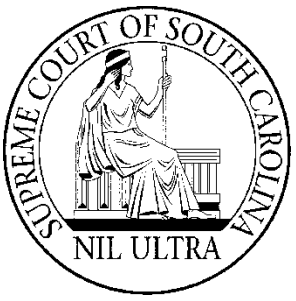

OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 21, 2025
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Barry Scott Suggs, Respondent.

Appellate Case No. 2024-001646

Opinion No. 28283
Heard May 13, 2025 – Filed May 21, 2025

PUBLIC REPRIMAND

Disciplinary Counsel William M. Blitch, Jr. and Assistant Disciplinary Counsel Phylicia Yvette Christine Coleman, both of Columbia, for the Office of Disciplinary Counsel.

W. James Hoffmeyer, of Florence, for Respondent.

PER CURIAM: In this attorney disciplinary matter, Respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, Respondent admits misconduct and consents to the imposition of a confidential admonition or a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

I.

This Agreement involves two disciplinary complaints. The first complaint involves Respondent's criminal arrest for discharging a firearm within city limits, and the second complaint involves his failure to properly perfect an appeal.

A.

On October 22, 2021, officers from the City of Florence Police Department responded to a loud noise that echoed off buildings. After hearing a second loud noise, an officer in the area identified the noise as a gunshot. Officer 1 drove towards the location of the noise and found Respondent sitting on the front porch of his law office. Officer 1 asked Respondent whether he had any guns on his person, and Respondent stated he did not. Respondent smelled like alcohol and there was a spent shell casing on the ground near Respondent. A second officer arrived and observed additional spent casings on the porch of Respondent's law office. Accordingly, Respondent was handcuffed. While being escorted to the police car, Respondent attempted to kick Officer 1.[1]

When Officer 3 arrived on the scene, Respondent informed him there was a gun inside the law office and gave Officer 3 permission to retrieve it. The officers retrieved the gun and found it was loaded with three live rounds that matched the spent casings found on the front porch of Respondent's law office. Respondent was arrested and charged with discharging a firearm within city limits. When the officers attempted to get information from Respondent, he refused to give his name and date of birth.

Once secured in the patrol car, bodycam footage shows Respondent was nonresponsive when called on by the officers. The officers opened the back doors to the police car to ensure Respondent's well-being. Respondent was asked to sit up so he could breathe more easily, but Respondent refused.

Dashcam footage from Officer 2's nearby patrol car captured the incident on video. That video shows Respondent walked outside his law office, sat on his front porch, and discharged the weapon. The muzzle flash can be seen coming from where Respondent is seated on his porch.

Respondent self-reported his arrest to ODC on October 26, 2021, and has now completed a diversionary program, which will result in the dismissal of his criminal charge for discharging a weapon within the city limits. Respondent claims he carelessly handled his pistol and accidentally discharged the weapon.

[1] Respondent was not charged with resisting arrest or assaulting a police officer.

Respondent admits his conduct reflects poorly on the legal profession.

B.

In the second complaint, Respondent failed to properly perfect an appeal. Respondent represented Client, who was found guilty of several criminal charges and sentenced to twenty years in prison on October 18, 2023. Client requested that Respondent file an appeal on his behalf, but Respondent did not file the appeal. On January 11, 2024, Client filed a pro se notice of appeal with the South Carolina Court of Appeals.

On January 16, 2024, the Court of Appeals notified Respondent that Client's notice of appeal had been received and assigned an appellate case number. The Court of Appeals also outlined the deficiencies within the notice of appeal and directed Respondent to correct those deficiencies within ten days or the matter would be dismissed. Respondent replied to the Court of Appeals via email stating that the appeal was not sent from his office and that all correspondence should be directed to Client. On January 24, 2024, the Court of Appeals notified Respondent that he is counsel of record for Client until relieved by the court. That letter also gave Respondent specific instructions on how to be relieved and informed Respondent that the deficiencies noted in the January 16, 2024 letter were required to be corrected within ten days or the appeal would be dismissed.

On March 21, 2024, Client sent a letter to the Court of Appeals inquiring whether a direct appeal in his case was pending. Client indicated in this letter that he instructed Respondent to file a direct appeal on his behalf in October 2023 and had not heard from Respondent. On April 9, 2024, the Court of Appeals issued an order dismissing Client's case because the notice of appeal was not timely served. On April 26, 2024, the Court of Appeals issued the remittitur in Client's case.

Respondent represents that he did not see any justiciable appellate issues to substantiate an appeal on Client's behalf and that he informed Client of that. Respondent admits receiving both the January 16, 2024 and January 24, 2024 letters from the Court of Appeals and acknowledges he took no further action on behalf of Client, despite receiving those letters. Respondent admits he failed to competently and diligently represent Client and failed to protect Client's interests by not perfecting the direct appeal.

II.

Respondent admits that his conduct violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (requiring competence); Rule 1.3 (requiring diligence); Rule 1.4 (requiring prompt and reasonably complete communication); Rule 1.16(c) (requiring a lawyer to comply with applicable rules requiring notice to or permission of a court when terminating a representation); Rule 8.4(b) (prohibiting a criminal act that reflects adversely on the lawyer's fitness to practice law); and Rule 8.4(e) (prohibiting conduct prejudicial to the administration of justice).

Respondent also admits his misconduct is grounds for discipline under the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (providing a violation of the Rules of Professional Conduct is a ground for discipline); and Rule 7(a)(5) providing conduct demonstrating an unfitness to practice law is a ground for discipline).

At oral argument before this Court, Respondent acknowledged the seriousness of his misconduct and expressed remorse for his actions. Respondent explained that at the time of the shooting incident in October 2021, he was suffering from depression. Respondent testified that situation caused him to realize the extent to which his mental health had deteriorated and prompted him to address it.

III.

We find Respondent's misconduct warrants a public reprimand. *In re Stratos*, 374 S.C. 212, 215, 648 S.E.2d 607, 608 (2007) (publicly reprimanding a lawyer for failing to adequately communicate with his client and failing to timely perfect an appeal on his client's behalf); *cf. In re Sorenson*, 380 S.C. 119, 121, 669 S.E.2d 91, 92 (2008) (publicly reprimanding a lawyer who was arrested on misdemeanor criminal charges that were subsequently dismissed). Accordingly, we accept the Agreement and publicly reprimand Respondent for his misconduct. Within thirty days, Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct. As a condition of discipline, Respondent shall complete the Legal Ethics and Practice Program Ethics School within one year.

PUBLIC REPRIMAND.

KITTREDGE, C.J., FEW, JAMES and HILL, JJ., concur. VERDIN, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Donna B. Welch, individually and as Personal Representative of the Estate of Melvin G. Welch, deceased, Respondent,

v.

Advance Auto Parts, Inc., American Honda Motor Co., Inc., Atlas Asbestos Co, Atlas Turner, Inc. as successor to Atlas Asbestos Co, a foreign company, Bahnson, Inc., Covil Corporation, Daniel International Corporation, Davis Mechanical Contractors, Inc., Ellington Insulation Company, Inc., Fluor Constructors International f/k/a Fluor Corporation, Fluor Constructors International, Inc., Fluor Daniel Services Corporation, Fluor Enterprises, Inc., General Parts, Inc. individually and as successor-in-interest to Carquest Corporation; Goodrich Corporation f/k/a The B. F. Goodrich Company, The Goodyear Tire & Rubber Company, Graybar Electric Company, Inc., Honeywell International, Inc. individually and as successor-in-interest to Allied Signal, Inc., as successor to Bendix Corporation, Morse Tec LLC f/k/a Borgwarner Morse Tec LLC, and successor-by-merger to Borg-Warner Corporation, Occidental Chemical Corporation as successor to Durez Corporation; O'reilly Automotive Stores, Inc., Paramount Global f/k/a Viacomcbs Inc., f/k/a CBS Corporation, a Delaware corporation f/k/a Viacom, Inc., successor-by-merger to CBS Corporation, a Pennsylvania corporation, f/k/a Westinghouse Electric Corporation, Pneumo Abex LLC successor-in-interest to Abex Corporation, Redco Corporation f/k/a Crane Co., Reinz Wisconsin Gasket LLC f/k/a and/or successor to Reinz Wisconsin Gasket Co. and Wisconsin Gasket Manufacturing Co., a wholly owned subsidiary of Dco LLC, Rust Engineering & Construction, Inc., Rust

International Inc., Southern Insulation, Inc., Spirax Sarco, Inc., Union Carbide Corporation, Westrock MWV, LLC individually and as successor-in-interest to Westvaco, ZF Active Safety US Inc. f/k/a Kelsey-Hayes Company, Defendants,

of which Atlas Turner, Inc. is the Appellant,

and

Donna B. Welch, individually and Personal Representative of the Estate of Melvin G. Welch, deceased,

and

Peter D. Protopapas, Duly Appointed Received for Atlas Turner, Inc., are Respondents.

Appellate Case No. 2023-001096

Appeals From Richland County
Jean Hoefer Toal, Circuit Court Judge

Opinion No. 28284
Heard February 11, 2025 – Filed May 21, 2025

AFFIRMED IN PART AND REVERSED IN PART

Stephen Lynwood Brown, Russell Grainger Hines, and James D. Gandy, III, all of Clement Rivers, LLP, of Charleston, for Appellant Atlas Turner, Inc.

Theile Branham McVey, of Kassel McVey, of Columbia; Aaron Daniel Chapman and Ka'Leya Q. Hardin, both of Dallas, TX; Charles William Branham, III, of Dean Omar Branham Shirley, LLP, of Dallas, TX; and Todd Barnes, of Indianapolis, IN, all for Respondent Donna B. Welch.

Jonathan M. Robinson and Shanon N. Peake, both of Smith Robinson Holler DuBose Morgan, LLC, of Columbia; George Murrell Smith, Jr., of Smith Robinson Holler DuBose Morgan, LLC, of Sumter, and John Kenneth Chandler and Brian Montgomery Barnwell, both of Rikard & Protopapas, LLC, of Columbia, all for Respondent Peter Demos Protopapas.

JUSTICE HILL: In this appeal from an asbestos case, Atlas Turner, Inc. (Atlas Turner) challenges the order of the trial court imposing discovery sanctions and appointing a Receiver. Given Atlas Turner's conspicuous misconduct, we conclude the sanctions were plainly justified and the appointment of the Receiver was also within the trial court's discretion. Accordingly, we affirm the order granting sanctions, and we affirm the portion of the Receivership order appointing the Receiver over Atlas Turner's Insurance Assets. However, because the trial court erred in giving the Receiver authority beyond that necessary to investigate and collect Atlas Turner's Insurance Assets, we reverse the Receivership order in part.

I. Facts

Melvin G. Welch, of Abbeville, South Carolina, died in 2023 of mesothelioma caused by his exposure to asbestos. His widow and personal representative, Respondent Donna B. Welch, sued Atlas Turner and others she alleges caused his death. Atlas Turner is a still active Canadian company that produced and sold asbestos insulation. Atlas Turner's customer lists reveal it shipped asbestos insulation to South Carolina. It is alleged Welch was likely exposed to Atlas Turner's asbestos products while he worked in Greenwood, South Carolina.

Respondent's lawsuit was brought in Richland County and assigned to the Honorable Jean H. Toal, who presides over the South Carolina asbestos docket. Cases on the

docket are subject to standard mandatory discovery procedures and scheduling orders so they may be timely resolved.

