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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

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

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

Appellate Case No. 2025-001224

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

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; 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, Appellant,

v.

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

RESPONDENTS ECC CONTRACTING, LLC'S, EAST COAST CARPENTRY, AND PALMETTO TRIM AND RENOVATION'S OPPOSITION TO THE NATIONAL ASSOCIATION OF HOMEBUILDERS AND THE HOME BUILDERS' ASSOCIATION OF SOUTH CAROLINA'S AMICUS CURIAE BRIEF

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INTRODUCTION

Respondents, ECC Contracting, LLC, East Coast Carpentry, and Palmetto Trim and Renovation (collectively the "Respondents"), respectfully oppose the amicus curiae brief submitted by the National Association of Home Builders ("NAHB") and the Home Builders Association of South Carolina ("HBASC") (collectively "Amici"), which supports Petitioner, Builders FirstSource-Southeast Group, LLC ("BFS").

This appeal involves two versions of BFS's Master Subcontract Agreement. The first is the 2005 Master Subcontract Agreement (hereinafter "2005 Contracts"), which governed BFS's relationships with Palmetto Trim and Renovation and East Coast Carpentry. The second consists of "Version – 5/17/06 of a BFS Master Subcontractor Agreement (hereinafter "Later Contracts"), which governed BFS's relationships with ECC Contracting as well as other Respondent subcontractors, including Hurley Services, AC Construction, WS Contractors, Pohlman Quality Exteriors, and L&G Construction. Although the 2005 Contracts and Later Contracts contain different indemnity language, both establish comprehensive contractual frameworks governing the parties' respective warranty, defense, indemnity, and risk-allocation obligations. The Court of Appeals analyzed each version separately, concluding that the indemnity provisions in both the 2005 Contracts and the Later Contracts were unenforceable under settled South Carolina law.

Because the Amici focus almost exclusively on the Court of Appeals' analysis of the Later Contracts, particularly Section 3 and Section 5, Respondents likewise address those provisions unless otherwise indicated.

ARGUMENT

The Court of Appeals' decision represents a straightforward application of settled South Carolina law to the claims BFS asserted and the Contracts BFS drafted. Contrary to Amici's characterization, this appeal does not concern the general enforceability of contractual indemnity provisions or the ability of sophisticated commercial parties to allocate risk through contract. Rather, it concerns whether BFS may enforce these particular indemnity provisions which it describes in its pleading as supporting claims seeking "full contractual indemnification" for "any liability" and "any sums" for which it might be held responsible, including liability arising from its own alleged negligence.

Amici's arguments depend upon a fundamentally different case than the one before this Court. Throughout their brief, they repeatedly recast BFS's third-party claims as seeking indemnification only for damages attributable to Respondents' negligence and isolate selected contractual provisions to portray the contracts as routine subcontractor indemnity agreements. But courts do not decide hypothetical cases, rewrite pleadings, or rewrite contracts. They interpret the claims actually pleaded, construe contracts as integrated instruments, and apply settled principles of contract construction to determine whether the obligations the parties created are enforceable. Viewed through that proper lens, the Court of Appeals correctly concluded that South Carolina's longstanding clear and unequivocal rule governed BFS's indemnity claims.

First, BFS's pleadings sought far more than indemnification for subcontractor negligence. Plaintiffs alleged that BFS was independently negligent in supplying defective building materials and in supervising the construction project. In response, BFS demanded "full contractual indemnification" for "any liability" and "any sums" for which it might be held liable, without limiting its claims to damages caused solely by Respondents' negligence. The Court of Appeals evaluated the claims BFS pleaded, not the narrower theory BFS and Amici now advance on appeal.

Second, the Court of Appeals correctly construed the 2005 Contract and Later Contracts as a whole. Rather than creating a limited obligation to indemnify BFS only for subcontractor negligence, the contracts establish an indemnity framework of warranty, defense, indemnity, guaranty, and attorney-fee provisions that repeatedly shift responsibilities arising from BFS's own conduct to its subcontractors. South Carolina law requires contracts to be interpreted as integrated instruments, not by isolating individual provisions favorable to one party.

Third, the Court of Appeals properly resolved a legal question presented before it. Whether an indemnity agreement clearly and unequivocally shifts responsibility for an indemnitee's own negligence is a question of contract interpretation and enforceability for the court, not an issue reserved for a jury after trial. Because BFS sought to enforce immediate defense and indemnity obligations under the 2005 Contracts and Later Contracts implicating its own alleged negligence, the Court of Appeals correctly determined, as a matter of law, that the contracts failed to satisfy South Carolina's longstanding clear and unequivocal standard.

Fourth, the Court of Appeals' decision rests on independent grounds that Amici cannot avoid. In addition to concluding that BFS's indemnity claims failed under South Carolina's clear and unequivocal rule, the Court held the Later Contracts are unconscionable. BFS has not meaningfully challenged that independent basis for affirmance, and Amici cannot enlarge the issues before this Court or revive arguments BFS has abandoned.

Ultimately, Amici's policy concerns do not justify departing from settled South Carolina law. Affirming the Court of Appeals will not invalidate contractual indemnity provisions, restrict sophisticated parties from allocating risk, or undermine the construction industry. Rather, it will simply apply the particular facts of this case, including the claims BFS actually pleaded and the contractual provisions BFS drafted, to settled South Carolina law and, in doing so, reaffirm longstanding principles of contract construction and public policy. Parties remain free to allocate risk by contract, but must do so in a manner that complies with South Carolina law. Because the

Court of Appeals applied those settled principles to the facts before it, its decision should be affirmed.

Finally, Amici's criticism of the Court of Appeals' decision is incomplete because it never meaningfully addresses the court's separate analysis of the 2005 Contract. Although the Amici briefly reference isolated language from the 2005 Contract, they do not address the Court of Appeals' holding that the 2005 indemnity provisions were "inherently confusing," nor do they explain why the Court of Appeals erred in finding those provisions required indemnity for BFS's own negligence notwithstanding language purporting to limit indemnity to subcontractor negligence. Instead, the Amici seem to treat the 2005 Contract as an ordinary subcontractor negligence indemnity agreement and move on to largely focus on the Later Contracts.

