

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

RECEIVED

Mar 17 2026

S.C. SUPREME COURT

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

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

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

Appellate Case No. 2025-001224

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

v.

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

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

v.

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

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

---

**RESPONDENTS EAST COAST CARPENTRY AND PALMETTO TRIM AND RENOVATION'S JOINT RETURN TO PETITIONER'S BRIEF**

---

**RICHARDSON PLOWDEN & ROBINSON, P.A.**

James H. Elliott, Jr. (S.C. Bar. No 13620)  
F. Heyward Grimball (S.C. Bar. No. 101743)  
Payton D. Hoover (S.C. Bar. No. 75967)  
Sarah F. Hawkins (S.C. Bar No. 80120)  
235 MaGrath Darby Blvd., Suite 100  
Mt. Pleasant, SC 29464  
(843) 805-6550 FAX (843) 805-6588  
jelliott@RichardsonPlowden.com  
fhgrimball@RichardsonPlowden.com  
phoover@richardsonplowden.com  
shawkins@richardsonplowden.com  
**Attorneys for Respondent East Coast  
Carpentry and Palmetto Trim and  
Renovation**

## TABLE OF CONTENTS

COUNTER STATEMENT OF THE QUESTION PRESENTED .....	8
COUNTER STATEMENT OF FACTS.....	8
COUNTER STANDARD OF REVIEW.....	14
ARGUMENT .....	15
1. BFS’S PLEADINGS SEEK INDEMNITY FOR LIABILITY THAT INCLUDES BFS’S OWN NEGLIGENCE.....	16
A. BFS is Bound by the Allegations of its Own Pleadings .....	17
B. BFS is Bound By Its Demand for Indemnification of “Any Liability”.....	19
C. Paragraph 167 Alleges Causation, but Paragraph 168 Defines the Scope of Indemnity ....	20
2. BFS’S INDEMNITY PROVISIONS ARE UNENFORCEABLE UNDER THE SOUTH CAROLINA ANTI-INDEMNITY STATUTE S.C. CODE ANN. §32-2-10 .....	21
3. THE COURT OF APPEALS CORRECTLY APPLIED THE HEIGHTENED “CLEAR AND UNEQUIVOCAL” STANDARD .....	24
A. The Contractual Framework Implicates BFS’s Own Negligence.....	25
B. The Indemnity Provisions Fail the Clear and Unequivocal Standard .....	26
C. BFS Cannot Avoid The Clear and Unequivocal Standard By Recasting Its Claim .....	27
D. East Coast and Palmetto Trim Cannot Be Solely Negligent For the Claims Against BFS and BFS is Statutorily Responsible For The Work of East Coast .....	28
E. Concord and Cumberland Supports Affirmance .....	29
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 .....	30
a. The “to the fullest extent permitted by law” argument is not preserved for appellate review .....	31
b. The phrase “to the fullest extent permitted by law” does not save the indemnity provision and fails as a matter of law .....	32

G. <u>Campbell v. Beacon Mfg. Co. and S.C. Elec. &amp; Gas v. Utilities Const. Co.</u> Are Neither Binding Nor Even Persuasive Authorities.....	33
4. THE COURT OF APPEALS PROPERLY APPLIED SETTLED SOUTH CAROLINA LAW REGARDING CONTRACT INTERPRETATION.....	34
A. The Indemnity Provisions Are Ambiguous and Must Be Construed Against BFS.....	36
B. The Court of Appeals Did Not Misinterpret the Contractual Term “Work” .....	38
5. SEVERANCE OF THE INDEMNITY LANGUAGE WOULD REQUIRE JUDICIAL REWRITING OF THE 2005 CONTRACTS .....	40
6. ALTERNATIVE SUSTAINING GROUND #1: BFS’S 2005 CONTRACT IS UNCONSCIONABLE JUST AS THE LATER CONTRACTS ARE .....	42
7. ALTERNATIVE SUSTAINING GROUND #2: BFS’S CONTRACTUAL INDEMNITY CLAIMS AGAINST EAST COAST ARE BARRED BY THE APPLICABLE STATUTE OF REPOSE, S.C. CODE ANN §15-3-640 .....	44
CONCLUSION .....	45

**TABLE OF AUTHORITIES**

**Cases**

Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 409 S.C. 490, 762 S.E.2d 696 (2014)...25,27

BEI Beach, LLC v. Christman, 440 S.C. 98, 889 S.E.2d 601 (Ct. App. 2023).....19

Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002).....23

Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993).....24

Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001).....15

Campbell v. Beacon Mfg. Co., 313 S.C. 451, 438 S.E.2d 271(Ct. App.).....33,34

C.A.N. Enterprises, Inc. v. South Carolina Health and Human Servs. Fin. Comm’n, 296 S.C. 373, 373 S.E.2d 584 (1998) .....37

Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 628 S.E.2d 38 (2006) .....15

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) .....15

Columbia/CSA-HS Greater Columbia Healthcare Sys. v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n, 411 S.C. 557, 769 S.E.2d 847 (2015) .....45

Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) .....25, 29, 31, 41

Creech v. South Carolina Wildlife & Marine Resources Dep’t., 328 S.C. 24, 491 S.E.2d 571 (1997).....31

Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 620, 879 S.E.2d 746, 759 (2022) .....32

Doe v. TCSC, LLC, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020).....42

D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) .....23,31

Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483 (Ct. App. 2007) .....36

Federal Pacific Electric v. Carolina Production Enterprises, Inc., 298 S.C. 23, 378 S.E.2d 56 (1989).....24, 27

George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).....15

<u>Johnson v. Alexander</u> , 413 S.C.196, 775 S.E.2d 697 (2015) .....	20
<u>Kitchen Planners, LLC v. Friedman</u> , 440 S.C. 456, 892 S.E.2d 297 (2023).....	14,15
<u>Knight v. Austin</u> , 396 S.C. 518, 722 S.E.2d 802 (2012).....	14
<u>Lewis v Premium Inv. Corp.</u> , 351 S.C. 167, 568 S.E.2d 361 (2002).....	16, 27, 38, 41
<u>Manley v. Manley</u> , 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987) .....	15
<u>McGill v. Moore</u> , 381 S.C. 179, 672 S.E.2d 574 (2009).....	34
<u>McPherson v. J.E. Serrine &amp; Co.</u> , 206 S.C. 183, 33 S.E.2d 501 (1945).....	36
<u>Plantation A.D., LLC v. Gerald Builders of Conway, Inc.</u> , 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009).....	37
<u>Postal v. Mann</u> , 308 S.C. 385, 418 S.E.2d 322 (Ct. App. 1992).....	17
<u>Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.</u> , 387 S.C. 583, 694 S.E.2d 15 (2010).....	16, 27, 41
<u>Rimer v. State Farm Mut. Auto. Ins. Co.</u> , 248 S.C. 18, 148 S.E.2d 742 (1966).....	24
<u>S.C. Elec. &amp; Gas Co. v. Utilities Const. Co.</u> , 244 S.C. 79, 125 S.E.2d 613 (1964).....	33
<u>S.C. Pub. Int. Found. v. Calhoun Cnty. Council</u> , 432 S.C. 492, 854 S.E.2d 836 (2021).....	15
<u>Schulmeyer v. State Farm Fire &amp; Co.</u> , 335 S.C. 491, 579 S.E.2d 132 (2003).....	25, 36
<u>Simpson v. MSA of Myrtle Beach, Inc.</u> , 373 S.C. 14, 644 S.E.2d 663 (2007).....	40, 42
<u>Springs &amp; Davenport, Inc. v. AAG, Inc.</u> , 385 S.C. 320, 683 S.E.2d 814 (Ct. App. 2009).....	26
<u>Stevens &amp; Wilkinson of S.C., Inc. v. City of Columbia</u> , 409 S.C. 568, 762 S.E.2d 696 (2014)...	32
<u>White v. J.M. Brown Amusement Co., Inc.</u> , 360 S.C. 366 (2004).....	24
<u>Whitlock v. Stewart Title Guar. Co.</u> , 399 S.C. 610, 732 S.E.2d 626 (2012).....	34
<u>Williams v. Gov't Emps. Ins. Co. (GEICO)</u> , 409 S.C. 586, 762 S.E.2d 705 (2014).....	34, 38
<u>Williams v. Jeffcoat</u> , 444 S.C. 224, 906 S.E.2d 588 (2024).....	14
<u>Witherspoon v. Stogner</u> , 182 S.C. 413 (1937).....	19

**Statues**

S.C. Code Ann. § 15-3-640 .....44

S.C. Code Ann. § 15-3-670(A) .....45

S.C. Code Ann. 29-6-230.....43

S.C. Code Ann. § 32-2-10.....16, 21, 23, 24, 32, 34, 41

S.C. Code Ann. §40-11-270.....28

**Court Rules**

Rule 56(c), SCRCP.....14

Rule 208(b)(3), SCACR .....8

## **COUNTER STATEMENT OF THE QUESTIONS PRESENTED**

1. 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?
2. 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?
3. 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?
4. Did the Court of Appeals properly decide that severance of the unenforceable contractual indemnity provisions was not possible without judicial re-writing of the contract?
5. Are BFS’s 2005 Contracts unconscionable?
6. Are BFS’s Contractual Indemnity Claims barred by the Statute of Repose, S.C. Code Ann. §15-3-640?

