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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
Appellate Case No.: 2016-000076

RECEIVED
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SC Court of Appeals

Superior Construction Corporation.....Appellant,

v.

The Muhler Company, Inc.....Respondent.

**APPELLANT
SUPERIOR CONSTRUCTION CORPORATION'S
PETITION FOR REHEARING**

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Appellant Superior Construction Corporation hereby petitions for rehearing of this Court's Opinion filed August 8, 2018. This petition is made pursuant to Rule 221(a), SCACR.

ARGUMENT

The indemnity agreement in Superior Construction Corporation's (hereinafter "Superior") subcontract with The Muhler Company, Inc. (hereinafter "Muhler") is a standard provision.¹ Substantially similar indemnification provisions are used in construction contracts all across the county. Additionally, insurance forms are tailored to the language of standard indemnity agreements. See Jack P. Gibson & W. Jeffrey Woodward, The 2004 ISO Additional Insured Endorsement Revisions, 25-SUM Construction Law 5, 7-8 (Summer 2005); Shanda K. Pearson, "The Times They are A-Changin'd" 2013 Revisions to ISO's Commercial General Liability Coverage Forms, 55 No. 8 DRI For Def. 20 (Aug. 2013). Thus, this Court's holding in this case extends far beyond the immediate parties to this case and has a substantial impact on the entire construction industry in South Carolina.

This Court acknowledges that the effect of its holding is to make one of the most widely utilized standard form indemnity agreements unenforceable in South Carolina. Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, Op. No. 5585 (S.C. Ct. App. filed Aug. 8, 2018) (Shearouse Adv. Sh. No. 32 at 60, 76 n.6), 2018 WL 3748616 at *9 n.6. More specifically, the end result this Court's holding is that the AGC and AIA standard form indemnity agreements provide a general contractor with no more than a modified form of equitable indemnity that removes the disqualification of unclean hands: the general contractor can only recover in indemnity the specific damages caused by the subcontractor, and the mere fact that the

¹ The subcontract incorporated an Associated General Contractors (AGC) form. Its language was similar to, but did not come from, the American Institute of Architects (AIA) as asserted by the Court. (R. p. 363.) Neither the parties nor counsel drafted the provision.

general contractor may have been partly at fault does not disqualify them from receiving said indemnity. Thus, a general contractor, who will always have some level of duty to generally supervise the work of its subcontractors, will never be able to receive the extent of indemnity provided by the plain language of the standard forms. The Court recognizes that the rule of strict construction this Court imposes is so onerous that no one yet has divined what language complies with it. Id. By affirming the trial court’s interpretation of “clear and unequivocal”—an interpretation that is inconsistent with the law in other jurisdictions—this Court sends contractors on a mythical “quest for the Holy Grail” to obtain indemnification that is otherwise considered standard within the industry.

Prior South Carolina law on this issue was not out of the mainstream—courts generally strictly construe indemnity agreements against the indemnitee. 41 Am. Jur. 2d § Indemnity 14 (Aug. 2018 Update). Nevertheless, courts in other jurisdictions have not held that standard form indemnity agreements are unenforceable.

This Court erred in imposing the common-law public policy rationale to indemnity agreements that are governed by statute. Additionally, this Court failed to construe the contract language in accordance with the rules of contract interpretation. This Court appears to have misread case law interpreting the “notice” provision in standard form indemnity agreements. Finally, this Court improperly refused to consider the effect of the 2007 settlement pursuant to which Muhler assumed additional duties. Accordingly, Superior hereby requests that this Court rehear this matter and reverse its current holding.

I. This Court erred in overlooking the statutory distinction between sole and concurrent negligence.

This Court held that the “clear and unequivocal” standard applies to all indemnity agreements because all prior case law applies that standard. Concord and Cumberland, Adv. Sh.

No. 32 at 65-69, 2018 WL 3748616 at *3-*5. However, none of the cases this Court cited addressed construction contracts. See Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003); Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989); Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 490 S.C. 487, 763 S.E.2d 19 (2014). As this Court explained, the “negligence rule” is a common-law standard that serves the public policy of deterring future negligent conduct. Concord and Cumberland, Adv. Sh. No. 32 at 68, 2018 WL 3748616 at *4.

However, statutes establish this State’s public policy. Prot. and Advocacy for People with Disabilities, Inc. v. Buscemi, 417 S.C. 267, 276, 189 S.E.2d 756, 761 (Ct. App. 2016). Common law public policy only applies in the absence of a statute. Id.

In the context of construction contracts, the legislature has spoken. Indemnity agreements purporting to indemnify the indemnitee for damages arising out of property damage proximately caused by or resulting from the *sole* negligence of the indemnitee are declared to be against public policy and unenforceable. S.C. Code Ann. § 32-2-10 (Rev. 2007) (emphasis added). It is the legislature that has drawn the distinction between a party’s “sole” negligence and its “own” negligence. Section 32-2-10 declares the public policy in this state as applied to construction contracts, and that statute only prohibits indemnification for the indemnitee’s “sole negligence.”

The statute contains an exception for indemnity agreements against liability for damages resulting from the negligence, “in whole or in part,” for the indemnitee. Section 32-2-10. Thus, it is not contrary to public policy for an indemnity agreement to require indemnification for property damage the indemnitor is only partly responsible for causing. Moreover, the statute does not declare indemnification in which the indemnitor and the indemnitee are both at fault to be against public policy.

Thus, this Court erred in imposing the common law rule on construction contracts. Section 32-2-10 says nothing about indemnification for the indemnitee’s “own” negligence. The distinction the legislature drew is between the “sole” negligence and concurrent negligence, and the statute supersedes the common-law rule as to what constitutes the public policy of this State.

Since indemnity agreements requiring indemnification for property damage only partly caused by the indemnitee—regardless of who else may have been at fault in causing the damage—are not against public policy in construction contracts, the rationale for imposing an impossibly high standard on indemnity agreements does not exist.

II. This Court erred in failing to interpret the indemnity agreement according to the rules of construction contracts.

Even if strict construction is applied to indemnity agreements in construction contracts, the indemnity agreement in the AGC form should nevertheless meet this standard. This Court appears to have accepted the trial court’s interpretation of “clear and unequivocal.” The trial court interpreted “clear and unequivocal” to be a “very high standard of eliminating any possibility that the contract language upon which they rely can be read to limit indemnification to the indemnitor’s own negligence.” (R. p. 30.) No case law was cited in support of this interpretation. Moreover, this Court itself held that the “clear and unequivocal” standard can be met by “the clear terms of the contract.” Concord and Cumberland, Adv. Sh. No. 32 at 69, 2018 WL 3748616 at *5 (citing Campbell v. Beacon Mfg. Co., 313 S.C. 451, 438 S.E.2d 271 (Ct. App. 1993)). .

The rule of strict construction does not give courts free rein to disregard contract provisions. Contractual indemnity is not implied in law or drawn from equitable considerations. “Contractual indemnity involves a transfer of risk for consideration, and the contract itself establishes the relationship between the parties.” Rock Hill Tel. Co., Inc. v. Globe Communications, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005); 41 Am. Jur. 2d Indemnity

§ 13 (Aug. 2018 Update). “Contractual terms cannot be read out of an indemnity agreement altogether, and the meaning of a provision is not discerned by reading it in isolation but by recognizing its relation to the other terms of the complete contractual relationship.” 41 Am. Jr. 2d Indemnity § 13. “When construing indemnification contracts, the court will not ignore broad, straightforward language that unequivocally states an agreement to indemnify. 41 Am. Jur. 2d Indemnity § 15 (Aug. 2018 Update).

This Court committed two critical errors in construing the AGC form indemnity agreement. First, this Court failed to interpret the contract in accordance with its terms. Second, this Court failed to credit the contract terms that specify that indemnification for an indemnitee’s own concurrent negligence is included in the indemnity agreement.