I. COURT OF APPEALS CORRECTLY HELD THAT BFS'S PLEADINGS AND CONTRACTS IMPLICATED ITS OWN ALLEGED NEGLIGENCE, REQUIRING APPLICATION OF SOUTH CAROLINA'S CLEAR AND UNEQUIVOCAL RULE

Amici's repeated assertion that BFS merely sought indemnity for subcontractor fault mischaracterizes the record. Amici's position depends entirely on a series of untenable rewrites: reshaping BFS's pleadings, altering its contracts, and disregarding settled South Carolina law. The Court of Appeals declined to engage in these revisions. Instead, it interpreted the claims BFS pleaded, construed the contracts BFS actually drafted as an integrated whole, and applied longstanding principles of contract construction and public policy. Because the pleadings and contracts directly implicated BFS's own alleged negligence, the Court of Appeals properly recognized that South Carolina's clear and unequivocal standard governed. Resolving this legal question of enforceability at summary judgment was not only procedurally appropriate, but legally required. The Court of Appeals' ruling applies controlling precedent in *Concord and Cumberland* and *Ashley II*, and aligns with South Carolina's public policy dating back to *Murray v. Texas Co.*

A. <u>The Pleadings</u>

The Amici repeatedly contend the Court of Appeals improperly foreclosed BFS from pursuing indemnification for damages attributable solely to Respondents' negligence. That argument fails because it rests on a claim BFS never pleaded. The Court of Appeals properly evaluated the indemnity claims BFS actually asserted, not the narrower theory BFS and Amici now advance on appeal.

Plaintiffs alleged that BFS independently supplied defective building materials and failed to supervise and inspect the work performed at the Retreat project. Thus, BFS faced potential liability based upon its own alleged conduct, not merely liability imputed from the acts of its subcontractors. Against that backdrop, BFS sought "full contractual indemnification" and demanded recovery for "any liability" and "any sums for which BFS may be held liable." It likewise demanded defense and indemnification against the claims asserted in the underlying construction defect litigation without limiting its requested relief to damages caused solely by Respondents' negligence. By its own allegations, BFS sought contractual protection broad enough to encompass liability arising from its own alleged acts and omissions. The Court of Appeals therefore properly analyzed the claims BFS actually pleaded, rather than the narrower indemnity theory BFS later attempted to advance.

Having chosen to plead its claims in those expansive terms, BFS cannot now recast them as something narrower on appeal. South Carolina law is well settled that parties are bound by their pleadings and may not assume a contrary position on appeal. *Postal v. Mann*, 308 S.C. 385, 418 S.E.2d 322 (Ct. App. 1992) and *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) (citing *Elrod v. All,* 243 S.C. 425, 436, 134 S.E.2d 410, 416) all reflect that fundamental principle. Accepting Amici's position would require this Court to disregard the operative pleadings and substitute a materially different indemnity claim than the one BFS actually asserted. South

Carolina law permits no such judicial rewriting. *Lewis v. Premium Inv. Corp.,* 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002). The Court of Appeals properly evaluated the claims before it and correctly refused to rewrite BFS's pleadings to preserve an indemnity theory BFS never alleged.

B. The Contractual Language Extends Beyond Indemnification for Subcontractor Negligence

Having properly determined the scope of the indemnity claims BFS asserted, the Court of Appeals next examined the contracts themselves. In doing so, it applied the settled principles governing contract interpretation in South Carolina. Courts must construe a contract as a whole, giving effect to each provision and harmonizing the agreement whenever reasonably possible. They may not isolate individual clauses or definitions while disregarding the broader contractual framework. See *Whitlock v. Stewart Title Guar. Co.,* 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012); *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014); and *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 574 (2009). The Court of Appeals applied those principles.

Read as an integrated whole, the 2005 Contract and Later Contracts do not merely require Respondents to indemnify BFS for damages resulting from subcontractor negligence. Rather, they establish a comprehensive framework of warranty, defense, indemnity, guaranty, and fee-shifting obligations that repeatedly and uniformly require subcontractors to protect BFS from liabilities arising from BFS's own contractual responsibilities and alleged conduct.

For example, the warranty provisions require subcontractors to warrant not only their workmanship but also defects in "design" and "materials," even though Respondents neither designed nor supplied the allegedly defective building materials supplied by BFS. Likewise, the indemnity provisions extend beyond damages caused solely by subcontractor negligence by requiring subcontractors to defend and indemnify BFS against broad categories of claims, while the fee-shifting provisions similarly require subcontractors to reimburse BFS for attorney's fees, judgments, settlements, and litigation expenses arising from claims implicating BFS's own responsibilities. Considered together, these provisions create a risk-allocation scheme that extends well beyond a conventional agreement to indemnify for subcontractor negligence.

The Court of Appeals properly interpreted both the 2005 Contract and Later Contracts. Amici, by contrast, isolate selected provisions favorable to BFS while disregarding the surrounding warranty, defense, guaranty, and fee-shifting obligations that define the parties' overall allocation of risk. South Carolina law does not permit such piecemeal construction. Rather, courts must determine the parties' intent from the four corners of the document, not from isolated provisions. *McPherson v. J.E. Sirrine & Co.,* 206 S.C. 183, 204, 33 S.E.2d 501 (1945). As such, a Court cannot "blue pencil" contractual provisions to create a narrower indemnity obligation than the one the parties actually drafted. *Poynter Investments, Inc. v. Century Builders of Piedmont, Inc.,* 387 S.C. 583, 694 S.E.2d 15 (2010); *Lewis,* 351 S.C. at 171. Because the Contracts, read as a whole, repeatedly seek to shift liabilities arising from BFS's own conduct, the Court of Appeals correctly concluded that they implicated South Carolina's clear and unequivocal rule.

C. <u>The Court of Appeals Properly Applied South Carolina's Clear and Unequivocal Rule</u>

Having correctly determined that BFS's pleadings sought indemnification broad enough to encompass its own alleged negligence and that both the 2005 Contract and Later Contracts likewise imposed obligations extending beyond subcontractor negligence, the Court of Appeals properly concluded that South Carolina's clear and unequivocal rule governed the enforceability of the 2005 Contracts and Later Contracts.

The Amici repeatedly argue that the Court of Appeals "prematurely" applied South Carolina's clear and unequivocal standard before a jury determined whether BFS was negligent.

That argument misunderstands the nature of the legal issue decided below. The Court of Appeals did not need to determine whether BFS or any Respondent was negligent, allocate comparative fault, or decide what portion of any damages might ultimately be attributable to any party. Rather, it resolved the legal question whether the contractual indemnity language, as drafted and as invoked by BFS, was legally capable of imposing the defense and indemnity obligations BFS sought to enforce.

South Carolina's clear and unequivocal standard is not a post-trial damages allocation rule. It is a threshold rule of contract construction governing whether an indemnity provision may be enforced when it purports to shift responsibility for the indemnitee's own negligence. *See Austen v. Snipes,* 370 S.C. 664, 668-69, 636 S.E.2d 644, 646-47 (Ct. App. 2006) (construction of an unambiguous contract and determination of ambiguity are questions of law). As this Court explained in *Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc.,* 409 S.C. 487, 763 S.E.2d 19 (2014), the rule reflects South Carolina's long-standing policy that a party will not be relieved of responsibility for its own negligence absent a clear and unequivocal contractual expression of that intent. The rule necessarily requires judicial review of the contract before indemnity obligations may be imposed. *See Concord and Cumberland*, 424 S.C. 639, 645-46, 819 S.E.2d 166, 170-71 (affirming summary judgment on enforceability of indemnity provision).

