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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

2021-001050

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; Liollo 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.

RECORD ON APPEAL
VOLUME I

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RECORD ON APPEAL
Volume I

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant Hurley Services LLC's Amended Motion for Summary Judgment as to Cross Claims of Builders First Source heard by this Court on November 6, 2020, is GRANTED as to all claims from Builders FirstSource-Southeast Group, LLC except those for equitable indemnification. Defendant shall submit a formal proposed order within 10 days from the date of this order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/07/2021.

ECC Contracting LLC
East Coast Carpentry Company
Rodrigo Assis
Edward Bruce Witham
Pohlman Quality Exteriors Inc
Yesenia Alvarez Penaloza
Sixto Melchor Ayala
Mario Salgado
Givair De Caris
Dino Schwartz
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Garcia Roofing LLC
Feliciano Cruz Silva
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Marroquin Construction
Jessica Marroquin
Juan Constructors
Juan Garza Ramos

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

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☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant East Coast Carpentry's Motion for Summary Judgment as to Cross Claims of Builders First Source heard by this Court on November 6, 2020, is GRANTED as to all claims from Builders FirstSource-Southeast Group, LLC except those for equitable indemnification. Defendant shall submit a formal proposed order within 10 days from the date of this order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

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Charleston Common Pleas

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So Ordered

s/Jennifer B. McCoy #2764

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant Palmetto Trim and Renovations Inc.'s Motion for Summary Judgment as to Cross Claims of Builders First Source, filed on October 29, 2020 and heard by this Court on November 6, 2020, is GRANTED as to all claims from Builders FirstSource-Southeast Group, LLC except those for equitable indemnification. Defendant shall submit a formal proposed order within 10 days from the date of this order.

ORDER INFORMATION

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So Ordered

s/Jennifer B. McCoy #2764

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant ECC Contracting LLC's Amended Motion for Summary Judgment as to Cross Claims of Builders First Source heard by this Court on November 6, 2020, is GRANTED as to all claims from Builders FirstSource-Southeast Group, LLC except those for equitable indemnification. Defendant shall submit a formal proposed order within 10 days from the date of this order.

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So Ordered

s/Jennifer B. McCoy #2764

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COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant AC Construction Inc.'s Motion for Summary Judgment as to Cross Claims of Builders First Source, filed on October 29, 2020 and heard by this Court on November 6, 2020, is GRANTED as to all claims from Builders FirstSource-Southeast Group, LLC except those for equitable indemnification. Defendant shall submit a formal proposed order within 10 days from the date of this order.

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☐ Other

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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant WS Contractors LLC's Amended Motion for Summary Judgment as to Cross Claims of Builders First Source heard by this Court on November 6, 2020, is GRANTED as to all claims from Builders FirstSource-Southeast Group, LLC except those for equitable indemnification. Defendant shall submit a formal proposed order within 10 days from the date of this order.

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So Ordered

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Electronically signed on 2021-05-07 09:57:56 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
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JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

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DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant Pohlman Quality Exteriors Inc.'s Second Amended Motion for Summary Judgment as to Cross Claims of Builders First Source heard by this Court on November 6, 2020, is GRANTED as to all claims from Builders FirstSource-Southeast Group, LLC except those for equitable indemnification. Defendant shall submit a formal proposed order within 10 days from the date of this order.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/07/2021.

ECC Contracting LLC
East Coast Carpentry Company
Rodrigo Assis
Edward Bruce Witham
Pohlman Quality Exteriors Inc
Yesenia Alvarez Penaloza
Sixto Melchor Ayala
Mario Salgado
Givair De Caris
Dino Schwartz
Advanced Building Connection LLC
Garcia Roofing LLC
Feliciano Cruz Silva
Carlos Marroquin
Marroquin Construction
Jessica Marroquin
Juan Constructors
Juan Garza Ramos

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-05-07 09:56:56 page 3 of 3

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
) C/A NO. 2016-CP-10-03783

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

Plaintiffs,)

vs.)

Winston Carlyle Charleston National, LLC;)
Colin R. Campbell Construction, Inc.; Colin)
Campbell, individually; C.R. Campbell)
Construction Co., Inc; Colin Campbell)
Construction, LLC; 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; ECC)
Contracting, LLC; Hurley Services, LLC;)
McDaniel Construction Co., LLC; AC)
Construction Corp.; AC Construction, Inc.;)
L&G Construction Group, LLC; Liollio)
Architecture; JC Construction d/b/a JC)
Construction, LLC a/k/a JC Contractors a/k/a)
JC Contractors, LLC; Soto & Vasquez)
Construction, LLC a/k/a Costa de Oliveira)
Construction, LLC; Solesmar Jesus de)
Oliveira; Wilson Lucas Sales d/b/a Miracle)
Siding; Miracle Siding, LLC; Royal Homes)
of SC, Inc.; Colleen Batissa; Christopher)
Batissa; Norma Ferreira Bruno; Mendez)
Construction, LLC; Juan Garza Ramos; Juan)
Garza Ramos d/b/a Juan Constructors; Jessica)
Marroquin; Jessica Marroquin d/b/a)
Marroquin Construction; Carlos Marroquin;)
Carlos Marroquin and Jessica Marroquin)
d/b/a Marroquin Construction; Feliciano)
Cruz Silva; Garcia Roofing, LLC; Givair de)
Caris; and Mario Salgado,)

Defendants.)

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
HURLEY SERVICES, LLC**

This matter came on before me on November 6, 2020, as Presiding Judge of the Ninth Judicial Circuit on the Amended Motion for Summary Judgment of Hurley Services, LLC (Hurley). Builders FirstSource-Southeast Group, LLC (BFS) filed multiple crossclaims against Hurley including claims for equitable and contractual indemnity, negligence, express and implied warranty, and breach of contract.

The Court has carefully considered the arguments of counsel, the memoranda and exhibits which have been filed, and it has also taken judicial notice of all relevant pleadings, decisions of the Circuit Courts which relate to the issue of collateral estoppel, and other known facts.

The parties fully litigated without objection all legal issues which are addressed in this Order.

This is a construction defects suit involving a multi-family development in Mount Pleasant, South Carolina consisting of 31 buildings. In their Fourth Amended Complaint, Plaintiffs allege product defects, installation deficiencies, and a failure to supervise against both BFS and Hurley. Hurley was a labor-only subcontractor to BFS under a Master Subcontract Agreement drafted by BFS. BFS sold and provided for installation windows, doors, weather-resistant materials, and other building components for some of the buildings.

LEGAL STANDARD

Summary judgment is appropriate if the circuit court finds “there is no genuine issue as to any material fact” Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, “the evidence and all inferences which can be reasonably drawn from

the evidence must be viewed in the light most favorable to the nonmoving party.” Hancock v. Mid-S Mgmt. Co., 381 S.C. 326, 329-30 (2009). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Manley v. Manley, 291 S.C. 325, 329 (Ct. App. 1987). “[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party’s case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

EQUITABLE INDEMNITY

The plaintiffs allege installation, supervision, and product deficiencies against both BFS and Hurley, and BFS has filed a crossclaim for equitable indemnity. Based upon the record before me, I believe there are material issues of fact with regard to these issues, and Hurley’s Motion for Summary Judgment as to the equitable indemnity claim is denied.

BFS CROSSCLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE

In its oral arguments and memorandum of law, BFS concedes that its crossclaims against Hurley for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity, and that they are subject to

dismissal pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Grp, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015). Therefore, the Court will grant summary judgment with respect to those claims.

CONTRACTUAL INDEMNITY

In its Memorandum in Opposition to Hurley's Amended Motion for Summary Judgment, BFS argues that the provisions of its Master Subcontract Agreement are clear, unequivocal, and unambiguous. Whether a contract is ambiguous is a matter of law for the court. McCord v. Laurens County Healthcare System, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020) (reh'g denied). The construction of a clear and unambiguous contract is a question of law for the court to determine. Hawkins v. Greenwood Dev. Corp., 328 S.C. 385, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

This Court finds that it can decide as a matter of law pursuant to Rule 56(c) SCRPC whether the language of the contract drafted by BFS is unconscionable and unenforceable, fails to meet the clear and unequivocal standard, is against public policy, violates S.C. Code Ann. §32-2-10 S.C. Code, and whether BFS is collaterally estopped from contesting whether its contractual indemnity language meets the clear and unequivocal standard.

PROVISIONS DRAFTED BY BFS ARE UNCONSCIONABLE AND UNENFORCEABLE

BFS drafted two Master Subcontract Agreements as is shown by its logo on the first page of the agreements. One is dated May 14, 2012, and the other, December 18, 2014. The 2012 agreement is the operative agreement.

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties intentions as determined by the contract language. PCS Nitrogen, Inc. v.

Continental Cas. Co., 429 S.C. 30, 39, 837 S.E.2d 662, 666 (Ct. App. 2019) (reh’g denied).

The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, “from the four corners of the instrument” alone. McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). Any uncertainty as to the meaning of any term should be resolved against the party who prepared the contract. Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 683 S.E.2d 814 (Ct. App. 2009). 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., 409 S.C. 586, 762 S.E.2d 705, 710 (2014).

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (2007) (citation omitted). Among the factors considered by the court in determining whether a contract was tainted by an absence of meaningful choice are the relative disparity in the bargaining power of the party; whether there is an element of surprise in the inclusion of the challenged language; and the conspicuousness of the language or clause. *id.*

Hurley was a local subcontractor in the Charleston area which installed products for

BFS. BFS is the regional division of Builders FirstSource as appears from its name on the contract. Hurley worked on four of the two-story multifamily buildings and was paid a total of \$5,319.50. Although BFS emphasizes in its memorandum that Hurley voluntarily entered into two agreements with BFS, and had the right to terminate the agreement under certain circumstances, BFS does not specifically address the issue of unequal bargaining power. There is no evidence that Hurley was sophisticated or was represented by legal counsel.

This Court takes judicial notice of the fact that BFS is a large supplier of building materials and that its Master Subcontract Agreement is so one-sided, that a subcontractor executing the agreement, more than likely lacks any meaningful bargaining power. *Cf. Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016) (Kittredge & Pleicones, JJ, dissenting) (taking judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller).

The contract provisions are also deceptive. Contract provisions result in unfair surprise when the real meaning of the terms are intentionally obscured by one of the parties. *id.* The master contract was carefully drafted by BFS in a way which would obligate its subcontractors to warrant the design and suitability of products provided by BFS, and further, for subcontractors to indemnify and defend BFS and others from any property damage or personal injury resulting from those products. Referring to the Master Subcontract Agreement, one finds the following:

“SECTION 1. Introduction.

- a. **Work.** “[T]his 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**”)’

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.

“[I]n 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 ... and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated”

Hurley was a labor-only subcontractor for the installation of doors, windows, and Tyvek provided by BFS. There is no evidence that Hurley provided any materials for the installation of products supplied by BFS. In Section 2(c), BFS drafted the aforementioned language to read that “work” includes materials supplied by others, which in this case is BFS. Under Section 3 WARRANTY, the subcontractor unknowingly warrants to BFS the design and suitability of products BFS supplies and sells and also unknowingly agrees to indemnify BFS and others for those products. Although the indemnification provisions of Section 5 INDEMNITY are printed in bold letters, this indemnification provision was buried in the fine prints of Section 3 WARRANTY.

In finding contract provisions unconscionable in Simpson, the court observed, in pertinent part, as follows:

“[W]hile certain phrases within other provisions of additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) ... We cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law”

Simpson, 644 S.E.2d at 670.

BFS uses the language in Sections 1, 2, and 3 in combination with the indemnity and duty to defend provisions found in the first three paragraphs of Section 5, to assert claims for contractual indemnity and a defense against its subcontractors for materials BFS furnished to the project.

BFS denies asserting claims against Hurley for deficiencies in windows, doors, and other materials it gave Hurley for installation at the project. BFS contends that the word

“materials” as used in Section 3 WARRANTY refers to materials provided by Hurley. However, there is no evidence in the record that Hurley provided any materials for the installation of BFS products. Even if Hurley did provide materials, there is no evidence that any of these materials are defective or deficient.

The language in Section 3 WARRANTY “subcontractor guarantees the work against defects in design ... and materials” only makes sense if the word “design” refers to manufactured materials provided by BFS. Hurley is not responsible for the design of the buildings in the project. BFS, not Hurley, provides structural components. Yet the warranty provisions of Section 3 WARRANTY requires Hurley to give a ten-year warranty on “structural applications”. This warranty exceeds the eight-year time limit in the applicable statute of repose found in S.C. Code Ann. §15-3-640.

Thus, it is clear that a disparity in bargaining power and the intentional use of deceptive language buried in fine print of the agreement deprived Hurley of a meaningful choice in the execution of the agreement.

It is equally clear that the Master Subcontract Agreement drafted by BFS is an adhesion contract which is drawn to the fullest extent possible in favor of BFS. BFS has expansive rights and remedies under the agreement it drafted. In contrast, most of the rights and remedies of Hurley are limited or waived. Most paragraphs of the agreement create obligations and liabilities for Hurley or a waiver or limitation of Hurley’s rights. The agreement drafted by BFS attempts to transfer all risks associated with the project to its subcontractors, including risks associated with the products and components furnished by BFS.

On November 11, 2019, BFS filed an Answer to Plaintiffs' Fourth Amended Complaint and reasserted multiple crossclaims against Hurley and other subcontractors alleging that Hurley was contractually responsible for the provision of adequate materials and services in connection with its respective undertakings at the project, even though there is no evidence Hurley provided any materials.

Under general principles of state law, an adhesion contract is a standard form contract offered on a "take it or leave it basis" with terms that are non-negotiable. Munoz v. Greentree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001). Although adhesion contracts are not per se unconscionable, the cumulative effect of these oppressive and one-sided provisions can cross a line which makes the contract unconscionable. Simpson, 644 S.E.2d at 674.

The combination of an absence of a meaningful choice on the part of Hurley, deceptive language, and one-sided provisions in the adhesion contract drafted by BFS renders the warranty/indemnification provisions in Section 3 and the indemnity/duty to defend paragraphs in Section 5 unconscionable and unenforceable. South Carolina courts will not enforce a contract which is violative of public policy or statutory law. Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004); D.R. Horton, Inc. v. Builders FirstSource – SE Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).

**THE CLAIMS OF BFS FOR CONTRACTUAL INDEMNITY AND A DEFENSE
ARE BARRED BY THE CONCORD & CUMBERLAND HOLDING**

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to

recover for an indemnitee's concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018) (reh'g denied). (Affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity crossclaims of contractor based upon the application of the clear and unequivocal standard.)

At the hearing and in its Memorandum in Opposition to Hurley's Amended Motion for Summary Judgment, BFS argues that it is not seeking indemnity for loss or damage arising out of any negligence of BFS itself, but rather is seeking indemnity only against liability for damage or loss arising out of the sole or concurrent negligent acts or omissions of its subcontractor, Hurley, in the performance of the subcontractor's work. BFS goes on to assert that the clear and unequivocal standard in Concord & Cumberland does not apply. A review of the indemnification and defense provisions in Sections 3 and 5 and the crossclaims filed by BFS reveal that this argument is without merit.

The indemnity provision buried in the fine print of Section 3 WARRANTY would allow BFS to seek indemnity for personal injuries and property damage arising from the sole negligence of BFS in selecting and selling products which it gives to Hurley for installation. The indemnity provision is jumbled with warranty and guaranty language, and does not meet the clear and unequivocal standard.

Section 5 of the master agreement contains multiple indemnity clauses. The first paragraph of Section 5 INDEMNITY, provides as follows:

"To the fullest extent permitted by Law, the subcontractor shall indemnify, defendant 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 for whose acts the subcontractor may be liable. The Contractor's insurance requirements are separate and distinct from the requirement of indemnification hereunder."

This language is based on the AIA form indemnification language and the key phrase, for our arguments at the Circuit Court level, was "but only to the extent caused in whole or in part by any negligent acts or omission on the part of subcontractor." The decision in Concord & Cumberland specifically recognized that this language fails as a matter of law because it does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own liability. *id.*

The third paragraph of Section 5 INDEMNITY is as follows:

"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.”

In their Fourth Amended Complaint, Plaintiffs have alleged that BFS was negligent in supervising its subcontractors and in supplying defective materials. In its crossclaims against Hurley, BFS seeks to recover the amount of any judgment in favor of Plaintiffs arising from its own negligence, and also all costs, expenses, and attorneys fees it incurs in defending the action, even if 100% of defense costs arise from the sole negligence of BFS. BFS is judicially bound by its pleadings. Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

Paragraph 3 of Section 5 INDEMNITY is a disguised indemnity provision for defense costs. By claiming it is not seeking indemnification for its own negligence, BFS is asking the Court to ignore its pleadings and the language which it drafted and to disregard controlling authority. It is clear that BFS is seeking indemnification for its own negligence.

THE CONTRACTUAL INDEMNITY CLAIMS OF BFS ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

This Court has taken judicial notice of two Circuit Court orders which have interpreted BFS’s contractual indemnity language. See order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six Owners’ Association, Inc. v. Windsor South, LLC, 2016-CP-10-3455 and the amended order of the Honorable Clifton Newman filed February 3, 2020 in the Court of Common Pleas for Berkeley County in the case of Builders FirstSource-Southeast

Group, LLC v. M.I. Windows & Doors, Inc., et al. as Civil Action No. 2018-CP-08-2547.

Significantly, the Honorable Clifton Newman found the same version of the BFS Master Agreement which is in issue in this case to be unenforceable as a matter of law because the indemnification clauses are not clear and unequivocal and they violate South Carolina Rules of Contract Construction.

The Honorable Roger Young also ruled that Judge Newman's amended Order constitutes a prior final judgment that determined that the contractual indemnity provisions in BFS's master agreement was unenforceable as a matter of law. BFS has appealed both orders.

To invoke collateral estoppel, a party need not have also been a party to the prior action; the law only requires that the party against whom estoppel is applied have been a party to that action and had a full and fair opportunity to litigate the issue in the prior action. South Carolina Property & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991).

In its Memorandum in Opposition to Hurley's Motion for Summary Judgment, BFS does not take issue with the fact that the same contractual indemnity provisions in this case were considered by the courts in issuing their orders. However, it takes the position that BFS will not have had a full and fair opportunity to litigate the issues decided by Judges Newman and Young until the resolution of any appeals and entry of final judgment. In other words, BFS is contending that these orders are not final judgments for purposes of the application of the doctrine of collateral estoppel.

The appeals from these orders do not undermine their status as final judgments; the

law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's judgment, and thus, will not be a barrier to applying collateral estoppel. See Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189, 61 S.Ct. 513, 515, 85 L.Ed. 725 (1941). (Finding finality of a court's judgment is not lost because appeal is pending until and unless reversed.)

The contractual indemnity terms drafted by BFS have been litigated and directly determined in the prior actions, and collateral estoppel should apply. A final judgment is one that finally determines the rights of the parties. First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), *aff'd* 308 S.C. 421, 418 S.E.2d 545 (1992). Moreover, Rule 201(a) SCACR provides that an: "appeal may be taken, as provided by law, from any final judgment or appealable order." BFS could not have appealed these orders unless they were final orders. Thus, this Court finds that BFS is collaterally estopped from enforcing the contractual indemnity claims asserted in the Master Subcontract Agreement which it drafted.

BFS'S CONTRACTUAL INDEMNITY PROVISIONS VIOLATE
S.C. CODE ANN. §32-2-10

S.C. Code Ann. §32-2-10 provides, in pertinent part, as follows: "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” (emphasis added).

The Court has carefully considered the contractual indemnity provisions in BFS’s Master Subcontract Agreement. All of them violate S.C. Code Ann. §32-2-10, are against public policy, and are unenforceable.

The fine print indemnity language found in Section 3 WARRANTY is jumbled with warranty and guaranty provisions under which Hurley warrants, guarantees, and agrees to indemnify BFS for its sole negligence in selecting and selling materials and building components for installation in the project. The warranty and guaranty provisions are merely disguised indemnity provisions. These provisions clearly violate S.C. Code Ann. §32-2-10.

The first and second paragraphs in Section 5 INDEMNITY also purport to indemnify BFS for its sole negligence in violation of the statute.

The third paragraph in Section 5 INDEMNITY deals with defense costs. BFS placed that paragraph in the same section as two preceding paragraphs dealing with indemnity for attorney’s fees.

Paragraph three is in effect a disguised indemnity provision for defense costs. There is no legal basis for separating it from the other indemnity provisions, especially where BFS claims attorney’s fees and defense costs in its crossclaims. The attorneys’ fees and defense costs are nothing more than continuing consequential damages. Under paragraph three, Hurley is obligated for 100% of attorney’s fees and defense costs even if BFS is solely at fault in connection with asserted claims and suits. This provision also

violates S.C. Code Ann. §32-2-10.

All of the warranty, guaranty, and indemnification provisions in Section 3 WARRANTY and the indemnity/defense provisions found in the first three paragraphs of Section 5 INDEMNITY violate S.C. Code Ann. §32-2-10. They also violate the public policy of this state and are unenforceable.

**THE COURT IS NOT OBLIGATED TO REWRITE THE BUILDERS
FIRSTSOURCE CONTRACTUAL INDEMNITY PROVISIONS.**

BFS argues that the provisions of the agreement are independent and severable. All of the contractual indemnity provisions described in this order are either unconscionable and unenforceable, violate S.C. Code Ann. §32-2-10 S.C. Code, or fail to meet the clear and unequivocal standard. There are so many objectionable clauses that run throughout the agreement that it is not possible to sever or reform them. See Smith v. D.R. Horton, Inc., 403 S.C. 10, 16, 742 S.E.2d 37, 41 (Ct. App. 2013) aff'd 417 S.C. 42, 790 S.E.2d 1 (2016) (Kittredge & Pleicones, JJ, dissenting). This Court has no obligation or authority to rewrite the contractual indemnity provisions of BFS. Poynter Inves., Inc. v. Cent. Builders of Piedmont, Inc., 694 S.E.2d 15, 18 (S.C. 2010); Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

After carefully considering the arguments of counsel, the memoranda of law and exhibits submitted by the parties, and taking judicial notice of the pleadings, two Circuit Court orders of the Honorable Roger M. Young, Sr. and the Honorable Clifton Newman, and other known facts, I find and conclude as follows:

1. That there are material issues of fact with respect to the equitable indemnity crossclaim of BFS.

2. That the crossclaims of BFS for breach of express and implied warranties, breach of contract, and negligence, are disguised equitable indemnity claims and are not viable as alternative causes of action.

3. That the Master Subcontract Agreement was drafted by BFS, and any issues relating to the interpretation of the agreement should be construed against BFS.

4. That the Master Subcontract Agreement is a contract of adhesion, and substantially all of the provisions are drawn in favor of BFS.

5. That BFS has attempted in the Master Subcontract Agreement to transfer all risks associated with the project to Hurley, including risks associated with the materials and building components which BFS supplies for installation.

6. That a disparity in bargaining power and deceptive language buried in the fine print of the agreement deprived Hurley of a meaningful choice in the execution of the Master Subcontract Agreement.

7. That all warranties and guarantees found in Section 3 WARRANTY are disguised indemnity provisions.

8. That the duty to defend provisions contained in Paragraph Three of Section 5 INDEMNITY are disguised indemnity provisions for defense costs and attorneys fees.

9. That the warranty, guaranty, and indemnity provisions found in Section 3 WARRANTY are unconscionable and unenforceable.

10. That the indemnity and duty to defend provisions found in Section 5 INDEMNITY are unconscionable and unenforceable.

11. That the contractual indemnity provisions in the Master Subcontract

Agreement do not meet the clear and unequivocal standard and are unenforceable.

12. That BFS is collaterally estopped from contending that its contractual indemnity provisions in the Master Subcontract Agreement meet the clear and unequivocal standard.

13. That the contractual indemnity provisions in the Master Subcontract Agreement violate S.C. Code Ann. §32-2-10.

14. That the Master Subcontract Agreement contains so many provisions that are deceptive and unconscionable, fail to meet the clear and unequivocal standard, violate S.C. Code Ann. §32-2-10, and are against public policy, that it would be impossible to sever and/or reform them without rewriting the Master Subcontract Agreement, which this Court is not obligated to do.

IT IS, THEREFORE,

ORDERED, that the motion of Hurley Services, LLC for summary judgment with respect to the crossclaim of BFS for equitable indemnity is denied;

FURTHER ORDERED, that the motion of Hurley Services, LLC for summary judgment with regard to the crossclaims of BFS for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity be and it is hereby granted.

AND IT IS SO ORDERED.

[Document Prepared for Electronic Signature]



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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, C.R. Campbell
Construction Co., Inc., Colin Campbell
Construction, LLC, 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, ECC Contracting, LLC, Hurley
Services, LLC, McDaniel Construction Co.,
LLC, AC Construction Corp., AC Construction,
Inc., L&G Construction Group, LLC, Liollo
Architecture, JC Construction d/b/a JC
Construction, LLC a/k/a JC Contractors a/k/a
JC Contractors, LLC, Soto & Vasquez
Construction, LLC a/k/a Costa De Oliveira
Construction, LLC, Solesmar Jesus De
Oliveira, Wilson Lucas Sales d/b/a Miracle
Siding, Miracle Siding, LLC, Royal Hornes of
SC, Inc., Colleen Batissa, Christopher Batissa,
Norma Ferreira Bruno, Mendez Construction,
LLC, Juan Garza Ramos, Juan Garza Ramos
d/b/a Juan Constructors, Jessica Marroquin,
Jessica Marroquin d/b/a Marroquin
Construction, Carlos Marroquin, Carlos
Marroquin and Jessica Marroquin d/b/a
Marroquin Construction, Feliciano Cruz Silva,
Garcia Roofing, LLC, Givair De Caris, and
Mario Salgado,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-03783

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
EAST COAST CARPENTRY**

Builders FirstSource-Southeast Group, LLC,

Third-Party Plaintiff,

v.

Pohlman Quality Contractors; and Pohlman
Quality Exteriors, Inc.; Palmetto Trim and
Renovation; Edward Bruce Witham; and East
Coast Carpentry,

Third-Party Defendants.

This matter came on before me on November 6, 2020 as Presiding Judge of the Ninth Judicial Circuit on Amended Motion of East Coast Carpentry, hereinafter “East Coast”, for summary judgment with respect to cross-claims filed by Builders FirstSource-Southeast Group, LLC, hereinafter “BFS”, for equitable and contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. For the reasons set forth herein below, East Coast’s motion is GRANTED IN PART as to BFS’s claims except those for equitable indemnity:

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at Retreat at Charleston National Country Club, a thirty-one building townhome community in Mount Pleasant, SC (“the Retreat Project” or “the Project”). Plaintiffs allege, *inter alia*, defective/improper installation of framing components, windows and doors, building paper/weather resistive barrier, and related flashing, have caused water infiltration and damage to the substrate and other building components at all buildings throughout the Project.

BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that BFS holds an unlimited commercial general contractor’s license (License No. 112969) with the South Carolina Labor Licensing

& Regulation (“SC-LLR”), and Terry Rosamond is BFS’s representative that serves as the “qualifying party” for such licensure in this state. It is undisputed that BFS furnished the framing lumber, house-wrap, windows, doors, related flashings, and caulk and BFS provided 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. 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. East Coast did not perform any other work on the Project. Per the ‘Gemini’ records, this work was all completed in 2006. .

According to BFS, East Coast executed a BFS “Master Subcontractor Agreement” dated October 21, 2005 (hereafter “Master Agreement”). The Master Agreement at issue here is a BFS contract form bearing “Version – 4/20/05.” BFS seeks to recover from East Coast and BFS’s subcontractors in indemnity under the terms of the applicable BFS Master Agreement.

ABBREVIATED PROCEDURAL HISTORY

Plaintiffs filed their initial Complaint on July 22, 2016. BFS filed third-party claims against East Coast for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence with its Amended Answer and Third-Party Complaint to Plaintiffs’ Fourth Amended Complaint filed on November 13, 2019. BFS’s third-Party claims allege that BFS is entitled to be indemnified in the amount which BFS “may pay in satisfaction” of Plaintiffs’ claim “plus [BFS’s] costs of defense, inclusive of attorneys’ fees”, without regard for the fault of either East Coast or BFS.

East Coast filed its Motion for Summary Judgment on January 7, 2020 and its Amended Motion for Summary Judgment as to BFS’s third-party claims on October 15, 2020 asserting the arguments contained in its original Motion and supplementing those arguments with a Statute of Repose defense. BFS did not file a memorandum in opposition to East Coast’s Motion or Amended Motion for Summary Judgment but opposed the motion at oral arguments on November 6, 2020.

LEGAL STANDARD

A trial court should grant a motion for summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRPC; see Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting Tupper v. Dorchester Cnty., 326 S.C. 318, 487 S.E.2d 187 (1997)). “Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent’s case, the opponent may not simply rest on the mere allegations contained in the pleadings.” Grant v. Mount Vernon Mills, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). “Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” Id. at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

I. BFS’s CROSS-CLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE ARE DISGUISED CLAIMS FOR EQUITABLE INDEMNITY.

Although BFS did not submit a memorandum of law in opposition to East Coast’s Amended Motion for Summary Judgment¹, during oral arguments on November 6, 2020, BFS conceded that its cross-claims against East Coast for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity and that they are subject to dismissal pursuant to Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. BuildersirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v.

¹ It should be noted that BFS, in its memorandum in opposition to Polhman Quality Exteriors’ Second Amended Motion for Summary Judgment, which was heard at the same time as ECC’s Amended Motion for Summary Judgment, BFS conceded that its cross-claims for breach of express and implied warranties, breach of contract, and negligence against Polhman Quality Exteriors were merely disguised claims for equitable indemnification pursuant to the Stoneledge cases cited herein.

Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). Therefore, the Court will grant summary judgment with respect to those claims.

II. BFS's claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal and thus they fail as a matter of law. Concord and Cumberland HPR v. Concord and Cumberland, LLC, 2018 WL 3748616 (S.C. Ct. App. 2018):

Third-Party Complaint alleges that the subcontract between BFS and East Coast “provided for contractual indemnification in favor of Builders FirstSource”. The language contained in the “Master Subcontract Agreement” indemnity provision states:

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:

- a. Waiver. [omitted because it applies to workers comp]
- b. Release and Indemnity.

(1) [Omitted bc applies to personal injury]

(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 Indemnitees [defined as Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees in (1)] 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 Indemnitees failure to supervise Subcontractor’s operations.

This language is inherently confusing insofar as it calls for East Coast to indemnify BFS for BFS’s sole negligence while also claiming to limit the indemnity “to the extent” of East Coast’s negligence. Thus, the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS’s own negligence. See Concord and Cumberland HPR v. Concord and Cumberland, LLC, 2018 WL 3748616 (S.C. Ct. App. 2018).

In footnote 6 to the Cumberland case the South Carolina Court of Appeals noted that standard AIA form indemnity clause does not meet this 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 American Institute of Architects (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." Because South Carolina appellate courts have never upheld an indemnity clause as "clear and unequivocal," parties and their lawyers have little guidance. This is why the Texas Supreme Court discarded the "clear and unequivocal" standard in favor of one they call "express negligence," although we are uncertain how much that clears things up. See id. at 708. There may be better alternatives to the "clear and unequivocal" standard, but we must leave that to our legislature or supreme court.