## **COUNTER STATEMENT OF FACTS**

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”).<sup>1</sup> Petitioner, Builders FirstSource – Southeast Group, LLC (hereinafter “BFS”), BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that BFS holds an unlimited

---

<sup>1</sup> Respondents submit that a counter statement of the case to present the facts neutrally due to the argumentative nature of 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...”).

commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is BFS's representative that serves as the "qualifying party" for such licensure in this state. A. p. 879. It is undisputed that BFS furnished the framing lumber, house-wrap, windows, doors, related flashings, and caulk, and BFS provided superintendents to oversee and inspect the installation of such materials for construction of the Project on Buildings 5-21, 2200, 2300, 2500, 2600, 2700, 2800, and 2900. A. p. 59.

Respondents, East Coast Carpentry (hereinafter "East Coast") and Palmetto Trim and Renovation (hereinafter "Palmetto") (collectively "Respondents") served as subcontractors of BFS. In that capacity, East Coast performed window installation on Buildings 6, 8, 9, 12, 13, 14, 16, 17, 18. East Coast did not perform any other work on the Project. Per BFS's records, this work was all completed in 2006. Id. Palmetto performed window installation work on Units 500, 700 and 1000. A. p. 52. Palmetto did not perform any other work at the Subject Property.

According to BFS, Respondents executed a BFS "Master Subcontractor Agreement" dated October 21, 2005 (hereinafter "2005 Contracts"). A. pp. 1451 – 1463, 1464 - 1476. The 2005 Contracts at issue here is a BFS contract form bearing "Version – 4/20/05." BFS seeks to recover from Respondents in indemnity under the terms of the applicable BFS 2005 Contracts.

The 2005 Contracts contain the following relevant clauses:

**SECTION 1. Introduction.**

**Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**"). TIME IS OF THE ESSENCE. . . . In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which

are, or will be, on file at the office of the Contractor ("**Contract Documents**") and incorporated into the Agreement by this reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

....

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

....

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

....

**SECTION 3. Warranty and Service.** All Work shall be unconditionally guaranteed by Subcontractor for a period of two years, or such longer period as may be required by law or for which Owner requires Contractor to warrant such Work, from the date following Owner's acceptance of the Work. Subcontractor shall correct at its own expense all defects that appear during such period, and all damage (whether to the Work or other components of the Project) arising out of, caused by or in any way related to said defects or repair, within twenty-four (24) hours after written notice or within the time agreed to in writing by Contractor (Saturdays and Sundays excluded). *The determination as to what constitutes a defect will*

*be within the sole discretion of Contractor and Owner. If Subcontractor fails to promptly commence and complete the correction of defects, Contractor or Owner may do so. In such event, Subcontractor shall promptly reimburse Contractor for the cost of such work, plus a sum of fifteen percent (15%) thereof (for supervision and overhead). Contractor may, at its option, elect to charge such amounts against the next Partial Payment (defined in **Section 8**) or the final payment. Subcontractor will maintain a published phone number or an answering service during normal working hours.*

....

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

....

**b. Release and Indemnity.**

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

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

....

## SECTION 8. Payment to Subcontractor.

....

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

## SECTION 9. Miscellaneous.

....

- f. Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. *The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof.* It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

Id. (Italics added for emphasis).

### **Procedural History**

The underlying litigation began on July 22, 2016, when Plaintiffs filed suit against the developer, Winston Carlyle Charleston National, LLC, and the general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually. The initial Complaint alleged negligence, gross negligence, breach of express and implied warranties, and breach of fiduciary duty as to the developer 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,<sup>2</sup> 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.

On November 13, 2019, BFS filed Third Party claims against East Coast and Palmetto, asserting claims for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence. A. pp. 445-454. BFS claimed entitlement to indemnification for “any liability BFS is found to have” and recovery for “any sums for which BFS may be held liable.” A. p. 449. East Coast and Palmetto timely answered all claims asserted against it by BFS and raised relevant affirmative defenses.

On December 20, 2019, Palmetto filed a motion for summary judgment, which was amended on October 22, 2020, with regard to BFS’s third-party claims. A. pp. 512-515. On January 7, 2020, East Coast filed a motion for summary judgment, which was amended on October 15, 2020, with regard to BFS’s third-party claims. A. pp. 516-519. On November 6, 2020, Palmetto

---

<sup>2</sup> For example, Plaintiffs’ forensic expert specifically contends that the windows selected have inadequate design pressure ratings which require replacement of the windows. (Pet. Br. p. 2). BFS supplied the windows for the Subject Property. (A. p.864).

and East Coast argued its motion for summary judgment before Circuit Court Judge, the Honorable Jennifer B. McCoy. On July 7, 2021, Judge McCoy signed and filed an Order granting partial summary judgment in favor of Palmetto and East Coast, and also issued similar orders for six other subcontractor defendants. A. pp. 42 – 49. On July 26, 2021, BFS filed a motion for reconsideration, which was denied on August 23, 2021. A. pp. 131-133. BFS appealed from those orders. Over BFS's objection, the Court of Appeals consolidated the eight appeals.

