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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

The Honorable Clifton Newman, Judicial Circuit Court Judge
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 Kirkpatrick, And Paul A. Brim, And Fred Rappaport and Joyce Rappaport, And Thomas 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 is the .....APPELLANT,
And
The Muhler Company, Inc. is the.....RESPONDENT.

FINAL BRIEF OF RESPONDENT THE MUHLER COMPANY, INC.

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II. DID THE CIRCUIT COURT CORRECTLY DETERMINE THE SCOPE OF THE INDEMNIFICATION PROVISION IN THE 2007 AGREEMENT WAS LIMITED TO INDEMNIFICATION FOR ONLY MUHLER'S ALLEGED NEGLIGENCE?

INTRODUCTION

The sole issue in this appeal is whether the circuit court properly determined that the indemnification provisions contained in two agreements between Appellant Superior Construction Corporation ("Superior") and Respondent The Muhler Company, Inc. ("Muhler") did not create a duty on the part of Muhler to indemnify Superior for Superior's negligence. This case involves several consolidated lawsuits involving allegations that a condominium development known as the Concord & Cumberland Condominiums ("Concord & Cumberland Project" or "Project") located in Charleston County, South Carolina was negligently designed and constructed. After the individual condominium owners and the association brought suit against the general contractor, Superior, and a number of other parties, Superior sued its subcontractors on the Project, including Muhler, seeking indemnity. While numerous contractors and construction defects were implicated in the underlying lawsuit, this instant appeal involves only Muhler's scope of work on the Project—the installation and supply of windows and doors.

In simplest terms, this case is a general contractor's failed attempt to seek indemnification from its subcontractors for improper work that the general contractor should have – and would have – discovered if it had properly supervised its job site. This case is also an attempt to have those subcontractors indemnify it for work falling outside of the subcontractors' scope of work and falling within the general contractor's scope of work. Initially, Superior contended that it was entitled to both contractual and equitable indemnification from Muhler. However, no doubt after recognizing that it is certainly not without fault, Superior conceded that it is not entitled to equitable indemnification.

Therefore, the only issue in this appeal is whether the circuit court properly determined that Muhler has no duty to provide contractual indemnification to Superior for Superior's own negligence.

The trial court correctly determined that the indemnity provisions in the agreements did not clearly and unequivocally provide that Muhler agreed to indemnify Superior for Superior's negligence. Because Superior has failed to identify any basis upon which this Court should reverse the circuit court's grant of summary judgment on this issue in Muhler's favor, the circuit court's determination should be affirmed. Furthermore, while the denial of Superior's own motion for partial summary judgment is not a proper subject of this appeal, the trial court correctly denied Superior's motion because the scope of the indemnification agreements did not extend to Superior's negligence. *See Fuller v. Blanchard*, 358 S.C. 536, 546, 595 S.E.2d 831, 836, n. 21 (Ct. App. 2004) (refusing to hear appeal of denial of summary judgment "[b]ecause the granting of a motion for summary judgment is appealable while the denial of a motion for summary judgment is not . . . .") *and Hedgepath v. AT&T*, 348 S.C. 340, 366, 559 S.E.2d 327, 341 (Ct. App. 2001) ("Because of the dissonance in the precedent in regard to the appealability of the denial of a motion for summary judgment, we decline to address the issue on the merits."). Therefore, the circuit court's decision should be affirmed.

STATEMENT OF THE CASE

This action originated with the March 19, 2010 filing of a Complaint by plaintiff Concord and Cumberland Horizontal Property Regime ("Concord and Cumberland") against a number of defendants including the general contractor, Superior; the developers, Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, and Estates, Inc.; the architect, J. Davis Architects, PLLC ("J. Davis"); and the window manufacturer, Weather Shield, Mfg, Inc. ("Weather Shield"). Concord and Cumberland brought suit seeking to have certain provisions of the Master Deed declared unenforceable and invalid as well as seeking to recover damages for negligence, negligence per se, breach of implied warranty of workmanlike services, and breach of express warranty, among other things.

On May 27, 2010, Superior filed its Answer to the Complaint, as well as a Third-Party Complaint that added Muhler and a number of other subcontractors as third-party defendants who worked on the Concord & Cumberland Project. Specifically, Superior included causes of action for contractual indemnity, equitable indemnity, breach of contract (to include performance bond claims), and breach of express and implied warranties against the third-party defendants, including Muhler. Muhler answered Superior's Third-Party Complaint on August 11, 2010.

On June 1, 2012, Concord and Cumberland filed a Second Amended Complaint asserting direct claims for negligence and breach of implied warranty of workmanlike service against a number of subcontractors, including Muhler. In addition, Concord and Cumberland also included causes of action for breach of express warranties, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular

purpose, negligence and strict liability/products liability against Weather Shield and Muhler with regard to the design, manufacture, marketing, distribution, sale, and/or placement of the windows and doors into the stream of commerce. Also, Concord and Cumberland included direct causes of action against Muhler and another subcontractor, In the Wind, Inc. ("ITW"), for negligence and breach of implied warranty of workmanlike service with regard to the installation of the windows and doors.

