

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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SC Court of Appeals

Consolidated Case No. 2010-CP-10-2271

Appellate Case No.: 2016-000076

Concord and Cumberland Horizontal Property Regime, And Thomas R. Mather, And Betty Y. Segal, And Signature Charleston, LLC and Wade Robinson, And James C. Kirkpatrick, And Paul A. Brim, And Fred Rappaport and Joyce Rappaport, And Thomas R. Debnam, as Trustee of The Trust Agreement of Thomas R. Debnam, And Pamela L. Vaughan, And 304 Concord & Cumberland, LLC, And 402 Concord & Cumberland, LLC, And Avant & Associates, LLC and Oakland Holding, LLC, And Mattison J. MacGillivray and Teresa E. MacGillivray And Pamela Queen, And Stuart Reeves, Plaintiffs,

v.

Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, Estates, Inc., Estates Management Company, Superior Construction Corporation, Weather Shield Mfg., Inc., The Muhler Company, Inc., In The Wind, Inc., J. Davis Architects, PLLC, Wall Craft Construction, Inc., Weatherholtz Masonry, LLC, Philip Gasque d/b/a Philip Gasque Construction, Architectural Stone Company, Southern Mechanical, Inc., Greg Gasque Metal Works, Keating Roofing and Sheet Metal, Inc., Lowcountry Tile Contractors, Inc., Safeco Insurance Company of America, Companion Property and Casualty of America, Companion Property and Casualty Group, Watts Builders, LLC, Elias Duffy d/b/a Masonry Pros, Renaissance Steel, LLC, American Drywall Construction, Inc., Turner Electrical of SC, Inc., and Metro Waterproofing, Inc., Defendants

Of whom Superior Construction CorporationAPPELLANT,
And
The Muhler Company, Inc.....RESPONDENT.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN GRANTING PARTIAL SUMMARY JUDGMENT TO THE MUHLER COMPANY, INC. AGAINST SUPERIOR CONSTRUCTION CORPORATION?
2. DID THE COURT ERR IN DENYING PARTIAL SUMMARY JUDGMENT TO SUPERIOR AGAINST MUHLER?
3. DID THE COURT ERR IN FINDING THAT THE SUBCONTRACT BETWEEN SUPERIOR AND MUHLER DOES NOT CLEARLY AND UNEQUIVOCALLY PROVIDE INDEMNIFICATION FROM RESPONDENT FOR ANY ALLEGED CONCURRENT NEGLIGENCE OF SUPERIOR, EXCEPTING CLAIMS FOR “THE WORK ITSELF?”
4. DID THE COURT ERR IN FINDING THAT THE 2007 AGREEMENT BETWEEN SUPERIOR AND MUHLER DOES NOT CLEARLY AND UNEQUIVOCALLY PROVIDE INDEMNIFICATION FOR ANY ALLEGED CONCURRENT NEGLIGENCE OF SUPERIOR?
5. DID THE COURT ERR IN CONSTRUING THE SUBCONTRACT AND THE JUNE 2007 AGREEMENT SEPARATELY IN REACHING ITS DECISION?
6. DOES THE SUBCONTRACT HAVE TO BE RECONCILED WITH THE TERMS OF THE JUNE 2007 AGREEMENT PURSUANT TO THE LAW OF SOUTH CAROLINA CONSTRUING CONTRACTS GENERALLY BEFORE THE “CLEAR AND UNEQUIVOCAL” STANDARD REGARDING OF THE SCOPE OF CONTRACTUAL INDEMNIFICATION CAN BE PROPERLY ASSESSED?
7. DOES THE SUBCONTRACT AND THE JUNE 2007 AGREEMENT, WHEN RECONCILED AND CONSTRUED TOGETHER, REQUIRE MUHLER TO INDEMNIFY SUPERIOR FOR ANY POSSIBLE CONCURRENT NEGLIGENCE OF SUPERIOR AS IT RELATES TO THE WINDOW AND DOOR CLAIMS SETTLED BY SUPERIOR?

STATEMENT OF THE CASE

This is an appeal from two orders of Clifton Newman, Presiding Judge of the Ninth Judicial Circuit. By order dated September 25, 2014 and filed October 6, 2014, Judge Newman granted Respondent The Muhler Company, Inc.'s (hereinafter "Muhler") Motion for Partial Summary Judgment in part and denied Appellant Superior Construction Corporation's (hereinafter "Superior") Motion for Partial Summary Judgment. Judge Newman denied Superior's timely Motion to Reconsider by Order dated January 12, 2016. Superior appeals from both of these orders.

This appeal concerns Superior's cross-claims for contractual indemnification in a complex construction case involving a luxury condominium project located at the corner of Concord and Cumberland Streets ("Subject Property") in Charleston, South Carolina. Plaintiff Horizontal Property Regime for the subject property (HPR) and certain individual condominium unit owners (hereinafter "C&C plaintiffs") filed a total of fifteen (15) separate lawsuits against numerous defendants, including Superior and Muhler. The Complaints were filed between March 19, 2010 and December 29, 2011. The C&C plaintiffs asserted claims of negligence, negligence per se, and breach of implied warranty of workmanlike service against Superior. (R. pp. 73-112) Superior timely served an Answer, Cross Claim, and Third Party Complaint which added Respondent Muhler as a Third Party Defendant and asserted claims for *inter alia*, contractual and equitable indemnity. In subsequent amended pleadings, C&C plaintiffs asserted direct claims against Muhler for negligence; breach of implied warranties of workmanlike service, merchantability, and fitness for a particular purpose; and breach of express warranty, and strict liability (products). (R. p. 229; R. p. 236; R. pp. 253-256; R. pp. 258-267)

By Consent Order of April 26, 2012, all of the parties of the fifteen cases agreed to a bench trial under the Honorable Judge Newman for all matters pertaining to each of the lawsuits, along with the consolidation of all discovery, reserving the right to later consolidate the cases for trial. (which would later be agreed to be the remaining parties of the case.) In April of 2013, after extensive discovery among the parties, which involved over forty depositions, numerous site inspections and destructive testing, and over a half-million pages of document production, Superior reached a settlement with all Plaintiffs to obtain a release from all of their claims related to or arising from the windows and exterior doors, including all loss of use and diminution of value claims, increased assessments levied on unit owners, and claims for resulting property damage, for the sum of Seven Hundred and Seventy-Five Thousand Dollars (\$775,000.00). (R. pp. 402-431) Superior also entered into other separate carve-out settlements alongside its other subcontractors with all C&C plaintiffs for all other claims related to all other scopes of work outside of the windows and doors, which are not subject to the present appeal. Thus Superior's settlement of the window and door claims is separate and distinct from all of the other multiple settlement agreements entered into by Superior with Plaintiffs for claims arising from all of the other elements of the building envelope that were asserted in all of the fifteen lawsuits. Leading up to the settlement, Superior separately incurred over five hundred thousand dollars (\$500,000.00) in legal fees and expenses that are affiliated with its defense of the window and door claims, over one hundred thousand dollars (\$100,000.00) in expert witness fees that directly relate to the Plaintiffs' window and door claims, and over thirty thousand dollars (\$30,000.00) in court reporter fees. On July 11, 2014 Superior filed a Motion for Partial Summary Judgment against Muhler to establish liability under equitable

and contractual indemnification for amounts paid to the C&C plaintiffs to settle the window and door claims, along with costs of defense and attorneys' fees (up to the time of settlement of the window & door claims), plus "prevailing party" costs and attorneys' fees pursuant to Appellant's rights of indemnity under the Subcontract and the 2007 Agreement. Superior stipulated that the ultimate amount of Respondent's liability would have to be determined at a damages hearing after obtaining a grant of summary judgment against Respondent.

