IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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 Corporation .....APPELLANT,
And
The Muhler Company, Inc.....RESPONDENT.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Appellant Superior Construction Corporation (Superior) addresses the Initial Brief of Respondent The Muhler Company Inc. (Muhler) as follows, generally in the order of relevant items as presented by Muhler.

I. Regarding Issues of Appeal

Muhler correctly states that the sole issue on appeal (as more specifically stated by each party's Statements of Issues on Appeal) is the correct interpretation of the Subcontract and the 2007 Agreement, although Superior and Muhler obviously disagree as to the trial court's ultimate disposition in its appealed Order. Muhler distracts from the issues identified on appeal by referring to the denial of Superior's Motion for Partial Summary Judgment as being not proper for appeal. Superior stated before the trial court that Muhler and Superior's Motions were the contrapositive of each other as it regards the issue of indemnification in this appeal, and argued that by granting one party's motion, the trial court must therefore deny the other. *See* Transcript of Record of July 28-29, 2014, p. 53. Therefore under these specific circumstances, it is proper for Superior to include the denial of its motion for partial summary judgment as one of the issues on appeal, although it may possibly be deemed redundant.

II. Regarding Muhler's Statement of Facts

Muhler's Statement of Facts contain a number of assertions regarding its role and responsibility in the development of installation procedures (and whether or not they were substantially followed) that attempts to downplay if not deny the fact that Muhler was involved in the production of shop drawings for the window installation. They also attempt to cherry-pick items of witness testimony to attempt to argue that they complied with the installation instructions, despite the fact that experts on behalf of Superior have exhaustively shown in extensive reports and deposition testimony that the windows failed to perform in accordance with the building code,

the contract documents, and were improperly installed in numerous respects. For a non-exhaustive demonstration of this evidence, *See* Superior Construction Corp.'s Memorandum of Law in Support of Partial Summary Judgment Against The Muhler Company, Inc., pp.14-24. There is also copious documentation and testimony of the case to show that the windows themselves were defectively manufactured. Muhler's own expert, Ken Lies, has admitted to the failure of the windows to perform in accordance with these standards in numerous instances, including normal prevailing weather conditions, and has also suggested that certain critical aspects of the windows, such as the operator arm hardware, was insufficient to bear the weight of the windows. *See* Superior Construction Corp.'s Supplement to Its Memorandum of Law in Support of Partial Summary Judgment Against The Muhler Company, Inc. However, while Superior can easily cite even more evidence supporting these contentions, all of these items of dispute have no bearing upon the issues of the appeal. While both Superior and Muhler presented evidence to the trial court in their respective briefs and oral argument that could support a finding that both parties bore some personal negligence – with disputed degrees of significance and severity, the fact remains that the trial court's Order that is the subject of appeal did not make any formal finding of negligence on the part of Muhler or Superior. Superior specifically rejects the characterization of Muhler that Superior, Sutton Kennerly, and Estates "came up with" the design for the window installation without the active involvement of Muhler. In fact, Superior contends that Muhler was the critical actor regarding communications and coordination for the development of the window installation procedures, and in numerous instances Muhler was directly communicating with the architect of record and Weather Shield without the involvement of Superior. However, despite Muhler's attempt to frame the facts to suit its inaccurate narrative, the issues on appeal are strictly limited to the legal interpretation of the Subcontract and the 2007 Agreement.

Muhler also asserts in its Statement of Facts that Superior "did not satisfy any outstanding balances due to Muhler related to the subcontract" and attempts to construe this as a breach of the contract by Superior, which is flatly rejected. Muhler fails to mention that the Subcontract had specific provisions permitting Superior to withhold sums subject to dispute or claims by the Owner or third parties, which was the case in this matter. These provisions are in Article 5.3.3A and Article 10.1.1 of the Subcontract. Superior properly rebutted these arguments at oral argument and in brief. *See* Transcript of Record of July 28-19, 2014, p. 22-23. Again, this is an issue that has no bearing upon the issues raised on appeal, and the trial court's Order did not recognize Muhler's argument that the non-payment of disputed sums constituted a breach that barred Superior from recovery. Having addressed Muhler's Statement of Facts, Superior will now proceed to the legal issues. Superior makes no admission of Muhler's contentions regarding these aforementioned issues of fact.