On February 12, 2025, the Court of Appeals affirmed all eight of the Circuit Court's Orders. Retreat at Charleston National Country Club Home Owners Association, Inc., v. Winston Carlyle Charleston National, LLC, et al., 446 S.C. 566, (Ct. App. May 21, 2025). A. pp. 1532 – 1561. BFS's Petition for Rehearing was denied on May 21, 2025. A. p. 1562-64. 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) (citing Knight v. Austin, 396 S.C. 518, 521, 722 S.E.2d 802, 804 (2012)). Summary judgment is proper when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. See Rule 56(c), SCRPC; Knight, 396 S.C. at 521-22, 722 S.E.2d at 804. 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). “[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to 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 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 East Coast’s alleged sole negligence. That argument finds no support in either the language of the 2005 Contracts 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 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 v. Inves., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583 (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 affirmed the Circuit Court’s decision.

**I. 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; yet, that is precisely what BFS is attempting here.

**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 contradicted by the plain language of its own 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.

Plaintiffs' Fourth Amended Complaint alleges:

88. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of the Subcontractor Defendants [BFS and Respondents], and each of them individually, in one or more of the following particulars:

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

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

A. pp. 366-67.

As the Court of Appeals noted, “[t]he particulars of negligence alleged at subparts b, c, d, g, and i speak to BFS's duties in its role as a supplier of Project materials as well as the duties of BFS and any subcontractors responsible for supervising, inspecting, and approving the work. A. p. 1550.

BFS’s Third-Party Complaint leaves no ambiguity regarding the breadth of its indemnity demand. BFS alleges:

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

(emphasis added). A. p. 449.

This language is broad and notably devoid of limiting language even though it was responsive to allegations that BFS supplied defective materials for which it knew, or should have known, that its subcontractors bore no responsibility. 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

concurrent negligence for the installation of materials and sole negligence for the supply of materials.

**B. BFS is Bound By Its Demand for Indemnification of “Any Liability”**

South Carolina courts evaluate pleadings as a whole. Witherspoon v. Stogner, 182 S.C. 413 (1937). The scope of a claim is determined by considering both the allegations and the relief requested. BEI Beach, LLC v. Christman, 440 S.C. 98, 889 S.E.2d 601 (Ct. App. 2023). When BFS’s pleadings are 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 168, “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 167 Alleges Causation, but Paragraph 168 Defines the Scope of Indemnity**

BFS relies heavily on Paragraph 167 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 Third-Party Defendants.” A. p. 449. 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 168, 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. Id. 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 the Court of Appeals correctly concluded that BFS’s pleadings seek indemnification for

its own negligence, the Court of Appeals correctly rejected BFS's attempt to recast its claim on appeal. See Opinion, A. p. 2146.

## II. **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 construction agreements requiring indemnification for a contractor's own negligence to be against public policy and unenforceable. See S.C. Code Ann. §32-2-10. BFS's 2005 Contracts violates that prohibition and cannot be enforced.

Section 6 of the 2005 Contracts states:

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

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

b. Release and Indemnity,

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

(2) For all Claims not covered by (1) above and to the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend, and hold harmless the Indemnitees for, and to save them harmless against, any and all Claims (together with reasonable attorneys' fees), **to the extent of liability resulting**

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

(emphasis added). A. pp. 1455-56, 1468-69.

First of all, BFS conveniently skips over the first paragraph of Section 6 in its analysis. The first paragraph makes clear BFS's goal for this entire section is for its subcontractors to be responsible for any and all claims. "Subcontractor agrees that Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors." *Id.* This broad language does not contain any limiting provision.

Furthermore, the following provision relevant to this appeal, Section 6(b)(2), intertwines the subcontractor's indemnity obligations with BFS's own conduct. Section 6(b)(2)(iii), for example, requires indemnification for "omissions resulting from Indemnitee's failure to supervise Subcontractor's operations." Supervision of subcontractors was BFS's own responsibility. By its plain terms, the provision therefore requires subcontractors to indemnify BFS for liability arising from BFS's own failure to perform that duty. Section 8(i) similarly permits BFS to recover attorney's fees and expenses as well as amounts paid in settlement without regard to BFS's fault.<sup>3</sup>

---

<sup>3</sup> **SECTION 8. Payment to Subcontractor.**

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

South Carolina’s Anti-Indemnity Statute prohibits precisely this type of contractual arrangement. Section §32-2-10 provides that any construction agreement purporting to indemnify a promisee against liability for damages arising from bodily injury or property damage is “against public policy and unenforceable.” S.C. Code Ann. §32-2-10. Critically, the statute does not provide that only specific clauses are void. Rather, it declares the agreement itself unenforceable as a matter of law “notwithstanding any other provision of law.” Id.