Atlas Turner moved to dismiss the claims against it on the ground that South Carolina lacked personal jurisdiction over it. After the trial court denied Atlas Turner's motion, it ordered that Atlas Turner participate in discovery. Atlas Turner ignored deposition notices served upon it pursuant to Rule 30(b)(6), SCRCP, which requires a corporation to designate a representative to appear and be questioned according to the rule. The trial court warned Atlas Turner that if it did not cooperate with the Rule 30(b)(6) notices and answer other pending discovery, it would be sanctioned and possibly held in contempt.

Atlas Turner refused to respond to any discovery, even jurisdictional discovery (discovery limited to unearthing facts about the extent of Atlas Turner's activities and contacts with South Carolina) ordered by the trial court. It claimed it would not produce a Rule 30(b)(6) witness at the scheduled deposition time "or ever." It maintained it had no witness available because none of its employees had knowledge of the company's activities during the relevant period covered by the complaint. It alternatively argued that the Québec Business Concerns Records Act (QBCRA) prohibited it from responding to a South Carolina Court order for discovery. Specifically, Atlas Turner asserted that complying with the order would entail disclosing the contents of the company's records and such disclosures were prohibited by the QBCRA (a topic we will return to later in this opinion).

The trial court held Atlas Turner in contempt for its "willful and intentional" refusal to comply with court ordered discovery. As a sanction, the trial court struck Atlas Turner's answer, placing it in default. The trial court later appointed a Receiver over "the Insurance Assets" of Atlas Turner.

We certified Atlas Turner's appeal pursuant to Rule 204(b), SCACR.

II. Discovery Sanctions

We first take up the propriety of the discovery sanctions. Imposing sanctions for violating discovery rules is guided by the trial court's discretion, meaning we will not disturb the sanctions unless no reasonable evidence supports them or they were imposed contrary to the correct law. *Innovative Waste Mgmt., Inc. v. Crest Energy Partners GP, LLC*, 445 S.C. 19, 28, 911 S.E.2d 406, 410 (2025); *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

Atlas Turner asks us to reverse the trial court's sanction of striking its answer. This issue need not detain us long, for the record overflows with examples of Atlas Turner's cavalier disdain of the elementary rules of civil procedure. Fortune may favor the bold, but a party that persists in a bold refusal to comply with basic ordered discovery may soon realize it is the architect of its own misfortune. So it is here.

Atlas Turner disputes that its refusal to attend the Rule 30(b)(6) deposition was willful. It says it could not comply because it had no witness who knows what the company did forty odd years ago. It further claims the QBCRA forbids it from producing documents requested in the Rule 30(b)(6) notice and other discovery and also prevents it from allowing anyone to review its corporate records to prepare themselves to be a Rule 30(b)(6) designee. Both claims are untenable.

A. Rule 30(b)(6), SCRCP

Rule 30(b)(6) depositions are often vital to any litigation involving companies, the government, or other organizations. The whole idea behind Rule 30(b)(6) is to allow a party the opportunity to discover relevant facts about an organization by questioning the organization's designated representative under oath. The rule allows a party to name the organization as the deponent "and describe with reasonable particularity the matters on which examination is requested." Rule 30(b)(6), SCRCP. The organization then has the duty to designate one or more persons who will testify on its behalf and "the matters on which he will testify." *Id*. The designee(s) "shall testify as to matters known or reasonably available to the organization." *Id*.

Our Rule 30(b)(6) tracks the federal rule, which was adopted in 1970 to stop the childish game-playing that often plagued parties seeking to find facts from corporations. Before the rule change, a party had to identify by name the specific corporate employee it wished to depose about relevant matters. What ensued was a guessing game resembling "Marco Polo," where the requesting party often knew nothing about the labyrinths of the company's personnel structure or labor division. And the company had no duty to prepare the witness for the deposition. 8A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2103 (3d ed. April 2025 Update). The purpose of the new Rule was to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." Committee Note to 1970 Amendments to Fed. R. Civ. P. 30(b)(6).

This history underscores that Rule 30(b)(6) gives an organization the privilege of selecting the person who will speak for it on the designated matters, but also imposes a duty to prepare the speaker. *See* 7 James Wm. Moore et. al., *Moore's Federal Practice* § 30.25[3] (3d ed. 2021) ("[T]he organization has an affirmative duty to prepare the designated deponents so that they can give full, complete, and non-evasive answers to questions regarding the relevant subject matter.").

This duty does not end, as Atlas Turner seems to think, with the end of the designees' personal, first-hand knowledge of the noticed matters. Instead, the organization must endeavor in good faith to prepare its designee to testify on matters not only known to him, but on those topics within the notice that are, as the rule puts it, "reasonably available" to the organization. Rule 30(b)(6), SCRCP; Moore, *supra*, at § 30.25[3] ("Thus, the rule requires a good faith effort to find out the relevant facts, which may mean collecting information, reviewing documents, and interviewing employees with personal knowledge."); 8A Wright and Miller, *supra*, at § 2103 (in a Rule 30(b)(6) deposition, "unlike all other depositions, there is an implicit obligation to prepare the witness[, and a]s specified in the rule, this preparation is not limited to matters of which the witness has personal knowledge, but extends to all information reasonably available to the responding organization"). Many courts have so interpreted the rule. *See, e.g.*, *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006) (holding defendant violated Fed. R. Civ. P. 30(b)(6) by failing to prepare designee as to issues beyond designee's personal knowledge but within corporate knowledge of organization: the company had duty to "prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources"); *Bigsby v. Barclays Cap. Real Estate, Inc.*, 329 F.R.D. 78, 81 (S.D.N.Y. 2019) (same); *Crawford v. George & Lynch, Inc.*, 19 F. Supp.3d 546, 554 (D. Del. 2013) ("The duty of preparation goes beyond the designee's personal knowledge and matters in which the designee was personally involved. If necessary, the deponent must use documents, past employees, or other resources to obtain responsive information." (citation omitted)).

We find it telling that when Atlas Turner argued South Carolina had no personal jurisdiction over it, it relied on an affidavit of Richard Dufour, Canadian counsel for Atlas Turner. In his affidavit, Mr. Dufour declares Atlas Turner has never been registered or authorized to do business in South Carolina; never had offices, employees, or agents in the State; and never owned any bank accounts or real property here. As its counsel, Mr. Dufour is an agent of Atlas Turner. Given that he made these statements of "facts" in his affidavit "based upon" his "personal

knowledge, information and belief," it is curious how he gained access to these facts if, as Atlas Turner contends, the historical facts of their corporate conduct are unknown to anyone. In a later affidavit, Mr. Dufour states:

> Atlas Turner, Inc. has no former employees competent to testify to the topics listed on the 30(b)(6) Notices of Deposition in this case, and for the most part Atlas Turner, Inc. does not even maintain or possess the records that would be necessary to educate a witness to be able to testify to matters contained in the 30(b)(6) Notices of deposition.

We know of no reason why Mr. Dufour could not have been designated as the Rule 30(b)(6) corporate representative. *See* Moore, *supra*, at 30.25[3] ("There is no rule that would prevent corporate counsel . . . from serving as a Rule 30(b)(6) deponent.").

B. The QBCRA

The second reason Atlas Turner gives as to why it could not produce a Rule 30(b)(6) designee is that the QBCRA protects it from disclosing the contents of company records in response to a discovery request from any court outside of the province of Québec. As relevant here, the QBCRA provides:

> [N]o person shall, pursuant to or under any requirement issued by any legislative, judicial or administrative authority outside Québec, remove or cause to be removed, or send or cause to be sent, from any place in Québec to a place outside Québec, any document or résumé or digest of any document relating to any [business] concern.

QBCRA, Que.Rev.Stat. ch 278, §§ 1(b), 2 (1964). The QBCRA is a local law known as a "blocking statute." The argument that a foreign blocking statute, such as the QBCRA, is an insuperable barrier to discovery in American courts has been rejected by the United States Supreme Court. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 544 n.29 (1987) ("It is well settled that [blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."). Many courts have addressed whether the QBCRA

furnishes a valid excuse for a Québec company to resist discovery ordered by foreign courts. Almost all have answered that question with a resounding "No." *See, e.g.*, *Am. Indus. Contracting, Inc. v. Johns–Manville Corp.*, 326 F.Supp. 879, 880–81 (W.D. Pa. 1971). A number of these rulings were in asbestos cases, several of which featured Atlas Turner making the exact QBCRA-based arguments it recycles here. *See Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 644–46, 644 n.24 (D.S.C. 1992) (rejecting identical QBCRA theories presented by Atlas Turner); *see also Lyons v. Bell Asbestos Mines, Ltd.*, 119 F.R.D. 384, 387–89 (D.S.C. 1988) (finding company did not show it would be violating the QBCRA by producing documents and answering interrogatories, and noting even if the QBCRA did apply and "assuming the applicability of comity and other principles of international law to the present discovery dispute, those principles do not compel blind obedience to the legislative enactments of foreign jurisdictions").

We are mindful of comity concerns raised by the QBCRA. The Court in *Société Nationale* noted factors informing a comity analysis include the specificity of the discovery sought, its importance to the litigation, whether the information sought originated in the United States, whether there is an alternative way to secure the information, and what effect the ruling would have on important interests of the respective sovereigns. *Société Nationale*, 482 U.S. at 544 n.28. Any comity concerns with the QBCRA are slight. Québec is not a sovereign nation, only a province of one. And the Supreme Court of Canada, the sovereign of which Québec is a part, has held that, as a constitutional matter, the QBCRA does not bar discovery of a Québec company's records sought by a party located in another Canadian province. *Hunt v. Lac d'Amiante du Québec Ltée*, 4 S.C.R. 289 (1993). Indeed, the court went so far as to say the QBCRA lacks "minimum standards of order and fairness" and is therefore "counter to comity." *Id*.

We can dispatch any lingering comity worries by considering the *Société Nationale* factors. The discovery sought here included not only the Rule 30(b)(6) notice but standard mandatory discovery in South Carolina asbestos cases. The information sought was important and specific. It was not indigenous to Canada, for many of the facts related to Atlas Turner's role in Mr. Welch's asbestos exposure occurred in this state, a state where Atlas Turner chose to do business. *See Société Nationale*, 482 U.S. at 540 n.25 ("Petitioners made a voluntary decision to market their products in the United States . . . they are subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors."). No alternative source for these facts has been suggested, except for

Atlas Turner's inappropriate proposal that Respondent's counsel could search for them in "repositories" of asbestos data compiled by other plaintiffs from other cases. Finally, ordering discovery despite the QBCRA would not undermine an important national interest of Canada, for that country's own supreme court has downgraded the QBCRA and left it all but toothless. On the other hand, were we to allow the QBCRA to block the discovery here, it would "represent an extraordinary exercise of legislative jurisdiction" by a local foreign province over South Carolina's courts. *Id.* at 544 n.29.

Our rejection of the QBCRA as a legitimate block on the discovery sought is further justified by Atlas Turner's failure to show how our rejection hampers its ability to respond. Atlas Turner tells us that, if it were to educate a witness from its corporate records (records it also denies even exist), then it would violate the QBCRA. This argument cannot survive the scrutiny of reason. If Atlas Turner's interpretation of the QBCRA were correct, one wonders how it conducted business in the United States and around the world for so many decades.

Judge Toal gave Atlas Turner extensive opportunities to express its positions, such as they were, and be heard. She listened closely. She understood and explored its arguments. She also understood that its overbearing position was a grotesque distortion of elementary discovery principles. She said: "Enough."