On June 19, 2012, Superior filed its Answer to the Second Amended Complaint and included Crossclaims against the named defendants, including Muhler. The Crossclaims against Muhler were for contractual indemnity, equitable indemnity, breach of contract (to include performance bond claims), and breach of express and implied warranties. Muhler filed its Answer to the Second Amended Complaint and Reply to Superior's Crossclaims on August 22, 2012.

On April 19, 2013, Concord and Cumberland, as well as the plaintiffs in several other lawsuits arising out of the construction of the Concord & Cumberland Project, entered into a Partial Settlement and Release agreement with Superior wherein all plaintiffs released the claims related to the windows and doors. The partial settlement and release agreement specifically excluded any and all claims against J. Davis, Muhler, Weather Shield, and Watts Builders, Inc. ("Watts").

On July 25, 2013, Muhler reached an agreement to settle with all plaintiffs, and they executed a Receipt and General Release. The release specifically excluded several claims, including all indemnity and/or contract claims by Superior or Concord & Cumberland, LLC against J. Davis, Weather Shield, and Muhler and all claims by Muhler against Superior and Concord & Cumberland, LLC.

On August 27, 2013, Superior filed a Motion for Summary Judgment against Muhler. On October 17, 2013, Muhler filed a Notice of Motion and Motion for Summary Judgment seeking an order from the Court granting Muhler summary judgment on all of Superior's crossclaims alleged against Muhler. On May 16, 2014, Superior filed a Memorandum of Law in Support of Its Motion for Partial Summary Judgment Against Muhler. On July 15, 2014, Muhler filed an Amended Notice of Motion and Motion for Partial Summary Judgment and Memorandum of Law in Support of Its Motion for Partial Summary Judgement. On July 25, 2014, Muhler filed its Memorandum in Opposition to Motion for Partial Summary Judgment filed by Superior.

On July 28, 2014, the circuit court began oral arguments on all of the motions pending in the case at that time, including the motions for partial summary judgment filed by Muhler and Superior.[1] The circuit court also heard arguments on all of the motions at that time. At the conclusion of the hearing the following day, on July 29, 2014, the circuit court took the motions under advisement and instructed the parties to submit proposed orders with a cover letter explaining why the court should sign and enter that order. (R. pp. 1332-1333)

On October 6, 2014, the circuit court filed its Order granting Muhler's Motion for Partial Summary Judgment and denying Superior's Motion for Partial Summary Judgment. In the Order, the circuit court explained that to defeat Muhler's motion, Superior had "to meet the very high standard of eliminating any possibility that the contract on which [it] rel[ies] can be read to limit indemnification to the indemnitor's

[1] During oral argument, Superior dismissed its crossclaim against Muhler for equitable indemnity. (R. p. 1063)

own negligence." (R. p. 30) Further, the court explained Superior was required to "demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence" and that "[i]f any other interpretation of the contract language is reasonably possible, they cannot prevail on their contract claims as a matter of law." (R. p. 30) After analyzing the indemnification provisions contained in the two contracts between Superior and Muhler, the initial subcontract agreement ("Subcontract") and the subsequent agreement entered into on June 11, 2007 ("2007 Agreement"), the circuit court granted Muhler's Motion. (R. p. 34)

First, the circuit court considered whether the indemnity clause in the Subcontract between Superior and Muhler indemnified Superior for its own negligence. (R. pp. 31-33) The court explained the indemnification provision in the Subcontract did not provide such indemnification and noted "[c]ourts uniformly interpret this language as not providing indemnification for the indemnitee's own negligence." (R. p. 31) Further, while noting that Superior had presented cases at the hearing in support of its argument that Superior was entitled to indemnification for its own negligence, the circuit court rejected Superior's reliance on those cases and reasoned the indemnification language at issue in those cases was substantially dissimilar and those cases were inapposite. (R. pp. 32-33) Accordingly, the court found the indemnification provision in the Subcontract "d[id] not clearly indicate intent by the parties to indemnify Superior for its own wrongdoing." (R. p. 33)

Next, the circuit court considered the indemnification provision in the 2007 Agreement. The court reasoned that while the indemnification language of the 2007

Agreement was broader than the language of the Subcontract, it still did not "state clearly and unequivocally that [] Muhler [] agreed to indemnify Superior [] for [its] own negligence and/or wrong-doing." (R. p. 33) Further, the circuit court determined that "[t]o the extent the provisions in the 2007 Agreement purport to indemnify Superior [] 'unconditionally,' they are unconscionably broad." (R. p. 33) The circuit court determined that the "inclusion of the term 'unconditionally' in an indemnification provision that also contains restrictions renders that provision ambiguous." (R. p. 34) Therefore, the circuit court found that the indemnification provisions in the 2007 Agreement did not cover Superior for its own negligence. (R. p. 34)

The circuit court also denied Superior's Motion for Partial Summary Judgment. (R. p. 37)

On October 16, 2014, Superior filed its Motion to Reconsider. On October 22, 2015, Muhler filed its Opposition to Superior's Motion to Reconsider. A hearing was held on the Motion to Reconsider on December 4, 2015. The circuit court denied the Motion to Reconsider by order filed on January 19, 2016. Superior filed its Notice of Appeal on January 21, 2016.