On its face, the AGC indemnity agreement calls for Muhler to indemnify Superior from “all claims . . . arising out of or resulting from [Muhler’s negligent work] . . . “to the extent caused . . . in whole or in part by [Muhler’s negligent work], regardless of whether it is caused in part by [Superior].” Under the clear terms of the contract, Muhler agreed to indemnify Superior for damage Muhler is partly at fault for causing, even if Superior was also partly at fault.

The AGC indemnity agreement has three key clauses. The first key clause, “arising out of or resulting from the performance of the Subcontractor’s Work” (hereinafter “the General Scope clause”), is contained in Article 12.1. of Muhler’s subcontract. This clause broadly identifies the type of claims against which Muhler agrees to indemnify. The second clause is found in the first part of Article 12.1.(a). This clause, “to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of [Muhler]” (hereinafter “the Causal Limitation clause”), limits Muhler’s obligation to property damage that Muhler is at least partly responsible for causing. The third clause is at the end of Article 12.1.(a). This clause, “regardless of whether

it is caused in part by [Superior]" (hereinafter "the Notice clause"), serves notice to Muhler that it must indemnify Superior for Superior's own concurrent negligence. This Court arrived at its holding by misconstruing all three of these clauses.

A. This Court improperly imposed a limiting construction of the term "arising out of or resulting from."

The General Scope clause provides in relevant part that Muhler agrees to indemnify and hold Superior harmless "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*" (R. p. 372 (emphasis added).) This clause identifies that type of claims against which Muhler must indemnify: those which "aris[e] out of or result[] from" Muhler's allegedly negligent work.

This Court agreed that the phrase "arising out of and resulting from" is a broad and comprehensive term. Concord and Cumberland, Adv. Sh. No. 32 at 71, 2018 WL 48616 at *6. Nevertheless, this Court imposed an unduly restrictive construction, reasoning that the phrase "limits Muhler's obligation to indemnify to damages arising from installation of windows and doors and, by itself, would prevent Superior from receiving indemnification from Muhler for damages arising from other trades" Id. at 72, 2018 WL 48616 at *7.

This Court provided no authority for this assertion. Superior cited Supreme Court precedent holding that "arising out of" means "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). While Town of Duncan was an insurance case, the court was nevertheless construing an indemnity agreement. Town of Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990) (explaining that liability insurance is a form of contractual indemnity). "Arising out of" is not restricted to proximate cause,

but rather encompasses almost any causal connection or relationship. City of Atlanta v. Benator, 310 Ga. App. 597, 607, 714 S.E.2d 109, 117 (Ga. Ct. App. 2011); Lawyers Title Ins. Corp. v. New Freedom Mortg. Corp., 285 Ga. App. 22, 645 S.E.2d 536 (Ga. Ct. App. 2007). This Court erred in ignoring the authorities Superior cited.

This Court's interpretation ignores the contract language and the realities of construction defect litigation. Contrary to this Court's interpretation, the indemnity agreement does not merely promise indemnification for damages arising from the windows and doors. See Concord and Cumberland, Adv. Sh. No. 32 at 72, 2018 WL 48616 at *7 ("Thus, although article 12.1 is broad and comprehensive, it limits Muhler's obligation to indemnify to *damages* arising from installation of windows and doors") (emphasis added). The indemnity agreement provides that Muhler will indemnify against "all *claims* . . . arising out of or resulting from" Muhler's work. (R. p. 372 (emphasis added).)

In an indemnity agreement, the focus is not on the claims against the indemnitor. The plaintiff may sue the indemnitor (Muhler), but it is irrelevant for purposes of the indemnity agreement whether a direct claim against Muhler is asserted. The indemnity agreement concerns itself with claims against the indemnitee (Superior), not those against the indemnitor. "Indemnity is that form of compensation in which a first party [Muhler] is liable to pay a second party [Superior] for a loss or damage the second party [Superior] incurs to a third party [the plaintiffs]." Town of Winnsboro v. Wiedemann-Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990). The "claim" at issue is the plaintiff's claim against Superior.

When a homeowner brings a construction defect action, the claim is asserted against the Builder. See Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 347, 384 S.E.2d 730, 738 (1989) (holding that "[a] *builder* may be liable to a home buyer in tort" based upon

violations of building codes and industry standards) (emphasis added). This lawsuit was initially filed against Superior Construction under Kennedy. (See R. p. 73.) This represents a “claim” against Superior. The general contractor may distinguish between trades by asserting third-party claims against its subcontractors, but these claims are not the ones against which indemnification is sought.

By way of example, the general contractor in D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) sought indemnification for all damages from the entire project from a single subcontractor under an indemnity agreement containing similar language. 422 S.C. at 147-48, 810 S.E.2d at 43. This Court never reached the issue of the scope of the indemnity agreement because it ruled the agreement violated South Carolina law in that DR Horton procured a generalized arbitration award that failed to identify any specific negligence of the purported indemnitor. Furthermore, Superior would hasten to add that it does not construe the entire indemnity agreement in this case to accomplish what D.R. Horton sought in that case. The point is that, read in isolation, the General Scope clause, “claims . . . arising out of or relating to [Muhler’s work]” encompasses far more than the Causal Limitation clause, “property damage . . . caused in whole or in any part by [Muhler’s work].” (See R. p. 372) Without the Causal Limitation clause, the indemnity agreement would encompass any lawsuit against Superior in which defective work by Muhler is alleged.

This Court also improperly read into “arising out of or resulting from” a restriction on indemnification for the indemnitee’s own negligence. “Where an indemnification clause requires indemnification from losses that ‘arise out of’ certain specified events but does not explicitly mention indemnitee’s negligence, the clause still requires full indemnification although the

indemnitee's negligence may have partially caused the loss.” 41 Am. Jur. 2d Indemnity § 18 (Aug. 2018 Update).

This Court therefore erred in holding that the the Broad Scope clause is limited to damages caused by Muhler's work. This Court improperly read the Broad Scope clause through the lens of the limitations set forth in the Causal Limitation clause to further limit the scope of the agreement. Because contractual indemnity is determined by the language of the contract rather than equitable considerations, this Court's interpretation of the indemnity agreement was unduly constricted. See 41 Am. Jur. 2d Indemnity § 13.

B. This Court erred in ignoring the words “or in any part.”

This Court also erred in construing the indemnity agreement as if it does not provide indemnification for damage caused in part by Muhler's negligence. In the Causal Limitation clause of the indemnity agreement, Muhler agreed to indemnify Superior from claims for property damage arising or resulting from its work “to the extent caused or alleged to be caused *in whole or in any part*” by Muhler's negligent work. (R. p. 372 (emphasis added).) In other words, Muhler agreed to indemnify Superior for that portion of the damages for which it was concurrently negligent. See 41 Am. Jur. 2d Indemnity § 19 (Aug. 2018 Update) (holding that indemnity agreements based upon concurrent negligence are enforceable).

The indemnity agreement distinguishes between independent negligence and concurrent negligence. By limiting Muhler's obligation to property damage caused in whole or in part by Muhler, the Causal Limitation clause prevents Muhler from being required to indemnify for the sole negligence of any other party, including Superior, thus satisfying the requirements of Section 32-2-10. On the other hand, the Causal Limitation clause requires Muhler to indemnify for property damage it is only partly responsible for causing: “caused . . . in any part.” (R. p. 372.)

Both of these phrases must be given effect. Stevens Aviation, Inc. v. DynCorp. Intern, LLC, 407 S.C. 416, 756 S.E.2d 148, 153 (2014). Harmonizing these two phrases does not allow for a general ban on indemnification for the indemnitee’s own negligence. A distinction must be drawn between the sole, or independent, negligence of other parties (including Superior) and the concurrent negligence of Muhler with other parties.