We agree. In selecting the appropriate sanctions, the trial court must consider the nature of the discovery refused, the discovery stage of the case, willfulness, and prejudice. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457 (2009). The sanction of striking a party's pleadings is extreme, but it is a specific response our rules endorse. Rule 37(b)(2)(C), SCRCP. Such a sanction is "harsh medicine," reserved for episodes of discovery misconduct displaying bad faith, willful disobedience, or a callous indifference to the rights of other parties and the discovery process. *Davis v. Parkview Apartments*, 409 S.C. 266, 282, 762 S.E.2d 535, 544 (2014); *Rickerson v. Karl*, 412 S.C. 215, 221, 770 S.E.2d 767, 770 (Ct. App. 2015). Any sanction imposed must be sufficient to vindicate the important rights the discovery rules guarantee and the essential tools they provide to allow lawyers to prepare their clients' cases for trial.

Atlas Turner claims the trial court exceeded its sanctioning discretion because it only considered its willful misconduct. But Atlas Turner was emphatic that it did not intend to comply with repeated discovery orders issued by the trial court. The trial

court did not need to spell out what all involved knew: that the nature of the discovery at issue was the very right to discovery itself, in all its stages. *See Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003) ("Discovery is the quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed.").

Striking the pleadings of a party who refuses to abide by the basic governing rules was, under the circumstances here, a measured act of discretion. Atlas Turner was consistent in its campaign to stymie any discovery about them. Our civil procedure is guided by rules whose prime directive is to "secure the just, speedy, and inexpensive determination of every action." Rule 1, SCRCP; *see also In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001) ("The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." (quoting *In re Alford Chevrolet–Geo*, 997 S.W.2d 173, 180 (Tex. 1999))); *id*. ("[T]he discovery process is designed to 'make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'" (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958))). A party can foul out of the process. *See Innovative Waste*, 445 S.C. at 22, 911 S.E.2d at 407 ("[I]n discovery, time does eventually run out on bad behavior.").

III. Personal Jurisdiction

The trial court found Atlas Turner placed its products into the stream of commerce with the knowledge or expectation that the products would be sold and used by consumers in South Carolina. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) ("The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."); *Hammond v. Butler, Means, Evins & Brown*, 300 S.C. 458, 462, 388 S.E.2d 796, 798 (1990) ("[A]t the pre-trial stage of the proceedings, the plaintiff need only make a prima facie showing [of personal jurisdiction] by pleadings and affidavits."). According to Respondent's prima facie showing, Mr. Welch was exposed to asbestos in 1965 to 1967, and Atlas Turner sold asbestos-containing pipe insulation and spray insulation to a Charlotte based wholesaler installer who supplied South Carolina companies in 1967, as well as to a Greenville based installer from 1968 to 1973. Evidence also indicated (1) the asbestos-containing pipe insulation sold by Atlas Turner matched the description of

the pipe insulation installed at the plant where Mr. Welch worked in South Carolina and (2) Atlas's spray insulation was also used at the plant where Mr. Welch worked.

Persons and companies that choose to do business in South Carolina receive in return the benefit and protection of our laws and our legal system. Our laws allow them the confidence to enter contracts here that they are assured will be enforced impartially by our courts and that their economic rights will be protected. These legal benefits and protections are essential to the formation of reliable markets and an appealing business environment. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 592 U.S. 351, 367 (2021). Anyone entering and profiting from a business market in South Carolina that our laws and courts helped foster has fair warning that any wrongs he commits here will be subject to the remedies of those same courts. He also has notice that should he create harm to the citizens of this state, it would be reasonable and fair that our citizens could sue him here, rather than having to travel to pursue him elsewhere. Due process, at least as far as personal jurisdiction is concerned, has always considered this exchange fair, the balance true. *Id.* at 355 ("When a company . . . serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit."). Some parties, after enjoying the benefits on their side of the scale, seek to trick the balance. When brought into the courts of the state in which they selected to transact business—for injuries done to the citizens and workers of that state by their conduct—these parties respond with shock and surprise. And uninformed (but not uninterested) observers decry that such a reckoning with justice is "bad for business."

The trial court found Respondent had produced enough evidence at the pretrial stage to show Atlas Turner chose to do business here and conducted business to a point where it should have known it would be held to account for any injury its business caused here. Atlas Turner has not appealed the trial court's ruling denying its motion to dismiss for lack of personal jurisdiction. Respondent asks us to declare Atlas Turner has abandoned and waived this issue. Atlas Turner claims it has "reserved" the personal jurisdiction issue, maintaining that it could not appeal the issue because the ruling was interlocutory. It is settled law that we may consider the otherwise interlocutory ruling denying a motion to dismiss for lack of personal jurisdiction when it is joined with other appealable matters. *QZO, Inc. v. Moyer*, 358 S.C. 246, 252, 594 S.E.2d 541, 545 (Ct. App. 2004). Nevertheless, we will not address the issue now, and nothing in this opinion may be construed as affecting the merits of any later appeal of the personal jurisdiction issue.

IV. Appointment of Receiver

Atlas Turner next contends the trial court abused its discretion in appointing a Receiver. "[T]he power of appointment of a receiver should be resorted to only in exceptional circumstances[.]" *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384, 402, 1 S.E.2d 797, 805 (1939).

The equitable right to have a Receiver appointed is "an ancient one." *Pelzer v. Hughes*, 27 S.C. 408, 416, 3 S.E. 781, 785 (1887). Its roots reach back to Elizabethan times when English courts appointed Receivers to manage and preserve the assets of a debtor's estate when there was a risk the debtor was purposefully diminishing it. 1 Ralph Ewing Clark, *Clark on Receivers* § 4 (3d ed. 1959).

A Receiver is an officer of the court, appointed to marshal and collect—to receive—the assets of the corporation. In that sense, the Receiver stands in the corporation's shoes. *In re Am. Slicing Mach. Co*., 125 S.C. 214, 218, 118 S.E. 303, 304 (1923). Receiverships were more common before the Great Depression and the expansion of the federal bankruptcy laws, but they can still be a useful equitable tool. *Digit. Media Sols., LLC v. S. Univ. of Ohio, LLC*, 59 F.4th 772, 777–78 (6th Cir. 2023). The effect of appointing a Receiver means that the Receiver, as a "hand of the court," exercises power and control over the defendant's assets and property specified in the appointment order and administers them at the court's discretion for the benefit of creditors and the debtor's estate. *Allen v. Cooley*, 53 S.C. 414, 446, 31 S.E. 634, 646 (1898). Title, though, remains in the defendant's name. A Receiver must administer the estate in compliance with the appointing order and "in accordance with the laws of this State." Rule 66(a), SCRCP.

A. Appointment of Receiver under S.C. Code Ann. § 15-65-10(5) (2005)

Our law allows appointment of a Receiver in several circumstances, including "[i]n such other cases as are provided by law or may be in accordance with the existing practice, except as otherwise provided in this Code." § 15-65-10(5). At common law, an equity court had the inherent power to appoint a Receiver before judgment. 1 Clark, *supra*, at § 149. A Receiver may only be appointed before judgment in the rarest of cases, when "there is the strongest reason to believe that the plaintiff is entitled to the relief demanded in his complaint, and there is danger that the property will be materially injured before the case can be determined." *Richland County. v. S.C. Dep't of Revenue*, 422 S.C. 292, 313, 811 S.E.2d 758, 769 (2018) (quoting *Pelzer*, 27 S.C. at 416, 3 S.E. at 785). This extreme power may only be used in

extreme cases, such as where a defendant's conduct demonstrates it is fraudulently concealing or disposing of assets that may be responsive to a later judgment. 1 Clark, *supra*, at § 181. The Receiver may then collect the defendant's assets and administer property. *Id.* at § 163. We have followed this general rule and upheld the appointment of a Receiver before judgment where the plaintiff has made a prima facie showing that the defendant intends to fraudulently avoid or defeat the plaintiff's recovery. *See Virginia-Carolina Chem. Co. v. Hunter*, 84 S.C. 214, 220–21, 66 S.E. 177, 179 (1909) ("[W]hen a debtor is trying to defeat his creditors by an act or course of conduct which indicates moral fraud—a conscious intent to defeat, delay, or hinder his creditors in the collection of their debts—then a court of equity will grant any relief within its jurisdiction appropriate and effective to protect creditors against the fraud without requiring the creditor to run the risk of losing his debt from the delay of obtaining judgment and a return of nulla bona on the execution."). As this Court explained:

> When a business man, merchant, or manufacturer or farmer disposes of large resources, and then, professing to have nothing, leaves his debts unpaid, and sets his creditors at arm's length by refusing to give any account of his property or to take any interest in the satisfaction of their claims, the court is warranted in drawing the inference that there has been a fraudulent disposition of the property.

Id. at 223, 66 S.E. at 180.

We would not be inclined to affirm a trial court's appointment of a Receiver before judgment except in the rarest case. Because Receiver appointment is an equitable remedy and equity follows the law, one holding a tort, contract, or other legal claim generally has no right before judgment to a debtor's property. *See Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497–501 (1923) (explaining an unsecured contract claim is insufficient to warrant appointment of Receiver before judgment); 12 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § § 2983 (3d ed. April 2025 Update) (stating party seeking Receivership against defendant must show he has some legally recognized right to defendant's property "that amounts to more than a mere claim against defendant"). We decline to upset the trial court's discretionary decision here, for this is that rare instance when equity's aid may be called upon before the legal claims have been reduced to judgment. Atlas Turner's strident and outspoken refusal to comply with the trial court's orders

convinces us it will continue to act in bad faith as the case against it progresses. It is not lost upon us that Atlas Turner has long experience as a defendant in asbestos cases. We note too that when faced with lawsuits—for allegedly causing serious injury and death to American workers and citizens related to the pernicious products it sold for profit even after the lethal risk these products posed was known—its tactic has been to claim that, if the courts exerted jurisdiction over them, it would offend the "traditional notions of fair play and substantial justice" due process guarantees. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). When that ploy fails, Atlas Turner's version of due process is to refuse to abide by court orders requiring it to answer basic information. It is alleged Atlas Turner has come into our state, turned profits by selling its hazardous wares in our state, and inflicted grievous harm on citizens in our state. Then, when the shadow of the courthouse door falls upon it, it insists it was never here, and if a court asks anything else about it, it responds: we have nobody who knows anything. Atlas Turner seems to claim its corporate form allows it to "both be and not be." Robert H. Jackson, What Price "Due Process"?, 5 N. Y. L. Rev. 435, 438 (1927).

We conclude Atlas Turner's conduct justified the appointment of a Receiver before judgment. First, Atlas Turner's contemptuous disregard of the court's discovery orders and other conduct demonstrates it is seeking to evade its responsibilities as a civil litigant. There is evidence that Atlas Turner's corporate policy for responding to asbestos lawsuits is to adopt a "minimum defense posture" and incur default judgments. Atlas Turner followed that policy here. Second, Atlas Turner represented to the trial court that it had no Insurance Assets relevant to these cases. However, there is evidence Atlas Turner was involved in a transaction that may have compromised some of its potential insurance coverage. The record further discloses that Atlas Turner has refused to tender its policies to certain insurers for defense and indemnity. *See Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 317 (8th Cir. 1993) (affirming appointment of Receiver where defendant refused to cooperate in discovery and provided inaccurate financial information: "Faced with this pattern of willful nondisclosure and false disclosure, followed by transfer to avoid a tenacious judgment creditor, the district court was well within its discretion in turning to a drastic remedy such as a receiver").