III. BFS's claims for contractual indemnity are based on contractual provisions that are illegal and unenforceable:

The contract between BFS and East Coast contains multiple indemnity provision including those which require ECC to indemnify BFS for damages incurred as a result of BFS' sole negligence in violation of S.C. Code Ann. § 32-2-10. The relevant indemnity provision is above. Section 6 explicitly calls for East Coast to unconditionally defend and indemnify BFS in subsection (1) and then calls for East Coast to indemnify BFS for BFS' failure to supervise in subsection (2). These provisions explicitly violation of SC Code Ann. §32-2-10 as they require East Coast to indemnify BFS for BFS' sole negligence: Indemnification provisions calling for the Indemnitor to indemnify the Indemnitee "for damages caused by its [the Indemnitee's] negligence or the negligence of its subcontractors" are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45-6 (Ct. App. 2018). Further, our Court of Appeals has held that "[A]n illegal contract is unenforceable." Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, the Court held that the indemnification agreement "purports to require BFS to indemnify D.R. Horton for its own negligence in violation of

section 32-2-10” and went on to conclude that “[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.” *Id.* This case is no different. Because the indemnity provisions of the contracts between BFS and ECC require ECC to indemnify BFS for BFS’ sole negligence, BFS’ contracts are illegal, and thus unenforceable and ECC is entitled to summary judgment.

CONCLUSION

After carefully considering the pleadings in the case, the arguments of counsel, the memoranda of law and exhibits submitted by the parties, I find and conclude as follows:

1. That the cross-claims of BFS against East Coast for breach of express and implied warranties, breach of contract, and negligence are disguised equitable indemnity claims and are not viable as alternative causes of action.
2. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS’s Master Subcontractor Agreement “[Version 4/20/05]”) violate South Carolina public policy and S.C. Code § 32-2-10.
3. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS’s Master Subcontractor Agreement “[Version 4/20/05]”) are neither clear nor unequivocal and, thus, fail as a matter of law.
4. Genuine issues of material fact exist as to the Statute of Repose argument raised by East Coast Carpentry.

IT IS, THEREFORE, ORDERED that the amended motion of East Coast Carpentry for summary judgment with regard to the Third-Party Claims of Builders FirstSource-Southeast Group, LLC is hereby **GRANTED IN PART as to all claims on all grounds except for those sounding in equity.** AND IT IS SO ORDERED.

The Honorable Jennifer B. McCoy
Judge, Ninth Judicial Circuit

Charleston, South Carolina
_____, 2021



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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, C.R. Campbell
Construction Co., Inc., Colin Campbell
Construction, LLC, 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, ECC
Contracting, LLC, Hurley Services, LLC,
McDaniel Construction Co., LLC, AC
Construction Corp., AC Construction, Inc.,
L&G Construction Group, LLC, Liollio
Architecture, JC Construction d/b/a JC
Construction, LLC a/k/a JC Contractors a/k/a
JC Contractors, LLC, Soto & Vasquez
Construction, LLC a/k/a Costa De Oliveira
Construction, LLC, Solesmar Jesus De
Oliveira, Wilson Lucas Sales d/b/a Miracle
Siding, Miracle Siding, LLC, Royal Hornes
of SC, Inc., Colleen Batissa, Christopher
Batissa, Norma Ferreira Bruno, Mendez
Construction, LLC, Juan Garza Ramos, Juan
Garza Ramos d/b/a Juan Constructors, Jessica
Marroquin, Jessica Marroquin d/b/a
Marroquin Construction, Carlos Marroquin,
Carlos Marroquin and Jessica Marroquin
d/b/a Marroquin Construction, Feliciano Cruz
Silva, Garcia Roofing, LLC, Givair De Caris,
and Mario Salgado,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-03783

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
PALMETTO TRIM AND
RENOVATIONS**

Builders FirstSource-Southeast Group, LLC,

Third-Party Plaintiff,

v.

Pohlman Quality Contractors; and Pohlman
Quality Exteriors, Inc.; Palmetto Trim and
Renovation; Edward Bruce Witham; and
East Coast Carpentry,

Third-Party Defendants.

This matter came on before me on November 6, 2020 as Presiding Judge of the Ninth Judicial Circuit on Amended Motion of PALMETTO TRIM AND RENOVATION, hereinafter “Palmetto”, for summary judgment with respect to cross-claims filed by Builders First Source-Southeast Group, LLC, hereinafter “BFS”, for equitable and contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. For the reasons set forth herein below, Palmetto’s motion is GRANTED as to BFS’s claims for contractual indemnification, breach of express and implied warranties, breach of contract and negligence, and is DENIED as to BFS’s claim for equitable indemnification:

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at Retreat at Charleston National Country Club, a thirty-one building townhome community in Mount Pleasant, SC (“the Retreat Project” or “the Project”). Plaintiffs allege, *inter alia*, defective/improper installation of framing components, windows and doors, building paper/weather resistive barrier, and related flashing, have caused water infiltration and damage to the substrate and other building components at all buildings throughout the Project.

BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that BFS holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is BFS's representative that serves as the "qualifying party" for such licensure in this state. It is undisputed that BFS furnished the framing lumber, house-wrap, windows, doors, related flashings, and caulk and BFS provided 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. Palmetto served as a subcontractor of BFS and in that capacity performed window installation work on Units 500, 700 and 1000. Palmetto did not perform any other work on the Project. Certificates of Occupancy were issued for building 500 on July 21, 2006; building 700 on July 25, 2006 and building 1000 on July 25, 2006.

According to BFS, Palmetto executed a BFS "Master Subcontractor Agreement" dated May 16, 2005 (hereafter "Master Agreement"). The Master Agreement at issue here is a BFS contract form bearing "Version – 2/16/04." BFS seeks to recover from Palmetto and BFS's subcontractors in indemnity under the terms of the applicable BFS Master Agreement.

ABBREVIATED PROCEDURAL HISTORY

Plaintiffs filed their initial Complaint on July 22, 2016. BFS filed third-party claims against Palmetto on May 1, 2017 asserting third-party claims against Palmetto for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence. BFS's operative third-party claims are now contained in BFS's Amended Answer and Third-Party Complaint to Plaintiffs' Fourth Amended Complaint filed on November 13, 2019. BFS's third-Party claims allege that BFS is entitled to be indemnified in the amount which BFS "may pay in satisfaction" of Plaintiffs' claim "plus [BFS's] costs of defense, inclusive of attorneys' fees", without regard for the fault of either Palmetto or BFS.

Palmetto filed its Amended Motion for Summary Judgment as to BFS's third-party claims on October 22, 2020 asserting the arguments contained in its original brief and adopting those of East Coast Carpentry. BFS did not file a memorandum in opposition to Palmetto's Amended Motion for Summary Judgment but opposed the motion at oral arguments on November 6, 2020.

LEGAL STANDARD

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; see Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting Tupper v. Dorchester Cnty., 326 S.C. 318, 487 S.E.2d 187 (1997)). "Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings." Grant v. Mount Vernon Mills, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

I. BFS's CROSS-CLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE ARE DISGUISED CLAIMS FOR EQUITABLE INDEMNITY.

Although BFS did not submit a memorandum of law in opposition to Palmetto's Amended Motion for Summary Judgment¹, during oral arguments on November 6, 2020, BFS conceded that its

¹ It should be noted that BFS, in its memorandum in opposition to Polhman Quality Exteriors' Second Amended Motion for Summary Judgment, which was heard at the same time as ECC's Amended Motion for Summary Judgment, BFS conceded that its cross-claims for breach of express and implied warranties, breach of contract, and negligence against

cross-claims against Palmetto for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity and that they are subject to dismissal pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. BuildersfirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). Therefore, the Court will grant summary judgment with respect to those claims.

II. BFS's claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal and thus they fail as a matter of law. Concord and Cumberland HPR v. Concord and Cumberland, LLC, 2018 WL 3748616 (S.C. Ct. App. 2018)

Paragraphs 165 of the Third-Party Complaint alleges that the subcontract between BFS and Palmetto "provided for contractual indemnification in favor of Builders FirstSource". The language contained in the "Master Subcontract Agreement" indemnity provision states:

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:

- a. Waiver. [omitted because it applies to workers comp]
- b. Release and Indemnity.
 - (1) [Omitted bc applies to personal injury]
 - (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 Indemnitees [defined as Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees in (1)] 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

Polhman Quality Exteriors were merely disguised claims for equitable indemnification pursuant to the Stoneledge cases cited herein.

materials provided in connection with the Work; or (iii) omissions resulting from Indemnitees failure to supervise Subcontractor's operations.

This language is inherently confusing insofar as it calls for Palmetto to indemnify BFS for BFS's sole negligence. Thus, the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS's own negligence. See Concord and Cumberland HPR v. Concord and Cumberland, LLC, 2018 WL 3748616 (S.C. Ct. App. 2018).

In footnote 6 to the Cumberland case the South Carolina Court of Appeals noted that standard AIA form indemnity clause does not meet this 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 American Institute of Architects (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." Because South Carolina appellate courts have never upheld an indemnity clause as "clear and unequivocal," parties and their lawyers have little guidance. This is why the Texas Supreme Court discarded the "clear and unequivocal" standard in favor of one they call "express negligence," although we are uncertain how much that clears things up. See id. at 708. There may be better alternatives to the "clear and unequivocal" standard, but we must leave that to our legislature or Supreme Court.

CONCLUSION

After carefully considering the pleadings in the case, the arguments of counsel, the memoranda of law and exhibits submitted by the parties, I find and conclude as follows:

1. That the cross-claims of BFS against Palmetto for breach of express and implied warranties, breach of contract, and negligence are disguised equitable indemnity claims and are not viable as alternative causes of action.
2. That the indemnity and duty to defend provision of the Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 2/16/04]") are unconscionable, ambiguous, unintelligible, conflicting, and are unenforceable.

3. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 2/6/04]") violate South Carolina public policy and S.C. Code § 32-2-10.
4. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 2/16/04]") are neither clear nor unequivocal and, thus, fail as a matter of law.
5. That BFS's third-party claim against Palmetto for equitable indemnification remains, as a genuine issue of material fact still exists as to the arguments set forth by Palmetto with regard to their arguments for summary judgment on that claim.

IT IS, THEREFORE, ORDERED that the amended motion of Palmetto Trim and Renovations for summary judgment with regard to the Third-Party Claims of Builders FirstSource-Southeast Group, LLC for contractual indemnification, breach of express and implied warranties, breach of contract, and negligence be and is hereby **GRANTED**; and that the amended motion of Palmetto Trim and Renovations for summary judgment with regard to the Third-Party Claim of Builders FirstSource-Southeast Group, LLC for equitable indemnification be and is hereby **DENIED**.

AND IT IS SO ORDERED.

The Honorable Jennifer B. McCoy
Judge, Ninth Judicial Circuit

Charleston, South Carolina
_____, 2021



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

vs.

Builders FirstSource-Southeast Group, LLC;
et al.,

Defendants.

Builders FirstSource-Southeast Group, LLC,

Third-Party Plaintiff,

v.

Palmetto Trim and Renovations, LLC, et. al.,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C/A No.: 2016-CP-10-03783

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
ECC CONTRACTING, LLC**

This matter came on before me on November 6, 2020 as Presiding Judge of the Ninth Judicial Circuit on Amended Motion of ECC Contracting, LLC, hereinafter “ECC”, for summary judgment with respect to cross-claims filed by Builders FirstSource-Southeast Group, LLC, hereinafter “BFS”, for equitable and contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. For the reasons set forth herein below, ECC’s motion is GRANTED as to BFS’s claims for contractual indemnification, breach of express and implied warranties, breach of contract and negligence, and is DENIED as to BFS’s claim for equitable indemnification:

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at Retreat at Charleston National Country Club, a thirty-one building townhome community in Mount Pleasant, SC (“the Retreat Project” or “the Project”). Plaintiffs allege, *inter alia*, defective/improper installation of framing components, windows and doors, building paper/weather resistive barrier, and related flashing, have caused water infiltration and damage to the substrate and other building components at all buildings throughout the Project.

BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that BFS holds an unlimited commercial general contractor’s license (License No. 112969) with the South Carolina Labor Licensing & Regulation (“SC-LLR”), and Terry Rosamond is BFS’s representative that serves as the “qualifying party” for such licensure in this state. It is undisputed that BFS furnished the framing lumber, house-wrap, windows, doors, related flashings, and caulk and BFS provided 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 2900¹. ECC served as a subcontractor of BFS and in that capacity performed deck repair work on Unit 2001², and installed windows and doors on Units A1 & A2³ pursuant. ECC did not perform any other work on the Project.

According to BFS, ECC executed a BFS “Master Subcontractor Agreement” dated February 26, 2008 (hereafter “Master Agreement”). The Master Agreement at issue here is a BFS

¹ The building numbering system changed during the project.

² No deficiencies have been documented by Plaintiffs at Unit 2001.

³ A1 & A2 correspond to Units 2200 & 2201 located at 3036 and 3038 Fraserburg Way, Mt. Pleasant SC.

contract form bearing “Version – 5/17/06.” BFS seeks to recover from ECC and BFS’s subcontractors in indemnity under the terms of the applicable BFS Master Agreement.

ABBREVIATED PROCEDURAL HISTORY

Plaintiffs filed their initial Complaint on July 22, 2016. BFS filed third-party claims against ECC on June 30, 2017. Subsequently, ECC was made a direct defendant by Plaintiffs and BFS then asserted cross-claims against ECC for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence. BFS’s operative cross-claims are now contained in BFS’s Amended Answer and Third-Party Complaint to Plaintiffs’ Fourth Amended Complaint filed on November 13, 2019. BFS’s cross-claims allege that BFS is entitled to be indemnified in the amount which BFS “may pay in satisfaction” of Plaintiffs’ claim “plus [BFS’s] costs of defense, inclusive of attorneys’ fees”, without regard for the fault of either ECC or BFS.

ECC filed its Amended Motion for Summary Judgment as to BFS’s cross-claims on October 15, 2020. ECC submitted its memorandum of law in support of its Amended Motion for Summary Judgment on October 23, 2020. BFS did not file a memorandum in opposition to ECC’s Amended Motion for Summary Judgment but opposed the motion at oral arguments on November 6, 2020.

LEGAL STANDARD

A trial court should grant a motion for summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCP; see Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting Tupper v. Dorchester Cnty., 326 S.C. 318, 487

S.E.2d 187 (1997)). “Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent’s case, the opponent may not simply rest on the mere allegations contained in the pleadings.” Grant v. Mount Vernon Mills, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). “Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” Id. at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

I. BFS’S CROSS-CLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE ARE DISGUISED CLAIMS FOR EQUITABLE INDEMNITY.

Although BFS did not submit a memorandum of law in opposition to ECC’s Amended Motion for Summary Judgment⁴, during oral arguments on November 6, 2020, BFS conceded that its cross-claims against ECC for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity and that they are subject to dismissal pursuant to Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. BuildersfirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). Therefore, this Court will grant summary judgment with respect to those claims.⁵

⁴ It should be noted that BFS, in its memorandum in opposition to Polhman Quality Exteriors’ Second Amended Motion for Summary Judgment, which was heard at the same time as ECC’s Amended Motion for Summary Judgment, BFS conceded that its cross-claims for breach of express and implied warranties, breach of contract, and negligence against Polhman Quality Exteriors were merely disguised claims for equitable indemnification pursuant to the Stoneledge cases cited herein.

⁵ While the Court has relied on BFS’s consent to the applicability of the Stoneledge cases to grant summary judgment as to the claims discussed in this section, it also notes that the doctrine of collateral estoppel would also permit summary judgment as to BFS’s cross-claims against ECC for breach of express and implied warranty, breach of contract, and negligence due to this Court’s prior decisions. See Amended Order Granting Charleston Exteriors, LLC

II. THE TERMS OF BFS'S MASTER SUBCONTRACT ARE NEITHER CLEAR NOR UNEQUIVOCAL.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to recover for an indemnitee's concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018) (reh'g denied) (Affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity crossclaims of contractor based upon the application of the clear and unequivocal standard.)

"Section 5. INDEMNITY" of the Master Agreement contain multiple paragraphs dealing with indemnity and the duty to defend. The first paragraph plainly states that BFS may seek indemnification:

"ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE."

The next paragraph suggests a duty to indemnify BFS:

"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."

The following paragraph provides that:

"THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE

and ECC Contracting, LLC's Motions for Summary Judgment in the matter of Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., Case No. 2018-CP-08-02547 (S.C. Com. Pl. Feb. 3, 2020); Order Granting Hurley Services, LLC's and Charleston Exteriors' Motion for Summary Judgment in Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al., Case No. 2016-CP-10-03455 (S.C. Com. Pl. April. 29, 2020)

CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS,
DIRECTORS, AGENTS, AND EMPLOYEES.”

Additionally, the Master Agreement contains an indemnification provision buried in the fine print of “Section 3. Warranty”, which provides:

“Section 3. Warranty.

... subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... 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 ... including, without limitation, property damage to the homes or properties into which the Work is incorporated ...”

The indemnification provisions in “Section 5. INDEMNITY” of the Master Agreement, as set forth above, are ambiguous, conflict with each other and the indemnification provision in the fine print of “Section 3. WARRANTY”, and do not meet the elevated clear and unequivocal standard found in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).

III. BFS’S CLAIMS FOR CONTRACTUAL INDEMNITY ARE BASED ON PROVISIONS WHICH VIOLATE S.C. CODE § 32-2-10 AND, THUS, ARE ILLEGAL AND UNENFORCEABLE.

The Master Agreement between BFS and ECC contains multiple indemnity provision including those which require ECC to indemnify BFS for damages incurred as a result of BFS’ sole negligence in violation of S.C. Code Ann. § 32-2-10.

There is nothing in South Carolina law that separates a subcontractor’s duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement. Indeed, the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10 speaks solely of

“damages” while limiting the ability of the Indemnitor to indemnify the Indemnatee. The Anti-Indemnity statute bars indemnity agreements wherein the Indemnatee seeks to be indemnified from “...damages arising out of bodily injury or property damage...” proximately caused by the indemnitee’s sole negligence. SC Code Ann. §32-2-10. Further, BFS claims its attorney’s costs and fees as damages in its complaint.

Section 5 of the Master Agreement, as set forth above, explicitly calls for ECC to pay BFS’s attorney’s fees “regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees.” This is an explicit violation of SC Code Ann. §32-2-10 as it requires ECC to indemnify BFS for BFS’s sole negligence. The fact that it limits the claimed damages to attorney’s fees, as opposed to a judgment cost, is immaterial. Under South Carolina law, recoverable damages may include attorneys’ fees when so provided by contract or statute. See Rimer v. State Farm Mut. Auto. Ins. Co., 148 S.E.2d 742, 746 (S.C. 1966). However, when recovery of attorneys’ fee is by contract, the contractual terms providing for indemnification of such damages must still comply with South Carolina law and, here, the Master Agreement fails to do so.

Additionally, the middle paragraph of Section 5 of the Master Agreement, as shown above, calls for the Subcontractors to “indemnify, defend, and hold harmless” BFS “...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.” This provision also obviously violates SC Code Ann. §32-2-10.

As BFS should well know, indemnification provisions calling for the Indemnitor to indemnify the Indemnatee “for damages caused by [the Indemnatee’s] negligence or the negligence of its subcontractors” are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-

Se. Grp., LLC, 422 S.C. 144, 152 (Ct. App. 2018). Further, our Court of Appeals has held that “[A]n illegal contract is unenforceable.” Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, this Court held that the indemnification agreement “purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10” and went on to conclude that “[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.” Id. This case is no different.

Because the indemnity provisions of Master Agreement between BFS and ECC require ECC to indemnify BFS for BFS’s sole negligence, the Master Agreement is illegal, and thus unenforceable and ECC is entitled to summary judgment.

IV. BFS’S CROSS-CLAIM AGAINST ECC FOR CONTRACTUAL INDEMNIFICATION IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984).

During oral arguments and within its memorandum of law, ECC argued that the indemnification provisions contained Master Agreement fail to meet the “clear and unequivocal” standard enunciated by Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), that such provisions

violate South Carolina public policy and S.C. Code § 32-2-10, that the terms are unconscionable, and that BFS is collaterally estopped from contending otherwise. This Court agrees.

In three recently decided cases – Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al. case number 2018-CP-08-02547, filed in the Berkeley County Court of Common Pleas (“BFS v. MI Windows”); Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al., case No. 2016-CP-10-03455, filed in Charleston County Court of Common Pleas (“Six Fifty Six”); and Pavic v. Carolina Cottage Homes, LLC, et al., case number 2019-CP-10-00772, filed in the Charleston County Court of Common Pleas (“Pavic”) – this court evaluated similar motions for summary judgment brought by BFS’s subcontractors in regard to cross-claims asserted by BFS that were nearly identical to those asserted in this case.⁶

In BFS v. MI Windows, the Honorable Clifton B. Newman held that the indemnity provision in the Master Agreement contains language concerning indemnity and the prospect of BFS’s subcontractors being forced to indemnify BFS for BFS’s negligence, and that such language “is confusing at best and deceptive at worst.” See Amended Order of the Honorable Clifton Newman filed February 3, 2020, in the Court of Common Pleas for Berkeley County in the case of Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al., Civil Action No. 2018-CP-08-2547, p. 6-7 (the “Newman Order”). As a result, Judge Newman held that the indemnity language in Master Agreement did not meet the “clear and unequivocal” standard required by Concord & Cumberland. Id.

In Six Fifty Six, the Honorable Roger M. Young, Sr. held that BFS’s contractual indemnification claims against its subcontractors were barred by the Newman Order pursuant to

⁶ ECC’s motion for summary judgment was at issue in the first of these cases, while motions of Hurley Services, LLC, who is a party to this litigation that had its motion for summary judgment as to BFS’s cross-claims heard and granted at the same time as ECC’s in this litigation, were at issue in all three.

the doctrine of collateral estoppel. See Order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC, Civil Action No. 2016-CP-10-3455, p. 3 (the "Young Order"). Judge Young also held that BFS's cross-claim for contractual indemnity was based on contractual provisions in BFS's master subcontractor agreement that "are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law." Id. (citing Concord & Cumberland).

In Pavic, the Honorable Jennifer B. McCoy held that BFS's master subcontractor agreement is an adhesion contract; that BFS's master subcontractor agreement contains multiple indemnity provisions, including multiple provisions in "Section 5. INDEMNITY" and another "buried in the fine print of "Section 3. Warranty"; that the indemnity provisions in BFS's master subcontractor agreement are unconscionable within the meaning of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644, S.E.2d 663 (2007); that the indemnification provisions in Section 5 of BFS's master subcontractor agreement are ambiguous, conflict with each other and the provisions found in Section 3, do not meet the clear and unequivocal standard of Concord & Cumberland, and violate South Carolina public policy and S.C. Code § 32-2-10. See Order of the Honorable Jennifer B. McCoy filed January 25, 2021, in the Charleston County Court of Common Pleas in the case of Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, p. 4-8 (the "McCoy Order"). In Pavic, Judge McCoy also confirmed that the Newman Order and the Young Order are final orders that collaterally estop BFS from contesting the findings therein as BFS had a full and fair opportunity to litigate the issues in BFS v. MI Windows and Six Fifty Six, and that the contract terms were "actually litigated, directly determined in the prior

[actions], and the issues were essential to the [judgments] such that collateral estoppel should apply. Id. at p. 9-10.

In the present case, the Master Agreement and indemnity provisions that BFS now wishes to assert against ECC as part of its contractual indemnification cross-claim involve the same master subcontractor agreement and indemnity provisions that were at issue in all three cases referenced above (i.e., BFS Master Subcontractor Agreement “[Version 5/17/06]”). Moreover, BFS seeks full contractual indemnification from ECC for any liability BFS is found to have to Plaintiffs or others in this action, which is identical to the relief sought by BFS in BFS v. MI Windows, Six Fifty Six, and Pavic. As such, this Court finds that BFS had a full and fair opportunity to litigate identical issues involving the same exact contract in BFS v. MI Windows, Six Fifty Six, and Pavic, and that, in each of the prior cases, the contract terms were actually litigated, directly determined, and the issues were essential to the judgments rendered therein. Therefore, this Court finds that collateral estoppel bars BFS’s cross-claim against ECC for contractual indemnification.

CONCLUSION

After carefully considering the pleadings in the case, the arguments of counsel, the memoranda of law and exhibits submitted by the parties, I find and conclude as follows:

1. That the cross-claims of BFS against ECC for breach of express and implied warranties, breach of contract, and negligence are disguised equitable indemnity claims and are not viable as alternative causes of action.
2. That the indemnity and duty to defend provision of the Master Agreement (i.e., BFS’s Master Subcontractor Agreement “[Version 5/17/06]”) are unconscionable, ambiguous, unintelligible, conflicting, and are unenforceable.
3. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS’s Master Subcontractor Agreement “[Version 5/17/06]”) are neither clear nor unequivocal and, thus, fail as a matter of law.
4. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS’s Master Subcontractor Agreement “[Version 5/17/06]”) violate South Carolina public policy and S.C. Code § 32-2-10, and thus, are illegal and unenforceable.

5. That BFS is collaterally estopped by prior decisions from contending that the indemnity provisions contained in its Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 5/17/06]") are clear and unequivocal, do not violate South Carolina public policy, and/or meet the requirements of South Carolina law.

IT IS, THEREFORE, ORDERED that the amended motion of ECC Contracting, LLC for summary judgment with regard to the cross-claims of Builders FirstSource-Southeast Group, LLC for contractual indemnification, breach of express and implied warranties, breach of contract, and negligence be and is hereby **GRANTED**; and that the amended motion of ECC Contracting, LLC for summary judgment with regard to the cross-claim of Builders FirstSource-Southeast Group, LLC for equitable indemnification be and is hereby **DENIED**.

AND IT IS SO ORDERED.

The Honorable Jennifer B. McCoy
Judge, Ninth Judicial Circuit

Charleston, South Carolina
_____, 2021



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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, C.R. Campbell
Construction Co., Inc., Colin Campbell
Construction, LLC, 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, ECC Contracting, LLC, Hurley
Services, LLC, McDaniel Construction Co.,
LLC, AC Construction Corp., AC Construction,
Inc., L&G Construction Group, LLC, Liollo
Architecture, JC Construction d/b/a JC
Construction, LLC a/k/a JC Contractors a/k/a
JC Contractors, LLC, Soto & Vasquez
Construction, LLC a/k/a Costa De Oliveira
Construction, LLC, Solesmar Jesus De
Oliveira, Wilson Lucas Sales d/b/a Miracle
Siding, Miracle Siding, LLC, Royal Hornes of
SC, Inc., Colleen Batissa, Christopher Batissa,
Norma Ferreira Bruno, Mendez Construction,
LLC, Juan Garza Ramos, Juan Garza Ramos
d/b/a Juan Constructors, Jessica Marroquin,
Jessica Marroquin d/b/a Marroquin
Construction, Carlos Marroquin, Carlos
Marroquin and Jessica Marroquin d/b/a
Marroquin Construction, Feliciano Cruz Silva,
Garcia Roofing, LLC, Givair De Caris, and
Mario Salgado,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-03783

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
AC CONSTRUCTION, INC. A/K/A AC
CONSTRUCTION, CORP.**

Builders FirstSource-Southeast Group, LLC,

Third-Party Plaintiff,

v.

Pohlman Quality Contractors; and Pohlman
Quality Exteriors, Inc.; Palmetto Trim and
Renovation; Edward Bruce Witham; and East
Coast Carpentry,

Third-Party Defendants.

This matter came before me on defendants AC Construction, Inc. a/k/a AC Construction, Corp.'s (collectively "AC Construction") Motion for Summary Judgement as to Cross-Claims Asserted by Builders FirstSource Southeast Group, LLC filed on October 29, 2020. In addition to the arguments raised therein, AC Construction, pursuant to Rule 10(c), SCRCPP, adopted by reference the arguments set forth in East Coast Carpentry ("ECC") and WS Contractors, LLC's ("WSC") amended motions for summary judgment as to defendant Builders FirstSource-Southeast Group, LLC's ("BFS") crossclaims. These arguments include, *inter alia*: that BFS' claims for breach of contract, negligence, breach of express and implied warranties, are merely disguised claims for equitable indemnity; and that BFS' claim for contractual indemnity must fail as a matter of law because it is based on a contractual provision that is unenforceable and that BFS's is collaterally estopped from arguing otherwise.

The motions were heard on November 6, 2020. Based on the record before the court, the applicable law, and the arguments of counsel, I find AC Construction is entitled to a judgment as a matter of law in regard to BFS's claims for breach of contract, breach of implied and express warranties, negligence, and contractual indemnity. Summary judgment is denied as to the remaining claim for equitable indemnity.

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at Retreat at Charleston National Country Club, a thirty-one building townhome community in Mount Pleasant, SC (“the Retreat Project” or “the Project”). Plaintiffs allege, *inter alia*, defective/improper installation of framing components, windows and doors, building paper/weather resistive barrier, and related flashing, have caused water infiltration and damage to the substrate and other building components at all buildings throughout the Project.

BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that BFS holds an unlimited commercial general contractor’s license (License No. 112969) with the South Carolina Labor Licensing & Regulation (“SC-LLR”), and Terry Rosamond is BFS’s representative that serves as the “qualifying party” for such licensure in this state. It is undisputed that BFS furnished the framing lumber, house-wrap, windows, doors, related flashings, and caulk and BFS provided 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. AC Construction served as a subcontractor of BFS and in that capacity performed framing services on Buildings 5 through 22. AC Construction did not perform any other work on the Project. Buildings 5 through 21 were completed in 2007. Buildings 22 through 30 were completed between 2012 and 2015.

According to BFS, AC Construction executed a BFS “Master Subcontractor Agreement” dated November 7, 2007 (hereafter “Master Agreement”). The Master Agreement at issue here is a BFS contract form bearing “Version – 5/17/06.” BFS seeks to recover from AC Construction and BFS’s subcontractors in indemnity under the terms of the Master Agreement.

PROCEDURAL HISTORY

Plaintiffs initiated this suit on July 22, 2016. Plaintiffs brought claims against Colin R. Campbell Construction, Inc. and BFS in their Amended Complaint filed on May 1, 2017. BFS asserted third-party claims against AC Construction and BFS's other subcontractors for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence in its Amended Answer and Third-Party Complaint filed on June 30, 2017. BFS filed an Answer to Plaintiffs' Second Amended Complaint and Cross-Claims Against multiple subcontractors, including AC Construction, on July 3, 2018. BFS's contractual indemnity claim is based upon the indemnity provisions in the subject Master Agreements.

LEGAL STANDARD

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC; see Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting Tupper v. Dorchester Cnty., 326 S.C. 318, 487 S.E.2d 187 (1997)). "Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings." Grant v. Mount Vernon Mills, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

I. BFS's CROSS-CLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE ARE DISGUISED CLAIMS FOR EQUITABLE INDEMNITY.

During oral arguments on November 6, 2020, BFS conceded its cross-claims against AC Construction for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity and that they are subject to dismissal pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. BuildersfirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). Therefore, the Court will grant summary judgment with respect to those claims.

II. BFS'S CROSS-CLAIM AGAINST AC CONSTRUCTION FOR CONTRACTUAL INDEMNIFICATION IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984).

During oral arguments and within its memorandum of law, the moving parties argued that the indemnification provisions contained in the Master Agreement fail to meet the “clear and unequivocal” standard enunciated by Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), that such provisions violate South Carolina public policy and S.C. Code § 32-2-10, that the terms are unconscionable, and that BFS is collaterally estopped from contending otherwise. This Court agrees.

In three recently decided cases – Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al. case number 2018-CP-08-02547, filed in the Berkeley County Court of Common Pleas (“BFS v. MI Windows”); Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC,

et al., case No. 2016-CP-10-03455, filed in Charleston County Court of Common Pleas (“Six Fifty Six”); and Pavic v. Carolina Cottage Homes, LLC, et al., case number 2019-CP-10-00772, filed in the Charleston County Court of Common Pleas (“Pavic”) – this court evaluated similar motions for summary judgment brought by BFS’s subcontractors in regard to cross-claims asserted by BFS that were nearly identical to those asserted in this case.

In BFS v. MI Windows, the Honorable Clifton B. Newman held that the indemnity provision in the Master Agreement contains language concerning indemnity and the prospect of BFS’s subcontractors being forced to indemnify BFS for BFS’s negligence, and that such language “is confusing at best and deceptive at worst.” See Amended Order of the Honorable Clifton Newman filed February 3, 2020, in the Court of Common Pleas for Berkeley County in the case of Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al., Civil Action No. 2018-CP-08-2547, p. 6-7 (the “Newman Order”). As a result, Judge Newman held that the indemnity language in Master Agreement did not meet the “clear and unequivocal” standard required by Concord & Cumberland. Id.