STATEMENT OF FACTS

Superior served as the general contractor for the construction of the building shell for the Concord & Cumberland Project. (R. p. 600) Concord and Cumberland, LLC was the original owner and developer of the project and hired, among others, J. Davis as the architect and Sutton-Kennerly Associates ("SKA") as the waterproofing experts. (R. p. 630; R. p. 667)

Superior entered into the Subcontract with Muhler to supply and install windows and doors that were manufactured by Weather Shield. While the Subcontract called for the installation of windows, the scope of that installation was limited to setting windows in rough openings that were prepared by Superior and/or its subcontractors. (R. pp. 680-681; R. pp. 661-662; R, p. 686) Muhler employed two different subcontractors, ITW and Watts, to install the windows. ITW also worked as a direct subcontractor for Superior by preparing rough openings that included the installation of sill pans and bucks within the pans. (R. p. 711; R. p. 687)

Muhler did not take on any design responsibility for the Concord & Cumberland Project, but, rather, it looked to the architect for design and to the window manufacturer, Weather Shield, to provide installation instructions. Muhler's vice president of new construction sales, Ron Sykora ("Sykora"), stated that, "[a]s the supplier of the windows and the installer of the windows, we look to the design professional to create an installation procedure and detail and then we perform that detail procedure. That's what was done here at this project." (R. pp. 727, 729; R. p. 740) Richard Andrews ("Andrews"), the project manager with Estates Management on behalf of Concord and Cumberland, LLC, testified that Muhler "adhered to those instructions." (R. pp. 663-

664)

At some point during a mock-up of a wall, it became apparent that the proposed method for installing the windows did not conform to Weather Shield's installation instructions. The main problems involved Weather Shield's requirement that the window be installed against the buck and involved an issue with the pans. (R. pp. 709-710) In meetings where these problems were discussed, Brad Lawson ("Lawson"), Muhler's production manager, confirmed that Muhler served as "the referee between Superior, J. Davis and Sutton & Kennerly," to "make sure that Weather Shield's installation documents were complied with . . . . So we were there to get these parties to agree how they wanted to put it in, as long as it complied with Weather Shield's documents." (R. pp. 714-715)

Lawson testified that "the design that Sutton-Kennerly and Estates and Superior came up with, I didn't have confidence in it that it was going to be waterproof." Although Muhler voiced its objection, it used the installation design provided to it because, "at that point, they're the experts, that's their building, this is how they wanted it put in." (R. p. 722; R. p. 724) Sykora explained that Muhler "just, [was] being instructed how to put windows and doors in. Certainly . . . this particular installation with the bucks sitting in a pan and attached as they were in a pan was something we hadn't seen before, but we're not design professionals. We're not waterproofing professionals. So we wouldn't be interjecting what we felt to be a proper waterproofing method." (R. p. 731) Superior's president during the construction of the Concord & Cumberland Project, Chip Clardy ("Clardy"), confirmed that the architect simply told Superior how to install the windows in the bucks that were sitting in the pans. (R. p. 697)

After twenty-five windows were installed, Concord and Cumberland, LLC and/or J. Davis, the architect, raised objections and Muhler was asked to remove those windows and reinstall them following a different protocol. Clardy testified that the procedure for installing windows from that point forward came from either Concord and Cumberland, LLC and/or J. Davis and that he agreed that any problems with the design of how the windows were to be installed was the responsibility of Concord and Cumberland, LLC and/or J. Davis. (R. pp. 700-701; R. pp. 727-728)

Sometime in 2007, the Concord & Cumberland Project began to experience water intrusion issues, including but not limited to leaking at the windows and doors. Weather Shield, Superior, and Muhler entered into the 2007 Agreement, under which Concord and Cumberland, LLC was identified as a third-party beneficiary, to address the issues of leaking windows. The 2007 Agreement required, among other things, that Superior satisfy any outstanding balances due to Muhler related to the subcontract. (R. p. 622) Superior has not complied with that provision of the contract. (R. pp. 754-755)

The individual units at the Concord & Cumberland Project were completely sold out before the construction was complete. (R. p. 668) Control over the Project was transferred to the unit owners in March 2008. (R. p. 758)