The evidence supports the finding that Atlas Turner engaged in moral fraud against the trial court, the state of South Carolina, and Respondent. *Virginia-Carolina Chem. Co.*, 84 S.C. at 220–21, 66 S.E. at 179; 12 Wright & Miller, *supra*, at § 2983

("Factors that courts have considered relevant to establishing the requisite need for a receivership include . . . fraudulent conduct on the part of defendant . . . .").

B. Jurisdiction to Appoint a Receiver

Atlas Turner also says the trial court had no jurisdiction to appoint a Receiver because it neither owns nor possesses any property within the borders of South Carolina. Consequently, according to Atlas Turner, a South Carolina Receiver is powerless to control any of its property. The order appointed a Receiver over Atlas Turner's Insurance Assets. Atlas Turner has not explained where it contends these assets are located, other than its general claim that all property it owns rests outside the borders of this state.

Atlas Turner points to *Pollock v. Carolina Interstate Building & Loan Ass'n*, 48 S.C. 65, 25 S.E. 977 (1896), and claims a Receiver has no power to affect property outside South Carolina. This distorts *Pollock*, for there the court only held an order of a North Carolina court appointing a Receiver over a North Carolina company did not affect the validity of service of a lawsuit filed here on the company's South Carolina registered agent. *Id*. at 74–76, 25 S.E. at 980. Atlas Turner's recourse to *Booth v. Clark*, 58 U.S. 322 (1854), fares no better, for there it was held only that a Receiver appointed by a state court had no absolute right to sue in a foreign jurisdiction. 58 U.S. at 338. This aspect of *Booth* has been supplanted by various federal statutes and rules. *See* 2 Ralph Ewing Clark, *Clark on Receivers* § 591 (3d ed. 1959); *Mentink v. World Time Corp. of Am.*, 131 F.R.D. 210, 211 (S.D. Fla. 1990); 28 U.S.C. § 754 (2018). Although a Receiver's right to sue in another state is not squarely before us, that issue is controlled by the law of the foreign state, the full faith and credit clause, and comity. *See* 65 Am. Jur. 2d Receivers § 260 (Jan. 2025 Update); 2 Clark, *supra*, at § 591. We have allowed a foreign Receiver to sue in South Carolina. *Wilson v. Keels*, 54 S.C. 545, 553–56, 32 S.E. 702, 704–06 (1899).

We hope Atlas Turner does not believe a court exercising its equity powers cannot order a party over whom it has personal jurisdiction to convey and produce its property and assets, regardless of where they may be located. Equity can compel one over whom it has personal jurisdiction to do an act even though that act may affect property outside the court's territorial jurisdiction. That equity may force just such a thing has been a basic principle recognized for centuries. *See Penn v. Lord Baltimore* (1750) 1 Ves. Sr. 444 (ordering specific performance of contract even through order affected lands in Pennsylvania and Maryland). Chief Justice Marshall, relying on *Penn*, held that, in contract cases, an equity court's jurisdiction "is

sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." *Massie v. Watts*, 10 U.S. 148, 158–63 (1810) (holding Kentucky federal court had jurisdiction to compel defendant over whom it had personal jurisdiction to convey land located in Ohio); *Muller v. Dows*, 94 U.S. 444, 449 (1876) ("It is here undoubtedly a recognized doctrine that a court of equity, sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant."); *Booth*, 58 U.S. at 332 ("Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the defendant claims an equitable title, within the jurisdiction of the court . . . ."). Because equity has jurisdiction over the defendant, "it is immaterial that the res is beyond the territorial jurisdiction of the court." *City of Jamestown v. Pennsylvania Gas Co.*, 1 F.2d 871, 878 (2d Cir. 1924) (New York federal district court had power to order defendant to cut off its gas supply located in Pennsylvania).

Atlas Turner mistakes not only equity's power, but the Receiver's role. The Receiver stands in the companies' shoes. He may do whatever the corporation could do in relation to its property, for it is in his possession subject to the control of the court. We doubt a company or individual would claim it had no right to funds it owned on deposit at a bank simply because the bank is located in another jurisdiction. No one would dispute a holder of an asset such as an insurance policy has the power and the right to invoke the policy's benefits, regardless of where the policy "resides." And nothing would prevent a state court that has personal jurisdiction over the company from compelling the company to do whatever was necessary to bring the benefits of the policy to litigation in this state. *See* Rule 66(b), SCRCP (stating a Receiver "shall . . . have general power and authority to sue for and collect the debts, demands and rent belonging to the debtor . . ."); Restatement (Second) of Conflict of Laws § 53 cmt. a (1971) ("A state which has judicial jurisdiction over a person is not limited to the issuance through its courts of a money judgment against him. The state may likewise order the person to do, or to refrain from doing, one or more acts. And the power of the state to make such an order is not affected by the fact that the acts called for are to be done in another state."). In one well-known case, a Receiver appointed by a New York court for a California defendant, over whom it had personal

jurisdiction, was authorized to retrieve a thoroughbred racehorse from California and ship it to Kentucky. *Madden v. Rosseter*, 187 N.Y.S. 462, 462–63 (N.Y. 1921).

In like manner, courts have required defendants over whom they have jurisdiction to transfer foreign stock the defendant owns to a Receiver. *See United States v. Ross*, 302 F.2d 831, 834 (2d Cir. 1962) (defendant ordered to turn over stock located in Bahamas to Receiver in New York: "Personal jurisdiction gave the court power to order [the defendant] to transfer property whether that property was within or without the limits of the court's territorial jurisdiction"); *Stewart v. Laberee*, 185 F. 471, 474 (9th Cir. 1911) ("A court may control by its receivership property beyond its territorial jurisdiction when it has jurisdiction of the parties, and it may restrain them from interfering with the receiver's possession of such property."); *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1188 (11th Cir. 1991) ("[I]t is undisputed that the district court has *in personam* jurisdiction over the defendant, thus the receiver could be empowered to reach foreign assets."). We therefore affirm the trial court's appointment of a Receiver for Atlas Turner's Insurance Assets.

We take a moment to discuss Atlas Turner's conduct in these cases and how it affects Receivership. Its conduct fits the strategy we earlier mentioned: to shun the civil process of South Carolina's courts to the point of being declared in default and then fight the enforceability of the default judgment on what it perceives to be friendlier soil. That is in fact what an English company has done in another South Carolina asbestos case where the trial court appointed a Receiver. And an English court has gone along, ruling as a matter of private international law that the defaulting company did not submit to jurisdiction in South Carolina and English law will only enforce foreign judgments against a corporate defendant if the company has established a "fixed place of business" in the foreign forum. *Cape Intermediate Holdings Ltd. And Cape PLC v. Protopapas* [2024] EWHC 2999 (Ch), 13–14, 49–51. The English Court went so far as to issue an injunction against the Receiver, purporting to bar him from action even in South Carolina. *Id*. at 72.

The English court reasoned that English law may restrain a foreign court to prevent "injustice." *Id.* at 69–70. It quoted a decree that gave as an example a foreign court whose standard for personal jurisdiction was so wide as to be against accepted international law principles. *Id*. at 70. The English court then proceeded to note that the powers given to the Receiver stretched worldwide. *Id*. It reasoned that the English company could not risk fighting its case in South Carolina because it would then be submitting to jurisdiction here. *Id*. at 70–71.

Shocking to American eyes, the English court enjoined the Receiver "from acting or purporting to act for or on behalf of" the English company in default, even in a South Carolina court. *Id*. at 61, 72.

We appreciate that the laws of different countries may differ, even countries that have a special relationship with each other. Our respect and spirit of comity—not to mention our duty to follow the law—does not permit us to enjoin a court of another sovereign nation from interfering with our rulings on the propriety of a Receivership. As it would with any court, such a ruling by us would be in the words of Lord Scarman, a *brutum fulmen* (an empty noise).

C. Scope of Receiver's Authority

It is common knowledge that the asbestos industry knew of the dangers of their product as early as the 1930's. *Borel v. Fibreboard Paper Prods. Corp*., 493 F.2d 1076, 1083–86 (5th Cir. 1973). In early asbestos cases, some asbestos companies claimed they did not know of the dangers until 1965, the year Dr. Irving J. Selikoff published his landmark work on asbestos related diseases. *Id*. (discussing when the dangers of asbestos became widely known, including the publication of Dr. Selikoff's studies). Mr. Welch was allegedly exposed in the late 1960s and early 1970s, well after the wide release of Dr. Selikoff's findings. Lung cancer and mesothelioma are particularly horrendous diseases. Atlas Turner is in default. If there are Insurance Assets available to compensate Respondent for Mr. Welch's medical costs, lost income, pain, and suffering as a result of Atlas Turner's corporate misconduct, justice requires that they be brought to bear. We hold any Insurance Assets owned by Atlas Turner that may cover Mr. Welch's injuries are properly within the Receivership estate, meaning those Insurance Assets are within South Carolina's exclusive jurisdiction. *See Palmer v. State of Texas*, 212 U.S. 118, 125 (1909) ("If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty."); *SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 840 (5th Cir. 2019) (recognizing that insurance policies and proceeds may be part of a Receivership estate and placed in the state court's exclusive *in rem* jurisdiction).

Further, it is well established that a Receiver has the right and duty to collect and accumulate the property and assets of the defendant specified in the appointment order, including its rights and claims. 1 Clark, *supra*, at § 163; 2 Clark, *supra*, at §

365. This includes rights under an insurance policy the defendant has purchased. We hold the trial court properly gave the Receiver power to pursue claims in South Carolina's jurisdiction to bring the Insurance Assets to bear in covering Mr. Welch's injuries. However, we hold that power does not properly extend to reach every claim relating to Atlas Turner's assets and business activities. *Stanford Int'l Bank*, 927 F.3d at 841.

As such, we find it appropriate to shrink the scope of the Receivership order. *See Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971) ("The remedial powers of an equity court must be adequate to the task, but they are not unlimited."). The trial court defined Insurance Assets as:

> [A]ny insurance policy, proceeds of insurance policies, claims related to those policies, information relating to those insurance policies, including, but not limited to mail, files of counsel, or other information which is reasonably calculated to lead to the discovery of admissible evidence about those insurance policies or any other assets which are related to, touch or are otherwise relevant to such insurance.

We find equity only allows insurance policies that have the potential to cover Mr. Welch's injuries to be included in this definition, and we reverse and vacate the portion of this definition that allows the Receiver to have power over "any other assets which are related to, touch or are otherwise relevant to such insurance." The Receivership order does not grant the Receiver entry into the Atlas Turner boardroom or some vague right to "take over" operation of the company.

Finally, we note Atlas Turner retains the right to post a bond to lift the Receiver appointment order. S.C. Code Ann. § 15-65-50 (2005).

V. Conclusion

As can be seen, Atlas Turner's arguments throughout this case have been contrary to longstanding legal principles. It persists in repeating long debunked theories that no thinking court would accept. This causes us to repeat once again what no one should have to be told: that a lawsuit "is not a children's game, but a serious effort on the part of adult human beings to administer justice[.]" *Griffin v. Cap. Cash*, 310 S.C.

288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992) (quoting *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872, 873 (4th Cir. 1947)).

No matter what manner of injury compensation system a society chooses to be governed by, there will be those who say it does too much, and those who say it does too little. Some will point to its excesses, others to its limitations. Unwelcome outcomes become sensationalized, often unmoored from objective facts that were critical to the outcome but inconvenient to the shaping of soundbites or op-ed pieces.