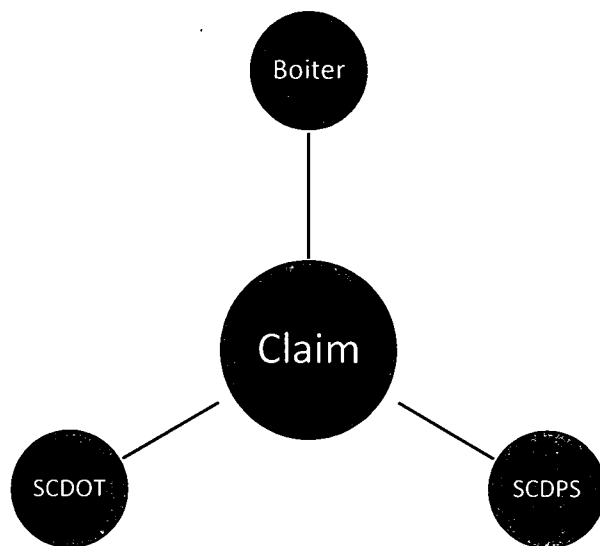
There appears to be some confusion as to what is meant by the term “concurrent negligence.” The term “concurrent negligence” is not contained in the statute. See S.C. Code Ann. § 32-2-10. In this case, the “concurrent negligence” to which Superior refers is common responsibility for the same scope of work. See Black’s Law Dictionary 123 (2d Pocket ed. 2001) (defining “concurrent” in relevant part as “covering the same matters”). In other words, “concurrent negligence” refers to that portion of the damages caused in whole or in part by the subcontractor for the scope of work identified in the subcontract.

There are different ways that two or more tortfeasors may contribute toward a loss. Two tortfeasors may violate separate and independent duties that combine to cause the plaintiff’s damages. Secondly, two tortfeasors may violate duties that partly intersect with each other, and yet are partly independent of each other, that combine to cause the loss. Third, one tortfeasor may violate a duty that is completely subsumed within the duty of another (who is also negligent) to cause the loss. To visualize this in terms of Venn diagrams, the first category would look like two separate circles. The second category would be symbolized by two circles that partly intersect. The third category would have a circle within a larger circle.

1. Category One

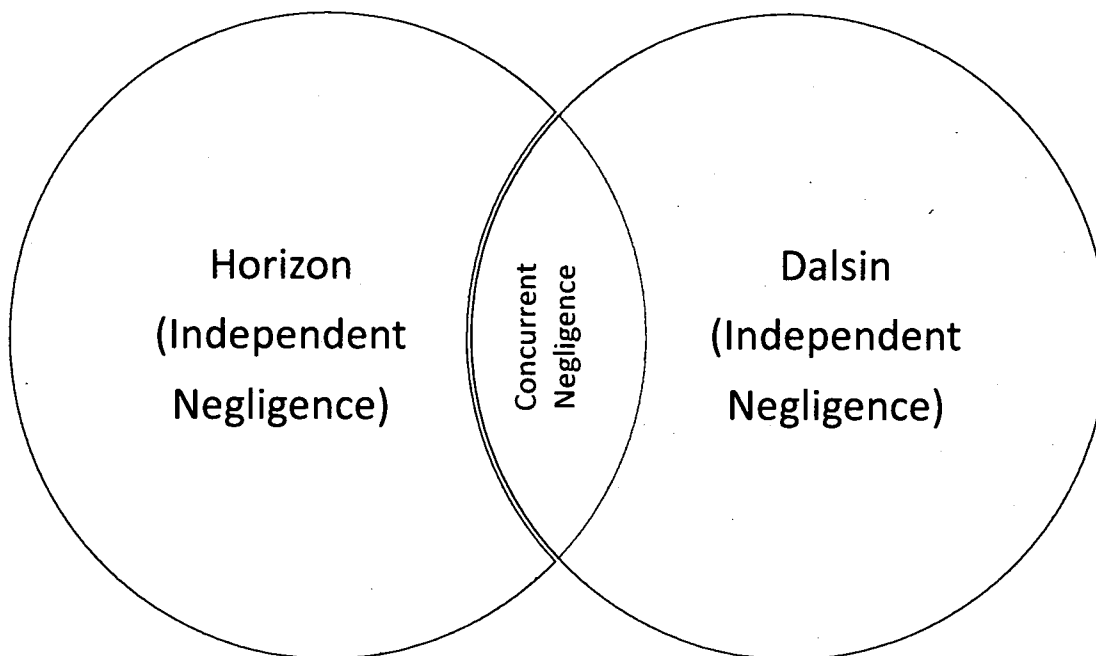
An example of the first category—violation of separate duties by separate tortfeasors that combine to cause the loss—is found in Boiter v. South Carolina Department of Transportation,

383 S.C. 123, 712 S.E.2d 401 (2011). In Boiter, the plaintiffs were injured in a motor vehicle accident at an intersection when the traffic light was not working. Id. at 126, 712 S.E.2d at 402. The Department of Transportation was negligent in failing to implement an appropriate re-lamping policy. Id. The Department of Public Safety was negligent in failing to timely send a police officer to direct traffic after receiving notice of the traffic light malfunction. Id. The court held that each department violated separate duties, and the wrongful acts of each were separate and distinct. Id. at 133, 712 S.E.2d at 406. Neither defendant was responsible for the duties of the other; consequently, the court held that there were two independent and separate acts of negligence, and thus two separate “occurrences” for purposes of the Tort Claims Act. Id. at 134, 712 S.E.2d at 406. There is no “concurrent negligence” in Boiter, as depicted in Figure 1 below.



2. Category Two

A second category involves claims against two or more parties that have separate but intersecting duties. This type of claim is depicted in Figure 2 below.



In *Braegelmann v. Horizon Development. Co.*, the court construed the Causal Limitation clause to prevent indemnification for the indemnitee’s own negligence. 371 N.W.2d 644, 646-47 (Minn. Ct. App. 1985). The court appears to have drawn its distinction from a statute that, although inapplicable in that particular case, prohibited indemnification for a party’s own negligence. *Id.* at 646 (citing Minn. Stat. § 337.02 (1984)). The issue of an area of intersecting duties, the breach of which would constitute concurrent negligence, was not raised in *Braegelman*.

Most of the cases Muhler and this Court cited, while invoking a language of a broad prohibition on indemnification against a parties “own” negligence, actually fall into this second category. See *Mautz v. J.P. Patti Company*, 298 N.J. Super. 13, 688 A.2d 1088 (N.J. Super. Ct. App. Div. 1997); *Brown v. Boyer-Washington Blvd. Assocs.*, 856 P.2d 352 (Utah 1993); *Cabo Constr., Inc. v. R.S. Clark Constr., Inc.*, 227 S.W.3d 314 (Tex. App. 2007); *MSI Constr. Mgrs., Inc. v. Corvo Iron Works, Inc.*, 208 Mich. App. 340, 527 N.W.2d 79 (Mich. Ct. App. 1995);

Glendale Constr. Servs., Inc. v. Accurate Air Sys., Inc., 902 S.W.2d 536 (Tex. App. 1995). When a case involves workplace injuries, there are typically separate but intersecting duties involved.²

For example, in Mautz, the owner / general contractor was responsible for general worksite safety. 298 N.J. Super at 17, 688 A.2d at 1090. The site clearing contractor was responsible for the operation of the front-end loader and the shoring of the trench wall. Id. The owner / general contractor typically does not assume a duty to safely operate equipment owned or controlled by subcontractors. See Rock Hill, 393 S.C. at 390, 611 S.E.2d at 238 (“The general rule is that an employer is not vicariously liable for the negligent acts of an independent contractor.”). However, the shoring of the trench involved the worksite and arguably was the joint responsibility of both the owner / general contractor and the site clearing contractor. Thus, there were two separate yet intersecting acts of negligence that allegedly combined to produce the plaintiff’s injury.

