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 RESPONDENTS ECC CONTRACTING, LLC and AC CONSTRUCTION, INC.

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Appellant/Petitioner Builders FirstSource-Southeast Group, LLC (hereinafter "BFS") submits the following reply brief in response to the briefs submitted by Respondent subcontractors ECC Contracting, LLC (hereinafter "ECC") and AC Construction, Inc. (hereinafter "AC"). Because the briefs of ECC and AC are nearly exact replicas of each other, BFS believes this reply brief responds comprehensively to each, but for ease of reading, all citations to the briefs throughout are exclusively to ECC's brief.

I. BFS properly preserved an appeal from the holding that the contracts are unconscionable.

ECC and AC argue in their briefs that BFS failed, both in its Petition for Certiorari and its Brief, to challenge the court of appeals' holding that the contracts at issue are unconscionable. In fact, ECC and AC assert that "BFS's Petition for Writ of Certiorari and its merits brief devote [*sic*] seem to skip this ruling entirely." See ECC Brief, p. 18. However, and notwithstanding the Respondent subcontractors' contention to the contrary, BFS ***EXPLICITLY*** acknowledged and refuted the court of appeals' ruling, in both its Petition and its Brief, and BFS has thus properly preserved this issue upon appeal.

In both its Petition for Certiorari and its Brief, BFS appealed this holding in Question Presented III: "Should the court restrict its inquiry to the provision of the contract directly at issue, that is, the indemnification provision, rather than considering provisions under which no cause of action has been brought in this case ...?" In its Petition for Certiorari, BFS argued that "The court of appeals' misinterpretation of the contract language formed the basis of its holdings, including its holdings that: . . . (4) the contracts were **unconscionable**" BFS Petition for Writ of Cert., p. 19 (emphasis added). Bringing this holding within the scope of Question III, BFS further noted that "[t]he court of appeals reached this view of the contracts [that they were unconscionable] by

isolating provisions of the contracts, some of which were completely irrelevant to the issue in this case. . ." (Id.). Even more explicitly, in its brief before this Supreme Court, BFS argued:

> ... the Respondent subcontractors argued, with the fantasy contract provisions in mind, that there is a **disparity in bargaining power between the parties, that the contracts are of adhesion and therefore unconscionable.** Lastly, the Respondent subcontractors argued that the court should not honor the severability provisions in the contracts and instead find the contracts unenforceable. Notwithstanding BFS's efforts to dissuade the lower courts of the Respondent subcontractors' unsupported contentions, the trial court wholesale adopted the Respondent subcontractors' arguments, and **the court of appeals errantly affirmed the same.** As explained herein, **the Respondent subcontractors' arguments are without merit**, and **the court of appeals erred** by ignoring the basic rules of contract construction. Thus, this Court must reverse the court of appeals' Opinion and remand BFS's contractual indemnification claims to trial."

BFS Brief, p. 25 (emphasis added).

The court of appeal's determination that the contracts were unconscionable was based upon its misconstruction of the provisions of the contract - provisions that were, in fact, irrelevant to the relief sought in this case. If the court had not considered irrelevant provisions, and if the court had not misconstrued such irrelevant provisions, the court would have had no basis to hold the contract unconscionable. BFS argued this within the scope of Question Presented III, and thus properly appealed this erroneous holding.

II. The contracts are not unconscionable.

In attempted support for their contention that the Later Contracts are unconscionable, ECC and AC argue that the provisions of the contract are oppressive. They point sweepingly and generally to indemnity, warranty, waiver, and payment provisions. See ECC Brief, pp. 20-21. BFS has previously addressed many of these provisions in its opening brief, explaining in detail why such provisions are not unconscionable or illegal and do not stand for what Respondent subcontractors argue. See BFS Brief, pp. 27-36. It is telling, however, that, while continuing to insist that the contract is nonetheless unconscionable, neither ECC nor AC has even attempted to

challenge or engage BFS arguments in support of the challenged contractual provisions. Therefore, BFS, in refutation of the ECC and AC arguments that the contract is replete with unconscionable provisions, BFS simply reiterates those arguments set forth in its opening brief, none of which have been effectively refuted by the ECC and AC. Moreover, as explained in its opening Brief, to the extent that any provision in the parties' contract is determined to be unenforceable, this Court must honor the intent of the parties and sever any such provision accordingly pursuant to the severability provision in the contract. See BFS Brief, pp. 36-40.

III. While public policy may support protecting homebuyers, it does not support relieving ECC and AC of liability for damages caused by their own negligence.

ECC and AC argue that considerations of public policy should preclude BFS from recovering from its subcontractors under the relevant indemnity provision of its subcontract agreements. In support of its argument, the subcontractors appear to contend that:

a) If BFS is not subject to liability (because of its contractual provision requiring that it be indemnified against liability by its subcontractors), then BFS will be less diligent about the quality of the work (here, as implemented by ECC and AC);

b) If BFS is less diligent about the quality of the work (as implemented by ECC and AC), BFS will put such defective work (as implemented by ECC/AC) into the market stream, thus potentially harming homebuyers.

