[7] ECC served as a subcontractor of BFS and in that capacity performed deck repair work on a single unit and installed windows and doors at two units. A. p. 59.

design and material defects that fall outside ECC's defined work, which was limited to installation of material. Thus, even accepting BFS's definition of "Work," the indemnity provisions still reach claims arising from BFS's own decisions regarding design and materials.

The Court of Appeals, therefore, did not misinterpret the Master Agreement, it applied settled principles of contract interpretation. A definition describing what ECC was hired to do cannot be used to conceal indemnity provisions requiring ECC to pay for liabilities arising from BFS's own conduct. Because the Master Agreement's indemnity framework extends beyond ECC's defined work and into areas controlled by BFS, the clear and unequivocal standard applies, and the agreement fails to satisfy it.

B. The Ambiguity Created by BFS's Drafting Must Be Construed Against BFS

A contract is ambiguous when it is capable of more than one reasonable interpretation. Schulmeyer, 353 S.C. at 495, 579 S.E.2d at 134. Where such ambiguity exists, South Carolina law requires courts to construe the contract against the party who drafted it. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) (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). The Master Agreement drafted by BFS contains precisely the type of internal inconsistency that creates contractual ambiguity.

Certain provisions appear to limit indemnification to damages attributable to subcontractor negligence, while other provisions simultaneously impose obligations that extend to claims arising from BFS's own conduct. See supra, Section I – III. When read together, these provisions create conflicting standards governing the scope of indemnification. Some language suggests that indemnity is limited to damages caused by the subcontractor, while other provisions impose defense and indemnification obligations even when liability arises from BFS's own conduct. These

provisions cannot be reconciled without choosing one interpretation over another. That is the hallmark of contractual ambiguity.

Because BFS drafted the Master Agreement, it bore the burden of ensuring its indemnity provisions were "clear and unequivocal." BFS failed to do so. Instead, BFS drafted a series of conflicting and confusing obligations. The Court of Appeals did not create that ambiguity; it recognized the contradictions inherent in the language BFS chose.

BFS now asks this Court to harmonize those provisions in a way that narrows their scope and preserves its indemnity claim. South Carolina law does not permit courts to rewrite contracts to rescue a party from the consequences of its drafting choices. As this Court has repeatedly held, it is without authority to alter a contract by construction or to make a new contract for the parties. "[i]t is not the function of the court to rewrite contracts for parties." C.A.N. Enterprises, Inc. v. South Carolina Health and Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1998); Lewis, 351 S.C. at 171, 568 S.E.2d at 363 (2002).

In short, the Court of Appeals did exactly what South Carolina law requires: it read the Master Agreement as a whole, considered the interaction among its various provisions, and recognized that the indemnity framework drafted by BFS is internally inconsistent. Under settled principles of contract interpretation, those ambiguities must be construed against BFS as the drafter. The Court of Appeals therefore correctly concluded that BFS's indemnity provisions cannot be enforced as written.

C. The Boilerplate Phrase "To the Fullest Extent Permitted by Law" Does Not Cure an Otherwise Unlawful Indemnity Provision

BFS cannot salvage its indemnity provisions by prefacing them with the boilerplate phrase "to the fullest extent permitted by law." South Carolina courts have already rejected that argument. In D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, the Court of Appeals

considered an indemnification agreement that began with identical language and found the provision violated South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10. D.R. Horton, 422 S.C. at 152, 810 S.E.2d 41, 45-46. Thus, such boilerplate language does not cure provisions that otherwise attempt to impose obligations prohibited by South Carolina law.

Here, the Master Agreement repeatedly attempts to impose defense and indemnity obligations on subcontractors for claims arising from BFS's own conduct. Because § 32-2-10 declares such provisions contrary to public policy and unenforceable, BFS cannot preserve them through generalized qualifying language. Nor does the phrase satisfy the separate requirement that indemnity for an indemnitee's negligence be expressed in "clear and unequivocal" terms. Rather than clarifying the parties' intent, the phrase introduces uncertainty by leaving courts to determine after the fact what obligations are "permitted by law."

Accordingly, the boilerplate phrase "to the fullest extent permitted by law" cannot cure an indemnity provision that simultaneously violates § 32-2-10 and fails the heightened clear and unequivocal standard.

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

Having drafted an indemnity scheme that violates both South Carolina's Anti-Indemnity Statute and the clear and unequivocal standard, BFS now asks the Court to salvage portions of the agreement through severance. South Carolina law does not permit such judicial reconstruction.