III. Superior Properly Raised and Argued the Reconciliation of the Subcontract and the 2007 Agreement.

Muhler claims that Superior did not raise before the trial court the issue of construing the Subcontract and the 2007 Agreement together, in conjunction – or in other words reconciling the two instruments. This is comprehensively incorrect. While Superior argued that the Subcontract by itself provided for the indemnification for concurrent negligence (Id., at 23-24), it also argued that the final analysis must reconcile the Subcontract with the 2007 Agreement. At the oral argument of July 28-29, 2015, Superior argued that the 2007 agreement "by its terms expands upon the obligations of the subcontract. It expands upon items related to what type of cures of fixes will be provided, touches upon payment issues. It touches upon indemnification. It expands the potential recovery under indemnification that initially existed under the subcontract. So the two instruments go together as to the Muhler Company." *See* Transcript of Record of July 28-19,

2014, p. 12. Superior further argued "that the 2007 Agreement and the subcontract *in conjunction* provided the relief it [Superior] seeks." Id. At 14. [Emphasis added.] Superior stated that "Muhler's liability is predicated on both the subcontract and the 2007 agreement." Id. At 49. Superior further stated "with Muhler it's a two-fold analysis because we have the contract and the agreement." Id. p. 206. "Muhler's liability is predicated on both the subcontract and the 2007 agreement." Id. at 49. *See also* Transcript of Record of December 12, 2015, pp. 28-35, 38-39, 47-49. Superior properly raised this issue at oral argument and in its Initial brief, and preserved it to raise in its Motion to Reconsider, which set forth the particulars of the reconciliation in the Motion, and are incorporated and expounded upon in Superior's Initial Brief at Section III.

Muhler further make a bizarre contradictory statement in asserting at page 20 of its Initial Brief that "[i]n response to Superior's argument that it [the trial court] did not reconcile the two agreements, the circuit court explained that it spent 'quite a bit of time examining these two contracts' in issuing its ruling on the parties' motions,"[1] while at the same time asserting in footnote 4 of the Brief that "[b]ecause this issue was not properly raised... the October 4, 2014 Order does not address this issue." Muhler's Initial Brief, p. 20. So it appears Muhler is claiming both that the issue was and was not raised. Despite this, the Order of October 4th nonetheless analyzes the two instruments separately from each other, makes no specific statement that it attempted to reconcile the two, and the fact that the trial court indicated at the hearing on the Motion to Reconsider that it spent "quite a bit of time examining these two contracts" is still not a statement that it attempted to reconcile the two instruments. In fact, the trial court's full statement is: "I recall spending quite a bit of time examining these two contracts, *as I'll have to do it again,*

[1] Muhler cited this statement as at p. 28 of the Transcript of Hearing on Superior's Motion to Reconsider, which is the Transcript of December 4, 2015. This citation is actually found at p. 51., lines 16-18.

apparently." Transcript of Record of December 4, 2015, p.51. [Emphasis Added]. The same record also states:

> MR. MAJURE: ....But still, the analysis is that the two agreements must be reconciled and the end product then examined to see if that meets the clear and unequivocal test.
>
> THE COURT: And you're saying I didn't do that.
>
> MR. MAJURE: Yes.
>
> THE COURT: I did not reconcile it.

Id., at p. 48. The Court's Order Denying Superior's Motion to Reconsider makes no statement that it reconciled the Subcontract and the 2007 Agreement – only that it "finds no error of law or facts in its original Order." The Court makes no explicit statement in Transcript of Record for the Motion to Reconsider that it did in fact perform such reconciliation, and in fact indicates the direct opposite, as shown above.