We are aware there are many cases on the asbestos docket in South Carolina. The docket of this Court and the court of appeals have seen a radical increase in appeals by asbestos defendants. Almost all of these appeals were properly dismissed as premature and obviously interlocutory. We have yet to see an asbestos case where the trial court has exercised personal jurisdiction over a defendant that did not meet the level of minimum contacts with our state that due process demands. If we were to see one, we would not hesitate to hold that the South Carolina courts lack jurisdiction.

Likewise, we emphasize that while equity allows the appointment of a Receiver before judgment in this unusual case, it is an extraordinary remedy reserved for the most extraordinary cases. It is not to be used in the typical default case. This case is atypical and extraordinary where Atlas Turner's behavior warrants the relief ordered by the veteran trial judge who gave Atlas Turner many chances to comply and follow the rules like every other litigant. If Atlas Turner disagreed with the trial courts' pre-trial personal jurisdiction ruling, it had the usual recourse, including raising the issue again at trial. *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780–81 (1993). Instead, Atlas Turner acted as if a ruling against them granted it license to ignore its responsibilities. Such conduct has consequences.

It is unfortunate that Atlas Turner has refused to abide by or honor its responsibilities under our process of civil law. When Atlas Turner defied the rule of law, the trial court not only followed it but enforced it by responding with remedies the law has long recognized. It is these rulings that we uphold today.

We therefore affirm the discovery sanctions against Atlas Turner, and we affirm in part and reverse in part the order appointing the Receiver.

AFFIRMED IN PART AND REVERSED IN PART.

KITTREDGE, C.J., FEW, JAMES, JJ., and Acting Justice Paula H. Thomas, concur.

The Supreme Court of South Carolina

Re: Amendments to Rule 607, South Carolina Appellate Court Rules

Appellate Case No. 2025-000807

ORDER

Pursuant to Article V, Section 4 of the South Carolina Constitution, Rule 607 of the South Carolina Appellate Court Rules (SCACR) is amended as set forth in the attachment to this Order.

The amendment to Rule 607(d), SCACR, which controls the priority in which a court reporter shall transcribe and deliver the transcript, requires that priority be given to requests to transcribe various matters involving the custody of children.

The amendments to Rule 607(h)(1)(H), SCACR, increase the per page costs Judicial Branch Court Reporters shall receive for delivering transcripts on an expedited basis. The change in priority and the increased fees in paragraph (h)(1)(H) shall apply to all requests for expedited transcripts made on or after May 28, 2025.

s/ John W. Kittredge C.J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

s/ D. Garrison Hill J.

s/ Letitia H. Verdin J.

Columbia, South Carolina
May 15, 2025

Rule 607(d), SCACR, is amended to provide:

(d) Delivery of Transcripts. A court reporter shall transcribe and deliver the transcript no later than sixty (60) days after the date of the request. Records shall be transcribed by the court reporter in the order in which the requests for transcripts are made; provided, however, that requests to transcribe post-conviction relief proceedings challenging a sentence of death shall be given priority as provided by S.C. Code Ann. § 17-27-160(E). Priority shall also be given to requests to transcribe proceedings for appeals from termination of parental rights proceedings, adoption proceedings, Department of Social Services actions involving the custody of a minor child, and domestic relations actions involving child custody and visitation pursuant to *Re: Expediting Appeals in Matters Involving Child Custody and Visitation*, S.C. Sup. Ct. Order filed November 17, 2022.

Rule 607(h)(1)(H), SCACR, is amended to provide:

(H) The following per page costs apply to requests to produce a transcript on an expedited basis:

(i) A fee of Seven Dollars and Twenty-Five Cents ($7.25) for original transcripts delivered within seven days of the request and One Dollar ($1.00) for a copy.

(ii) A fee of Nine Dollars and Twenty-Five Cents ($9.25) for original transcripts delivered overnight and One Dollar and Twenty-Five Cents ($1.25) for a copy.

(iii) A fee of Ten Dollars ($10.00) for original transcripts delivered on a daily basis and One Dollar and Twenty-Five Cents ($1.25) for a copy.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollio Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado; Defendants,

Builders FirstSource-Southeast Group, LLC, Third-Party Plaintiff, Appellant,

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry, Third-Party Defendants,

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

Appellate Case No. 2021-001050

Appeal From Charleston County
Jennifer B. McCoy, Circuit Court Judge

Opinion No. 6099
Heard March 5, 2024 – Filed February 12, 2025
Withdrawn, Substituted, and Refiled May 21, 2025

AFFIRMED

Stephen P. Hughes and William Hewitt Cox, III, both of Howell Gibson & Hughes, PA, of Beaufort, for Appellant.

Thomas Frank Dougall, of Dougall & Collins, of Elgin, and Michal Kalwajtys, of Baker Ravenel & Bender, LLP, of Columbia, both for Respondent L&G Construction Group, LLC.

Edward Glenn Elliott, of Aiken Bridges Elliott Tyler & Saleeby, P.A., of Florence, for Respondent Pohlman Quality Exteriors, Inc.

W. McElhaney White and Todd Russell Flippin, of Holcombe Bomar, PA, of Spartanburg, for Respondent Hurley Services, LLC.

Kevin W. Mims, John Barnwell Fishburne, Jr., and William Chase McNair, all of Luzuriaga Mims, LLP, of Charleston, for Respondent AC Construction Inc.

Payton Dwight Hoover and James H. Elliott, Jr., both of Richardson Plowden & Robinson, PA, of Mount Pleasant, for Respondent Palmetto Trim and Renovation.

Francis Heyward Grimball and James H. Elliott, Jr., both of Richardson Plowden & Robinson, PA; Mark Shanter Chaparro, of Hall Booth Smith, PC; and L. Dean Best, of Best Law, P.A., all of Mt. Pleasant, for Respondent ECC Contracting, LLC.

Francis Heyward Grimball and James H. Elliott, Jr., both of Richardson Plowden & Robinson, PA, of Mt. Pleasant, for Respondent East Coast Carpentry.

John Phillips Linton, Jr. and Jennifer Sue Ivey, both of Walker Gressette & Linton, LLC, of Charleston, for Respondent WS Contractors, LLC.

MCDONALD, J.: Builders FirstSource-Southeast Group, LLC (BFS) appeals eight orders granting summary judgment or partial summary judgment to various subcontractors. BFS argues the circuit court erred in (1) applying the clear and unequivocal standard of *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018); (2) finding the indemnity provisions of BFS's subcontracts violate South Carolina law

and public policy; (3) finding BFS's indemnity claims are collaterally estopped; (4) failing to address severability or finding the court lacked authority to sever; and (5) deeming the subcontracts unconscionable and unenforceable. We affirm all eight orders.

Facts and Procedural History

This appeal stems from complex construction defect litigation filed by The Retreat at Charleston National Country Club Home Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime (collectively, Plaintiffs). In this underlying case, Plaintiffs sought damages for deficiencies in the original construction of a multi-family development consisting of thirty-two buildings containing 129 townhome units (the Project). According to Plaintiffs' fourth amended complaint, BFS "provided materials and/or labor, including but not limited to the framing, the windows and doors and all related components at all or a portion of the Project."[1]

Plaintiffs claimed, among other things, that BFS's framing and window installation services were deficient and that these deficiencies resulted in water intrusion and corresponding damages. Plaintiffs' forensic expert opined the windows had inadequate design pressure (DP) ratings;[2] were installed using fasteners of an improper type and inadequate length to assure the embedment of the fasteners into the framing; and were installed using fasteners at spacing intervals exceeding those required by the manufacturer's installation criteria.

BFS contracted with several subcontractors for work on the Project. After litigation began, BFS filed crossclaims or third-party claims against many of its subcontractors, asserting causes of action for negligence, breach of express and implied warranty, breach of contract, and contractual or equitable indemnity.

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[1] BFS holds an unlimited commercial general contractor's license. The circuit court found it "is undisputed that BFS furnished the framing lumber, housewrap, windows, doors, related flashings, and caulk" as well as "superintendents to oversee and inspect the installation of such materials for construction of the Project on Buildings 5-21, 2200, 2300, 2500, 2600, 2700, 2800, and 2900."

[2] DP ratings address the pressure a window can withstand without failing.

Respondents filed motions for summary judgment and supporting memoranda throughout 2019 and 2020. In May 2021, the circuit court issued Form 4 orders granting, or granting in part, summary judgment to Palmetto Trim and Renovation (Palmetto), Hurley Services, LLC (Hurley), ECC Contracting, LLC (ECC), East Coast Carpentry (East Coast), AC Construction, Inc. (ACC), WS Contractors, LLC (WSC), and Pohlman Quality Exteriors, Inc. (Pohlman).[3] Formal orders followed, and the circuit court denied BFS's motions to reconsider.[4] BFS timely filed eight separate notices of appeal. Over BFS's objection, this court consolidated these eight appeals.

Standard of Review

"Rule 56(c) of the South Carolina Rules of Civil Procedure provides that the moving party is entitled to summary judgment 'if the [evidence before the court] show[s] that there is no genuine issue as to any material fact and that the moving

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[3] "Palmetto served as a subcontractor of BFS and in that capacity performed window installation work on Units 500, 700 and 1000." "Hurley was a labor-only subcontractor to BFS . . . . BFS sold and provided for installation windows, doors, weather-resistant materials, and other building components for some of the buildings." "ECC served as a subcontractor of BFS and in that capacity performed deck repair work on Unit 2001, and installed windows and doors on Units A1 & A2." No deficiencies have been documented by Plaintiffs at Unit 2001. "East Coast served as a subcontractor of BFS and in that capacity performed window installation on Buildings 6, 8, 9, 12, 13, 14, 16, 17, 18." ACC "served as a subcontractor of BFS and in that capacity performed framing services on Buildings 5 through 22. [ACC] did not perform any other work on the Project." "WSC served as a subcontractor of BFS and performed work on Buildings 22 through 31 at the Project that were constructed between 2012 and late 2014. WSC did not perform any work on other buildings at the Project." Pohlman was a labor-only contractor on Buildings 11 and 21; BFS supplied building materials for Pohlman's use.

[4] The circuit court also granted L&G Construction's motion to join in ECC and WSC's motions for partial summary judgment. In this order, the circuit court explains, "BFS supplied all materials and hired several subcontractors to perform its scope of work. L&G, a residential framer, was one of those subcontractors."

party is entitled to a judgment as a matter of law.'" *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 459, 892 S.E.2d 297, 297 (2023) (alterations by the court) (quoting Rule 56(c), SCRCP).

Analysis

Among the orders before us, two different versions of BFS's master subcontract are at issue. Two orders address the 2005 version of BFS's master subcontract (the 2005 Contracts); the other six involve a later version of this master agreement (the Later Contracts).

The 2005 Contracts govern BFS's relationships with Palmetto and East Coast (collectively, the 2005 Subcontractors). These contracts contain the following relevant clauses, including the indemnification language of Section 6(b)(2):

> **SECTION 1. Introduction.**
>
> **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**"). TIME IS OF THE ESSENCE. . . . In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor ("**Contract Documents**") and incorporated into the Agreement by this reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or

supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

. . . .

SECTION 2. Materials and Workmanship. Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

. . . .

c. Protection of Work. Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

. . . .