That threshold inquiry was particularly vital here because BFS sought far more than reimbursement after liability was established. The contracts required Respondents to defend BFS immediately upon the assertion of <u>any</u> claim[1], indemnify BFS against broad categories of liability, and reimburse attorney's fees and litigation expenses. Those obligations arise during the litigation

[1] Section 5 para. 3. App. pp. 2709, "The Duty to Defend under this Section 5 is independent and separate from the duty to indemnify, and **the duty to defend exits regardless of any ultimate liability or negligence of the Contractor**, the Owner, or any of their officers, directors, agents, and employees."
(Formatting changed for ease of reading, emphasis added)

itself, not after a jury allocates fault. If the contracts unlawfully require subcontractors to defend and indemnify BFS against claims implicating BFS's own alleged negligence, courts must determine that issue before compelling performance of those obligations.

The Court of Appeals affirmed the lower court's ruling because the enforceability of the contractual obligations BFS sought to impose presented a question of law. Had the contracts satisfied South Carolina's clear and unequivocal standard, questions regarding negligence, causation, and damages would have remained for trial. Because they did not, no genuine issue of material fact precluded summary judgment. No party to any lawsuit has the right to bring claims unsupported by the law to the finder of fact.

Amici's contrary approach would require courts to postpone determining the enforceability of indemnity agreements until after years of litigation and, in many cases, after subcontractors had already been compelled to provide a defense and incur substantial litigation expenses under contractual provisions that may ultimately prove unenforceable. South Carolina law does not require courts to defer threshold questions of contract enforceability until after the very obligations challenged have already been imposed. *See Fed. Pac. Elec. v. Carolina Prod. Enters.,* 298 S.C. 23, 25–26, 378 S.E.2d 56, 57–58 (Ct. App. 1989) (deciding enforceability of indemnity provision as a matter of law in declaratory judgment action); *Concord and Cumberland*, 424 S.C. at 645–51, 819 S.E.2d at 170–73 (affirming summary judgment before any adjudication of the general contractor's negligence).

Finally, the Amici assert that the Court of Appeals created a new procedural rule permitting summary judgment whenever the clear and unequivocal standard applies. It did no such thing. Amici's argument confuses two distinct questions: whether BFS ultimately could establish negligence at trial and whether the contracts it sought to enforce were legally capable of shifting liability for its own alleged negligence. The Court of Appeals decided only the latter. Reading BFS's pleadings together with the contracts BFS drafted, the Court correctly concluded that BFS sought contractual protection against liability arising from its own alleged negligence. That determination triggered the application of South Carolina's longstanding clear and unequivocal rule, a threshold question of law. Because the challenged provisions failed to satisfy that rule, the Court of Appeals properly affirmed the lower court's ruling.

D. The Court of Appeals Correctly Applied *Concord and Cumberland*

The Amici argue that the court misconstrued *Concord and Cumberland Horizontal Property Regime v. Concord and Cumberland, LLC,* 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). That argument fails because it attributes to *Concord and Cumberland* a holding it never announced.

Concord and Cumberland addressed whether an indemnity provision clearly and unequivocally expressed the parties' intent to require a subcontractor to indemnify a contractor for the contractor's own concurrent negligence. *Id.* at 650. The Court of Appeals held that it did not. Nothing in *Concord and Cumberland* suggests that courts must postpone that threshold determination until after trial or that an otherwise unenforceable indemnity agreement may later be salvaged by narrowing the indemnitee's litigation position.

Indeed, the premise underlying Amici's argument differs fundamentally from the posture of this case. As established in Subsections A and B, *supra*, BFS did not plead a limited claim seeking indemnity only for damages attributable to Respondents' negligence. Because both the pleadings and the contracts implicated BFS's own negligence, the Court of Appeals correctly concluded that the clear and unequivocal standard governed.

The Amici nevertheless attempt to transform *Concord and Cumberland* into a rule permitting courts to salvage an otherwise unenforceable indemnity framework by narrowing the contractor's litigation position after the fact. But *Concord and Cumberland* does not authorize such judicial rewriting. The enforceability of an indemnity agreement depends upon the contract the parties executed and the claims the indemnitee actually seeks to enforce, not upon a narrower theory advanced only after the contract's validity is called into question. *Id.* at 647, 656.

Nor can BFS avoid the clear and unequivocal rule by speculating that a jury ultimately might find it free from negligence. The relevant inquiry was never whether BFS would ultimately bear fault; it was whether BFS sought contractual protection broad enough to encompass liability arising from its own alleged negligence. The Court of Appeals answered that legal question by examining the contracts together with BFS's pleadings, precisely as *Concord and Cumberland* requires; the clear and unequivocal standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. *Id.* at 649.

Ultimately, Amici's disagreement is not with the Court of Appeals' reading of *Concord and Cumberland*, but with the consequences of applying it to the pleadings and contracts before the court. Because BFS sought to enforce indemnity provisions implicating its own alleged negligence, *Concord and Cumberland* required application of South Carolina's clear and unequivocal standard. The Court of Appeals did exactly what *Concord and Cumberland* instructs: it determined as a matter of law, that the contracts failed that standard. *Concord and Cumberland* does not authorize courts to rescue an otherwise unenforceable indemnity scheme by rewriting either the pleadings or the contracts after litigation has begun.

E. *Murray v. Texas Co.*, Confirms the Court of Appeals Analysis

The Amici cite *Murray v Texas Co.*, for the proposition that the "negligence rule" has been a part of South Carolina jurisprudence for many decades. Ironically, the Amici miss the point of the *Murray* case, which is perhaps the oldest example of South Carolina Courts refusing to allow parties to avoid liability for defective construction by contracting away their responsibilities for said construction.

