THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

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

Opinion No. 2025-6099

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

v.

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

Builders FirstSource-Southeast Group, LLC, 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.

PETITIONER's REPLY BRIEF to RESPONDENT WS CONTRACTORS, LLC

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BFS REPLY TO WS CONTRACTORS

I. The questions presented on appeal are equally applicable to all of the Respondent subcontractors, including WS Contractors.

Respondent WS Contractors, LLC (hereinafter "WSC") argues that only one question on appeal - Question 5, regarding application of S.C. Code Ann. Section 32-2-10 to attorney's fees – applied to BFS's claims against WSC and therefore, this Court should dismiss WSC from the appeal. Such notion is patently incorrect. That this Court declined to hear the parties' arguments about whether attorney's fees are included within the purview of S.C. Code Ann. Section 32-2-10 has no bearing on whether certain clauses or provisions of the parties' contracts comply with or run afoul of what WSC refers to as the "Anti-Indemnity Statute." Contrary to WS Contractors' first argument, all five (5) questions on appeal pertain to the Order of Judge McCoy granting WS Contractors' summary judgment. Even WSC appears to appreciate as much, which is why it briefed the other five (5) questions on appeal. As explained below, the court of appeals determination - that the parties' contract violated S.C. Code Ann. Section 32-2-10 and public policy of this State - is without foundation and is based on the lower courts' erroneous analysis of select language from both relevant and non-relevant contract provisions.

II. WSC misrepresents the plain language of the parties' contract provisions.

WSC's argues that BFS's contractual indemnity claim is based on language from the parties' contract that is illegal, [un]enforceable, and void against public policy. WSC Brief, p. 23. WSC includes purported citations (a) to the third paragraph of Section 5 Indemnity, (b) to subsection (i) of Section 8 Payment to Subcontractor, and (c) to the second paragraph of Section 5 Indemnity as examples of provisions that allegedly require WSC to indemnify BFS for attorney's fees and costs without regard to BFS's possible sole or concurrent negligence. See WSC Brief, pp. 23-24. WSC argues that the court of appeals properly applied S.C. Code Ann. Section 32-2-10

and the clear and unequivocal standard to these attorney's fees provisions because these fees are imposed without regard to BFS's fault. See WSC Brief, p. 23. As explained hereinbelow, the provisions cited by WSC are not relevant to BFS's contractual indemnification cause of action asserted against WSC in the underling litigation and when properly read, they do not run afoul of Section 32-2-10 or any other relevant case law or statutory law in South Carolina.

A. The third paragraph of Section 5 Indemnity.

The third paragraph of Section 5 does not call for WSC to indemnify BFS for BFS's sole or concurrent negligence. That is because the third paragraph of Section 5 does not provide BFS any right to indemnity. Instead, the third paragraph of Section 5 provides BFS a right to defense from WSC against an indemnified claim.

The first sentence of the third paragraph explains that "the duty to defend under this Section 5 is independent and separate from the duty to indemnify" and that "the duty to defend exists regardless of any ultimate liability or negligence of [BFS]." See A. p. 1495. The second sentence states, "[t]he 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." See A. p. 1495. The third and final sentence of the third paragraph of Section 5 states, "[WSC]'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 [BFS] for the matter indemnified hereunder is fully and finally barred by the applicable statute of limitations." A. p. 1495.

Thus, by its plain language, there must first be a claim to which BFS believes it is entitled to be defended and indemnified from WSC against and second, BFS must provide WSC written notice of such claim. Contrary to WSC's arguments, any defense obligation under the third

paragraph of Section 5, is inherently tied to an indemnified claim under Section 5. More importantly, there is nothing within the third paragraph of Section 5 that calls for WSC to indemnify BFS against BFS's sole negligence. Therefore, the third paragraph of Section 5 does not run afoul of Section 32-2-10 or the public policy of South Carolina.