Ken Lies was brought on site in late 2008 to develop a "remedy [for] concerns that were being expressed regarding the windows." (R. p. 795) Lies developed what later became known as the Ken Lies repair protocol, which was circulated to all the parties and then applied to three windows in 2009. (R. p. 797) With some adjustments, the windows produced generally passing results. (R. pp. 797-799) The Ken Lies repair protocol did not require removing the windows from their openings. (R. p. 806)

In February 2009, Myles Glick was engaged by Plaintiffs "to find the causes of the water intrusion into the exterior skin of the building and ultimately into the units." (R. p. 829) Significantly, Glick testified that he was engaged to examine the Concord & Cumberland Project and provide an opinion as to the problems with leaking windows. However, on his first trip to the Project, he immediately noticed that there was no flashing and called Plaintiffs' counsel and informed him, "I think you got more problems than you do just trying to keep water out of these windows. I think you got some other problems. So I saw it when I got out of my car." (R. pp. 836, 852, 854) Ultimately, Glick testified that there were problems associated with almost every "trade that touched the building." (R. p. 877)

In 2010, Plaintiffs began filing lawsuits against Superior, along with numerous other defendants. Plaintiffs complained about specific issues with various components of the Project, including: 1) the stucco system; 2) windows; 3) wall sheathing; 4) brick; 5) balconies; 6) roof; and 7) miscellaneous. (R. p. 235 ¶ 49) The Second Amended Complaint alleged numerous causes of action against Superior that had nothing to do with the windows and/or Muhler's work under the Subcontract. More importantly, a number of Plaintiffs' complaints that were related to the windows or leaking were directly attributable to failures or negligence on the part of Concord and Cumberland, LLC, SKA, J. Davis, Superior, and/or other subcontractors.

ARGUMENT

I. Standard of Review.

Summary judgment is appropriate where, as here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(e), SCRCP; *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537 (1991). Where a party establishes entitlement to judgment as a matter of law, the court must grant summary judgment. *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991). *See also Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 558-559, 671 S.E.2d 79, 85 (Ct. App. 2008) (explaining that once the party moving for summary judgment meets the initial burden of showing it is entitled to summary judgment as a matter of law, the opposing party must then present specific facts showing genuine issues for trial). "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002) (citing *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1990)).

Here, Muhler demonstrated that it was entitled to judgment as a matter of law with regard to the scope of indemnity under the Subcontract and 2007 Agreement, and Superior has failed to present any basis upon which the circuit court's grant of partial summary judgment in Muhler's favor should be reversed. The relevant indemnification provisions in the Subcontract and the 2007 Agreement, read either separately or together, fail to clearly and unequivocally state that Muhler was agreeing to indemnify Superior for Superior's negligence. The circuit court properly granted Muhler's Motion and the grant should be affirmed.

II. The Circuit Court Properly Granted Muhler's Motion for Partial Summary Judgment.

The circuit court's determination that the indemnification provisions in the Subcontract and the 2007 Agreement did not provide indemnification for Superior's negligence was correct under South Carolina law and should be affirmed. In attacking the circuit court's Order, Superior has identified two areas about which it takes issue—1) that the circuit court allegedly conflated the issue of "own" negligence with "sole" negligence in determining that the language of the indemnity provisions was not clear and unequivocal, and 2) the circuit court did not read the two indemnification provisions contained in the two separate agreements together. In arguing that the circuit court erred, Superior takes great pains to make the issues in the appeal seem complicated. They are not. The trial court correctly applied well-established South Carolina contract law to the relevant language of the indemnification provisions and reached the correct determination that Superior is not entitled to indemnity for its negligence—whether sole, own, or concurrent—based on the actual language of the Subcontract and the 2007 Agreement. Therefore, the circuit court's grant of summary judgment on this issue should be affirmed.

A. The Circuit Court Correctly Determined the Clear and Unequivocal Standard Applies.

Superior attempts to create some sort of distinction between sole, own, and concurrent negligence. It argues that because it is not seeking indemnification for its sole negligence that somehow the indemnification provisions do not have to meet the standard established by South Carolina courts for there to be indemnification for its negligence. That is simply not the law. Indemnification for a party's negligence is "not favored in the

law," and because "[l]iability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary . . . there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation, and no inference from words of general import can establish." 41 Am. Jur.2d Indemnity § 16.

While there is no dispute that South Carolina law allows parties to agree to indemnify each other for various types of damages or losses, there is equally no dispute that under South Carolina law "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in **clear and unequivocal terms**." *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (emphasis added). *See also Murray v. The Texas Co.*, 172 S.C. 399, 402, 174 S.E. 231, 232 (1934) (finding "broad and comprehensive" language was insufficient to prove the contract relieved a party from its own negligence).

Therefore, Superior's attempt to argue that prior South Carolina precedent addressing indemnification provisions is not applicable here is unavailing. Superior argues that the Supreme Court of South Carolina's decision in *Murray* and this Court's decision in *Federal Pacific Electric v. Carolina Production Enterprises*, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989) do not apply because "the indemnification sought in both cases was for the sole negligence of the parties seeking indemnification" and this Court should disregard the legal principals set forth in those cases. Superior is wrong.