The Causal Limitation clause limits the indemnity obligation to those damages within the claim against the indemnitee that were “caused in whole or in any part” by the indemnitor’s negligence. An examination of the Braegalman line of cases reveals that in each case, indemnification was being sought in part for negligence that was outside the scope of the indemnitor’s duties. The courts’ holdings were based upon the requirement that the damage must be “caused . . . by” the indemnitor. In most of the cases, the courts did not reach the issue of concurrent negligence, or that portion of the damage that was “caused . . . in part” by the indemnitor’s negligence.

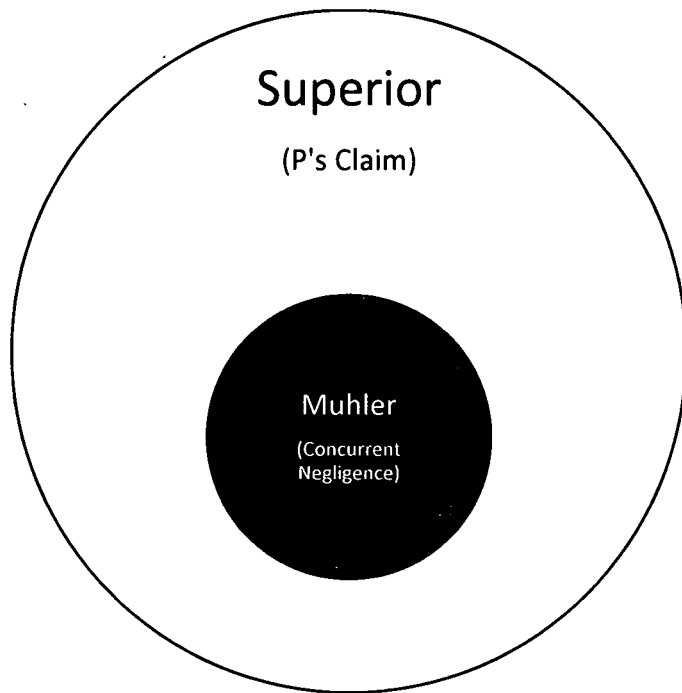
² This does not necessarily mean that all workplace personal injury claims on a construction project will all fall into this category. The distinguishing factor is not the type of case, but whether the indemnitee was sued for damage that was not at least partly caused by the indemnitor.

The indemnification agreement only requires indemnification to the extent the loss was caused by the indemnitor's scope of work. When the indemnification sought involves breaches of duties that were outside the indemnitor's scope of work, partial or "concurrent negligence" is involved, and the case falls into Category Two.

3. Category Three

Construction defect claims fall into the third category. In a construction project, the builder contracts with the developer or the homeowner to construct all or a portion of a building project. Through the prime contract, the builder assumes a duty to construct the building in accordance with building codes, industry standards, and life safety standards. Kennedy, 299 S.C. at 347, 384 S.E.2d at 738. A subcontractor is an independent contractor that contracts with the general contractor to perform a portion of the work that the general contractor has already contracted with the owner to perform. 13 Am. Jur. 2d Building, Etc. Contracts § 1 (Aug. 2018 Update). Thus, a subcontractor's duties with respect to subcontracted work are completely subsumed within the duties of the general contractor under the prime contract.

When portions of the work are subcontracted, the general contractor retains a responsibility to supervise the subcontractor's work. Teseniar v. Professional Plastering & Stucco, Inc., 407 S.C. 83, 96, 754 S.E.2d 267, 274 (Ct. App. 2014). Under this supervisory duty, the general contractor is responsible for choosing subcontractors. 16 Jade Street, LLC v. R. Design Constr. Co., LLC 405 S.C. 384, 386, 747 S.E.2d 770, 771 (2013). Questions about the work are directed by the subcontractor to the general contractor. Id. at 387, 747 S.E.2d at 772. Thus, an owner's claim against a general contractor is essentially a negligent supervision claim for the negligent performance of the work by the subcontractors. This type of claim is depicted in Figure 3 below:



In this particular case, Superior self-performed certain work, including preparation of the rough openings for the windows. (R. p. 25.) However, Superior’s prime contract included a duty to see that the windows were installed properly, even if materials from other contractors were used in its work. (R. p. 370.) Furthermore, Muhler assumed complete responsibility for the window and door installation in the 2007 settlement agreement. (R. p. 386-87.)

The owner may sue the builder and the subcontractor for construction defects. 17 S.C. Jur. Construction Law § 45 (June 2018 Update). If a general contractor is found liable to the owner for the subcontractor’s defective work, the general contractor is entitled to indemnification from the subcontractor for all amounts paid to the owner resulting from the subcontractor’s defective work. Id. (citing Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992)).

Therefore, in the context of construction defect litigation, any defects in a particular scope of work involve concurrent negligence between the subcontractor and the general contractor. The subcontractor, through its subcontract, assumes a duty to properly perform the work within the

scope of work contemplated in the subcontract. The general contractor retains a duty to properly supervise the subcontractor's work. Although Superior self-performed some work in this case to prepare some of the "bucks" in some of the window rough openings, Muhler was responsible for the entire window and door installation scope of work. (R. pp. 370, 386-87.)

The Supreme Court of South Carolina has held that "caused by" extends to negligent supervision claims. McPherson By and Through McPherson v. Michigan Mut. Ins. Co., 310 S.C. 316, 310 S.C. 316 (1993). In McPherson, the Supreme Court held that a negligent supervision claim against a city was caused by the ownership, operation, or use of an auto because without the negligent operation of the auto, there was no link between the city's alleged negligence and the plaintiff's injuries. Id. at 320, 310 S.C. at 320. In like manner, a homeowner's claim against a general contractor is derived from the alleged negligent performance of the work by the subcontractor. Thus, the plaintiff's claims against Superior were "caused . . . in . . . part" by Muhler's negligent performance of its scope of work.

As discussed above, under the General Scope clause, Muhler broadly assumed a duty to indemnify Superior for any claim against Superior in which Muhler's negligent performance of its scope of work is alleged. (R. p. 372.) This broad duty is narrowed under the Causal Limitation clause to that portion of the claim that is caused, at least in part, by Muhler's negligence.

Superior's entire claim against Muhler is based upon concurrent negligence—that is, for damages caused, at least in part, by Muhler. This case does not involve duties that are separate and independent of Muhler's scope of work. Under its subcontract, Muhler assumed responsibility for a portion of Superior's scope of work—that portion pertaining to the provision and installation of the windows and doors. Superior has separately settled all claims that relate to other scopes of work, thus removing any damages that were not associated with Muhler's scope of work from the

equation. Therefore, the Braegelmann line of cases are inapposite—they deal with a factually distinguishable situation (i.e., “Category Two”) in which some of the damages were caused by negligence for which the indemnitor was not responsible.

The distinction Superior makes is not arbitrary, but rather one which is imposed by the language of the indemnity agreement. Courts construing substantially similar indemnity agreements have observed this distinction. In Nusbaum v. City of Kansas City, the court construed the phrase “to the extent caused . . . by” to remove responsibility for indemnifying for damages caused by negligence that was *independent of* the indemnitor’s negligence. 100 S.W.3d 101, 106-07. Nusbaum is a well-reasoned decision by the Supreme Court of Missouri, sitting *en banc*, and its holding is instructive.

In Nusbaum, a patron was injured on the grounds of a theater. 100 S.W.3d at 102. The plaintiff tripped over a manhole cover that protruded above the sidewalk. Id. The case involved the plaintiff’s claims against three defendants. The theater (Starlight) was sued for failing to provide a safe premises. Id. at 103. The plaintiff sued the general contractor that was performing work on the theater grounds (Dunn) for knocking down a light pole and failing to repair it, and for damaging the manhole/sidewalk area where the accident occurred. Id. The plaintiff also sued the subcontractor that caused the damage to the light pole and manhole/sidewalk area (PC). Id.