The logic of the aforesaid argument is fundamentally flawed.

First, the logic rests on the erroneous premise that BFS will, under the relevant indemnity provision, be able to transfer "100% of the responsibility for inevitable litigation" to its subcontractors. However, the relevant indemnity provision at issue here is the first paragraph of Section 5 Indemnity, which governs indemnification rights in cases, such as the one before this Court, where the Plaintiffs' claims seek to recover property damage allegedly resulting from

defective construction performed by BFS and its Respondent subcontractors. The indemnity provision in the first paragraph of Section 5 Indemnity limits the rights of BFS, to recovery in indemnity, to damages arising in whole or in part by the negligent acts or omissions of its subcontractor. See A. p. 1482. This provision does and cannot be reasonably read to impose any obligation upon the Respondents to indemnify BFS against damages caused by BFS's own negligence. Here, where BFS's scope of work included supplying windows that complied with the relevant building code, BFS (not the Respondents) faces potential liability to the owners for any damage determined to result from BFS's window supply. At the same time, because BFS faces potential liability to the owners for any damage that may be determined to result from the Respondent subcontractors' installation services and supply of fasteners used for installation, the parties' contract provides BFS the right to recover indemnity but only for the damage determined to result from the subcontractors' negligent acts or omissions.

The Respondents' argument is further flawed by its reliance upon its unsupported contention that the only reason a contractor would produce or supervise acceptable work is the threat of litigation costs. Thus, even assuming the Respondents' first (flawed) premise, where the subcontractor bears 100% of the responsibility, there is no reasonable basis to conclude that BFS would not care about the quality of the work, as if BFS were indifferent to the prospect of suit for the poor work of its subcontractors, with no corresponding consideration of the difficulties, potential expense, and harm to its own reputation.

Yet a third flaw in the logic of the Respondents' argument is the assumption (clearly detrimental to ECC and AC) that the Respondents are providing poor work that is causing "defective homes" to be placed "into the stream of commerce."

Finally, and perhaps more importantly, the Respondents' argument works equally effectively against ECC and AC as it might against BFS: allowing ECC and AC to escape all

contractual liability to BFS in this case (the logical extension of the Respondents' argument), diminishes any incentive for them to provide workmanlike service and defect-free materials thereby harming innocent homeowners.

The cases cited by ECC and AC, as well as South Carolina common law generally, relate to public policy, providing protections for homeowners, in the context of underlying consumer transactions, and not in the context of contracts between a contractor and its subcontractor. Neither the cases cited by the Respondents, nor the common law in general, provide any support for the application of such public policy considerations under the circumstances prevailing here. It is submitted that the most effective means of serving the public policy of protecting homeowners is to allow a derivatively negligent contractor to recover in indemnity from its *actually* negligent subcontractor for damages caused by that subcontractor's own negligence. Far from serving that goal, the arguments as filed by the Respondents would actually undermine this important policy consideration.

IV. BFS's pleadings seek indemnification only for the negligence (whether sole or concurrent) of its subcontractors.

BFS argued in its opening brief that its indemnification cause of action seeks recovery only against liability that may be imposed on BFS when such liability was in fact the result of the negligence of its subcontractors. See BFS Brief, pp. 5, 15-20. BFS's pleading argument is supported by the language of Paragraphs 133-138, 162-168. See BFS's cross-claim for indemnification at A. pp. 440-441; BFS's third-party claim for indemnification at A. pp. 447-49. BFS also, however, made the alternative argument, that even if the Court construes BFS's pleading to include a claim for indemnity for liability resulting from BFS's own negligence, the language of Paragraphs 133-137 and 162-167 nonetheless at least compel the Court to recognize that such a more expansive claim also includes, perhaps concurrently, a claim for indemnity for any liability

imposed based upon the negligence of the subcontractors. This latter claim must survive even if the other supposed claim fails.

In their brief, ECC and AC attack BFS's contention that its pleading seeks recovery only for liability imposed as a result of the negligence of the subcontractors. Notably, however, neither ECC nor AC ever responds to the alternative argument put forward by BFS, an argument which is at the very heart of what this Court asked the parties to brief when it granted certiorari: *whether, even if a claim for recovery for its own negligence were asserted, the complaint nonetheless also included a claim for recovery for liability resulting from the negligence of the subcontractor.* Whether BFS pled a claim for its own negligence is not dispositive, as long as it also pled a claim to recover for the negligence of its subcontractor. Because ECC and AC failed to argue this position the Court should consider their objections to it abandoned. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).

Nonetheless, ECC and AC are also incorrect in the argument that they do make: that BFS's pleading seeks recovery from ECC and AC for damages resulting from the negligent acts or omissions of BFS. ECC and AC argue that BFS's relief requested in paragraph 138 of its cross-claim for indemnification is "broadand notably devoid of limiting language." ECC Brief, p. 24. ECC and AC also argue that the "pleading does not limit indemnification to damages caused solely by subcontractors, nor does it exclude liability arising from BFS's own conduct." See Id. ECC and AC conclude that by seeking the broadest relief possible, BFS pled a claim that encompasses the entirety of any judgment entered against it, including damages attributable to its own independent negligence. See Id.

