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

The Honorable Jennifer B. McCoy, Circuit Court Judge

Court of Appeals Case No. 2025-001224
Circuit Court Case No. 2016-CP-10-03783

Opinion No. 2025-6099 (S.C. Ct. App. filed Feb. 12, 2025)

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 AC CONSTRUCTION, INC.'S BRIEF

LUZURIAGA MIMS, LLP

Kevin W. Mims, SC Bar No. 69418
W. Chase McNair, SC Bar No. 100695
1156 King Street
Charleston, SC 29403
843.410.4713
kmims@lmlawllp.com
cmcnair@lmlawllp.com

Attorneys for Respondent AC Construction, Inc.

TABLE OF CONTENTS

COUNTER STATEMENT OF THE QUESTIONS PRESENTED ..……………………….7

COUNTER STATEMENT OF FACTS……………………………………………………..8

ARGUMENT …………………………………………………………………………11

1. BFS HAS FAILED TO APPEAL THE COURT OF APPEALS RULING THAT ITS CONTRACTS ARE UNCONSCIONABLE, WHICH IS DISPOSITIVE OF THIS SUBSEQUENT APPEAL…………………….……………..……….12

2. THE LATER CONTRACTS ARE UNCONSCIONANBLE …….…………..….13

3. PUBLIC POLICY WARRANTS AFFIRMANCE OF THE COURT OF APPEALS DECISION ………………………………………………………………....15

4. BFS'S PLEADINGS SEEK INDEMITY 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"…..18

C. Paragraph 137 Alleges Causation, but Paragraph 138 Defines the Scope of Indemnity…………………….………………………………………..19

5. BFS'S INDEMNITY PROVISIONS ARE UNENFORCEABLE UNDER THE SOUTH CAROLINA ANTI-INDEMNITY STATUTE S.C. STATUTE S.C. CODE ANN. § 32-2-10……………………………………….…………….20

6. THE COURT OF APPEALS CORRECTLY APPLIED THE HEIGHTENED "CLEAR AND UNEQUIVOCAL" STANDARD………………………….…24

A. BFS's Contract Does Not Support its Argument….. …………………….25

B. BFS Cannot Avoid the Clear and Unequivocal Standard by Recasting Its Claim. ……………………………………………………………....28

C. AC Construction Cannot be Solely at Fault for the Claims Against BFS….. 29

D. Concord and Cumberland Supports Affirmance….……………………...30

E. 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……………………………………………………………..31

F. Campbell v. Beacon Mfg. Co., and S.C. Elec. & Gas v. Utilities Const. Co. Are Neither Binding Nor Even Persuasive Authorities…………………..33

7. THE COURT OF APPEALS PROPERLY APPLIED SETTLED SOUTH CAROLINA LAW REGARDING CONTRACT INTERPRETATION……...…35

8. SEVERANCE OF THE INDEMNITY LANGUAGE WOULD REQUIRE JUDICIAL REWRITING OF THE MASTER AGREEMENT BETWEEN BFS AND AC CONSTRUCTION…………………………………………..…...…37

9. THE COURT OF APPEALS CORRECTLY APPLIED COLLATERAL ESTOPPEL……………………………………………………………….... 39

CONCLUSION ……………………………………………………………………….41

TABLE OF AUTHORITIES

CASES

Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 409 S.C. 490, 762 S.E.2d 696 (2014)..24, 28

Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002)………..…..23, 27, 38

BEI Beach, LLC v. Christman, 440 S.C. 98, 889 S.E.2d 601 (Ct. App. 2023) …………………18

Beall v. Doe, 281 S.C 363, 315 S.E.2d 186 (Ct. App. 1984)…………………………………..…40

Campbell v. Beacon Mfg. Co., 313 S.C. 451, 438 S.E.2d 271 (Ct. App. 1993)…..………….33, 34

Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004) ………………………………………………………………………………………13

Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), reh'g denied (Oct. 18, 2018)…………………………………………...11, 16, 24, 26, 28, 30, 32, 33, 34, 35, 39

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, 879 S.E.2d 746 (2022)………………..... 15, 33

D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018)…. ……………………………………………………………………..22, 23, 27, 30

Doe v. TCSC, LLC, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020)……………………………39

Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964)…...……………………………...… 17, 18, 19

Federal Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 378 S.E.2d 56 (1989)………..….24, 28

First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513 (1994)………………………...12

First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992) ………………………………………………….12, 41

Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) …….. 13

Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941) …………………. 41

Johnson v. Alexander, 413 S.C.196, 202, 775 S.E.2d 697 (2015) ………………………….18, 19

Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)……..…………………………..40

Kennedy v. Columbia Lumber & Manufacturing Co., Inc., 299 S.C. 335 (1989)………… .15, 16

Lane v. Trenholm Bldg. Co., 267 S.C. 497 (1976)………………………………………………15

Lewis v. Premium inv. Corp., 351 S.C. 167 (2002) ……………………………..…….. 11, 28, 29

MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363 (Ct. App. 2003)……………………25

McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009)…………...………………………..35, 36

McPherson v. J.E. Sirrine & Co., 206 S.C. 183 (1945) …………………………………………36

Munoz v. Greentree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) ……………………13

Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 687 S.E.2d 714 (S.C. Ct. App. 2009).37

Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322 (Ct. App. 1992)…..………………………17

Poynter v. Inves., Inc., v. Cent. Builders of Piedmont, Inc., 387 S.C. 583 (2010)..……………. 11

Poynter v. Ratcliff, 387 S.C. 580, 694 S.E.2d 15 (2010) ………………………………………. 39

Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966)………..23

S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 125 S.E.2d 613 (1964) ………...33, 34

Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 579 S.E.2d 132 (2003) …………….24

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) ……………..14, 39

Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) ……………………………………………………………………………………… 33

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) …………………………………………….…….10

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015)…………………………………………………..……………...10

Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636 (1975) ………………………………….25

Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 762 S.E.2d 705 (2014)…………….35

Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 732 S.E.2d 626 (2012) ……………………35

White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366 (2004) …………………………….. 23

Witherspoon v. Stogner, 182 S.C. 413 (1937) ……………………………………………..18

STATUTES AND RULES

S.C. Code Ann. § 29-6-230 ………………………………………………………………14

S.C. Code Ann. § 32-2-10………………………..11, 16, 20, 22, 23, 24, 27, 32, 34, 35, 37, 39, 41

Rule 201(a), SCACR…………………………………………………………………….41

Rule 208(b)(1)(B), SCACR ……………………………………………………………. 13

Rule 208(b)(6), SCACR ………………………………………………………………….43

Rule 241(a), SCACR …………………………………………………………………….41

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Whether BFS's failure to appeal the Court of Appeals ruling its contracts are unconscionable contracts of adhesion constitute an abandonment of that issue on appeal to the Supreme Court? If so, does that render this appeal moot?
2. Is BFS judicially bound by its pleadings, which sought "full" indemnity for "any liability" and "any sums" incurred, thereby asserting an unrestricted claim that encompasses BFS's own negligence?
3. Did the Court of Appeals properly apply the "clear and unequivocal" standard to BFS's contractual indemnity claim, where the contract requires subcontractors to provide a defense regardless of any ultimate liability or negligence of BFS?
4. Whether BFS is allowed to selectively enforce a legally deficient indemnity provision which is broad enough to implicate the indemnitee's own fault under Concord and Cumberland?

5. Did the Court of Appeals properly decide that severance of the unenforceable contractual indemnity provisions was not possible without judicial re-writing of the contract?

6. Did the Court of Appeals correctly hold collateral estoppel bars BFS from relitigating the enforceability of identical indemnity provisions, which were previously litigated and decided in prior circuit court actions involving the same contractual language?

COUNTER STATEMENT OF FACTS

The matter before the Court is a case in which BFS seeks to recover contractual indemnity from AC Construction, Inc. ("AC Construction") for liability arising from BFS's own negligence. BFS and AC Construction entered into a subcontract dated November 7, 2007 "[Version 5/17/06]" containing indemnity provisions.[1] BFS argues its contract only seeks indemnity for AC Construction's negligence, but both the Circuit Court and the Court of Appeals correctly rejected that assertion. As both courts found, the indemnity provisions at issue sought to shift liability for BFS's own negligence without doing so in clear and unequivocal terms. As a result, BFS's contractual indemnity claim failed as a matter of law.

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, alleging construction deficiencies in the common elements of the Retreat at Charleston National Country Club, a townhome community in Mount Pleasant, South Carolina ("the Retreat Project" or "the Project"). (A. pp.

[1] The Court of Appeals notes two versions of BFS's master subcontracts are at issue, the 2005 version of BFS's master subcontract (2005 Contracts) and the other six involving a later version of BFS's master subcontract ("the Later Contracts")—one of which is Version 5/17/06 relative to AC Construction, among others. (A. p. 1536-37, Ct. App. Opinion p. 5-6). According to BFS, AC Construction's work at the Project was performed pursuant to "Version – 5/17/06" of a BFS "Master Subcontract Agreement" dated November 7, 2007 ("Master Agreement" or "Later Contract" or "Version 5/17/06"). (A. pp. 73).

174-186). The Complaint specifically alleged causes of action for negligence, gross negligence, breach of express and implied warranties, and breach of fiduciary duty as to the developer. (Id.) Plaintiffs filed an Amended Complaint on May 1, 2017, setting forth causes of action against additional defendants, including Appellant Builders FirstSource-Southeast Group, LLC, ("BFS") for negligence, gross negligence, and breach of implied warranties. (A. pp. 187-207). The Amended Complaint alleged, among other things, that BFS used and supplied defective materials, installed materials not in accordance with the plans and specifications, and constructed the project in violation of the applicable building codes. (Id.)

In their Second Amended Complaint, Plaintiffs allege direct claims against AC Construction and BFS for negligence/gross negligence and breach of implied warranties. (A. pp. 248-274). In its Answer to Plaintiffs' Second Amended Compliant, BFS asserts cross-claims against AC Construction for contractual indemnity, breach of express warranties, breach of implied warranties, negligence/gross negligence, and breach of contract. (A. pp. 275-308). Plaintiffs amended the complaint two more times, and BFS asserted the same cross-claims against AC Construction in its responsive pleadings. (A. pp. 372–413). AC Construction timely answered BFS's claims and raised relevant affirmative defenses. (A. pp. 495-511). BFS's allegations against AC Construction are wholly derived from Plaintiffs' allegations against BFS.

On October 29, 2020, AC Construction filed its motion for summary judgment as to BFS's cross claims. (A. pp. 1205-1207). The circuit court granted AC Construction's motion except as to BFS's equitable indemnity claims on July 7, 2021. (A. pp. 71-83, Order). The Hon. Jennifer B. McCoy also issued similar orders granting summary judgment in favor of seven other subcontractor defendants on crossclaims of BFS. In the July 7, 2021 Order, the circuit court granted partial summary judgment in favor of AC Construction and dismissed BFS's cross-claims for

breach of express and implied warranties, breach of contract, and negligence, ruling those causes of action were disguised equitable indemnity claims and were not viable as alternative causes of action.[2] (A. pp. 71-83). BFS has not appealed this ruling. Judge McCoy granted partial summary judgment in favor of AC Construction and dismissed BFS's claim for contractual indemnity, ruling the indemnity and duty to defend provisions of BFS's Master Agreement (i.e. "[Version 5/17/06]") drafted by BFS (1) are neither clear nor unequivocal, and thus, fail as a matter of law; (2) that such provisions violate South Carolina public policy and S.C. Code § 13-2-10, and thus, are illegal and unenforceable; and (3) BFS was collaterally estopped by prior decisions from contending such provisions are clear and unequivocal, do not violate South Carolina public policy, and/or meet the requirements of South Carolina law. BFS has appealed these rulings. BFS's motion to alter or amend filed on July 19, 202 was denied on August 23, 2021. (A. pp. 128-130). BFS appealed all eight circuit court orders on September 22, 2021. Over BFS's objection, the Court of Appeals consolidated the eight appeals.