In *Murray*, the Plaintiff was a Texas Co. 'Commission Agent' (Distributor in modern business terms[2]) to sell its gasoline in Eastover, SC; Texas Co. furnished and installed the relevant gas station equipment (pumps, tanks, etc.); a gasoline leak developed due to some defect in the materials or installation; Plaintiff sued for lost gasoline and business losses associated with a prolonged repair process that prevented them from selling gasoline. *Id.* The defendant moved for a directed verdict, contending that a broadly worded contractual Indemnity/hold harmless provision barred the plaintiff's negligence claim. *Id.* The appeal placed multiple issues before the Supreme Court of South Carolina in addition to the enforceability of the contract, including the sufficiency of evidence of negligence and damages. Ultimately, the Court found sufficient evidence of negligence and damages due to lost gasoline, but insufficient evidence of other business losses due to declining foot traffic because Plaintiff could not sell gasoline and reversed and remanded. *Id at passim.*

Importantly, for this case, the Court treated the scope and enforceability of the contractual provision as a threshold question of law. The Court addressed the provision and held that a contract clause relieving a party from liability for its own negligence must be "clear and explicit." *Id.* at 232. Finding that the provision failed this test, the Court affirmed the trial court's refusal to direct a verdict on that contractual defense. *Id.* Only after resolving this legal contract issue did the Court address whether the conflicting factual evidence of negligence was sufficient to send to the jury. *Id.* Although *Murray* arose in a directed-verdict posture, it nevertheless demonstrates that the enforceability and scope of an indemnity provision are legal questions for the court that may properly be resolved before the ultimate issue of negligence is decided by the factfinder.

[2] *See* *Federal Pacific Electric v. Carolina Production Enterprises*, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989) (analyzing *Murray*).

Equally important, *Murray* illustrates the strict manner in which South Carolina courts interpret such agreements against the drafter. Although the clause before the Court broadly required the plaintiff to hold the defendant harmless from "all claims, suits, and liabilities of every character whatsoever and howsoever arising from the existence or use of the equipment at said station," the Court concluded that this language, while "broad and comprehensive," was "provocative of some doubt." *Id.* Because the defendant drafted the agreement for its own benefit, it "could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence." *Id.* Because it failed to do so, the Court applied the rule of *contra proferentem* to this exculpatory context, explaining: "The rule of law is, that a doubt shall be solved against him whose business it was to speak without ambiguity." *Id.*

The Court of Appeals applied those same principles here. Like the drafter in *Murray*, BFS drafted the contracts from which it now seeks extraordinary protection. It could have stated with unmistakable clarity the precise scope of the indemnity obligations it now advocates. Instead, it drafted indemnity provisions containing expansive and internally inconsistent warranty, defense, indemnity, and fee-shifting provisions, and now asks this Court to narrow those provisions through judicial construction. *Murray* teaches the opposite. When a drafter seeks indemnification for its own negligence, broad and comprehensive language is insufficient. The contract must express that intent clearly and explicitly, and any doubt must be resolved against the drafter, not cured through judicial rewriting.

F. <u>*Ashley II* Reinforces The Court of Appeals' Decision</u>

The Amici rely on *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.,* 409 S.C. 487, 763 S.E.2d 19 (2014) as support for their broad conception of contractual freedom. Properly understood, however, *Ashley II* reinforces, rather than undermines, the Court of Appeals' decision. In *Ashley II,* this Court reaffirmed that contractual provisions purporting to indemnify a party for its own negligence are governed by South Carolina's longstanding clear and unequivocal rule. *Id.* at 490. The Court explained that the purpose of the rule is to deter negligent conduct by preventing a party from escaping responsibility for its own negligence absent an unmistakable contractual expression of that intent. *Id at 490-91*.

The Court declined to apply the clear and unequivocal rule in *Ashley II* because the certified question arose in the context of CERCLA liability, which the Court emphasized is "fundamentally not a fault-based determination." *Id.* at 491. Moreover, the indemnitee there sought to enforce the indemnity provision strictly according to its express terms by limiting its claim to costs attributable solely to the indemnitor's conduct prior to a 1966 closing. Because the indemnitee was not seeking indemnification for its own post-closing acts or omissions, the Court found that enforcing the contractual indemnity provision "in no manner runs afoul of the negligence rule." Id at 492.

This case presents the opposite circumstance, one that was absent from *Ashley II.* As demonstrated above, BFS neither limited its pleadings nor drafted the 2005 Contracts and Later Contracts to be confined to damages attributable solely to Respondents' conduct. Instead, BFS pleaded claims seeking "full contractual indemnification," "any liability," and "any sums for which BFS may be held liable," invoking an integrated contractual indemnity structure that included broad warranty, indemnity, defense, and fee-shifting provisions. Because BFS sought contractual protection broad enough to encompass liability arising from its own alleged negligence, the very deterrence rationale underlying South Carolina's clear and unequivocal rule is directly implicated here.

Nor does *Ashley II* support Amici's broad appeal to freedom of contract. Although the Court recognized that sophisticated commercial parties generally remain free to allocate risk by agreement, it expressly acknowledged that such freedom "is not without limitation." *Id.* Although *Ashley II* did not involve a construction contract, the General Assembly has independently declared in S.C. Code Ann. § 32-2-10 that certain construction indemnity provisions are contrary to public policy. Respondents do not ask this Court to improperly limit freedom of contract; they ask only that BFS be held to the settled legal requirements governing the contracts it drafted.

Accordingly, *Ashley II* does not support the expansive rule Amici advocate. The Court expressly described the "narrow reach" of its holding and declined to alter South Carolina's longstanding clear and unequivocal rule outside the unique CERCLA context presented there. This case falls squarely within that longstanding rule. Because BFS sought to enforce indemnity provisions broad enough to encompass its own alleged negligence, the Court of Appeals applied the very principles *Ashley II* reaffirmed.

G. *S.C. Electric & Gas* Does Not Compel A Different Result

The Amici rely on *South Carolina Electric & Gas Co. v. Utilities Construction Co.,* 244 S.C. 79, 135 S.E.2d 613 (1964), to argue that BFS likewise should have been permitted to proceed to trial. That reliance is misplaced because *S.C. Elec. & Gas Co.* addressed a fundamentally different factual and legal circumstance.

First, *S.C. Elec. & Gas Co.* involved a utility company whose liability was purely constructive and "imputed by operation of law". *Id. at 90.* The utility company was held liable solely by operation of a municipal ordinance for damages caused by an independent contractor's defective work. *Id.* BFS occupies no comparable position. Unlike the utility company in *S.C. Elec. & Gas Co.*, BFS was sued for its own alleged independent negligence. Plaintiffs alleged that BFS independently supplied defective windows, doors, framing lumber, and other building materials, failed to supervise and inspect subcontractor work, and otherwise contributed directly to the construction defects. Modern statutory law likewise places direct responsibility on licensed general contractors for the work performed by unlicensed subcontractors. See S.C. Code Ann. §40-11-270. Consequently, BFS's potential liability does not arise solely from imputed negligence, but from its own alleged acts and omissions.

Second, *S.C. Elec. & Gas Co.* was decided more than a decade before the General Assembly enacted South Carolina's Anti-Indemnity Statute, S.C. Code Ann. §32-2-10. That statute now reflects the Legislature's determination that construction agreements purporting to indemnify a party for its own negligence are contrary to public policy and unenforceable. Because *S.C. Elec. & Gas Co.* predates the enactment of § 32-2-10, the Court had no occasion to consider the General Assembly's subsequent declaration that certain construction indemnity provisions are contrary to public policy.