Muhler provides no rebuttal to Superior's analysis of the reconciliation of the Subcontract indemnity clause and the 2007 Agreement indemnity clause in Section III of Superior's Initial Brief, other than to disingenuously claim that "section 11 of the 2007 Agreement does not reference or even purport to modify Paragraph 12.1 of the Subcontract," and therefore the two instruments must be treated separately. While Section 11 does not explicitly reference Paragraph 12.1 of the Subcontract by name, the fact remains that Paragraph 12.1 of the Subcontract is the only contractual indemnity clause in the only subcontract existing between Superior and Muhler prior to the 2007 Agreement, and Section 11 of the Agreement is the only indemnity clause in the Agreement that is directed towards Muhler. These two clauses are the only indemnity clauses in existence in this matter that pertain to Muhler towards Superior. The 2007 Agreement explicitly states that it does not amended the parties' contractual rights and responsibilities "*except to the extent specifically stated in the Agreement.*" (2007 Agreement, p. 1.) Therefore the Subcontract and the 2007 Agreement are directly intertwined; one must resort to the Agreement to ascertain

the full scope of obligations of the parties under the Subcontract. Despite the fact that the Agreement does not list anywhere in it the "chapter and verse" of the specific sections of the Subcontract that it is modifying, the organization of the provisions of the Agreement corresponds to numerous substantive provision of the Subcontract in an organized fashion. The Agreement deals with several aspects of testing and inspection of work (par. 1, 5), parties of the contract (par. 4), warranty obligations & modifications (par. 6), time of completion/ schedule of work (par. 6), performance of the scope of work & workmanship for windows & doors (par. 7 & 8), repair obligations (par. 9), payment (par. 10), indemnity (par. 11), arbitration (par. 17), dispute resolution (par. 18 & 20), and choice of law (par. 26). All of these important contractual elements of the Agreement have corresponding sections in the Subcontract that deal with all of these elements. *See* Subcontract, Table of Contents. Muhler itself craves reference to the fact that paragraph 10 of the Agreement is linked to the subcontract in regards to the disputed payment obligation, despite the fact that paragraph 10 does not explicitly identify the specific payment section of the Subcontract: "[t]he 2007 Agreement required, among other things, that Superior satisfy any outstanding balances due to Muhler related to the subcontract. Superior has not complied with that provision of the contract." Muhler Initial Brief, p. 11. The indemnity clause of paragraph 11 of the Agreement clearly modifies the indemnity clause of the Subcontract.

IV. Campbell v. Beacon Manufacturing Co. Supports Superior's Argument.

Muhler also errs in claiming that Campbell v. Beacon Manufacturing Co., 313 S.C. 451, 438 S.E. 2d 271 (Ct. App. 1991) "does not support Superior's argument." Superior never argued that Campbell represented a departure from prior precedent, however a clarification is warranted that Muhler did not directly raise. Superior argued that "[i]ndemnity agreements providing indemnification *for concurrent negligence* are subject to the general rules of contract construction," citing Campbell, 313 S.C. at 453, 438 S.E.2d at 272. "A contract of indemnity will

be construed in accordance with the rules for the construction of contracts generally." Federal Pacific Electric v. Carolina Prod. Enters., 298 S.C. 23, 378 S.E.2d 56 (Ct.App.1989)." Muhler's criticism appears to be directed to the analysis of the particular phrase "in whole or in part" and noting that "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." (Initial Brief, p. 24). Muhler claims in footnote 3 that "[t]he Court did not make such a holding." Initial Brief of Respondent The Muhler Company. Inc., p. 18. Muhler is wrong; the language of Campbell states:

> Assuming, however, that Beacon's negligence was in issue, summary judgment was still appropriate. In the contract, Spartan agreed to indemnify Beacon for damages arising "in whole or in part" from the acts of its employees. Even if it is conceded Beacon's own negligence was a concurring cause of the damage, it remains undisputed that the damage arose "in part" from the employee's act of setting the fire. Thus, under the clear terms of the contract, Spartan is obligated to indemnify Beacon.

Campbell, 313 S.C. at 455, 478 S.E.2d at 273.

The indemnity agreement at issue is contained in a standard form contract by the Associated General Contractors of America. Under Muhler's argument, indemnity agreements in standard contracts have little to no effect, because equitable indemnification is available when the indemnitee is without fault. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct. App. 1999). The whole point of the indemnity agreement is to allocate fault when negligence is concurrent.