On February 12, 2025, the South Carolina Court of Appeals issued and published Opinion No. 6066 affirming the trial court's decision of all eight 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) ("Ct. App. Opinion"). BFS filed a petition for a rehearing on February 27, 2025. (A. pp. 1565-1584). On May 21, 2025, the Court of Appeals issued a substituted opinion denying the petition for rehearing. (A. pp. 1562-1564). On June 20, 2025, BFS filed its Petition for Writ of Certiorari to the South Carolina Supreme Court. (A. pp. 1624-1651). On December 16, 2025, the South Carolina Supreme Court granted certiorari as to

[2] Pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015).

Petitioner's Questions 1-4 and 6. (A. pp. 1621-1623). Petitioner's Brief was filed on January 27, 2026. Respondent AC Construction files this Brief in response.

ARGUMENT

At the core of BFS's appeal is the premise it can both rewrite its contract and reframe its pleadings after the fact. BFS's contractual indemnity claims are based on provisions that attempted to secure indemnification for its own negligence—provisions that were neither clear nor unequivocal, as required by Concord and Cumberland, and in violation of S.C. Code Ann. § 32-2-10. As such, the Circuit Court properly concluded the contractual indemnity claim fails as a matter of law, which was affirmed by the Court of Appeals. Undeterred, BFS now asserts it can nonetheless pursue contractual indemnity from AC Construction for AC Construction's alleged sole negligence. But this argument finds no support in the plain language of the Master agreement or in the allegations of the operative Complaint. A contractual indemnity provision that is legally invalid cannot be resurrected or selectively enforced for a narrower purpose. To do so amounts to judicial revision of the Master Agreement. This Court has no obligation or authority to rewrite the contractual indemnity provisions of BFS. Lewis v. Premium inv. Corp., 351 S.C. 167, 171 (2002); Poynter v. Inves., Inc., v. Cent. Builders of Piedmont, Inc., 387 S.C. 583 (2010). Finally, a final trial court order pending appeal does not negate the finality of the order for purposes of collateral estoppel.

This appeal therefore presents a straightforward application of settled South Carolina law. BFS drafted an indemnity framework that reaches its own conduct, pleaded a claim seeking indemnification for "any liability" and "any sums" it may incur, and now attempts to retreat from the breadth of those choices on appeal. South Carolina law does not permit such revision. The Court of Appeals correctly applied the governing legal standards and properly concluded BFS's

contractual indemnity claim fails as a matter of law. Finally, the Court of Appeals opinion need not be disturbed because BFS has failed to appeal the conclusion of the Court of Appeals that the Contracts in question are unconscionable and adhesion contracts, which renders this appeal moot.

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

Notably, BFS did not address the Court of Appeals' findings that the Master Subcontractor Agreement contains oppressive and one-sided provisions characteristic of an adhesion contract. The Court of Appeals expressly concluded that the warranty, guaranty, and indemnity provisions were "ambiguous, conflict with each other, and do not meet the clear and unequivocal standard." As such, the Court of Appeals concluded "The disparity in bargaining power along with the ambiguous terms in these adhesion contracts deprived the Later Subcontractors of any meaningful choice when entering the Later Contracts. The Later Contracts give the drafter expansive rights and remedies, while creating oppressive obligations or liabilities for the Later Subcontractors *and* limiting or waiving their rights." (A. p. 1560, Ct. App. Opinion).

Yet, BFS's Petition for Writ of Certiorari and its merits brief seem to skip this ruling entirely. Instead, BFS focuses almost exclusively on its interpretation of the indemnity provisions while ignoring the broader structural defects in the agreement identified by the lower court. Issues not meaningfully challenged on appeal are deemed abandoned. <u>See First Sav. Bank v. McLean,</u> 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (<u>citation omitted</u>) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."). "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." <u>First Union Nat. Bank of S.C. v. Soden</u>, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (<u>citation omitted</u>). "Failure to challenge the

ruling is an abandonment of the issue and precludes consideration on appeal." Id. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance. Id. BFS has not appealed the Court of Appeals Opinion its Later Contracts are unconscionable, and accordingly, it stands as the law of the case. Our appellate rules reflect this rationale. "Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR.

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

II. THE LATER CONTRACTS ARE UNCONCIONABLE

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

Here, the record reflects a significant disparity in bargaining power. AC Construction was

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

The provisions of the Master Subcontractor Agreement further demonstrate its one-sided nature. The contract repeatedly shifts risk to the subcontractor while granting BFS expansive protections and remedies. Among other things, the agreement attempts to require subcontractors to indemnify and defend BFS, even in connection with materials and products supplied by BFS; imposes sweeping warranty obligations relating to design and materials over which subcontractors had no control; limits subcontractor remedies; waives various rights and claims against BFS; and conditions payment on receipt of payment from the owner. Several of these provisions, including the "pay-if-paid" clause, are expressly prohibited by South Carolina statute. See S.C. Code Ann. § 29-6-230 ("The payment by the owner to the contractor or the payment by the contractor to another subcontractor or supplier is not, in either case, a condition precedent for payment to the construction subcontractor. Any agreement to the contrary is not enforceable.") (emphasis added).