Lastly, *S.C. Elec. & Gas Co.* did not address the issue presented here. It did not involve indemnity provisions that were internally inconsistent, implicated the indemnitee's own negligence, or were challenged as failing South Carolina's clear and unequivocal standard and public policy. Nor did it consider whether a court must determine the enforceability of an indemnity agreement before compelling subcontractors to undertake defense and indemnity obligations. Rather, the *S.C. Elec. & Gas Co.* court addressed only whether indemnity was ultimately owed under an enforceable indemnity provision.

The question before this Court is fundamentally different. The issue is not whether a factfinder should allocate fault between BFS and Respondents. Rather, it is whether the relevant contracts, as drafted by BFS and as invoked through its expansive pleadings, lawfully authorized the indemnity and defense obligations BFS sought to enforce. The Court of Appeals correctly answered that legal question.

II. THE COURT OF APPEALS PROPERLY INTERPRETED THE LATER CONTRACTS AS INTEGRATED AGREEMENTS RATHER THAN ISOLATED PROVISIONS

The Amici contend the Court of Appeals ignored the Later Contracts definition of "Work" and improperly transformed ordinary warranty and indemnity provisions into obligations requiring BFS to answer for its own conduct.[3] Both the record and settled South Carolina law demonstrate otherwise.

Under South Carolina law, contractual intent cannot be determined by isolating individual definitions or parsing selected clauses. Rather, courts must examine the agreement from its four corners, reading provisions together to harmonize the agreement as a whole. *Williams v. Gov't Employees Ins. Co.*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014). The Court of Appeals followed this fundamental rule. It did not disregard the definition of "Work" in Section 1; instead, it properly recognized that while Section 1 defines a subcontractor's operational responsibilities, Sections 3, 5[4], and 8 dictate the scope of its liability.

Section 3 illustrates this risk-shifting scheme. Though styled as a warranty, it requires subcontractors to guarantee defects in "design, workmanship, and materials." It is undisputed that Respondents' role was strictly limited to installation, while BFS selected and supplied the materials. By forcing subcontractors to warrant "design" and "materials" controlled entirely by BFS, the Later Contracts systematically shifted liability for BFS's own conduct, including design

[3] Notably, this argument concerns only the Later Contracts as Amici did not address the Court of Appeals' separate analysis of the 2005 Contract, which independently held that the 2005 Contract's indemnity provisions were unenforceable under South Carolina's clear and unequivocal standard.

[4] See *infra re* Section 5.

and material defects for windows and doors that were neither designed nor supplied by the Respondents.

Section 8 reinforces this conclusion by requiring subcontractors to reimburse BFS for all litigation expenses, settlements, and judgments arising from materials furnished on the project, without limiting those obligations to damages caused by subcontractor negligence. Interpreted together, these provisions prove that BFS drafted a comprehensive framework designed to insulate itself from the consequences of its own acts. Because this integrated scheme implicated BFS's own negligence, the Court of Appeals correctly applied South Carolina's clear and unequivocal standard.

III. SECTION 5 CONFIRMS THAT THE ENFORCEABILITY OF BFS'S DEFENSE AND INDEMNITY FRAMEWORK PRESENTS A THRESHOLD QUESTION OF LAW FOR THE COURT.

The Amici devote considerable attention to Section 5 of the Later Contracts, arguing that its various paragraphs merely address separate factual circumstances and therefore do not conflict. Even accepting that characterization, Section 5 confirms the Court of Appeals' analysis.

Section 5 does not exist in isolation. Its provisions operate together to create an integrated defense and indemnity framework protecting BFS against claims arising from its own alleged negligence. While the first paragraph of Section 5 addresses subcontractor negligence, the second paragraph explicitly requires subcontractors to indemnify BFS for bodily injury claims "regardless of whether such claim... is caused, or is alleged to be caused, in whole or in part, by the negligence of any of the indemnitees." That language unmistakably seeks contractual protection for BFS's own alleged negligence and therefore implicates South Carolina's clear and unequivocal rule.

The third paragraph of Section 5 reinforces that conclusion. It provides that the duty to defend is "independent and separate" from the duty to indemnify and arises immediately upon the presentation of a claim "regardless of any ultimate liability or negligence" of BFS. Thus, under the contract BFS drafted, a subcontractor must begin defending BFS before any court or jury determines whether BFS was negligent at all.

That timing is significant. Because the contractual duty to defend arises at the inception of the litigation, the threshold question is whether that obligation is legally enforceable, not whether BFS ultimately prevails on the merits. The enforceability of a contract presents a question of law for the court, not a factual issue for a jury. Amici's proposal to defer that determination until after fault has been allocated would invert that well-settled principle by requiring subcontractors to perform under a potentially unlawful contractual provision before a court has determined whether the provision is enforceable.

Practically speaking, under Amici's approach, subcontractors would be compelled to finance BFS's defense throughout years of litigation, only to learn later that the contractual obligation was unenforceable from the outset. The Amici seek a paradigm best described as rules for me but not for thee – they may enforce their contractual indemnity provisions from the outset of litigation, but the Respondents may not assert any defenses thereto until the close of litigation. The fact that the alleged Amici Curiae have, for themselves, interpreted the relevant contract provisions and come to this Court and suggested such a fundamentally unfair paradigm is yet further evidence of the unconscionability of these Later Contracts. South Carolina law does not require parties to perform contractual obligations that may violate public policy before a court resolves their enforceability.

Read as a whole, Section 5 establishes an inseparable mechanism requiring the subcontractors to shield BFS from the immediate financial consequences of claims alleging BFS's own negligence while also providing ultimate indemnification if liability is imposed. The Court of Appeals correctly ruled that contractual framework as unenforceable as a matter of law.

IV. THE LATER CONTRACTS INDEMNITY PROVISIONS VIOLATE SOUTH CAROLINA'S ANTI-INDEMNITY STATUTE

Affirmance is independently required because the risk-allocation framework drafted by BFS violates South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10. Through that statute, the General Assembly declared that construction contract provisions purporting to indemnify a promisee against liability arising from its own sole negligence are contrary to public policy and unenforceable.

The Court of Appeals correctly recognized that the Later Contracts cannot be evaluated by isolating individual provisions favorable to BFS. Rather, Sections 3, 5, and 8 operate together as a comprehensive framework governing warranty obligations, defense obligations, indemnity, and fee shifting. Read as an integrated whole, that framework repeatedly requires subcontractors to assume liabilities arising from BFS's own conduct, thereby bringing the Later Contracts as well as the 2005 Contract squarely within the prohibition of § 32-2-10.

