RECEIVED

Mar 18 2026

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2025-001224

Opinion No. 2025-6099

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

v.

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

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

v.

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

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

---

RESPONDENT POHLMAN QUALITY EXTERIORS, INC. BRIEF IN RESPONSE TO PETITIONER

E. Glenn Elliott, Esquire
Bar No.: 7838
Weldon L. Coates, Esquire
Bar No.: 105156
Aiken, Bridges, Elliott, Tyler, & Saleeby
181 E. Evans St., Suite 409
P.O. Box 1931 (29503)
Florence, SC 29506
(843) 669-8787
ege@aikenbridges.com
wlc@aikenbridges.com
Attorneys for Respondent
Pohlman Quality Exteriors, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

COUNTER-STATEMENT OF THE CASE

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

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

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

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

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

In her Order, Judge McCoy

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

The Court of Appeals issued its Opinion on February 12, 2025, affirming each of the trial court's rulings. Petitioners filed a Petition for Rehearing on February 27, 2025, but such was denied by the Court of Appeals on May 21, 2025. Petitioner later filed its Petition for Writ of Certiorari on June 20, 2025. The Petition was granted on December 16, 2025.

STANDARD OF REVIEW

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

ARGUMENT

As noted in Pohlman's Return to the Petition for Writ of Certiorari, certain Questions presented by BFS were not raised, discussed or briefed by Pohlman in the lower courts. Upon granting by this Court of five of BFS's six (6) Questions, Respondent will provide substantive discussion in this Brief in response to all remaining Questions/issues except for those raised by Question 6 (i.e. Argument VI of BFS's Brief).

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE "CLEAR AND UNEQUIVOCABLE STANDARD" WAS PROPERLY APPLIED TO THE INDEMNITY PROVISION IN THE LATER CONTRACT AS BFS SEEKS INDEMNITY FOR ITS SOLE OR CONCURRENT NEGLIGENCE

The consequential question for this Court remains the same as it has throughout the history of review of the relevant subcontracts: "Does the indemnification provision of the Later Contract seek to require the subcontractor (Pohlman) to indemnify BFS for its sole or concurrent negligence." If so, the "clear and unequivocal" standard articulated in Concord v. Cumberland applies. BFS continuously argues that it does not seek indemnification for its own negligence. That argument, unfortunately for BFS, fails to align with their pleadings, the wording of the indemnification provisions of the Later Contract, and the realities of the case.

A. Paragraph 168 of BFS's Third-Party Complaint demands indemnification for "any liability," which would include liability of BFS to Plaintiff for its own negligence.

BFS looks to its pleadings to attempt to avoid the Court's application of the "clear and unequivocal" standard to the indemnity provision. BFS begs the Court to accept the position that it does not seek indemnification for its own negligence, and regardless, any liability on its part in the underlying case is the result of the negligence of its subcontractors. As Pohlman identified in its earlier briefs, and as echoed by the Court of Appeals in their Opinion, this position is clearly inconsistent with the claims BFS has asserted against Pohlman in its pleadings. Opinion, A. p. 2146. Paragraph 168 of BFS's Third Party Complaint plainly shows that BFS seeks indemnity for any liability or any sums for which BFS is held liable to Plaintiff or others, rather than only those sums which may be attributable to Pohlman's sole negligence.[1] It is clear from the language of Paragraph 168 (and, also, Paragraph 138) that BFS seeks recovery from Pohlman for the full and

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

complete amount of any verdict rendered against it, including any damages included in the verdict for BFS's own negligence.