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

Taken together, these provisions illustrate the cumulative effect of oppressive and one-sided drafting that South Carolina courts have found sufficient to render adhesion contracts

unenforceable. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 33–36, 644 S.E.2d at 673–74. When a contract is structured to transfer virtually all project risk to the subcontractor, including risks associated with products supplied by the contractor, the resulting imbalance deprives the subcontractor of any meaningful choice in accepting the agreement. Accordingly, the Later Contracts are unconscionable and unenforceable as a matter of law.

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

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

South Carolina has a deeply-rooted and long-standing policy of protecting new home

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

This case represents the logical progression of the same public policy. Our Courts have expressed for over 50 years a desire to protect innocent home buyers from defective products. If contractors, such as BFS, are allowed to force their subcontractors, like AC Construction, to bear 100% of the risk of construction defect litigation, then contractors, like BFS, do not have any incentive to properly supervise the work of their subcontractors even though they are ultimately responsible to the Homeowner. In practice, allowing BFS to save the indemnity provisions at issue in this appeal "to the fullest extent permitted by law" would actually function to *incentivize* Contractors like BFS to cut corners and place defective homes into the stream of commerce because such Contractors would be able to force their subcontractors to bear 100% of the responsibility for the inevitable litigation that results. This is the same logic is demonstrated by both the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10, and the "clear and unequivocal" standard (also known as the "Negligence Rule") articulated by the Concord and Cumberland court.

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

BFS's central premise that its pleadings seek contractual indemnity solely for damages caused by its subcontractor's negligence is irreconcilable with the plain language of its own

pleadings. By seeking indemnification for "any liability" it incurs without limitation or exception, BFS seeks indemnification broad enough to encompass liability arising from its own conduct. South Carolina law does not permit a litigant to selectively reinterpret its pleadings to impose limitations that do not appear in the pleading itself.

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

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

Despite BFS's current argument it seeks only indemnity for AC Construction's negligence, the Court of Appeals correctly found the plain language of BFS's pleadings shows BFS sought recovery for any sums for which BFS is held liable to Plaintiff or others, rather than only those sums which may be attributable to AC Construction's sole negligence. In fact, the word 'sole' is not in BFS's Complaint. Instead, BFS seeks the following:

> 138. That **BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or others in this action**, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of Cross Claim 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.

(A. p. 441, BFS's Complaint ¶138 (emphasis added).

When paragraph 138 seeks full contractual indemnification for any liability and to be reimbursed by AC Construction for any sums for which BFS may be held liable, BFS is clearly seeking recovery from AC Construction for the full and complete amount of any verdict rendered against it, including any damages within the verdict for BFS's own negligence. Settled precedent binds BFS to its operative pleadings seeking "full contractual indemnity" for "any liability" and "any sums" for which BFS may be held liable. BFS may not now take a contradictory position from the statements in its pleadings when it is judicially convenient and argue it only seeks contractual indemnity and recovery of any amount for AC Construction's sole negligence. See Johnson v. Alexander, 413 S.C.196, 202, 775 S.E.2d 697, 700 (2015) (citing Elrod, 243 S.C. at 436, 134 S.E.2d at 416 ("The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible")). By demanding full reimbursement for "any sums" it may be required to pay, BFS has plead a claim which encompasses the entirety of any judgment entered against it, including damages attributable to its own independent negligence or concurrent negligence.

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 Third-Party Complaint is read in its entirety, it plainly seeks indemnification broad enough to encompass BFS's own liability. The Court of Appeals correctly recognized this point, concluding the wording of the pleadings, specifically Paragraph 138, "leaves little doubt that BFS's pleadings also seek indemnification for its own negligence." (Ct. App. Opinion, A. p. 1552).

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

Because BFS chose this broad language in its pleadings, it is now bound by the consequences of that choice. As the South Carolina Supreme Court has held, "the allegations, statements or admissions contained in a pleading are conclusive as against the pleader" and "a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings." Johnson v. Alexander, 413 S.C.196, 202, 775 S.E.2d 697, 700 (2015) (citing Elrod, 243 S.C. at 436, 134 S.E.2d at 416). Facts admitted in a pleading must be taken as true against the pleader, and evidence contradicting those allegations is inadmissible. Id.

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

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

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

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

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

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

Before reaching questions of contractual interpretation, this case is governed by South Carolina's Anti-Indemnity Statute. The statute declares construction agreements requiring a subcontractor to indemnify a contractor for the contractor's own negligence to be against public policy and unenforceable. See S.C. Code Ann. §32-2-10. BFS's Master Agreement violates that

prohibition and cannot be enforced. Section 5 of the Master Agreement governs indemnification.

Paragraph 1 provides:

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

(A. pp. 1543-44, Ct. App. Opinion, Later Contract, § 5 INDEMNITY) (<u>emphasis</u> <u>added</u>, all caps in the original). Subsequent provisions of the same section expand the subcontractor's obligations.

Paragraph 2 and 3 state:

> Notwithstanding the foregoing, to the fullest extent permitted by law, the Subcontractor shall indemnify, defend, and hold harmless, the contractor, the Owner, and all of their officers, directors, agents, and employees (the "indemnitees"), from and against any and all claims, damages, losses, and expenses, including, but not limited to, Attorney's Fees (such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) arising out of or resulting from bodily injury to, or sickness, disease or death of, the subcontractor, any agent, employee, or representative of the subcontractor, or any of its subcontractors, **regardless of whether such claim, damage, loss, or expense is caused or is alleged to be caused in whole or in party, by the negligence of any of the Indemnitees**, it being the expressed intent of the contractor and the subcontractor that in such event the subcontractor is to **indemnify, defend, and hold harmless the Indemnitees from the consequences of their own negligence, whether it is or is alleged to be the sole or concurrent cause of the bodily injury**, sickness, disease, or death of the subcontractor, subcontractor's agent, employee, or representative, or the agent, employee, or representative of any of its subcontractors, the indemnification obligations under this paragraph shall not be limited by any limitation on the amount or type of damages, compensation, or benefits payable by or for Subcontractor under Workers

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

(A. pp. 1544-46, Ct. App. Opinion, Later Contract, § 5 INDEMNITY) (emphasis added, all caps in the original). Taken together, these provisions require subcontractors to not only indemnify BFS for claims arising from BFS's own negligence, but also to defend BFS regardless of BFS's fault. By its plain terms, the Master Agreement shifts liability for BFS's own negligence onto its subcontractors.