Here, pursuant to parties' contract, including the third paragraph of Section 5, BFS wrote WSC demanding defense against Plaintiffs' claim. Notwithstanding the rights and obligations set forth by the third paragraph of Section 5, WSC declined to provide BFS a defense against Plaintiffs' claims in the underlying action. By failing to defend BFS against Plaintiffs' claims, BFS believed WSC to be in breach of contract and accordingly filed a breach of contract claim against WSC in separate litigation. See Builders FirstSource-Southeast Group, LLC v. American Safety Indemnity Company, et. al., civil action number 2019-CP-10-004725. Eventually, BFS and WSC settled BFS's breach of contract claim and the parties filed a Stipulation of Dismissal ending the separate action on March 3, 2025. Therefore, the parties' dispute regarding the rights and obligations of the third paragraph of Section 5 are moot and should not be considered by this Court.

Contrary to the arguments of WSC, Section 5 contains only two specific indemnity provisions. Paragraph One of Section 5 (the only provision upon which BFS relies), clearly imposes an obligation upon the subcontractor, WSC, to indemnify BFS against liability resulting from the negligence of the subcontractor. See A. p. 1494.

By contrast, the separate Paragraph Two of Section 5 (which has neither been cited nor relied upon by BFS in this action), imposes an obligation upon the subcontractor to indemnify BFS, "to the fullest extent permitted by law" against personal injury sustained by the subcontractor, its employees, etc. See Id.

Here, the underlying action deals with Plaintiffs' property damage claims allegedly resulting from the negligent acts or omissions of BFS and WSC. Thus, BFS's indemnification claim against WSC is governed by the indemnity provision set forth in the first paragraph of Section 5 as it is the only provision that provides a right to indemnity for third-party property damage claims, such as those asserted here by Plaintiffs. Consistent therewith, BFS seeks indemnification from WSC for any liability or damage determined to result from WSC's negligent acts or omissions. See BFS indemnification cross-claim at A. pp. 440-441. While WSC achieved a settlement with Plaintiffs that resolved Plaintiffs' claims against BFS as it relates to WSC's scope of work, the first paragraph of Section 5 also provides BFS the right to recover "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)...." incurred defending against Plaintiffs' claims relating to WSC's scope of work. A. p. 1494. That is what BFS seeks – attorney's fees and costs determined to result from the negligent acts or omissions of WSC.

The third paragraph does not provide that WSC must indemnify BFS against BFS's sole or even concurrent negligence. Instead, the third paragraph of Section 5 provides BFS the right to defense from WSC against an indemnified claim, such as Plaintiffs' property damage claim allegedly resulting from the negligent acts or omissions of WSC. There is nothing illegal or unenforceable about such provision. Such a provision does not run afoul of S.C. Code Ann. Section 32-2-10, nor does it violate the public policy of South Carolina. It was error for the lower courts to hold otherwise.

B. Subsection 8(i).

Next, WSC argues that 8(i) of the parties' contract calls for WSC to indemnify BFS without regard to BFS's sole or concurrent negligence. WSC Brief, p. 24. As explained herein below, WSC is mistaken again.

Subsection 8(i) speaks to the rights and obligations of the parties regarding mechanic's liens filed by WSC's suppliers or subcontractors. See A. pp. 1498-1499. Here, there are no disputes between the parties or their suppliers or subcontractors regarding payments owed for any materials or services performed during construction of the Retreat at Charleston National project. There are no claims asserted by the parties regarding mechanic's liens or past due payments owed from construction of the Retreat at Charleston National project. BFS fails to see how 8(i) is relevant to its contractual indemnification cause of action asserted against WSC seeking to recover any liability or damage determined to result from the negligent acts or omissions of WSC in construction of the Retreat at Charleston National project. Nevertheless, BFS will explain how WSC is mistaken as to the plain language of 8(i).