In *Murray*, the court did not make any distinction between "sole" negligence and "own" negligence as Superior seems to suggest. Specifically, the court stated the issue to

be addressed was "whether the quoted provision of the contract relieved the company from liability for its negligence in the installation and repair of the equipment furnished by it." *Murray*, 172 S.C. at 402, 174 S.E.2d at 232. In addressing this issue, the court considered the trial court's reasoning that "the provision of a contract relieving one of the parties thereto from liability for his or its own negligence should be clear and explicit." *Id.* at 402, 174 S.E.2d at 232. In making its determination that the language at issue did not meet this standard, the court did not consider a distinction between "sole" or "own" negligence. The court simply stated that the parties' agreement did not evidence an understanding that the indemnitor agreed to indemnify the indemnitee for the indemnitee's negligence. Because Superior is seeking the same relief here, the *Murray* case is certainly instructive and was found to be so by this Court in *Federal Pacific*.

Likewise, *Federal Pacific* is instructive. Without focusing on whether the negligence at issue was solely the indemnitee's negligence, this Court acknowledged the "unusual" nature of requesting indemnification for a party's own negligence and explained that such "contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed." *Fed. Pac.*, 298 S.C. at 26, 378 S.E.2d at 57. Further, the Court noted that "most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and equivocal terms." *Id.* at 26, 378 S.E.2d at 57 (citations omitted). The *Federal Pacific* Court did not limit these statements to situations addressing the "sole" negligence of the indemnitee. The same is true of the Supreme Court's decision in *Laurens Emergency* because the court did not distinguish between "own" negligence and

"concurrent" negligence when it explained the necessity of "requiring strict construction of a contract containing an indemnity provision purporting to relieve an indemnitee from the consequences of its own negligence."[2] Therefore, the circuit court correctly relied on this standard in determining that the indemnification provisions in the Subcontract and the 2007 Agreement did not obligate Muhler to indemnify Superior for Superior's negligence, whether concurrent or otherwise.

In addition, the Court's reasoning in *Campbell v. Beacon Manufacturing Company*, 313 S.C. 451, 438 S.E.2d 271 (Ct. App. 1993) does not support Superior's argument. The *Campbell* Court did not announce any intention to part with prior South Carolina precedent and did not affirmatively state that the previous test for indemnification provisions would not apply in this situation.[3] And, the Court did not state that "own" negligence was synonymous with "sole" negligence. Rather, the Court responded to the indemnitor's arguments that the indemnitee was negligent and contributed to its own damages by stating there was no evidence in the record supporting this argument. And, in determining that even if the indemnitee were negligent there was a duty to indemnify, the Court considered the actual language of the contract, which was

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[2] Somewhat confusingly, Superior also argues that the "'clear and unequivocal' standard of *Laurens Emergency*only applies to the more narrow issue of a party being able to be indemnified as to their concurrent negligence." Initial Brief of Appellant, p. 31. While Muhler does not contend that such a distinction is necessary because the negligence of the indemnitee is the negligence of the indemnitee whether it is referred to as "own" or "concurrent," if Superior concedes that the clear and unequivocal standard applies, then it concedes the circuit court correctly chose to apply the standard in this case.

[3] Superior also contends that the *Campbell* Court "expressly held that this phrase signifies indemnification for concurrent negligence." Initial Brief of Appellant, p. 24. The Court did not make such a holding.

very different from the language in the Subcontract and the 2007 Agreement. The ruling in *Campbell* does not support Superior's argument.

Superior has failed to present any legitimate arguments that the circuit court erred in applying South Carolina precedent regarding indemnification language to the provisions at issue in the Subcontract and the 2007 Agreement. The circuit court properly applied the strict construction standard to the indemnification provisions in light of Superior's attempt to seek indemnity for its negligence, and, therefore, the circuit court's decision should be affirmed.

B. The Circuit Court Correctly Determined the Indemnity Provisions in the Subcontract and the 2007 Agreement Do Not Provide Indemnity for Superior's Negligence.

Superior contends the circuit court failed to construe the terms of the Subcontract and the 2007 Agreement together to reach a determination that somehow the language of the two agreements together would suddenly demonstrate that Muhler agreed to clearly and unequivocally indemnify Superior for Superior's own negligence. Superior's arguments belie the plain language of the two agreements. In issuing its ruling on the motions for partial summary judgment, the circuit court correctly analyzed the two agreements separately, per the terms of the separate agreements. And, the circuit court's determination that the language contained in the indemnification provisions did not meet the "very high standard of eliminating any possibility that the contract language on which they rely can be read to limit indemnification to the indemnitor's own negligence" was correct. *See* R. p. 30. Therefore, the circuit court's order should be affirmed.