South Carolina courts have repeatedly enforced this statutory prohibition. As BFS is well aware of, 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 2005 Contracts 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

---

*have against Contractor or Owner that arise directly or indirectly from curing any such liens, claims, encumbrances, or demands.* (emphasis added) A. p. 1459.

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. 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 2005 Contracts purports to require East Coast and Palmetto 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.

### **III. 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 in litigation. 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. If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect.”)

**A. The Contractual Framework Implicates BFS’s Own Negligence**

The 2005 Contracts repeatedly implicates BFS’s own conduct and negligence. Section 6(b)(2)(iii), requires indemnification for “omissions resulting from Indemnitee’s failure to supervise Subcontractor’s operations.” Supervision of subcontractors was BFS’s own responsibility. By its plain terms, the provision therefore requires subcontractors to indemnify BFS for liability arising from BFS’s own failure to perform that duty. Section 8(i) similarly permits BFS to recover attorney’s fees and expenses as well as amounts paid in settlement without regard to BFS’s fault.

These provisions extend well beyond damages attributable solely to subcontractor workmanship. Instead, they expose subcontractors to liability arising from BFS’s own conduct in selecting materials, supervising subcontractors, and administering the project. 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 2005 Contracts does not meet the clear and unequivocal standard as the indemnity provisions set forth in Section 6 contain internally inconsistent indemnity obligations. The initial paragraph of Section 6 requires subcontractors to be responsible for any and all claims. One paragraph appears to limit indemnification to damages caused by the subcontractor's negligence, while another requires indemnification for claims arising from BFS's own supervisory omissions.

The 2005 Contracts do not satisfy the clear and unequivocal standard because the indemnity provisions in Section 6 contain internally inconsistent obligations. The opening paragraph broadly requires subcontractors to indemnify BFS for "any and all claims," while another provision appears to limit indemnification to damages caused by the subcontractor's negligence. Yet another provision expands the obligation further by requiring indemnification for claims arising from BFS's own supervisory omissions.

These conflicting provisions create ambiguity regarding the scope of the subcontractor's indemnity obligations. 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). BFS cannot simultaneously claim that its intent was limited to subcontractor negligence while maintaining indemnity provisions that require defense and indemnity regardless of its own fault.

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. As the Court of Appeals correctly observed, the indemnity language is

“inherently confusing,” and therefore fails to satisfy the heightened clear and unequivocal standard required under South Carolina law.

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

BFS attempts to avoid the clear and unequivocal standard by reframing its claim as one seeking indemnity only for subcontractor’s negligence. That characterization cannot override the language of the 2005 Contracts.

When the 2005 Contracts are 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.

Because the 2005 Contracts implicate BFS’s negligence, South Carolina law requires the provision to satisfy the heightened clear-and-unequivocal standard. That standard applies regardless of how BFS now characterizes its 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 2005 Contracts that implicates its own negligence yet fails to express, in clear and unequivocal terms, an intent to shift that specific liability to East Coast and

Palmetto, 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. East Coast and Palmetto Trim Cannot Be Solely Negligent For the Claims Against BFS and BFS is Statutorily Responsible for the Work of East Coast and Palmetto Trim**

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 all of the work performed by its subcontractors, including East Coast and Palmetto. A. pp. 688-689. Given that supervisory role, any negligence attributed to East Coast or Palmetto, which is denied, would inherently establish concurrent negligence by BFS. It's simply impossible for BFS to be entirely free of responsibility for any alleged deficiencies in its subcontractor's work. BFS therefore cannot transform a claim involving potential concurrent negligence into one involving sole subcontractor negligence in order to avoid the heightened standard.

Furthermore, BFS bears statutory responsibility for East Coast's work. BFS holds an unlimited commercial general contractor's license (License No. 112969). While S.C. Code Ann. §40-11-270 permits licensed contractors to use unlicensed subcontractors, it simultaneously mandates that the licensed contractor, in this case BFS, provide supervision and be "fully responsible" for the actions of these unlicensed subcontractors. It is undisputed that nine of the thirteen subcontractors BFS sued, including Respondents, are unlicensed. Because BFS is "fully responsible" for its unlicensed subcontractors, it cannot claim to be without fault and, therefore,

cannot succeed on its contractual indemnity claim. This aligns with the fundamental public understanding of contractor accountability: if you hire a contractor for, say, window installation, and they hire a subcontractor whose work goes awry, you naturally contact the primary contractor you hired, not the subcontractor.