By Footnote 16, WSC attempts to provide citation to 8(i) as an example of a provision in the parties' contract that provides BFS the right to indemnity from WSC without regarding to BFS's sole or concurrent negligence. See WSC Brief, pp. 24-25. However, WSC incorrectly captures the complete language of 8(i) and combines it with select language from the second paragraph of Section 5 Indemnity. See Id.

Contrary to WSC's errant citation, 8(i) begins with "to the fullest extent permitted by law, [WSC] hereby agrees to indemnify, defend, and hold harmless [BFS] from and against any mechanics' and materialmen's liens upon the Project, attorneys' fees and expenses, amounts paid in settlement, and amounts paid to discharge judgments arising out of the services, labor, equipment, or materials furnished by [WSC] or [WSC] employees, suppliers, or subcontractors."

A. p. 1499. 8(i) next states that "[i]f [WSC] fails to do so, [BFS] may deduct from sums then or thereafter due to [WSC] such amounts as [BFS] deems appropriate in its sole discretion to indemnify [BFS] from such liens, claims, and encumbrances." Id. 8(i) also states that "[BFS] may, in its sole discretion, cure any liens or satisfy any demands, and recover its costs related directly or indirectly thereto from [WSC]." Id. Lastly, 8(i) states, "[WSC] hereby waives, releases, and forever discharges [BFS] from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities that [WSC] may have against [BFS] that arise directly or indirectly from curing any such liens, claims, encumbrances, or demands." Id.

The obligations imposed by subsection 8(i) clearly relate only to liens incurred by the subcontractor in implementing its scope of work, and not to liens incurred by BFS.

Thus, by its plain language, there is nothing in subsection 8(i) that provides WSC must indemnify BFS against BFS's sole or concurrent negligence. Therefore, 8(i) does not violate Section 32-2-10 or the public policy of South Carolina.

C. The second paragraph of Section 5 Indemnity.

The second paragraph of Section 5 Indemnity only provides BFS the right to indemnity from WSC against a bodily claim suffered by WSC or by employees, etc., of WSC. See A. p. 1494 The Paragraph provides specifically that, "notwithstanding the foregoing (a reference to the indemnity provision of Paragraph One), and to the fullest extent permitted by law, [WSC] shall indemnify, defend, and hold harmless [BFS] 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, [WSC], any agent, employee, or representatives of [WSC], or any of [WSC]'s subcontractors...." Id. BFS's right to

such indemnity from WSC exist "regardless of whether such claim, damage, loss, or expense is caused, or is alleged to be caused, in whole or in part, by the negligence of [BFS]...." Id. Further, the second paragraph states "[i]t being the expressed intent of [BFS] and [WSC] that in such event [WSC] is to indemnify, defend, and hold harmless [BFS] from the consequences of [its] own negligence, whether it is or is alleged to be the sole or concurrent cause of the bodily injury, sickness, disease, or death of [WSC], [WSC]'s agent, employee, or representative, or the agent, employee, or representative of any of [WSC]'s subcontractors." Id.

First, the indemnity provisions of Paragraph Two are specifically separate from the indemnity provisions of Paragraph One, and impose the obligation to indemnify only "to the fullest extent permitted by law".

The claims at issue here do not relate to any "bodily injury, sickness, disease, or death" of WSC or its agent, employee, representative or subcontractor. Thus, this provision is not relevant to BFS's contractual indemnification cause of action against WSC for any liability or damage determined to result from WSC's negligent acts or omissions in construction of the Retreat at Charleston National project. Moreover, BFS does not rely upon this provision in the assertion of its claim against WSC here. Nevertheless, BFS appreciates that this provision may violate Section 32-2-10. However, by the plain language of Section 32-2-10, while the second paragraph is against public policy and unenforceable, "[n]othing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee...against liability for damage resulting from the negligence, in whole or in part, of the promisor, its agents or employees." S.C. Code Ann. § 32-2-10. Therefore, the first paragraph of Section 5, as well as, the third and fourth paragraphs of Section 5, remain in full force and effect per the statute. Moreover, as explained in BFS' Brief, the Court must honor the parties' intent and sever this

provision to the extent that it believes it to be violative of Section 32-2-10. See BFS Brief, pp. 36-40.