The Amici nevertheless urge this Court to preserve the contracts by isolating selected provisions and construing them as though they required indemnification only for subcontractor negligence. That approach is inconsistent with both the applicable statutory and settled South Carolina contract law. Courts do not rewrite contracts to create narrower obligations than those the parties actually negotiated. Instead, contracts must be interpreted from their four corners, giving effect to the agreement as written, and courts may not excise or "blue-pencil" unlawful provisions to salvage an otherwise unenforceable risk-allocation scheme. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002). The Court of Appeals properly refused to rewrite BFS's contractual framework to save it from the consequences of the language BFS chose to draft.

Nor would such an approach serve the purpose of South Carolina's Anti-Indemnity Statute. If courts routinely severed or judicially narrowed unlawful indemnity provisions after litigation commenced, contractors would have every incentive to draft the broadest possible indemnity agreements, secure in the knowledge that a Court could later trim those provisions to the legal limit if challenged. The contractor would have no incentive to limit their claims against their subcontractors to the laws of this state unless and until a Court forced them to.

The General Assembly enacted §32-2-10 to prevent precisely that result by prohibiting contractual provisions that shift responsibility for a party's own negligence in construction contracts. That legislative policy would be substantially undermined if courts routinely rewrote unlawful agreements rather than enforcing the statute as written.

This conclusion is consistent with the holding in *D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). There, BFS, standing in the Respondents' shoes in this matter, successfully argued that an indemnity provision requiring it to indemnify D.R. Horton for D.R. Horton's own negligence violated S.C. Code Ann. § 32-2-10 and was unenforceable. In *D.R. Horton*, the Court of Appeals, agreeing with BFS, held that "[a]n illegal contract is unenforceable" and refused to require BFS to indemnify D.R. Horton for damages attributable to D.R. Horton's own negligence. *Id.* at 152, 810 S.E.2d at 45-46. Significantly, the court did not rewrite the agreement or selectively enforce only those portions of the indemnity provisions it considered lawful. Instead, it enforced the public policy embodied in § 32-2-10 and South Carolina Jurisprudence, refusing to give effect to the unlawful risk-shifting provisions.

BFS now asks this Court to reach the opposite result by judicially narrowing indemnity provisions that likewise violates South Carolina's public policy. Nothing in *D.R. Horton* authorizes courts to salvage an unlawful indemnity agreement by rewriting the parties' bargain after litigation has commenced. The same result follows here.

Contrary to Amici's assertions, affirming the Court of Appeals would not invalidate ordinary construction indemnity agreements or disrupt longstanding commercial practice. It would simply hold BFS to the integrated contractual framework it drafted and reaffirm the longstanding principle that parties remain free to allocate risk by contract only to the extent their agreements comply with South Carolina law and public policy. Because the indemnity framework violates § 32-2-10, the Court of Appeals correctly held those provisions unenforceable, providing an independent basis for affirmance.

V. THE COURT OF APPEALS CORRECTLY HELD THE LATER CONTRACTS' INDEMNITY FRAMEWORK IS UNCONSCIONABLE

A. BFS Failure to Challenge the Unconscionability Ruling Is Dispositive of This Appeal

The Court of Appeals held that the Later Contracts were unconscionable contract of adhesion. In reaching that conclusion, the court found the warranty, guaranty, and indemnity provisions were "ambiguous, conflict with each other, and do not meet the clear and unequivocal standard." The court further concluded that the disparity in bargaining power, coupled with the oppressive and one-sided nature of the agreements, deprived the Later Subcontractors of any meaningful choice and granted BFS expansive rights and remedies while imposing substantial obligations and liabilities on the subcontractors. App. pp. 1477–88.

Notably, BFS failed to directly challenge these unconscionability findings in either its Petition for Writ of Certiorari or its merits brief.[5] Instead, BFS focuses almost exclusively on the

[5] BFS's Questions Presented in their Petition for Writ of Certiorari, App. pp. 1628-29, repeated in Appellants initial brief were:
1. When a contractor files a general third-party claim against its subcontractor seeking to recover in contractual indemnity for all damages for which it might be held liable, does such claim include those damages for which the

scope of the Court of Appeals analysis of its contracts, refusal to sever offensive provisions, and its narrow interpretation of the indemnity provisions while largely ignoring the Court of Appeals' independent, alternative determination that the Later Contracts are unconscionable adhesion agreements.

Under settled South Carolina law, issues not argued on appeal are deemed abandoned. *First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). Likewise, where an appellant fails to challenge an independent ground supporting the judgment, that ruling becomes the law of the case and provides a sufficient basis for affirmance. *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998).

Because BFS has not demonstrated error in the Court of Appeals' unconscionability analysis, that ruling remains an independent and sufficient basis for affirmance. Even if this Court were to disagree with portions of the Court of Appeals' indemnity analysis, the judgment should nevertheless be affirmed on this unchallenged, alternative ground. See *Futch v. McAllister Towing of Georgetown, Inc.,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

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subcontractor is either solely or concurrently responsible?
2. Should a contract provision imposing an obligation to indemnify - specifically as it relates to a contractor's claim for damages for which its subcontractor is either solely or concurrently responsible - be construed in accordance with precedent and with the laws governing contracts generally, or should it for the first time be subject to the heightened "clear and unequivocal" standard that would be applicable if the contractor were solely seeking indemnity for its own negligence?
3. 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, and should the inquiry into the meaning of the contract always give defined terms in the parties' contract the limited meaning ascribed to them in the contract?
4. Does the court's refusal to honor the severance language in this contract, and its consequent refusal to sever the offending language and thus save the contract, violate the Supreme Court's precedent?
5. Does S.C. Code Section 32-2-10 by its specific provisions apply only to agreements in indemnification, and does its silence regarding attorneys' fees reflect both legislative intent and a common law imperative that attorneys' fees do not fall within the scope of Section 32-2-10?
6. Is a trial court's order that is on appeal, and thus on which judgment has not yet been finally entered, considered sufficiently "final" for collateral estoppel or res judicata purposes?

B. Amici Cannot Revive Issues BFS Abandoned

The Amici cannot cure BFS's abandonment of the unconscionability issue. South Carolina law is clear that Amici Curiae may support issues properly before the Court but may not expand the scope of appellate review by raising new issues, arguments, or theories not pursued by the parties. *Wilson ex rel. State v. City of Columbia*, 434 S.C. 206 (2021) (reaffirming that amici may not enlarge the issues presented for review). Likewise, in *South Carolina Public Interest Foundation v. Richland County,* 436 S.C. 271 (Ct. App. 2021), the Court of Appeals declined to consider an argument raised solely by an amicus, relying upon *James v. Anne's Inc.,* 390 S.C. 188 (2010), and Rule 213, SCACR.