On July 14, 2014 Respondent filed an Amended Motion for Partial Summary Judgment Against Superior, seeking a declaration that: "1) neither the Subcontract and the 2007 Agreement permit Superior to be indemnified for its own wrongdoing, and that the 2007 Agreement fails for lack of consideration and impossibility; 2) that neither Superior nor C&C is entitled to equitable indemnification because neither can prove it has 'clean hands'." Both Superior and Respondent submitted extensive memoranda in support of their motions and/or in rebuttal to the other parties' motions and memoranda. Oral argument was conducted before the Court on July 28-29, 2014, at which Superior voluntarily dismissed its claim for equitable indemnity and pursued partial summary judgment based upon contractual indemnity as further set forth in Superior's Motion for Partial Summary Judgment, supporting memoranda and oral argument. Superior's contractual indemnity claim was based upon a standard Form 600 subcontract issued by the American General Contractors' Association and a subsequently executed, custom-drafted contractual agreement known as the "June 2007 Agreement", or simply the "2007 Agreement." The proper legal interpretation of these agreements was at the core of the cross motions between Appellant and Respondent, and the sole basis for the Court's

determination of these motions. In particular, the issue of whether the Subcontract and the 2007 Agreement satisfied the “clear and unequivocal” standard of Laurens Emerg. Med. Spec. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) for a party to be indemnified for its concurrent negligence via contractual indemnification was disputed by Superior and Muhler. Each side’s motion as it related to the legal interpretation of the contractual indemnity obligation issue was the essentially the exact, diametrically opposite position of the other: by granting Superior’s motion, the Court would be simultaneously denying Respondent’s motion as to this issue, and vice versa.

Superior and Respondent both stipulated before the Court that there was no appellate authority in South Carolina that specifically construed the language of the indemnity provisions of the AGC Form 600 Subcontract, [or any substantially identical or similar form contract language from the American Institute of Architects (AIA)] as it relates to the scope of indemnity in dispute.] A major aspect of the legal argument between Superior and Respondent centered upon each side submitting extra-jurisdictional appellate decisions that examined form contracts that were substantially identical to, or at least very similar to, the AGC form indemnity language, as well as other major construction industry form contract indemnity language. Ultimately, each side’s position stands or falls upon the legal interpretation of the indemnity obligation from the Subcontract and the June 2007 Agreement.

The trial court’s issued its Order filed October 6, 2014, which ruled on a number of pending dispositive motions, including the cross motions for partial summary judgment by Superior and Muhler. In relevant part, Judge Newman’s Order granted Muhler’s motion to the extent Muhler sought a declaration that, as a matter of law, neither the Subcontract nor

the 2007 Agreement would permit Superior to be indemnified for its “own negligence” as it relates to the windows and doors, although the Court did not make a specific finding of negligence as to Superior or Muhler in the Order. The Order did not grant summary judgment to Muhler on any other grounds. By direct extension, in granting Muhler’s motion as noted, Superior’s motion for partial summary judgment was accordingly denied.

Superior timely filed a Motion to Reconsider the Order filed October 6, 2014, which was heard for oral argument on December 4, 2015. Judge Newman denied the Motion to Reconsider via the Order dated January 12, 2016. Superior filed its Notice of Appeal on January 14, 2016, appealing the grant of partial summary judgment to Muhler. A Consent Order to Stay the Trial Pending Appeal was filed with the lower court on January 25, 2016. At this time, the only parties remaining in the case are Superior, Muhler, and Weathershield MFG, Inc., with claims asserted by each of these against all others. Due to the size, complexity, and expense of the anticipated trial, as well as the common issues of fact and law that impact the disposition of all parties’ claims and defenses, the Court, with the unanimous consent of the parties, found that it was in the interests of judicial economy to stay the trial of the case pending the outcome of the instant appeal. (R. pp. 67-71)

The proper interpretation of the Subcontract and 2007 Agreement as it relates to the Appellant’s rights of indemnity is the sole basis of this appeal.

FACTS

The following facts are not in dispute. Superior Construction served as the General Contractor for the construction of the building shell of the Subject Property. The Developer or Owner of this project was Concord & Cumberland, LLC. Muhler served as a subcontractor to Superior for the provision and installation of the windows and exterior

doors, including the supply and installation of all related caulking and sealants. (R. p. 335; R. pp. 362-382) Muhler's installation work was performed by two subcontractors, Watts Builders, Inc. and In The Wind, Inc. (R. p. 335) Weather Shield MFG, Inc. manufactured the windows and exterior doors. (Id.)

Initially, Superior was directly responsible for preparing the window rough openings to receive the window installation. (R. p. 25) Superior subsequently subcontracted this work to Watts. (R. p. 335) Thus, Watts performed some work as a subcontractor for Muhler and some work as a subcontractor for Superior. (R. p. 25) Muhler's scope of work included installation of the windows into rough openings prepared by Superior and/or its subcontractors. (Id.)

The Prime Contract between Superior and Concord and Cumberland, LLC, (identified as the "Owner" in the Prime Contract) was an AIA Document A101 (1997) Standard Form of Agreement Between Owner and Contractor, which incorporated an amended version of the AIA A201 General Conditions. (Article 8.1.2 of Enumeration of Contract Documents, AIA Document A101.) Article 3.18 of the General Conditions placed contractual indemnity obligations upon Superior towards the Owner for any claims arising from the performance of the work of the contract to the extent caused by the negligent acts or omissions of Superior, any of its subcontractors, or anyone employed directly or indirectly by them. (R. pp. 488-489.)

The subcontract between Superior and Muhler for the windows and exterior doors is an AGC Document No. 600 Subcontract for Building Construction, 1984 edition, by the Associated General Contractors of America. At Article 12.1, the Subcontract provides as follows:

Article 12
INDEMNIFICATION

12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that

(a) any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease, or death, or injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

(b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Article 12.

(R. pp. 362-383)

The installation of the windows and doors commenced (approximately) in the last week of February 2007. In early 2007, the windows and doors were found to be leaking. (R. p. 51) Superior, Muhler, and Weather Shield entered into a separate agreement dated June 11, 2007 (hereinafter "the June 2007 Agreement"). (Id.) The recitations in the June 2007 Agreement acknowledge the existence of failed window water testing and other matters of non-performance of the windows, and further indicated that the Agreement sought to resolve non-compliance issues with the windows and doors. (R. p. 384) In the June 2007 Agreement, Muhler agreed to warrant that the windows were free from defects

and that Muhler would repair any future window failures or defects. (R. pp. 385-386.) As consideration for the Agreement, Superior agreed not to pursue litigation against Muhler and Weather Shield for the windows leaks that had been discovered. (R. p. 387)

The June 2007 Agreement also contained an indemnity agreement which provided, with respect to Muhler, as follows:

11. In the event either Superior or Concord and Cumberland, LLC are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended contract documents, or are defectively installed, Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable attorneys' fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration, liability incurred by either or both as consequence [sic] including, but not limited to costs and attorneys' fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.

(Id.) Article 12.1 of the Subcontract and Paragraph 11 of the 2007 Agreement are the only two indemnification clauses in existence dealing with Muhler towards Superior.

Superior agreed to satisfy any outstanding balances due Muhler in exchange for Muhler's completion of its work under the subcontract. (R. p. 51; R. p. 387) These funds have been withheld due to the ongoing window leaks at Concord and Cumberland, pursuant to Superior's rights under Article 10.1.1 of the Subcontract, and other provisions.