III. Section 32-2-10 does not invalidate the parties' contract, only the promise or agreement to indemnify against sole negligence.

Section 32-2-10 provides in relevant part that:

> [A] promise or agreement . . . purporting to indemnify the promisee . . . against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee . . . is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee . . . against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.

The statute speaks specifically in terms of a "promise or agreement...to indemnify". Moreover, South Carolina courts, when interpreting the term "agreement" as used in the statute, have treated it to mean "the agreement to indemnify for the promisee's own negligence", rather than "the entire contractual agreement. This treatment is evident from the very case that WSC cites: D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018). WSC claim that the court in DR Horton "render[ed] the contract void against public policy". The Respondents have misconstrued the opinion of the D.R. Horton court, and their reliance on the DR Horton court opinion is without foundation.

It is important to note, initially, that the DR Horton court was considering an indemnity provision set forth within a single paragraph of an overall contract, a paragraph comprised of several clauses, each of which addressed separate circumstances under which the subcontractor was required to indemnify the contractor. See D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 148, 810 S.E.2d 41, 43 (Ct. App. 2018). The DR Horton court determined that one of those separate clauses was in fact void as against public policy. See Id. at 422 S.C. at

152. However, notwithstanding that determination, the DR Horton court specifically recognized the validity of the remaining subclauses within the indemnity paragraph, **despite the fact that the separate clauses were set forth within a single paragraph.** Thus, the DR Horton court, and specifically contrary to the assertions of the Respondents, did not invalidate the entire contract, and did not, in fact, invalidate even the remaining provisions of the indemnification provision, set forth within the same paragraph as the subclause found to be void. D.R. Horton, 422 S.C. at 152-53. The DR Horton court further clarified the limitation of its ruling, noting that "the indemnification **clause** is void as against public policy to the extent that it purports to require BFS to indemnify DR Horton for damages caused by its negligence." See D.R. Horton, 422 S.C. at 152-53.

The DR Horton court, rather than invalidating the entire contract, limited its holding to one specific subclause within a more expansive indemnification provision, allowing enforcement of the remaining indemnification provisions which were not determined to violate the statute.

Critically, the DR Horton court noted that, to the extent that the indemnification provision allowed general contractor D.R. Horton to recover from BFS, the subcontractor, for BFS's own negligence, that portion of the indemnification provision did not violate public policy. See D.R. Horton, 422 S.C. at 152. D.R. Horton was precluded from any recovery, not because of any invalidation of the entire contract, but because the underlying award was without any findings of fact as to the basis for the award, and it would have been pure speculation as to whether the award included any damages resulting from the work of BFS. See Id. at 153. One can image that under different facts, however, D.R. Horton would have been allowed to recover under the "indemnification clause" that the court acknowledged *did not* violate public policy.

The D.R. Horton court's separation, within the contract, of the indemnity subclause ("agreement") that violated the statute from the indemnity "agreement" that did not, is compelled by the very language of Section 32-2-10. The statute prohibits only "agreements" by which the promisor undertakes to indemnify the promisee against liability for the promisee's own sole negligence. It states further that nothing within the statute shall affect an "agreement" whereby the promisor agrees to indemnify the promisee for the *promisor's* own negligence. For our purposes, this means that an "agreement" to indemnify BFS against BFS's own sole negligence would be unenforceable, *but at the same time*, Section 32-2-10 cannot "affect" a simultaneous "agreement" whereby WSC indemnifies BFS for WSC's own negligence. The contract at issue may or may not contain a separate agreement (set forth within an entirely separate and distinct paragraph of Section 5) to indemnify BFS for BFS's own negligence, but *even if it does*, the separate agreement under the first paragraph cannot be affected by the statute – by the statute's own terms, this agreement must stand. For this reason, the D.R. Horton court similarly recognized that there was a portion of the contract's indemnity agreement that survived its Section 32-2-10 analysis.