1. The circuit court properly construed the Subcontract and the 2007 Agreement separately.

In asserting that the circuit court erred with respect to its reading of the indemnification provisions in the Subcontract and the 2007 Agreement, Superior contends that the language of the 2007 Agreement, read in conjunction with the Subcontract, alters it such that there would be the duty to indemnify Superior for Superior's negligence—essentially Superior contends that the 2007 Agreement lowers the bar. The trial court properly read the two agreements separately per their terms and Superior's argument lacks merit.

As an initial matter, Superior's assertion that the 2007 Agreement altered the language of the Subcontract was not raised to the circuit court in opposition to Muhler's motion and was raised for the first time in connection with Superior's Motion to Reconsider.[4] (R. pp. 953-954) In response to Superior's argument that it did not reconcile the two agreements, the circuit court explained that it spent "quite a bit of time examining those contracts" in issuing its ruling on the parties' motions. (R. p. 997) Therefore, contrary to Superior's assertion, the circuit considered the terms of both agreements and determined that they should not be read together.

The 2007 Agreement specifies that neither the testing performed to date, "nor this Agreement has amended or affected any party's contractual rights and responsibilities

[4] Because this issue was improperly raised for the first time in connection with Superior's Motion to Reconsider, the October 6, 2014 Order does not address this issue. *Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 344-345 (Ct. App. 2008) (a party cannot raise an issue for the first time on a Rule 59(e), SCRCP motion); *Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (a party cannot raise an issue for the first time on a Rule 59 motion that could have been raised at trial). Therefore, given that Superior did not properly present this issue to the circuit court, by addressing this argument here, Muhler does not waive its right to argue that this Court should not consider this argument in connection with this appeal.

except to the extent specifically stated in this Agreement." (R. p. 619). Per the terms of the 2007 Agreement, it stands on its own. Section 11 of the 2007 Agreement does not reference or even purport to modify Paragraph 12.1 of the Subcontract. (R. p. 622) There simply is no specific modification of the Subcontract's indemnification provision. Therefore, the circuit court did not err in rejecting Superior's argument in connection with denying Superior's Motion for Reconsideration.

2. The circuit court properly applied the clear and unequivocal standard to the indemnification provision in the Subcontract.

Superior's reading of the indemnification provision in the Subcontract is flawed. The provision at issue in the Subcontract states:

> 12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, and 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 . . . 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. p. 607) (emphasis added) While Superior contends that it is entitled to be indemnified for its own negligence, the language of this provision clearly demonstrates

that there was no intent between Superior and Muhler for Muhler to indemnify Superior for Superior's negligence. Rather, this provision provides that Muhler would indemnify Superior for claims and expenses arising out of the performance of Muhler's work to the extent that the claims or expenses are caused by Muhler's acts or omissions. This provision does not state clearly and unequivocally that Muhler agreed to indemnify Superior for Superior's own negligence (or concurrent negligence to the extent there is any distinction). Superior's arguments to the contrary are unavailing.

Under South Carolina law, general principles of contract interpretation require courts to construe the contract "as a whole and different provisions dealing with the same subject matter are to be read together." *Skull Creek Club Ltd. v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). Applying these principles here supports the circuit court's determination that Muhler had no obligation to indemnify Superior for Superior's negligence.

Courts across the country that have considered language substantially similar to that contained in the indemnification provision in the Subcontract have uniformly determined that this provision does not provide indemnification for the indemnitee's own negligence. *See e.g., Brown v. Boyer-Washington Blvd. Assoc.*, 856 P.2d 352, 355 (Utah 1993) (limiting similar indemnification language to damages caused in whole or in part by acts of the subcontractor); *MT Builders, LLC v. Fisher Roofing, Inc.*, 197 P.3d 758, 765 (Ariz. Ct. App. 2008) (explaining that identical indemnification language created "a comparative fault or negligence arrangement whereby the indemnitor's liability is limited 'to the extent' it and its supervisors were at fault"); *Cabo Constr., Inc. v. R.S. Clark Constr., Inc.*, 227 S.W.3d 314, 317 (Tex. App. 2007) (finding same language did not

expressly state that the subcontractor would indemnify the contractor for the contractor's own negligence); *Mautz v. J.P. Patti Co.*, 688 A.2d 1088, 1092-1093 (N.J. Super. Ct. App. Div. 1997) (finding virtually identical language did not indemnify indemnitee for its own negligence but instead provided indemnification "only to the extent the [indemnitor's] negligence contributed to the loss"); *Frank v. MSI Constr., Mgrs., Inc.*, 527 N.W.2d 79, 81 (Mich. Ct. App. 1995) (construing practically identical language to mean the subcontractor is liable to the general contractor only "to the extent of its own negligence but is not required to indemnify" the general contractor for the general contractor's own negligence); *Glendale Constr. Servs., Inc. v. Accurate Air Sys., Inc.*, 902 S.W.2d 536, 539 (Tex. Ct. App. 1995); *Braegelmann v. Horizon Dev. Co.*, 371 N.W.2d 644, 646-647 (Minn. Ct. App. 1985) (interpreting same operative language as not providing indemnification to the general contractor for its own negligence).