Nusbaum is a “Category Two” case. Starlight, as the owner, is not responsible for the work of independent contractors. Rock Hill, 363 S.C. at 390, 611 S.E.2d at 238. Starlight’s liability was based upon a premises liability theory, which possibly overlapped with the general contractor’s duty to keep its worksite safe. PC was liable, both for directly causing the harm and under its subcontract with Dunn.

In analyzing language substantially similar to Article 12.1.(a) of the indemnity agreement at issue, the court held as follows:

The phrase “to the extent caused” expresses an intention to limit the indemnitor’s liability to the portion of the fault attributed to the indemnitor. . . . The 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 PC indemnify Dunn for PC’s negligence *even if Dunn participates in part in PC’s negligent conduct*. To hold otherwise would make the intended expression to limit liability to the acts of indemnitor meaningless. . . .

Nusbaum, 100 S.W.3d at 106-07 (emphasis added). The court remanded the case to the trial court for factual findings as to the portions of the damages that were caused by negligent acts *independent of* that of each indemnitor. Id. at 107-08.

Nusbaum does not stand for the broad proposition Muhler seeks to draw—that standard form indemnity agreements do not provide any indemnification for a general contractor’s own negligence across the board. The court’s holding was that the indemnity agreement does not require a subcontractor to indemnify for negligence that was independent of the indemnitee’s negligent conduct. The court expressly held that standard form indemnity agreements do in fact indemnify for a general contractor’s own negligence insofar as it relates to its supervisory duty over the subcontractor’s scope of work. Thus, Nusbaum supports Superior’s position because it distinguishes between independent (or “sole”) negligence and concurrent negligence.

Other cases Superior cited drew this distinction. In Cumberbatch v. Board of Trustees, Delaware Technical & Community College, the court held that the indemnity agreement provided indemnification for concurrent negligence, but remanded the case for further findings to allocate between concurrent and independent negligence. 382 A.2d 1383, 1386-87 (Del. Super. Ct. 1978). The court analyzed the distinction between concurrent and independent negligence and held that all alleged negligence was concurrent in Berry v. Orleans Parish School Board, 830 So.2d 283, 286-87 (La. 2002).

Under the AGC from subcontract Article 12.1., the indemnity agreement requires Muhler to indemnify Superior for “all” damages and defense costs for which Muhler was at least partly at fault. (R. p. 372.) Thus, an indemnitor must indemnify for all damage caused by his concurrent negligence, even that portion of the damage concurrently caused by the indemnitee.

Superior’s argument is not contradictory. See Concord and Cumberland, Adv. Sh. No. 32 at 72-73, 2018 WL 3748616 at *6. Page 28 of the Appellant’s Brief states:

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.

This is completely consistent with the thrust of Superior’s argument and relevant case law. As discussed above, “concurrent negligence” refers to negligence for which Muhler is partly responsible. Under the indemnity agreement, Muhler agrees to indemnify for concurrent negligence. The limiting phrase in the Causal Limitation clause prevents Muhler from being required to indemnify for the independent negligence of other subcontractors, *i.e.*, damages associated with the work of other trades, such as the roof, siding, or framing. It does not preclude Muhler from being required to indemnify for Superior’s concurrent negligence.

Therefore, this Court erred in construing the standard form AGC indemnity agreement so narrowly. Neither Muhler nor this Court has cited any cases in which similar indemnity agreements have been held to bar indemnification for negligent supervision claims against a general contractor that are dependent upon the negligence of the indemnitee. This Court appears to have indulged in a presumption that any damages caused by the negligence of Superior, by definition, could not also be caused by the negligence of Muhler. However, the indemnity agreement does not limit Muhler’s obligation to damages wholly caused by Muhler, but rather to damages “caused in whole or in any part” by Muhler. Because none of the damages for which

Superior seeks indemnification are for negligence that was independent of Muhler's negligence in performing its scope of work under its subcontract, all claimed damages are for damage "caused . . . in any part by" Muhler and Superior is entitled to its requested relief.

C. The indemnity agreement provides sufficient notice that Muhler must indemnify for Superior's own negligence.

The indemnity agreement contains a provision clearly and unequivocally requiring Muhler to indemnify Superior for Superior's concurrent negligence to the extent it was caused in part by Muhler. It requires Muhler to indemnify for claims against Superior arising out of or resulting from Muhler's work, provided that the alleged property damage is at least partly caused by Muhler's negligence, "*regardless of whether it is caused in part by a party indemnified hereunder.*" (R. p. 372 (Para. 12.1.(a)) (emphasis added).) The italicized language is the Notice clause.

This Court "read this phrase to mean that whatever level of indemnification article 12.1 provides is not negated simply because Superior's negligence contributed to the loss." This Court further observed: "Thus, reading article 12.1 as a whole, the final phrase of article 12.1(a) shows only the parties' intent that Muhler's obligation to indemnify for Muhler's negligence is not diminished or affected in the event Superior is concurrently negligent." Yet this Court concluded that "[c]ontrary to Superior's claims, this final phrase does not show an intention by the parties to indemnify Superior for its concurrent negligence."

This court's analysis is confusing, and it appears to attempt to deny the very conclusion demanded by its own reasoning. Superior is not seeking indemnification for damages caused by its sole negligence. Nor is Superior seeking indemnification for any damages that were not at least partly caused by Muhler's negligence. By concluding that the Notice clause does not show an

intent to indemnify for Superior’s concurrent negligence, this Court interprets the contract language to mean the exact opposite of what it actually says.

This Court erred in resorting to Braegelmann on this point. As discussed above, Braegelmann is a “Category Two” case in which some of the damages claimed were not caused, at least in part, by the indemnitee’s negligence. Braegelmann was a workplace injury case. 371 N.W.2d at 645. A subcontractor does not assume duties owed by the general contractor with respect to keeping its employees safe while working on the job—the subcontractor owes this duty directly by virtue of the employment relationship. The general contractor and the subcontractor owe separate duties to the employees of subcontractors with respect to workplace safety, and a court cannot simply assume that a subcontractor must indemnify for all damages awarded against the general contractor if the subcontractor was in any degree negligent. Id. at 645-46. Having held that the subcontractor only owed indemnification to the extent of its negligence, but not for the general contractor’s “own” (*i.e.*, independent) negligence, the court concluded that the final phrase could not extend the scope of the indemnity agreement. Id. at 646.

Again, Nusbaum is instructive. In a prior case, a Missouri court had held that the phrase, “regardless of whether it is caused in part by a party indemnified hereunder,” was sufficiently clear to advise the indemnitor that it was assuming a duty to indemnify for the indemnitee’s own negligence. Buchanan v. Rentenbach Contractors, Inc., 922 S.W.2d 467, 470 (Mo. Ct. App. 1996). Buchanan was a workplace injury case, and thus a “Category Two” case. Id. at 469. Consequently, Nusbaum overruled Buchanan to the extent it held that an indemnitor must indemnify for the independent negligence of others. 100 S.W.3d at 107. However, this holding immediately followed the court’s ruling that the “to the extent caused” clause is interpreted to mean “that PC

indemnify Dunn for PC's negligence even if Dunn participates in part in PC's negligent conduct.”

Id.

Case law does not support the broad proposition that standard indemnity agreements never provide indemnification for the indemnitee's own negligence. Reading Braegelmann and Nusbaum together, and applying general rules of contract construction, two conclusions can be drawn. First, the Notice clause does not extend the scope of the indemnity agreement. In other words, this phrase does not require an indemnitee to provide indemnification for anything other than damages for which he is at least partly at fault. Second, and more importantly, the intent of the Notice clause is to satisfy the “notice” requirement, *i.e.*, that indemnification for an indemnitee's own negligence must be clearly specified.