Construction of the building shell was substantially complete in October 2007. (R. p. 51) The windows continued to leak after the execution of the June 2007 Agreement. (R. p. 339) The C&C plaintiffs filed this action alleging, among other things, water intrusion through and around the windows and doors. (R. p. 51) Superior implead Muhler under, among other things, a theory of contractual indemnity. (R. pp. 113-135) Plaintiffs further asserted claims against the Owner, Concord and Cumberland, LLC ("the Owner") arising from the same aforementioned allegations pertaining to the windows and doors,

including, *enter alia*, breach of the implied warranty of habitability. (R. p. 243) The Owner in turn asserted cross claims against Superior and its Surety (Safeco) for breach of contract, contractual and equitable indemnity, breach of express and implied warranty, and negligence. (Answer to Second Amended Complaint of Concord & Cumberland, LLC and Cross Claims Against Superior Construction Corporation [*et al*], ¶¶ 73-107) (R. pp. 306-312)

After four and a half years of pre-suit claim investigation and litigation, with extremely extensive discovery involving over a half million pages of document production, over forty depositions and three mediations, on April 25, 2013 Superior settled of all of the C&C plaintiffs' claims related to or arising from the windows and exterior doors for the sum of Seven Hundred and Seventy-Five Thousand Dollars (\$775,000.00). (R. p. 340) Superior also entered into other carve-out settlements for all other claims related to or arising from all of the other scopes of work outside of the windows and doors, which are not subject to the present motion and will not be sought against Muhler and Weather Shield. Thus, Superior's contractual indemnity claim against Muhler is only for windows and door issues—damages caused by other trades (*i.e.*, roofing, stucco installation, etc.) were settled under separate settlement agreements. Leading up to the settlement, Superior separately incurred over five hundred thousand dollars (\$500,000.00) in legal fees and expenses that are affiliated with its defense of the window and door claims, over one hundred thousand dollars (\$100,000.00) in expert witness fees that directly relate to the Plaintiffs' window and door claims, and over thirty thousand dollars (\$30,000.00) in court reporter fees. (*Id.*) Shortly after Superior settled with Plaintiffs, in July of 2013, Muhler reached a settlement with Plaintiffs as well for Three Hundred Thousand Dollars.

Superior moved for partial summary judgment against Muhler as to liability on Superior's contractual indemnity claim. (R. p. 334) Specifically, Superior sought a declaration as to Muhler's liability, with a damages hearing thereafter to ascertain the amount of damages. (Id.)

Muhler opposed Superior's motion for partial summary judgment, and filed its own motion for partial summary judgment, on the ground that Superior is not entitled to contractual indemnification for its "own negligence." (R. p. 52) In briefing these motions, Superior and Muhler both presented evidence that the other was negligent, and that the other's negligence contributed to the window and door water intrusion issues. (R. pp 346-357; R. pp. 539-541)

The trial court granted Muhler's motion "to the extent that [Muhler] seek[s] to have the Court find as a matter of law that neither the Subcontract nor the 2007 Agreement clearly and unequivocally provide indemnification for Superior's . . . own negligence." (R. pp. 62-63) However, the Court did not make a formal finding of negligence as to Superior or Muhler in the Order. The trial court denied Superior's motion.

In moving for reconsideration, Superior stipulated that it is not seeking indemnity from Muhler for Superior's sole negligence. (R. p. 942) Superior's claim is based upon its entitlement to indemnification from Muhler, which includes any alleged concurrent negligence as to Superior. (Id.) The trial court denied Superior's Motion to Reconsider on January 12, 2016. Superior timely filed its Notice of Appeal on January 21, 2016.

STANDARD OF REVIEW

This Court exercises *de novo* review of questions of law. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). In reviewing factual questions for purposes

of review of a ruling on a summary judgment motion, appellate courts must apply the same standard which governs the trial court under Rule 56(c), SCRCP. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005).

“Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.” Faile v. S.C. Dep’t of Juvenile Justice, 350 S.C. 315, 323-24, 566 S.E.2d 536, 540 (2002). “In determining whether a genuine question of fact exists, the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party.” Id.

ARGUMENTS

I. THE TRIAL COURT IMPROPERLY CONFLATED INDEMNIFICATION FOR THE INDEMNITEE'S OWN NEGLIGENCE WITH INDEMNIFICATION FOR THE INDEMNITEE'S SOLE NEGLIGENCE.

The trial court held that Superior cannot obtain indemnity for its “own” negligence. However, the Court failed to adequately distinguish the broader concept of “own” negligence from the more narrow concept of concurrent negligence

A. Indemnitee’s “own” negligence versus “sole” negligence

South Carolina courts have addressed claims by the indemnitee for their “own” negligence on two occasions. Murray v. Texas Co., 172 S.C. 399, 174 S.E.2d 231 (1934); Federal Pacific Elec. v. Carolina Prod. Enters., 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989). In both cases, the liability arose from the conduct of the indemnitee, without any fault on the part of the indemnitor.

Murray involved an oil company that contracted with a local service station to sell its products at retail. A gas tank installed by the oil company leaked, causing the service station to suffer loss. Id. The service station sued the oil company for damages. Id.

The oil company defended on the ground that the indemnity agreement in the lease relieved the oil company from claims arising from its own negligence. Id. at 232. Essentially, the oil company attempted to treat the indemnity agreement as an exculpatory agreement. See McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005). The court held that when a party seeks to relieve itself of a legal duty by contract, it must do so in express terms. Murray, 172 S.C. at ____, 174 S.E. at 232. Murray is not applicable because Superior is not seeking to relieve itself

of a legal duty, but rather to obtain compensation from Muhler for losses Superior incurred in the litigation with the C&C plaintiffs arising from Muhler's work. See Rock Hill Tel. Co., 363 S.C. at 389, 611 S.E.2d at 237 (defining indemnity). But even to the extent Murray could be construed to apply to indemnity agreements, it is distinguishable because it relates to a situation in which the party seeking to enforce the indemnity agreement is solely at fault.

Federal Pacific addresses a similar situation. In that case, Federal Pacific leased an industrial plant to Carolina Production. 298 S.C. at 25, 378 S.E.2d at 57. The lease contained an indemnity agreement in favor of Federal Pacific. Id. The plaintiffs' claim arose from an electrical switchgear manufactured and installed by Federal Pacific and/or its subcontractors. Id. at 26, 378 S.E.2d at 57. The switchgear exploded, injuring Carolina Production employees and several other people. Id. The injured plaintiffs sued Federal Pacific on a product liability theory, and did not name Carolina Production as a defendant or allege negligence on the part of Carolina Production. Id. Nevertheless, Federal Pacific sought indemnification from Carolina Production. The court held that the indemnification provision in that case did not require indemnification for Federal Pacific's own negligence. Id. at 27, 378 S.E.2d at 58.

The above review of the facts of Murray and Federal Pacific demonstrates that the indemnification sought in both cases was for the sole negligence of the parties seeking indemnification. These cases are not controlling because in the construction contracts, indemnity agreements purporting to provide indemnity for the sole negligence of the party seeking indemnification are barred by statute. S.C. Code Ann. § 32-2-10.

B. Indemnitee's concurrent negligence

The term “own” negligence can also encompass a situation in which the negligence of the indemnitor combined with the negligence of the indemnitee to produce the injury to the plaintiff. South Carolina courts have held that indemnity agreements providing for indemnity for damage caused “in whole or in part” by the indemnitor allow the indemnitee to recover, even if partly negligent. Campbell v. Beacon Mfg. Co., Inc., 313 S.C. 451, 438 S.E.2d 271 (Ct. App. 1993).