These decisions are analogous and Superior's reliance on *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 So.2d 1072 (Fla. Dist. Ct. App. 2003) and cases of its ilk is misplaced. Neither *Camp, Dresser & McKee* nor the other cases contain language that is substantially similar to that found in Paragraph 12.1 of the Subcontract. Therefore, those cases and their results are inapplicable. The indemnification clause in *Camp, Dresser & McKee* provided that there will be indemnity for damages "arising out of or resulting from the performance of the work." That is not the language included in the Subcontract, which provides for indemnity for damages "arising out of or resulting from the performance of [Muhler]'s Work." The indemnity provision in the Subcontract is distinctly different from the provision in *Camp, Dresser & McKee* and by its terms is limited to damages arising from Muhler's work and extends only to damages caused "in

whole or in part by any negligent act or omission of [Muhler]" or its employees. Clearly, the provision in the Subcontract does not provide indemnification for Superior's negligence.

Likewise, Superior's argument that the phrase "regardless of whether it is caused in part by a party indemnified hereunder" supports its flawed reading of the indemnification provision is incorrect. As mandated under South Carolina law, this phrase must be interpreted in light of the other language in the indemnification provision. Cases previously considering this language determined that the language of the entire indemnification provision failed to demonstrate an intent by the subcontractor to indemnify the indemnitee for the indemnitee's own negligence. Those courts, like South Carolina courts, read the provisions together and based upon that reading made the only logical determination that could be made – that the indemnitor's obligation to indemnify did not include indemnifying the indemnitee for the indemnitee's negligence.

For example, in *Nusbaum v. City of Kansas City*, 100 S.W.3d 101 (Mo. 2003), the Supreme Court of Missouri considered an indemnification provision that was similarly worded and determined that it did not provide indemnity for the contractor's own negligence. In addressing this issue, the court stated that Missouri law provided that "[a] contract of indemnity will not be construed so as to indemnify one against loss or damage resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms." *Nusbaum*, 100 S.W.3d at 105 (citation omitted). Further, the court noted that "[i]n absence of such clear expression or where any doubt exists as to the intention of the parties, courts in Missouri will not construe a contract of indemnity to indemnify against the indemnitee's own negligence." *Id.* at 105 (quotations omitted).

The provision at issue provided that the subcontractor would indemnify for damages "arising out of or resulting from performance of the Subcontractor's Work . . . . regardless of whether or not such claim, damage, loss, or expense is caused in part by a party indemnified hereunder." *Id.*

In addressing whether this provision clearly and unequivocally expressed an intent to indemnify the contractor for its own negligence, the *Nusbaum* court determined that the "phrase 'to the extent caused' expresses an intention to limit the indemnitor's liability to the portion of fault attributed to the indemnitor." *Id.* at 106. The court explained "[t]he preferred construction of the indemnification provision at issue, one that provides a reasonable meaning to each phrase of the provision, requires nothing more than that [the indemnitor] indemnify [the indemnitee] for [the indemnitor]'s negligence even if [the indemnitee] participates in part in [the indemnitor]'s negligent conduct." *Id.* at 106-107. The court further explained that "[t]o hold otherwise would make the intended expression to limit liability to the acts of indemnitor meaningless." *Id.* at 107.[5]

[5] Likewise, Superior's criticisms regarding the court's analysis in *Braegelmann* are misplaced. Specifically, Superior discounts that court's holding because it contends that 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." Initial Brief of Appellant, p. 27. Superior's statement is disingenuous. Actually, the *Braegelmann* court did consider this language in determining whether the indemnification provision clearly and unequivocally provided that the indemnitor was agreeing to indemnify the indemnitee for the indemnitee's negligence. The court determined that this phrase, along with "to the extent caused" language, provided support for the determination that there was no intent to indemnify for the indemnitee's negligence. *See Braegelmann*, 371 N.W.2d at 646 ("The remaining language, 'regardless of whether it is caused in part by a party indemnified hereunder,' makes the indemnification provision equivocal at best and it therefore fails under the strict construction standard."). The court's reasoning in *Braegelmann* is in accord with South Carolina law.

Further, in addressing the circuit court's decision, Superior engages in an unnecessary discussion regarding factual issues that were not addressed in the October 6, 2014 Order and that are not relevant to this appeal. The appeal concerns a narrow issue—did Muhler agree to indemnify Superior for Superior's negligence, which the circuit court correctly determined it did not. The nature of and the percentage of the parties' negligence is not the issue that the circuit court addressed and is not an issue that should be addressed on a motion for summary judgment. Therefore, Superior's arguments related to this issue should be disregarded.

3. The circuit court properly applied the clear and unequivocal standard to the indemnification provision in the 2007 Agreement.