In Six Fifty Six, the Honorable Roger M. Young, Sr. held that BFS’s contractual indemnification claims against its subcontractors were barred by the Newman Order pursuant to the doctrine of collateral estoppel. See Order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six Owners’ Association, Inc. v. Windsor South, LLC, Civil Action No. 2016-CP-10-3455, p. 3 (the “Young Order”). Judge Young also held that BFS’s cross-claim for contractual indemnity was based on contractual provisions in BFS’s master subcontractor agreement that “are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law.” Id. (citing Concord & Cumberland).

In Pavic, this Judge held that BFS's master subcontractor agreement is an adhesion contract; that BFS's master subcontractor agreement contains multiple indemnity provisions, including multiple provisions in "Section 5. INDEMNITY" and another "buried in the fine print of" "Section 3. Warranty"; that the indemnity provisions in BFS's master subcontractor agreement are unconscionable within the meaning of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644, S.E.2d 663 (2007); that the indemnification provisions in Section 5 of BFS's master subcontractor agreement are unclear, conflict with each other and the provisions found in Section 3, do not meet the clear and unequivocal standard of Concord & Cumberland, and violate South Carolina public policy and S.C. Code § 32-2-10. See Order of the Honorable Jennifer B. McCoy filed January 25, 2021, in the Charleston County Court of Common Pleas in the case of Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, p. 4-8 (the "McCoy Order"). In Pavic, I also found and ruled that the Newman Order and the Young Order are final orders that collaterally estop BFS from contesting the findings therein as BFS had a full and fair opportunity to litigate the issues in BFS v. MI Windows and Six Fifty Six, and that the contract terms were "actually litigated, directly determined in the prior [actions], and the issues were essential to the [judgments] such that collateral estoppel should apply. Id. at p. 9-10.

In the present case, the Master Agreement and indemnity provisions that BFS now wishes to assert against AC Construction as part of its contractual indemnification cross-claim involve the same master subcontractor agreement and indemnity provisions that were at issue in all three cases referenced above (i.e., BFS Master Subcontractor Agreement "[Version 5/17/06]"). Moreover, BFS seeks full contractual indemnification from AC Construction for any liability BFS is found to have to Plaintiffs or others in this action, which is identical to the relief sought by BFS in BFS v. MI Windows, Six Fifty Six, and Pavic. As such, this Court finds that BFS had a full and fair opportunity to litigate identical issues involving the same exact contract in BFS v. MI Windows, Six Fifty Six, and Pavic, and that, in each of the prior cases, the contract terms were actually litigated, directly determined, and the issues

were essential to the judgments rendered therein. Therefore, this Court finds that collateral estoppel bars BFS's cross-claim against AC Construction for contractual indemnification.

III. THE TERMS OF BFS'S MASTER SUBCONTRACT ARE NEITHER CLEAR NOR UNEQUIVOCAL.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to recover for an indemnitee's concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018) (reh'g denied) (Affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity crossclaims of contractor based upon the application of the clear and unequivocal standard.)

"Section 5. INDEMNITY" of the Master Agreement contain multiple paragraphs dealing with indemnity and the duty to defend. The first paragraph states that BFS may seek indemnification:

"ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE."

The next paragraph suggests a duty to indemnify BFS:

"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."

The following paragraph provides that:

"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."

Additionally, the Master Agreement contains an indemnification provision buried in the fine print of "Section 3. Warranty", which provides:

“Section 3. Warranty.

... subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... 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 ... including, without limitation, property damage to the homes or properties into which the Work is incorporated ...”

On one hand, BFS Master Agreement contemplates indemnification of all attorneys’ fees incurred in the defense of the BFS as well as all amounts paid in settlement or to satisfy demands – each without any regard to the fault of the subcontractor or any reference to the negligence of BFS; in other areas the Master Agreement refers to indemnification in favor of BFS regardless of the sole or concurrent negligence of BFS; and yet other provisions qualify indemnification to the extent the loss is caused in whole or part by the negligence of Subcontractor. The terms are confusing at best, contradictory at times, and arguably misleading. As such, the Master Agreement’s indemnity clauses are unenforceable as a matter of law.

This Court finds that the indemnification provisions in “Section 5. INDEMNITY” of the Master Agreement, as set forth above, are unclear, conflict with each other and the indemnification provision in the fine print of “Section 3. WARRANTY”, and do not meet the elevated clear and unequivocal standard found in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). As a result, the indemnification provisions of the Master Agreement are unenforceable and AC Construction is entitled to summary judgment.

IV. BFS’S CLAIMS FOR CONTRACTUAL INDEMNITY ARE BASED ON PROVISIONS WHICH VIOLATE S.C. CODE § 32-2-10 AND, THUS, ARE ILLEGAL AND UNENFORCEABLE.

The Master Agreement between BFS and AC Construction contains multiple indemnity provision including those which require AC Construction to indemnify BFS for damages incurred as a result of BFS's sole negligence in violation of S.C. Code Ann. § 32-2-10.

There is nothing in South Carolina law that separates a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement. Indeed, the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10 speaks solely of "damages" while limiting the ability of the Indemnitor to indemnify the Indemnitee. The Anti-Indemnity statute bars indemnity agreements wherein the Indemnitee seeks to be indemnified from "...damages arising out of bodily injury or property damage..." proximately caused by the indemnitee's soles negligence. SC Code Ann. §32-2-10. Further, BFS claims its attorney's costs and fees as damages in its complaint.

Section 5 of the Master Agreement, as set forth above, explicitly calls for AC Construction to pay BFS's attorney's fees "regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees." Section 8.i. of the Master Agreement also provides for indemnification of attorneys' fees and expenses and amounts paid in settlement without regard to the fault of BFS. These terms explicitly violate SC Code Ann. §32-2-10 as they require AC Construction to indemnify BFS for BFS's sole negligence. Under South Carolina law, recoverable damages may include attorneys' fees when so provided by contract or statute. See Rimer v. State Farm Mut. Auto. Ins. Co., 148 S.E.2d 742, 746 (S.C. 1966). However, when recovery of attorneys' fee is by contract, the contractual terms providing for indemnification of such damages must still comply with South Carolina law and, here, the Master Agreement fails to do so.

Additionally, the middle paragraph of Section 5 of the Master Agreement, as shown above, calls for the Subcontractors to "indemnify, defend, and hold harmless" BFS "...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.” This provision also obviously violates SC Code Ann. §32-2-10.

As BFS should well know, indemnification provisions calling for the Indemnitor to indemnify the Indemnitee “for damages caused by [the Indemnitee’s] negligence or the negligence of its subcontractors” are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152 (Ct. App. 2018). Further, our Court of Appeals has held that “[A]n illegal contract is unenforceable.” Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, this Court held that the indemnification agreement “purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10” and went on to conclude that “[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.” Id. This case is no different.

Because the indemnity provisions of Master Agreement between BFS and AC Construction require AC Construction to indemnify BFS for BFS’s sole negligence, the Master Agreement is illegal, and thus unenforceable and AC Construction is entitled to summary judgment.

CONCLUSION

After carefully considering the pleadings in the case, the arguments of counsel, the memoranda of law and exhibits submitted by the parties, I find and conclude as follows:

1. That the cross-claims of BFS against AC Construction for breach of express and implied warranties, breach of contract, and negligence are disguised equitable indemnity claims and are not viable as alternative causes of action.
2. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS’s Master Subcontractor Agreement “[Version 5/17/06]”) violate South Carolina public policy and S.C. Code § 32-2-10.
3. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS’s Master Subcontractor Agreement “[Version 5/17/06]”) are neither clear nor unequivocal and, thus, fail as a matter of law.

IT IS, THEREFORE, ORDERED that the motion of AC Construction for summary judgment with regard to the Cross-Claims of Builders FirstSource-Southeast Group, LLC is hereby **GRANTED**

with only the equitable indemnity claim of BFS against AC Construction surviving. AND IT IS SO ORDERED.

The Honorable Jennifer B. McCoy
Judge, Ninth Judicial Circuit

Charleston, South Carolina
_____, 2021



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-07-07 13:06:04 page 13 of 13

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Retreat At Charleston National Country Club Home Owners Association, Inc. And The Retreat At Charleston National Country Club Horizontal Property Regime,

Plaintiffs,

vs.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, Individually, C.R. Campbell Construction Co., Inc., Colin Campbell Construction, LLC, 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, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co., LLC, AC Construction Corp., AC Construction, Inc., L&G Construction Group, LLC, Liollio Architecture, JC Construction d/b/a JC Construction, LLC a/k/a JC Contractors a/k/a JC Contractors, LLC, Soto & Vasquez Construction, LLC a/k/a Costa De Oliveira Construction, LLC, Solesmar Jesus De Oliveira, Wilson Lucas Sales d/b/a Miracle Siding, Miracle Siding, LLC, Royal Hornes of SC, Inc., Colleen Batissa, Christopher Batissa, Norma Ferreira Bruno, Mendez Construction, LLC, Juan Garza Ramos, Juan Garza Ramos d/b/a Juan Constructors, Jessica Marroquin, Jessica Marroquin d/b/a Marroquin Construction, Carlos Marroquin, Carlos Marroquin and Jessica Marroquin d/b/a Marroquin Construction, Feliciano Cruz Silva, Garcia Roofing, LLC, Givair De Caris, and Mario Salgado,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-03783

**ORDER GRANTING SUMMARY
JUDGMENT IN FAVOR OF WS
CONTRACTORS, LLC**

Defendants.
Builders FirstSource-Southeast Group, LLC,
Third-Party Plaintiff,
v.
Pohlman Quality Contractors; and Pohlman Quality Exteriors, Inc.; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry,
Third-Party Defendants.

This matter came before the Court on November 6, 2020 as Presiding Judge of the Ninth Judicial Circuit on WS Contractors, LLC's ("WSC") Second Amended Motion for Summary Judgment with respect to the crossclaims of Builders FirstSource-Southeast Group, LLC ("BFS") (hereinafter the "Motion" or "Motion for Summary Judgment"). For the reasons set forth herein below, WSC's Motion is GRANTED as to BFS's crossclaims for contractual indemnification, breach of express and implied warranties, breach of contract, and negligence, and for equitable indemnification.

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at the Retreat at Charleston National Country Club, a thirty-one (31) building townhome community in Mount Pleasant, South Carolina ("the Project"). Plaintiffs allege, among other things, defective/improper installation of framing components, windows and doors, building paper/weather resistive barrier, and related flashings have caused water infiltration and damage to the substrate and other building components at all buildings throughout the Project.

BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that BFS holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is BFS's representative that serves as the "qualifying party" for such licensure in this state. It is undisputed that BFS supplied lumber, provided and installed framing, and house-wrap, windows and doors, related flashings, and caulk as a subcontractor of Colin Campbell Construction ("CCC") for various buildings at the Project. BFS also provided superintendents to oversee installation of such materials for the buildings at 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.

According to BFS, WSC executed a BFS "Master Subcontractor Agreement" dated September 24, 2012. The Master Subcontractor Agreement is a BFS form contract bearing "Version – 5/17/06." Notably, this version of the Master Agreement is the same version at issue in the motions for summary judgment filed on behalf of ECC Contracting, LLC, Hurley Services, LLC, and several other movants as well as this Court's other orders granting (in whole or part) summary judgment on such motions.

PROCEDURAL HISTORY

Plaintiffs initiated this suit on July 22, 2016. Plaintiffs brought claims against CCC and BFS in their Amended Complaint filed on May 1, 2017. BFS asserted third-party claims against WSC and BFS's other subcontractors for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence in its Amended Answer and Third-Party Complaint

filed on June 30, 2017. BFS's contractual indemnity claim is based upon the indemnity provisions in the subject Master Subcontract Agreements.

Plaintiffs ultimately amended their Complaint to assert direct claims against WSC. At the time this Motion was before the Court, WSC had settled with Plaintiffs. As part of the settlement, WSC procured an "issue release" from Plaintiffs in favor of BFS; the BFS entities are among the "Issue Releasees" named in the release agreement and the release extinguishes any and all liability of BFS relating to the "acts, omissions, labor, materials, work, or involvement" of WSC and its subcontractors on the Project, whether the work was performed on behalf of BFS or not. BFS is also released from "the scope of work for the Project identified in Exhibit A attached hereto [to the Release] involving Building Numbers 22 through 31, inclusive, and made a part hereof, including, without limitation, the acts, omissions, labor, materials, work, and involvement of Issue Releasees with respect to the scope of work for the Project identified in Exhibit A...."

Accordingly, the only claims pending against WSC in this litigation are BFS's crossclaims.¹ WSC originally brought this Motion for Summary Judgment on BFS's crossclaims on January 22, 2020, and, thereafter, WSC filed two Amended Notices of Motion for Summary Judgment against BFS prior to the Motion as well as a Memorandum in support of its Motion. Counsel for WSC and the other movants appeared as well as counsel for BFS. BFS did not file a memorandum or brief in opposition to WSC's Motion for Summary Judgment. Defendants Hurley Services LLC, ECC Contracting LLC, East Coast Carpentry, L&G Construction Group LLC, Jason Pohlman, Palmetto Trim and Renovations LLC, and AC Construction Inc. filed Motions for

¹ After Plaintiffs added direct claims against WSC and BFS's other subcontractors (who were collectively the Third-Party Defendants), BFS converted its third-party claims to cross-claims, which are contained in BFS's operative pleading, its Answer to Plaintiffs' Fourth Amended Complaint filed on November 13, 2019. BFS's crossclaims rest upon the same allegations and assert the same causes of as the prior third-party claims.

Summary Judgment on similar grounds. The Court held a hearing on the Motions for Summary Judgment on November 6, 2020. Counsel for the movants and BFS appeared and argued the motions before the Court. At the hearing, counsel for WSC also joined in and adopted the arguments made by the attorneys for movants ECC Contracting and Hurley Services.

LEGAL STANDARD

“Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). A party’s “response to the motion must set forth specific facts, *admissible in evidence*, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him.” Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (Ct. App. 1988) (emphasis added). Summary judgment “is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 388, 701 S.E.2d 776, 779 (2010).

I. BFS’S CROSS-CLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE ARE DISGUISED CLAIMS FOR EQUITABLE INDEMNITY.

Although BFS did not submit a memorandum of law in opposition to WSC’s Amended Motion for Summary Judgment², during oral arguments on November 6, 2020, BFS conceded that

² It should be noted that BFS, in its memorandum in opposition to Polhman Quality Exteriors’ Second Amended Motion for Summary Judgment, which was heard at the same time as WCS’s Amended Motion for Summary Judgment, conceded that its cross-claims for breach of express and implied warranties, breach of contract, and negligence against Polhman Quality Exteriors were merely disguised claims for equitable indemnification pursuant to the Stoneledge cases cited herein.

its cross-claims against WSC for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity and that they are subject to dismissal pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. BuildersFirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). Therefore, this Court will grant summary judgment with respect to those claims.

Although BFS consents to the applicability of Stoneledge and the grant summary judgment as to the claims discussed in this section, the doctrine of collateral estoppel also permits this Court to enter summary judgment as to BFS's cross-claims against WSC for breach of express and implied warranty, breach of contract, and negligence due to this Court's prior decisions on point. See Amended Order Granting Charleston Exteriors, LLC and ECC Contracting, LLC's Motions for Summary Judgment in the matter of Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., Case No. 2018-CP-08-02547 (S.C. Com. Pl. Feb. 3, 2020); Order Granting Hurley Services, LLC's and Charleston Exteriors' Motion for Summary Judgment in Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al., Case No. 2016-CP-10-03455 (S.C. Com. Pl. April. 29, 2020). The applicability of the doctrine of collateral estoppel and the import of those decisions are discussed in Section II of this Order which immediately follows.

II. BFS'S CROSS-CLAIM AGAINST WSC FOR CONTRACTUAL INDEMNIFICATION IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit

was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984).

During oral arguments and within its memorandum of law, WSC argued that the indemnification provisions contained in the Master Agreement fail to meet the “clear and unequivocal” standard enunciated by Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), that such provisions violate South Carolina public policy and S.C. Code § 32-2-10, that the terms are unconscionable, and that BFS is collaterally estopped from contending otherwise. This Court agrees.

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No. 2018-CP-08-2547, p. 6-7 (the “Newman Order”). As a result, Judge Newman held that the indemnity language in Master Agreement did not meet the “clear and unequivocal” standard required by Concord & Cumberland. Id.

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In Pavic, this Judge held that BFS’s master subcontractor agreement is an adhesion contract; that BFS’s master subcontractor agreement contains multiple indemnity provisions, including multiple provisions in “Section 5. INDEMNITY” and another “buried in the fine print of “Section 3. Warranty”; that the indemnity provisions in BFS’s master subcontractor agreement are unconscionable within the meaning of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644, S.E.2d 663 (2007); that the indemnification provisions in Section 5 of BFS’s master subcontractor agreement are unclear, conflict with each other and the provisions found in Section 3, do not meet the clear and unequivocal standard of Concord & Cumberland, and violate South Carolina public policy and S.C. Code § 32-2-10. See Order of the Honorable Jennifer B. McCoy filed January 25, 2021, in the Charleston County Court of Common Pleas in the case of Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, p. 4-8 (the “McCoy

Order”). In Pavic, I also found and ruled that the Newman Order and the Young Order are final orders that collaterally estop BFS from contesting the findings therein as BFS had a full and fair opportunity to litigate the issues in BFS v. MI Windows and Six Fifty Six, and that the contract terms were “actually litigated, directly determined in the prior [actions], and the issues were essential to the [judgments] such that collateral estoppel should apply. Id. at p. 9-10.

In the present case, the Master Agreement and indemnity provisions that BFS now wishes to assert against WSC as part of its contractual indemnification cross-claim involve the same master subcontractor agreement and indemnity provisions that were at issue in all three cases referenced above (i.e., BFS Master Subcontractor Agreement “[Version 5/17/06]”). Moreover, BFS seeks full contractual indemnification from WSC for any liability BFS is found to have to Plaintiffs or others in this action, which is identical to the relief sought by BFS in BFS v. MI Windows, Six Fifty Six, and Pavic. As such, this Court finds that BFS had a full and fair opportunity to litigate identical issues involving the same exact contract in BFS v. MI Windows, Six Fifty Six, and Pavic, and that, in each of the prior cases, the contract terms were actually litigated, directly determined, and the issues were essential to the judgments rendered therein. Therefore, this Court finds that collateral estoppel bars BFS’s cross-claim against WSC for contractual indemnification.

III. THE TERMS OF BFS’S MASTER SUBCONTRACT ARE NEITHER CLEAR NOR UNEQUIVOCAL.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to recover for an indemnitee’s concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018) (reh’g

denied) (Affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity crossclaims of contractor based upon the application of the clear and unequivocal standard.)

"Section 5. INDEMNITY" of the Master Agreement contain multiple paragraphs dealing with indemnity and the duty to defend. The first paragraph states that BFS may seek indemnification:

"ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE."

The next paragraph suggests a duty to indemnify BFS:

"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."

The following paragraph provides that:

"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."

Additionally, the Master Agreement contains an indemnification provision buried in the fine print of "Section 3. Warranty", which provides:

"Section 3. Warranty.

... subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... 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 ... including, without limitation, property damage to the homes or properties into which the Work is incorporated ...”

On one hand, BFS Master Agreement contemplates indemnification of all attorneys’ fees incurred in the defense of the BFS as well as all amounts paid in settlement or to satisfy demands – each without any regard to the fault of the subcontractor or any reference to the negligence of BFS; in other areas the Master Agreement refers to indemnification in favor of BFS regardless of the sole or concurrent negligence of BFS; and yet other provisions qualify indemnification to the extent the loss is caused in whole or part by the negligence of Subcontractor. The terms are confusing at best, contradictory at times, and arguably misleading. As such, the Master Agreement’s indemnity clauses are unenforceable as a matter of law.

This Court finds that the indemnification provisions in “Section 5. INDEMNITY” of the Master Agreement, as set forth above, are unclear, conflict with each other and the indemnification provision in the fine print of “Section 3. WARRANTY”, and do not meet the elevated clear and unequivocal standard found in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). As a result, the indemnification provisions of the Master Agreement are unenforceable and WSC is entitled to summary judgment.

IV. BFS’S CLAIMS FOR CONTRACTUAL INDEMNITY ARE BASED ON PROVISIONS WHICH VIOLATE S.C. CODE § 32-2-10 AND, THUS, ARE ILLEGAL AND UNENFORCEABLE.

The Master Agreement between BFS and WSC contains multiple indemnity provision including those which require WSC to indemnify BFS for damages incurred as a result of BFS’s sole negligence in violation of S.C. Code Ann. § 32-2-10.

There is nothing in South Carolina law that separates a subcontractor’s duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification

agreement. Indeed, the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10 speaks solely of “damages” while limiting the ability of the Indemnitor to indemnify the Indemnatee. The Anti-Indemnity statute bars indemnity agreements wherein the Indemnatee seeks to be indemnified from “...damages arising out of bodily injury or property damage...” proximately caused by the indemnitee’s sole negligence. SC Code Ann. §32-2-10. Further, BFS claims its attorney’s costs and fees as damages in its complaint.

Section 5 of the Master Agreement, as set forth above, explicitly calls for WSC to pay BFS’s attorney’s fees “regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees.” Section 8.i. of the Master Agreement also provides for indemnification of attorneys’ fees and expenses and amounts paid in settlement without regard to the fault of BFS. These terms explicitly violate SC Code Ann. §32-2-10 as they require WSC to indemnify BFS for BFS’s sole negligence. Under South Carolina law, recoverable damages may include attorneys’ fees when so provided by contract or statute. See Rimer v. State Farm Mut. Auto. Ins. Co., 148 S.E.2d 742, 746 (S.C. 1966). However, when recovery of attorneys’ fee is by contract, the contractual terms providing for indemnification of such damages must still comply with South Carolina law and, here, the Master Agreement fails to do so.

Additionally, the middle paragraph of Section 5 of the Master Agreement, as shown above, calls for the Subcontractors to “indemnify, defend, and hold harmless” BFS “...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.” This provision also obviously violates SC Code Ann. §32-2-10.

As BFS should well know, indemnification provisions calling for the Indemnitor to indemnify the Indemnitee “for damages caused by [the Indemnitee’s] negligence or the negligence of its subcontractors” are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152 (Ct. App. 2018). Further, our Court of Appeals has held that “[A]n illegal contract is unenforceable.” Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, this Court held that the indemnification agreement “purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10” and went on to conclude that “[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.” Id. This case is no different.

Because the indemnity provisions of Master Agreement between BFS and WSC require WSC to indemnify BFS for BFS’s sole negligence, the Master Agreement is illegal, and thus unenforceable and WSC is entitled to summary judgment.

V. BECAUSE WSC HAS PROCURED AN ISSUE RELEASE IN FAVOR OF BFS, IT NECESSARILY FOLLOWS THAT BFS IS UNLAWFULLY SEEKING TO RECOVER FROM WSC IN INDEMNITY FOR BFS’S SOLE NEGLIGENCE.

WSC is uniquely situated in this action because WSC has settled and entered into a release agreement with the Plaintiffs. As part of that settlement and release, WSC procured an “issue release” from Plaintiffs in favor of BFS with respect to the entire scope of work performed by WSC and its subcontractors. That issue release provides in pertinent part as follows:

In consideration of the receipt of the Settlement Amount, Releasors hereby release, acquit, and forever discharge Builders FirstSource, Inc., Builders FirstSource Southeast Group, Winston Carlyle Charleston National, LLC, Colin R. Campbell Construction, Inc., C.R. Campbell Construction Co., Inc., Colin Campbell Construction, LLC, and their respective owners, parents, subsidiaries, directors, officers, shareholders, members, managers, principals, employees, agents, heirs, assigns, and Colin Campbell, individually (hereinafter collectively “Issue Releasees”) relating to or arising from (a) the scope of work for the Project identified in Exhibit A attached hereto involving Building Numbers 22 through 31, inclusive, and made a part hereof, including, without limitation, the acts, omissions,

labor, materials, work, and involvement of Issue Releasees with respect to the scope of work for the Project identified in Exhibit A, and (b) the acts, omissions, labor, materials, work, or involvement of the Settling Defendants and Releasee(s) identified in Paragraph 2 at the Project known as The Retreat at Charleston National Country Club.

Issue Release, ¶ 6.

Given the scope of this release, Plaintiffs have released BFS from its own acts and omissions and WSC's acts and own omissions relative to the scope of work performed by WSC at the Retreat Project. BFS will not and cannot bear any liability to Plaintiffs in this action on account of WSC's acts and omissions or the scope of work performed by WSC for BFS because BFS has been released from such. Notably, aside from WSC no other BFS subcontractor movant has produced evidence of such an issue release for the benefit of BFS in this action.

Based on the undisputed facts, this Court finds that BFS is seeking to recover in indemnity for its sole negligence with respect to issues in the instant litigation that have nothing to do with WSC. That is the necessary conclusion because Plaintiffs have released BFS for anything have to do with the entire scope of work performed by WSC and its subcontractors at the Retreat Project. The allegations of BFS's cross-claims also do not restrict BFS's recovery in indemnity to losses to the extent caused by the subcontractor's negligence; the allegations are, like the Master Agreement's indemnity clauses, much broader. The Master Agreement's indemnification clauses fail to meet South Carolina's applicable rules of construction, including, without limitation, the clear and unequivocal standard, that apply in this context. Furthermore, the Master Agreement is violative of Section 32-2-10 of the SC Code of Laws which prohibits indemnification for claims based on the indemnitee's sole negligence. The issue release procured by WSC in favor of BFS serves as a unique and independent ground to find that BFS is seeking to recover in indemnity

against WSC for its sole negligence and its cross-claim must be dismissed on summary judgment as a matter of law.

VI. BFS'S REMAINING CROSS-CLAIM FOR EQUITABLE INDEMNITY ALSO FAILS AS A MATTER OF LAW AGAINST WSC BECAUSE OF THE IMPACT OF THE ISSUE RELEASE PROCURED BY WSC FOR BFS.

Under South Carolina law, there can be no equitable indemnity among mere joint tortfeasors. See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 518 S.E.2d 301, 307 (S.C. App. 1999). As discussed above, by virtue of the “issue release” from Plaintiffs in favor of BFS with respect to the entire scope of work performed by WSC and its subcontractors, it necessarily follows that if this Court ever finds BFS in any way liable to Plaintiffs with respect to the Retreat Project, that liability must flow from something done not by WSC and its subcontractors, but instead from the acts or omissions of BFS or others acting on its behalf. Therefore, if following any trial of this case the court ultimately finds BFS liable to Plaintiffs in this action, BFS would necessarily be a tortfeasor, share some degree of fault, and have unclean hands, which would, as a matter of law, serve to bar any recovery in equitable indemnity against WS Contractors. See id.

Because the issue release procured by WSC in favor of BFS extinguishes any and all liability of BFS that in any way relates to WSC and its work, this Court concludes as a matter of law that any prospective liability of BFS to Plaintiffs relative to the Retreat Project would necessarily be derived from BFS's negligence or fault without any reference to WSC. The issue release is dispositive of the matter and the Court hereby grants summary judgment to WSC against BFS's cross-claim for equitable indemnity.

CONCLUSION

After carefully considering the pleadings in the case, the arguments of counsel, the memoranda of law and exhibits submitted by the parties, the Court finds and concludes as follows:

1. That the cross-claims of BFS against WSC for breach of express and implied warranties, breach of contract, and negligence are disguised equitable indemnity claims, are not viable as alternative causes of action, BFS is collaterally estopped by prior decisions from relitigating this issue, and BFS has conceded as much to the Court.
2. That the doctrine of collateral estoppel further precludes re-litigating final orders where courts of this state have determined that the indemnity provisions contained in BFS's Master Agreement fail to meet the clear and unequivocal standard, violate South Carolina public policy, and/or fail meet the requirements of South Carolina law.
3. That the indemnity and duty to defend provision of the BFS Master Agreement are unclear, unconscionable, unintelligible, conflicting, and are unenforceable.
4. That the indemnity and duty to defend provisions of the BFS Master Agreement are neither clear nor unequivocal and, thus, fail as a matter of law.
5. That the indemnity and duty to defend provisions of the BFS Master Agreement violate South Carolina public policy and S.C. Code § 32-2-10, and thus, are illegal and unenforceable.
6. That the BFS's cross-claim for equitable indemnity against WSC fails as a matter of law because the "issue release" which WSC obtained for BFS's benefit absolves and releases BFS from all liability stemming from any acts or omissions of WSC; therefore, any prospective liability of BFS to Plaintiffs relative to the Retreat Project would necessarily be derived from BFS's negligence or fault without any reference to WSC.

IT IS, THEREFORE, ORDERED that the amended motion by WS Contractors, LLC for summary judgment with regard to the cross-claims of Builders FirstSource-Southeast Group, LLC for contractual indemnification, breach of express and implied warranties, breach of contract, negligence, and equitable indemnity be and is hereby **GRANTED**. To the extent the court's initial Form Order stated WSC's Motion for Summary Judgment was granted "in part," that is now amended as set forth herein to include all claims.

AND IT IS SO ORDERED.

The Honorable Jennifer B. McCoy
Judge, Ninth Judicial Circuit

Charleston, South Carolina
_____, 2021



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-07-29 11:18:01 page 18 of 18

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

vs.

Winston Carlyle Charleston National, LLC; Builders FirstSource, WS Contractors, LLC, East Coast Carpentry, L&G Construction Group, LLC, et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-10-3783

ORDER

granting

DEFENDANT

L&G Construction Group, LLC

partial summary judgment

This matter came before me on the defendant L&G Construction Group, LLC's ("L&G") joinder in the defendants East Coast Carpentry's and WS Contractors, LLC's ("WSC") amended motions for summary judgment as to defendant Builders FirstSource-Southeast Group, LLC's ("BFS") crossclaims. In its notice of joinder, L&G adopted East Coast's and WS's arguments in support of the motions: that BFS claims for breach of contract, negligence, breach of express and implied warranties, are merely disguised claims for equitable indemnity; and that BFS's claim for contractual indemnity must fail as a matter of law because it is based on a contractual provision that is unenforceable and that BFS's is collaterally estopped from arguing otherwise.

The motions were heard on November 6, 2020. Based on the record before the court,

the applicable law, and the arguments of counsel, I find that L&G is entitled to a judgment as a matter of law in regard to BFS's claims for breach of contract, breach of implied and express warranties, negligence, and contractual indemnity. Summary judgment is denied as to the remaining claim for equitable indemnity.

BACKGROUND

Winston Carlyle Charleston National, LLC was a single purpose entity that developed the Retreat at Charleston National Country Club subdivision ("the Retreat"). Sometime around 2012, Winston Carlyle engaged Colin R. Campbell Construction, Inc. (Campbell) to serve as the general contractor on the project. The project was developed in four phases with a total of 31 sets of townhouses.

After completion of the first phase, Campbell (or Winston Carlyle) contracted with BFS for "dry-in" construction of most of the remaining buildings. BFS was responsible for framing the buildings, which included installation of the sheathing as well as the installation of windows and doors, and the installation of weather-resistive barrier (WRB). BFS supplied all materials and hired several subcontractors to perform its scope of work. L&G, a residential framer, was one of those subcontractors.