Campbell involved a fire that destroyed a warehouse leased to Beacon Manufacturing Company, Inc. Id. at 453, 438 S.E.2d 271-72. Beacon hired Spartan Security, Inc. to provide security at the warehouse. Id. Spartan admitted that one of its employees set the fire. Id. at 454, 438 S.E.2d at 272. Beacon sought indemnification from Spartan after the owners sued Beacon. Id.

The court held that Beacon was entitled to indemnification from Spartan for the acts of Spartan’s employee. Id. Spartan defended by alleging the fire was partly caused by Beacon’s negligence in failing to install a fire protection system. Id. The court held that Beacon was entitled to indemnification even if it was partly at fault because under the indemnity agreement, Spartan agreed to indemnify Beacon for damages arising “in whole or in part” from the acts of Spartan or its employees. Id. at 455, 438 S.E.2d at 273. The court opined that the “in whole or in part” language was sufficient to provide indemnification for concurrent negligence. Id.

Thus, the term “own” negligence is not synonymous with “sole” negligence. The term “own” negligence is broader than “sole” negligence, and it encompasses both “sole” negligence and “concurrent” negligence. In construction contracts, indemnity for “sole” negligence is prohibited by statute. S.C. Code Ann. § 32-2-10. In contracts to which

Section 32-2-10 does not apply, courts impose a standard of strict construction against indemnity agreements purporting to provide indemnification for the sole negligence of the indemnitee. Federal Pacific, 298 S.C. at 26, 378 S.E.2d at 57; Murray, 172 S.C. at ____, 174 S.E. at 232. However, South Carolina courts impose no such bar upon indemnification agreements providing indemnification for concurrent negligence. Such agreements fall within an express exception to Section 32-2-10. There are no cases imposing the rule of strict construction on indemnity agreements for concurrent negligence in South Carolina. Instead, indemnity agreements providing indemnification for concurrent negligence are subject to the general rules of contract construction. Campbell, 313 S.C. at 453, 438 S.E.2d at 272.

In Laurens Emergency Medical Specialists, PA v. M.S. Bailey & Sons Bankers, the court held that indemnity agreements seeking to relieve a party of the consequences of its own negligence are subject to the rule of strict construction. 355 S.C. 104, 111-12, 584 S.E.2d 375, 379 (2003). Laurens EMS dealt with a “second-party” indemnification claim in which one of the parties sought indemnification from the other arising from a dispute between the parties. The court declined to allow “second-party” indemnification claims. Id. at 111, 584 S.E.2d at 378. After reaching that holding, the court addressed a secondary argument that the indemnity agreement did not expressly allow indemnification for the own negligence of the party seeking indemnification. Id. Because the court had already held that indemnification was not allowed in that situation, the court’s holding with respect to indemnification for the own negligence of the party seeking indemnification represents nothing more than a reiteration of the general rule. Laurens EMS did not address a concurrent negligence situation.

Superior has stipulated it is not seeking indemnification for its sole negligence. (R. p. 942) Superior settled the claims for damage caused by other trades by separate agreements. This leaves only the window and door claims, and Muhler was the subcontractor for installation of windows and doors. The evidence of negligence on the part of Superior does not convert Superior's claim into a "sole" negligence claim. Because Superior also presented evidence of negligence on the part of Muhler, Superior's indemnification claim is for "concurrent" negligence—damage caused in part by the alleged negligence of both Muhler and Superior. This type of claim is allowed under South Carolina law, provided that it is supported by the contract language. Campbell, 313 S.C. at 453, 438 S.E.2d at 272. However, even if the rule of strict construction against indemnification for a party's "own" negligence is applied, the indemnity agreements in this case are sufficiently specific to support Superior's claim for contractual indemnification.

II. THE INDEMNITY CLAUSE IN THE SUBCONTRACT ALLOWS SUPERIOR TO RECOVER FOR CONCURRENT NEGLIGENCE.

While the ultimate determination of Superior's right of indemnity requires the Subcontract and the June 2007 Agreement to be reconciled and construed together, the Court examined the Subcontract in isolation from the June 2007 Agreement to conclude that the Subcontract did not permit Superior to be indemnified for its "own negligence," which as explained above should be narrowed to refer to Superior's alleged concurrent negligence. Superior now addresses the Court's examination of the Subcontract.

Under South Carolina law, the contract language establishes the relationship between the parties for purposes of contractual indemnification. Rock Hill, 363 S.C. at 389, 611 S.E.2d at 237. "A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally." Campbell, 313 S.C. at 453, 438 S.E.2d

at 272. Contracts are interpreted in accordance with the intent of the parties as expressed in the contract language. Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497-98; 649 S.E.2d 494, 497-98 (Ct. App. 2007). Importantly, contracts must be read in such a way as to give effect to every part of the contract, and one part of a contract should not be read to annul another part of the same contract. Stevens Aviation, Inc. v. DynCorp Intern. LLC, 407 S.C. 407, 416, 756 S.E.2d 148, 153 (2014); Richland Lexington Airport Dist. v. American Airlines, Inc., 306 F. Supp. 2d 548, 564 (D.S.C. 2002). The trial court erred in reading out of the indemnity agreement language that provided for indemnification for concurrent negligence.

The indemnity agreement in Muhler's subcontract contains three key phrases with respect to this claim. First, Muhler promised to indemnify Superior for claims "arising out of or resulting from the performance of the Subcontractor's Work." Second, Muhler's indemnity obligation is limited to claims for property damage "to the extent caused or alleged to be caused in whole or in any part by any negligence act or omission of [Muhler or its subcontractors]." Third, Muhler's indemnification obligation arises "regardless of whether it is caused in part by a party indemnified hereunder."

As a preliminary matter, under the indemnity agreement Muhler's indemnification obligation applies "[t]o the fullest extent permitted by law." Thus, Superior is entitled to indemnity to the extent provided under the indemnity agreement unless barred by law. Muhler agreed to indemnify and hold Superior harmless from "all claims, damages, loss and expenses, including but not limited to attorney's fees." Thus, Superior is entitled to recover both damages and defense costs, provided the requirements of the indemnity

agreement are met. This includes the amounts Superior is seeking for damages, attorney's fees, expert fees, and court costs. This leads to the first of the three key phrases.

A. Superior's damages arise out of or result from the performance of Muhler's work.

Muhler's duty to indemnify is triggered if the damages and defense costs "aris[e] out of or result[] from the performance of" Muhler's work. This phrase has two subparts. First, the indemnification claim must "arise out of or result from" the specified scope of work. Second, the connection must be to "the performance of the Subcontractor's Work."

1. "Arising out of or resulting from"

The phrase "arising out of" is construed broadly in clauses of inclusion in indemnity agreements. "This language is comprehensive and unconditional." Campbell, 313 S.C. at 454, 438 S.E.2d at 272. In the insurance context, South Carolina courts have construed "arising out of" to mean "incident to," "flowing from," "having connection with," or "causal relation to." Town of Duncan v. State Budget & Control Bd., Div. of Ins. Servs., 326 S.C. 6, 13, 482 S.E.2d 768, 772 (1997).