The Section II of the Amici's Argument section of their brief stands in stark juxtaposition of BFS' Questions presented in its petition for Writ of Certiorari. It states "The Court of Appeals Erred in finding that BFS's Contracts were unconscionable." App. PP. 1937. BFS made no such assertion in its questions presented to this Court. Instead, BFS used the word unconscionable just three times in its Petition for Certiorari: Twice in the section on the third question presented "III. The manner in which the court of appeals indefensibly parsed the parties' contract violated the long-established rules of contract interpretation memorialized in the precedential opinions of this Supreme Court." App. pp. 1642-3. And a final time, in the section on the fourth question presented, "IV. The failure of the court of appeals to sever any problematic language in the contract conflicts with this Court's precedent regarding severance provisions and severability of contracts." App. pp. 1644.

These cursory assertions that the Court of Appeals erred in ruling the contracts were unconscionable does not amount to a challenge the Court of Appeals erred in finding that unconscionability exists in these contracts – it is simply an appeal of the evidence considered in reaching that conclusion and the refusal to sever the provisions the Court found to evidence unconscionability. The Amici cannot raise this issue in their briefing on behalf of BFS.

To the extent Amici attempt to challenge the Court of Appeals' unconscionability ruling, or other aspects of the decision not meaningfully pursued by BFS, those arguments are not appropriately before this Court.

C. Court of Appeals Unconscionability Ruling is Consistent with South Carolina Law

Even if this Court looks past the procedural bar, the Court of Appeals' ruling is substantively correct. 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).

The record reflects a significant disparity in bargaining power. Respondent ECC is 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 Later Contracts 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 requires 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.[6] 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 that obscure the true scope of subcontractor liability. For example, the warranty provisions require subcontractors to warrant "design, workmanship and materials," even though ECC merely installed Window and Door products selected and supplied by BFS. The agreement is replete with oppressive, one-sided, provisions which relieve BFS of nearly all responsibility and leave Respondents 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

[6] **SECTION 8. Payment to Subcontractor.**

a. Payment by Owner is Condition Precedent. Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("**Cost of Work**") performed pursuant to Work Orders and that *Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner*. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accept Subcontractor's Work and Contractor received Payment from Owner for all payments to Subcontractor. *It is expressly agreed that any basis for non-payment by Owner, including the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner*. A. p. 1485. (*Italic* emphasis added) 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.

The Amici suggest that any uncertainty regarding comparative fault should be resolved by allowing a jury to determine the parties' respective negligence before addressing the contractual issues. That approach overlooks the threshold inequity presented here. The issue is not whether a jury should allocate fault among potentially negligent actors. Rather, it is whether BFS may invoke an adhesion contract containing oppressive, internally inconsistent, and unlawful risk-shifting provisions as the vehicle for that allocation in the first place. South Carolina law does not require courts to postpone deciding the enforceability of such agreements until after the drafting party has already obtained the very contractual advantages the law prohibits. Permitting BFS to do so would reward the party that drafted the challenged provisions, possessed the superior bargaining power, and now seeks equitable treatment only after attempting to enforce an agreement the Court of Appeals determined was unconscionable and contrary to South Carolina public policy. Equity does not require such a result; it supports affirmance.

VI. AMICI'S POLICY CONCERNS FAIL BECAUSE THE COURT OF APPEALS APPLIED SETTLED SOUTH CAROLINA LAW TO THE PARTICULAR CONTRACTS BEFORE IT

The Amici portray the Court of Appeals' decision as a dramatic departure from South Carolina law that threatens freedom of contract, disrupts the construction industry, and creates uncertainty regarding contractual indemnity. That characterization overstates what the Court of Appeals actually decided. The decision does not announce a new rule of law or broadly invalidate construction indemnity agreements. Instead, it applies settled South Carolina law to the pleadings and contractual indemnity provisions presented in this case. Because the decision is confined to these facts, affirmance will not produce the sweeping commercial consequences Amici predict.

Indeed, the Court of Appeals' decision neither invalidates construction indemnity agreements writ large nor alters longstanding industry expectations. Contractors and subcontractors remain free to allocate risk by contract, including through indemnity provisions that comply with South Carolina law. "The legal axiom that ignorance of the law is no excuse has long been the law of this nation and state." *Gregory v. Gregory*, 292 S.C. 587, 589–90, 358 S.E.2d 144, 146 (Ct. App. 1987) *citing* 31A C.J.S. *Evidence* Section 132(1) (1980); *Benn v. Camel City Coach Co.,* 162 S.C. 44, 160 S.E. 135 (1931).

The decision below simply holds that when a party seeks the extraordinary protection of indemnification for its own negligence, it must satisfy the clear and unequivocal rule and comply with the public policy established by the General Assembly and this Court. All parties seeking to conduct business in South Carolina are charged with following our laws. *Id.*

Far from disrupting settled expectations, the Court of Appeals reinforces the same fundamental principles that have long governed construction contracts in South Carolina for decades: parties are bound by the contracts they draft; contractual risk allocation must comply with South Carolina law and public policy; and courts, not juries, resolve legal questions concerning the enforceability of contractual provisions before those provisions are imposed upon the parties.

A. The Court of Appeals Promotes Predictability by Requiring Parties to Draft Clear and Lawful Agreements.

Predictability is achieved when contracts are enforced according to their written terms and when parties know, before litigation begins, the legal requirements governing the agreements they draft. South Carolina has required clear and unequivocal language before one party may obtain indemnification for its own negligence for decades. Likewise, the General Assembly enacted § 32-

2-10 nearly fifty years ago to prohibit construction agreements that shift liability for a party's own negligence in violation of public policy. Illegal and/or unconscionable contracts have never been enforceable in this State. The Court of Appeals did not announce a new rule. It simply applied these settled principles to the 2005 Contract and Later Contracts drafted by BFS.

Amici's proposed litigation paradigm where the enforceability/legality of a contract can only be determined after findings of fact by a jury would create genuine uncertainty. Under their approach, parties could draft broad indemnity agreements, pursue expansive indemnity claims throughout years of litigation, and only, if and, after those agreements are challenged argue that they should be construed more narrowly than written. Such an approach would require courts to rewrite contracts rather than enforce them, making the scope of contractual obligations dependent upon litigation strategy instead of contractual language. South Carolina law has never endorsed that approach.