In support of their arguments, ECC and AC cite Postal v. Mann for the proposition that "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." ECC Brief, p. 23 (citing 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))). They also cite Witherspoon v. Stogner for the point that "South Carolina courts evaluate pleadings as a whole." ECC Brief, p. 24 (citing 182 S.C. 413 (1937)). Lastly, they cite BEI Beach, LLC v. Christman for the point that "[t]he scope of a claim is determined by considering both the allegations and the relief requested." See Id. (citing 440 S.C. 98, 889 S.E.2d 601 (Ct. App. 2023)).

Despite citing to this authority, ECC and AC nonetheless have asked this court to do exactly what the noted case law prohibits: to consider only isolated provisions of the pleading, and to fail to read the complaint together as a whole. Specifically, ECC and AC argue (without citation or explanation) that this Court should ignore the limiting language set forth in Paragraph 137 because it "merely states BFS's theory of causation; it does not define the scope of the relief sought." ECC Brief, p. 25. Despite the Respondents' contentions, however, Paragraph 137 does both; it alleges that any liability is only vicarious, and thus, alleges that any relief must and will be derived from the wrongdoing of the Respondent subcontractors. As argued before, BFS's pleading assumes and alleges that there was no wrongdoing on the part of BFS, and thus, any BFS right to recovery must arise from the negligence of the Respondent subcontractors. Whether the facts of the case later bear out this assumption is immaterial when analyzing the pleading. What is clear, however, from the case law cited by ECC, is that the Court cannot ignore this paragraph when analyzing whether BFS was asserting a claim to recover for liability or damage determined to result from the negligence of Respondent subcontractors. See BEI Beach, LLC v. Christman, 440 S.C. 98, 889 S.E.2d 601 (Ct. App. 2023)(noting "[t]he scope of a claim is determined by considering both the allegations and the relief requested").

Thus, a fair, impartial, and appropriate reading of the BFS pleading clearly demonstrates that BFS contends that any liability on its part is the result of the negligent acts or omissions of the Respondent subcontractors, and that BFS is seeking contractual indemnity only against liability

occasioned by such Respondent subcontractors' negligence. Such result comports with the basic rules of pleading construction. See 71 C.J.S. Pleading § 79 ("A pleading should receive a fair and reasonable construction and be interpreted according to its plain meaning and per the general rules of pleading.") Further, because a plaintiff is entitled to have its claims heard on the merits, pleadings are to be construed to do substantial justice. See Id. South Carolina follows these basic principles regarding construction of pleadings, and memorialized the same in Rules of Civil Procedure. See Rule 8(f), SCRCP.

Again, even assuming that BFS's pleading could be reasonably construed as broadly as is urged by ECC and AC, such a broad interpretation would nonetheless clearly encompass claims for contractual indemnity against liability occasioned by the subcontractor's negligence. It bears emphasis that the Concord & Cumberland court addressed a pleading that sought the same relief that ECC and AC argue is so fatal to this case: that is, the general contractor/indemnitee, by its own admission, sought indemnity (pursuant to an indemnity provision nearly identical in substance to the relevant indemnity provision here) not only against liability for damages caused by its own concurrent negligence, but also against liability for damages caused by the concurrent negligence of its subcontractor/indemnitor. The court there, however, disagreed with the conclusion proffered by ECC and AC. Notwithstanding the breadth of the general contractor's claims, the court, while denying indemnity for damages occasioned by the general contractor's own concurrent negligence, nonetheless recognized the independent claim that existed in contractual indemnity for damages occasioned by the concurrent negligence of the subcontractor, and the court allowed indemnity against such damages. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 652, 819 S.E.2d 166, 173 (Ct. App. 2018) (quoting Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985)("... suggests a 'comparative negligence' construction under which each party is accountable 'to the extent' their negligence

contributes to the injury"). As in the Concord & Cumberland case, this Court should recognize the independent claim that exists for contractual indemnity against the damages occasioned by the negligence (whether sole or concurrent) of the subcontractor. ECC and AC have cited to no authority to support their implicit contention that a party is to be penalized for overly expansive pleading. Such a contention is not only incompatible with the basic rules of pleading construction, but also inconsistent with considerations of substantial justice, and should be rejected by this Court.

From the beginning, BFS pled a cause of action seeking recovery for any liability that it incurred as a result of the negligence of its subcontractors. Failing to read a cause of action against the subcontractors for indemnity against damages resulting from ECC and AC's own negligence not only results in a gross injustice, where ECC and AC skirt responsibility for their own negligence, but is also inconsistent with established case law and the rules of pleading. For these reasons, the Court must reject ECC's invitation to affirm the errors of the lower courts, and remand BFS's contractual indemnification cause of action for trial.