Because the indemnity provision set forth in the first paragraph of Section 5, which is the only relevant indemnification provision in the parties' contract, does not violate Section 32-2-10 (a statute which in fact explicitly states it cannot be used to strike down such an indemnification provision), the holding of the court of appeals on this issue should be reversed.

IV. The clear and unequivocal standard does not apply here, because BFS is not seeking indemnity for its own negligence, whether sole or concurrent.

It is only when a party seeks to be relieved from the consequences of its own negligence that our case law requires that the indemnity clause must be set forth in clear and unequivocal terms. See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 763 S.E.2d 19

(2014); Laurens Emergency Med Specialists PA v. MS Bailey and Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003); Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 648, 819 S.E.2d 166, 171 (Ct. App. 2018)(citing Federal Pacific Electric v. Carolina Production Enterprises, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989), noting the indemnity clause was subject to the clear and unequivocal standard because the respondent was seeking indemnification for its "own negligence;" also, citing Laurens, noting the court found strict construction of the indemnity clause was required because the party claimed the clause could relieve it "from the consequences of its own negligence.").

Here, where BFS is seeking indemnity only for any liability or damage that is determined to result from the acts or omissions of WSC, it was error for the lower courts to subject the relevant indemnity provision to the heightened "clear and unequivocal" standard. Instead, the indemnity provision is to be construed in accordance with the general rules for construction of contracts. See Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 SE2nd 271, 272 (Ct. App. 1993)(citing Federal Pacific). Therefore, this Court must reject WSC's contentions to the contrary, reverse the court of appeals' Opinion, and remand BFS's contractual indemnification cause of action against WSC to trial.

V. The terms and provisions of the parties' agreement are not ambiguous and are not in conflict with other terms and provisions in the contract.

WSC would have this Court follow the errant path of the lower courts by analyzing select language from non-relevant provisions and by ignoring language which limits the parties' rights and obligations to create ambiguities and conflicting provisions. However, this Court is fully aware that a court may not review isolated portions of a contract or single sentences or clauses to create ambiguities. See Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014); Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975).

As explained in II.A. above, the third paragraph of Section 5 Indemnity does not conflict with the first paragraph of Section 5 Indemnity. The third paragraph does not provide BFS the right to indemnity. The third paragraph explains the defense rights and obligations of the parties under Section 5. There are no ambiguities in the first or third paragraphs of Section 5. At best, one may create an ambiguity when one reads select language therefrom in isolation and without context. Such contract interpretation contradicts basic rules of construction of contracts. The separate indemnification provisions in Section 5, are to be applied to only the respective circumstances addressed in those paragraphs. Here, where the parties are dealing with a third-party's property damage claims, the first paragraph of Section 5 is the only relevant indemnity provision, and provides a right to indemnity but only for damage resulting in whole or in part from the negligent acts or omissions of WSC. The third paragraph of Section 5 speaks to WSC's defense of BFS against Plaintiffs' claims. Contrary to WSC's arguments, there is nothing to "reconcile" between the first and third paragraphs of Section 5 Indemnity. The first paragraph provides BFS the right to indemnity from WSC against third-party property damage claims, but only to the extent that the damage arises in whole or in part from a negligent act or omission of WSC. The third paragraph provides BFS the right to defense against claims such as Plaintiffs'.

Conclusion

In conclusion, WSC supplied fasteners for installation of the windows and Plaintiffs' expert testified that he observed deficiencies both in the fasteners supplied by WSC and in the manner in which WSC installed them at the project. It was error for the trial court to grant and the court of appeals to affirm summary judgment on BFS's indemnification cause of action against WSC as there is a genuine issue of material fact regarding the parties' alleged negligence and BFS is only

seeking indemnification from WSC for any liability or damage determined to result from WSC's negligent acts or omissions.

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