2. "The performance of the Subcontractor's Work"

"Subcontractor's Work" is a defined term in Muhler's Subcontract. (R. p. 365) The term refers to Muhler's scope of work under the Subcontract. Putting this together with the construction of "arising out of or resulting from" set forth above, the phrase, in its entirety, means that Superior's indemnity claim must have some connection with Muhler's scope of work under the Subcontract. The terms of Superior's settlement for the windows and doors makes it expressly clear that Muhler's entire scope is encompassed in the indemnity claim.

3. The trial court's erroneous distinction

The trial court correctly concluded that the reference is to Muhler's scope for work. (R. p. 58) However, the trial court erroneously attempted to distinguish between indemnity agreements which provide recovery for damages and defense costs that "arise out of the performance of the subcontractor's work" and those which merely provide recovery for those which "arise out of the performance of the work." (R. pp 57-58) Generally, the terms "the subcontractor's work" and "the work" are references to defined terms in construction contracts. Both terms likely refer to the subcontractor's scope of work in the subcontract, with any differences attributable to the shorthand term assigned by the parties in any particular subcontract. The trial court was attempting to distinguish a Florida case, Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So.2d 1072 (Fla. Dist. Ct. App. 2003). The parallel phrase in the indemnity agreement at issue in Camp, Dresser & McKee provided "arising out of or resulting from the performance of the work." Id. at 1076. The court did not construe this phrase in Camp, Dresser & McKee, and the court's holding did not turn on any distinction between "the work" and "the subcontractor's work." The scope of work section of the subcontract was not quoted in the opinion.

However, most likely "the work" in Camp, Dresser & McKee meant the same thing as "the Subcontractor's Work" in Muhler's Subcontract. In both cases, the reference is to the scope of work indicated in the particular contract. If the trial court's interpretation were applied, it would mean that the indemnity obligation in Camp, Dresser & McKee extended to any work on the entire project, including work that had nothing to do with the subcontractor's scope of work. This argument was not raised in that case. Since the trial

court's construction would lead to absurd results, the trial court erred in attempting to distinguish Camp, Dresser & McKee on this basis.

Therefore, the phrase "arising out of or resulting from" means that Superior's indemnity claim must have some connection with Muhler's scope of work. However, this does not mean that the indemnity claim is limited to Muhler's scope of work alone, as damage to other property could "arise out of" or "result from" the scope. Because "arising out of or resulting from" has a broad construction, Muhler's indemnity obligation may be triggered by any claim having a connection to Muhler's scope of work. To protect against indemnity claims for damage too far afield from Muhler's scope of work, the indemnification agreement has another phrase further clarifying the extent to which Muhler's indemnification obligation is triggered.

B. The alleged property damage was caused in whole or in part by Muhler's negligence.

Article 12.1(a) of the indemnity agreement in Muhler's Subcontract contains several provisos. The first is that the indemnity claim must be attributable to bodily injury or property damage. This requirement is satisfied because the C&C plaintiffs' claim is for water damage caused by leakage through and around the windows installed by Muhler.

The second key phrase in the indemnity agreement comes next. The Subcontract provides that the indemnity claim for property damage applies "to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor [or its sub-subcontractors]." This is the phrase upon which the trial court relied in denying Superior's Motion for Partial Summary Judgment. (R. p. 58)

The C&C plaintiffs alleged that Muhler's negligent installation of the windows caused leaks and lead to resulting water damage. (R. p. 177; R. p. 184; R. p. 186; R. pp.

201-203) Superior also presented evidence that Muhler was negligent, and that Muhler's negligence contributed to the leaks and water intrusion in and around the windows. (R.pp. 346-357) Muhler and its sub-subcontractors Watts and In The Wind, Inc. were responsible for installing the windows. (R. p. 50) Therefore, the requirement that Superior's indemnity claim be (at least in part) caused by or allegedly caused by Muhler's negligent performance of its scope of work under the Subcontract is met.

1. "To the extent caused or alleged to be caused . . . by"

However, Muhler's indemnification obligation is limited "to the extent caused or alleged to be caused in whole or in any part by [Muhler's negligence]." This language clarifies what was potentially left open by the broad language of the first key phrase ("arising out of or resulting from"). It has the effect of limiting Muhler's indemnification obligation to property damage that is at least partly caused by Muhler's negligent performance of its scope of work.

The C&C plaintiffs alleged that a number of defects existed in the exterior skin of the building, including stucco, window installation, roof, and brick defects. (R. pp. 183-185) The defective work of all of these trades is alleged to have caused water intrusion and resulting property damage to the building. (R. pp. 185-186) Thus, all have some connection with Muhler's alleged negligence, and could fall under the broad, inclusive language "arising out of or resulting from." The function of the phrase "to the extent that . . ." is to limit Muhler's indemnity obligation to only that damage caused by, or allegedly caused by, Muhler and its subcontractor's negligent performance of its scope of work.

2. “Alleged to be caused”

Because the indemnification agreement is triggered by allegations of negligence, Superior does not have to prove that Muhler’s negligence caused the alleged damage. It is sufficient that such damage is alleged. As set forth above, the allegations in the pleadings by the C&C plaintiffs satisfy this requirement.

3. “In whole or in any part”

The indemnity agreement further clarifies that Muhler’s obligation is triggered by property damage caused “in whole or in any part” by Muhler’s negligent performance of its scope of work. South Carolina courts have expressly held that this phrase signifies indemnification for concurrent negligence. Campbell, 313 S.C. at 455, 438 S.E.2d at 273. Thus, Muhler’s indemnification obligation is triggered by any damage caused by its negligent work, even if the damage was partly caused by another contractor.

4. Interpretation of the clause as a whole

When each of these subparts are read together, the second key phrase in the indemnity agreement limits Muhler’s indemnity obligations to property damage for which Muhler’s negligence is at least a concurrent cause. Muhler’s liability does not have to be proved, mere allegations are sufficient. Importantly, nothing is said in this phrase about the effect of the identity of any other parties that may have contributed to the damage when Muhler’s negligence is concurrent. The phrase simply indicates that Muhler’s indemnification obligation is triggered if it was solely or concurrently responsible for the damage.

The allegations by the C&C plaintiffs illustrate the function of this phrase. In the Amended Complaint, water damage is alleged, and this water damage is alleged to be

caused by the negligent work of multiple trades, including the roof, stucco, and brick work as well as the window installation. (R. pp. 183-185) Although all of this damage may fall within the broad language, “arising out of or resulting from,” damage caused by the work of other trades is excluded by the limiting phrase “but only to the extent caused or alleged to be caused in whole or in any part by any negligent act of [Muhler or its sub-contractors].”

This phrase excludes damage caused by the work of other trades, for which Muhler was not at least partly responsible. However, it includes any damage for which Muhler’s negligence was a concurring cause. It says nothing about other parties whose negligence may also have contributed to the damage. It is simply silent on that subject. However, another phrase clarifies that Muhler’s indemnification obligation applies even if the damage was partly caused by the negligence of an indemnitee.

C. “Regardless of whether it is caused in part by a party indemnified hereunder”

The final phrase of the indemnity agreement provides that Muhler’s indemnification obligation applies to property damage caused by its concurrent negligence, “regardless of whether it is caused in part by a party indemnified hereunder.” Superior, identified as the “Contractor” in Muhler’s Subcontract, is “a party indemnified hereunder.” (R. p. 365) Therefore, the phrase indicates that Muhler must indemnify Superior for property damage caused by Muhler’s concurrent negligence, “regardless of whether it is caused in part by [Superior].”