V. The relevant portions of the contract do not violate Section 32-2-10.

In an attempt to avoid potential liability for their own negligent actions, ECC and AC argue that if a contract contains any provision that violates Section 32-2-10, the entire contract is void and unenforceable – even the provisions that do *not* violate Section 32-2-10. This is a misreading of both the statute and caselaw.

Because this case arises from the Plaintiffs' claims of property damage, the claims implicate the indemnity provision set forth in the first paragraph of Section 5 Indemnity of the parties' contracts. This indemnity provision allows BFS to recover from AC and ECC, "but only to the extent [of losses and subsequent attorneys' fees] caused in whole or in part by any negligent act or omission of the subcontractor." See A. p. 1482. This indemnity agreement complies with

– and is in fact specifically authorized by – Section 32-2-10. Further, this indemnity provision provides a legitimate, licit means of recovery, and nowhere do the Respondents argue otherwise.

Instead, ECC and AC look to other provisions of the contract that are not implicated in this litigation. For example, ECC and AC point to the indemnity provision set forth in the second paragraph of Section 5 Indemnity, which provides for recovery when, among other things, BFS has been subject to claims involving personal injury sustained by the subcontractor. This uninvoked provision, the subcontractors argue, violates Section 32-2-10, and thus they conclude that "the agreement itself is against public policy and unenforceable as a matter of law." ECC Brief, p. 28. By "the agreement," it is clear that the subcontractors mean not just the specific indemnity provision in Paragraph 2 of the agreement that allegedly violates the statute, but rather that *the entire contract* is unenforceable. See Id. (claiming that "critically, the statute does not provide that only specific clauses are void" but rather the entire agreement). This interpretation of the statute is contradicted by case law and, equally importantly, by the specific language of the statute itself.

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 ECC and AC cite: D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d

41, 45 (Ct. App. 2018). ECC and AC 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 ECC and AC indemnify BFS for ECC's and AC'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.

VI. The "clear and unequivocal" standard should not have been applied to the indemnification provision at issue in this case.

In Section VI, the wording of the briefs of ECC and AC departs slightly from each other; however, the heart of the arguments is the same: first, they argue that certain contractual provisions which are irrelevant to the relief requested in this case nonetheless trigger the "clear and unequivocal" standard. They then argue that the clear and unequivocal standard should therefore be applied to the entire contract, and not just to the provisions that allegedly seek indemnification for one's own negligence. Thirdly, they argue, as though it were dispositive, that it would be impossible for the subcontractor to be found "solely" negligent, and that this assumed concurrent negligence somehow precludes any recovery. These arguments demonstrate a misunderstanding of South Carolina law.

A. Here, where BFS does not seek indemnification for its own negligence, the indemnification provision is not required to be set forth in "clear and unequivocal" terms.

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 negligent acts or omissions of Respondent subcontractors, 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 ECC's and AC's contentions to the contrary, reverse the court of appeals' Opinion, and remand BFS's contractual indemnification cause of action to trial.

B. The "clear and unequivocal" standard should not be applied to contractual provisions that explicitly limit the liability of the subcontractors to the results of their own negligence.

As discussed, *supra*, BFS is not seeking indemnification for its own negligence, whether sole or concurrent. Additionally, the indemnity clause at issue here – set forth in the first paragraph of Section 5 Indemnity– does not relieve BFS from the consequences of its own negligence. Neither party has even attempted to argue that the indemnity provision in the first paragraph of Section 5 itself triggers the heightened standard; instead the Respondents look to later provisions, such as the indemnity provision in the second paragraph of Section 5 or to language in the third paragraph of Section 5, to argue that those provisions trigger the heightened standard, which, the Respondents contend then applies to the entire contract – even to provisions or clauses that do not "purport to relieve an indemnitee from the consequences of its own negligence."

Concord and Cumberland speaks of the heightened standard as applying to a "clause," which, Black's Law Dictionary defines as "[a] distinct section or provision of a legal document or instrument." CLAUSE, Black's Law Dictionary (12th ed. 2024). Here, the parties' contract is

comprised of rights, obligations, and agreements set forth in separate and distinct clauses and provisions set forth in separate and distinct "Sections." Of relevance, Section 5 Indemnity is comprised of four separate paragraphs. The first paragraph includes an indemnity provision for third-party bodily injury and property damage claims and the second paragraph sets forth an unrelated indemnity provision regarding bodily injury claims suffered by the subcontractor, its agents, employees, or its subcontractor. The third paragraph sets forth details concerning the parties' rights and obligations to defend against a claim under Section 5. The fourth paragraph sets forth details noting that the indemnification and defense rights and obligations do not extend to design professionals. While the heightened standard may apply to the indemnity provision set forth in the second paragraph of Section 5, if BFS seeks indemnity for its own negligence in a bodily injury claim filed the subcontractor, there is no evidence or justification for applying it to the indemnity provision set forth in the first paragraph of Section 5.