Muhler's argument also violates the rule that all provisions in a contract must be given effect. When construing a contract, a court must give effect to all contract provisions, if practical. M & M Group, Inc. v. Holmes, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008); see also Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007) ("Documents will be interpreted so as to give effect to all of their provisions, if practical.") (citation omitted); Burch v. S.C. Cotton Growers Co-op, Ass'n, 181 S.C. 295, ___, 187

S.E. 422, 424 (1936) (same); Reynolds v. Stockman, 109 S.C. 112, ___, 95 S.E. 341, 342 (1918) (same). A contract must be read as a whole, and an ambiguity cannot be created by pointing to an isolated portion of the contract. Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008).

In the indemnity agreement, Muhler promises to indemnify Superior for property damage caused by Muhler's work "to the extent caused . . . in whole or in any part by any negligent act or omission of [Muhler]." (Superior's Mem. in sup. of its Mot. for Partial Summ. J., filed May 16, 2014, Exh. 1.) This clause limits Muhler's indemnification responsibility to situations in which Muhler is at least partially negligent (*i.e.*, concurrent negligence). Under this provision, Muhler owes indemnification if its negligence contributed to the damage, regardless of which other contractor may have been concurrently negligent. This phrase alone does not address the question of whether Muhler owes indemnification if Superior's negligence contributes to the alleged damage. However, the next sentence, "regardless of whether it is caused in part by a party indemnified hereunder," removes any doubt. Superior is "a party indemnified hereunder." Accordingly, Muhler owes indemnification if it is concurrently negligent, even if Superior's own negligence contributed to the damage. Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 So. 2d 1072, 1077 (Fla. Dist. Ct. App. 2003). This language is clear an unequivocal, satisfying the more stringent standard even if it is applies. Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111–12, 584 S.E.2d 375, 379 (2003).

V. There is not a "Uniform" Interpretation of the Subcontract Indemnity Clause in Outside Authority; It is Actually Almost Evenly Divided with a Narrow Majority Supporting Superior's Interpretation.

Muhler, craving reference to the language of the October 6, 2014 Order without citation, states: "[c]ourts *uniformly* interpret this language [of the Subcontract indemnification clause] as not providing indemnification for an indemnitee's own negligence." Initial Brief of the Muhler

Company, Inc., p. 22. [Emphasis added.] Superior has already addressed the fact that this is simply not the case – the interpretation of the clause (in standard form) is nowhere near "uniform.", Superior incorporates pages 3-6 of Superior's Motion to Reconsider, as well as Section II.C and the cases cited in pages 35-39 of Section III of Superior's Initial Brief in rebuttal to Muhler's contention. Further, Muhler also makes a blanket claim that the cases cited by Superior regarding the interpretation of the subcontract indemnity language are not substantially similar to Paragraph 12.1 of the Subcontract. Except for the case of Camp, 853 So. 2d 1072, Muhler provides no further specific explanation of how the cases cited by Superior are materially dissimilar. Superior provided the language of the specific standard form indemnity clauses and noted where the authority cited by Muhler states for itself that it is substantially similar or almost identical to the form clauses. Therefore, Muhler's argument is unsupported and should be disregarded. Furthermore, because the ultimate resolution of Muhler's indemnity obligation for Superior's specific claims in this matter requires the reconciliation of the Subcontract with the 2007 Agreement under ordinary rules of contract interpretation, and then the "clear and unequivocal" analysis of Laurens EMS, 355 S.C. 104, 584 S.E.2d 375, Muhler's contentions here don't reach the end result it desires. In addition, as to the case of Cabo Construction Inc. v. R S Clark Construction, Inc., 227 S.W.3d 314 (Tex. App. 2007) cited by Muhler, the indemnity provision in question utilized the clause "*but only to the extent caused by* the negligent acts or omissions of the Subcontractor," which is substantially different to the language of the Subcontract indemnity clause which states "to the extent caused in whole or in any part" – which as discussed earlier herein and in Section II.B.3 of Superior's initial brief-- Campbell, 313 S.C. 451, 438 S.E. 2d 271, recognized this language to encompass indemnification of a indemnitee's concurrent negligence. Aside from that, the reconciliation of the Subcontract with the 2007 Agreement as set forth in Section III of Superior's Initial Brief removes all doubt that Cabo could otherwise create.

Muhler's citation of Frank v. MSI Constr. Mgr. Inc., 527 N.W.2d 79 is actually MSI Construction Mgr. Inc. v. Corvo Iron Works, Inc. If the latter is the intended citation, this case does support Muhler's position on the interpretation of the Subcontract language.