The indemnity agreement in Muhler’s Subcontract is substantially similar to the language in the American Institute of Architects (AIA) Standard Document A201 for General Conditions of the Contract for Construction. Camp, Dresser & McKee, 853 So.2d

1077. The Supreme Court of the United States has cited this language “as being a paradigm of clarity in shifting the risk of a negligent indemnitee’s loss to the indemnitor.” Id. (citing United States v. Seckinger, 397 U.S. 203, 212, 90 S. Ct. 880, 886, 25 L. Ed. 224 n.17 (1970)). Thus, even under the standard of strict construction, the phrase “regardless of whether [the property damage] is caused in part by [Superior]” expressly provides indemnification for Superior’s own negligence, so long as Superior’s negligence is concurrent with Muhler’s negligence in causing the property damage. Section III of Superior’s argument further explores other extrajurisdictional caselaw that specifically examines the same or substantially identical standard form contract indemnity clauses that also contain this critical phrase, and is incorporated herein by reference.

The trial court erred in refusing to apply the clear language of the indemnity agreement. In reaching its conclusion, the trial court cited a line of cases from other jurisdictions beginning with on a Minnesota case, Braegelmann v. Horizon Development Co., 371 N.W.2d 644 (Minn. Ct. App. 1985).

Braegelmann involved a factually distinguishable situation—an on-the-job personal injury claim. Braegelmann, 371 N.W.2d at 645. In such claims, the injured worker’s employer has a different duty than the general contractor. The employer has direct duties to its employees, whereas the general contractor has a general duty to provide a safe worksite. This is materially different from the construction defect litigation context.

In construction contracts, the general contractor contractually assumes responsibility for the construction of a particular project, and then subcontracts out various components of the work. South Carolina law allows negligence claims against contractors for construction defects in residential projects. Kennedy v. Columbia Lumber & Mfg. Co.,

Inc., 299 S.C. 335, 347, 384 S.E.2d 730, 738 (1989). The subcontractor's duty is to properly perform the actual installation work, whereas the general contractor's duty is to properly supervise and oversee the installation work. Thus, the general contractor's negligence is not independent of the subcontractor's, as in on-the-job injury claims.

Moreover, Braegelmann is not controlling because South Carolina law requires a court to harmonize all of the contract provisions: Stevens Aviation, Inc. v. DynCorp Intern. LLC, 407 S.C. 407, 416, 756 S.E.2d 148, 153 (2014); Richland Lexington Airport Dist. v. American Airlines, Inc., 306 F. Supp. 2d 548, 564 (D.S.C. 2002). In Braegelmann, the court simply disregarded the final phrase "regardless of whether it is caused in part by a party indemnified hereunder," finding it ambiguous without making any attempt to harmonize or reconcile its operation with the other terms of the agreement. Braegelmann, 371 N.W.2d at 646.

Braegelmann fails to give any consideration to a construct that effectuates the totality of the clause's provision: that out of possibly several liable parties, the indemnitor is only to pay that part of the total liability arising out of or resulting from its scope of work, plus that of the indemnitee. For example, if there are five parties found liable to a plaintiff, two of which included parties situated as Muhler and Superior, then Muhler would only be responsible for the portions paid by Muhler and Superior, but excluding all others. This interpretation gives effect to Article 12.1 in its entirety, while still meeting the clear and unequivocal standard. Camp recognizes in its analysis the "only to the extent caused by" language found in the AIA clause that mirrors the clause in Braegelmann, yet still concludes that the indemnitor was liable to the indemnitee for its concurrent negligence, noting that "[t]he document makes no sense if [the indemnity clause] has the meaning that

[respondents] ascribe to it.” Camp, at 1078. However, additionally, Article 12.1 of Muhler’s AGC subcontract does not use the language “*only to the extent caused*” (emphasis added) as found in the clause examined by Braegelmann, but instead states “to the extent caused *in whole or in part*” by the subcontractor’s negligence (emphasis added.)

Under South Carolina law, courts must attempt to construe every part of the contract as a whole, and may not point to a single phrase in finding an ambiguity. Jones v. Builders Inv. Group, LLC, 415 S.C. 321, 781 S.E.2d 737 (Ct. App. 2015). Therefore, Braegelmann and its progeny are not controlling, and the trial court erred in failing to give effect to this provision in the indemnity agreement.

When all of the provisions of the indemnity agreement are read together, the meaning is clear. The first key phrase, “arising out of or resulting from the performance of” Muhler’s work, broadly assumes a duty to indemnify for anything connected to Muhler’s scope of work under the Subcontract. The second key phrase, “to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of [Muhler and its sub-subcontractors]” narrows the scope of Muhler’s indemnification obligation to property damage caused by Muhler’s sole or concurrent negligence. This phrase does not address the question of indemnification for an indemnitee’s own negligence. However, the third phrase clarifies that when the negligence is concurrent, Muhler assumes a duty to indemnify for the concurrent negligence of an indemnitee.

When the indemnity agreement is read as a whole, it provides that Muhler’s duty to indemnify does not extend to damage caused by other subcontractors, such as the roofer, the stucco installer, or the brickmason. However, Muhler’s duty to indemnify encompasses

concurrent negligence, including Superior's own concurrent negligence, to the extent the alleged property damage was caused at least in part by Muhler's negligence.

When negligence is concurrent, the indemnity agreement does not call for a factual allocation—in such cases, Muhler agrees to indemnify in full. The “to the extent . . .” language comes into play, and fault must be allocated, only when indemnity is sought for damages associated with multiple trades. Since Superior separately settled claims arising from each scope of work, this clause does not arise any complications here because the settlement of claims arising from or related to the windows and doors has been segregated from all other scopes.

Therefore, the trial court erred in granting Muhler's motion for summary judgment and holding that the indemnity agreement in the Subcontract does not provide indemnification for Superior's alleged concurrent negligence. The Supreme Court of the United States has held that the language of this indemnity agreement satisfies the “clear and unequivocal” standard. Seckinger, 397 U.S. at 212 n.17. This Court should reverse the trial court's order on the ground that the clear and unambiguous language of the Subcontract, when read as a whole, provides that Muhler must indemnify Superior for Superior's own concurrent negligence as it relates to the windows and doors.

III. THE TRIAL COURT ERRED IN FAILING TO RECONCILE THE SUBCONTRACT WITH THE 2007 AGREEMENT AND CONSTRUE THEM IN CONJUNCTION. AS A MATTER OF LAW SUPERIOR'S RIGHT OF INDEMNITY AGAINST MUHLER PROVIDED BY THE TERMS OF THE SUBCONTRACT AND THE JUNE 2007 AGREEMENT, WHEN RECONCILED AND CONTRUED TOGETHER, MEET THE “CLEAR AND UNEQUIVOCAL” STANDARD UNDER SOUTH CAROLINA LAW IN ORDER FOR THE SCOPE OF SUPERIOR'S RIGHT OF INDEMNITY FROM MUHLER

TO INCLUDE ANY POSSIBLE CONCURRENT NEGLIGENCE OF SUPERIOR AS IT RELATES TO THE WINDOW AND DOOR CLAIMS.

Sections I and II of Superior's argument are incorporated herein to the extent not contrary to the foregoing. The trial court erred in its interpretation of the Subcontract indemnity clause by failing to give effect to all of the provisions of the indemnity agreement in the Subcontract and then further failing to reconcile its terms with June 2007 Agreement before applying the "clear and unequivocal" standard of Laurens Emerg. Med. Spec. v. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003). In so doing, the trial court improperly imposed a heightened level of scrutiny of standard form indemnity agreements which will render them nearly unenforceable in South Carolina, and the instant case as further modified by the June 2007 Agreement.