Alternatively, if this Court does determine that the heightened standard is appropriately applied to the entire contract, including the indemnity provision set forth in the first paragraph of Section 5, BFS urges this Court to carefully follow the example of the court in Concord & Cumberland. The Concord & Cumberland court looked at the language of Section 12.1 of the parties' contracts, and read it together with its subpart, Section 12.1(a).[1] In Section 12.1, the subcontractor "broadly agreed to indemnify for any damages resulting from the scope of work in the Subcontract, which was installation of windows and doors." Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 652, 819 S.E.2d 166,

[1] Notably, the contract at issue in this case includes "Section 5 Indemnity" which is made up of four distinct paragraphs. Moreover, the indemnity provision in the first paragraph, upon which BFS relies in the assertion of its contractual indemnification claim here, is not interdependent on any other provision or clause like subsection 12.1(a) would have been dependent upon its parent section 12.1. Thus, multiple distinctions exists regarding why the heightened standard might be applied to all of 12.1, but not the separate and distinct paragraphs of Section 5 in this case.

173 (Ct. App. 2018). The Concord & Cumberland court immediately went on to say, however, that in subsection 12.1(a) "the phrase, 'to the extent caused ... in whole or in any part by any negligent act or omission of [Muhler],' limits Muhler's obligation to indemnify to damages and losses but only to the extent they were caused by the negligence of Muhler and its subcontractors." Id. at 652–53. The Concord & Cumberland court was thus faced with broad indemnity language and narrow indemnity language. The broad indemnity language may have violated Section 32-2-10; however, the narrow indemnity language certainly did not. Nevertheless, the Concord & Cumberland court did not invalidate the entire contract. Nor did it refuse to enforce other legal provisions in the contract, and it did not hold the contract was unconscionable.

Instead, the Concord & Cumberland court interpreted the contract to mean that the subcontractor's obligation to indemnify was limited to those damages and losses caused by the subcontractor's own negligence. The Concord & Cumberland court, in making its determination, cited the Minnesota Court of Appeals, which determined that a nearly identical clause, "... suggests a 'comparative negligence' construction under which each party is accountable 'to the extent' their negligence contributes to the injury". See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 652, 819 S.E.2d 166, 173 (Ct. App. 2018) (quoting Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985)).

This may mean, as in Concord & Cumberland, that the language fails to meet the heightened standard that would allow the contractor to recover for its own concurrent negligence, but it *preserves* the contractor's ability to recover for the negligence of its subcontractor. Indeed, the Concord & Cumberland court did exactly that when it affirmed the trial court's holding that "limited indemnification to damages resulting from the work Muhler performed," while disallowing Superior to recover for its own negligence. Id. at 169–70. BFS asks this Court for the same relief granted to Superior in Concord & Cumberland: that even if this Court decides that the

language of the contract implicates and then fails to pass the clear & unequivocal test, that the Court nonetheless allows BFS to recover from its Respondent subcontractors contractual indemnification limited to any damages determined to result from the work the Respondent subcontractors performed.

C. BFS can recover from the subcontractors for the subcontractors' own negligence regardless of whether the subcontractors' negligence is sole or concurrent.

ECC and AC offer an identical four-sentence paragraph arguing why they "cannot be solely at fault for the claims against BFS." ECC Brief p. 34. Because BFS operated in a supervisory role, they argue, "BFS therefore cannot transform a claim involving potential concurrent negligence into one involving sole subcontractor negligence in order to avoid the heightened standard." Id. Notably, the subcontractors neither point to anywhere that BFS has attempted to do this, nor do they explain how the analysis changes regardless of whether the subcontractors were solely versus concurrently negligent. As has been explained above, what triggers the "heightened standard" is not whether the subcontractors were solely or concurrently negligent, but rather, whether BFS is seeking recovery for its own negligence, whether sole or concurrent. See Ashley II, Laurens, Concord & Cumberland, and Federal Pacific supra.

First, ECC and AC proceed on a flawed premise: that simply because BFS acted as a supervisor, BFS must be held liable in every possible situation where the subcontractor is negligent. The Respondents have, however, cited no authority in support of this contention. Moreover, their contention is, in fact, undermined by relevant case authority.

This Court has had previous occasion to address an argument analogous to that put forth by the Respondents herein. See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008). The plaintiffs in Fields argued that a general contractor is "automatically responsible"

for the negligence of the subcontractor. This Court, in disposing of that contention, stated as follows:

> "In the context of the cause of action for negligence, the Fields' argument on this issue seems misguided. The Fields argue that the trial court should have charged a theory of automatic liability, but that the trial court also properly charged the jury that '[a]ny failure to exercise due care on the part of [the Builder]...would constitute negligence;' that '[a] Builder who undertakes construction of the building impliedly represents that he possesses and will exercise a reasonable degree of skill usually possessed by a member of the building occupation;' and that '[a] Builder who undertakes to supervise the construction of a building is under a duty to exercise reasonable care and such supervision to see that the work is done in conformity with applicable building code...and in a good and workmanlike manner.'"

This Court went on to state that:

> "In our review it would have been wildly inconsistent for the trial court to charge that a general contractor must exercise only the degree of care reasonably expected in the industry in constructing and supervising the construction of the Fields' home, and in the same breadth to have charged that a general contractor is automatically liable for any negligence associated with the construction. Liability attaching 'automatically', in our opinion, seems more like strict liability than negligence."