SECTION 3. Warranty and Service. All Work shall be unconditionally guaranteed by Subcontractor for a period of two years, or such longer period as may be required by law or for which Owner requires Contractor to warrant such Work, from the date following Owner's acceptance of the Work. Subcontractor shall correct at its own expense all defects that appear during such period, and all damage (whether to the Work or other components of the Project) arising out of, caused by or in any way related to said defects or repair, within twenty-four (24) hours after written notice or within the time agreed to in writing by Contractor (Saturdays and Sundays

excluded). *The determination as to what constitutes a defect will be within the sole discretion of Contractor and Owner*. If Subcontractor fails to promptly commence and complete the correction of defects, Contractor or Owner may do so. In such event, Subcontractor shall promptly reimburse Contractor for the cost of such work, plus a sum of fifteen percent (15%) thereof (for supervision and overhead). Contractor may, at its option, elect to charge such amounts against the next Partial Payment (defined in **Section 8**) or the final payment. Subcontractor will maintain a published phone number or an answering service during normal working hours.

. . . .

SECTION 6. Waiver, Release, and Indemnification.
Subcontractor agrees that Subcontractor, and not Contractor, shall be *responsible for all injuries, losses, or damages to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors. Subcontractor will indemnify, defend and hold Contractor harmless against any such injuries and claims.*
Accordingly:

. . . .

b. Release and Indemnity.

(1) Subcontractor hereby agrees to release, indemnify, defend, and hold harmless Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees (each an "**Indemnitee**"), to the fullest extent permitted by law from any costs, expenses, demands, causes of action, claims, damage, liability, loss, or costs ("**Claims**") (together with attorneys' fees) arising out of, resulting from, or connected with the death of or any injury to, or any damage to the property of, Subcontractor or its employees, agents, or subcontractors or any of their respective subcontractors, employees, officers, agents, or invitees.

(2) For all Claims not covered by (1) above and to the fullest extent permitted by law, *Subcontractor agrees to release, indemnify, defend, and hold harmless the Indemnitees for, and to save them harmless against, any and all Claims (together with reasonable attorneys' fees), to the extent of liability resulting from Subcontractor's negligence or willful misconduct incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations.*

. . . .

SECTION 8. Payment to Subcontractor.

. . . .

i. Indemnification. Subcontractor hereby agrees to indemnify, defend, and save Contractor and Owner harmless from and against any mechanics' and materialmen's liens upon the Project, attorneys' fees and expenses, amounts paid in settlement, and amounts paid to discharge judgments arising out of the services, labor, equipment, or materials furnished by Subcontractor or its employees, suppliers, or subcontractors. If Subcontractor fails to do so, Contractor may deduct from sums then or thereafter due to Subcontractor such amounts as Contractor deems appropriate in its sole discretion to indemnify Contractor and Owner from liens, claims, and encumbrances. Contractor may, in its sole discretion, cure any liens or satisfy any demands, and recover its costs related directly or indirectly thereto from Subcontractor. *Subcontractor hereby waives, releases, and forever discharges Contractor and Owner from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities that Subcontractor may have against Contractor or Owner that arise directly or indirectly from curing any such liens, claims, encumbrances, or demands.*

SECTION 9. Miscellaneous.

. . . .

f. Other. This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. *The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof.* It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

(Italics added for emphasis).

The Later Contracts govern BFS's relationships with Hurley, ECC, ACC, WSC, Pohlman, and L&G (the Later Subcontractors). These contain similar language, including the indemnification language of Section 5, which BFS contends is the relevant indemnification language in the Later Contracts:

SECTION 1. Introduction.

a. Work. This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**"). TIME IS OF THE ESSENCE. It will

apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor's customer (the "**Owner**"). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the "**Contract Documents**") and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contract[] Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

. . . .

SECTION 2. Materials and Workmanship.
Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

. . . .

c. Protection of Work. Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, *protect all of its labor, materials (regardless of who supplied such materials*), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

. . . .

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor *guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns*, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) *ten (10) years for all Work consisting of any structural applications* . . . . If demand is made upon Subcontractor to perform under this warranty, *Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated*. . . . This

warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third-party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

. . . .

SECTION 5. INDEMNITY.
TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND *AGAINST ANY AND ALL CLAIMS*, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, *BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN 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*. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR

IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, *REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES*, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS

PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND *THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES*. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR

SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

. . . .

SECTION 8. Payment to Subcontractor.

. . . .

i. INDEMNIFICATION FOR LIENS. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES.

CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. ***SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.***

SECTION 9. Miscellaneous.

. . . .

f. Other. This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. *The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof.* It is the intent of the parties that

> any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

(Italics added for emphasis).

I. Clear and Unequivocal Standard

BFS argues the circuit court erroneously applied the clear and unequivocal standard articulated in *Concord & Cumberland* to the relevant contractual language because BFS was not seeking indemnity for its own negligence. We disagree, as BFS's position is inconsistent with the language of its own claims as well as the convoluted language within the challenged indemnity provisions.

Courts consistently define indemnity as "'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'" *Concord & Cumberland*, 424 S.C. at 646–47, 819 S.E.2d at 170 (quoting *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 109, 584 S.E.2d 375, 377 (2003)). "Typically, courts will construe an indemnification contract 'in accordance with the rules for the construction of contracts generally.'" *Id.* (quoting *Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993)).

"[O]ur supreme court has generally held that a contract of indemnity may require a party to indemnify an indemnitee against its own negligence if the 'intention is expressed in clear and unequivocal terms.'" *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018) (quoting *Laurens Emergency Med. Specialists, PA*, 355 S.C. at 111, 584 S.E.2d at 379). "[T]he clear and unequivocal standard applies any time an indemnitee is seeking indemnification for its negligence, whether sole or concurrent." *Concord & Cumberland*, 424 S.C. at 649, 819 S.E.2d at 172.

In *Concord & Cumberland*, a condominium regime and several unit owners sued a general contractor (Superior) for construction defects. 424 S.C. at 643, 819 S.E.2d at 168. Superior then brought claims against its window and door subcontractor (Muhler), seeking contractual and equitable indemnification. *Id.* Superior settled with the plaintiffs "for $775,000 and also claimed approximately $630,000 in attorney's fees and expenses related to its defense of the window and door claims." *Id.* at 644–45, 819 S.E.2d at 169. When Superior sought to recoup these funds

from Muhler, it became necessary for this court to examine the subcontract's indemnity provisions. Superior urged the court to apply general rules of contract interpretation, rather than the "clear and unequivocal" standard, to its contractual indemnity claim, alleging it sought indemnity for its concurrent negligence, not its sole negligence. *Id.* at 646, 819 S.E.2d at 170. Rejecting that argument, this court found the clear and unequivocal standard applied whether the contractor "sought indemnification for its sole or concurrent negligence." *Id.*[5]

Here, Plaintiffs' fourth amended complaint alleges:

> 88. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of the Subcontractor Defendants [BFS and Respondents], and each of them individually, in one or more of the following particulars:

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[5] In a footnote, the *Concord & Cumberland* court noted even the American Institute of Architects (AIA) form indemnity clause utilized at that time did not satisfy the clear and unequivocal standard:

> We recognize the challenges lawyers often face in drafting indemnity provisions that can meet the strict "clear and unequivocal" test. In fact, none of our precedents appear to have found a provision that has met the standard. The provision here derived from an . . . AIA[] form. The AIA is a respected organization, and its forms are used regularly in the construction industry. Nevertheless, the indemnity clause at issue here may have been influenced by the "clear and unequivocal" standard. As the Texas Supreme Court has observed, this strict construction test has caused drafters of indemnity provisions to write them in a way that can be read as indemnifying the indemnitee for its own negligence, "yet be just ambiguous enough to conceal that intent from the indemnitor." *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 707–08 (Tex. S. Ct. 1987). What results are law suits that burden courts with deciding whether the parties' intent was camouflaged or "clear and unequivocal."

Id. at 658 n.6, 819 S.E.2d at 176 n.6.

a. in failing to properly construct the Project by deviating from the plans and specifications and by failing to employ practices and methods of construction conforming with accepted industry standards; and/or using defective material; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturer's instructions;

b. in failing to properly supervise their work and the work of other trades in order to ensure that all work proceeded in accordance with the plans and specifications and in conformity with the customary and ordinary standards of the construction industry;

c. in accepting non-conforming or defective material;

d. in using and supplying defective materials;

e. in installing materials not in accordance with the plans and specifications;

f. by installing materials in violation of manufacturer's instructions;

g. in accepting and performing deficient and/or defective workmanship and/or materials without proper inspection to ensure that the work was correct and in conformity with industry standards and in accordance with the plans and specifications and the manufacturer's instructions;

h. in constructing the Project in violation of the applicable building codes; and

i. in failing to inform the architect, owner or general contractor of defects in the plans and specifications

The particulars of negligence alleged at subparts b, c, d, g, and i speak to BFS's duties in its role as a supplier of Project materials as well as the duties of BFS and any subcontractors responsible for supervising, inspecting, and approving the work.

BFS's contractual indemnification claim is found within the following paragraphs of its amended answer to the fourth amended complaint and asserted crossclaim:

> 133. That the Plaintiff, The Retreat at Charleston National Country Club HOA, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime, have sued Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), asserting damages allegedly caused, inter alia, by deficiencies in framing, including but not limited to deficiencies in the installation of windows, doors, and related components, during original construction of the subject structures.
>
> 134. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Fourth Amended Complaint.
>
> 135. That the respective subcontracts between this Defendant and the Cross Claim Defendants, provide for contractual indemnification in favor of BFS.
>
> 136. That the Cross Claim Defendants served as subcontractors to BFS in connection with their services at the subject structures. Regardless, therefore, of any specific contractual obligation to indemnify, there exists a special relationship between this Defendant, and the Cross Claim Defendants, sufficient to impose obligations of indemnity against the aforesaid Cross Claim Defendants, in favor of BFS.
>
> 137. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of the Cross Claim Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.
>
> 138. That BFS is entitled to *full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action, and*

> *BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Cross Claim Defendants*, entitling BFS to recover from the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, *and further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others*, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

(emphasis added). Similar language addresses the third-party defendants:

> 163. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Amended Complaint.
>
> . . . .
>
> 167. That to the extent, if any*, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the Third-Party Defendants*, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.
>
> 168. *That BFS is entitled to full contractual and common law indemnification from the Third-Party Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action*, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Third-Party Defendants, entitling BFS to recover from the Third-Party Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and *further entitling BFS to recover from the Third-Party Defendants any sums for which BFS may be held liable to the Plaintiffs or to others*, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

(emphases added). BFS alleges in its contractual indemnification claims, as well as in conjunction with other claims not at issue on appeal, that it seeks recovery for

any sums for which BFS may be held liable to the Plaintiffs or others, in addition to attorneys' fees and costs from Respondents. In our view, the wording of paragraphs 138 and 168 leaves little doubt that BFS's pleadings also seek indemnification for its own negligence.

A. 2005 Contracts

The sections of the two orders addressing the *Concord & Cumberland* arguments are identical—both found the Section 6 indemnity "language is inherently confusing" and "the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS's own negligence." Additionally, both orders provide "the indemnity and duty to defend provisions of the Master Agreement . . . are neither clear nor unequivocal and, thus, fail as a matter of law."

We view the language in Section 6 as inherently confusing insofar as it calls for the 2005 Subcontractors to indemnify BFS for BFS's sole negligence while also claiming to limit the indemnity "to the extent" of the 2005 Subcontractors' own negligence. Thus, we agree with the circuit court that the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS's own negligence. Accordingly, we affirm the circuit court's rulings that the indemnity provisions of the 2005 Contracts are neither clear nor unequivocal, and that BFS's contractual indemnity claims against Palmetto and East Coast fail as a matter of law.