VI. The Trial Court's Determination that the Term "Unconditional" in the 2007 Agreement is Overly Broad, and Thus Unconscionable, and Additionally Ambiguous as to the Duty of Indemnification was in Error.

Muhler raises the issue of the trial court's discussion of the term "unconditionally indemnify" found within Par. 11 of the Agreement, and claims that Superior did not appeal the trial court's determination in this regard, and that accordingly "the 2007 Agreement is unconscionably broad and Superior is not entitled to indemnity for its own negligence." First, Muhler misconstrues the trial court's finding by apparently referring to the 2007 Agreement in its entirety – the October 6, 2014 Order states "*[to] the extent that the provisions of* the 2007 Agreement purport to indemnify Superior and C&C 'unconditionally' they are unconscionably broad." The Court limited its treatment of the term "unconscionable" to the issue of indemnification for concurrent negligence, finding it to be ambiguous. October 6, 2014 Order, p.11. Secondly, this issue is well within the confines of Superior's Statement of Issues on Appeal, particularly Issue Number Four, Five, and Six. Superior also addressed the particular term at oral argument in several respects. Superior argued the term protected Superior in rebuttal to Muhler's claim that the non-payment of the disputed contract balance. Transcript of Record of July 28-29, 2014, pg. 22, line 21 through p.23, line 14. Superior argued in rebuttal to Muhler's claim that the term was ambiguous. Id., at 85-86. Issue Number Four furthermore encompasses the trial court's entire analysis for the Agreement (non-exclusively), to include unconscionability.

The word "unconditional" as a term included in an indemnification clause does not appear to have any specific treatment in South Carolina law, although there are other terms and clauses examined in indemnity clauses which the Court has declared as "unconditional" in choosing to

enforce various contractual obligations. Campbell, *supra*, described a sub-phrase in the indemnity clause at issue before the court as "comprehensive and unconditional" in deciding to uphold the obligation of indemnity. Campbell, 313 S.C. at 455, 478 S.E.2d at 273. Given the Court enforced the indemnity in Campbell with such a description, then it seriously undermines the argument of unconscionability or ambiguity of the term, at least in a contractual indemnity clause. The word is defined by Black's Law Dictionary (seventh edition) as "not limited by a condition; not depending upon an uncertain event or contingency." The internet website www.thesaurus.com [which resorts to Roget's 21rst Century Thesaurus, Third Edition (2013)] lists synonyms for the word "unconditional" which include "definite, explicit, full, unlimited, unqualified, unrestricted, unmistakable" and "*unequivocal.*" {Emphasis added.] There is some authority that has used the terms "unequivocal" and "unconditional" together in a manner that appears to also treat the terms synonymously. *See* Sossamon v. Littlejohn, 241 S.C. 478, 129 S.E.2d 124 (1963). The trial court's resort to Fisher to declare the use of "unconditional" as unconscionable is also not supported and directly contradicted by authority dealing with facts far more similar to the instant case. Fisher is distinguishable as involving an exculpatory release in connection with a serious personal injury claim which extended the protection of the release to purportedly anyone in a restricted area, not a contractual indemnity claim in a commercial relationship between two sophisticated parties, negotiating via counsel, in which the persons to who the obligation was very narrowly defined as the case here. This distinction was recognized explicitly in rebuttal to Fisher in Keith v. River Consulting Inc., 365 S.C. 500, 618 S.E.2d 302 (2005):

> As an alternative basis for granting Hightower Construction's motion for summary judgment, the circuit court found that the disputed indemnification clause was overly broad and thus void as against public policy. We disagree.
>
> The circuit court based its finding on this court's recent decision in *Fisher v. Stevens*, 355 S.C. 290, 584 S.E.2d 149 (Ct.App. 2003). In Fisher we held that an exculpatory clause, once determined overly broad, was void as against public