Fields, 376 S.C. at 560-561.

The logic of the Fields opinion is equally applicable to the relationship between the petitioner and the Respondents here, and the simple fact that BFS may have supervised the subcontractors' work does not render BFS automatically concurrently negligent such as to preclude its recovery in this action.

Secondly, even if BFS were concurrently negligent, it is unclear from the subcontractors' briefs how that would change any of the analysis here. BFS has argued at every stage of this litigation that it is seeking indemnification for the negligence "*whether sole or concurrent*" of its subcontractors. BFS's potential concurrent negligence, while perhaps a hurdle to an argument in equitable indemnity, does not bar its ability to recover in contractual indemnity.

ECC and ACC effectively urge this Court to ignore parts of the outcome and reasoning of Concord & Cumberland that are incompatible with its arguments but nonetheless are essential to this case: namely, that the Concord & Cumberland court (1) affirmed the trial court's holding, a holding that explicitly denied recovery for the general contractor's own negligence (finding that the relevant indemnity provision was not sufficiently clear and unequivocal), but still allowed the general contractor to recover (under the same indemnity provision), for the negligence of the subcontractor; and (2) explicitly articulated that recovery in contractual indemnity, instead of being completely denied to the general contractor, would be limited to the extent of the negligence cause by the subcontractor. Each of these points is examined further below.

The Concord & Cumberland court, in affirming the lower court's award of summary judgment, recognized that the indemnitee/general contractor Superior, had no claim in equitable indemnity due to its own partial negligence. Nonetheless, and specifically contrary to the representations of ECC and ACC in this matter, the Concord & Cumberland court, in construing an indemnity provision virtually identical to that at issue here, recognized that such provision authorized indemnity against a subcontractor's concurrent negligence, notwithstanding the admitted concurrent negligence of the general contractor, and despite determining that the relevant contractual indemnification provision was not set forth in sufficiently clear and unequivocal terms.

The statement of the Concord & Cumberland court, in affirming the lower court, is particularly relevant to the issue at bar:

> "Specifically, we agree with the *Muatz* and *Bragelmann* courts that the phrase 'to the extent caused in whole or in part by any negligent act or omission of [Meuller]' limits Meuller's obligation to indemnify to damages and losses but only to the extent they were caused by the negligence of Meuller and its subcontractors. Meuller's indemnity obligation extends to losses Meuller only causes in part, but does not clearly and unequivocally require Meuller to indemnify for the negligence of others that contributed to the same loss."(emphasis added)

Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 652–53, 819 S.E.2d 166, 173–74 (Ct. App. 2018).

Moreover, the fact that the alleged negligence BFS may be at issue, should be immaterial to a consideration of BFS's claims against its subcontractors for indemnity against liability for damages occasioned by those subcontractors' negligence. The court of appeals, in Concord & Cumberland, in addressing a contractual indemnity provision nearly identical to that at issue here, determined that the phrase, "to the extent caused...in whole or in any part by any negligent act or omission of the subcontractor," limits the subcontractor's obligation to indemnify to those damages caused by the subcontractor's own negligence. The Concord & Cumberland court, in making its determination, cited the Minnesota Court of Appeals, which determined that a nearly identical clause, "... suggests a 'comparative negligence' construction under which each party is accountable 'to the extent' their negligence contributes to the injury." See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 652, 819 S.E.2d 166, 173 (Ct. App. 2018) (quoting Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985)).

ECC has offered no justification or citation of relevant authority in support of its argument that the heightened "clear and unequivocal" standard applies to the indemnity provision as set forth in the first paragraph of Section 5. BFS submits there is not such relevant authority, that the ECC contentions are without merit, and that its arguments should be rejected by this Court.

Concord & Cumberland addressed the issue of sole versus concurrent negligence in a different context: whether the heightened standard applied when the litigant sought indemnification for its own sole negligence, whether it applied when it sought indemnification for its own concurrent negligence, or whether it applied regardless of whether the litigant sought indemnification for its own sole or concurrent negligence. The court decided that the heightened standard applied regardless of whether the litigant sought indemnification for its own sole or

concurrent negligence. But, as BFS has argued before, BFS is not seeking indemnification for its own negligence, even if BFS were to be found concurrently negligent. BFS only seeks indemnification for the negligence, whether sole or concurrent, of its subcontractors, and for *this reason* the heightened standard does not apply. Thus, even if BFS and the subcontractors were found to be concurrently negligent, BFS could still seek indemnification for the portion of its loss that was due to the subcontractors' portion of the concurrent negligence without implicating the heightened standard.

VII. The court of appeals improperly applied rules of contract interpretation because the defined term "Work" is the lens through which the contract is given meaning – the contract is not the lens through which the defined term is given meaning.

ECC and AC Construction allege that the court of appeals properly applied selective cannons of construction for contract interpretation, while ignoring other more relevant canons.