In defense of Paragraph 168, BFS points to Paragraph 167 of its Third-Party Complaint and argues that this Paragraph indicates the only way BFS could be found liable to Plaintiffs would be due to Pohlman's wrongful acts, omissions, negligence, etc. The wording of Paragraph 167 ignores the reality of the case, and, in fact, the Plaintiffs allegations in the Fourth Amended Complaint. Plaintiffs allege BFS owed duties to them in its role as a supplier of materials for the project and as a subcontractor responsible for supervising, inspecting, and approving the work of its sub-subcontractors. These are all duties owed to the Plaintiff which a jury can find BFS breached on its own, without subcontractor involvement. The Court of Appeals even identified these duties in their analysis. See Opinion, A. p. 2144. At least at this stage, there is a world in which a jury may find BFS negligent for its own actions, or for the actions of the subcontractors they had a duty to "supervise, inspect, and approve." Unfortunately for BFS, in Paragraph 168 of the Third-Party Complaint, it uses the word "any," which does not limit the liability for which BFS will seek indemnification or the reimbursement it will seek for monies it is required to pay, including "any" liability or sum owed to Plaintiff by BFS relevant to breach of the duties outlined above.

When considering the pleadings as a whole, which is the analysis the Court will engage in[2], the pleadings are so broad as to encompass any liability BFS may have for its sole or concurrent negligence, regardless of their subjective belief regarding their liability.

B. Similar to BFS's pleadings, the indemnity provisions contained within the Later Contract also demonstrate an attempt to obtain indemnification from Pohlman for BFS's sole negligence.

[2] Witherspoon v. Stogner, 182 S.C. 413 (1937).

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

While BFS's arguments have continued to shift as the appellate process continues, the wording of the BFS form subcontract it forced its subcontractors to sign without negotiation has not. BFS drafted an ambiguous indemnity provision that identifies two separate and distinct standards for the subcontractor's (Pohlman) indemnification exposure. The first paragraph of the indemnity provision purports to limit Pohlman's indemnification responsibility to BFS to damages to the extent caused by Pohlman, but the second paragraph requires Pohlman to indemnify BFS for damages even if those damages are the result of the sole negligence of BFS. These are directly conflicting and cannot be reconciled, as noted by both reviewing Courts. By definition, the indemnity provision cannot be said to "clearly and unequivocally" state the intention of the parties that Pohlman agreed to indemnify BFS for its own negligence. Furthermore, 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 appears to state directly that the Court of Appeals misapplied the holding of Concord and Cumberland, where instead they should have only applied the standard to one portion of the indemnity provision. The problem with that logic is that the trial court found that the indemnity provision, as a whole, could not remain because the paragraphs therein were so conflicting and

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

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

Judge McCoy found that the language of the two paragraphs in the indemnity provision is in conflict and cannot be reconciled. The Court of Appeals agreed and declined to "re-write" the Later Contract to BFS's benefit. See Opinion, A. p. 2148. This course of action was proper, and consistent with established, well-settled law to be applied when construing contracts.

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

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

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

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

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

Instead, the Court of Appeals agreed that individual portions of indemnity provision could not be effectively severed due to the provision being "replete with terms that violate South Carolina law and public policy." See Opinion, A. p. 2153. It is within the court's discretion on how to sever certain provisions or to scrap the provision entirely. *See* Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020). The Court of Appeals properly affirmed the trial court's decision to refrain from re-writing the indemnity provision.

CONCLUSION

Continued review of the language of the Later Contract and its enforceability, or lack thereof, will not change the words written therein. The Court of Appeals rightly held that the "clear and unequivocal" standard was to be applied to the indemnity provision and that the Court could not use the severance provision in the Later Contract to fix BFS's problems for them. Regardless of their framing of the issues, analysis of their own pleadings, and the cited case law, BFS's goal remains the same as it was when the Later Contract was drafted: BFS seeks indemnification from Pohlman for BFS's own negligence and to walk away from this case without potentially suffering the consequences of its own actions. Due to the analysis above, Pohlman hereby requests that the Supreme Court affirm the ruling of the Court of Appeals.

(Signature Block on Next Page)

Respectfully submitted,

s/ E. Glenn Elliott

E. Glenn Elliott, Esquire
Bar No.: 7838
Weldon L. Coates, Esquire
Bar No.: 105156
Aiken, Bridges, Elliott, Tyler, & Saleeby
181 E. Evans St., Suite 409
P.O. Box 1931 (29503)
Florence, SC 29506
(843) 669-8787
ege@aikenbridges.com
wlc@aikenbridges.com
Attorneys for Respondent
Pohlman Quality Exteriors, Inc.