In August 2013, BFS and L&G, entered into a Master Subcontractor Agreement¹ ("Master Agreement"), drafted by BFS, which provides, among other things, that L&G "warrants and guarantees the Work will conform to any specifications provided by Contractor

¹ This is a standard form used by BFS in its contracts with other subcontractors, including WS Contractors, LLC, in whose motion for summary judgment L&G joined.

and . . . guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns,” and that L&G

shall indemnify, defend and hold harmless [BFS] . . . against any and all claims . . . arising out of or resulting from . . . 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 [L&G]’s performance of the work or other activities of [L&G], but only to the extent caused in whole or in part by any negligent act or omission of [L&G] Notwithstanding the foregoing, to the fullest extent permitted by law, [L&G] shall indemnify, defend, and hold harmless, [BFS] 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 subcontractors, 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 . . . [BFS], it being the expressed intent of BFS and [L&G] that in such event [L&G] is to indemnify, defend, and hold harmless [BFS] 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 [L&G] under workers compensation acts, disability benefit acts, or other employee benefit acts. [L&G] 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 [BFS], 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 [L&G]. [L&G]’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 [BFS], 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.

Sometime after executing the Master Agreement, BFS contacted L&G's general manager, Miguel Loarca, inquiring if L&G would be interested in providing its services for the Retreat project. BFS then issued to L&G purchase orders for framing two of the Retreat's buildings. Several years after completion of the Retreat, a number of the unit-owners started to notice a variety of construction defects and experienced water intrusion and related damage. Acting through their association, the homeowners retained counsel and filed this action.

The plaintiffs sued all parties involved in the development of the Retreat, including BFS and its subcontractors. BFS in turn crossclaimed² against L&G and other subcontractors for breach of contract, breach of implied and express warranties, negligence, and equitable and contractual indemnity. L&G has since settled with the plaintiffs and their claims against L&G have been dismissed with prejudice.

SUMMARY JUDGMENT STANDARD

Under Rule 56 of the South Carolina Rules of Civil Procedure, the judgment sought by the moving party "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. The rule further provides that "[w]hen a motion for

² BFS's pleading that contains the crossclaims is styled "Answer of Defendant Builders FirstSource Southeast Group, LLC and Builders FirstSource, Inc., to Plaintiffs Fourth Amended Complaint, and Reasserted and/or other Cross Claims of Builders FirstSource-Southeast Group, LLC against WS Contractors, LLC, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Company, LLC, AC Construction Corp., AC Construction, Inc., L&G Construction Group, LLC"; this pleading is hereinafter referred to as the Cross-Complaint.

summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRCPP.

“In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party.” *Gilmer v. Martin*, 323 S.C. 154, 156, 473 S.E.2d 812, 813 (Ct. App. 1996). It is not sufficient, however, that a non-moving party creates an inference that is not reasonable or raises an issue of fact that is not genuine. *Evans v. Stewart*, 370 S.C. 522, 636 S.E.2d 632, 635 (Ct. App. 2006). “To justify departure from the course of the trial of an issue of fact and the award of summary judgment, the court must be convinced that the issue is not genuine but feigned and that there is in truth nothing to be tried. . . . The fact that there is a factual dispute is not enough to preclude a summary judgment.” *Saluda Motor Lines, Inc. v. Crouch*, 300 S.C. 43, 46, 386 S.E.2d 290, 292 (Ct. App. 1989) (quoting 73 Am. Jur. 2d *Summary Judgment* § 27).

“The plain language of Rule 56(c), SCRCPP, mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof at trial.” *Etheredge v. Richland School Dist. I*, 330 S.C. 447, 453, 499 S.E.2d 238 (Ct. App. 1998). “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. In that way, a motion for summary judgment is akin to a motion for a directed verdict because in each instance, one

party must lose as a matter of law.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868 (2001) (internal citations and quotation marks omitted).

DISCUSSION

I. BFS’s crossclaims for negligence, breach of contract, and breach of express and implied warranties.

L&G argues that despite setting forth—under separate headings—claims for contractual indemnity, equitable indemnity, breach of contract, breach of express and implied warranties, and negligence, BFS’s Cross-Complaint articulates in essence only two causes of action: equitable indemnity and contractual indemnity. L&G is correct in its assessment. The causes of action for breach of contract, breach of express and implied warranties, and negligence are indeed superfluous and merit dismissal.

Under South Carolina law, “[t]he character of an action is primarily determined by the allegations contained in the complaint.” *Seebaldt v. First Fed. Sav. & Loan Ass’n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). In other words, not the heading given a cause of action in the pleading, or even legal terms of art used throughout, but rather the content of the allegations and their implications for the parties, if proven true, determines what cause of action is actually being asserted. Accordingly, in some cases a close reading of the allegations may lead to a conclusion that several differently articulated causes of actions are indeed one and the same. The appellate opinions in the sister cases of *Stoneledge at Lake Keowee Owners’ Association, Inc. v. Clear View Construction, LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015), and *Stoneledge at Lake Keowee Owners’ Association, Inc. v. Builders FirstSource-Southeast Group*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015), perfectly illustrate this point.

In *Stoneledge*, which was a single case at the trial level, the court granted summary judgment of the subcontractors in regard to the general contractor's crossclaims for breach of contract and breach of warranty, "finding these claims [to be] 'merely disguised . . . claims for equitable indemnity[,] not viable as alternative causes of action.'" *Id.* at 634, 776 S.E.2d at 436. By a separate order, the trial court dismissed the negligence crossclaim holding that despite its styling it was nothing but a claim for equitable indemnity. *Stoneledge v. Clear View Construction*, 413 S.C. at 619, 776 S.E.2d at 428.

In its de novo review of the orders, the South Carolina Court of Appeals scrutinized the cross-complaint and found that the allegations, such as, "[s]hould [plaintiff] prevail on its claims, [the general contractor] is entitled to recover legal fees and costs or any amount it is ordered to pay to [plaintiff]," *id.* at 621, 776 S.E.2d at 429 (quotation and alteration marks omitted), demonstrated the contingent nature of the claims. The allegations indicated that the general contractor did not sustain its own damages as a result of the alleged negligence, breach of contract, or breach of warranty on the part of its subcontractor but was merely exposed to potential liability to the plaintiff and incurred the costs of its own defense. *Stoneledge v. Builders FirstSource*, 413 S.C. at 636, 776 S.E.2d at 437. The *Stoneledge* court held that because these claims were not independent of the equitable indemnity cause of action, summary judgment in favor of the subcontractors was appropriate. *Id.* at 637, 776 S.E.2d at 438; *Stoneledge v. Clear View Construction*, 413 S.C. at 619, 776 S.E.2d at 428.

Here, BFS's crossclaims for negligence, breach of warranties, and breach of contract, are indeed couched in conditional terms that do not articulate causes of action that are actually distinct from the claim for equitable indemnity. For example, ¶ 142 of BFS's Cross-Complaint

(pleading a cause of action for breach of express warranties) opens with the phrase “*That in the event Plaintiffs prove . . .*” (Cross-Compl. ¶ 142) (emphasis added). In the subsequent paragraph, BFS alleges that it “is entitled to judgment against the Cross Claim Defendants *in the amount of any judgment which the Plaintiffs obtain against BFS . . .*” (Cross-Compl. ¶ 142.) (emphasis added) This pattern of pleading repeats throughout the remainder of the Cross-Complaint: ¶¶ 146 and 147 (breach of implied warranties); ¶¶ 150 and 151 (negligence); and ¶¶ 154 and 155 (breach of contract).

Even though BFS alleges breaches of contract and warranties and negligence on its subcontractors’ part, hardly a close reading of the Cross-Complaint reveals that BFS has not sustained distinct injuries as a result of those breaches, separate from the burdens of Plaintiffs’ lawsuit. According to its own allegations, BFS has not yet been damaged by L&G; it will have been damaged only in conjunction with the undesirable outcome of the plaintiffs’ case against it: ¶ 147, “to the extent that the Plaintiffs may obtain judgment against BFS”; ¶ 151, “[i]n the event that the Plaintiffs obtain judgment against BFS . . .”

The language of these allegations leaves no doubt that BFS’s crossclaims for breaches of contract and warranties and for negligence are entirely dependent on the outcome of the plaintiffs’ case against BFS. Consequently, they are merely disguised claims for equitable indemnity.

II. Contractual indemnity.

Under South Carolina law, “[i]ndemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.” *Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct.App.1990),

aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992). “A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity.” *Id.* Contractual indemnity is “an obligation that arises by virtue of express contractual language establishing a duty in one party to save another harmless upon occurrence of specified circumstances.” 41 Am. Jur. 2d *Indemnity* § 7 (2015).

Indemnity contracts are construed “in accordance with the rules for the construction of contracts generally.” *Campbell v. Beacon Mfg. Co., Inc.*, 438 S.E.2d 271, 313 S.C. 451 (Ct. App. 1993). Thus, “if the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect. When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense.” *Schulmeyer v. State Farm Fire and Cas.*, 353 S.C. 491, 579 S.E.2d 132, (2003).

But the parties’ freedom to contract for indemnification is not unconstrained. Under South Carolina law, a clause in a construction contract that purports “to indemnify the promisee . . . against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the *sole negligence of the promisee* . . . is against public policy and unenforceable.” S.C. Code Ann. § 32-2-10 (emphasis added). Furthermore, a contractual indemnity provision whereby a general contractor seeks indemnity from its subcontractors for the general contractor’s concurrent negligence is also unenforceable unless the parties’ intent to so provide is stated in clear and unequivocal terms. *See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 643–644, 819 S.E.2d 166, 168–169 (Ct. App. 2018) (reh’g denied).

Here, the language of Section 5 of the BFS's Master Agreement, entitled "Indemnity," does not meet the clear-and-unequivocal standard. Moreover, by providing for indemnity against liability arising from BFS's own negligence, it violates § 32-2-10.

Section 5 comprises several paragraphs that deal with indemnity and the duty to defend. According to its first paragraph, BFS may seek indemnification "only to the extent caused, in whole or in part, by any negligent act or omission of the subcontractor or anyone indirectly employed by the subcontractor or anyone for whose acts the subcontractor may be liable." The next paragraph, however, imposes on L&G a duty to indemnify BFS "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." Furthermore, according to the Master Agreement, "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."

Apart from Section 5, the Master Agreement contains an additional indemnification provision that is embedded in Section 7, "Warranty":

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 . . . including, without limitation, property damage to the homes or properties into which the Work is incorporated . . .*"

These verbose indemnification provisions, spread throughout several pages of the agreement, hardly constitute clear and unequivocal terms required by the South Carolina law. *See id.* Furthermore, by providing for indemnity and duty to defend BFS regardless of its

ultimate liability or negligence, the agreement violates the proscription set forth in § 32-2-10 of the South Carolina Code and is therefore unenforceable. *See D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152 (Ct. App. 2018).

In addition, BFS is collaterally estopped from arguing otherwise: it litigated the issue of enforceability of the Master Agreement's indemnity clause and lost on summary-judgment motions of its subcontractors in three cases. *See Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al.* C/A No. 2018-CP-08-02547, filed in the Berkeley County Court of Common Pleas; *Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al.*, C/A No. 2016-CP-10-03455, filed in Charleston County Court of Common Pleas; and *Pavic v. Carolina Cottage Homes, LLC, et al.*, C/A No. 2019-CP-10-00772, filed in the Charleston County Court of Common Pleas.

CONCLUSION

For the foregoing reasons, L&G's motion for summary judgment on BFS's crossclaims, with the exception of equitable-indemnity claim, is **GRANTED**.

IT IS SO ORDERED.



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-07-07 13:17:15 page 12 of 12

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C/A NO.: 2016-CP-10-03783

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, Americo Roofing
Concepts, Inc., DVS, Inc., Advanced Building
Connections, 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 & Vazquez
Construction, LLC, Costa De Oliveira
Construction, LLC a/k/a Costa De Oliveira
Construction, LLC, Solesmar Jesus De
Oliveira, 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, Juan Garza Ramos
d/b/a Juan Constructors, Jessica Marroquin,
Jessica Marroquin d/b/a Marroquin
Construction, Carlos Marroquin Construction,
Carolos Marroquin, Carolos and Marroquin 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,

**ORDER GRANTING IN PART
THE SECOND AMENDED
MOTION FOR SUMMARY JUDGMENT
OF POHLMAN QUALITY EXTERIORS, INC.
AS TO THE CLAIMS OF
BUILDERS FIRSTSOURCE –
SOUTHEAST GROUP, LLC
(CLAIM FOR EQUITABLE INDEMNIFICATION
REMAINS PENDING)**

v.

Pohlman Quality Contractors, Pohlman Quality
Exteriors, Palmetto Trim and Renovation,
Edward Bruce Witham, and East Coast
Carpentry,

Third-Party Defendants.

This matter comes before me upon a motion filed by Pohlman Quality Exteriors, Inc. (hereinafter Pohlman) seeking an Order pursuant to Rule 56 dismissing the third-party claims asserted against it by Builders FirstSource-Southeast Group, LLC's (hereinafter BFS). For the reasons set forth herein, the Motion is GRANTED IN PART.

A hearing on this matter was held before me on November 6, 2020. Present and participating in the hearing on Pohlman's Motion were Glenn Elliott, counsel for Pohlman, and Steve Hughes, counsel for BFS.

This case arises out of the construction of a condominium project. BFS, as a subcontractor to the General Contractor, agreed to accomplish a scope of work which included rough framing and the installation of windows, doors, and other components for some of the buildings at the project. BFS then entered into subcontracts with a several parties, including Pohlman, to provide labor to accomplish BFS's scope of work. Plaintiffs filed the above-captioned lawsuit alleging deficiencies in the work provided by BFS. BFS then brought a third-party action against its subcontractors, including Pohlman. The Third-Party Complaint seeks recovery from the subcontractors on the theories of Contractual and Common Law Indemnity, Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract. Pohlman argues it is entitled to Summary Judgment on the following grounds:

1. BFS's claims for Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract are merely disguised aims for indemnity" and fail as a matter of law pursuant to *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630,634, (Ct. App. 2015).

2. The subcontract produced by BFS between it and Pohlman is dated after Pohlman completed its work at this project, so the only viable claim BFS may have against Pohlman is for equitable indemnification.
3. Even if the subcontract is applicable, BFS's claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal and thus they fail as a matter of law. *Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 2018 WL 3748616 (S.C. Ct. App. 2018), and § 32-2-10 Code of Laws of South Carolina (1976, as amended).

Each of these contentions is discussed below.

Applicability of the *Stoneledge* case

For a common law claim such as negligence, breach of contract, or breach of warranty to be viable and independent from a claim for indemnification, the claimant must identify and prove it has incurred damages which do not arise exclusively from the claims made against it.

Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 776 S.E.2d 426 (SC Appeals 2015).

On November 13, 2019 BFS filed its Third-Party Complaint. In each of its Third-Party causes of action BFS describes the damages it seeks to collect from Pohlman as follows

That BFS is entitled to judgment against the Third-Party Defendants in the amount of any judgment which the Plaintiffs may obtain against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of any express warranties on the part of the Third-Party Defendants, plus BFS costs for defense, inclusive of attorneys' fees.

Cause of action for Breach of Express Warranties paragraph 173; Cause of action for Breach of Implied Warranties paragraph 177; Cause of action for Negligence paragraph 181; Cause of action for Breach of Contract paragraph 185.

BFS's description of the damages it is seeking via each of these causes of action makes it clear that the alleged damages arise out of, and are not "independent" of, the claims made against Centex by Plaintiff.

Applicability of the Subcontract

On September 12, 2019, two months prior to filing of the Third-Party Complaint, Counsel for BFS sent a letter to Pohlman advising of the litigation. That letter refers to "The relevant subcontract agreement" and makes a number of demands upon Pohlman, including defense and indemnification. Sent to Pohlman with that letter was a copy of a subcontract between Pohlman and BFS dated October 16, 2007.

Payment records produced to Pohlman by BFS as part of discovery in this case show that Pohlman installed windows in building numbers 11 and 21 at the project. Those records indicate that Pohlman completed the installation of windows in building 11 on "02/09/07" and that Pohlman completed the installation of windows in building 21 on "03/02/07".

Pohlman argues the October 16, 2007 subcontract is not applicable or relevant to this case because it was entered into by the parties after Pohlman completed its work at the project.

During the hearing Counsel for BFS referred to a subcontract between BFS and Pohlman dated August 18, 2006. Counsel for Pohlman told the Court that document had not been produced prior to the hearing. During the hearing Counsel for BFS could not provide proof that the 2006 contract had been produced to opposing Counsel. However, after being provided with an opportunity to review the document, Counsel for Pohlman acknowledged that the copy 2006 subcontract appears to contain the same language and provisions as the 2007 version and his client's signature appears to be the same on both documents. Based upon those observations, and the representation by Counsel for BFS that his client assures him the document is genuine, Counsel for Pohlman withdrew his argument that there was no written subcontract between Pohlman and BFS applicable to Pohlman's work at this project.

Validity of Indemnification Provisions of the Subcontract

Section 5 of the 2006 subcontract between BFS and Pohlman, labeled "INDEMNITY", consists of four lengthy paragraphs. However, for purposes of this analysis the Court need only consider the first two paragraphs which read as follows

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 AND 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 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 BENEFITS ACTS, OR OTHER EMPLOYEE BENEFITS ACTS. THESE SUBCONTRACTORS SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5. **[emphasis added]**

The South Carolina Court of Appeals has held that the “clear and unequivocal” standard must be applied when interpreting a contractor's claim against a subcontractor seeking indemnification for alleged negligent construction of a condominium project, and that the “clear and unequivocal” standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. *Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (SC Appeals 2018).

The highlighted language of Section 5 of the subcontract shows that the indemnification provisions of the subcontract are not “clear and unequivocal”. The first paragraph states that Pohlman must indemnify BFS for claims or damages “but only to the extent caused in whole or in part” by any negligent act or omission of Pohlman or anyone employed by Pohlman. However, the second paragraph contradicts the first paragraph by purportedly requiring Pohlman to indemnify BFS, and others, even if it is alleged that the loss was caused in whole by BFS. The language of those two paragraphs are in conflict and cannot be reconciled.

However, even if the conflicting language could be reconciled the indemnification provision of the subcontract is still invalid. § 32-2-10 Code of Laws of South Carolina (1976, as amended) provides that any promise or agreement related to the design or construction of a building which requires a party to indemnify another party even if the loss or damage was caused by the sole negligence of the indemnitor is “against public policy and unenforceable”.

This Court finds that the indemnification provisions of the 2006 subcontract between Pohlman and BFS

- do not meet the “clear and unequivocal” standard of review, and
- violate the provisions of § 32-2-10.

The Court notes that the rulings contained within this Order do not leave BFS without a remedy. BFS has articulated a claim against Pohlman for equitable indemnification and that claim remains viable.

DUE TO THE FOREGOING, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT

- The Third-Party claims of BFS for Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract are dismissed with prejudice;
- The Indemnification provisions of the August 18, 2006 subcontract between BFS and Pohlman are deemed unenforceable because those provisions do not meet the “clear and unequivocal” standard of review, and because those provisions are against public policy pursuant to § 32-2-10 Code of Laws of South Carolina (1976, as

amended);

- BFS's cause of action against Pohlman for Equitable Indemnification remains pending and viable.

IT IS SO ORDERED!

JENNIFER B. MCCOY
Circuit Court Judge

Charleston, South Carolina
May _____, 2021



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Other

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-07-07 13:02:44 page 8 of 8

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant filed a Motion to Reconsider the Court's order of July 19, 2021 granting ECC partial summary judgment with this Court on May 14, 2021. "The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court Denies Defendant's Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/23/2021 .

Solesmar Jesus De Oliveira
Costa De Oliveira Construction LLC
ECC Contracting LLC
East Coast Carpentry Company
Rodrigo Assis
Edward Bruce Witham
Pohlman Quality Exteriors Inc
Yessenia Alvarez Penaloza
Sixto Melchor Ayala
Mario Salgado
Givair De Caris
Dino Schwartz
Advanced Building Connection LLC
Garcia Roofing LLC
Feliciano Cruz Silva
Carlos Marroquin
Marroquin Construction
Jessica Marroquin
Juan Constructors
Juan Garza Ramos

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-08-23 14:28:43 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
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- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant filed a Motion to Reconsider the Court's July 29, 2021 Order granting East Coast Carpentry partial summary judgment with this Court on August 9, 2021. "The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court Denies Defendant's Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).

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Marroquin Construction
Jessica Marroquin
Juan Constructors
Juan Garza Ramos

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-08-23 14:26:23 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

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☐ Other

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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant filed a Motion to Reconsider the Court's order granting AC Construction's Partial Summary Judgment with this Court on July 19, 2021. "The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court Denies Defendant's Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).

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Court Reporter:

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Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al
Case Number: 2016CP1003783
Type: Order/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-08-23 14:29:33 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant filed a Motion to Reconsider the Court's July 26, 2021 Order granting Palmetto Trim and Renovations partial summary judgment with this Court on August 5, 2021. "The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court Denies Defendant's Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).

ORDER INFORMATION

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So Ordered

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Electronically signed on 2021-08-23 14:25:33 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant filed a Motion to Reconsider the Court's July 7, 2021 Order granting Hurley Services, LLC partial summary judgment with this Court on July 19, 2021. "The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court Denies Defendant's Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).

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Electronically signed on 2021-08-23 14:28:13 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant filed a Motion to Reconsider the Court's July 29, 2021 Order granting WS Contractors, LLC partial summary judgment with this Court on August 9, 2021. "The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court Denies Defendant's Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant filed a Motion to Reconsider the Court's July 7, 2021 Order granting L&G Construction Group, LLC partial summary judgment with this Court on July 19, 2021. "The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court Denies Defendant's Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).

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So Ordered

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Electronically signed on 2021-08-23 14:27:53 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

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IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant filed a Motion to Reconsider the Court's July 7, 2021 Order granting Pohlman Quality Exteriors, Inc partial summary judgment with this Court on July 19, 2021. "The purpose of Rule 59(e), SCRPC, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court Denies Defendant's Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRPC; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).

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So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-08-23 14:27:03 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Builders Firstsource-Southeast Group, LLC

Plaintiff,

V

MI Windows And Doors, INC.; ECC
Contracting, LLC; Hurley Services, LLC;
and Charleston Exteriors, LLC,

Defendant,

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2018-CP-08-02547

**AMENDED ORDER GRANTING
CHARLESTON EXTERIORS,
LLC'S AND ECC CONTRACTING,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

This matter came before the Court on Friday, October 18th on the Motion for Summary Judgment of the Defendant Charleston Exteriors, LLC seeking dismissal of the Plaintiff's causes of action for breach of contract, negligence, breach of warranties, and indemnity. Present and participating in the argument were the movants counsel, C. Clay Olson, Esquire of Harper Little, PLLC and the Plaintiff was represented by Witt Cox, Esquire of Howell Gibson & Hughes.

ECC Contracting filed a similar, if not identical motion which was also heard. Counsel for ECC, Heyward Grimbail, Esquire of Richardson Plowden was in attendance to advocate and advance the arguments of ECC Contracting. The ECC Motion for Summary Judgment was heard concurrently with the Charleston Exteriors motion. The Court hereby rules on both Charleston Exteriors, LLC's Motion for Summary Judgment as well as ECC's Motion for Summary Judgment.

BACKGROUND

The Plaintiff, Builders First Source Southeast Group, Inc. ("BFS") is a supplier of building materials and components, as well as a provider of construction services for new construction and remodeling projects. BFS provided materials and services at a construction

project known as the “Abbey at Spring Grove” which is located in Moncks Corner, South Carolina.

The Abbey at Spring Grove (the “Abbey”) is a 69-home residential community situated in Berkeley County, South Carolina. The Abbey was developed by Lennar Carolinas¹. To be precise, the Abbey is a portion, or phase, of the larger Spring Grove Plantation development.

A lawsuit was filed in 2014 by Patricia Damico on behalf of herself and other owners within the Abbey at Spring Grove. *See Patricia Damico and Lenna Lucas, individually and behalf of all other similarly situated v. Lennar Carolinas, LLC, et al., Case No. 2014-CP-08-02424 (the “Underlying Class Action”)*. The underlying matter was amended on more than one occasion as the Plaintiff asserted exterior window claims on November 23rd, 2015.

On November 25th, 2015, Lennar Carolinas answered the Amended Complaint and asserted Third-Party claims against several of its contractors and suppliers. Among these Third-Party Defendants was Builders First Source who signed its responsive pleading on December 15th, 2015 and filed it on December 21st, 2015.

The case before the Court was filed on December 21st, 2018 in Berkeley County, South Carolina. The allegations made against Charleston Exteriors, LLC are derived from allegations made by the Plaintiff Damico and Lennar in the underlying lawsuit. Specifically, the Plaintiff and Lennar Carolinas have alleged that BFS was negligent in the installation of windows at the Abbey; that BFS breached its subcontract agreement with Lennar by virtue of the allegations made by the Plaintiff against Lennar; that BFS breached express and implied warranties as alleged in the underlying lawsuit; that Lennar is entitled to both contractual indemnification or, alternatively, equitable indemnification from BFS due to the claims made in the underlying

¹ Lennar Carolinas is not a party to this litigation. Lennar is a Defendant in the matter styled Damico v. Lennar Carolinas, LLC.

lawsuit. As a consequence of these claims made in the underlying lawsuit, BFS has brought this lawsuit alleging that Charleston Exteriors and ECC breached their subcontract with BFS, that Charleston Exteriors and ECC breached certain implied and/or express warranties with BFS; that BFS is entitled to contractual/equitable indemnification from Charleston Exteriors and ECC; and that Charleston Exteriors and ECC were negligent in the installation of the windows at the Project.

FINDINGS OF FACT

1. Builders First Source "BFS" was on actual notice of potential claims against Charleston Exteriors, LLC on December 15, 2015. There can be no other conclusion with regard to this issue upon reviewing the Answer of Builders First Source dated December 15th, 2015. See Exhibit "A"

2. BFS has not submitted a Memorandum of Law to rebut Charleston Exteriors argument that BFS was on notice of a potential claim against Charleston Exteriors on or before December 15th, 2015.

3. Uncontroverted testimony from the hearing, coupled with a review of the D'amico record shows that at no time did BFS attempt to amend its pleadings in the underlying suit against Charleston Exteriors, LLC.

4. BFS began defending the underlying lawsuit on or before December 15, 2015.

5. BFS began incurring costs and attorneys fees when it began to defend this case on or before December 15, 2015.

6. The Subcontract Agreements entered into by ECC and Charleston Exteriors with BFS contain language concerning indemnity and the prospect of these Defendants being forced to indemnify BFS for the negligence of BFS.

7. The contractual indemnification language referenced in Paragraph 6 is both confusing and contradictory at times. The language fails to clearly and unequivocally explain that these Defendants are obligated to indemnify BFS for BFS's negligence.

8. BFS failed to present any evidence suggesting that this lawsuit seeks damages for any acts or omissions which are separate or distinct from the underlying lawsuit. The Court concludes that the claims made in this lawsuit are wholly derivative of those brought in the Damico litigation.

9. BFS entered into a Master Subcontractor Agreement with Charleston Exteriors on October 17th, 2012.

LEGAL STANDARD APPLICABLE TO RULE 56 MOTIONS

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; see *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 487 S.E.2d 187 (1997)). "Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings." *Grant v. Mount Vernon Mills*, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984). "[W]hen plain, palpable, and

indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Hedgepath v. AT&T*, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

A. THE CLAIMS OF THE PLAINTIFF FOR NEGLIGENCE, BREACH OF CONTRACT, AND BREACH OF WARRANTIES ARE TIME BARRED

South Carolina recognizes the “discovery rule” when considering an action to be time barred. Under the discovery rule, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. *Burgess v. American Cancer Society*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). Also, *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999) The statute of limitations for negligence, breach of contract, and breach of warranties is three years. Compelling portions of the record in the underlying matter were presented by the Defendants which illustrates that the Plaintiff was on direct and actual notice of its potential claims against Charleston Exteriors and ECC on December 15th, 2015. Subsequently, more than three years went by before this lawsuit was filed on December 21st, 2018. These causes of action fail for being untimely.

B. DISGUISED INDEMNITY CLAIMS

Although the Court has already determined that claims of BFS for negligence, breach of contract, breach of warranties (“Non-Indemnity Claims) are each barred by the three-year statute of limitations, the Court will consider the Defendants’ additional argument. The Defendants have alleged that the Non-Indemnity claims must fail pursuant to the “Stoneledge Defense” which bars claims that are disguised indemnification claims cloaked within separate

causes of action.² Upon hearing the oral arguments and reviewing memoranda presented to the Court, it is evident that the Plaintiff's Non-Indemnity claims do not exist outside of the derivative Damico lawsuit. They must, therefore, fail.

The allegations in this case make no separate or unique contention(s) which are in addition to the allegations made by Lennar and the Plaintiff in the *Damico* matter. Builders First Source has failed to provide any admissible record evidence that it sustained any separate or independent damages outside the scope of the Damico lawsuit. *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim");

C. MASTER SUBCONTRACT AGREEMENT INDEMNITY PROVISIONS ARE NEITHER CLEAR NOR EQUIVOCAL

The Defendants seek Summary Judgment as to Builders First Source's contractual indemnification claim on the ground that it violates South Carolina rules of contract construction. Section 5 of the Master Subcontract Agreement is confusing at best and deceptive at worst.

Section 5 contains two Paragraphs. The first paragraph seems to suggest that BFS may only seek indemnification for damages.....

ONLY TO THE EXTENT CAUSED. IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR

² Counsel for ECC and Charleston Exteriors presented memoranda and oral arguments consistent with the reasoning in a recent S.C. appellate case which is known as "Stoneledge" and is specifically cited as *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015)

INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

Below this lengthy paragraph is an almost identically constructed paragraph which is slightly altered to indicate that BFS may seek indemnification from Charleston Exteriors for damages caused by the negligence of any person or entity. Specifically, the second paragraph suggests a duty to indemnify BFS.....

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.

The Court can only conclude that the Master Subcontract Agreement is not what our courts had in mind when setting precedent regarding “anti-indemnity” clauses in contracts. Typically, courts will construe an indemnification contract *"in accordance with the rules for the construction of contracts generally."* *Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. However, when an indemnity clause purports *"to relieve an indemnitee from the consequences of its own negligence,"* our case law requires strict construction of the clause. *Laurens*, 355 S.C. at 111, 584 S.E.2d at 378-79. *"Indeed, most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms."* *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). See *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018) see also *Murray v. Texas Co.*, 172 S.C. 399, 402, 174 S.E.2d 231, 234 (1934)(finding “broad and comprehensive” language was insufficient to prove the contract relieved a party from its own negligence).

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question

as to BFS seeking indemnification for its own negligent acts or omissions. BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contractual indemnity claims.

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal when seeking to be indemnified for its own negligence, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

D. BUILDERS FIRST SOURCE'S CONTRACTUAL INDEMNIFICATION CLAIM IS ALSO BARRED PURSUANT TO THE RELEVANT STATUTE OF LIMITATIONS

The contractual indemnity claim(s) made by Builders First Source against ECC and Charleston Exteriors have also been challenged pursuant to the statute of limitations. As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. *Choate v. United States*, 233 F. Supp. 463 (D.C. Okla. 1964) *First Gen. Servs. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Our courts, however, have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 (Ct. App. 2015). In this case, BFS has pled that it is "entitled to full

contractual and common law indemnification for and against Liability”. *See Complaint, Paragraph 34.*

The Court draws further distinction in this case because the relief prayed for in the BFS complaint seeks consequential damages for attorney’s fees. Specifically, the Complaint against ECC and Charleston Exteriors states that, “....BFS has been subjected to liability and has incurred consequential damages in having to expend attorney’s fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.” *See Complaint, Paragraph 33; See also Paragraph 34* (“...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney’s fees, costs, and other expenses incurred in defending the underlying action... ”)

BFS began to incur liability for attorney’s costs and fees – damages it seeks in this litigation when its Answer was drafted and served. BFS’s Answer was executed and served more than three years prior to the filing of the present action. Thus BFS’s claims for “contractual and common law indemnification against Liability” are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

The facts before the Court are distinguishable from the *First General Services* case in that BFS is seeking indemnification for damages which have begun to accrue more than three years prior to filing and, as a result, the Court is inclined to agree with the Defendants that consequential damages, as defined by the Complaint, began to accrue prior to December 15th, 2015 and, therefore, these damages cannot be recovered as Builders First Source discovered them more than three years prior to the filing of its lawsuit against Charleston Exteriors and ECC.