#### **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 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 case did not approve the selective enforcement of internally inconsistent or legally deficient indemnity provisions. By applying the heightened standard to BFS's expansive pleadings and 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 2005 Contracts 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 2005 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.

#### **IV. THE COURT OF APPEALS PROPERLY APPLIED SETTLED SOUTH CAROLINA LAW REGARDING CONTRACT INTERPRETATION**

The Court of Appeals properly interpreted the 2005 Contracts by examining its defined terms and indemnity framework as an integrated whole, rather than isolating subsections. South Carolina law requires courts 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 the 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). That is precisely the approach the Court of Appeals employed. When Sections 1, 2, 3, 6, and 8 of the 2005 Contracts are read together, the 2005 Contracts reveals a set of indemnity provisions that are both overreaching and contradictory.

The core of this legal dispute lies in Section 6(b)(2). Section 6(b)(2) expands the indemnity obligation well beyond the subcontractor's own conduct. It requires indemnification: "to the fullest extent permitted by law... for any and all Claims... to the extent of liability resulting from Subcontractor's negligence or willful misconduct... which arise out of or relate to (i) any alleged

personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations." A. pp. 1455-56.

BFS focuses exclusively on the introductory phrase limiting indemnity "to the extent of liability resulting from Subcontractor's negligence," but doing so requires ignoring the very subsections that expand the indemnity clause's reach. Section 6(b)(2)(iii) expressly requires indemnification for "omissions resulting from Indemnitee's failure to supervise Subcontractor's operations." Id. Supervision was BFS's own responsibility. By its plain language, the provision therefore reaches conduct attributable to BFS itself. Likewise, Section 6(b)(2)(ii) requires indemnity for defects in "materials provided in connection with the Work." Id. East Coast provided labor, while BFS selected and furnished the materials for installation. The provision does not distinguish between materials furnished by the subcontractor and those supplied by BFS. Thus, when read in context, the indemnity language sweeps broadly enough to encompass defects tied to materials supplied by BFS.

The 2005 Contracts's risk-allocation provisions extend beyond the indemnity clauses themselves. Section 8(i), which requires the subcontractors to indemnify and defend BFS from "attorneys' fees and expenses, amounts paid in settlement, and amounts paid to discharge judgments arising out of the services, labor, equipment, or materials furnished..." without regard to any allocation of fault. A. p. 1459. Section 8(i) contains no limiting language tied to subcontractor negligence. Instead, it imposes an unconditional obligation to defend BFS and pay its litigation expenses and settlements, even when those liabilities arise from BFS's own conduct. Section 3 requires the subcontractor to "correct at its own expense all defects... and all damage

(whether to the Work or other components of the Project) arising out of, caused by or in any way related to said defects,” while granting the contractor and owner sole discretion to determine what constitutes a defect. A. p. 1454. These provisions, further illustrate that the agreement allocates liability through multiple interrelated provisions, reinforcing that the indemnity clauses cannot be severed in isolation without altering the broader contractual allocation of risk.

When these provisions are read together, as South Carolina law requires, the 2005 Contracts reveals a contractual framework that attempts to shift liability to subcontractors for damages arising from BFS’s own conduct in its selection of materials and supervision of its subcontractors. 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. Serrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501 (1945). The Court of Appeals therefore properly considered the relationships among the 2005 Contracts’s indemnity and fee-shifting provisions in determining the overall allocation of risk.

**A. The Indemnity Provisions Are Ambiguous and 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); Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 687 S.E.2d 714, 718 (Ct. App. 2009). The 2005 Contracts 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 supervisory failures or material selections. These provisions cannot be reconciled without choosing one interpretation over another. That is the hallmark of contractual ambiguity.

Because BFS drafted the 2005 Contracts, 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).

The Court of Appeals did exactly what South Carolina law requires: it read the 2005 Contracts 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.

**B. 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 2005 Contracts. Pet. Br. pp. 26-27. But the Court did not overlook the definition. Instead, it recognized that the definition describes the scope of East Coast and Palmetto's contractual duties, while the indemnity provisions describe the scope of East Coast and Palmetto'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 2005 Contracts 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. 1451. Both East Coast and Palmetto's role was limited to installation;<sup>4</sup> it had no responsibility for the design or selection of windows and doors.

When the 2005 Contracts is read in its entirety, the indemnity provisions extend beyond that defined scope. Section 6 requires East Coast to indemnify BFS for "omissions resulting from [BFS's] failure to supervise subcontractor's operations." A. 1455-56. Yet, it is undisputed that the supervision of subcontractor work were responsibilities belonging to BFS, not East Coast. Because East Coast's defined "Work" did not include assuming BFS's supervisory duties a provision requiring East Coast to indemnify BFS for BFS's failure to perform those duties shifts liability beyond the subcontractor's own workmanship.