South Carolina's Anti-Indemnity Statute prohibits precisely this type of contractual arrangement. See S.C. Code Ann. §32-2-10 (a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promise . . . against liability for damages arising out of bodily injury or property damage is against public policy and unenforceable). Critically, the statute does not provide that only specific clauses are void. Rather, it declares the agreement itself is against public policy and unenforceable as a matter of law. If there is any doubt as to the absolute nature of this rule, the statute provides this rule is true "notwithstanding any other provision of law." Id.

South Carolina courts have repeatedly enforced this statutory prohibition. As BFS is well

aware, in D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, the Court of Appeals held that an indemnity provision requiring a subcontractor to indemnify a contractor for damages caused by the contractor's own negligence violated § 32-2-10 rendering the contract void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45–46 (Ct. App. 2018). Because the agreement violated the statute, the court refused to require the indemnitor (BFS) to pay damages caused by the indemnitee's (DR Horton) negligence. Id. The Court reaffirmed the longstanding principle that "an illegal contract is unenforceable." Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)).

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

Nor can BFS avoid the statute by characterizing its claims as one for attorney's fees or defense costs. BFS has admitted its attorney's fees are "consequential damages of an indemnity claim" in its briefing at the trial court level. (A. p. 1380.). Although attorney's fees may be recoverable by contract or statute, such provisions must still comply with South Carolina law. Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1966). Nothing in

South Carolina law permits a contractor to recover defense costs for claims arising from its own negligence where the Anti-Indemnity Statute would otherwise prohibit indemnification.

Because the Master Agreement purports to require AC Construction to indemnify BFS for liability arising from BFS's own conduct, in violation of S.C. Code Ann. § 32-2-10, the entire agreement is unenforceable as a matter of law. The Court of Appeals correctly applied the statute and properly declined to enforce a contractual provision that contravenes South Carolina public policy.

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

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

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

parties' intentions as determined by the contract language"). The Court of Appeals correctly applied this settled framework in the instant case.

A. BFS's Contract Does Not Support Its Argument.

BFS requests this Court to judicially revise its own subcontractor agreement to provide indemnification for claims arising from the subcontractor's sole negligence. However, this is not what BFS's contract states on its face. As South Carolina law makes clear, parties are free to contract as they see fit, and courts are not empowered to rescue parties from the consequences of the agreements they themselves drafted. *See* Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643 (1975); MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 369 (Ct. App. 2003).

According to BFS, AC Construction's work at the Project was performed pursuant to "Version – 5/17/06" of a BFS "Master Subcontract Agreement" dated November 7, 2007 ("Master Agreement" or "Later Contract" or "Version 5/17/06"). (A. pp. 73). There are multiple indemnity provisions throughout the Master Agreement. In reviewing Section 5 INDEMNITY, the Court of Appeals correctly held the provisions of Section 5 are ambiguous, conflict with each other, and do not meet the clear and unequivocal requirement. (A. pp. 1548, 1553, 1554-55, Ct. App. Opinion pp. 17, 22, 23-24). Paragraph 1 of Section 5 INDEMNITY of the Master Agreement relates to property damage. That provision states:

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

> may be liable. The Contractor's insurance requirements are separate and distinct from the requirement of indemnification hereunder.

(A. pp. 1543-47, Ct. App. Opinion p. 12-16, Later Contract, §5 ¶1 INDEMNITY (emphasis added, all caps in the original).

This language, based on the AIA form indemnification language, contains the key phrase "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." Id. The Court of Appeals, in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 176 (Ct. App. 2018), reh'g denied (Oct. 18, 2018), specifically found that such language is legally insufficient. It concluded this type of indemnity provision fails to meet the heightened standard for contracts seeking to relieve an indemnitee of the consequences of its own liability. Despite this clear precedent, BFS now asks this Court to disregard that conclusion and rewrite its Master Agreement to support a claim of indemnification for AC Construction's sole negligence.

BFS, contending that it can rewrite the contract to seek merely indemnification for the sole negligence of AC Construction, would have the inquiry end here without regard to the remainder of Section 5 of the contract. However, the third paragraph of Section 5 states (all caps omitted for ease of reading):

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

(A. pp. 1543-47, Ct. App. Opinion p. 12-16, Later Contract, §5 ¶3 INDEMNITY) (emphasis added, all caps in the original).

Indemnification provisions calling for the Indemnitor to indemnify the Indemnitee "for damages caused by its [the Indemnitee's] negligence **or** the negligence of its subcontractors" are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45-6 (Ct. App. 2018) (emphasis added). Further, our Court of Appeals has held 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)). In D.R. Horton, this Court held the indemnification agreement "purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10" and went on to conclude that "[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton." Id. This case is no different. BFS attempts to draw a distinction between the present case and D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC by claiming it is not seeking indemnification for its own negligence, whether sole or concurrent. However, the question is not what relief counsel for BFS claims his client now seeks, in contravention to the problematic indemnity language in BFS' contracts and the allegations of his operative pleading, but rather is there a legal valid indemnity provision to enforce.