IT IS ORDERED that the Defendants Charleston Exteriors, LLC and ECC Contracting,

LLC's Motion for Summary Judgment is granted as to the following causes of action only:

- a. Negligence
- b. Breach of Contract
- c. Breach of Warranties
- d. Contractual Indemnity

IT IS ORDERED that these causes of action are hereby dismissed with prejudice and this ruling should serve precedent in the Damico matter as well.

THIS COURT FINDS THAT two claims remains which are subject to the Motion to Consolidate brought simultaneously by Builders First Source. The claims are for equitable indemnification and contribution. The Court finds that these claims are subject to consolidation with the related D'Amico matter which remain stayed until further notice or order.

IT IS FURTHER ORDERED that the cause of action for equitable indemnification involves a question for the jury and the Motion for Summary judgment is, therefore, denied as to that cause of action. The Plaintiff's Contribution claim survives as it was not before me as part of this motion for summary judgment.

AND IT IS SO ORDERED this ____ day of __, 2020, at ____, South Carolina.

Clifton B. Newman Presiding Judge



Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And
Doors, Inc. , defendant, et al
Case Number: 2018CP0802547
Type: Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127

Electronically signed on 2020-02-01 21:45:57 page 11 of 11

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Six Fifty Six Owners Association, Inc., et al.,

Plaintiffs,

vs.

Winsor South, LLC, et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-10-3455

**ORDER GRANTING DEFENDANTS
HURLEY SERVICES, LLC AND
CHARLESTON EXTERIORS' MOTION
FOR SUMMARY JUDGMENT AGAINST
THE CLAIMS OF BUILDERS FIRST
SOURCE-SOUTHEAST GROUP, LLC**

This matter came before the Court on March 5, 2020 on Defendants Hurley Services, LLC and Charleston Exteriors' Motion for Summary Judgment against the claims of Builders First Source-Southeast Group, LLC.

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at Six Fifty Six Coleman Boulevard, a twelve-building townhome community in Mount Pleasant, SC ("the Project"). Builders First-Source is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that Builders First-Source holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is Builders First-Source's representative that serves as the "qualifying party" for such licensure in this state. Defendant supplied and installed windows and doors as a subcontractor of the Ryland Group for only the "Ryland Phase" buildings at the Project, which consists of nine (9) buildings that were constructed in 2013 and 2014. It is undisputed that Builders First-Source furnished the windows, related flashings, and caulk and provided superintendents to oversee such installation for the Ryland Phase buildings at the Project.

Builders First-Source filed a third-party complaint in the present litigation on May 9, 2017 asserting third-party claims against Hurley for contractual indemnity, breach of express and implied

warranties, breach of contract, and negligence. Hurley was ultimately made a direct defendant by Plaintiffs and Builders First-Source then asserted cross-claims against Hurley in lieu of it previously asserted third-party claims, but on all the same causes of action and grounds. Builders First-Source's operative cross-claims are contained in Builders First-Source's Answer to Plaintiffs' Third Amended Complaint filed on January 24, 2019. Builders First-Source's cross-claims allege that they are entitled to be indemnified in the amount which Builders First-Source "may pay in satisfaction" of Plaintiffs' claim "plus Builders First-Source [sic] costs for defense, inclusive of attorneys' fees, without regard for the fault of either Hurley or Builders First-Source.

Defendant Hurley Services, LLC is now before the Court on their Motion for Summary Judgment against the claims of Builders First-Source. Charleston Exteriors joins the Motion.

STANDARD OF REVIEW

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). A party's "response to the motion must set forth specific facts, *admissible in evidence*, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him." *Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (Ct. App. 1988) (emphasis added). Summary judgment "is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 388, 701 S.E.2d 776, 779 (2010).

DECISION

Based on the submitted Motions and Oral Arguments the Court hereby finds:

- (1) There exists no genuine issue as to any material fact and Hurley Services and Charleston Exteriors are entitled to judgment dismissing all cross-claims against it as a matter of law;
- (2) Builders First Source-Southeast Group, LLC's cross-claims are barred by the doctrine of collateral estoppel because of Judge Clifton Newman's order filed on February 3, 2020 in the case of Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al, Case No. 2018-CP-08-2547. Specifically, the Court references and adopts the court's analysis in Paragraphs B and C therein.
- (3) Builders First Source-Southeast Group, LLC's cross-claims for breach of contract, breach of express and implied warranty, and negligence are "merely disguised . . . claims for equitable indemnity" and fail as a matter of law. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634, (Ct. App. 2015);
- (4) Builders First Source-Southeast Group, LLC's cross-claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law. *See Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 2018 WL 3748616 (S.C. Ct. App. 2018).

CONCLUSION

Therefore, it is ordered that Defendants Hurley Services, LLC and Charleston Exterior's Motion for Summary Judgment against the claims of Builders First Source-Southeast Group, LLC is GRANTED.

And it is SO ORDERED.

Charleston, South Carolina



Charleston Common Pleas

Case Caption: Six Fifty Six Owners Association Inc , plaintiff, et al VS Winsor South Llc , defendant, et al

Case Number: 2016CP1003455

Type: Order/Summary Judgment

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
) C/A NO. 2019-CP-10-00772

Dag Pavic and Stela Susac-Pavic,)

Plaintiffs,)

vs.)

Carolina Cottage Homes, LLC d/b/a)
Saussy Burbank; SB Holding, LLC d/b/a)
Saussy Burbank; Saussy Burbank GC,)
LLC; American Residential Services,)
LLC; Builders FirstSource-Southeast)
Group, LLC; Hurley Services, LLC;)
Simons Contractors, LLC and Cohen's)
Drywall Company, Inc.)

Defendants.)

Builders FirstSource-Southeast Group,)
LLC,)

Third Party Plaintiff,)

vs.)

MW Manufacturers, Inc.,)

Third Party Defendant.)

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR
OF HURLEY SERVICES, LLC**

This matter came on before me on September 28, 2020 as Presiding Judge of the Ninth Judicial Circuit on Motion of Hurley Services, LLC, hereinafter "Hurley", for partial summary judgment with respect to crossclaims filed by Builders FirstSource-Southeast

Group, LLC, hereinafter “BFS”, for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity.

This is a construction defects suit relating to a single-family residence. Plaintiffs allege, among other things, defective/improper installation of windows and related flashing, causing water infiltration and damage to the substrate. Hurley was a labor-only subcontractor to BFS under a master subcontractor agreement drafted by BFS. BFS sold doors and MW 800 Series windows to the general contractor and provided them to Hurley for installation in Plaintiffs’ residence. These windows are the subject of a class-action suit and settlement. *See Gulbankian v. MW Mfrs., Inc., United States District Court, District of Massachusetts, Civil Action No. 10-10392-RWZ (D. Mass. Dec. 29, 2014).*

Plaintiffs and BFS entered into a stipulation filed October 31, 2019, that Plaintiffs “are not alleging or asserting any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the aforesaid windows and/or any component parts thereof, or in any MW installation instructions or requirements for the windows.”

An abbreviated procedural history is helpful in understanding the facts of the case:

1. Plaintiffs filed a Third Amended Complaint against the general contractor, BFS, Hurley, and others on April 2, 2019.
2. On April 19, 2019, BFS filed an Answer to the Third Amended Complaint, crossclaims against Hurley, and a third-party complaint against the window manufacturer,

MW Manufacturers, Inc.

3. On July 29, 2019, MW Manufacturers, Inc. filed an Answer to the Third-Party Complaint of BFS interposing as a defense the Gulbankian class-action settlement and attaching orders and documents relating to the settlement.

4. On January 28, 2020, BFS filed a dismissal of its third-party complaint against MW Manufacturers, Inc. without prejudice and under a tolling agreement.

5. On August 5, 2020, the general contractor filed an Amended Answer to Plaintiffs' Third Amended Complaint and crossclaims against BFS for negligence, contractual indemnification, and breach of express and implied warranties in connection with labor, materials, and products furnished by BFS in connection with the construction of Plaintiffs' residence.

6. On August 26, 2020, BFS filed an answer to crossclaims of the general contractor and also crossclaimed against Hurley for contractual and equitable indemnity, express and implied warranties, negligence, and breach of contract.

BFS CROSSCLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE

In its oral arguments and memorandum of law filed on September 25, 2020, BFS concedes that its crossclaims against Hurley for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity, and that they are subject to dismissal pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct.

App. 2015); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). Therefore, the Court will grant summary judgment with respect to those claims.

CONTRACTUAL INDEMNITY

Hurley contends that there are no issues of material fact and that the indemnification provisions contained in the BFS master subcontractor agreement violate South Carolina public policy and the provisions of §32-2-10 S.C. Code and are unconscionable. Hurley also contends that these indemnity provisions fail to meet the “clear and unequivocal” standard enunciated by *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), and that BFS is collaterally estopped from contending otherwise.

BFS asserts that *Concord & Cumberland* is inapplicable because BFS is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from Hurley’s negligence. BFS also argues that the doctrine of collateral estoppel is inapplicable because there is no final order of a court deciding whether its indemnification provisions meet the “clear and unequivocal standard”. BFS also contends that there are issues of material fact relating to installation of windows by Hurley.

The master subcontractor agreement between BFS and Hurley is a contract of adhesion. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007).

BFS drafted the agreement, and any ambiguous language in the contract should be construed liberally and interpreted strongly in favor of the non-drafting party. *Southern Atlantic Financial Services, Inc.*, 356 S.C. 444, 590 S.E.2d 27 (2003); *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981).

Although the indemnity provisions in “Section 5. INDEMNITY” are printed in all capital letters, another indemnification provision is buried in the fine print of “Section 3. Warranty”. The language of this section is set out, in pertinent part, as follows:

“Section 3. Warranty.

... subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... 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 ... including, without limitation, property damage to the homes or properties into which the Work is incorporated ...”

BFS is a merchant within the meaning of §36-2-104(1) S.C. Code which provides as follows:

“‘Merchant’ means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.”

Thus, BFS has superior knowledge regarding the products it sells. Hurley had nothing to do with the selection, design, sale, and manufacture of the doors and windows which BFS sold to the general contractor and gave to Hurley for installation in Plaintiffs' residence. The aforementioned provision allows BFS to seek indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation. This is a clear violation of §32-2-10 S.C. Code, is against public policy, and it is also unconscionable within the meaning of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007).

In finding contract provisions unconscionable in Simpson, the Court observed, in pertinent part, as follows:

“While certain phrases within other provisions of additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) ... we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law ...” [644 S.E.2d at 670]

BFS denies asserting claims against Hurley for deficiencies in windows and doors it gave Hurley for installation in Plaintiffs' residence:

“... However, at no time, EVER, has BFS filed a claim against a subcontractor seeking for the subcontractor to indemnify BFS for claims relating to alleged manufactured material or component deficiencies. This case is no exception ...” [Memorandum BFS, p. 19]

Notwithstanding this assertion by BFS, on April 19, 2019, it filed a third-party complaint against the window manufacturer, MW Manufacturers, Inc., alleging multiple claims for defective windows. In the same pleading, it filed multiple crossclaims against Hurley for materials it provided to Hurley that may be inadequate, poor quality, not in compliance with the contract documents, industry standards, and building codes. BFS reiterated these same claims against Hurley in its crossclaims filed on August 26, 2020, although the window manufacturer had already been dismissed from the suit.

Although Plaintiffs have stipulated with BFS not to claim damages against defendants arising from class-action windows, there may be testimony and evidence at trial that any moisture damage is the result of defective windows rather than installation deficiencies. The general contractor has filed breach of warranty claims against BFS as to the windows and BFS, despite its denial, is attempting to transfer that risk to the installer through the fine print in the master subcontractor agreement.

Section 5 of the master agreement contains multiple paragraphs dealing with indemnity and a duty to defend. The first paragraph plainly states that BFS may seek indemnification:

“ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.”

The next paragraphs suggests a duty to indemnify BFS:

“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.”

The following paragraph provides that:

“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 aforementioned paragraphs in Section 5 are ambiguous, conflict with each other, and do not meet the elevated clear and unequivocal standard found in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).

In addition, the provisions of paragraph 5 conflict with the indemnification provisions found in the fine print of Section 3. All of these provisions violate South Carolina public policy and §32-2-10 S.C. Code.

Read together, the provisions of Section 3 and Section 5 of the agreement are also unconscionable because they permit BFS to seek indemnity and a defense from labor-only subcontractors such as Hurley for materials selected and sold by BFS to third parties. Under the agreement, even if BFS were solely liable for causing the loss that gives rise to the claim for defense, the Master Agreement purports to place the entire duty to defend and responsibility to indemnify for the cost to defend upon BFS’s subcontractor Hurley.

Other courts have considered the identical language of the BFS master agreement and have found that the indemnification provisions fail to meet the clear and unequivocal standard. *See Order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC, 2016-CP-10-3455 and the order of the Honorable Clifton Newman filed February 3, 2020, in the Court of Common Pleas for Berkeley County in the case of Builders FirstSource-Southeast Group, LLC v. M.I. Windows and Doors, Inc., et al. as Civil Action No. 2018-CP-08-2547 which are attached.*

It appears that the aforementioned orders are final orders and that BFS is collaterally estopped from contesting the findings and conclusions in the aforementioned Orders.

To invoke collateral estoppel, a party need not have been a party to the prior action; the law only requires that the party against whom estoppel is applied have been a party to that action and have a full and fair opportunity to litigate the issue in the prior action. *South Carolina Property Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (S.C. 1991). Here the contract terms have been actually litigated, directly determined in the prior action, and the issues were essential to the judgment such that collateral estoppel should apply.

The law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's judgment, and thus, will not be a barrier to applying collateral estoppel. *See Huron Holding Corporation v. Lincoln Mine Operating Co., 312*

U.S. 183, 61 S.Ct. 513, 85 L.Ed. 725 (1941). A final judgment is one that finally determines the rights of the parties. *First Union National Bank v. Hitman, Inc.*, 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992). Rule 201(a) SCACR, provides that an “appeal may be taken as provided by law, from any final judgment, appealable order, or decision”.

Summary judgment is appropriate if the court finds that there is no genuine issue of any material fact. *Rule 56(c) SCRCP*. This Court finds that there are no issues of material fact with regard to the following:

1. The language of the master subcontractor agreement;
2. That BFS drafted the master subcontractor agreement;
3. The language of the pleadings and stipulations filed by the parties;
4. That BFS gave Hurley windows and doors for installation in Plaintiffs’ residence which it had sold to the general contractor for installation in Plaintiffs’ residence;
5. That the windows BFS provided to Hurley were the subject of a class-action suit and settlement;
6. That other courts have issued final orders holding that the master subcontractor agreement of BFS fails to meet the clear and unequivocal standard for indemnity contracts.

Although BFS contends that there are material issues of fact because of alleged installation deficiencies on the part of Hurley, those alleged deficiencies have no bearing on whether the language of the contract is against public policy, violates §32-2-10 S.C. Code, is unconscionable, and fails to meet the clear and unequivocal standard. This

Court's dismissal of the claims of BFS for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity, does not leave BFS without a remedy. BFS still has its equitable indemnity claim against Hurley.

After carefully considering the pleadings in the case, the arguments of counsel, the memoranda of law and exhibits submitted by the parties, I find and conclude as follows:

1. That the crossclaims of BFS for breach of express and implied warranties, breach of contract, and negligence, are disguised equitable indemnity claims and are not viable as alternative causes of action.
2. That the indemnity and duty to defend provisions of the master subcontractor agreement are unconscionable, ambiguous, unintelligible, conflicting, oppressive, and are unenforceable.
3. That the indemnity and duty to defend provisions of the master subcontractor agreement violate South Carolina public policy and §32-2-10 S.C. Code.
4. That the indemnity and duty to defend provisions of the master subcontractor agreement are neither clear nor unequivocal, and fail as a matter of law.
5. That BFS is collaterally estopped by prior decisions from contending that the indemnity provisions contained in its Master Subcontractor Agreement are clear and unequivocal and meet the requirements of South Carolina law.

IT IS, THEREFORE,

ORDERED, that the motion of Hurley Services, LLC for partial summary judgment with regard to the crossclaims of BFS for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity be and it is hereby granted.

AND IT IS SO ORDERED.

Document prepared for Electronic Signature



Charleston Common Pleas

Case Caption: Dag Pavic , plaintiff, et al VS Carolina Cottage Homes LLC ,
defendant, et al

Case Number: 2019CP1000772

Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2021-01-22 12:15:32 page 12 of 12

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

THE RETREAT AT CHARLESTON NATIONAL
COUNTRY CLUB HOME OWNERS
ASSOCIATION, INC. AND THE RETREAT AT
CHARLESTON NATIONAL COUNTRY CLUB
HORIZONTAL PROPERTY REGIME,

Plaintiffs,

vs.

WINSTON CARLYLE CHARLESTON
NATIONAL, LLC; COLIN R. CAMPBELL
CONSTRUCTION, INC.; COLIN CAMPBELL,
INDIVIDUALLY,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT

) CASE NO. 2016-CP-10- 3783

) **COMPLAINT**
) **(Negligence, Gross Negligence,**
) **Breach or Warranties, Breach of**
) **Fiduciary Duty)**

) **(Jury Trial Demanded)**

FILED
2016 JUL 22 AM 10:55
JULIE ARMSTRONG
CLERK OF COURT
BY

The Plaintiffs, complaining of the Defendants herein, would respectfully show unto this
Honorable Court as follows:

PARTIES AND JURISDICTION

1. The Retreat at Charleston National Country Club Home Owners Association, Inc., is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Charleston County, South Carolina. The Retreat at Charleston National Country Club Home Owners Association, Inc. was formed pursuant to the Master Deed and By-Laws for The Retreat at Charleston National Country Club Horizontal Property Regime to carry out the responsibilities of The Retreat at Charleston National Country Club Horizontal Property Regime and Home Owners Association, including but not limited to, the maintenance and repair of the Common Elements at The Retreat at Charleston National Country Club townhome / condominium project and to administer and enforce the covenants and restrictions of The Retreat at Charleston National Country Club Project (the "Community" or "Project"). (The

Retreat at Charleston National Country Club Home Owners' Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime are collectively referred to as "Plaintiffs").

2. Defendant Winston Carlyle Charleston National, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Winston Carlyle Charleston National, LLC, was responsible for the planning, development, and construction of the condominium project more commonly known as The Retreat at Charleston National Country Club.

3. Winston Carlyle Charleston National, LLC are hereinafter referred to as "Winston Carlyle Defendants" and/or Developers and/or General Contractors.

4. Defendant Colin R. Campbell Construction, Inc. is, upon information and belief, a business organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Colin R. Campbell Construction, Inc., was responsible for the construction of the condominium project more commonly known as The Retreat at Charleston National Country Club.

5. Defendant Colin Campbell is, upon information and belief, an individual residing and/or doing business in Charleston County, South Carolina. Upon information and belief, Colin Campbell held a South Carolina Homebuilders License and was responsible for the construction of the condominium project more commonly known as The Retreat at Charleston National Country Club.

6. Defendant Colin R. Campbell Construction, Inc. and Defendant Colin Campbell,

Individually are hereinafter collectively referred to as the “Campbell Defendants” and/or General Contractor.

7. Upon information and belief, the Winston Carlyle held legal title to certain real estate in Charleston County, South Carolina, and developed and constructed The Retreat at Charleston National Country Club Project on that real estate.

8. Venue is proper because the property is located in Charleston County and the events giving rise to the claims against these Defendants occurred in Charleston County.

9. This Court has jurisdiction over the subject matter of this action and the parties to this action.

10. The collective actions, conduct and agreements of the Defendants at all times contemplated the sale of the condominium units to individual purchasers and the formation of a property or homeowners’ association to be charged with the responsibility for maintenance and repairs of the common elements of the residential units.

11. Upon information and belief, Defendants did collectively design, develop, construct and sell the Project. Developer(s), as grantor(s) and Declarant(s) of the Project, caused to be prepared and filed in the RMC Office for Charleston County, South Carolina, the Declaration of Covenants, Conditions and Restrictions for The Retreat at Charleston National Country Club Home Owners Association as well as By-laws for The Retreat at Charleston National Country Club Home Owners Association thereby committing the real estate with improvements thereon to be single-family attached residential units in the condominium form of ownership.

12. Since completion of the Project, problems with moisture and water infiltration into the interior of the buildings at the Project have occurred. An inspection of the Project site and the buildings located at the Project has resulted in the discovery of numerous construction

defects impacting upon the structural integrity and safety of the Project. Upon information and belief, the problems or defects at the Project are a result of defective construction of the exteriors of the buildings.

13. The defects in and/or construction complained of include, but are not limited to, the following:

- a. Failure of the waterproofing system has caused severe damage to the structural components of the buildings by allowing water to infiltrate the buildings;
- b. Failure of the building envelope system has caused severe damage by allowing water to infiltrate the interior spaces;
- c. Improper installation of the windows;
- d. Improper fasteners and improper fastener installation and spacing;
- e. Improper application of and/or lack of sealants;
- f. Improper installation of and/or failure to install weather resistant barrier systems;
- g. Improper installation of the exterior vinyl siding;
- h. Improper application and/or lack of proper building paper
- i. Improper flashing and/or failure to install flashing throughout the project;
- j. Improper installation of and/or failure to install flashing at the wall to column termination;
- k. Lack of column supports;
- l. Improper installation of and/or failure to install blocking at sheathing panel joints;
- m. Lack of weather resistant barrier and integral flashing resulting in severe damage to the framing of porch roof and deck construction;
- n. Improper installation of and/or failure to install flashing at wall to deck intersections resulting in water intrusion into the ceiling/walkway construction and damage to framing members;
- o. Improper construction of stairs in violation of code requirements;
- p. Improper installation of and/or lack of flashing at dissimilar materials and throughout the project;
- q. Improper installation of the metal roofing system and related components;

- r. Improper installation of and/or lack of kick-out flashing in roofing systems;
- s. Improper installation of the asphalt shingle roofing system and related components;
- t. Use of improper roof nails and improper nail installation;
- u. Exposed nail heads;
- v. Holes in the roofing systems allowing water into the roofing system causing damage to the sheathing and structural components;
- w. Improper installation of and/or lack of waterproofing system(s) at decks and deck intersections;
- x. Improper installation of French doors and related components;
- y. Improper construction and installation of the exterior guard rail system and picket spacing in violation of code requirements;
- z. Improper installation of the PVC vent boots;
- aa. Use of non-galvanized fasteners;
- bb. Improper framing including cracked and buckled framing;
- cc. Decay of and damaged structural building components;
- dd. Defects causing decay of building components;
- ee. Interior damage and mold due to exterior water intrusion;
- ff. Failure to construct the Project in accordance with the applicable building codes and/or in conformance with accepted industry standards;
- gg. Failure of the building exteriors has compromised the integrity of the exterior building envelope and resulted in deterioration of the building structure;
- hh. Failure of the flashing and waterproofing systems which have caused severe damage and decay to the structural components of the Project by allowing water to infiltrate the building structure; and
- ii. Failure to construct the Project and its buildings in accordance with the applicable standard building codes and accepted construction practices.

14. Actual property damage to the Project has been caused by continuous and repeated exposure to moisture and water seeping into and around the walls, terminations, windows, doors, decks, porches and intersections, resulting from the negligent and grossly negligent construction,

and development of the Project performed by the Defendants. Consequently, continuous and repeated water intrusion has resulted in physical property damage, including severe damage, rot and deterioration of the building and its structural components. Due to the construction deficiencies, continuous and repeated exposure to harmful conditions, including water intrusion, has occurred, resulting in physical and consequential damages, including but not limited to the following:

- a. physical injury to tangible property and/or the work of others caused by the continuous and repeated exposure to substantially the same harmful conditions including excessive moisture from water infiltration in and around improperly installed windows and doors, and through negligently constructed and installed exterior cladding, sealants, joints, caulk, roofing, and waterproofing systems.
- b. physical injury to tangible property and/or the work of others caused by the continuous and repeated exposure to substantially the same harmful conditions including excessive moisture from water infiltration in and around improperly installed decks and porches, windows and doors, roofing systems and through negligently constructed and installed flashing and waterproofing systems.

15. The negligent and grossly negligent acts of omission and commission by these parties and the damages that resulted therefrom were foreseeable.

16. As a direct and proximate result and consequence of the numerous construction defects and problems at the Project, the Project has suffered substantial water intrusion, rot and deterioration and the Plaintiffs have spent and will continue to spend substantial sums of money for the extraordinary repairs and reconstruction of major portions of the Project.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence as to Defendant Developer(s) -
Winston Carlyle Charleston National, LLC)

17. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

18. Defendant Developers owed a duty to the Plaintiffs to exercise that degree of skill necessary to select an architect, engineer and contractor and to oversee the Project and otherwise deliver the Project free of construction defects and designed and built in conformity with the customary and ordinary standards of the building and construction industry.

19. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of Developers in one or more of the following particulars:

- a. in failing to properly select a design professional and contractor so that the Project would be designed and built by methods of construction and design conforming with accepted industry standards;
- b. in allowing and/or accepting non-conforming or defective work;
- c. in failing to properly oversee the Project in order to ensure that all work proceeded in accordance with the plans and specifications and also in conformity with the customary and ordinary standards of the construction industry; and
- d. in failing to inform the architect, engineer and contractor of any defects found in the Project.
- e. In failing to properly inform the unit owners of the conditions known or which should have been known at the time each owner purchased a unit;
- f. In failing to turn the common elements over to the Association in good condition

- or with sufficient funds for the Association to repair the common elements; and
- g. In failing to act as a reasonable and prudent developer would have acted under the circumstances then and there existing.

20. As a direct and proximate result and consequence of the negligence and/or gross negligence of Developers, the Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structure, the costs of experts, loss of use, depreciation in value, and such punitive damages as may be appropriate.

FOR A SECOND CAUSE OF ACTION
(Breach of Express Warranties as to Defendant Developer(s) –
Winston Carlyle Charleston National, LLC)

21. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

22. Defendant Developers represented and warranted that the Project, including the project units and the general common elements, were of the highest quality. Those representations and warranties were made in connection with the sale of the units and formation of The Retreat at Charleston National Country Club Home Owners Association.

23. Defendant Developers breached their express warranty by producing, selling and turning over to the Plaintiffs, an inferior and rapidly deteriorating project, plagued with extensive and severe construction defects and problems.

24. As a direct and proximate result and consequence of Defendant Developers' breach of express warranty, the Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structure, loss of use and depreciation in value, the costs of experts, and such

punitive damages as may be appropriate.

FOR A THIRD CAUSE OF ACTION
(Breach of Implied Warranty as to Defendant Developer(s) –
Winston Carlyle Charleston National, LLC)

25. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

26. Defendant Developers, as seller, grantor and developer, made implied warranties of habitability and fitness for intended use.

27. Defendant Developers have breached their implied warranty by producing, selling and turning over to the Plaintiffs an inferior and rapidly deteriorating project plagued with extensive and severe construction defects and problems.

28. As a direct and proximate result and consequence of Defendant Developers' breach of their implied warranty, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repairs, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, the costs of experts, and depreciation in value.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty- as to Defendant Developer(s) –
Winston Carlyle Charleston National, LLC)

29. Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

30. Defendants at all times during which they were or were in control of Directors of The Retreat at Charleston National Country Club Home Owners' Association, were charged with the duty of administration, care and maintenance of the regime property and its common elements according to the terms of the Master Deed and with safeguarding any interests and rights of the members, both present and future, of the regime as unit owners or they undertook such duties.

31. Upon information and belief, from its inception and for a period of time afterwards, Developers controlled The Retreat at Charleston National Country Club Home Owners' Association.

32. Developers, as a controlling entity, owed a fiduciary duty to the Plaintiffs to inform them of any deficiencies in the construction of The Retreat at Charleston National Country Club Project.

33. Developers, as a controlling entity, also owed a fiduciary duty to the Plaintiffs to disclose any defects in construction of The Retreat at Charleston National Country Club Project.

34. Developers breached their fiduciary duty to the Plaintiffs by failing to disclose construction defects to the Plaintiffs prior to relinquishing control of the Board of Directors to the owners.

35. Developers owed a fiduciary duty to Plaintiffs to turn over the common elements of the Regime to The Retreat at Charleston National Country Club Home Owners Association in good condition, or to provide funds to Plaintiffs to remedy any defects in the common areas.

36. Developers breached their fiduciary duty to Plaintiffs by turning over to Plaintiffs a deteriorating and defective townhome project without providing The Retreat at Charleston National Country Club Home Owners' Association with any funds to effectuate necessary repairs.

37. Defendants owed a duty to Plaintiffs to exercise that degree of skill necessary to insure that the regime property was properly maintained and to keep the owners informed of serious defects found or discovered and to protect the owners' property interest in conformity with customary and ordinary standards.

38. As a direct and proximate result and consequence of the aforementioned negligent,

grossly negligent and reckless acts or omissions of Defendants, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repairs, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, the costs of experts, and depreciation in value.

FOR A FIFTH CAUSE OF ACTION

**(Negligence/Gross Negligence as the General Contractor –
Winston Carlyle Defendants; Defendant Colin R. Campbell Construction, Inc. and
Defendant Colin Campbell, Individually/Campbell Defendants)**

39. Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

40. Defendants as the general contractors owed a duty to the Plaintiffs to exercise that degree of skill necessary to construct, supervise and review the design and otherwise deliver the Project free of construction defects and to ensure that the Project was designed and built in conformity with the customary and ordinary standards of the building and construction industry.

41. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of Defendants in more of the following particulars:

- 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 materials; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturer's instructions;
- b. in using and supplying defective material;
- c. by installing materials not in accordance with the plans and specifications;
- d. by installing materials in violation of manufacturer's instructions;

FOR A SIXTH CAUSE OF ACTION
(Breach of Warranties as the General Contractor –
Winston Carlyle Defendants and Campbell Defendants)

44. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

45. Upon information and belief, Defendants made express warranties in connection with contracting to build the Project to the effect that the building would be free from construction defects.

46. Defendants also impliedly warranted that the Project would be constructed in a careful, diligent and workmanlike manner, free of construction deficiencies.

47. Defendants breached their express and implied warranties in the following particulars:

- a. in failing to properly construct the Project by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
- b. in using and supplying defective material;
- c. by installing materials not in accordance with the plans and specifications;
- d. by installing materials in violation of manufacturer's instructions;
- e. in performing work which violated applicable building codes;
- f. in failing to properly supervise employees, agents and subcontractors to ensure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
- g. in accepting defective and/or non-conforming materials and labor;

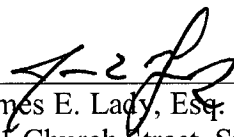
48. As a direct and proximate result and consequence of Defendant General Contractor's breach of warranties, the Plaintiffs have suffered injuries and damages in an amount equal to the

extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, costs of hiring experts, depreciation in value and such punitive damages as may be appropriate.

WHEREFORE, Plaintiffs pray for judgment against the Defendants for such actual, consequential and punitive damages as this Court deems appropriate and for such other and further relief as is just and proper, including costs, pre-judgment interest and attorney's fees.

MULLEN WYLIE, LLC

By:


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ATTORNEYS FOR PLAINTIFFS

July 19, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

THE RETREAT AT CHARLESTON NATIONAL
COUNTRY CLUB HOME OWNERS
ASSOCIATION, INC. AND THE RETREAT AT
CHARLESTON NATIONAL COUNTRY CLUB
HORIZONTAL PROPERTY REGIME,

Plaintiffs,

vs.