By definition, indemnity agreements transfer risk for consideration. Rock Hill Tel. Co., Inc. v. Globe Communications, Inc., 365 S.C. 385, 389, 611 S.E.2d 235, 237 (2005). Under South Carolina law, indemnification for the sole negligence of the indemnitee is barred by statute in construction contracts. S.C. Code Ann. § 32-2-10. On the other hand, contractual indemnity is unnecessary when the indemnitee is not negligent, because a right of equitable indemnity arises by operation of law. Id. Thus, one of the primary purposes of indemnity agreements is assign the risk in cases of concurrent negligence. Such indemnity agreements are allowed under South Carolina under an exception to Section 32-2-10. South Carolina courts have held that indemnity agreements providing for indemnity for damage caused "in whole or in part" by the indemnitor allow the indemnitee to recover, even if partly negligent. Campbell v. Beacon Mfg. Co., Inc., 313 S.C. 451, 438 S.E.2d 271 (Ct. App. 1993).

Under South Carolina law, the contract language establishes the relationship between the parties for purposes of contractual indemnification. Rock Hill, 363 S.C. at 389, 611 S.E.2d at 237. “A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally.” Campbell, 313 S.C. at 453, 438 S.E.2d at 272. Contracts are interpreted in accordance with the intent of the parties as expressed in the contract language. Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 497-98, 649 S.E.2d 494, 497-98 (Ct. App. 2007). Importantly, contracts must be read in such a way as to give effect to every part of the contract, and one part of a contract should not be read to annul another part of the same contract. Stevens Aviation, Inc. v. DynCorp Intern. LLC, 407 S.C. 407, 416, 756 S.E.2d 148, 153 (2014); Richland Lexington Airport Dist. v. American Airlines, Inc., 306 F. Supp. 2d 548, 564 (D.S.C. 2002). The “clear and unequivocal” standard of Laurens only applies to the more narrow issue of a party being able to be indemnified as to their concurrent negligence.

The trial court has not made a specific finding of negligence adverse to Muhler or Superior. The entire issue at hand is whether Superior can indemnified by Muhler via the contractual terms notwithstanding any possible concurrent negligence Superior may have in connection with the defects and damages pertaining to the windows and doors. Such a finding eliminates the need for trial on the issue of liability, and only a damages hearing would be required as between Muhler and Superior. It is undisputed in this matter that the “clear and unequivocal” standard of Laurens Emerg. Med. Spec. v. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003) applies to Superior’s right of contractual indemnity from Muhler in accordance with the Subcontract and the 2007 Agreement. The issue is whether the standard is met, and both Superior and Muhler agree that this

issue is dispositive of Superior's motion for partial summary judgment (as to liability) as well as the directly contrary argument advanced by Muhler in support of summary judgment. (R. p 1226; R. pp. 1231-1232) As noted above, there is no appellate authority in South Carolina construing the indemnity clause of the AGC 600 Subcontract in regards to the "clear and unequivocal" standard of Laurens for a party to be indemnified for its actual or possible concurrent negligence, nor as to the American Institute of Architects (AIA) forms A201 and A401 (1997 editions), which are extremely similar. The Court was presented extra jurisdictional authority from a query of all 50 states on this issue by both Superior and Muhler under the same standard and involving, at least in the large majority of instances, substantively identical indemnity language. While Superior argues that the Subcontract does permit Superior to be indemnified for its alleged concurrent negligence, ultimately the Subcontract and the 2007 Agreement must be reconciled or construed together, to determine all of the aspects of the total indemnity obligation are altered in the Subcontract by the Agreement. That process is not governed by the higher "clear and unequivocal" standard of Laurens, but the law of South Carolina construing contracts generally. Campbell, *supra*. After that step is performed, the "clear and unequivocal" analysis must be applied. Superior stressed that the two agreements must be construed together. (R. pp. 1073-1075) While Superior argues that the Subcontract does permit it to be indemnified for its possible concurrent negligence as set forth in Section II, the inquiry is not complete until the Subcontract is reconciled with the 2007 Agreement. Paragraph 1 of the 2007 Agreement explicitly states that the subcontract terms remain in place, "except to the extent specifically stated in the Agreement." (R.

pp. 943) As previously noted, Article 12.1 of the Subcontract and paragraph 11 of the 2007 Agreement are the only two indemnity clauses in existence that pertain to Muhler towards Superior.

Paragraph 11 of the 2007 Agreement alters the Subcontract terms and expands the scope of recovery to include the work itself, which was excluded in Article 12.1. While Article 12.1 of the Subcontract carved out claims for “the Subcontractor’s Work itself” from the scope of the indemnification, this directly conflicts with Paragraph 11 of the Agreement, which explicitly references the circumstance of claims by others that the window and/or doors are defectively installed or not complying with the original and amended contract documents (which would be the Work itself) and states that “all damages” are within the scope of the indemnity obligation. Furthermore, the language of “all damages” in Paragraph 11 also directly conflicts with the language of Article 12.1 that restrains the scope or recovery of those categories of damages “to the extent caused in whole or in any part by any negligent act or omission of the Subcontractor.” Therefore the provisions of Paragraph 11 prevail. This was the part of the Subcontract indemnity clause that the Court focused on as part of its conclusion that Muhler would not have to indemnify Superior for any concurrent negligence, which as discussed in Section II was in error.

Paragraph 11 of the 2007 Agreement expands the “trigger” of the obligation of indemnity from only “negligent acts or omissions...” per the Subcontract to a lower standard of “the event” of being sued by “a subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended contract documents, or are defectively installed.” (R. p. 384) The 2007 Agreement further

indicates that Superior is being indemnified from “*these allegations*” (emphasis added). An allegation is defined as: “1. The act of declaring something to be true. 2. something declared or asserted as a matter of fact, especially in a legal pleading; a party’s formal statement of a factual matter as being true or provable, without its yet having yet been proved.” Blacks Law Dictionary, seventh edition (2001). Whereas a formal finding of fact may be required to determine “the extent” of a claim “caused or alleged to be caused” under the Subcontract indemnity clause standing alone, an “event” of a lawsuit involving specific type of “allegations” does not. However, nonetheless Superior presented ample evidence to the trial court to demonstrate that the “allegations” were supported by extensive evidence to support Superior’s decision to settle the window and door claims. (R. pp. 346-356; R. p. 432) The parties of the 2007 Agreement are explicitly acknowledging in its recitals that there have been failing window performance tests. However, nothing in Paragraph 11 of the 2007 Agreement (or any other part of it) removes the critical language of Article 12.1 of the Subcontract stating that the obligation of indemnification was “*regardless of whether it is caused in part by a party indemnified hereunder.*” This language, as demonstrated below, has critical significance.

Since the foregoing discussion of appellate decisions is going to repeatedly reference the examination of one of the AGC and AIA standard form clauses, or one declared as substantially identical, the indemnity clauses of the AIA forms are additionally provided:

AIA A401-1997 §4.6 INDEMNIFICATION

§4.6.1 To the fullest extent permitted by law, the subcontractor shall indemnify and hold harmless the Owner, Contractor,

Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the subcontractor's Work under this subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

AIA A201-1997 §3.18 INDEMNIFICATION

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work under this subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 4.6.

In Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So.2d 1071, 28 Fla. Weekly D1412 (2003), an engineering firm (Camp) pursued contractual indemnity against a general contractor to recover after settling a claim by a subcontractor's injured employee. The contractor was subject to a contractual indemnity clause that

the court found to be “almost verbatim” to the AIA Standard Document A201 General Conditions, and stated that “[t]he United States Court has cited this language as being a paradigm of clarity in shifting the risk of a negligent indemnitee’s loss to the indemnitor. United States v. Seckinger, 397 U.S. 203, 212, 90 S.Ct. 880, 25 L.Ed.2d 224, n. 17 (1970)...[w]e conclude that this provision clearly expresses the parties’ intent that CDM may be indemnified by Howard even if CDM is sued for its own wrongful conduct.” *Id.*, at 1077.

Berry v. Orleans Parish School District School Board, 830So.2d 283 (2002), under a “unequivocal” standard, held a contractual indemnity clause almost identical to the AIA 401 indemnification clause was held to include the scope of any concurrent negligence in the requirement of the indemnitor to indemnify the indemnitee for the claims of a third party, which included claims asserted against both parties, as well as claims asserted solely against the indemnitor, but involved the same injury.

Cumberbatch v. Board of Trustees, Delaware Tech. & Comm. College, 382 A.2d 1383 (1978), involved a contractual indemnity claim by a contractor against a subcontractor regarding a third party personal injury claim on a construction site. Examining the AIA A401 §4.18 indemnification clause, the court determined under a clear and unequivocal standard that the contractor could be indemnified for its concurrent negligence, so long as the underlying injury was caused in whole or in part by the subcontractor. The Court further noted that the indemnification clause presented was “nearly identical” to the one examined in in a prior case reaching the same conclusion, Binswanger Glass Co. v. Beers Const. Co., 141 Ga.App. 715, 234 S.E.2d 363 (1977). Cumberbatch, at 1386. Binswanger, which involved an indemnity claim

by a contractor against a subcontractor for a third party wrongful death on a construction site, also followed the “clear and unequivocal” standard and concluded the indemnity clause was “sufficient to require indemnification where concurrent negligence exists.” Binswanger at 717.

Gunka v. Consolidated Papers, Inc. 179 Wis.2d 525, 508 N.W.2d 426 (1993) follows the same general factual construct as Binswanger and Cumberbatch for a third party construction site injury claim, and a contractual indemnity clause requiring indemnification from the contractor to the owner “from...all claims, damages, losses and expenses...arising out of or resulting from the performance of the work or services, provided that...[the claim, damage, loss or expense] is caused in whole or part by any negligent act or omission of the contractor...*regardless of whether or not it is caused in part by a party indemnified hereunder.* [Emphasis added.]” Gunka at 428. [Truncation and brackets in original] The trial court had returned a finding of concurrent negligence as to the contractor who employed Gunka as well as the property owner seeking indemnification. The Wisconsin Court of Appeals affirmed the trial court’s ruling that the indemnification clause required the contractor to indemnify the owner for the liability incurred from the owner’s concurrent negligence.

The State of Iowa has also recognized the “clear and unequivocal” standard, and has found indemnity clauses extremely similar to the AGC form 600 and AIA A201 to permit a party to be indemnified for their concurrent negligence. See Payne Plumbing & Heating Co., Inc. v Bob McKiness Excavating and Grading, Inc., 382 N.W.2d 156 (8th Cir. (Iowa) 1986), affirmed by Thornton v. Guthrie County Rural Elec. Co-op Ass 'n, 467 N.W.2d 574, 576-578 (1991). The Payne court construed the following clause:

“The Subcontractor agrees to indemnify and save harmless the Contractor from any and all loss or damage (including, without limiting the generality of the foregoing, legal fees and disbursements paid or incurred by the Contractor to enforce the provisions of this paragraph), occasioned wholly or in part by any negligent act or omission of the Subcontractor or that of anyone directly or indirectly employed by them or performing the work of this Subcontract under the direction of the Subcontractor or anyone for whose acts any of them may be liable in carrying out the provisions of the general contract and of this Subcontract *regardless of whether or not it is caused in part by a party indemnified hereunder.*”

Payne at 160, emphasis in original. Thornton, examining the following language, found it to nearly the same as Payne's, and reached the same conclusion that the clear and unequivocal standard was met:

“To the fullest extent permitted by law, bidder [B & L] shall indemnify and hold harmless owner [the co-op] and engineer and their consultants, agents and employees from and against all claims, damages, losses and expenses, including but not limited to, attorneys fees whether incurred prior to or during litigation, administrative hearings, arbitration, or bankruptcy proceedings, including trial and appellate levels, arising out of or resulting from the performance of work, provided that any such claim, damage, loss, or expense is either (1) caused in whole or in part by any negligent act or omission of the bidder, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, *regardless of whether or not it is caused in part by a party indemnified hereunder....*”

Thorton, at 576. [Emphasis added.] In addition to the decisions noted above, the same conclusion has been reached in several additional reported decisions over the substantially identical language, and focusing on the same key “regardless” phrase : Oster v. Medtronic, Inc. 428 N.W.2d 116, 118 (1988), McBro, Inc. v. M&M Glass Company, 611 So.2d 283 (1992), Simon Property Group, L.P. v. Brandt Const. Inc., 830 N.E.2d 981, 994-995 (Ct. App. Ind. 2005), Robinson v. A.Z. Shmina & Sons Co., 96 Mich. App. 644, 293 N.W.2d 661 (Mich. Ct. App. 1980), Wallace v. Slidell Memorial Hosp., 509 So.2d 69

(La. App. 1987), Washington Elementary School Dist, No. 6 v. Baglino Corp., 169 Ariz. 58, 817 P.2d 3, 9 (Ariz. Sup. Ct. 1991).

CONCLUSION

The language of Subcontract and the 2007 Agreement, when reconciled and construed together, clearly and unequivocally require Muhler to indemnify Superior even if Superior was found to be concurrently negligent as it relates to the window and door claims referenced above. The obligation of indemnity per the 2007 Agreement is not triggered or predicated upon a finding that Muhler or its subcontractors were negligent, but rather instead the event of Superior being sued by subsequent owners directing specific allegations against the windows and doors, which indisputably occurred. It is unnecessary for Superior to specifically establish the negligence of Muhler in trial, or for there to be any finding of apportionment of fault as to Muhler and Superior. Muhler is liable under the contractual terms of the Subcontract and the 2007 Agreement to indemnify Superior for full sums specifically paid to settle the window and door claims made against Superior by Plaintiffs, as well as the costs to defend those claims, plus their attorneys' fees and costs as the prevailing party per paragraph 20 of the 2007 Agreement.



Christopher A. Majure, Esquire
Timothy J. Newton, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1210/1240
cmajure@murphygrantland.com
tnewton@murphygrantland.com
Attorneys for Appellant

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Consolidated Case No. 2010-CP-10-2271

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SC Court of Appeals

Superior Construction Corporation APPELLANT,

v.

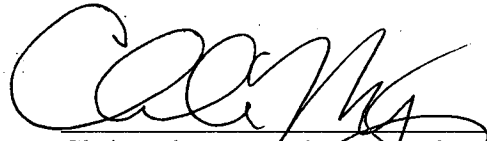
The Muhler Company, Inc. RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant, designation of Matter to be included in the Record on Appeal and Certificate of Counsel on the Respondent by depositing a copy of it in the United States mail, postage prepaid, on December 12, 2016, addressed to the counsel of record at the following address:

Counsel of Record

P. Gunner Nistad, Esquire
Gallivan White & Boyd, PA
40 Calhoun Street, Suite 315
Charleston, SC 29401



Christopher A. Majure, Esquire
Timothy J. Newton, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1210/1240
cmajure@murphygrantland.com
Attorneys for Appellant

Columbia, South Carolina
December 12, 2016