B. The Court of Appeals Preserves Freedom of Contract by Enforcing the Agreement the Parties Executed.

Freedom of contract supports affirmance, not reversal. The Court of Appeals enforced the contracts BFS drafted according to settled South Carolina law. It did not prohibit sophisticated commercial parties from allocating risk; it simply declined to rewrite BFS's indemnity framework that exceeded the limits imposed by South Carolina law and public policy. As this Court recognized in *Ashley II*, freedom of contract "is not without limitation." *Ashley II,* 409 S.C. at 492. The decision simply reaffirms that while parties remain free to allocate responsibility for subcontractor negligence, indemnification for a party's own negligence is an extraordinary contractual allocation of risk that must comply with South Carolina's clear and unequivocal rule and the Anti-Indemnity Statute.

Indeed, affirmance promotes, not undermines, freedom of contract because it holds sophisticated parties to the agreements they actually drafted. BFS drafted the 2005 Contracts and Later Contracts, selected its indemnity language, and accurately described the contract provisions in its pleadings seeking "full contractual indemnification" for "any liability" and "any sums" for which it might be held responsible. Having done so, BFS cannot invoke freedom of contract as a basis for asking this Court to enforce a materially different agreement than the one it drafted.

C. Early Resolution of Enforceability Promotes Judicial Economy and Prevents the Misuse of Unenforceable Indemnity Provisions.

The Court of Appeals' decision also advances sound judicial administration. Whether an indemnity agreement clearly and unequivocally authorizes indemnification for an indemnitee's own negligence is a question of law appropriately resolved by the court before trial. Determining that issue at summary judgment prevents parties from incurring years of unnecessary litigation over contractual provisions that are unenforceable as a matter of law. Courts routinely resolve issues of contract interpretation before trial, and the decision below reflects the proper exercise of that gatekeeping function.

The Amici's proposed scheme for litigating indemnity claims would produce precisely the opposite result. Under their approach, a contractor could draft expansive indemnity provisions, require subcontractors to undertake an immediate defense regardless of the contractor's ultimate negligence, pursue broad indemnity claims throughout discovery and trial, and postpone judicial review of the agreement's enforceability until after fault has been allocated. Such a rule would substantially increase the cost and complexity of construction litigation while diminishing the protections afforded by South Carolina's clear and unequivocal standard.

As this Court explained in *Ashley II*, the public policy underlying the clear and unequivocal rule is to deter negligent conduct by preventing parties from contractually insulating themselves from the consequences of their own negligence absent unmistakable contractual language. *Ashley II,* 409 S.C. at 490-91. That policy would be undermined by the Amici's proposed rule, which would permit parties to invoke expansive indemnity provisions throughout litigation and postpone judicial review of their enforceability until after trial.

The Later Contracts itself demonstrates why early judicial review is essential. Section 5 provides that the subcontractor's duty to defend is "independent and separate" from the duty to indemnify, arises immediately upon presentation of a claim, and exists "regardless of any ultimate liability or negligence" of BFS. Thus, under BFS's own contract, subcontractors could be compelled to provide a defense and incur significant litigation expenses long before any determination regarding negligence. If courts were prohibited from addressing enforceability until after trial, subcontractors could be forced to satisfy contractual obligations that ultimately prove unenforceable as a matter of law.

The procedural history of this case illustrates the practical consequences of Amici's proposed rule. Even after plaintiffs dismissed certain subcontractors or stipulated that no defects were attributable to their work, BFS continued pursuing indemnity related claims, including claims for attorney's fees. That history demonstrates why South Carolina law appropriately treats enforceability as a threshold legal question. Once it becomes apparent that an indemnity agreement cannot lawfully shift liability for the indemnitee's own negligence, courts should resolve that legal issue before requiring parties to continue litigating contractual claims that cannot ultimately be enforced.

D. The Court of Appeals Decision Is Consistent With South Carolina's Longstanding Public Policy of Accountability in Residential Construction

Finally, affirmance is consistent with South Carolina's longstanding public policy of protecting homeowners from defective residential construction. Although the Amici emphasize freedom of contract, that principle has never displaced the equally longstanding public policy that builders and contractors remain accountable for the quality of residential construction and may not avoid legal responsibility through contractual provisions that violate South Carolina law.

For more than fifty years, South Carolina has consistently expanded legal protections for homebuyers, even when doing so required departing from traditional common-law principles. In *Lane v. Trenholm Building Co.*, the Supreme Court abandoned the doctrine of *caveat emptor* in favor of *caveat venditor*, recognizing an implied warranty of fitness in the sale of newly constructed homes because of the unique need to protect homebuyers. 267 S.C. 497, 500–01, 229 S.E.2d 728, 729–30 (1976). The Court reaffirmed and expanded that policy in *Kennedy v. Columbia Lumber & Manufacturing Co.*, explaining that it would be "repugnant to the South Carolina policy of protecting the new home buyer" to allow builders to avoid responsibility for defective construction through "traditional and technical legal distinctions." 299 S.C. 335, 346, 384 S.E.2d 730, 737 (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 itself to "expanding our rules to provide the innocent buyer with protection." *Id.* South Carolina's commitment to protecting homeowners remains firmly embedded in its jurisprudence. See *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 621, 879 S.E.2d 746, 760 (2022) ("Generally, courts will not enforce contracts that violate public policy.").

The Court of Appeals' decision is entirely consistent with these longstanding principles. South Carolina's Anti-Indemnity Statute reflects the General Assembly's determination that contractors should not be permitted to contract away responsibility for their own negligence. Likewise, the clear and unequivocal rule exists because public policy disfavors contractual provisions that insulate parties from the consequences of their own negligent conduct. Both doctrines encourage those responsible for residential construction to exercise due care rather than rely upon contractual provisions shifting responsibility to others.

By contrast, the rule advocated by Amici would substantially diminish those incentives. If contractors may draft expansive indemnity provisions that can later be judicially narrowed and enforced "to the fullest extent permitted by law," they have every incentive to draft agreements that shift as much litigation risk as possible onto subcontractors while minimizing their own risk exposure. Such a rule weakens the incentives for contractors to properly supervise construction, ensure quality workmanship, and prevent defective homes from entering the stream of commerce. That result is inconsistent with the public policies underlying both § 32-2-10 and South Carolina's longstanding commitment to protecting innocent homebuyers.

Ultimately, this case does not require the Court to choose between freedom of contract and public policy. South Carolina has long permitted sophisticated commercial parties to allocate risk by contract. But that freedom has never extended to agreements that contravene the General Assembly's express declaration of public policy or the judiciary's longstanding commitment to protecting homeowners from defective residential construction. Affirming the Court of Appeals simply applies those settled principles to the particular contracts and pleadings before the Court. It does not alter South Carolina law or disrupt legitimate commercial expectations.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge this Court to uphold South Carolina's longstanding statutory and public policy jurisprudence regarding construction contracts and the prohibition of illegal and unconscionable contracts which do not clearly and unequivocally set forth risk transfer and indemnity provisions. Accordingly, this Court should affirm the ruling of the Court of Appeals.

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