WINSTON CARLYLE CHARLESTON
NATIONAL, LLC; COLIN R. CAMPBELL
CONSTRUCTION, INC.; COLIN CAMPBELL,
INDIVIDUALLY; BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC; AMERICO
ROOFING CONCEPTS, INC.; DVS, INC.;
ADVANCED BUILDING CONNECTION, LLC;
GUY C. LEE BUILDING MATERIALS, LLC;
WS CONTRACTORS, LLC; DINO SCHWARTZ,
Individually,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
)

) CASE NO. 2016-CP-10-3783
)

) **AMENDED COMPLAINT**
) **(Negligence, Gross Negligence,**
) **Breach or Warranties, Breach of**
) **Fiduciary Duty)**
)

) **(Jury Trial Demanded)**
)

FILED
2017 MAY -1 PM 3:03
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The Plaintiffs, complaining of the Defendants herein, would respectfully show unto this
Honorable Court as follows:

PARTIES AND JURISDICTION

1. The Retreat at Charleston National Country Club Home Owners Association, Inc., is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Charleston County, South Carolina. The Retreat at Charleston National Country Club Home Owners Association, Inc. was formed pursuant to the Master Deed and By-Laws for The Retreat at Charleston National Country Club Horizontal Property Regime to carry out the responsibilities of The Retreat at Charleston National Country Club Horizontal Property Regime and Home Owners Association, including but not limited to, the maintenance

and repair of the Common Elements at The Retreat at Charleston National Country Club townhome / condominium project and to administer and enforce the covenants and restrictions of The Retreat at Charleston National Country Club Project (the “Community” or “Project”). (The Retreat at Charleston National Country Club Home Owners’ Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime are collectively referred to as “Plaintiffs”).

2. Defendant Winston Carlyle Charleston National, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Winston Carlyle Charleston National, LLC, was responsible for the planning, development, and construction of the condominium project more commonly known as The Retreat at Charleston National Country Club.

3. Winston Carlyle Charleston National, LLC are hereinafter referred to as “Winston Carlyle Defendants” and/or Developers and/or General Contractors.

4. Defendant Colin R. Campbell Construction, Inc. is, upon information and belief, a business organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Colin R. Campbell Construction, Inc., was responsible for the construction of the condominium project more commonly known as The Retreat at Charleston National Country Club.

5. Defendant Colin Campbell is, upon information and belief, an individual residing and/or doing business in Charleston County, South Carolina. Upon information and belief, Colin Campbell held a South Carolina Homebuilders License and was responsible for the construction

of the condominium project more commonly known as The Retreat at Charleston National Country Club.

6. Defendant Colin R. Campbell Construction, Inc. and Defendant Colin Campbell, Individually are hereinafter collectively referred to as the “Campbell Defendants” and/or General Contractor.

7. Defendant Builders Firstsource-Southeast Group, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of Delaware, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Builders Firstsource-Southeast Group, LLC 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.

8. Defendant Americo Roofing Concepts, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Defendant Americo Roofing Concepts, Inc. provided materials and/or labor, including but not limited to the installation of the roofing systems and decking systems and all related components at all or a portion of the Project.

9. Defendant DVS, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Defendant DVS, Inc. provided materials and/or labor, including but not limited to the installation of the exterior siding systems, railing, window and door systems and all related components at all or a portion of the Project.

10. Defendant Advanced Building Connection, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Defendant Advanced Building Connection, LLC provided materials and/or labor, including but not limited to the framing systems and window and door systems and all related components at all or a portion of the Project.

11. Defendant Guy C. Lee Building Materials, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of North Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Guy C. Lee Building Materials, LLC 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.

12. Defendant WS Contractors, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Defendant WS Contractors, LLC provided materials and/or labor, including but not limited to the exterior siding systems, railing, framing systems, window and door systems, and all related components at all or a portion of the Project.

13. Defendant Dino Schwartz is, upon information and belief, an individual residing and/or doing business in Charleston County, South Carolina. Upon information and belief, Dino Schwartz provided materials and/or labor, including but not limited to the framing systems and window and door systems, and all related components at all or a portion of the Project.

14. Defendants Builders Firstsource-Southeast Group, LLC, Americo Roofing Concepts,

Inc., DVS, Inc., Advanced Building Connection, LLC, Guy C. Lee Building Materials, LLC, WS Contractors, LLC and Dino Schwartz shall be referred to hereinafter collectively as “Subcontractor Defendants.”

15. Upon information and belief, the Winston Carlyle held legal title to certain real estate in Charleston County, South Carolina, and developed and constructed The Retreat at Charleston National Country Club Project on that real estate.

16. Venue is proper because the property is located in Charleston County and the events giving rise to the claims against these Defendants occurred in Charleston County.

17. This Court has jurisdiction over the subject matter of this action and the parties to this action.

18. The collective actions, conduct and agreements of the Defendants at all times contemplated the sale of the condominium units to individual purchasers and the formation of a property or homeowners’ association to be charged with the responsibility for maintenance and repairs of the common elements of the residential units.

19. Upon information and belief, Defendants did collectively design, develop, construct and sell the Project. Developer(s), as grantor(s) and Declarant(s) of the Project, caused to be prepared and filed in the RMC Office for Charleston County, South Carolina, the Declaration of Covenants, Conditions and Restrictions for The Retreat at Charleston National Country Club Home Owners Association as well as By-laws for The Retreat at Charleston National Country Club Home Owners Association thereby committing the real estate with improvements thereon to be single-family attached residential units in the condominium form of ownership.

20. Since completion of the Project, problems with moisture and water infiltration into the interior of the buildings at the Project have occurred. An inspection of the Project site and the

buildings located at the Project has resulted in the discovery of numerous construction defects impacting upon the structural integrity and safety of the Project. Upon information and belief, the problems or defects at the Project are a result of defective construction of the exteriors of the buildings.

21. The defects in and/or construction complained of include, but are not limited to, the following:

- a. Failure of the waterproofing system has caused severe damage to the structural components of the buildings by allowing water to infiltrate the buildings;
- b. Failure of the building envelope system has caused severe damage by allowing water to infiltrate the interior spaces;
- c. Improper installation of the windows;
- d. Improper fasteners and improper fastener installation and spacing;
- e. Improper application of and/or lack of sealants;
- f. Improper installation of and/or failure to install weather resistant barrier systems;
- g. Improper installation of the exterior vinyl siding;
- h. Improper application and/or lack of proper building paper
- i. Improper flashing and/or failure to install flashing throughout the project;
- j. Improper installation of and/or failure to install flashing at the wall to column termination;
- k. Lack of column supports;
- l. Improper installation of and/or failure to install blocking at sheathing panel joints;
- m. Lack of weather resistant barrier and integral flashing resulting in severe damage to the framing of porch roof and deck construction;
- n. Improper installation of and/or failure to install flashing at wall to deck intersections resulting in water intrusion into the ceiling/walkway construction and damage to farming members;
- o. Improper construction of stairs in violation of code requirements;
- p. Improper installation of and/or lack of flashing at dissimilar materials and throughout the project;

- q. Improper installation of the metal roofing system and related components;
- r. Improper installation of and/or lack of kick-out flashing in roofing systems;
- s. Improper installation of the asphalt shingle roofing system and related components;
- t. Use of improper roof nails and improper nail installation;
- u. Exposed nail heads;
- v. Holes in the roofing systems allowing water into the roofing system causing damage to the sheathing and structural components;
- w. Improper installation of and/or lack of waterproofing system(s) at decks and deck intersections;
- x. Improper installation of French doors and related components;
- y. Improper construction and installation of the exterior guard rail system and picket spacing in violation of code requirements;
- z. Improper installation of the PVC vent boots;
- aa. Use of non-galvanized fasteners;
- bb. Improper framing including cracked and buckled framing;
- cc. Decay of and damaged structural building components;
- dd. Defects causing decay of building components;
- ee. Interior damage and mold due to exterior water intrusion;
- ff. Failure to construct the Project in accordance with the applicable building codes and/or in conformance with accepted industry standards;
- gg. Failure of the building exteriors has compromised the integrity of the exterior building envelope and resulted in deterioration of the building structure;
- hh. Failure of the flashing and waterproofing systems which have caused severe damage and decay to the structural components of the Project by allowing water to infiltrate the building structure; and
- ii. Failure to construct the Project and its buildings in accordance with the applicable standard building codes and accepted construction practices.

22. Actual property damage to the Project has been caused by continuous and repeated exposure to moisture and water seeping into and around the walls, terminations, windows, doors,

decks, porches and intersections, resulting from the negligent and grossly negligent construction, and development of the Project performed by the Defendants. Consequently, continuous and repeated water intrusion has resulted in physical property damage, including severe damage, rot and deterioration of the building and its structural components. Due to the construction deficiencies, continuous and repeated exposure to harmful conditions, including water intrusion, has occurred, resulting in physical and consequential damages, including but not limited to the following:

- a. physical injury to tangible property and/or the work of others caused by the continuous and repeated exposure to substantially the same harmful conditions including excessive moisture from water infiltration in and around improperly installed windows and doors, and through negligently constructed and installed exterior cladding, sealants, joints, caulk, roofing, and waterproofing systems.
- b. physical injury to tangible property and/or the work of others caused by the continuous and repeated exposure to substantially the same harmful conditions including excessive moisture from water infiltration in and around improperly installed decks and porches, windows and doors, roofing systems and through negligently constructed and installed flashing and waterproofing systems.

23. The negligent and grossly negligent acts of omission and commission by these parties and the damages that resulted therefrom were foreseeable.

24. As a direct and proximate result and consequence of the numerous construction defects and problems at the Project, the Project has suffered substantial water intrusion, rot and deterioration and the Plaintiffs have spent and will continue to spend substantial sums of money for the extraordinary repairs and reconstruction of major portions of the Project.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence as to Defendant Developer(s) -
Winston Carlyle Charleston National, LLC)

25. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

26. Defendant Developers owed a duty to the Plaintiffs to exercise that degree of skill necessary to select an architect, engineer and contractor and to oversee the Project and otherwise deliver the Project free of construction defects and designed and built in conformity with the customary and ordinary standards of the building and construction industry.

27. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of Developers in one or more of the following particulars:

- a. in failing to properly select a design professional and contractor so that the Project would be designed and built by methods of construction and design conforming with accepted industry standards;
- b. in allowing and/or accepting non-conforming or defective work;
- c. in failing to properly oversee the Project in order to ensure that all work proceeded in accordance with the plans and specifications and also in conformity with the customary and ordinary standards of the construction industry; and
- d. in failing to inform the architect, engineer and contractor of any defects found in the Project.
- e. In failing to properly inform the unit owners of the conditions known or which should have been known at the time each owner purchased a unit;
- f. In failing to turn the common elements over to the Association in good condition

or with sufficient funds for the Association to repair the common elements; and

- g. In failing to act as a reasonable and prudent developer would have acted under the circumstances then and there existing.

28. As a direct and proximate result and consequence of the negligence and/or gross negligence of Developers, the Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structure, the costs of experts, loss of use, depreciation in value, and such punitive damages as may be appropriate.

FOR A SECOND CAUSE OF ACTION
(Breach of Express Warranties as to Defendant Developer(s) –
Winston Carlyle Charleston National, LLC)

29. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

30. Defendant Developers represented and warranted that the Project, including the project units and the general common elements, were of the highest quality. Those representations and warranties were made in connection with the sale of the units and formation of The Retreat at Charleston National Country Club Home Owners Association.

31. Defendant Developers breached their express warranty by producing, selling and turning over to the Plaintiffs, an inferior and rapidly deteriorating project, plagued with extensive and severe construction defects and problems.

32. As a direct and proximate result and consequence of Defendant Developers' breach of express warranty, the Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structure, loss of use and depreciation in value, the costs of experts, and such

punitive damages as may be appropriate.

FOR A THIRD CAUSE OF ACTION
(Breach of Implied Warranty as to Defendant Developer(s) –
Winston Carlyle Charleston National, LLC)

33. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

34. Defendant Developers, as seller, grantor and developer, made implied warranties of habitability and fitness for intended use.

35. Defendant Developers have breached their implied warranty by producing, selling and turning over to the Plaintiffs an inferior and rapidly deteriorating project plagued with extensive and severe construction defects and problems.

36. As a direct and proximate result and consequence of Defendant Developers' breach of their implied warranty, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repairs, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, the costs of experts, and depreciation in value.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty- as to Defendant Developer(s) –
Winston Carlyle Charleston National, LLC)

37. Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

38. Defendants at all times during which they were or were in control of Directors of The Retreat at Charleston National Country Club Home Owners' Association, were charged with the duty of administration, care and maintenance of the regime property and its common elements according to the terms of the Master Deed and with safeguarding any interests and rights of the members, both present and future, of the regime as unit owners or they undertook such duties.

39. Upon information and belief, from its inception and for a period of time afterwards, Developers controlled The Retreat at Charleston National Country Club Home Owners' Association.

40. Developers, as a controlling entity, owed a fiduciary duty to the Plaintiffs to inform them of any deficiencies in the construction of The Retreat at Charleston National Country Club Project.

41. Developers, as a controlling entity, also owed a fiduciary duty to the Plaintiffs to disclose any defects in construction of The Retreat at Charleston National Country Club Project.

42. Developers breached their fiduciary duty to the Plaintiffs by failing to disclose construction defects to the Plaintiffs prior to relinquishing control of the Board of Directors to the owners.

43. Developers owed a fiduciary duty to Plaintiffs to turn over the common elements of the Regime to The Retreat at Charleston National Country Club Home Owners Association in good condition, or to provide funds to Plaintiffs to remedy any defects in the common areas.

44. Developers breached their fiduciary duty to Plaintiffs by turning over to Plaintiffs a deteriorating and defective townhome project without providing The Retreat at Charleston National Country Club Home Owners' Association with any funds to effectuate necessary repairs.

45. Defendants owed a duty to Plaintiffs to exercise that degree of skill necessary to insure that the regime property was properly maintained and to keep the owners informed of serious defects found or discovered and to protect the owners' property interest in conformity with customary and ordinary standards.

46. As a direct and proximate result and consequence of the aforementioned negligent,

grossly negligent and reckless acts or omissions of Defendants, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repairs, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, the costs of experts, and depreciation in value.

FOR A FIFTH CAUSE OF ACTION

**(Negligence/Gross Negligence as the General Contractor –
Winston Carlyle Defendants; Defendant Colin R. Campbell Construction, Inc. and
Defendant Colin Campbell, Individually/Campbell Defendants)**

47. Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

48. Defendants as the general contractors owed a duty to the Plaintiffs to exercise that degree of skill necessary to construct, supervise and review the design and otherwise deliver the Project free of construction defects and to ensure that the Project was designed and built in conformity with the customary and ordinary standards of the building and construction industry.

49. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of Defendants in more of the following particulars:

- 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 materials; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturer's instructions;
- b. in using and supplying defective material;
- c. by installing materials not in accordance with the plans and specifications;
- d. by installing materials in violation of manufacturer's instructions;

- e. in failing to properly supervise the subcontractors and/or 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;
- f. in accepting non-conforming or defective material or labor;
- 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;
- i. in failing to adequately construct a waterproofing system on the exterior of the building thereby allowing water to infiltrate the interior of the building;
- j. in failing to inform the architect and/or developer of the defects in the plans and specifications; and
- k. In failing to act as a reasonable and prudent contractor would act under the circumstances then and there existing.

50. Defendants knew or should have known its actions and work were in breach of their duties owed to Plaintiffs.

51. As a direct and proximate result and consequence of the negligence and/or gross negligence of Defendants, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, costs of hiring experts, depreciation in value and such punitive damages as may be appropriate.

FOR A SIXTH CAUSE OF ACTION
(Breach of Warranties as the General Contractor –
Winston Carlyle Defendants and Campbell Defendants)

52. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

53. Upon information and belief, Defendants made express warranties in connection with contracting to build the Project to the effect that the building would be free from construction defects.

54. Defendants also impliedly warranted that the Project would be constructed in a careful, diligent and workmanlike manner, free of construction deficiencies.

55. Defendants breached their express and implied warranties in the following particulars:

- a. in failing to properly construct the Project by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
- b. in using and supplying defective material;
- c. by installing materials not in accordance with the plans and specifications;
- d. by installing materials in violation of manufacturer's instructions;
- e. in performing work which violated applicable building codes;
- f. in failing to properly supervise employees, agents and subcontractors to ensure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
- g. in accepting defective and/or non-conforming materials and labor;

56. As a direct and proximate result and consequence of Defendant General Contractor's breach of warranties, the Plaintiffs have suffered injuries and damages in an amount equal to the

extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, costs of hiring experts, depreciation in value and such punitive damages as may be appropriate.

FOR A SEVENTH CAUSE OF ACTION

(Negligence/Gross Negligence/ Defendants Subcontractors - Builders Firstsource-Southeast Group, LLC, Americo Roofing Concepts, Inc., DVS, Inc., Advanced Building Connection, LLC, Guy C. Lee Building Materials, LLC, WS Contractors, LLC, and Dino Schwartz)

57. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.
58. The Subcontractor Defendants, and each of them individually, owed a duty to Plaintiff to exercise that degree of skill necessary to construct, supervise and review their work, and the work of other trades and to otherwise deliver the building free of construction defects and ensure that the building was constructed in conformity with the customary and ordinary standards of the building and construction industry.
59. 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, and each of them individually, in one or more of the following particulars:
- 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.

60. As a direct and proximate result and consequence of the negligence and/or gross negligence of the Subcontractor Defendants, Plaintiff has suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, depreciation in value and such punitive damages as may be appropriate.

FOR AN EIGHTH CAUSE OF ACTION

(Breach of Implied Warranty/Defendants Subcontractors - Builders Firstsource-Southeast Group, LLC, Americo Roofing Concepts, Inc., DVS, Inc., Advanced Building Connection, LLC, Guy C. Lee Building Materials, LLC, WS Contractors, LLC, and Dino Schwartz)

61. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.
62. The Subcontractor Defendants impliedly warranted that the Project would be constructed in a careful, diligent and workmanlike manner, free of construction deficiencies.
63. The Subcontractor Defendants and each of them individually breached the implied warranties in one or more of the following particulars:
- j. in failing to properly construct the project by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
 - k. in using and supplying defective material;
 - l. by installing materials not in accordance with the plans and specifications;
 - m. by installing materials in violation of manufacturer's instructions;
 - n. in performing work which violated applicable building codes;
 - o. in failing to properly supervise employees, agents and subcontractors to ensure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
 - p. in accepting defective and/or non-conforming materials and labor;
 - q. in providing deficient and/or defective workmanship and/or materials, without proper inspections to ensure that the work was correct and in conformity with

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.

60. As a direct and proximate result and consequence of the negligence and/or gross negligence of the Subcontractor Defendants, Plaintiff has suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, depreciation in value and such punitive damages as may be appropriate.

FOR AN EIGHTH CAUSE OF ACTION

(Breach of Implied Warranty/Defendants Subcontractors - Builders Firstsource-Southeast Group, LLC, Americo Roofing Concepts, Inc., DVS, Inc., Advanced Building Connection, LLC, Guy C. Lee Building Materials, LLC, WS Contractors, LLC, and Dino Schwartz)

61. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

62. The Subcontractor Defendants impliedly warranted that the Project would be constructed in a careful, diligent and workmanlike manner, free of construction deficiencies.

63. The Subcontractor Defendants and each of them individually breached the implied warranties in one or more of the following particulars:

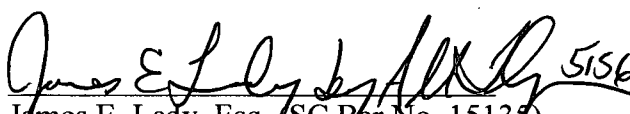
- a. in failing to properly construct the project by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
 - b. in using and supplying defective material;
 - c. by installing materials not in accordance with the plans and specifications;
 - d. by installing materials in violation of manufacturer's instructions;
 - e. in performing work which violated applicable building codes;
 - f. in failing to properly supervise employees, agents and subcontractors to ensure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
 - g. in accepting defective and/or non-conforming materials and labor;
 - h. in providing deficient and/or defective workmanship and/or materials, without proper inspections to ensure that the work was correct and in conformity with customary industry standards and in accordance with the plans and specifications and the manufacturer's instructions;
 - i. in failing to adequately construct a waterproofing system on the exterior of the building such as to allow water to infiltrate the interior of the building;
- and

- j. in failing to advise the General Contractor or owner of defects in the plans and specifications.

64. As a direct and proximate result and consequence of the Subcontractor Defendants' breach of implied warranties, Plaintiff has suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use and depreciation in value.

WHEREFORE, Plaintiffs pray for judgment against the Defendants for such actual, consequential and punitive damages as this Court deems appropriate and for such other and further relief as is just and proper, including costs, pre-judgment interest and attorney's fees.

MULLEN WYLIE, LLC

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ATTORNEYS FOR PLAINTIFFS

April 28, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)
) CIVIL ACTION NO: 2016-CP-10-03783

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

Plaintiffs,

vs.

Winston Carlyle Charleston National,
LLC; Colin R. Campbell Construction,
Inc.; Colin Campbell, individually;
Builders FirstSource-Southeast Group,
LLC; Americo Roofing Concepts, Inc.;
DVS, Inc.; Advanced Building
Connection, LLC; Guy C., Lee
Building Materials, LLC; WS
Contractors, LLC; Dino Schwartz,
Individually,

Defendants.

Builders FirstSource-Southeast Group,
LLC,

Third Party Plaintiff,

vs.

Charleston Exteriors, LLC; ECC
Contracting, LLC; Hurley Services,
LLC; McDaniel Construction Co., LLC;
AC Construction Corp.; L&G
Construction Group, LLC, Pohlman
Quality Contractors, and Pohlman
Quality Exteriors, Inc.;

Third Party Defendants.

BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC'S
AMENDED ANSWER TO
PLAINTIFFS' AMENDED
COMPLAINT AND ASSERTING
ITS CROSS CLAIM AGAINST
WS CONTRACTORS, LLC, AND
THIRD PARTY COMPLAINT
AGAINST CHARLESTON
EXTERIORS, LLC, ECC
CONTRACTING, LLC, HURLEY
SERVICES, LLC, McDANIEL
CONSTRUCTION CO., LLC,
LLC, AC CONSTRUCTION
CORP., L&G CONSTRUCTION
GROUP, LLC, POHLMAN
QUALITY CONTRACTORS, AND
POHLMAN QUALITY
EXTERIORS, INC.

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2017 JUN 30 AM 11:53

FILED

The Defendant, Builders FirstSource-Southeast Group, LLC, amending its Answer to the Amended Complaint of the Plaintiffs, asserting its cross claim and third party claims, and reserving all rights under any and/or all pending and/or hereinafter filed motions, would respectfully allege unto this Honorable Court as follows:

FOR A FIRST DEFENSE

1. That each and every allegation set forth within the Amended Complaint, not hereinafter specifically admitted, is denied, and strict proof demanded thereof.
2. That this Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraphs 1, 2, 3, 4, 5, and 6 of the Amended Complaint, and therefore denies the same and demands strict proof thereof.
3. That this Defendant admits only so much of Paragraph 7 of the Amended Complaint as alleges that this Defendant is a limited liability company organized and existing pursuant to the laws of the State of Delaware, and so much thereof as alleges that this Defendant was conducting business in Charleston County, South Carolina at all times relevant hereto; this Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the remaining allegations of Paragraph 7, and therefore denies the same and demand strict proof thereof.

4. That this Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraphs 8, 9, 10, 11, 12, and 13 of the Amended Complaint, and therefore denies the same and demands strict proof thereof.
5. That this Defendant admits only so much of Paragraph 14 of the Amended Complaint as alleges that the Defendants designated therein will be referred to collectively as "subcontractor defendants". This Defendant denies so much of Paragraph 14 as alleges or may be construed to allege, any involvement by this Defendant in the design, development, construction, and/or supply of materials for the subject structures, and demands strict proof thereof.
6. That this Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in Paragraph 15 of the Amended Complaint.
7. That this Defendant would show that the allegations of Paragraphs 16 and 17 of the Amended Complaint set forth conclusions of law, which this Defendant need neither admit nor deny. To the extent that the allegations of said paragraphs may be deemed to require a response by this Defendant, such allegations are hereby specifically denied.
8. That this Defendant denies so much of Paragraph 18 of the Amended Complaint as asserts, or may be construed to assert, any allegation against this Defendant, and demands strict proof thereof; this Defendant is without knowledge or information sufficient to form an opinion as to the

truth of the remaining allegations of Paragraph 18, and therefore denies the same and demands strict proof thereof.

9. That this Defendant denies so much of Paragraph 19 of the Amended Complaint as asserts, or may be construed to assert, any allegation against this Defendant, and specifically denies so much thereof as alleges that the Defendant performed any act in connection with the design, developments, construction, and/or sale of the subject structures. This Defendant is without knowledge or information sufficient to form an opinion or belief as to the truth of the remaining allegations of Paragraph 19 of the Amended Complaint, and therefore denies the same and demands strict proof thereof.
10. That this Defendant denies the allegations set forth in Paragraphs 20, 21, 22, 23, and 24 of the Amended Complaint, and demand strict proof thereof.
11. That this Defendant, in responding to Paragraph 25 of the Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
12. That this Defendant would show that the allegations of Paragraphs 26, 27, and 28 of the Amended Complaint relate to parties other than this Defendant, and require no response by this Defendant; to the extent that the allegations of said paragraphs would be deemed to relate to this Defendant, such allegations are hereby specifically denied.

13. That this Defendant, in responding to Paragraph 29 of the Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
14. That this Defendant would show that the allegations of Paragraphs 30, 31, and 32 of the Amended Complaint relate to parties other than this Defendant, and require no response by this Defendant; to the extent that the allegations of said paragraphs would be deemed to relate to this Defendant, such allegations are hereby specifically denied.
15. That this Defendant, in responding to Paragraph 33 of the Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
16. That this Defendant would show that the allegations of Paragraphs 34, 35, and 36 of the Amended Complaint relate to parties other than this Defendant, and require no response by this Defendant; to the extent that the allegations of said paragraphs would be deemed to relate to this Defendant, such allegations are hereby specifically denied.
17. That this Defendant, in responding to Paragraph 37 of the Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
18. That this Defendant would show that the allegations of Paragraphs 38, 39, 41, 42, 43, 44, 45 and 46 of the Amended Complaint relate to parties other than this Defendant, and require no response by this Defendant; to the

extent that the allegations of said paragraphs would be deemed to relate to this Defendant, such allegations are hereby specifically denied.

19. That this Defendant, in responding to Paragraph 47 of the Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
20. That this Defendant would show that the allegations of Paragraphs 48, 49, 50, and 51 of the Amended Complaint relate to parties other than this Defendant, and require no response by this Defendant; to the extent that the allegations of said paragraphs would be deemed to relate to this Defendant, such allegations are hereby specifically denied.
21. That this Defendant, in responding to Paragraph 52 of the Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
22. That this Defendant would show that the allegations of Paragraphs 53, 54, 55, and 56 of the Amended Complaint relate to parties other than this Defendant, and require no response by this Defendant; to the extent that the allegations of said paragraphs would be deemed to relate to this Defendant, such allegations are hereby specifically denied.
23. That this Defendant, in responding to Paragraph 57 of the Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
24. That this Defendant would show that the allegations of Paragraphs 58 of the Amended Complaint sets forth conclusions of law, which this

Defendant need neither admit nor deny; to the extent and the allegations of said paragraph may be deemed to require a response by this Defendant, such allegations are hereby specifically denied.

25. That this Defendant denies the allegations set forth in Paragraphs 59, and 60 of the Amended Complaint.
26. That this Defendant, in responding to Paragraph 61 of the Amended Complaint, would re-allege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
27. That this Defendant would show that the allegations of Paragraphs 62 of the Amended Complaint sets forth conclusions of law, which this Defendant need neither admit nor deny; to the extent that the allegations of said paragraph may be deemed to require a response by this Defendant, such allegations are hereby specifically denied.
28. That this Defendant denies the allegations set forth in Paragraphs 63 and 64 of the Amended Complaint.

FOR AN AFFIRMATIVE DEFENSE
(Merger)

29. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
30. That this Defendant would show that, if any representations were made to the Plaintiffs during the course of negotiations between the parties, which representations are hereby specifically denied, then all representations merged into the contract between the parties.

FOR AN AFFIRMATIVE DEFENSE
(Statutes of Limitations)

- 31. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 32. That this Defendant would show that all claims asserted by the Plaintiffs are barred by the applicable statute and/or statutes of limitations.

FOR AN AFFIRMATIVE DEFENSE
(Notice)

- 33. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 34. That this Defendant would show that the Plaintiffs had constructive knowledge and/or actual knowledge of those conditions of which are alleged in the Amended Complaint, and nonetheless proceeded to purchase the subject property. Such circumstances constitute a complete bar to the Plaintiffs' claims.

FOR AN AFFIRMATIVE DEFENSE
(Insufficient Facts to Constitute Cause of Action)

- 35. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 36. That this Defendant would show that the allegations of the Amended Complaint fail to state facts sufficient to constitute a cause of action and/or causes of action against this Defendant.

FOR AN AFFIRMATIVE DEFENSE

- 37. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

38. That this Defendant would show that the Plaintiffs had no right or entitlement to rely upon any representations allegedly made by the Defendant, which representations are hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Superseding Negligence)

39. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
40. That this Defendant would show that the damages alleged by the Amended Complaint, which damages are hereby specifically denied, were the sole and proximate result of the intervening and/or superseding negligence and/or intervening and/or superseding willful acts and/or recklessness of third persons or parties, which intervening and/or superseding negligence and/or willful acts and/or other actions are a bar to the causes of action asserted against this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Contributory Negligence)

41. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
42. That this Defendant would show that the damages alleged by the Plaintiffs, which damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Plaintiffs, which actions combined and concurred with any negligence on the part of this Defendant, which

negligence is hereby specifically denied, to produce such damages, without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Comparative Negligence)

43. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
44. That this Defendant would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Plaintiffs, which acts were greater than any acts of negligence on the part of this Defendant, which acts on the part of this Defendant are hereby specifically denied, to produce such injury and/or damages, and without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Laches)

45. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
46. That this Defendant would show that the claims of the Plaintiffs are barred by the doctrine of laches.

FOR AN AFFIRMATIVE DEFENSE
(Assumption of the Risk)

47. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

48. That this Defendant would show that the Plaintiffs, by and through their actions and/or inactions with regard to the subject alleged in the Amended Complaint, have assumed the risk and/or accepted all portions of any damages alleged by the Plaintiffs and such assumption of risk and/or acceptance is a bar to claims against this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Mitigate)

49. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
50. That this Defendant would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and caused by the Plaintiffs' failure to mitigate, which failure is a complete bar to recovery by the Plaintiffs.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Estoppel)

51. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
52. That this Defendant would show that the Plaintiffs are barred by the doctrine of estoppel from asserting claims against this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Waiver)

53. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
54. That this Defendant would show that the claims of the Plaintiffs are barred by the doctrine of waiver.

FOR AN AFFIRMATIVE DEFENSE
(Economic Loss Rule)

55. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
56. That this Defendant would show that the claims of the Plaintiffs are barred by the economic loss rule.

FOR AN AFFIRMATIVE DEFENSE
(Sole Negligence of Third Parties)

57. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
58. That this Defendant would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the sole negligence and/or recklessness of third persons or parties, for whose conduct this Defendant is not liable.

FOR AN AFFIRMATIVE DEFENSE

59. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
60. That to the extent punitive damages are claimed, this Defendant demands a bifurcated jury trial pursuant to South Carolina Code Annotated §15-32-520, and demands that said damages, if any, be limited to three (3) times the amount of any compensatory damages, or the sum of \$500,000.00, whichever is greater, if any.

FOR AN AFFIRMATIVE DEFENSE
(Exclusion of Warranty)

- 61. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 62. That this Defendant would show that any and/or all applicable warranties have been properly and effectively excluded by this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Warranties)

- 63. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 64. That this Defendant would show that any and/or all applicable warranties have been properly and effectively modified by this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Limitation of Warranties)

- 65. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 66. That this Defendant would show that any and all applicable warranties have been properly and effectively limited by this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Expiration of Warranties)

- 67. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
- 68. That this Defendant would show that any relevant warranties have expired.