---

<sup>4</sup> EAST COAST AND PALMETTO 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.

The same problem appears in Section 6(b)(2)(ii), which requires indemnification for alleged defects in “materials provided in connection with the Work.” Id. The provision does not distinguish between materials supplied by the subcontractor and those selected and furnished by BFS. In this case, BFS supplied the windows and other materials installed by East Coast. Thus, even when the defined term “Work” is applied exactly as BFS proposes, the indemnity provisions still reach liability arising from BFS’s own materials and supervisory responsibilities.

Whether the Court of Appeals expressly cited the definition of “Work” in its Opinion is immaterial. The relevant question is not whether “Work” is defined, but whether the indemnity provisions, as drafted, attempt to shift liability for BFS’s own conduct. Because the plain language of Sections 1, 6 and 8 requires indemnification for BFS’s own conduct, the Court of Appeals correctly concluded that the indemnity framework implicates BFS’s own negligence and therefore fails under South Carolina law.

This mismatch between East Coast and Palmetto’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 2005 Contract is read as a whole, the answer is clear. Section 6 imposes liability relating to material defects and supervision, both of which were the responsibility of BFS. 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 2005 Contracts, it applied settled principles of contract interpretation. A definition describing what East Coast and Palmetto was hired to do cannot be used to conceal indemnity provisions requiring East Coast and Palmetto to

pay for liabilities arising from BFS's own conduct. Because the 2005 Contract's indemnity framework extends beyond East Coast and Palmetto's defined work and into areas controlled by BFS, the clear and unequivocal standard applies, and the agreement fails to satisfy it.

**V. SEVERANCE OF THE INDEMNITY LANGUAGE WOULD REQUIRE JUDICIAL REWRITING OF THE 2005 CONTRACTS**

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 obligations in the 2005 Contracts are not confined to a single clause. Instead, it appears across Sections 3, 6 and 8(i). 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, including its selection of materials and supervision of the work. 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 2005 Contracts’ 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.

#### **VI. ALTERNATIVE SUSTAINING GROUND #1: BFS’S 2005 CONTRACT IS UNCONSCIONABLE JUST AS THE LATER CONTRACTS ARE**

“[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007). In Simpson, our supreme court found an arbitration clause in an adhesion contract with unconscionable terms “wholly unenforceable,” despite the presence of a separate contractual severability clause, due to the “cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause.” Id. at 33–36, 644 S.E.2d at 673–74. The contractual severability provision did not result in an exception to the general rule of unenforceability of illegal contracts, especially where the contract was one-sided, oppressive, or a contract of adhesion. Id. at 29–30, 644 S.E.2d at 671.

The same reasoning applies here. The 2005 Contracts, like the Later Contracts, are replete with provisions that grant sweeping rights and protections to BFS while imposing expansive liabilities and restrictions on subcontractors. These provisions collectively operate to the substantial disadvantage of the subcontractors and reflect the type of one-sided contractual framework that South Carolina courts have recognized as unconscionable.

For the sake of brevity, Respondents incorporate by reference the arguments and authorities presented by the “Later Contracts” concerning the unconscionability of the 2005 Contract. The provisions discussed above illustrate the same pattern of oppressive drafting.

Additional examples further demonstrate the unconscionable nature of the agreement. Section 6 requires subcontractors not only to indemnify and defend BFS but also to release it from liability. (“Subcontractor agrees to release, indemnify, defend, and hold harmless the Indemnitees for ...”). A. pp. 1455–56. This provision dramatically expands BFS’s protection while simultaneously stripping subcontractors of potential claims arising from the same conduct.

Likewise, Section 8(a) conditions payment to subcontractors upon payment from the project owner, making owner payment a “condition precedent” to BFS’s obligation to pay subcontractors.<sup>5</sup> Such provisions are expressly prohibited under S.C. Code Ann. § 29-6-230, which states in relevant part, “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

---

<sup>5</sup> **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.* A. p. 1458-59. (*Italic emphasis added*)

payment to the construction subcontractor. Any agreement to the contrary is not enforceable.” Id.  
(Emphasis added).

Taken together, these provisions demonstrate the same type of oppressive and one-sided drafting that led this Court, in Simpson, to invalidate the contract provisions before it. Because the 2005 Contracts contain multiple unlawful and inequitable provisions that disproportionately benefit the drafter while disadvantaging subcontractors, they are unconscionable and unenforceable as a matter of law. Accordingly, the Courts should affirm the Court of Appeals on this independent ground.