B. Later Contracts

In the current case, BFS contends it is not seeking indemnity for loss or damage arising from its own negligence, but rather indemnity only against liability for loss or damage arising from the sole or concurrent negligent acts or omissions of its subcontractors in the performance of their work. Thus, BFS asserts the clear and unequivocal standard of *Concord & Cumberland* should not apply. However, our review of the indemnification and defense provisions in Sections 3 and 5 of the Later Contracts—as well as the language of BFS's crossclaims—reveals this not to be so. Sections 3 and 5 of the Later Contracts neither require any finding of fault on the part of the Later Subcontractors nor exclude any fault of BFS. Instead, these sections expressly reference indemnification for the sole negligence of BFS.

Moreover, the indemnity provision buried in the fine print of Section 3 of the Later Contracts contains a warranty provision that would allow BFS to seek indemnity for personal injuries and property damage arising from the sole negligence of BFS in selecting and selling the products **BFS provided** to the Later Subcontractors for installation. Because this indemnity provision is hidden among warranty and guaranty language, we agree with the circuit court that it fails to satisfy the clear and unequivocal standard.

Section 5 of the Later Contracts contains multiple indemnity clauses. The first paragraph of Section 5 is based in part on the same AIA form indemnification language stating "but only to the extent caused in whole or in part by any negligent act or omission on the part of subcontractor." *See Concord & Cumberland*, 424 S.C. at 643–44, 819 S.E.2d at 168–69. As the *Concord & Cumberland* court found, this language does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own negligence. *Id.* at 658 n.6, 819 S.E.2d at 176 n.6.

Additionally, the second paragraph of Section 5 contradicts the first paragraph by purportedly requiring the Later Subcontractors to indemnify BFS (and others) even if it is alleged that the loss was caused by BFS.[6] The language of these two

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[6] In its crossclaims, BFS states:

> That BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

See, e.g., *Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.*, 313 S.C. 283, 289, 437 S.E.2d 163, 166 (Ct. App. 1993) ("It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered[,] or stricken by amendment or

paragraphs cannot be reconciled. Further, the third paragraph of Section 5 is a disguised indemnity provision for defense costs. By claiming it is *not* seeking indemnification for its own negligence, BFS asks this court to ignore its pleadings and the Later Contracts' language, which it drafted, and to disregard controlling authority. We find the relevant provisions of the Later Contracts are not sufficiently clear and unequivocal to require the Later Subcontractors to indemnify BFS for BFS's own negligence (to the extent BFS seeks such indemnification). Accordingly, we affirm the circuit court's rulings that the indemnity provisions of the Later Contracts are neither clear nor unequivocal and that BFS's claims must fail as a matter of law.

II. Section 32-2-10 and Public Policy

BFS argues the circuit court erred in finding the contractual language permitting BFS to recover for its subcontractors' negligence violates section 32-2-10 of the South Carolina Code (2007) and public policy. We disagree.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary and popular meaning." *Id.* (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008)). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (quoting *McGill*, 381 S.C. at 185, 672 S.E.2d at 574).

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otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings[,] and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." (quoting *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992))).

The statute at issue provides, in pertinent part:

> **Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction**, alteration, repair or maintenance **of a building, structure**, highway, road, appurtenance or appliance, including moving, demolition and excavating, **purporting to indemnify the promisee,** its independent contractors, agents, employees, or indemnitees against liability **for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee**, its independent contractors, agents, employees, or indemnitees **is against public policy and unenforceable.** Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.

S.C. Code Ann. § 32-2-10 (emphasis added).

A. 2005 Contracts

Although § 32-2-10 allowed BFS and the 2005 Subcontractors to agree the 2005 Subcontractors will indemnify BFS for damages caused by the 2005 Subcontractors or their subs, the 2005 Contracts also contain multiple provisions requiring the 2005 Subcontractors to indemnify (or defend) BFS for damages incurred as a result of BFS's sole negligence. For example, Section 6 calls for the 2005 Subcontractors to unconditionally defend and indemnify BFS in subsection (b)(1) and then calls for the 2005 Subcontractors to indemnify BFS for BFS's failure to supervise in subsection (b)(2). These provisions violate § 32-2-10 because they seek to require the 2005 Subcontractors to indemnify BFS for its sole negligence. *See D.R. Horton, Inc.*, 422 S.C. at 152, 810 S.E.2d at 46 ("The indemnification agreement in this case purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10. Because the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton."). And, Section 8(i) of the 2005 Contracts provides for indemnification of attorney's fees and expenses as well as amounts paid in

settlement without regard to BFS's fault. Therefore, we affirm the circuit court's findings as to the public policy and statutory questions.

B. Later Contracts

While the statute allows BFS and the Later Subcontractors to agree that the Later Subcontractors will indemnify BFS for damages caused by the Later Subcontractors or their subs, Sections 3 and 5 of the Later Contracts obligate the Later Subcontractors not only to warrant the design and suitability of the defective materials and building components at the Project but also to indemnify and defend BFS from any property damage or personal injury resulting from the water intrusion issues related to the provided materials and building components.[7]

Additionally, Section 8(i) of the Later Contracts provides for indemnification of attorney's fees and expenses as well as amounts paid in settlement without regard to the fault of BFS. So, the Later Contracts purport to require the Later Subcontractors to indemnify BFS for its own negligence in selecting the framing lumber, housewrap, windows, doors, related flashings, and caulk as well as overseeing and inspecting the installation of the materials it provided for use in constructing the Project. Such a provision violates § 32-2-10. *See D.R. Horton, Inc.*, 422 S.C. at 152, 810 S.E.2d at 46 ("The indemnification agreement in this case purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10. Because the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton."). Moreover, because the Later Contracts' indemnity provisions require the Later Subcontractors to indemnify BFS against liability for damages from bodily injury or property damage proximately caused by or resulting from the sole negligence of BFS, these

[7] The language in Section 3 of the Later Contracts stating, "Subcontractor guarantees the Work against defects in design, workmanship, and materials" only makes sense if the words "design, workmanship, and materials" refer to the defective materials and building components provided by BFS because the Later Subcontractors had no responsibility for the design of the Project or any of its components—including the materials. Further, even though BFS provided the structural components, the Later Contracts appear to require the Later Subcontractors to provide a ten-year warranty on "structural applications."

provisions are unenforceable under § 32-2-10. For these reasons, we affirm the circuit court for this additional reason.

III. Collateral Estoppel[8]

BFS next argues the circuit court erred in finding the doctrine of collateral estoppel bars its indemnity claims because the prior judgments are both inapposite and not final because they have been appealed. We disagree.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was "'actually litigated and determined by a valid and final judgment'" in a previous action, "regardless of whether the claims in the first and subsequent suits are the same." *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) (quoting *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008)). Where the "illegality of the contract has been actually litigated and directly determined in the prior action and that issue was essential to the judgment," the application of offensive collateral estoppel is appropriate. *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). The party invoking collateral estoppel need not have also been a party in the prior action; the law requires only that the party against whom estoppel is applied have been a party with a full and fair opportunity to litigate the issue. *Id.* ("Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action . . . .").

There is no dispute that BFS is the party seeking to enforce the indemnity clauses of the Later Contracts (which are identical to those previously litigated). It further cannot be disputed that BFS was the party litigating the issue of enforceability in other construction defect cases before the circuit court. The circuit court had previously addressed the Later Contracts' indemnity language in *MI Windows & Doors*, *Dag Pavic and Stela Susas-Pavic*, and *Six Fifty-Six Owners' Association, et al*. Although BFS had appealed these orders, the circuit court did not err in finding the same terms had been actually litigated and directly determined in a prior action. A judgment is final and remains final unless and until it has been overturned on appeal. *See Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183,

[8] This issue is relevant only to the Later Contracts.

189 (1941) (finding finality of a court's judgment is not lost because appeal is pending unless and until reversed).

The rationale behind this rule is that if cases on appeal were not viewed as final judgments for collateral estoppel purposes, parties could simply refile in trial court while an appeal is pending and hope for a different result, thus subjecting courts (and parties) to inefficient duplicative litigation. *See generally Warwick Corp. v. Maryland Dep't of Transp.*, 573 F. Supp. 1011, 1014 (D. Md. 1983) ("Such a consequence would also be laughable. If a judgment was denied its *res judicata* effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation."), *aff'd Warwick Corp. v. Maryland Dep't of Transp.*, 735 F.2d 1359 (4th Cir. 1984). That appeals were pending at the time of the circuit court's rulings in these eight cases in no way changes the result: the prior findings have preclusive effect unless and until those dispositive findings are reversed. The indemnity clauses in the Later Contracts are the same clauses from the same agreement at issue in *MI Windows & Doors*, *Pavic*, and *Six Fifty-Six Owners' Association*. Because BFS had previously litigated the enforceability of its contractual indemnity provisions, the circuit court properly applied collateral estoppel.

IV. Severability

BFS next asserts the circuit court erred in failing to address the severability provision of the 2005 Contracts and the Later Contracts, and where the circuit court did address severability, it erred in holding it lacked authority to sever the offending provisions.[9] Again, we disagree.

In both sets of contracts, the severability clause states, "The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof." However, because the indemnity provisions are replete with terms that violate South Carolina law and public policy, these terms cannot be effectively severed. Among other things, the contracts require the 2005 Subcontractors to indemnify BFS for claims of death,

[9] The language of Section 9(f) is the same in the 2005 and Later Contracts.

personal injury, and property damage—regardless of BFS's negligence—and require subcontractors to defend BFS in the case of BFS's sole negligence.

Because the indemnity provisions themselves violate South Carolina law, we reject BFS's invitation to rewrite them. *Cf. Concord & Cumberland*, 424 S.C. at 656, 819 S.E.2d at 175 ("Merging the indemnity clauses into one clause by replacing some language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term to which Muhler did not agree. In the absence of clear and express language in the 2007 Agreement instructing what phrases replace specific terms in the [s]ubcontract, we decline Superior's invitation to rewrite the indemnity clauses. The circuit court properly interpreted each indemnity clause according to its own terms."); *Doe v. TCSC, LLC*, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020) (noting "[c]ourts have discretion . . . to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive").

V. Unconscionable and Unenforceable

Finally, BFS argues the circuit court erred in finding the warranty, contractual indemnity, and duty to defend provisions of the Later Contracts are unconscionable and unenforceable as a matter of law. We disagree.

"[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007). In *Simpson,* our supreme court found an arbitration clause in an adhesion contract with unconscionable terms "wholly unenforceable," despite the presence of a separate contractual severability clause, due to the "cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause." *Id.* at 33–36, 644 S.E.2d at 673–74. The contractual severability provision did not result in an exception to the general rule of unenforceability of illegal contracts, especially where the contract was one-sided, oppressive, or a contract of adhesion. *Id.* at 29–30, 644 S.E.2d at 671.

In *Damico v. Lennar Carolinas, LLC*, our supreme court emphasized the distinction between a contract of adhesion and the question of unconscionability:

> [*A*]*dhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***. Nevertheless, and regrettably, it is common practice for the sophisticated drafter of contracts to routinely argue that a particular contract is not one of adhesion when that is plainly untrue. Such a specious argument does not advance the party's position and instead detracts from other legitimate arguments the party may have. After all, unconscionability requires a finding of a lack of meaningful choice *coupled with* unreasonably oppressive terms. Thus, an adhesion contract with fair terms is certainly not unconscionable, and the mere fact a contract is one of adhesion does not doom the contract-drafter's case.

437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022).