FOR AN AFFIRMATIVE DEFENSE
(Excluded Remedies)

69. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
70. That this Defendant would show that the available remedies have been properly and effectively excluded by this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Remedies)

71. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
72. That this Defendant would show that all applicable remedies have been properly and effectively modified by this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Limitation of Remedies)

73. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
74. That this Defendant would show that all available remedies have been properly and effectively limited by this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Warranties)

75. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
76. That this Defendant would show that any and all applicable warranties have been properly and effectively disclaimed by this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Remedies)

77. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
78. That this Defendant would show that any and all available remedies have been properly and effectively disclaimed by this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Resolution by Arbitration)

79. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
80. That this Defendant would show that, to the extent that the claims against this Defendant are subject to resolution by arbitration, the instant action against this Defendant should be dismissed.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Comply with Contractual Conditions Precedent)

81. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
82. That this Defendant would show that the Plaintiffs have failed properly to comply with contractual conditions precedent to the assertion of those claims set forth in the Amended Complaint, which failure is a bar to all claims against this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Failure to comply with Statutory Conditions Precedent)

83. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

84. That this Defendant would show that the Plaintiffs have failed to comply with the statutory conditions precedent to the assertion of claims set forth in the Amended Complaint.

FOR AN AFFIRMATIVE DEFENSE
(Failure to give notice of breach of warranty)

85. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
86. That this Defendant would show that the Plaintiffs have failed to give reasonable notice of any alleged breach of any applicable warranty, which breach of warranty or warranties is hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Insufficient Service of Process)

87. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
88. That this Defendant would show that there has been insufficient service of process upon the person of this Defendant, and the Plaintiffs' claims should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE
(Reservation and Non-Waiver)

89. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
90. That this Defendant does not waive, and hereby specifically reserves, any additional and/or further defenses, the propriety of which may be indicated by additional information which may be acquired by this Defendant or its counsel during the course of discovery or otherwise.

FOR AN AFFIRMATIVE DEFENSE
(Joint Tort Feasors Act)

91. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
92. That this Defendant would show that, in the event of a verdict rendered jointly against this Defendant and the remaining Defendants, this Defendant is entitled to contribution from said remaining Defendants, pursuant to the provisions of the South Carolina Uniform Contribution Among Joint Tort Feasors Act and/or other provisions of law.

FOR AN AFFIRMATIVE DEFENSE

93. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
94. That this Defendant would allege that any recovery against this Defendant must be set off or reduced or abated or apportioned to the extent that any other party's actions caused or contributed to any damages, if any, or as otherwise provided pursuant to relevant sections of the South Carolina Contribution Among Joint Tort Feasors Act, Section 15-38-10, et seq. SC Code Amended.

FOR AN AFFIRMATIVE DEFENSE

95. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
96. That this Defendant would show that the design and materials used in the construction of subject property in question were developed, selected, and/or approved by other defendants, thereby reliving this Defendant of

any liability or responsibility for damages resulting from design deficiencies or materials which may not have been suitable for incorporation into the subject property.

FOR AN AFFIRMATIVE DEFENSE
(Protections under Constitution(s))

97. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
98. That this Defendant would show that the imposition of punitive damages is violative of protections afforded by the 5th, 8th, and 14th and/or other amendments to the United States and/or South Carolina constitutions.

FOR AN AFFIRMATIVE DEFENSE
(Statutes of Repose)

99. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
100. That this Defendant would show that the Plaintiffs' claims are barred by the applicable statute and/or statutes of repose.

FOR AN AFFIRMATIVE DEFENSE
(Statute of Frauds)

101. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
102. That this Defendant would show that the claims of the Plaintiffs are barred by the Statute of Frauds.

FOR AN AFFIRMATIVE DEFENSE
(Learned Intermediaries and Sophisticated User Doctrine)

103. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
104. Without admitting its products were installed on the subject structure, this Defendant submits that the products installed on the structure were sold to learned intermediaries or sophisticated users who, in turn, through the exercise of their own knowledge and expertise, should have known and appreciated the proper uses and requirements of the products and, therefore, this Defendant pleads the Learned Intermediary and Sophisticated User Doctrines as a complete defense to this action.

FOR AN AFFIRMATIVE DEFENSE
(Spoliation of Evidence)

105. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
106. Without admitting that its products were installed on the subject structure, this Defendant submits that repairs may have been made to the subject structure and further, that the alleged defective products may have been destroyed. To the extent that this Defendant has not been afforded the opportunity to inspect and examine the alleged defective products and/or their components, this Defendant pleads the Spoliation of Evidence Doctrine as a complete defense to this action.

FOR AN AFFIRMATIVE DEFENSE

107. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
108. That any products designed, manufactured, and/or distributed by this Defendant are found to be the cause of damages suffered by Plaintiffs, which this Defendant hereby specifically denies, the Plaintiffs cannot recover against this Defendant if and to the extent that the use of such products was under circumstances constituting an alteration or modification of the products as provided in South Carolina Code Section 15-73-10, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

109. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
110. In the event that the products designed, manufactured, and/or distributed by this Defendant are found to be the cause of damages suffered by Plaintiffs, which this Defendant specifically hereby denies, Plaintiffs cannot recover against this Defendant if and to the extent that the use of the products was under circumstances constituting a lack of reasonable or diligent care, and/or was an unreasonable use as defined in South Carolina Code Section 15-73-10, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

111. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

112. Products manufactured by this Defendant conformed to the current state of the art at all relevant times and such products were reasonably designed. Upon information and belief, Plaintiffs claims of alleged defects in the products, which claims are hereby specifically denied, are based upon an inherent characteristic of such products, that cannot be eliminated without substantially compromising the products usefulness or desirability, which is recognized by the ordinary person with the ordinary knowledge, and to the community, such that Plaintiffs cannot recover anything from this Defendant, as provided in South Carolina Code Section 15-73-20, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

113. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
114. To the extent that any petition in bankruptcy has been filed by or on behalf of this Defendant, this Defendant would plead discharge in bankruptcy as a complete defense to any and all claims.

FOR AN AFFIRMATIVE DEFENSE

115. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
116. That this Defendant would show that the Plaintiff lacks sufficient legal privity with this Defendant to permit imposition of liability.

FOR AN AFFIRMATIVE DEFENSE

117. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
118. That this Defendant would show that it has made no representations of warranties inducing the purchase for use of its products by Plaintiffs or others, except such warranties which may be express and in writing, and such express warranties are the only and best evidence of their content and legal effect, and include lawful disclaimers of implied warranties of merchantability and fitness for a particular purpose, and include limitations and responsibility to this Defendant. This Defendant is not responsible for any warranties or representations of purchases and resellers of its products.

FOR AN AFFIRMATIVE DEFENSE

119. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
120. That the Plaintiffs are without standing to assert those claims set forth within the relevant Amended Complaint, and the Plaintiffs' claims should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

121. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
122. That this Defendant would show that the Plaintiffs have failed to comply with those conditions precedent to litigation, as set forth within the relevant

Master Deed, and the Plaintiffs' Amended Complaint, and all causes of action set forth therein, should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

123. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
124. That this Defendant is informed and believes that the Plaintiffs have failed to comply with the provisions of Sections 40-59-10 et seq., and/or Section 40-11-10 et seq., South Carolina Code of Laws (1976), as amended, and the Plaintiffs' Amended Complaint should, therefore, be stayed and/or dismissed.

FOR AN AFFIRMATIVE DEFENSE

125. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
126. That, to the extent that the Plaintiff has failed to comply with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (Section 40-59-810 through 40-59-860), and/or Sections 40-11-500 through 40-11-570, South Carolina Codes of Laws (1976), including the provision of the required notice to the Defendant, and the provisions to the Defendant of an opportunity to cure, the Plaintiffs' action must be stayed and/or otherwise barred.

FOR AN ADDITIONAL AFFIRMATIVE DEFENSE AND BY WAY OF CROSS
CLAIM AGAINST WS CONTRACTORS, LLC

127. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

128. That this Defendant is informed and believes that WS Contractors, LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that WS Contractors, LLC provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

FOR A FIRST CAUSE OF ACTION AGAINST WS CONTRACTORS, LLC

129. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

130. 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.

131. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Amended Complaint.

132. That the Cross Claim Defendant, WS Contractors, LLC, (hereinafter sometimes “Cross Claim Defendant”) was responsible for provision of materials and services in connection with the installation of the aforesaid components of construction, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of relevant building codes. In the event that the Plaintiffs establish that the materials and/or services of the Cross Claim Defendant were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event the Cross Claim Defendant has failed properly to execute its duties, which failure has allegedly caused the Plaintiffs’ damages.
133. That the respective subcontracts between this Defendant and the Cross Claim Defendant, provide for contractual indemnification in favor of BFS.
134. That the Cross Claim Defendant served as subcontractor 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 Defendant, sufficient to impose obligations of indemnity against the aforesaid Cross Claim Defendant, in favor of BFS.
135. 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 Cross Claim Defendant, 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.

136. That BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendant, 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 Defendant, entitling BFS to recover from the Cross Claim Defendant, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the Cross Claim Defendant 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.

FOR A SECOND CAUSE OF ACTION AGAINST WS CONTRACTORS, LLC

137. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
138. That the Cross Claim Defendant made express warranties that materials, services, and/or workmanship provided in conjunction with their services at the subject structures, would be as required by and in accordance with the contract documents, applicable building codes, and industry standards.
139. That the respective sub-contract agreements between BFS and the Cross Claim Defendant include provisions, by which the Cross Claim Defendant

expressly undertook to provide materials and services in accordance with the contract documents.

140. That in the event that the Plaintiffs prove that the materials and/or services provided by the Cross Claim Defendant are not in accordance with the requirements of the contract documents, industry standards, or relevant building requirements, then and in that event the Cross Claim Defendant has materially breached its express warranties.
141. That BFS is entitled to judgment against the Cross Claim Defendant in the amount of any judgment which the Plaintiffs may obtain against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of any express warranties on the part of the Cross Claim Defendant, plus BFS costs for defense, inclusive of attorneys' fees.

FOR A THIRD CAUSE OF ACTION AGAINST WS CONTRACTORS, LLC

142. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
143. That the Cross Claim Defendant made implied warranties of workmanlike services, merchantability, and fitness for particular purpose, in connection with its services in renovation, repair, and/or construction at the subject residence.
144. That in the event that the Plaintiffs prove that the services of the respective Cross Claim Defendant were deficient, then and in that event the Cross Claim Defendant has materially breached its implied warranties.

145. That BFS is entitled to judgment against the Cross Claim Defendant in the event, and to the extent that the Plaintiffs may obtain judgment against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of implied warranties, including such warranty of workmanlike service.

FOR A FOURTH CAUSE OF ACTION AGAINST WS CONTRACTORS, LLC

146. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
147. That Cross Claim Defendant owed a duty of due care in providing services and materials in connection with construction and/or repair of the subject structures.
148. In the event that the Plaintiffs prove that due care was not exercised in the provision of materials and services by the Cross Claim Defendant, then and in that event the Cross Claim Defendant has breached its duties of due care.
149. In the event that the Plaintiffs obtains judgment against BFS as a direct, foreseeable and proximate result of the negligence of the Cross Claim Defendant, then and in that event BFS is entitled to judgment against the Cross Claim Defendant for the amount of any such judgment, or any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, plus costs of defense, inclusive of attorneys' fees.

FOR A FIFTH CAUSE OF ACTION AGAINST WS CONTRACTORS, LLC

150. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
151. That the Cross Claim Defendant was contractually responsible for provision of adequate materials and services in connection with its respective undertakings regarding construction of the subject structures.
152. That in the event that the Plaintiffs prove that the BFS contract was breached due to improper or inadequate materials and/or services provided by the respective Cross Claim Defendant, then and in that event the Cross Claim Defendant has materially breached its sub-contract, by failing properly and adequately to provide materials and services in connection with construction of the subject structures.
153. That BFS is entitled to judgment against the Cross Claim Defendant in the event, and to the extent that the Plaintiffs may obtain judgment against BFS for breach of contract, or for any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, and BFS is further entitled to recover the costs of defense, inclusive of attorneys' fees.

FOR AN ADDITIONAL AFFIRMATIVE DEFENSE AND BY WAY OF THIRD PARTY CLAIMS AGAINST CHARLESTON EXTERIORS, LLC, ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL CONSTRUCTION CO., LLC, AC CONSTRUCTION CORP., L&G CONSTRUCTION GROUP, LLC, POHLMAN QUALITY CONTRACTORS, AND POHLMAN QUALITY EXTERIORS, INC.

154. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

155. That this Defendant is informed and believes that ECC Contracting, LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that ECC Contracting, LLC provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.
156. That this Defendant is informed and believes that Hurley Services, LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Hurley Services, LLC provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.
157. That this Defendant is informed and believes that McDaniel Construction Co., LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation

was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that McDaniel Construction Co., LLC provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

158. That this Defendant is informed and believes that AC Construction Corp. is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that AC Construction Corp. provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

159. That this Defendant is informed and believes that L&G Construction Group, LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that L&G Construction Group, LLC provided materials and services in

connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

160. That this Defendant is informed and believes that Charleston Exteriors, LLC, is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Charleston Exteriors, LLC provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

161. That this Defendant is informed and believes that Pohlman Quality Contractors was a South Carolina entity, which entity was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Pohlman Quality Contractors provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

162. That this Defendant is informed and believes that Pohlman Quality Exteriors, Inc., is a corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Pohlman Quality Exteriors, Inc. provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

FOR A FIRST CAUSE AS TO CHARLESTON EXTERIORS, LLC,
ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL
CONSTRUCTION CO., LLC, AC CONSTRUCTION CORP., L&G
CONSTRUCTION GROUP, LLC, POHLMAN QUALITY CONTRACTORS, AND
POHLMAN QUALITY EXTERIORS, INC.

163. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

164. 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.

165. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Amended Complaint.
166. That the Third-Party Defendants, Charleston Exteriors, LLC, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co., LLC, AC Construction Corp., L&G Construction Group, LLC, Pohlman Quality Contractors, and Pohlman Quality Exteriors, Inc. (hereinafter sometimes "Third-Party Defendants") were responsible for provision of materials and services in connection with the installation of the aforesaid components of construction, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of relevant building codes. In the event that the Plaintiffs establish that the materials and/or services of the Third-Party Defendants were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event the Third-Party Defendants have failed properly to execute their duties, which failure has allegedly caused the Plaintiffs' damages.
167. That the respective subcontracts between this Defendant and the Third-Party Defendants, provide for contractual indemnification in favor of BFS.
168. That the Third Party 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 Third-Party

Defendants, sufficient to impose obligations of indemnity against the aforesaid Third-Party Defendants, in favor of BFS.

169. 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.

170. 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.

FOR A FIRST CAUSE AS TO CHARLESTON EXTERIORS, LLC, ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL CONSTRUCTION CO., LLC, AC CONSTRUCTION CORP., L&G CONSTRUCTION GROUP, LLC, POHLMAN QUALITY CONTRACTORS, AND POHLMAN QUALITY EXTERIORS, INC.

171. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
172. That the Third Party Defendants made express warranties that materials, services, and/or workmanship provided in conjunction with their services at the subject structures, would be as required by and in accordance with the contract documents, applicable building codes, and industry standards.
173. That the respective sub-contract agreements between BFS and the Third Party Defendants include provisions, by which the Third-Party Defendants expressly undertook to provide materials and services in accordance with the contract documents.
174. That in the event that the Plaintiffs prove that the materials and/or services provided by the Third-Party Defendants are not in accordance with the requirements of the contract documents, industry standards, or relevant building requirements, then and in that event the Third-Party Defendants have materially breached their express warranties.
175. That BFS is entitled to judgment against the Third-Party Defendants in the amount of any judgment which the Plaintiffs may obtain against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of any express warranties on the part of the

Third-Party Defendants, plus BFS costs for defense, inclusive of attorneys' fees.

FOR A FIRST CAUSE AS TO CHARLESTON EXTERIORS, LLC,
ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL
CONSTRUCTION CO., LLC, AC CONSTRUCTION CORP., L&G
CONSTRUCTION GROUP, LLC, POHLMAN QUALITY CONTRACTORS,
AND POHLMAN QUALITY EXTERIORS, INC.

176. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
177. That the Third-Party Defendants made implied warranties of workmanlike services, merchantability, and fitness for particular purpose, in connection with its services in renovation, repair, and/or construction at the subject residence.
178. That in the event that the Plaintiffs prove that the services of the respective Third-Party Defendants were deficient, then and in that event the Third-Party Defendants have materially breached their implied warranties.
179. That BFS is entitled to judgment against the Third-Party Defendants in the event, and to the extent that the Plaintiffs may obtain judgment against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of implied warranties, including such warranty of workmanlike service.

FOR A FIRST CAUSE AS TO CHARLESTON EXTERIORS, LLC,
ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL
CONSTRUCTION CO., LLC, AC CONSTRUCTION CORP., L&G
CONSTRUCTION GROUP, LLC, POHLMAN QUALITY CONTRACTORS,
AND POHLMAN QUALITY EXTERIORS, INC.

180. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
181. That Third-Party Defendants owed a duty of due care in providing services and materials in connection with construction and/or repair of the subject structures.
182. In the event that the Plaintiffs prove that due care was not exercised in the provision of materials and services by the Third-Party Defendants, then and in that event the Third-Party Defendants have breached their duties of due care.
183. In the event that the Plaintiffs obtains judgment against BFS as a direct, foreseeable and proximate result of the negligence of the Third-Party Defendants, then and in that event BFS is entitled to judgment against the Third-Party Defendants for the amount of any such judgment, or any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, plus costs of defense, inclusive of attorneys' fees.

FOR A FIRST CAUSE AS TO CHARLESTON EXTERIORS, LLC,
ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL
CONSTRUCTION CO., LLC, AC CONSTRUCTION CORP., L&G
CONSTRUCTION GROUP, LLC, POHLMAN QUALITY CONTRACTORS,
AND POHLMAN QUALITY EXTERIORS, INC.

184. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

185. That the Third-Party Defendants were contractually responsible for provision of adequate materials and services in connection with their respective undertakings regarding construction of the subject structures.

186. That in the event that the Plaintiffs prove that the BFS contract was breached due to improper or inadequate materials and/or services provided by the respective Third-Party Defendants, then and in that event the Third-Party Defendants have materially breached their sub-contract, by failing properly and adequately to provide materials and services in connection with construction of the subject structures.

187. That BFS is entitled to judgment against the Third-Party Defendants in the event, and to the extent that the Plaintiffs may obtain judgment against BFS for breach of contract, or for any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, and BFS is further entitled to recover the costs of defense, inclusive of attorneys' fees.

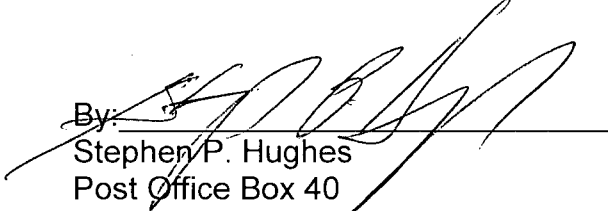
WHEREFORE, having fully answered the Amended Complaint of the Plaintiffs, and having set forth its Third-Party Complaint of Builders FirstSource-Southeast Group, LLC, this Defendant prays as follows:

- a. That the Plaintiff's Amended Complaint be dismissed, as to this Defendant, with costs to this Defendant;
- b. That Builders FirstSource-Southeast Group, LLC be granted judgment on its Cross Claim against WS Contractors, LLC;
- c. That Builders FirstSource-Southeast Group, LLC be granted judgment on its Third-Party claims against Third Party Defendants

Charleston Exteriors, LLC, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co., LLC, AC Construction Corp., L&G Construction Group, LLC; Pohlman Quality Contractors, and Pohlman Quality Exteriors, Inc.;

- d. That this Defendant have jury trial on all matters so triable;
- e. That this Defendant be granted such other and further relief as this Court may deem just and proper.

HOWELL, GIBSON & HUGHES, P.A.

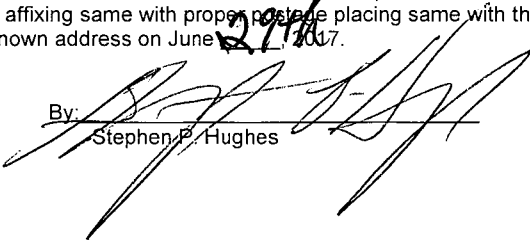
By: 
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Builders FirstSource-
Southeast Group, LLC

Beaufort, South Carolina

June 29, 2017

CERTIFICATE OF SERVICE

I certify that I served the foregoing Amended Answer to Plaintiff's Amended Complaint and Cross Claim and Third Party Complaint upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on June 29, 2017.

By: 
Stephen P. Hughes

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
)

THE RETREAT AT CHARLESTON NATIONAL
COUNTRY CLUB HOME OWNERS ASSOCIATION,
INC. AND THE RETREAT AT CHARLESTON
NATIONAL COUNTRY CLUB HORIZONTAL
PROPERTY REGIME,

) CASE NO. 2016-CP-10-3783
)

Plaintiffs,

) **SECOND AMENDED COMPLAINT**
) **(Negligence, Gross Negligence Breach**
) **or Warranties, Breach of Fiduciary**
) **Duty)**
)

vs.

) **(Jury Trial Demanded)**
)

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.; A.C. CONSTRUCTION,
INC.; L&G CONSTRUCTION GROUP, LLC;
POHLMAN QUALITY CONTRACTORS; POHLMAN
QUALITY EXTERIORS, INC., AND LIOLLIO
ARCHITECTURE,

Defendants.

The Plaintiffs, complaining of the Defendants herein, would respectfully show unto this

Honorable Court as follows:

PARTIES AND JURISDICTION

1. The Retreat at Charleston National Country Club Home Owners Association, Inc., is a non-profit corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Charleston County, South Carolina. The Retreat at Charleston National Country Club Home Owners Association, Inc. was formed pursuant to the Master Deed

and By-Laws for The Retreat at Charleston National Country Club Horizontal Property Regime to carry out the responsibilities of The Retreat at Charleston National Country Club Horizontal Property Regime and Home Owners Association, including but not limited to, the maintenance and repair of the Common Elements at The Retreat at Charleston National Country Club townhome / condominium project and to administer and enforce the covenants and restrictions of The Retreat at Charleston National Country Club Project (the “Community” or “Project”). (The Retreat at Charleston National Country Club Home Owners’ Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime are collectively referred to as “Plaintiffs”).

2. Defendant Winston Carlyle Charleston National, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Winston Carlyle Charleston National, LLC, was responsible for the planning, development, and construction of the condominium project more commonly known as The Retreat at Charleston National Country Club.

3. Winston Carlyle Charleston National, LLC is hereinafter referred to as “Winston Carlyle Defendants” and/or Developers and/or General Contractors.

4. Defendant Colin R. Campbell Construction, Inc. is, upon information and belief, a business organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Colin R. Campbell Construction, Inc., was responsible for the construction of the condominium project more commonly known as The Retreat at Charleston National Country Club.

5. Defendant Colin Campbell is, upon information and belief, an individual residing and/or

and By-Laws for The Retreat at Charleston National Country Club Horizontal Property Regime to carry out the responsibilities of The Retreat at Charleston National Country Club Horizontal Property Regime and Home Owners Association, including but not limited to, the maintenance and repair of the Common Elements at The Retreat at Charleston National Country Club townhome / condominium project and to administer and enforce the covenants and restrictions of The Retreat at Charleston National Country Club Project (the “Community” or “Project”). (The Retreat at Charleston National Country Club Home Owners’ Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime are collectively referred to as “Plaintiffs”).

2. Defendant Winston Carlyle Charleston National, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Winston Carlyle Charleston National, LLC, was responsible for the planning, development, and construction of the condominium project more commonly known as The Retreat at Charleston National Country Club.

3. Winston Carlyle Charleston National, LLC are hereinafter referred to as “Winston Carlyle Defendants” and/or Developers and/or General Contractors.

4. Defendant Colin R. Campbell Construction, Inc. is, upon information and belief, a business organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Colin R. Campbell Construction, Inc., was responsible for the construction of the condominium project more commonly known as The Retreat at Charleston National Country Club.

5. Defendant Colin Campbell is, upon information and belief, an individual residing and/or

doing business in Charleston County, South Carolina. Upon information and belief, Colin Campbell held a South Carolina Homebuilders License and was responsible for the construction of the condominium project more commonly known as The Retreat at Charleston National Country Club.

6. Defendant Colin R. Campbell Construction, Inc. and Defendant Colin Campbell, Individually are hereinafter collectively referred to as the “Campbell Defendants” and/or General Contractor.

7. Defendant Builders Firstsource-Southeast Group, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of Delaware, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Builders Firstsource-Southeast Group, LLC 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.

8. Defendant Builders Firstsource, Inc. is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of Delaware, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Builders Firstsource, Inc. 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.

9. Defendant Americo Roofing Concepts, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Defendant Americo Roofing Concepts, Inc. provided materials and/or labor, including but not limited to the installation of the roofing systems and decking

systems and all related components at all or a portion of the Project.

10. Defendant DVS, Inc. is, upon information and belief, a corporation organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Defendant DVS, Inc. provided materials and/or labor, including but not limited to the installation of the exterior siding systems, railing, window and door systems and all related components at all or a portion of the Project.

11. Defendant Advanced Building Connection, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Defendant Advanced Building Connection, LLC provided materials and/or labor, including but not limited to the framing systems and window and door systems and all related components at all or a portion of the Project.

12. Defendant Guy C. Lee Building Materials, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of North Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Guy C. Lee Building Materials, LLC 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.

13. Defendant WS Contractors, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Defendant WS Contractors, LLC provided materials and/or labor, including but not limited to the exterior siding systems, railing, framing systems, window and

door systems, and all related components at all or a portion of the Project.

14. Defendant Dino Schwartz is, upon information and belief, an individual residing and/or doing business in Charleston County, South Carolina. Upon information and belief, Dino Schwartz provided materials and/or labor, including but not limited to the framing systems and window and door systems, and all related components at all or a portion of the Project.

15. Defendant ECC Contracting, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief Defendant ECC Contracting LLC provided materials and/or labor, including but not limited to the framing systems, window and door systems and all related components at all or a portion of the Project.

16. Defendant Hurley Services, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief Defendant Hurley Services, LLC provided materials and/or labor, including but not limited to the framing systems, window and door systems and all related components at all or a portion of the Project.

17. Defendant McDaniel Construction Co., LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief Defendant McDaniel Construction Co., LLC provided materials and/or labor, including but not limited to the framing systems, window and door systems and all related components at all or a portion of the Project.

18. Defendants AC Construction Corp. and AC Construction, Inc. are, upon information and

belief, a corporation organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief Defendants AC Construction Corp. and AC Construction, Inc. provided materials and/or labor, including but not limited to the framing systems, window and door systems and all related components at all or a portion of the Project.

19. Defendant L&G Construction Group, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief Defendant L&G Construction Group, LLC provided materials and/or labor, including but not limited to the framing systems, window and door systems and all related components at all or a portion of the Project.

20. Defendant Charleston Exteriors, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief Defendant Charleston Exteriors, LLC provided materials and/or labor, including but not limited to the framing systems, window and door systems and all related components at all or a portion of the Project.

21. Defendant Pohlman Quality Contractors is, upon information and belief, a South Carolina business entity organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief Defendant Pohlman Quality Contractors provided materials and/or labor, including but not limited to the framing systems, window and door systems and all related components at all or a portion of the Project.

22. Defendant Pohlman Quality Exteriors, Inc. is, upon information and belief, a South

Carolina corporation organized and existing pursuant to the laws of the State of South Carolina, which was, at all time relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief Defendant Pohlman Quality Exteriors, Inc. provided materials and/or labor, including but not limited to the framing systems, window and door systems and all related components at all or a portion of the Project.

23. Defendant Liollo Architecture is, upon information and belief, a South Carolina corporation organized and existing pursuant to the laws of the State of South Carolina, which was, at all times relevant hereto, conducting business in Charleston County, South Carolina. Upon information and belief, Defendant Liollo Architecture was the architect for the Project and provided architectural design and post-construction inspection services for the Project.

24. Defendants 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, Charleston Exteriors, LLC, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co., LLC, AC Construction Corp., AC Construction, Inc., L&G Construction Group, LLC, Pohlman Quality Contractors, Pohlman Quality Exteriors, Inc. shall be referred to hereinafter collectively as “Subcontractor Defendants.”

25. Upon information and belief, the Winston Carlyle held legal title to certain real estate in Charleston County, South Carolina, and developed and constructed The Retreat at Charleston National Country Club Project on that real estate.

26. Venue is proper because the property is located in Charleston County and the events giving rise to the claims against these Defendants occurred in Charleston County.

27. This Court has jurisdiction over the subject matter of this action and the parties to this action.

28. The collective actions, conduct and agreements of the Defendants at all times contemplated the sale of the condominium units to individual purchasers and the formation of a property or homeowners' association to be charged with the responsibility for maintenance and repairs of the common elements of the residential units.

29. Upon information and belief, Defendants did collectively design, develop, construct and sell the Project. Developer(s), as grantor(s) and Declarant(s) of the Project, caused to be prepared and filed in the RMC Office for Charleston County, South Carolina, the Declaration of Covenants, Conditions and Restrictions for The Retreat at Charleston National Country Club Home Owners Association as well as By-laws for The Retreat at Charleston National Country Club Home Owners Association thereby committing the real estate with improvements thereon to be single-family attached residential units in the condominium form of ownership.

30. Since completion of the Project, problems with moisture and water infiltration into the interior of the buildings at the Project have occurred. An inspection of the Project site and the buildings located at the Project has resulted in the discovery of numerous construction defects impacting upon the structural integrity and safety of the Project. Upon information and belief, the problems or defects at the Project are a result of defective construction of the exteriors of the buildings.

31. The defects in and/or construction complained of include, but are not limited to, the following:

- a. Failure of the waterproofing system has caused severe damage to the structural components of the buildings by allowing water to infiltrate the buildings;
- b. Failure of the building envelope system has caused severe damage by allowing water to infiltrate the interior spaces;
- c. Improper installation of the windows;
- d. Improper fasteners and improper fastener installation and spacing;

- e. Improper application of and/or lack of sealants;
- f. Improper installation of and/or failure to install weather resistant barrier systems;
- g. Improper installation of the exterior vinyl siding;
- h. Improper application and/or lack of proper building paper
- i. Improper flashing and/or failure to install flashing throughout the project;
- j. Improper installation of and/or failure to install flashing at the wall to column termination;
- k. Lack of column supports;
- l. Improper installation of and/or failure to install blocking at sheathing panel joints;
- m. Lack of weather resistant barrier and integral flashing resulting in severe damage to the framing of porch roof and deck construction;
- n. Improper installation of and/or failure to install flashing at wall to deck intersections resulting in water intrusion into the ceiling/walkway construction and damage to framing members;
- o. Improper construction of stairs in violation of code requirements;
- p. Improper installation of and/or lack of flashing at dissimilar materials and throughout the project;
- q. Improper installation of the metal roofing system and related components;
- r. Improper installation of and/or lack of kick-out flashing in roofing systems;
- s. Improper installation of the asphalt shingle roofing system and related components;
- t. Use of improper roof nails and improper nail installation;
- u. Exposed nail heads;
- v. Holes in the roofing systems allowing water into the roofing system causing damage to the sheathing and structural components;
- w. Improper installation of and/or lack of waterproofing system(s) at decks and deck intersections;
- x. Improper installation of French doors and related components;
- y. Improper construction and installation of the exterior guard rail system and picket spacing in violation of code requirements;
- z. Improper installation of the PVC vent boots;

- aa. Use of non-galvanized fasteners;
- bb. Improper framing including cracked and buckled framing;
- cc. Decay of and damaged structural building components;
- dd. Defects causing decay of building components;
- ee. Interior damage and mold due to exterior water intrusion;
- ff. Failure to construct the Project in accordance with the applicable building codes and/or in conformance with accepted industry standards;
- gg. Failure of the building exteriors has compromised the integrity of the exterior building envelope and resulted in deterioration of the building structure;
- hh. Failure of the flashing and waterproofing systems which have caused severe damage and decay to the structural components of the Project by allowing water to infiltrate the building structure; and
- ii. Failure to construct the Project and its buildings in accordance with the applicable standard building codes and accepted construction practices.