The Section 5 indemnity provision fundamentally contradicts BFS's current assertion its claims for contractual indemnity are limited to sums solely attributable to AC Construction's negligence. Instead, this contractual indemnity provision calls for AC Construction to indemnify BFS for 100% of its attorney's costs and fees *regardless of who is found to be at fault*. This contractual overreach, combined with BFS's pleadings seeking recovery from AC Construction for "*any liability* BFS is found to have to Plaintiffs or to others" and "*any sums* for which BFS

may be held liable to the Plaintiffs or to others" (A. p. 441) (emphasis added), unequivocally demonstrates an attempt to obtain indemnification for BFS's own negligence, which is plainly at odds with South Carolina law.

In Concord and Cumberland, the Court of Appeals held the "clear and unequivocal" standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018). Despite this clear precedent, BFS now asks this Court to disregard that conclusion and rewrite its Master Agreement to support indemnification solely for AC Construction's negligence. As this Court has previously held, "[i]t is not the function of the court to rewrite contracts for parties." Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) (internal citations omitted). BFS's Petition is premised on judicial reconstruction of both its Master Agreement and operative Complaint. Accordingly, the Court of Appeals properly found that because BFS's indemnity provisions themselves violate both South Carolian law and public policy, it therefore had no obligation to rewrite them.

B. BFS Cannot Avoid the Clear and Unequivocal Standard by Recasting Its Claim.

BFS attempts to bypass the clear and unequivocal standard by retroactively narrowing its claim to encompass only its subcontractor's negligence. However, as the Court of Appeals correctly recognized such characterization cannot override the language of the Master Agreement or its own pleadings. (See Ct. App. Opinion, A. pp. 1554–55.).

When the Master Agreement is read as a whole, the indemnity provisions are broad enough to reach claims involving BFS's own conduct. Under South Carolina law, once a contract implicates the indemnitee's negligence, the provision must satisfy a heightened standard of clarity to be enforceable. Federal Pac. Elec., 298 S.C. at 27, 378 S.E.2d at 58; Ashley II, 409 S.C. at 501,

762 S.E.2d 702. This standard is triggered by the objective scope of the contractual language, not by BFS's subjective litigation strategy or its current theory of recovery.

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

Because BFS drafted a Master Agreement which implicates its own negligence yet fails to express, in clear and unequivocal terms, an intent to shift that specific liability to AC Construction, 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. This 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.

C. AC Construction Cannot be Solely at Fault for the Claims Against BFS.

BFS has admitted responsibility for supervising and inspecting the work performed by its subcontractors. (A. pp. 596, 688-689, 694). Given BFS's admitted supervisory role, any negligence found on AC Construction's part, which is denied, would inherently establish concurrent negligence by BFS by and through its failure to properly supervise. Accordingly, BFS cannot be entirely free of responsibility for any alleged deficiencies in AC Construction's work. BFS's

attempt to disguise claims of concurrent negligence as subcontractor sole-negligence contractual indemnity is unavailing and unsupported.

D. 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 in that case 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.

BFS's reliance on Concord and Cumberland as a mechanism to bypass the "clear and unequivocal" standard is misplaced. That decision did not authorize the selective enforcement of a

legally deficient indemnity provision. By applying the heightened standard to BFS's broad contractual language, the Court of Appeals in this case did not depart from precedent; it applied it.

E. 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 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 properly 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.

An issue cannot be raised for the first time on appeal; it 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 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.

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). However, South Carolina courts have never treated this phrase as determinative in interpreting or limiting an indemnity provision or as a mechanism that rescues otherwise unlawful language. Notably, BFS cites no authority supporting its interpretation. The Court of Appeals rejected precisely that notion in D.R. Horton, *supra*. There, the indemnification agreement began with the same prefatory language "to the fullest extent permitted by law," however, the court still concluded the provision violated South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10. D.R. Horton, 422 S.C. at 152, 810 S.E.2d at 45–46. The presence of that phrase did not cure the statutory violation or render the provision enforceable.

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

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

South Carolina contract law likewise requires a meeting of the minds as to the essential terms of an agreement. Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 620, 879 S.E.2d 746, 759 (2022); Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) ("A valid and enforceable contract requires a meeting of the minds between the parties with regard to

all essential and material terms of the agreement.") (citation omitted)); *cf. id.* at 579, 762 S.E.2d at 701 (noting even when parties manifest an intent to be bound, an indefinite material term may invalidate the agreement (quoting 1 Corbin on Contracts § 2.8 (Rev. ed. 1993)). BFS's interpretation would undermine the fundamental requirement. If the scope of the parties' obligations depends on what a court later determines to be "permitted by law," then neither party could know the meaning of the agreement at the time of contracting. Such an interpretation would render the parties' obligations indeterminate rather than definite.

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

F. 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. 1993), and S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 125 S.E.2d 613 (1964) to argue 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 the standard because its terms were unmistakably clear and supported indemnification even where Beacon was partially at fault. The 2005 Contracts and Later 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 construction agreements purporting to indemnify a party for its own negligence are contrary to public policy and unenforceable. Because S.C. Electric & Gas Co. was decided more than a decade before the enactment of § 32-2-10, it was decided under a materially different legal framework and provides little guidance in interpreting modern construction indemnity provisions governed by the statute.

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

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

The Court of Appeals applied the cardinal rule of South Carolina contract interpretation: to ascertain and give legal effect to the parties' intentions as determined by the contract language.

Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012). In doing so, courts must read a contract as a whole and avoid creating ambiguity by isolating provisions or single sentences. Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014); McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 574 (2009).

The Court of Appeals analyzed Sections 3, 5, and 8(i) of the Later Contracts, provisions that, when read together, contain the operative indemnity and defense language. The Court's thorough analysis revealed the indemnity provisions do not simply allocate responsibility for the subcontractors' own work. Instead, they contain broad and conflicting indemnity obligations that purport to shift liability to the subcontractors for personal injury and property damage arising directly from BFS's own negligence in supplying and selecting defective materials and overseeing their installation.