While acknowledging the limited definition of "Work" as it appears in the first section of the contract, ECC and AC immediately proceed to ignore that definition when they discuss the contract's Section 3 Warranty provisions. Because the contract requires the subcontractor to guarantee the Work (ECC in its brief improperly failed to capitalize Work to signal its status as a defined term) against defects in "design, workmanship, and materials," ECC and AC argue that this provision necessarily requires "subcontractors to indemnify BFS for defects in design or materials supplied by BFS . . ." ECC Brief, p. 40. Implicitly what they argue is that if Section 1 defines Work to include only materials and services provided or rendered by the subcontractor, Section 3 effectively expands the definition of "the Work" to include materials supplied by BFS. This reading, they argue, satisfies the cannon of construction for contract interpretation requiring that documents be read as a whole. ECC Brief, pp. 39-40.

This approach, however, is overly narrow, and has overlooked or ignored several other cannons of construction that compel a different result. The Restatement (Second) of Contracts

provides four generally-applicable standards by which contracts should be interpreted, two of which are especially instructive here:

> (a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect;
>
> [and]
>
> (c) specific terms and exact terms are given greater weight than general language[.]

Restatement (Second) of Contracts § 203 (1981).

Courts in South Carolina have repeatedly applied these principles to contract interpretation. See, e.g., Crenshaw v. Erskine Coll., 432 S.C. 1, 42, 850 S.E.2d 1, 22–23 (2020) (quoting from C.J.S. that "[a] construction rendering a provision, term, or part meaningless ... should be avoided."); Richland-Lexington Airport Dist. v. Am. Airlines, Inc., 306 F. Supp. 2d 548, 564 (D.S.C. 2002), aff'd, 61 F. App'x 67 (4th Cir. 2003) (noting that "[a]ny inconsistency between a general clause and a specific clause must be resolved in favor of the specific.").

An interpretation of Section 3 that is lawful and that gives meaning to all parts, including the definition of Work, would be that the subcontractor guarantees the Work - that is, any product or service the subcontractor provided - against defects in design, workmanship, and materials. In instances where the subcontractor only supplied labor, the subcontractor only guarantees its labor. The Contract, however, governs not only this job but every job that the subcontractor performs for BFS. More than that, the Contract, as a form contract, was written to govern BFS's relationships with multiple subcontractors, some of whom may provide any combination of labor, materials, or both. The fact that the Contract covers more scenarios than may be applicable here does not render it void or confusing, and it does not impose additional burdens solely on its labor-only subcontractors; it simply means that certain provisions will be applicable to some scopes of Work,

and not to others, and an interpretation of the Contract that seeks to give a reasonable, lawful, and effective meaning to it will recognize that.

An interpretation of the contract that honors specific terms over general ones also compels a reading of this Contract where the limitations of the defined term "Work" govern the more general Warranty Section. ECC and AC argue that "Work" determines the project but that the other sections determine the liability; however, Section 3 specifically limits liability to the "Work." Thus, if the court reads the section as intended, where the subcontractor is limited to guaranteeing its "Work," with "Work" being a defined and thus highly-specific term, it will see that the subcontractor's liability is thus necessarily also limited to the materials it provided or the services it rendered.

At the heart of contract interpretation is ascertaining the intent of the parties, which, when a contract is ambiguous (such as ECC and AC allege is the case here), can be illumined by the conduct of the parties. McCord v. Laurens Cnty. Health Care Sys., 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020); Restatement (Second) of Contracts § 5 (1981). If, prior to this litigation, ECC or AC had ever thought that it would be liable for the negligence of BFS, neither would likely ever have signed this contract or performed under it; instead, each Respondent has been performing under this contract for over a decade. Similarly, if BFS thought that it could recover from its subcontractors for its own negligence, BFS would likely have already tried – like Superior in Concord & Cumberland – to recover from its subcontractors in prior litigation; instead, BFS has only ever recovered from ECC and/or AC for damages resulting from the negligence (alleged or determined) of the subcontractors. The conduct of both parties over years' worth of projects illustrates that their joint intent was that the subcontractors would perform work (and possibly supply materials, as the particular job determined) for BFS, and that their indemnification and warranty obligations would be limited to the work they performed and the materials they provided.

VIII. Severance of any potentially offending language in the contract would honor the intent of the parties and would preserve rather than re-write Contract.

BFS maintains that when properly understood, none of its contractual provisions present any impediment to recovery in this case. However, to the extent that the Court disagrees, any offending provision can be easily severed.

In its opening brief, BFS argued that honoring the contract's severance provision would best effectuate the intent of the parties. BFS here craves reference to all of the arguments outlined in that brief.

ECC and AC engage with BFS's arguments only so far as they argue, without citation or explanation, that the clauses cannot be severed because, although physically separated, they are "interdependent" and they arise "from the same construction work." ECC Brief, p. 45.