Severance is appropriate only when the unlawful provision is independent and the remaining portions of the contract can stand without altering the parties' bargain. As this 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." Simpson v. MSA of Myrtle Beach, Inc, 373 S.C. 14, 33–36, 644 S.E.2d 663, 673–74 (2007). That principle controls here.

The indemnity framework BFS drafted is not confined to a single clause. Instead, it appears throughout Sections 3, 5, and 8(i) of the Master Agreement. When read together, as South Carolina law requires, these provisions form an integrated allocation of risk between BFS and its subcontractors. Collectively, they impose overlapping obligations that attempt to shift liability to the subcontractors for damages arising from BFS's own conduct. The Court of Appeals properly recognized that the agreement is "replete with terms that violate South Carolina law and public policy" and therefore unenforceable. Opinion, A. p. 1559.

BFS attempts to avoid this conclusion by characterizing the relevant provisions as "separate distinct sections relating to separate matters." Pet. Br. p. 39. But the mere physical separation of clauses does not render them severable. Each of the provisions at issue governs liability arising from the same construction work and defines the scope of subcontractor responsibility to BFS. Because these clauses are interdependent, removing certain provisions while leaving others intact would not simply sever unlawful language; it would create an indemnity framework materially different from the one BFS drafted.

South Carolina courts do not undertake such revisions. Courts may not "blue-pencil" contractual provisions in order to create a lawful agreement where the parties did not do so themselves. Poynter, 387 S.C. at 588, 694 S.E.2d at 18; Lewis, 315 S.C. at 588, 568 S.E.2d at 363. Likewise, as the Court of Appeals aptly observed in Concord and Cumberland, "merging the indemnity clauses into one clause by replacing some language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term to which [the party] did not agree." Concord & Cumberland 424 S.C. at 656.

Allowing severance in these circumstances would also undermine the public policy embodied in South Carolina's Anti-Indemnity Statute, S.C. Code Ann. §32-2-10. The statute reflects the Legislature's determination that contractors may not shift liability for their own negligence to subcontractors in construction contracts. S.C. Code Ann. §32-2-10. Where a contractual framework repeatedly attempts to impose such prohibited obligations, severance cannot be used to reconstruct the agreement into a lawful form. To do so would encourage drafters to include overbroad, unlawful provisions, secure in the knowledge that a court will later trim them down to the legal limit if challenged by the other party. South Carolina law does not encourage such statutory end-runs.

Recognizing these principles, the Court of Appeals concluded that individual portions of the indemnity provision could not be effectively severed because the agreement was "replete with terms that violate South Carolina law and public policy." Opinion, A. p. 1559. Under South Carolina law, a court has discretion in determining whether to sever particular provisions or decline enforcement of the clause altogether. See Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020). Given the pervasive defects in BFS's indemnity framework, the Court of Appeals correctly exercised that discretion and declined to engage in the judicial rewriting BFS now requests.

Because the unlawful provisions are intertwined with the Master Agreement's overall allocation of risk, attempting to sever isolated language would not preserve the parties' agreement, it would reconstruct it. South Carolina law does not authorize courts to repair contracts that violate statutory public policy. The Court should therefore affirm the Court of Appeals' determination that BFS's indemnity provisions are not subject to severance.

IX. BFS'S CONTRACTUAL INDEMNITY CLAIMS ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL

BFS's attempt to reframe its claim as one seeking indemnity only for ECC's alleged sole negligence does not avoid preclusion. Collateral estoppel bars a party from relitigating an issue that was actually litigated and determined by a valid and final judgment and was essential to that judgment. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The doctrine applies even if the claims asserted in the later litigation differ from those raised in the earlier action. Id. The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984).

Those requirements are satisfied here. The indemnity provisions at issue are identical to those previously argued in Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., et al., (A. pp. 665-675) (the "Newman" Order); Pavic v. Carolina Cottage Homes, LLC, et al,, (A. pp. 162 - 173) (the "McCoy" Order) and Six Fifty-Six Owners' Association, Inc., et al., v. Winsor South, LLC, et al., (A. pp. 682-86) (the "Young" Order). Each of those cases involved BFS and the same contractual indemnity language contained in the Master Subcontractor Agreement. In each action, the circuit court examined and ruled upon the enforceability of those provisions, rejecting BFS's attempts to impose indemnity obligations based on the same contractual language.

The Court of Appeals correctly recognized that the doctrine of collateral estoppel applies in these circumstances. As the court explained, the indemnity clauses at issue in this case are "the same clauses from the same agreement at issue in MI Windows & Doors, Pavic, and Six Fifty-Six Owners' Association," and because BFS had already litigated the enforceability of those provisions, the circuit court properly applied collateral estoppel to bar BFS from relitigating that

issue. See Opinion, A. p. 1557-58.