The Court of Appeals recognized that Section 3, though styled as a "Warranty" provision, includes hidden indemnity language. (A. pp. 1542-43, 1553, Ct. App. Opinion). This provision attempts to require subcontractors to indemnify BFS for damages arising from "design, workmanship, and materials." This specific phrasing—particularly the references to "design" and "materials"—is critical. Subcontractors like AC Construction had no design responsibility, nor did they supply materials; their role was solely to install materials provided by BFS pursuant to the provided design. Accordingly, the Court of Appeals rightly concluded this language could only refer to BFS's own conduct. (A. pp. 1553, Ct. App. Opinion). Consequently, requiring indemnity in such circumstances directly violates S.C. Code Ann. § 32-2-10, South Carolina's anti-indemnity statute. Furthermore, Section 8(i) expressly provides for indemnification of attorney's fees and settlement costs *without regard to BFS's fault*, further illustrating the agreements attempt to hold subcontractors liable for BFS's own negligent acts. These provisions were not viewed in isolation;

they were meticulously examined alongside Section 1's definition of "Work" and Section 5 "Indemnity," whose definitions and structural relationships were carefully considered in light of the entire contract.

BFS incorrectly asserts the Court of Appeals ignored the defined term "Work" set forth in Section 1 of the Master Agreement when analyzing the warranty and indemnity provisions under Section 3. The Court of Appeals' comprehensive analysis of the contract explicitly relied upon the definition of "Work" in Section 1. Rather than disregarding this definition, the court used it to confirm the subcontractor's scope of work did not include design or material selection. This appropriate conclusion, derived from reading the contract as a whole, demonstrated the indemnity obligations embedded in Sections 3 and 5 were overreaching and unenforceable. The approach utilized by the Court aligns with South Carolina law requiring a contract be interpreted "from the four corners" and read as a whole. See McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204 (1945) (The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, "from the four corners of the instrument" alone); see also McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("A contract is read as a whole document....").

By considering Section 1's definition of "Work" in relation to the warranty and indemnity provisions in later sections, both the Circuit Court and Court of Appeals correctly concluded the Master Agreement contains ambiguous, conflicting, and deceptive clauses that improperly require indemnification for BFS's own negligence. For example, Section 5, paragraph 1 purports to require subcontractor fault, while Section 5, paragraph 2 requires indemnity even for BFS's sole fault. Under South Carolina law, any uncertainty as to the meaning of any term "should be resolved

against the party who prepared the contract", which, in this case, is indisputably BFS. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 687 S.E.2d 714, 718 (S.C. Ct. App. 2009).

Far from ignoring defined terms or cherry-picking language, the Court of Appeals applied well-established principles of South Carolina contract interpretation: reading the contract as a whole, resolving ambiguities against the drafter, and rejecting efforts to rewrite contracts retroactively. The Court of Appeal's conclusion—that the multiple indemnity provisions set forth in the contract fail to meet the clear and unequivocal standard set forth in Concord and Cumberland and violate § 32-2-10—was based on a reasoned and comprehensive review of the entire agreement, not on selective parsing of clauses or a failure to honor defined terms. BFS is simply asking this Court to reweigh the evidence and re-interpret a contract the Court of Appeals carefully and properly construed. The Court of Appeals also properly found the Later Contracts are adhesion contracts and are therefore unenforceable. Accordingly, this Court should affirm the Court of Appeals' holistic review of the contracts, reading the agreements as a whole and giving effect to the relevant provisions within their full contractual and factual context in finding that BFS improperly sought indemnity for its own negligence.

VIII. SEVERANCE OF THE INDEMNITY LANGUAGE WOULD REQUIRE JUDICIAL REWRITING OF THE MASTER AGREEMENT BETWEEN BFS AND AC CONSTRUCTION.

BFS contends its severability clause should compel severance of the unenforceable indemnity provisions because doing so would honor the intent of the parties. However, this argument misapprehends the nature and extent of the violations within BFS's contractual indemnity provisions. This Court should affirm the Court of Appeals' refusal to sever the indemnity provisions because severance of the indemnity language across the agreement would

require an impermissible judicial rewriting of the Master Agreement between BFS and AC Construction.

Contrary to BFS's assertion, the indemnification language of BFS's Master Agreement is intertwined and not susceptible to division. The Court of Appeals, in Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002), held that "[a] severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be." As discussed above, the indemnity framework as a whole—including Section 3 (Warranty), Section 5 (Indemnity), and Section 8(i) (Attorney's Fees)—is riddled with conflicting, ambiguous, and deceptive language. BFS's argument the indemnity terms are independent and severable ignores that these provisions form a unified and intertwined indemnity scheme. In reading the deceptive language and conflicting indemnity provisions together, the Court of Appeals properly found the indemnity provisions were "replete with terms that violate South Carolina law and public policy," and thus unenforceable. (A. p. 1559, Ct. App. Opinion).

South Carolina courts have emphasized the permissibility of severability hinges upon the extent to which the unenforceable provisions permeate the entire agreement. As this Court explained in Simpson v. MSA of Myrtle Beach, Inc., "if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." 373 S.C. 14, 33–36, 644 S.E.2d 663, 673–74 (2007). That is precisely the case here. The indemnity provisions at issue seek to shift liability for BFS's own negligence, an objective flatly prohibited by South Carolina Code § 32-2-10. Severing such provisions would not simply involve

striking unlawful language; it would require the Court to reconstruct the contract's entire indemnity scheme to align it with lawful standards. Courts in South Carolina do not undertake such revisions. See Poynter v. Ratcliff, 387 S.C. 580, 588, 694 S.E.2d 15, 18 (2010) (holding that courts may not blue-pencil unlawful terms to render them enforceable). As the Court of Appeals aptly observed in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, "[m]erging 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." 424 S.C. 639, 656, 819 S.E.2d 171, 175 (Ct. App. 2018). Moreover, as the Court of Appeals in this case properly noted, "[c]ourts have discretion . . . to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive." Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020). (A. p. 1559).