The clauses are not interdependent; they stand alone. If the Court were to sever Section 5, Paragraph Two, the absence of that section would not affect any other provision. Such determination simply eliminates the obligation for the subcontractors to indemnify BFS in cases of personal injury to the subcontractor or its employees, etc. It does not affect obligations in cases arising out of property damage, and, were such claim ever to arise, it would not affect a claim made under the Section 3 warranty provision. Similarly, eliminating BFS's ability to recover under a warranty theory does not affect its ability to recover under Section 5, Paragraph One for property damage claims. The same is true for the mechanics' lien provision in Section 8. Section 3, Section 5 Paragraph Two, and Section 8 are the sections ECC and AC have repeatedly emphasized as being problematic. While BFS does not concede any issue with these provisions, the Court could sever any or all of these sections, and the Contract would still remain a complete "whole." BFS's right to recover under Section 5, Paragraph One – which is the only section

implicated by this litigation – would not change. Thus, it is impossible to see how Section 5, Paragraph One is "interdependent" on any other provision that may be facing severance.

Although BFS again does not concede that the terms of the Contract need to be severed, should the Court disagree, severing any offending provisions best serves the intent of the parties and would leave behind a complete and intact contract.

IX. Collateral Estoppel does not bar BFS's claims because the "issues" litigated in this case and the prior cases are not identical.

ECC and AC argue that collateral estoppel bars the claims in this case because (1) the "enforceability" of the indemnity provision has already been litigated, and (2) because the cases currently pending before the Supreme Court have already been finally decided. They are wrong on both counts.

As all parties agree, ECC and AC have the burden of showing that collateral estoppel should apply. Thus, they must establish that the issue in this case has been actually litigated in the prior action, has been directly determined in the prior action, and was necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct. App. 1984). ECC and AC argue, however, that the first element is satisfied simply because "[t]he indemnity provisions at issue are identical to those previously argued . . ." and the court already "ruled upon the enforceability of those provisions." ECC Brief, p. 47.

The "issue" in any of these sister cases, however, is not simply and generally "the enforceability of th[e]se provisions." In fact, the courts in all of the cases have been very clear that the issue is not simply that the provisions are unenforceable, but rather, that the provisions are not sufficient to allow BFS to recover for its own negligence. The issue of whether they *are* sufficient to allow BFS to recover for the negligence of its subcontractors, however, has been ignored by every court so far. These issues are distinct; one implicates an analysis of Concord &

Cumberland, and one does not; one implicates a discussion of Section 32-2-10 and public policy, and one does not. It is very possible that, as in Concord & Cumberland, a court could decide that an indemnification provision does not allow BFS to recover for its own negligence because it fails to meet a heightened standard, but at the same time it *does* allow BFS to recover for its subcontractors' negligence because no heightened standard would apply to such demand. Thus, the two issues are separate and independent of one another. The former has been ruled on by prior courts, but the latter has not been.

Finally, ECC and AC represent that the issue of whether an order on appeal is sufficiently final for purposes of collateral estoppel is well-settled. In fact, it is an issue of first impression in South Carolina, and "authorities are in conflict as to whether the pendency of an appeal, affects the operation of a judgment as res judicata." 9 A.L.R.2d 984 (Originally published in 1950). While both appeals and collateral estoppel require a "final" judgment, there appears to be a nuance in what is meant by final such that courts should not take for granted that what is "final" for purposes of an appeal is automatically "final" for purposes of res judicata. As BFS argued in its opening brief, even states within the geographic bounds of the Fourth Circuit have come to different conclusions regarding this question of finality.

The ALR cited above considers the two possible alternatives a court may adopt in answering this question, and it examines the negative consequences of each. One consequence of adopting the approach advocated by BFS in this case is that "it enables one against whom a judgment is entered to avoid its force for a considerable period of time merely by taking an appeal. 9 A.L.R.2d 984. However, given that modern codes limit appeals to a reasonable time, the ALR argues that this is not such a grave problem. Adopting the approach that ECC and AC advocate, however, has a more serious problem: an erroneous judgment currently on appeal could be relied upon to preclude relief to parties in subsequent suits, and while the original judgment may be

reversed on appeal, it may be impossible to obtain relief on the subsequent judgments, notwithstanding the original's reversal. Id. This, the ALR argues, is a much more substantial injustice. Id.

BFS noted in its initial Brief that this Court previously adopted the general rules as set forth in the Restatement (Second) of Judgments. See BFS Brief, pp. 41-43; citing S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213 (1991). ECC and ACC fail to submit any argument in opposition or explain how the Restatement and its commentary are not supportive of the position taken by BFS in this appeal – that an order pending appeal is not final for collateral estoppel purposes. Specifically, BFS would emphasize the Restatement's commentary, "a judgment will ordinarily be considered final in respect to a claim" if "it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court...." Restatement (Second) of Judgments Section 13 Requirement of Finality (1982).

Because the issues involved in this case are distinct and independent from those determined in prior cases, and because a more serious injustice would result from adopting the position of ECC and AC regarding the effect of final judgments, this Court should reverse the appellate court's decision regarding the preclusive nature of the prior cases.

CONCLUSION

For all of the reasons stated in this brief, as well as this party's opening brief, BFS asks this court to reverse the court of appeals on all counts and remand this case.

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