BFS attempts to avoid this result by arguing that appeals from those prior orders were pending. That contention conflicts with well-established law. A judgment remains final for purposes of collateral estoppel unless and until it is reversed 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 until and unless reversed). South Carolina law likewise defines a final judgment as 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). As the Court of Appeals explained, "a judgment is final and remains final unless and until it has been overturned on appeal." A. pp. 1557-58. Indeed, Rule 201(a), SCACR permits an appeal only from a final judgment or appealable order. The Newman, McCoy, and Young Orders therefore qualify as final judgments, the pendency of BFS's appeals does not diminish their preclusive effect.

The rationale underlying this rule is straightforward. If judgments lost their preclusive effect merely because an appeal was pending, parties could repeatedly relitigate identical issues in different courts while awaiting appellate review, resulting in duplicative litigation and inconsistent outcomes. The Court of Appeals expressly rejected that approach, noting that allowing parties to relitigate issues during the pendency of an appeal would subject courts and litigants to "inefficient duplicative litigation." A. pp. 1557-58.

Nor does BFS avoid preclusion by asserting that the earlier actions involved indemnity for BFS's negligence while this case concerns indemnity for subcontractor negligence. That distinction is immaterial. The prior orders determined the enforceability of the same indemnity provisions contained in BFS's Master Subcontractor Agreement. Once a court determines that a

contractual provision is unenforceable as a matter of law, the losing party may not relitigate that legal determination by advancing a different theory of liability under the same contractual language.

Permitting BFS to relitigate the enforceability of the same indemnity provisions in successive actions would undermine the very purpose of collateral estoppel, which is to promote finality, conserve judicial resources, and prevent inconsistent results. BFS's approach would allow it to move from county to county relitigating the same "clear and unequivocal" analysis based on the same contractual provisions until it obtains a favorable ruling. The doctrine of collateral estoppel exists precisely to prevent such repetitive litigation.

Accordingly, the Court of Appeals properly concluded that the enforceability of BFS's indemnity provisions had already been litigated and decided, and, therefore, collateral estoppel bars BFS from relitigating that issue under a different theory of liability.

CONCLUSION

For multiple independent reasons, the decision of the Court of Appeals should be affirmed.

First, BFS's own pleadings seek indemnification for "any liability" and "any sums" it may be required to pay. In its pleadings, BFS necessarily sought indemnification that includes liability arising from its own conduct. South Carolina law binds a party to the claims it chooses to assert in its pleadings, and BFS cannot now recast those claims on appeal to avoid their legal consequences.

Second, the indemnity provisions in BFS's Master Subcontractor Agreement violate South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10, which makes construction agreements purporting to indemnify a party for its own negligence contrary to public policy and unenforceable. The agreement's language requiring subcontractors to defend and indemnify BFS regardless of BFS's own negligence is clearly language the Legislature sought to prohibit.

Third, even apart from the statutory prohibition, the indemnity provisions fail under South Carolina's longstanding "clear and unequivocal" standard governing contractual indemnification for an indemnitee's own negligence. When the Master Agreement is read as a whole, the provisions are internally inconsistent and ambiguous. Rather than clearly limiting indemnification to subcontractor negligence, the agreement repeatedly contemplates claims arising from BFS's own conduct. Such language does not satisfy the strict clarity required by South Carolina precedent.

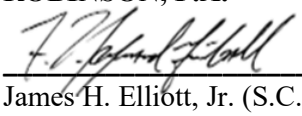
Fourth, BFS's request for severance would require the Court to rewrite the parties' agreement. The indemnity provisions are not confined to a single clause but instead appear throughout multiple sections of the Master Agreement. As the Court of Appeals correctly recognized, the agreement is "replete with terms that violate South Carolina law and public policy." Removing isolated phrases would not preserve the parties' bargain—it would reconstruct it. South Carolina courts have consistently refused to "blue-pencil" contracts in that manner.

Finally, BFS's claims are independently barred by collateral estoppel. The enforceability of these identical indemnity provisions has already been litigated and decided in prior circuit court actions involving the same contractual language. The Court of Appeals correctly concluded that BFS cannot relitigate that issue by advancing a different theory of liability under the same provisions.

BFS asks this Court to do what South Carolina law does not allow: rewrite a contract that violates statutory public policy, narrow pleadings after the fact, and relitigate issues that have already been decided. The Court of Appeals correctly applied settled law in rejecting those arguments. For these reasons, Respondent, ECC Contracting, LLC, respectfully requests that this Court affirm the decision of the Court of Appeals.

[signature page to immediately follow]

RICHARDSON PLOWDEN & ROBINSON, P.A.



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