> policy. The exculpatory clause at issue in *Fisher* relieved "any persons in any restricted area" from all liability. *Id.* at 296, 584 S.E.2d at 152. Because the clause relieved all potential defendants from any and all liability, no matter the circumstances giving rise to the injury, we concluded the clause was overly broad as a matter of law. *Id.* at 297, 584 S.E.2d at 153 (citing a Wisconsin Supreme Court case interpreting a exculpatory clause which likewise barred an injured party from any legal recourse for damages arising from his injuries).
>
> In the present case, the clause at issue merely calls for the indemnification of a potential defendant by another potential defendant for liability arising from a plaintiff's injuries. Furthermore, the contractual indemnification is limited to those injuries arising from the use and operation of the leased equipment while it is under the lessee's "exclusive jurisdiction, supervision, and control." Recognizing the freedom of sophisticated parties to contract as they choose, we conclude the clause, though wide in scope, is not so overly broad as to render the clause void as against public policy.

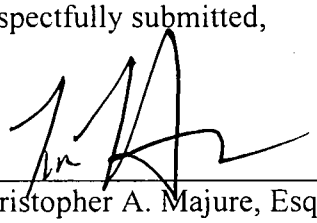
Keith, at 508-509. Superior's claim against Muhler is similarly limited in certain respects, despite the fact that the obligation is unconditional and includes any alleged concurrent negligence of Superior. Muhler's indemnity obligation via the Subcontract and the 2007 Agreement is first of all confined to Superior and Concord & Cumberland, LLC, not "any" and/or "all persons." The particular claim must arise from a particular subset of persons - not "all persons" but instead "subsequent owners"- making a specific type of claim – "windows and/or doors [that] do not comply with the original and amended contract documents, or are defectively installed." 2007 Agreement, Par. 11. If the claim did not fit these parameters, then the 2007 Agreement would not apply and the original Subcontract would govern undisturbed. The trial court's reference to Fisher v. Stevens to decide that "unconditional" was unconscionable and ambiguous was therefore unsupported and improper, and in error.

VII. Conclusion.

The Subcontract itself permits Superior to be indemnified for its alleged concurrent negligence, and the majority of extra-jurisdictional authority supports this conclusion. However, the final analysis of the entire scope and nature of Muhler's indemnity obligation towards Superior

requires the Subcontract to be reconciled with the 2007 Agreement, with emphasis on the sole indemnity clauses in each instrument dealing with Muhler's obligation of indemnity towards Superior. When reconciled, the fact that the obligation to indemnify Superior for any alleged concurrent negligence is only further expounded upon, and certain limitations on the remaining scope of the indemnity and what triggers the obligation in the Subcontract are drastically lowered and even eliminated. Further, the specific aspects of the language Subcontract raised by Muhler's argument in opposition to Superior's position are either eliminated or altered by the 2007 Agreement to eliminate all doubt. The unconditional obligation of Muhler is this regard, as set forth in the Subcontract and the 2007 Agreement is not ambiguous but instead unlimited, unqualified, unrestricted, and unequivocal. The fact that the obligation is unconditional is not unconscionable, especially as between sophisticated commercial entities negotiating via retained counsel. Therefore, Superior's right of contractual indemnity via Muhler includes any alleged concurrent negligence of Superior, and Muhler's obligation to perform said indemnity is fully invoked.

Respectfully submitted,



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October 24, 2016

CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief complies with Rule 211(b), SCACR.

October 24, 2016

Timothy J. Newton, Esquire

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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The Muhler Company, Inc.....RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant and Certificate of Counsel on the Respondent by depositing a copy of it in the United States mail, postage prepaid, on October 24, 2016, addressed to the counsel of record at the following address:

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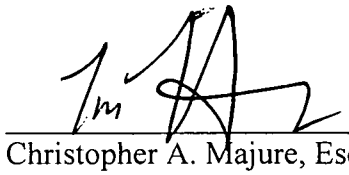

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October 24, 2016

HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
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Re: Superior Const. Corp. v. The Muhler Co., Inc.
Appellate Case No. 2016-000076
Our File No.: 4200-0114

Dear Ms. Kitchings:

Enclosed please find enclosed the original and one (1) copy of the following documents: Reply Brief of Appellant, Certificate of Counsel and Proof of Service in this matter.

Please file the original and return the filed-stamped copies to us via our courier.

Thank you for your assistance.

With kind regards,

Timothy J. Newton, Esquire

/ppr
Enclosure

cc: Gunnar Nistad, Esquire