Superior is not seeking indemnification for damages for which Muhler is not at least partly responsible. Therefore, Superior is not relying on the Notice clause for the purpose of extending Muhler's duty to indemnify beyond the scope of its concurrent duties pertaining to its scope of work in its subcontract—work that was a portion of Superior's overall prime contract with the Owner. For this reason, Braegelmann is not applicable.

Superior's position is that the Notice clause (“regardless of whether [the alleged property damage] is caused in part by [Superior]”) provides sufficient notice that Muhler will be responsible for Superior's concurrent negligence to the extent such damages are also caused by Muhler's concurrent negligence. Superior's position is supported by abundant case law.

In Buchanan, the court held that this phrase was sufficiently clear to provide notice. 922 S.W.2d at 470. This portion of the holding was not overruled by Nusbaum. Other courts have held that this phrase “clearly expresses the parties' intent that [the indemnitee] may be indemnified by [the indemnitor] even if [the indemnitee] is sued for its own wrongful conduct.” Camp, Dresser

& McKee, Inc. v. Paul N. Howard Co., 853 So.2d 1072, 1078 (Fla. Dist. Ct. App. 2003). The Supreme Court of Texas has upheld a similar phrase as being sufficient to satisfy the notice requirement. Enserch Corp. v. Parker, 794 S.W.2d 2, 8 (Tex. 1990).

The Supreme Court of the United States has held substantially similar contract language to be “[a]n example of an indemnification clause that makes specific reference to the effect of the negligence of the indemnitee.” U.S. v. Seckinger, 397 U.S. 203, 211 n.17 (1970). The Supreme Court thus held that this language satisfies the requirement that “the mutual intention of the parties [to indemnify for the negligence of the indemnitee] should appear with clarity on the face of the contract.” Id. at 211.

This Court brushed aside clear majority of cases, seeking to distinguish them on the ground that they lack the limiting language “to the extent caused . . . by” and instead “broadly require the indemnitor to indemnify for all damages ‘arising out of or resulting from the performance of the work.’” Concord and Cumberland, Adv. Sh. at 73-74 n.5, 2018 WL 3748616 at *7 n.5. The Court is incorrect.

Every case cited in footnote 5 of this Court’s opinion contains the following language, or substantially similar language:

[The indemnitor shall indemnify against all claims] arising out of or resulting from the performance of the Work, *provided that any such claim . . . is caused in whole or in part by any negligent act or omission of the [indemnitee]* . . . , regardless of whether or not it is caused in part by a party indemnified hereunder.

Seckinger, 397 U.S. at 885 n.17; McBro, Inc. v. M & M Glass Co., 611 So.2d 283, 284 (Ala. 1992); Washington Elementary Sch. Dist. No. 6 v. Bagliano Corp., 189 Ariz. 58, 59-60, 817 P.2d 3, 4-5 (Ariz 1991) (en banc); Cumberbatch, 382 A.2d at 1385; Camp, 853 So.2d at 1076; Simon Prop. Grp., L.P. v. Brandt Constr., Inc., 830 N.E.2d 981, 986 (Ind. Ct. App. 2005); Thornton v. Guthrie Cty. Rural Elec. Co-op. Ass’n, 467 N.W.2d 574, 576 (Iowa 1991); Payne Plumbing &

Heating Co., Inc. v. Bob McKiness Excavating & Grading, Inc., 382 N.W.2d 156, 160 (Iowa 1986);, 830 So.2d at 283-84; Wallace v. Slidell Mem’l Hosp., 509 So.2d 69, 74 (La. Ct. App. 1987); Robinson v. A. Z. Shmina and Sons Co., 293 Mich. App. 644, 648, 293 N.W.2d 661, 662-63 (Mich. Ct. App. 1980); Oster v. Medtronic, Inc., 428 N.W.2d 116, 118 (Minn. Ct. App. 1988); Gunka v. Consol. Papers, Inc., 179 Wis. 2d 525, 531, 508 N.W.2d 426, 428 (Wis. Ct. App. 1993) (emphasis added).

This Court simply missed the fact that every case Superior cited contained a Causal Limitation clause. These cases do not broadly require the indemnitor to indemnify for all damages [within the General Scope provision],” as this Court represented. See Concord and Cumberland, Adv. Sh. No. 32 at 73, 2018 WL 3748616 at *7. There is no meaningful difference between “to the extent that . . .” and “provided that . . .” Both of these phrases condition the duty to indemnify on the indemnitor being at least partly at fault. Thus, the Court ignored the majority rule based upon a false distinction.

In all of these cases, the courts enforced indemnification agreements against arguments that the Notice clause was not sufficiently clear. In many of the cases, the courts specifically held that the phrase “regardless of whether or not it is caused in part by a party indemnified hereunder” was sufficiently clear and unambiguous to provide notice that indemnification for the indemnitee’s own negligence was contemplated. Washington Elem., 169 Ariz. At 61-62, 817 P.2d at 6-7; Cumberbatch, 382 A.2d at 1386-87; Simon Prop., 830 N.E.2d at 995; Thornton, 467 N.W.2d at 576-77; Payne Plumbing, 382 N.W.2d at 160; Oster, 428 N.W.2d at 118-19; Gunka, 179 Wis.2d at 532, 508 N.W.2d at 428.

Importantly, Oster is a Minnesota case that post-dates Braegelmann. In Braegelmann, the court construed the Causal Limitation clause to prevent an indemnitor from being required to

indemnify for the indemnitee's "own" negligence: 371 N.W.2d at 646-47. Braegelmann does not appear to contemplate concurrent negligence. In Oster, the indemnity agreement at issue contained a Causal Limitation clause. 428 N.W.2d at 118. However, the Oster court (like this Court) missed that provision and attempted to distinguish Braegelmann on the ground that the indemnity agreement before it allowed indemnification for the entire claim, including those portions that were not caused by the indemnitee. Id. at 119. Nevertheless, Oster squarely held that the Notice provision was sufficient to allow indemnification for the indemnitee's own negligence. The court expressly held that the phrase "unequivocally expresses Kastner's intent to indemnify CAM, even for amounts attributable to CAM's own negligence." 428 N.W.2d at 119. Id.³

Thus, Oster effectively overruled Braegelmann's holding regarding the effectiveness of the Notice clause. Read together, Braegelmann stands for the proposition that the Causal Limitation clause limits indemnification to damage caused (at least in part) by the indemnitee, and Oster stands for the proposition that the Notice clause allows indemnification for the concurrent negligence of the indemnitee. Thus, Minnesota law is in accord with Superior's position in this case.

The Notice clause is not contained in any indemnification agreement that South Carolina appellate courts have previously considered. (See R. p. 372.) In each of the cases this Court cited, the indemnity agreement merely provided for indemnification in general terms without specifying that this indemnification must be made "regardless of whether [the property damage] is caused in part by a party indemnified hereunder." Fed. Pac., 298 S.C. at 25, 378 S.E.2d at 57 ("Carolina Production shall indemnify Federal Pacific and hold it harmless from and against any damage . . .

³ Note that since Oster held that the Notice clause is effective even when a Causal Limitation clause is lacking, this Court's distinction fails even if it finds that all of the cases Superior cited do not include a substantially similar Causal Limitation clause.

.”); Laurens, 355 S.C. at 107, 584 S.E.2d at 376 (“The Hospital will indemnify and hold EMS . . . harmless from and against any and all claims . . . caused by or resulting from allegations of wrongful acts or omission of Hospital”); Ashley II, 409 S.C. at 489, 763 S.E.2d at 20 (“Ross agrees to indemnify and hold harmless PCS in respect to all . . . suits . . . resulting from any acts or omissions of Ross”).