**VII. ALTERNATIVE SUSTAINING GROUND #2: BFS’S CONTRACTUAL INDEMNITY CLAIMS AGAINST EAST COAST ARE BARRED BY THE APPLICABLE STATUTE OF REPOSE, S.C. CODE ANN. §15-3-640**

Even if this Court were to accept BFS’s interpretation of the 2005 Contracts, which it should not, BFS’s contractual indemnity claim are independently barred by South Carolina’s Statute of Repose. S.C. Code Ann. § 15-3-640 establishes an eight-year repose period for actions arising from the defective or unsafe condition of an improvement to real property. Once that period expires, the statute extinguishes the underlying cause of action.

The South Carolina Supreme Court has made clear that a statute of repose “creates a substantive right in those protected to be free from liability after a legislatively determined period of time.” Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). Unlike a statute of limitations, a statute of repose establishes an absolute cutoff for liability regardless of when the alleged defect is discovered or when a claim might otherwise accrue. *Id.* Once the repose period expires, the cause of action is extinguished.

This principle applies equally to indemnity claims. Section §15-3-640 expressly includes within the statute’s scope “action[s] for contribution or indemnification for damages sustained on

account of an action described in this section.” S.C. Code Ann. § 15-3-640(6). The South Carolina Supreme Court has recognized that allowing indemnity claims after the repose period expires would defeat the legislature’s intent to establish a definitive end to liability for construction-related claims. See Columbia/CSA-HS Greater Columbia Healthcare Sys. v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n, 411 S.C. 557, 769 S.E.2d 847 (2015); Capco, 368 S.C. at 142.

The timeline in this case makes the statute’s application straightforward. Respondents’ work on the Project was completed in the 2006 – 2007 timeframe. (A. pp. 522, 539–566). BFS did not file its Third-Party Complaint against Respondents until 2019, which is more than twelve years after that work was completed and well beyond the eight-year repose period. (A. pp. 414–454). Even measured from the filing of the underlying lawsuit in July 2016, the repose period had already expired. (A. pp. 174–186).

BFS does not have a gross negligence claim against Respondents, and therefore the limited statutory exception contained in S.C. Code Ann. § 15-3-670(A) does not apply. (A. p. 452). Because the statute of repose extinguishes all causes of action once the repose period expires, including indemnity claims, BFS’s contractual indemnity claims against Respondents are barred as a matter of law.

Accordingly, even if the indemnity provisions in the 2005 Contracts were otherwise enforceable, which they are not under South Carolina’s Anti-Indemnity Statute and the clear and unequivocal rule, BFS’s claims fail for this additional and independent reason.

### **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. By pleading indemnity in such broad terms, 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 contained in BFS's Master Subcontractor Agreement violate South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10, which declares construction agreements purporting to indemnify a party for its own negligence to be contrary to public policy and unenforceable. The agreement's language requiring subcontractors to defend and indemnify BFS regardless of BFS's own negligence falls squarely within the conduct the Legislature has prohibited.

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 2005 Contracts 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.

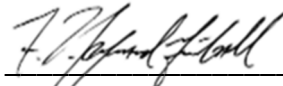
Fourth, BFS's request for severance would require the Court to rewrite the parties' agreement. The indemnity provisions are not confined to a single clause but instead appear throughout multiple sections of the 2005 Contracts. As the Court of Appeals correctly recognized, the agreement is "replete with 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.

Fifth, BFS' 2005 Contracts are unconscionable and unenforceable.

Finally, BFS's claims against East Coast are independently barred by the statute of repose set forth in S.C. Code Ann. §15-3-640, which extinguishes construction-related indemnity claims filed more than eight years after completion of the work.

For all of these reasons, Respondents East Coast Carpentry, LLC and Palmetto Trim and Renovation, respectfully requests that this Court affirm the decision of the Court of Appeals.

**RICHARDSON PLOWDEN &  
ROBINSON, P.A.**



---

James H. Elliott, Jr. (S.C. Bar. No 13620)  
F. Heyward Grimball (S.C. Bar. No. 101743)  
Payton D. Hoover (S.C. Bar. No. 75967)  
Sarah F. Hawkins (S.C. Bar No. 80120)  
235 MaGrath Darby Blvd., Suite 100  
Mt. Pleasant, SC 29464  
(843) 805-6550 FAX (843) 805-6588  
jelliott@RichardsonPlowden.com  
fhgrimball@RichardsonPlowden.com  
phoover@richardsonplowden.com  
shawkins@richardsonplowden.com

**ATTORNEYS FOR RESPONDENT  
EAST COAST CARPENTRY AND  
PALMETTO TRIM AND  
RENOVATION**

March 17, 2026  
Mt. Pleasant, South Carolina