Superior contends that the 2007 Agreement somehow expands the scope of indemnification in the Subcontract. As explained above, Superior's argument lacks merit because by its very terms, the 2007 Agreement does not seek to alter the language of the Subcontract. Notwithstanding this fact, the 2007 Agreement does not broaden the scope of indemnification under the Subcontract because even alone it does not provide indemnification to Superior for Superior's negligence.

The 2007 Agreement provides:

> 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 including, but not limited to, costs and attorneys' fees, any remedial costs of expert witnesses, cost of arbitration and all other damaged incurred.

(R. p. 622) (emphasis added) In the October 6, 2014 Order, the circuit court acknowledged that the language of the 2007 Agreement was broader than the language contained in the Subcontract. (R. p. 33) However, the circuit court determined that its language still did not clearly and unequivocally state that Muhler agreed to indemnity Superior for Superior's negligence. In further considering the language, the circuit court stated that "[t]o the extent that the provisions in the 2007 Agreement purport to indemnify Superior [] 'unconditionally,' they are unconscionably broad.'" (R. p. 33) (citing *Fisher v. Stevens*, 355 S.C. 290, 296, 584 S.E.2d 149, 152 (Ct. App. 2003) (holding that an overly broad indemnification provision would "offend notions of public policy")). The circuit court determined that *Fisher* was applicable in this context because "where the phrase 'unconditionally indemnify' is as objectionably broad, if not broader, as the phrase at issue in *Fisher*, which released 'any person in any restricted area' from liability," the reasoning would equally apply. (R. p. 33) (quoting *Fisher*, 355 S.C. at 296, 584 S.E.2d at 152). Superior did not appeal from the circuit court's determination in this regard. *See State v. NV Samtra Tobacco Trading Co.*, 379 S.C. 81, 92, 666 S.E.2d 218, 224 (2008) (determining where the appellant failed to appeal an issue it was not preserved for the court's review) (citing Rule 208(b)(1)(D), SCACR and *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003)). Therefore, the language of the 2007 Agreement is unconscionably broad and Superior is not entitled to indemnity for its negligence. *See Floyd v. Floyd*, 365 S.C. 56, 72, 615 S.E.2d 465, 474) (2005) ("An unappealed ruling becomes the law of the case.") (citing *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997)).

Further, like the Subcontract, the 2007 Agreement does not clearly, explicitly, or unequivocally state that Muhler agreed to indemnify Superior for Superior's negligence. While "formulaic language expressly stating that 'X indemnifies Y for Y's own negligence' is not mandatory," the "agreement must speak to the negligence of the indemnitee." *Snohomish County Pub. Transp. Benefit Area Corp. v. FirstGroup Am. Inc.*, 271 P.3d 850, 854 (Wash. 2012). Like in *Snohomish County*, the indemnity provision in the 2007 Agreement "does not tell a court 'clearly and unequivocally' that the parties considered the effect of the negligence of the indemnitee and intended to indemnify for the indemnitee's own negligence." *Snohomish County*, 271 P.3d at 862. Indemnity provisions promising to indemnify "from and against all claims," or where the indemnitor assumed "all responsibility for claims asserted by any person whatever," are "general terms" that are "insufficiently clear and unequivocal," to provide indemnification for the indemnitee's negligence. *Cox Cable Corp. v. Gulf Power Co.*, 501 So.2d 627, 629 (Fla. 1992). The use of the term "unconditionally" similarly does not express any intent to indemnify Superior for Superior's negligence.

Superior's arguments that the language of the 2007 Agreement operates to expand the scope of indemnity under the Subcontract are not supported by the actual operative language and the case law addressing such language. As noted above, the litany of cases cited by Superior contains language that is substantially different from the language at issue here, and therefore, those cases were not persuasive or instructive to the circuit court and they should not be instructive or persuasive here. The circuit court committed no error, and there is no basis to reverse the decision of the circuit court. Therefore, the circuit court should be affirmed.

CONCLUSION

The circuit court properly granted Muhler's Motion for Partial Summary Judgment. The indemnification provisions contained in the Subcontract and the 2007 Agreement do not clearly and unequivocally state Muhler agreed to indemnify Superior for Superior's negligence. Rather, a logical reading of the provisions at issue clearly demonstrates that Muhler only agreed to indemnify Superior with regard to ***Muhler's*** negligence. For all of the reasons set forth above, Muhler respectfully requests this Court affirm the circuit court's grant of its Motion for Partial Summary Judgment.

December 6, 2016

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court Of Common Pleas

The Honorable Clifton Newman, Judicial Circuit Court Judge
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 Kirkpatrick, And Paul A. Brim, And Fred Rappaport and Joyce Rappaport, And Thomas 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 is the .....APPELLANT,
And
The Muhler Company, Inc. is the.....RESPONDENT.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent The Muhler Company, Inc.'s Final Brief complies with South Carolina Appellate Court Rule 211(b).

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