The Later Subcontractors installed products for BFS, the regional division of Builders FirstSource, arguably a sophisticated drafter of contracts given its regional reach and its multiple subcontractor contracts on several Lowcountry projects. As discussed in sections I and II, *supra*, the warranty, guaranty, and indemnity provisions of the Later Contracts violate § 32-2-10, are ambiguous, conflict with each other, and do not meet the clear and unequivocal standard articulated in *Concord & Cumberland*.

The disparity in bargaining power along with the ambiguous terms in these adhesion contracts deprived the Later Subcontractors of any meaningful choice when entering the Later Contracts. The Later Contracts give the drafter expansive rights and remedies, while creating oppressive obligations or liabilities for the Later Subcontractors *and* limiting or waiving their rights. We find it inconceivable that a subcontractor with even a semblance of bargaining power who understood the implications of the language in these agreements would sign them unless there existed a total absence of meaningful choice. Accordingly, we affirm the circuit court's findings that the pertinent provisions of the Later Contracts are unconscionable and unenforceable as a matter of law.

Conclusion

For the foregoing reasons, the circuit court's eight orders are

AFFIRMED.

THOMAS, J., and VERDIN, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Zachary Brown, Claimant, Respondent,

v.

Southeastern Services, H.H.I., LLC, Employer, and Uninsured Employers' Fund, Carrier, Defendants,

of which Uninsured Employers' Fund is the Appellant.

Appellate Case No. 2022-001153

Appeal From The Workers' Compensation Commission

Opinion No. 6111
Heard March 12, 2025 – Filed May 21, 2025

DISMISSED

Timothy Blair Killen, of Holder, Padgett, Littlejohn & Prickett, LLC, of Mt. Pleasant, for Appellant.

Joshua Reece Fester, of Hardeeville, for Respondent.

HEWITT, J.: This appeal concerns an award of temporary disability payments and medical benefits in a workers' compensation case. The parties to this appeal are the Uninsured Employers' Fund (the Fund) and Zachary Brown (Claimant).

The key dispute before the Workers' Compensation Commission was whether Claimant's employer, Southeastern Services, H.H.I., LLC (Southeastern), regularly employed four or more employees and was subject to the Workers' Compensation

Act (the Act). The Fund argues the commission erred in finding Southeastern had the requisite number of employees. Claimant defends the commission's decision.

At our request, Claimant and the Fund submitted supplemental briefs addressing whether the commission's decision is immediately appealable. As both sides acknowledge, the right to immediately appeal a workers' compensation case is controlled by the Administrative Procedures Act (the APA), which provides that only two types of orders are immediately appealable: final decisions and intermediate orders for which delayed review will not provide an adequate remedy. The order in this case is neither a final decision nor is it the type of interlocutory order that must be immediately reviewed for appellate review to be adequate. Therefore, we dismiss this case as not immediately appealable.

BACKGROUND

The circumstances giving rise to Claimant's injury are fairly straightforward. Claimant was employed as a laborer for Southeastern. It is undisputed that Claimant fell from a ladder and injured his left leg while removing stucco from around a window at a home on Hilton Head. Claimant was taken to Hilton Head Hospital by two coworkers. He was admitted to the emergency room and treated for a mild fracture of the left tibia and fibula. Claimant underwent surgery later that month. Hardware was installed in his left leg during the surgery.

Roughly a year and a half later, Claimant sought an independent medical evaluation with Dr. Joseph Tobin. Dr. Tobin opined to a reasonable degree of medical certainty that Claimant had not yet reached maximum medical improvement. He further opined that Claimant would benefit from future treatment including the removal of the hardware from his leg.

Adversarial proceedings began when Claimant filed a Form 50 requesting a hearing before the commission. Southeastern conceded that it did not have workers' compensation insurance but contended it was not subject to the Act. There was no dispute about Claimant's injury; instead, the pivotal question was whether Southeastern was subject to the Act at the time of the injury.

The single commissioner found Southeastern was subject to the Act, awarded Claimant roughly $3,100 for a closed period of temporary disability benefits, and ordered Southeastern to provide medical treatment as recommended by a treating physician of Southeastern's choosing. The single commissioner also ordered the Fund to pay for Claimant's emergency room treatment. The Fund appealed this order

to the commission's appellate panel. The appellate panel affirmed the single commissioner's order in a 2 to 1 majority decision. This appeal followed.

APPEALABILITY

The APA governs the court system's review of workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). The right to seek judicial review of an agency's decision is found in section 1-23-380 of the South Carolina Code (Supp. 2024). In explaining two types of orders are immediately "appealable" to the court system, the statute provides, in pertinent part:

> A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review . . . . A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

Id.

Although the first part of the statute uses the term "final decision," most precedents use the term "final judgment." "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env't Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010); *see also Good v. Hartford Accident & Indemn. Co.*, 201 S.C. 32, 41–42, 21 S.E.2d 209, 212 (1942) (noting that a final judgment must "[d]ispose of the cause . . . as to all the parties, reserving no further questions or directions for future determination . . . and must be final in all matters" (quoting 2 Am. Jur. 860 § 22)). One of this court's past cases explains "[a]n order of the commission is not a final decision unless it resolves the entire action." *Ex parte S.C. Prop. & Cas. Ins. Guar. Ass'n*, 411 S.C. 501, 504, 768 S.E.2d 670, 672 (Ct. App. 2015). Another describes the APA as limiting appeals "to those from a 'final decision' of the commission." *Rose v. JJS Trucking*, 411 S.C. 366, 368, 768 S.E.2d 412, 413 (Ct. App. 2015). Black's Law Dictionary defines a final judgment as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy." *Judgment*, *Black's Law Dictionary* (12th ed. 2024). We understand these authorities to say that an agency determination is not a "final decision" unless it marks the end of the road for the case. *See Charlotte-Mecklenburg*, 387 S.C. at

267, 692 S.E.2d at 894 (holding that an administrative order is interlocutory "[i]f there is some further act [that] must be done by the court prior to a determination of the rights of the parties").

As the parties concede, the order in this case is not a "final decision." The commission's order did two things: it addressed whether Southeastern had the number of employees required to fall under the commission's jurisdiction and it established Claimant's entitlement to certain temporary benefits. Claimant has not reached maximum medical improvement, and the commission has not ruled on whether Claimant is entitled to an award for any permanent disability. Other disputes may well arise as this case proceeds toward a final decision. *See Rose*, 411 S.C. at 368, 768 S.E.2d at 413 (finding an order from the workers' compensation commission, which left permanency unresolved, did not qualify as a final order because "the commission ha[d] not yet ruled on the merits of [Claimant's] entire claim for benefits"). It is not uncommon for there to be several hearings and orders as a workers' compensation case makes its way to a final judgment.

The Fund contends the order in this case is immediately appealable as an intermediate ruling that cannot be adequately reviewed later. This order certainly fits the definition of an intermediate or interlocutory order, which is "[a]n order that relates to some intermediate matter in the case; any order other than a final order." *Judgment*, *Black's Law Dictionary* (12th ed. 2024). But precedent explains the APA's exception to the final judgment rule is a narrow exception that is to be rarely applied. *See Hilton v. Flakeboard Am. Ltd.*, 418 S.C. 245, 252, 791 S.E.2d 719, 723 (2016) ("[C]ircumstances . . . that will permit the immediate appeal of an interlocutory administrative decision under section 1-23-380(A) 'are about as rare as the proverbial hens' teeth." (quoting *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)); *Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 283, 290, 826 S.E.2d 863, 864, 867 (2019) (invoking this exception because remanding the claim to a single commissioner "for what would be a third ruling on the same claim" would create an "unreasonable delay in [reaching] a final decision").

The Fund's argument for immediate review of this award is that Southeastern will not have an adequate remedy if review of this decision is delayed until the final judgment. This is so, the Funds says, because there will be no way for Southeastern to recover what the Fund will have paid for Claimant's medical treatment and any temporary disability payments. We cannot agree.

The first reason we must reject this argument is that if we construed the exception to operate this broadly, it would completely swallow the final judgment rule, at least

as far as workers' compensation cases are concerned. The purpose of the final judgment rule "is to present the whole cause for determination in a single appeal and thus to prevent the unnecessary expense and delay of repeated appeals." *Good*, 201 S.C. at 41, 21 S.E.2d at 212 (citation omitted). Workers' compensation cases frequently involve awards of temporary benefits, including medical care, followed by a period of treatment before there is a final decision adjudicating whether the injury caused any permanent disability and determining the appropriate benefits to compensate for that disability. If this order is immediately appealable, every order addressing compensability and awarding temporary benefits or medical treatment would be immediately appealable. Review of intermediate orders would cease to be a rare exception. This would thwart, rather than serve, the workers' compensation regime's purpose of providing a speedy, informal, and efficient avenue to recovery. *See Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015) ("The Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation."); *see also Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) ("Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault."). Allowing temporary awards to be immediately appealable would encourage, rather than discourage, prolonged litigation and piecemeal appeals.

Second, and to the same general point, it is helpful to contrast this case with our supreme court's explanation that this exception can apply when the commission's order creates an unreasonable delay in issuing a final order. *See Hilton*, 418 S.C. at 251–52, 791 S.E.2d at 722–23 ("Under these extraordinary circumstances, . . . where the [c]ommission has in effect ordered a new trial without regard to the matters raised by the appealing party and without any explanation why such an extreme remedy is appropriate . . . [demonstrates] that requiring Hilton to wait to appeal until the final agency decision would not provide an adequate remedy."); *see also Russell*, 426 S.C. at 287, 826 S.E.2d at 866 (finding that the inadequate remedy exception was satisfied when "a party could face the possibility of repeated unexplained 'do overs' before a final decision of the [c]ommission" (quoting *Hilton*, 418 S.C. at 252, 791 S.E.2d at 723)); *id.* at 288, 826 S.E.2d at 866 ("In this case, however, the commission's unnecessary delays and repeated remands over the almost eight years since Russell filed her change of condition claim frustrated the goals of the Workers' Compensation Act."). Nothing whatsoever suggests this case was prime for an unreasonably lengthy delay. Claimant was awarded a closed period of temporary disability payments because he was released to work within a few weeks of his injury and surgery. The commission's order required nothing more than medical treatment

by an authorized treating physician. One wonders whether this seemingly simple case might have already proceeded to a final judgment had there not been an interlocutory appeal.

This system of delaying most workers' compensation appeals until the final judgment is not perfect. We understand, and expressly do not discount, the fact that this regime places the interim costs of disability and medical benefits on employers. That concern has less force in this case because the Fund acknowledges it has a statutory right to recover all of its interim expenses from Southeastern. *See* S.C. Code Ann. § 42-7-200 (C)–(D) (2015). But setting the Fund's unique position aside, two things prevent us from adopting the view that costs such as those associated with temporary benefits warrant immediate appellate review. First, there already is an existing remedy. Our case law recognizes that an employer has a right to seek reimbursement if a workers' compensation award is reversed. *See Moore v. North American Van Lines*, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995) (finding the circuit court may hear an employer's restitution claim when a benefit award is reversed because the commission lacked jurisdiction over the claim). This may not be a perfect remedy, but we cannot say it is inadequate. *See also Rose*, 411 S.C. at 369, 768 S.E.2d at 413 (holding parties have an adequate remedy when the only alleged prejudice is delaying the payment of money between insurance providers). Second, adopting this argument would just be another way of turning the final judgment rule completely on its head.

Because the commission's order is neither a final decision nor is it the type of interlocutory order that has to be reviewed immediately to ensure adequate appellate review, we dismiss this case as not immediately appealable. We decline to address all other issues because this dismissal is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

DISMISSED.

THOMAS and CURTIS, JJ., concur.