Here, the unlawful provisions were drafted by BFS such that they are inextricably linked and interwoven throughout the Master Agreement. This intricate entanglement makes it impossible for the court to selectively employ the severability clause to remove one or more offending provisions without embarking on an impermissible exercise of judicial revision. Accordingly, the Court of Appeals properly found that severance of the unenforceable contractual indemnity provisions is not possible without judicial re-writing of the contract.

IX. THE COURT OF APPEALS CORRECTLY APPLIED COLLATERAL ESTOPPEL

BFS's current attempt to reframe the same claim—now limited to AC Construction's alleged sole negligence—ignores the operative contractual language and the underlying factual predicate as to the enforceability of the indemnification provisions have already been judicially determined in prior actions. Collateral estoppel, also known as issue preclusion, prohibits a party

from relitigating an issue that was actually litigated and determined by a valid and final judgment in a prior case, and which was essential to that judgment. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). This applies even if the claims in the former and latter cases are different. Id. The party asserting collateral estoppel must demonstrate the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984).

The indemnity provisions at issue here are identical to those previously litigated in Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., et al., (A. pp. 665-675) (the "Newman" Order); Pavic v. Carolina Cottage Homes, LLC, et al., (A. pp. 826-847) (the "McCoy" Order) and Six Fifty-Six Owners' Association, Inc., et al. v. Winsor South, LLC, et al., (A. pp. 682-86) (the "Young" Order) all of which involved BFS and the same indemnity language. The record unequivocally demonstrates BFS had a full and fair opportunity to litigate, and did actually litigate, the enforceability of these specific indemnity clauses in prior actions before the Circuit Court. The clauses were directly determined to be inadequate and unlawful in the former actions and such conclusions were necessary to support the prior judgments of the court in those respective actions, which led to dismissals.

BFS's central argument, that its pending appeal(s) negate the finality of the prior judgments for collateral estoppel purposes, directly contradicts established South Carolina law and well-settled precedent. **A judgment is final and retains its preclusive effect even while on appeal, unless and until it is actually reversed**. See Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941) (emphasis added) (finding finality of a court's judgment is not lost because appeal is pending unless and until reversed). Rule 241(a), SCACR, provides that "[a]s a

general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." Accordingly, while appealing a trial order acts as an automatic stay of the *enforcement* of an order or judgment, it does not negate the *finality* of the order for purposes of preventing re-litigating the same issues in a separate matter. See id. A final judgment is one that "finally determines the rights' of the parties." First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992). Rule 201(a), SCACR, provides that an: "[a]ppeal may be taken, as provided by law, from any final judgment or appealable order." The status of the Newman Order, the Young Order, and McCoy Order as a final judgment is what makes the orders appealable in the first instance. None of BFS's respective appeals undermine the status of the associated order as a final judgment, and, therefore, is not a barrier to applying collateral estoppel. Accordingly, the Court of Appeals' ruling on collateral estoppel was correct.

CONCLUSION

For the reasons stated herein and above, the decision of the Court of Appeals should be affirmed. First, the Court of Appeals correctly determined the Master Agreement was an unconscionable contract of adhesion, which has been abandoned on appeal to this Court, rendering the remaining arguments moot. Second, BFS's own pleadings seek indemnification for "any liability" and "any sums" it may be required to pay. In its pleadings, BFS necessarily sought indemnification that includes liability arising from its own conduct. South Carolina law binds a party to the claims it chooses to assert in its pleadings, and BFS cannot now recast those claims on appeal to avoid their legal consequences. Third, the indemnity provisions in BFS's Master Subcontractor Agreement violate South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10, which

makes construction agreements purporting to indemnify a party for its own negligence contrary to public policy and unenforceable. The agreement's language requiring subcontractors to defend and indemnify BFS regardless of BFS's own negligence is clearly language the Legislature sought to prohibit. Fourth, even apart from the statutory prohibition, the indemnity provisions fail under South Carolina's longstanding "clear and unequivocal" standard governing contractual indemnification for an indemnitee's own negligence. When the Master Agreement is read as a whole, the provisions are internally inconsistent and ambiguous. Rather than clearly limiting indemnification to subcontractor negligence, the agreement repeatedly contemplates claims arising from BFS's own conduct. Such language does not satisfy the strict clarity required by South Carolina precedent. Fifth, BFS's request for severance would require the Court to rewrite the parties' agreement. The indemnity provisions are not confined to a single clause but instead appear throughout multiple sections of the Master Agreement. As the Court of Appeals correctly recognized, the agreement is "replete with terms that violate South Carolina law and public policy." Removing isolated phrases would not preserve the parties' bargain—it would reconstruct it. South Carolina courts have consistently refused to "blue-pencil" contracts in that manner. Finally, BFS's claims are independently barred by collateral estoppel. The enforceability of these identical indemnity provisions has already been litigated and decided in prior circuit court actions involving the same contractual language. The Court of Appeals correctly concluded that BFS cannot relitigate that issue by advancing a different theory of liability under the same provisions.

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

Court affirm the decision of the Court of Appeals.

Additionally, pursuant to Rule 208(b)(6), SCACR, AC Construction joins, adopts, and incorporates by reference herein any other applicable arguments set forth by other Respondents to the extent not inconsistent with the arguments set forth by Respondent herein.

LUZURIAGA MIMS, LLP

s/*Kevin W. Mims*____________________
Kevin W. Mims, SC Bar No. 69418
W. Chase McNair, SC Bar No. 100695
1156 King Street
Charleston, SC 29403
843.410.4713
kmims@lmlawllp.com
cmcnair@lmlawllp.com
Attorneys for Respondent AC Construction, Inc.

March 18, 2026