These holdings are in accord with the general rule that “mere general, broad, and seemingly all-inclusive language is not sufficient to impose liability for an indemnitee’s own negligence. See 41 Am. Jur. 2d Indemnity § 18. Prior South Carolina cases do not stand for the proposition that standard form indemnity agreements, which include language that numerous courts have held to be sufficiently specific, are nevertheless unenforceable. This Court should follow those courts that have distinguished between indemnity agreements that contain the Notice clause and those that lack it. See Rapid Leasing, Inc. v. Nat’l Am. Ins. Co., 263 F.3d 820, 828 (8th Cir. 2001).

Even if the Court should disagree on this point, aside from this, as explained in Section III below, if the Court had reconciled the two indemnity clauses in accordance with long standing rules of contract interpretation, the “to the extent” clause that is the crux of the Court’s ruling would have been found to have been superseded by the clearly countervailing language of Paragraph Ten of the 2007 Agreement. See Section III, *infra*.

This Court appears to insinuate that Superior attempted to conceal from Muhler its true intent under the indemnity agreement. Concord and Cumberland, Adv. Sh. No. 32 at 76 n.6, 2018 WL 3748616 at *9 n.6. Nothing could be further from the truth. The parties utilized a standard form contract that was developed for the construction industry. There is no evidence that Superior altered the language of the indemnity clause in the Subcontract, and every page of the Subcontract notes that it is the 1984 edition of the AGC 600 form contract—thus a form in existence in the

open market for over twenty years at the time of execution. The language in the indemnity agreement in the AGC form is substantially similar to language that “[t]he United States Supreme Court has cited . . . as being a paradigm of clarity in shifting the risk of a negligent indemnitee’s loss to the indemnitor.” Camp, 853 So.2d at 1077. Moreover, nearly every state that has considered the issue has held that the Notice clause provides sufficient notice of intent to indemnify the indemnitee for the indemnitee’s own negligence under any standard.

The standard form AGC indemnity agreement provided that Muhler must indemnify Superior if Muhler was partially responsible. The indemnity agreement further provides that Muhler must provide this indemnification regardless of whether Superior was also partially responsible. It is undisputed that Muhler was responsible for the window and door installation, and the requirement of the windows to perform in accordance with the building code and the contract documents. Superior’s only personal responsibility as it relates to its claim against Muhler was sequencing of the trades, general inspection of the overall quality and progress of the work, and the installation of wooden bucks in a presently unknown portion of the window rough openings, which, at most, amounts to alleged concurrent negligence. Therefore, Muhler must indemnify for damages associated with the windows and door installation, even though Superior’s concurrent negligence may be involved.

III. The Court Erred in Declining to Reconcile the Indemnity Clauses of the Subcontract and the 2007 Agreement.

This Court further erred in refusing to consider the effect of the 2007 settlement. Although the Subcontract indemnity clause does not need to be “rescued” by the 2007 Agreement, the Court was required to construe both instruments in conjunction, employing well-established rules of contract construction, and then applying the “clear and unequivocal” standard to the end result. This would have resulted in the “to the extent clause” that the Court erroneously relied upon

(apparently exclusively), to be superseded by the language of the 2007 Agreement. In other words, while Superior argues that the Court's interpretation of the Subcontract was incorrect, had the Court properly construed the 2007 Agreement with the Subcontract, the specific basis for the Court's improper interpretation of the Subcontract would not be "in play."

The Subcontract and the 2007 Agreement are not separate, independent contracts. The 2007 Agreement is a contractual modification of the Subcontract. Both Superior and Muhler are parties to both agreements.⁴ The Subcontract and the 2007 Agreement both involve the same project, and the exact same scope of work and materials provided. The make, model, location, number and cosmetic appearance of the windows and doors in the Subcontract did not change. The essential physical performance requirements of the windows and doors remained unchanged from the original contract documents. The total amount of payment under the Subcontract remained undisturbed. While there are terms of the Agreement that alter certain very specific portions of the Subcontract, to treat them as separate, independent agreements and make no attempt to reconcile the two is in error. [A] contract may only be altered by mutual agreement and for further consideration. Lee v. University of South Carolina, 407 S.C. 512, 518, 757 S.E.2d 394, 398 (Ct. App. 2014) (citing Layman v. State, 368 S.C. 631, 640, 630 S.E.2d 265, 269 (2006)). In this case, Superior's agreement to forbear upon its legal right to pursue litigation against Muhler for the explicitly recognized defects in the windows and doors was agreed to be sufficient consideration for the 2007 Agreement. See Paragraph Thirteen of the Agreement. Valuable consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Hennes

⁴ WeatherShield is also a party to the 2007 Agreement, but none of the provisions applying specifically and only to Weathershield have any bearing upon this Appeal or this Petition.

v. Shaw, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012); Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App.1998)

As explicitly stated by Paragraph One of the 2007 Agreement, the Agreement had not “amended or affected any party’s contractual rights except to the extent specifically stated in this Agreement.” While the Court acknowledged this fact in its decision, it then went on to essentially disregard the sole indemnity clause in the 2007 Agreement pertaining to Muhler, other than to state that its wording, in isolation from the Subcontract indemnity clause, failed to meet the “clear and unequivocal” requirement of Laurens. The Court’s refusal to examine the sole indemnity clause in the Agreement as pertaining to Muhler and reconcile it with the sole indemnity clause in Muhler’s subcontract appears to be because the 2007 Agreement did not list the “chapter and verse” of the Subcontract that was being modified by the Agreement, and provide, in exacting detail, what specific words or phrases were altered. However, the 2007 Agreement does not anywhere specifically cite any specific section of any portion of the Subcontract in such a manner; if the absence of such “chapter and verse” citations in the Agreement are an impediment to the Agreement’s enforcement, then essentially nothing in the Agreement modifies the Subcontract *at all*. This would be an absurd result for a document that both Superior and Muhler have conceded was extensively negotiated by each party’s legal counsel at significant cost, and without which would have simply resulted in Superior declaring Muhler to be in default and terminating Muhler in the spring of 2007. For example, Paragraph 10 of the Agreement specifically deals with matters of payment to Muhler, but it does not identify what specific sections of Article 5 of the Subcontract - which contains either all or substantially all terms related to payment- are modified by the terms of the Agreement. One must read the single sentence in Paragraph 10 and compare it to the terms of Article 5 to ascertain what specific item was changed. Paragraphs Six, Seven, and Eight of the

Agreement specifically deal with certain warranty aspects of the work, yet do not make a single reference to Article 9.10 of the Subcontract (entitled “Warranty”) by name to explain how exactly, word-by-word, the warranty terms are changed. Again, one must compare Paragraphs Six, Seven, and Eight of the Agreement to the corresponding relevant sections of the Subcontract to determine how the original terms were altered.

There is only one indemnification clause in the Subcontract and one in the Agreement pertaining to Muhler; contrary to the Court’s opinion, construing the two contract provisions in conjunction and reconciling them does not constitute re-writing or forming a new contract. The Court cites Lowcountry Open Land Trust v. Charleston Southern University, 376 S.C. 399, 410, 656 S.E.2d 775, 781 (Ct. App. 2008), in this regard; Lowcountry did not involve the reconciliation of two existing, interrelated contractual documents, but rather the interpretation and enforcement of a single contract whose terms were disputed by the parties, and a special master’s order to the parties to renegotiate and execute *an entirely new contract*. See Lowcountry, at 411-412. No such circumstances are present in this case; Superior and Muhler both voluntarily entered the Subcontract and both voluntarily modified certain specific terms of the Subcontract via the 2007 Agreement. The Court’s reference to Lewis v. Premium Investment Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002), also does not speak to the issue of construing a contract modification or two interrelated contractual documents, but instead addresses construing a single contract and the Court’s exercise of its powers of equity to “relieve a defaulting purchaser from the strict forfeiture provision in an installment land contract and provide the opportunity for redemption when equity so demands.” Id. A Court exercising its well- established right to construe contractual documents as a matter of law under established rules of construction does not constitute the “rewriting” of a contract because it results in one party prevailing over another party. There are numerous instances

of the Court examining more than one contractual writing or document concerning the same matter of business and parties and construing the two as a whole:

In South Carolina, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole. Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991); Moshtaghi v. Citadel, 314 S.C. 316, 321, 443 S.E.2d 915, 918 (Ct.App.1994) (citing Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 25 (1977)). “The date of the writings constituting the transaction is not material.” Moshtaghi, 314 S.C. at 321, 443 S.E.2d at 918 (citing Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991)); Plaza Dev. Servs. v. Joe Harden Builder, Inc., 294 S.C. 430, 433–34, 365 S.E.2d 231, 233 (Ct.App.1988) (“Where instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties.”). Moreover, where one of the contracts explains, amplifies, or limits the other, those provisions will be given effect between the parties so that the whole agreement, as actually contracted by the parties, may be effectuated. Moshtaghi, 314 S.C. at 321, 443 S.E.2d at 918; Edward Pinckney Assocs., Ltd. v. Carver, 294 S.C. 351, 354, 364 S.E.2d 473, 474 (Ct.App.1987) (“Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated.”); See Wilbur Smith & Assocs. v. Nat'l Bank of South Carolina, 274 S.C. 296, 299, 263 S.E.2d 643, 645 (1980). One contract draws contractual sustenance from the other. Edward Pinckney Assocs., 294 S.C. at 354, 364 S.E.2d at 474. This rule applies even where the parties are not the same, if the several instruments were known to all the parties and were delivered the same time to accomplish an agreed purpose. 17A Am. Jur.2d Contracts 388 (1991).

Ellie, Inc. v. Miccichi, 358 S.C. 78, 92, 594 S.E.2d 485, 493 (Ct. App. 2004); see also The Housing Auth. Of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 336, 588 S.E.2d 617, 621 (Ct.App. 2003). Furthermore, there is no appellate authority in this state indicating that the initial process of reconciling two contractual documents as a whole must be done under the “clear and unequivocal standard” – and therefore that heightened standard only applies *after* the two instruments are construed together. The Court should have reconciled the indemnity provisions of the Subcontract and the Agreement under the long- standing established rules of

contract interpretation, and then apply the “clear and unequivocal” test to the specific issue of an indemnitee being able to be indemnified for its concurrent negligence.

Because the Court declined to construe the Subcontract and the 2007 Agreement as a whole, with the specific provisions of the 2007 Agreement deemed as altering or “limiting, explaining, or otherwise affecting the provisions of” the Subcontract indemnity clause, Superior reincorporates Section III of Appellant’s Final Brief herein for the purposes of explaining in detail the end product of how the two clauses should have been construed.

The 2007 Agreement was not a separate and independent contract. The trial court found that the 2007 Agreement was intended to address the issues of leaking windows. (R. p. 26.) The 2007 Agreement recites that during construction, the windows failed certain tests. (R. p. 384.) Pursuant to the 2007 Agreement, Muhler and Weathershield undertook the duty to remediate the defects. (Id.) Muhler specifically undertook the duty to “remedy any defects in the installation of the windows” “[p]ursuant to the terms of the Subcontract Agreement.” (Id. at 385, ¶ 5.) Thus, the 2007 Agreement was an offshoot of the original subcontract.

As discussed above, the indemnity agreement in the original subcontract is enforceable with respect to concurrent negligence. The 2007 Agreement did not negate the existence of the indemnity agreement in the original subcontract, the Notice clause of which clearly and unequivocally required Muhler to indemnify Superior for Superior’s own concurrent negligence.

The 2007 Agreement broadened the scope of Muhler’s duties in certain respects, including its indemnity obligation. For this reason, it is improper to say that the 2007 Agreement failed to provide adequate notice to Muhler of its duty to indemnify for Superior’s concurrent negligence.

The language of the 2007 Agreement appears to contemplate indemnification for Superior’s negligence in that Muhler agreed to unconditionally indemnify Superior and to “pay all

damages” in the event Superior was subsequently sued by owners for defective installation of the windows. (R. p. 387, ¶ 11.) This explicitly overrides the “to the extent” clause of the Subcontract.

Importantly, the indemnity agreement in the 2007 Agreement was not a boilerplate provision in a construction contract, but rather a negotiated term in a settlement agreement drafted by counsel. Muhler expressly agreed to accept the terms of the 2007 Agreement as consideration for Superior’s forbearance from pursuing litigation against Muhler. (Id., ¶ 13.) Muhler expressly represented in the 2007 Agreement that it fully understood the terms of the 2007 Agreement with advise of counsel. The terms of the 2007 Agreement were the product of negotiation. (Id. at 389, ¶ 23.) The parties expressly agreed that the terms of the 2007 Agreement would not be strictly construed against the drafter. (Id. at 389, ¶ 23, 390 ¶ 26.) Muhler’s argument that the 2007 Agreement is unenforceable is tantamount to its reneging on the express terms of a settlement contract negotiated via counsel.

CONCLUSION

The South Carolina legislature has distinguished between indemnification for a party’s own sole negligence and a party’s own concurrent negligence. Since the legislature has permitted indemnification based upon concurrent negligence in construction contracts, this Court should not invoke the common law to nullify indemnity agreements that are permitted by the statute. Nevertheless, even if this court applies, the “clear and unequivocal” standard, the indemnity agreement in the AGC form contract meets this standard. This Court cited only one overruled case in support its holding and ignored the overwhelming majority of cases in which the courts held that standard form indemnity agreements are sufficiently clear. Furthermore, this Court failed to properly apply the terms of the contract to the facts before it. Superior is not seeking indemnification for any property damage for which Muhler is not partially responsible. The Notice

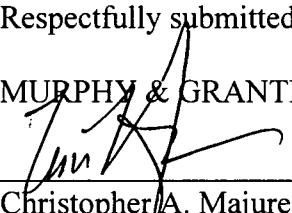
clause has nearly uniformly been held to satisfy the requirement that an intent to indemnify for the indemnitee's negligence be clearly and unequivocally stated.

Most importantly, the Court erred in refusing to construe the indemnity clause of the Subcontract with the indemnity clause of the 2007 Agreement together under established rules of contract interpretation, and then applying the "clear and unequivocal" standard of Laurens to the specific issue of Superior being able to be indemnified for its alleged concurrent negligence pertaining to Muhler's scope of work and materials. The result of the Court properly performing this duty would clearly remove the "to the extent" clause that the Court relies upon, almost exclusively, to declare that Superior's right of indemnity fails to meet the requirements of the "clear and unequivocal" standard.

Accordingly, Superior respectfully requests that this Court rehear this matter and rule that Superior is entitled to its requested relief.

Respectfully submitted,

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August 23, 2018

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
Appellate Case No. 2016-000076

RECEIVED
AUG 23 2018
SC Court of Appeals

Superior Construction Corporation.....APPELLANT,

v.

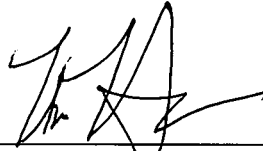
The Muhler Company, Inc.....RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on The Muhler Company, Inc. by depositing a copy of it in the United states mail, postage prepaid, on January 13, 2016, addressed to its attorney of record:

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August 23, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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AUG 23 2018

SC Court of Appeals

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

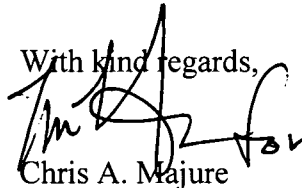
Dear Ms. Kitchings:

Enclosed please find enclosed the original and seven copies of Appellant's Petition for Rehearing, along with our check in the amount of \$25.00.

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

Thank you for your assistance.

With kind regards,


Chris A. Majure

CAM/ppr
Enclosure

cc: Gunnar Nistad, Esquire, Curtis L. Ott, Esquire and Janice Holmes, Esquire

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