32. Actual property damage to the Project has been caused by continuous and repeated exposure to moisture and water seeping into and around the walls, terminations, windows, doors, decks, porches and intersections, resulting from the negligent and grossly negligent construction, and development of the Project performed by the Defendants. Consequently, continuous and repeated water intrusion has resulted in physical property damage, including severe damage, rot and deterioration of the building and its structural components. Due to the construction deficiencies, continuous and repeated exposure to harmful conditions, including water intrusion, has occurred, resulting in physical and consequential damages, including but not limited to the following:

- a. physical injury to tangible property and/or the work of others caused by the continuous and repeated exposure to substantially the same harmful conditions including excessive moisture from water infiltration in and around improperly

installed windows and doors, and through negligently constructed and installed exterior cladding, sealants, joints, caulk, roofing, and waterproofing systems.

- b. physical injury to tangible property and/or the work of others caused by the continuous and repeated exposure to substantially the same harmful conditions including excessive moisture from water infiltration in and around improperly installed decks and porches, windows and doors, roofing systems and through negligently constructed and installed flashing and waterproofing systems.

33. The negligent and grossly negligent acts of omission and commission by these parties and the damages that resulted therefrom were foreseeable.

34. As a direct and proximate result and consequence of the numerous construction defects and problems at the Project, the Project has suffered substantial water intrusion, rot and deterioration and the Plaintiffs have spent and will continue to spend substantial sums of money for the extraordinary repairs and reconstruction of major portions of the Project.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence as to Defendant Developer(s) -
Winston Carlyle Charleston National, LLC)

35. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

36. Defendant Developers owed a duty to the Plaintiffs to exercise that degree of skill necessary to select an architect, engineer and contractor and to oversee the Project and otherwise deliver the Project free of construction defects and designed and built in conformity with the customary and ordinary standards of the building and construction industry.

37. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of Developers in one or more of the following particulars:

- a. in failing to properly select a design professional and contractor so that the Project would be designed and built by methods of construction and design conforming with accepted industry standards;
- b. in allowing and/or accepting non-conforming or defective work;
- c. in failing to properly oversee the Project in order to ensure that all work proceeded in accordance with the plans and specifications and also in conformity with the customary and ordinary standards of the construction industry; and
- d. in failing to inform the architect, engineer and contractor of any defects found in the Project.
- e. In failing to properly inform the unit owners of the conditions known or which should have been known at the time each owner purchased a unit;
- f. In failing to turn the common elements over to the Association in good condition or with sufficient funds for the Association to repair the common elements; and
- g. In failing to act as a reasonable and prudent developer would have acted under the circumstances then and there existing.

38. As a direct and proximate result and consequence of the negligence and/or gross negligence of Developers, the Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structure, the costs of experts, loss of use, depreciation in value, and such punitive damages as may be appropriate.

FOR A SECOND CAUSE OF ACTION
(Breach of Express Warranties as to Defendant Developer(s) –
Winston Carlyle Charleston National, LLC)

39. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

40. Defendant Developers represented and warranted that the Project, including the project units and the general common elements, were of the highest quality. Those representations and warranties were made in connection with the sale of the units and formation of The Retreat at Charleston National Country Club Home Owners Association.

41. Defendant Developers breached their express warranty by producing, selling and turning over to the Plaintiffs, an inferior and rapidly deteriorating project, plagued with extensive and severe construction defects and problems.

42. As a direct and proximate result and consequence of Defendant Developers' breach of express warranty, the Plaintiffs have suffered injuries and damages in the amount equal to the extraordinary repair, maintenance and reconstruction cost required and to be required over the expected life of the structure, loss of use and depreciation in value, the costs of experts, and such punitive damages as may be appropriate.

FOR A THIRD CAUSE OF ACTION
(Breach of Implied Warranty as to Defendant Developer(s) –
Winston Carlyle Charleston National, LLC)

43. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

44. Defendant Developers, as seller, grantor and developer, made implied warranties of habitability and fitness for intended use.

45. Defendant Developers have breached their implied warranty by producing, selling and turning over to the Plaintiffs an inferior and rapidly deteriorating project plagued with extensive and severe construction defects and problems.

46. As a direct and proximate result and consequence of Defendant Developers' breach of their implied warranty, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repairs, maintenance and reconstruction costs required and to be required over

the expected life of the structure, loss of use, the costs of experts, and depreciation in value.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty- as to Defendant Developer(s) –
Winston Carlyle Charleston National, LLC)

47. Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

48. Defendants at all times during which they were or were in control of Directors of The Retreat at Charleston National Country Club Home Owners' Association, were charged with the duty of administration, care and maintenance of the regime property and its common elements according to the terms of the Master Deed and with safeguarding any interests and rights of the members, both present and future, of the regime as unit owners or they undertook such duties.

49. Upon information and belief, from its inception and for a period of time afterwards, Developers controlled The Retreat at Charleston National Country Club Home Owners' Association.

50. Developers, as a controlling entity, owed a fiduciary duty to the Plaintiffs to inform them of any deficiencies in the construction of The Retreat at Charleston National Country Club Project.

51. Developers, as a controlling entity, also owed a fiduciary duty to the Plaintiffs to disclose any defects in construction of The Retreat at Charleston National Country Club Project.

52. Developers breached their fiduciary duty to the Plaintiffs by failing to disclose construction defects to the Plaintiffs prior to relinquishing control of the Board of Directors to the owners.

53. Developers owed a fiduciary duty to Plaintiffs to turn over the common elements of the Regime to The Retreat at Charleston National Country Club Home Owners Association in good condition, or to provide funds to Plaintiffs to remedy any defects in the common areas.

54. Developers breached their fiduciary duty to Plaintiffs by turning over to Plaintiffs a deteriorating and defective townhome project without providing The Retreat at Charleston National Country Club Home Owners' Association with any funds to effectuate necessary repairs.

55. Defendants owed a duty to Plaintiffs to exercise that degree of skill necessary to insure that the regime property was properly maintained and to keep the owners informed of serious defects found or discovered and to protect the owners' property interest in conformity with customary and ordinary standards.

56. As a direct and proximate result and consequence of the aforementioned negligent, grossly negligent and reckless acts or omissions of Defendants, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repairs, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, the costs of experts, and depreciation in value.

FOR A FIFTH CAUSE OF ACTION

**(Negligence/Gross Negligence as the General Contractor –
Winston Carlyle Defendants; Defendant Colin R. Campbell Construction, Inc. and
Defendant Colin Campbell, Individually/Campbell Defendants)**

57. Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

58. Defendants as the general contractors owed a duty to the Plaintiffs to exercise that degree of skill necessary to construct, supervise and review the design and otherwise deliver the Project free of construction defects and to ensure that the Project was designed and built in conformity with the customary and ordinary standards of the building and construction industry.

59. The deficiencies and defects which exist at the Project are the proximate and direct result of the negligence and/or gross negligence of Defendants in more of the following

particulars:

- 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 materials; and/or installing materials not in accordance with the plans and specifications, or in violation of the manufacturer's instructions;
- b. in using and supplying defective material;
- c. by installing materials not in accordance with the plans and specifications;
- d. by installing materials in violation of manufacturer's instructions;
- e. in failing to properly supervise the subcontractors and/or 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;
- f. in accepting non-conforming or defective material or labor;
- 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;
- i. in failing to adequately construct a waterproofing system on the exterior of the building thereby allowing water to infiltrate the interior of the building;
- j. in failing to inform the architect and/or developer of the defects in the plans and specifications; and

k. In failing to act as a reasonable and prudent contractor would act under the circumstances then and there existing.

60. Defendants knew or should have known its actions and work were in breach of their duties owed to Plaintiffs.

61. As a direct and proximate result and consequence of the negligence and/or gross negligence of Defendants, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, costs of hiring experts, depreciation in value and such punitive damages as may be appropriate.

FOR A SIXTH CAUSE OF ACTION
(Breach of Warranties as the General Contractor –
Winston Carlyle Defendants and Campbell Defendants)

62. The Plaintiffs incorporate into this cause of action the allegations above as fully as if repeated verbatim herein.

63. Upon information and belief, Defendants made express warranties in connection with contracting to build the Project to the effect that the building would be free from construction defects.

64. Defendants also impliedly warranted that the Project would be constructed in a careful, diligent and workmanlike manner, free of construction deficiencies.

65. Defendants breached their express and implied warranties in the following particulars:

- a. in failing to properly construct the Project by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
- b. in using and supplying defective material;
- c. by installing materials not in accordance with the plans and specifications;

- d. by installing materials in violation of manufacturer's instructions;
- e. in performing work which violated applicable building codes;
- f. in failing to properly supervise employees, agents and subcontractors to ensure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
- g. in accepting defective and/or non-conforming materials and labor;

66. As a direct and proximate result and consequence of Defendant General Contractor's breach of warranties, the Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, costs of hiring experts, depreciation in value and such punitive damages as may be appropriate.

FOR A SEVENTH CAUSE OF ACTION

(Negligence/Gross Negligence/ Defendants Subcontractors - 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, Charleston Exteriors, LLC, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co., LLC, AC Construction Corp., AC Construction, Inc., L&G Construction Group, LLC, Pohlman Quality Contractors, and Pohlman Quality Exteriors, Inc.)

67. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.
68. The Subcontractor Defendants, and each of them individually, owed a duty to Plaintiff to exercise that degree of skill necessary to construct, supervise and review their work, and the work of other trades and to otherwise deliver the building free of construction defects and ensure that the building was constructed in conformity with the customary and ordinary standards of the building and construction industry.

69. 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, and each of them individually, in one or more of the following particulars:

- 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.

70. As a direct and proximate result and consequence of the negligence and/or gross negligence of the Subcontractor Defendants, Plaintiff has suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use, depreciation in value and such punitive damages as may be appropriate.

FOR AN EIGHTH CAUSE OF ACTION

(Breach of Implied Warranty/Defendants Subcontractors - 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, Charleston Exteriors, LLC, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co., LLC, AC Construction Corp., AC Construction, Inc., L&G Construction Group, LLC, Pohlman Quality Contractors, and Pohlman Quality Exteriors, Inc.)

71. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.
72. The Subcontractor Defendants impliedly warranted that the Project would be constructed in a careful, diligent and workmanlike manner, free of construction deficiencies.
73. The Subcontractor Defendants and each of them individually breached the implied warranties in one or more of the following particulars:
- a. in failing to properly construct the project by deviating from the plans and specifications and/or failing to employ practices and methods of construction conforming to the customary and ordinary standards of the construction industry;
 - b. in using and supplying defective material;
 - c. by installing materials not in accordance with the plans and specifications;
 - d. by installing materials in violation of manufacturer's instructions;

- e. in performing work and constructing the Project in violation of the applicable building codes;
- f. in failing to properly supervise employees, agents and subcontractors to ensure that all work proceeded in accordance with the plans and specifications and in conformity with industry standards;
- g. in accepting defective and/or non-conforming materials and labor;
- h. in providing deficient and/or defective workmanship and/or materials, without proper inspections to ensure that the work was correct and in conformity with customary industry standards and in accordance with the plans and specifications and the manufacturer's instructions;
- i. in failing to adequately construct a waterproofing system on the exterior of the building such as to allow water to infiltrate the interior of the building; and
- j. in failing to advise the architect, owner or general contractor of defects in the plans and specifications.

74. As a direct and proximate result and consequence of the Subcontractor Defendants' breach of implied warranties, Plaintiff has suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use and depreciation in value.

FOR A NINTH CAUSE OF ACTION
(Negligence/Gross Negligence/Architect – Liollo Architecture)

75. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.

76. Defendant Architect undertook to perform investigations of the construction work at the Project and to certify that the exterior construction was proper.

77. In undertaking to perform the inspections of the construction work, Defendant Liollo owed a duty to Plaintiffs to exercise that degree of skill necessary to inspect and review the design and construction of the Project to insure that the Project was built in conformity with the plans and specifications it provided for the Project and in accordance with the customary and ordinary standards of the building and constructions industry and applicable building codes.
78. Defendant was negligent, and/or grossly negligent in its design and/or inspection of the Project in one or more of the following particulars:
- a. Inadequate inspection and acceptance of defective or non-conforming construction work;
 - b. Failure to design and insure construction in compliance with industry standards, applicable building codes and acceptable building practices;
 - c. Failure to notify the owner, developer or general contractor that the materials supplied were (1) non-conforming or defective and/or (2) were not installed according to the plans and specifications and/or (3) were not installed according to manufacturer's instructions and industry standards; and
 - d. In failing to act as a reasonable and prudent architect would act under the circumstances then and there existing.

See the affidavit of Gary Freeman (Exhibit 1) previously filed in this matter.

79. As a direct and proximate result and consequence of the negligence and gross negligence of Defendant Architect, Plaintiffs have suffered injuries and damages in an amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structures, loss of use, depreciation in value and such punitive damages as may be appropriate.

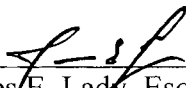
FOR A TENTH CAUSE OF ACTION
(Breach of Express and Implied Warranty/Architect – Liollo Architecture)

80. Plaintiff references and incorporates every allegation set forth above as if fully repeated verbatim herein.
81. Defendant Architect expressly and impliedly warranted that its design and inspection of the Project would be of the highest quality and in conformance with the generally accepted standards of the architectural and construction industry.
82. Defendant Architect further expressly and impliedly warranted that the construction work would be approved and inspected in a careful, diligent and workmanlike manner, assuring the work was in accordance with the contract documents and free of construction defects.
83. Defendant Architect breached its express and implied warranties in one or more of the following particulars:
- a. In failing to properly inspect the Project to insure that the construction work was performed in accordance with the plans and specifications and accepted industry standards;
 - b. In failing to notify the owner, developer or general contractor that the materials supplied were (1) non-conforming or defective and/or (2) were not installed according to the plans and specifications and/or (3) were not installed according to manufacturer's instructions and industry standards;
 - c. In failing to design and insure construction in compliance with industry standards, applicable building codes and acceptable building practices; and
 - d. In accepting defective and/or non-conforming materials and labor; and
 - e. In failing to act as a reasonable and prudent architect would act under the circumstances then and there existing.
84. As a result of the Architect's breach of the express and implied warranties, Plaintiffs are entitled to such actual and consequential damages as this Court may deem appropriate,

including but not limited to the amount equal to the extraordinary repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, loss of use and depreciation in value.

WHEREFORE, Plaintiffs pray for judgment against the Defendants for such actual, consequential and punitive damages as this Court deems appropriate and for such other and further relief as is just and proper, including costs, pre-judgment interest and attorney's fees.

MULLEN WYLIE, LLC

By: 
James E. Lady, Esq. (SC Bar No. 15135)
171 Church Street, Suite 370
Charleston, South Carolina 29401
Tel: (843) 853-6200/Fax (843) 853-8994
Email: jlady@mullenwylie.com

AND

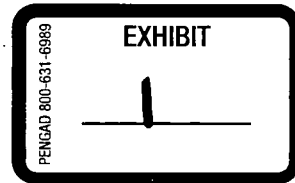
Robert L. Wylie, IV, Esq. (SC Bar No. 13052)
Post Office Box 1980
Myrtle Beach, South Carolina 29578
Tel: (843) 449-4800/Fax (843) 497-0449
Email: rwylie@mullenwylie.com

AND

J. Ryan Oates, Esquire
McCabe, Trotter & Beverly, PC
Post Office Box 212069
Columbia, South Carolina 29221
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Email: ryan.oates@mccabetrotter.com

ATTORNEYS FOR PLAINTIFFS

June 18, 2018
Charleston, South Carolina



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

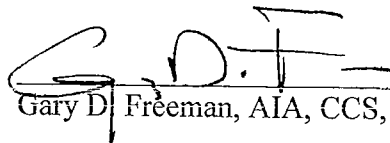
**AFFIDAVIT OF GARY D. FREEMAN, AIA,
CCS, NCARB**

PERSONALLY appeared before me, Gary D. Freeman, who, having being duly sworn,
deposes and states as follows:

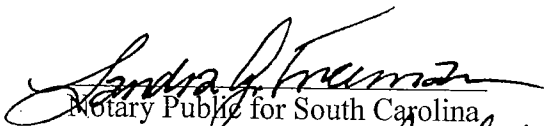
1. That I am a design professional and licensed architect in the State of South Carolina with my principle place of business in Awendaw, South Carolina;
2. I have actual professional knowledge and experience in the area of architecture as a result of having been regularly engaged in the active practice of architecture and design for the past 35 years;
3. I am routinely responsible for existing facility condition surveys and failure analysis of building components as well as analysis of contracts, building codes, and life safety issues. I have broad experience in the evaluation and research of industry standards as they relate to building violations;
4. My education, training, and experience are set forth in the attached CV (Exhibit A).
5. That my practice includes forensic architecture, and I have been qualified as an expert in the courts of South Carolina;
6. That I have investigated and observed the conditions at the Retreat at Charleston National Townhome Project in Mt. Pleasant, South Carolina ("The Retreat"), and I have reviewed the architectural design drawings for the Project;
7. The findings from my investigation are in my reports dated May 6, 2016, December 6, 2017, and January 19, 2018 attached as Exhibit B to this affidavit;
8. It is my understanding that Liollio Architecture designed the buildings at The Retreat and inspected the buildings after they were built to ensure the exterior was constructed properly.

9. That in observing the conditions of The Retreat and the construction of the units at that project, I have noted numerous violations of industry standards and the applicable building code.
10. That as a result of my observations, it is my opinion that Liollo Architecture failed to identify deficiencies in the construction of the Project and failed to identify deficiencies in the construction which did not conform with industry standards and did not comply with applicable building codes;
11. That as a result of my observations, it is my opinion that Liollo Architecture was negligent and failed to conform to the standard of care required of a design professional in its role during the inspection of the Retreat at Charleston National Townhome Project.
12. My review and evaluation of the Project is ongoing and the opinions expressed herein are not intended to be exhaustive or final. I reserve the right to supplement or amend this affidavit and/or my professional opinion after reviewing additional design drawings, records, data, depositions, or other information relating to the design and construction of Retreat at Charleston National Townhome Project in Mt. Pleasant, South Carolina.

FURTHER, AFFIANT SAITH NOT.


Gary D. Freeman, AIA, CCS, NCARB

SWORN TO before me this
16th day of February 2018.


Notary Public for South Carolina
My commission expires: April 17, 2018

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO: 2016-CP-10-03783

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

Plaintiffs,

vs.

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;
Pohlman Quality Contractors;
Pohlman Quality Exteriors, Inc., Liollo
Architecture,

Defendants.

Builders FirstSource-Southeast Group,
LLC,

Third Party Plaintiff,

vs.

WS Contractors; ECC Contracting,
LLC; Hurley Services, LLC; McDaniel
Construction Co., LLC; AC

ANSWER OF DEFENDANT
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC, AND
BUILDERS FIRSTSOURCE INC.,
TO THE PLAINTIFFS SECOND
AMENDED COMPLAINT, AND
CROSS CLAIMS OF BUILDERS
FIRSTSOURCE-SOUTHEAST
GROUP, LLC AGAINST WS
CONTRACTORS LLC, ECC
CONTRACTING, LLC, HURLEY
SERVICES, LLC, MCDANIEL
CONSTRUCTION COMPANY,
LLC, AC CONSTRUCTION
CORP, AC CONSTRUCTION
INC, LG CONSTRUCTION
GROUP, LLC, POLHMAN
QUALITY CONTRACTORS, AND
POLHMAN QUALITY
EXTERIORS, INC.

Construction Corp.; AC Construction,	)
Inc.and L&G Construction Group,	)
LLC; Pohlman Quality Contractors;	)
and Pohlman Quality Exteriors, Inc.	)
	)
<u>Third Party Defendants.</u>	)
	)
	)

The Defendants, Builders FirstSource-Southeast Group, LLC, and Builders FirstSource Inc., (hereinafter sometimes collectively “these defendants”), answering the Second Amended Complaint of the Plaintiffs, asserting the cross claim of Builders FirstSource-Southeast Group, LLC, and reserving all rights under any and or all pending and/or hereinafter filed motions, would respectfully allege unto this Honorable court as follows:

FOR A FIRST DEFENSE

1. That each and every allegation set forth within the second amended complaint, not hereinafter specifically admitted, is denied, and strict proof demanded thereof.

2. That these Defendants, are without knowledge or information sufficient to form an opinion or belief as to the truth the allegations set forth in Paragraph 1 through 6 of the second amended complaint, and therefor deny the same and demand strict proof thereof.

3. That these defendants admit only so much of paragraph 7 of the second amended complaint as alleges that the defendant, Builders FirstSource-Southeast Group, LLC, is a limited liability company organized and

existing pursuant to the laws of the state of Delaware, and so much thereof as alleges that Builders FirstSource-Southeast Group, LLC was conducting business in Charleston County, South Carolina at all time relevant hereto.

4. That these defendants deny the allegations set forth in paragraph 8 of the second amended complaint.
5. That these defendants would show that the allegations of paragraph 9 through 23 of the second amended complaint relate to parties other than these defendants, and require no response by these defendants: to the extent that the allegations of said paragraphs may be deemed to require a response by these defendants, such allegations are specifically denied.
6. That these defendants admit only so much of paragraph 24 of the second amended complaint as alleges that the defendants designated therein will be referred to collectively, within the second amended complaint, as "Subcontractor Defendants".
7. That these defendants are without knowledge or information sufficient to form an opinion or belief as to the truth of the allegations set forth in paragraph 25 of the second amended complaint.
8. That these defendants would show that the allegations of paragraphs 26 and 27 of the second amended complaint set forth conclusions of law, which these defendants need neither admit or deny.
9. That these defendants deny so much of paragraph 28 of the second amended complaint as asserts, or may be construed to assert, any

allegation against these defendants, and demand strict proof thereof. These defendants are without knowledge or information sufficient to form an opinion or belief as to the truth of the remaining allegations of paragraph 28, and therefor deny the same and demand strict proof thereof.

10. That these defendants deny so much of paragraph 29 of the second amended complaint as asserts, or maybe construed to assert, any allegation against these defendants, and specifically deny so much thereof as alleges that the defendant, Builders FirstSource, Inc., performed any action in connection with the design, development, construction, and/or sale of the subject structures. These defendants are without knowledge or information sufficient to form an opinion or belief as to the truth the remaining allegations of paragraph 29 of the second amended complaint, and therefor deny the same and demand strict proof thereof.
11. That these defendants deny the allegations set forth in paragraphs 30, 31, 32, 33, and 34 of the second amended complaint, and demand strict proof thereof.
12. That these defendants, in responding to paragraph 35 of the second amended complaint, would reallege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
13. That these defendants would show that the allegations of paragraphs 36, 37, and 38 of the second amended complaint relate to parties other than these defendants, and require no response by these defendants; to the

extent that the allegations of said paragraphs may be deemed to require a response by these defendants, such allegations are hereby specifically denied.

14. That these defendants, in responding to paragraph 39 of the second amended complaint, would reallege and reiterate each and every allegation set forth in the proceeding paragraphs hereof.
15. That these defendants would show that the allegations of paragraphs 40, 41, and 42 of the second amended complaint relate to parties other than these defendants, and require no response by these defendants; to the extent that the allegations of said paragraphs may be deemed to require a response by these defendants, such allegations are hereby specifically denied.
16. That these defendants, in responding to paragraph 43 of the second amended complaint, would reallage and reiterate each and every allegation set forth in the preceding paragraphs hereof.
17. That these defendants would show that the allegations of paragraphs 44, 45, and 46 of the second amended complaint relate to parties other than these defendants, and require no response by these defendants; to the extent that the allegations of said paragraphs may be deemed to require a response by these defendants, such allegations are hereby specifically denied.

18. That these defendants, in responding to paragraph 47 of the second amended complaint, would reallege and reiterate each and every allegations set forth in the preceding paragraphs hereof.
19. That these defendants would show that the allegations of paragraphs 48 through 56 of the second amended complaint relate to parties other than these defendants and require no response by these defendants; to the extent that the allegations of certain paragraphs may be deemed to require a response by these defendants, such allegations are hereby specifically denied.
20. That thee defendants, in responding to paragraph 57 of the second amended complaint, would reallage and reiterate each and every allegation set forth in the preceding paragraphs hereof.
21. That these defendants would show that the allegations of paragraphs 58 through 61 of the second amended complaint relate to parties other than these defendants, and require no response by these defendants; to the extent that the allegations of paragraphs may be deemed to require response by these defendants, such allegations are hereby specifically denied.
22. That these defendants, in responding to paragraph 62 of the second amended complaint, would reallage and reiterate each and every allegation set forth in the preceding paragraphs hereof.
23. That these defendants would show that the allegations of paragraphs 63 through 66 of the second amended complaint relate to parties other than

these defendants, and require no response by these defendants; to the extent that the allegations of said paragraphs may be deemed to require a response by these defendants, such allegations are hereby specifically denied.

24. That these defendants, in responding to paragraphs 67 of the second amended complaint, would reallege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
25. That these defendants would show that the allegations of paragraph 68 of the second amended complaint set forth conclusions of law, which these defendants neither admit nor deny; to the extent that the allegations of said paragraph may be deemed to require a response by this defendant, such allegations are hereby specifically denied.
26. That these defendants deny the allegations set forth in paragraphs 69 and 70 of the second amended complaint.
27. That these defendants, in responding to paragraph 71 of the second amended complaint, would reallage and reiterate each and every allegation set forth in the preceding paragraphs hereof.
28. That these defendants would show that the allegations of paragraph 72 of the second amended complaint set forth conclusions of law, which these defendants need neither admit nor deny; to the extent that the allegations of said paragraph may be deemed to require a response by these defendants, such allegations are hereby specifically denied.

29. That these defendants deny the allegation set forth in paragraphs 73 and 74 of the second amended complaint.
30. That these defendants, in responding to paragraph 75 of the second amended complaint, would reallege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
31. That these defendants would show that the allegations of paragraphs 76 through 79 relate to parties other than these defendants, and require no response by these defendants; to the extent that the allegations of said paragraphs may be deemed to require a response by these defendants, such allegations are hereby specifically denied.
32. That these defendants, in responding to paragraph 80 of the second amended complaint would reallege and reiterate each and every allegation set forth in the preceding paragraphs hereof.
33. That these defendants would show that the allegations of paragraphs 81 through 84 of the second amended complaint relate to parties other than these defendants, and require no response by these defendants; to the extent that the allegations of said paragraphs may be deemed to require a response by these defendants, such allegations are hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Statutes of Limitations)

34. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

35. That these Defendants would show that all claims asserted by the Plaintiffs are barred by the applicable statute and/or statutes of limitations.

FOR AN AFFIRMATIVE DEFENSE
(Notice)

36. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
37. That these Defendants would show that the Plaintiffs had constructive knowledge and/or actual knowledge of those conditions of which are alleged in the 2nd Amended Complaint, and nonetheless proceeded to purchase the subject property. Such circumstances constitute a complete bar to the Plaintiffs' claims.

FOR AN AFFIRMATIVE DEFENSE
(Insufficient Facts to Constitute Cause of Action)

38. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
39. That these Defendants would show that the allegations of the 2nd Amended Complaint fail to state facts sufficient to constitute a cause of action and/or causes of action against this Defendant.

FOR AN AFFIRMATIVE DEFENSE

40. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
41. That these Defendants would show that the Plaintiffs had no right or entitlement to rely upon any representations allegedly made by the Defendant, which representations are hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Superseding Negligence)

42. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
43. That these Defendants would show that the damages alleged by the 2nd Amended Complaint, which damages are hereby specifically denied, were the sole and proximate result of the intervening and/or superseding negligence and/or intervening and/or superseding willful acts and/or recklessness of third persons or parties, which intervening and/or superseding negligence and/or willful acts and/or other actions are a bar to the causes of action asserted against these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Contributory Negligence)

44. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
45. That these Defendants would show that the damages alleged by the Plaintiffs, which damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Plaintiffs, which actions combined and concurred with any negligence on the part of these Defendants, which negligence is hereby specifically denied, to produce such damages, without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Comparative Negligence)

46. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
47. That these Defendants would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and damages are hereby specifically denied, were due to and caused by the reckless, willful, wanton, negligent, careless and grossly negligent acts and conduct of the Plaintiffs, which acts were greater than any acts of negligence on the part of this Defendant, which acts on the part of these Defendants are hereby specifically denied, to produce such injury and/or damages, and without which the same would not have occurred.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Laches)

48. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
49. That these Defendants would show that the claims of the Plaintiffs are barred by the doctrine of laches.

FOR AN AFFIRMATIVE DEFENSE
(Assumption of the Risk)

50. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
51. That these Defendants would show that the Plaintiffs, by and through their actions and/or inactions with regard to the subject alleged in the Amended Complaint, have assumed the risk and/or accepted all portions of any

damages alleged by the Plaintiffs and such assumption of risk and/or acceptance is a bar to claims against this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Mitigate)

52. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
53. That these Defendants would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and caused by the Plaintiffs' failure to mitigate, which failure is a complete bar to recovery by the Plaintiffs.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Estoppel)

54. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
55. That these Defendants would show that the Plaintiffs are barred by the doctrine of estoppel from asserting claims against this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Doctrine of Waiver)

56. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
57. That these Defendants would show that the claims of the Plaintiffs are barred by the doctrine of waiver.

FOR AN AFFIRMATIVE DEFENSE
(Economic Loss Rule)

58. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
59. That these Defendants would show that the claims of the Plaintiffs are barred by the economic loss rule.

FOR AN AFFIRMATIVE DEFENSE
(Sole Negligence of Third Parties)

60. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
61. That these Defendants would show that the injuries and/or damages alleged by the Plaintiffs, which injuries and/or damages are hereby specifically denied, were due to and were the proximate result of the sole negligence and/or recklessness of third persons or parties, for whose conduct these Defendants are not liable.

FOR AN AFFIRMATIVE DEFENSE

62. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
63. That to the extent punitive damages are claimed, these Defendants demand a bifurcated jury trial pursuant to South Carolina Code Annotated §15-32-520, and demands that said damages, if any, be limited to three (3) times the amount of any compensatory damages, or the sum of \$500,000.00, whichever is greater, if any.

FOR AN AFFIRMATIVE DEFENSE
(Exclusion of Warranty)

64. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
65. That these Defendants would show that any and/or all applicable warranties have been properly and effectively excluded by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Warranties)

66. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
67. That these Defendants would show that any and/or all applicable warranties have been properly and effectively modified by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Limitation of Warranties)

68. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
69. That these Defendants would show that any and all applicable warranties have been properly and effectively limited by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Expiration of Warranties)

70. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

71. That these Defendants would show that any relevant warranties have expired.

FOR AN AFFIRMATIVE DEFENSE
(Excluded Remedies)

72. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
73. That these Defendants would show that the available remedies have been properly and effectively excluded by this Defendant.

FOR AN AFFIRMATIVE DEFENSE
(Modification of Remedies)

74. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
75. That these Defendants would show that all applicable remedies have been properly and effectively modified by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Limitation of Remedies)

76. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
77. That these Defendants would show that all available remedies have been properly and effectively limited by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Warranties)

78. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

79. That these Defendants would show that any and all applicable warranties have been properly and effectively disclaimed by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Disclaimer of Remedies)

80. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

81. That these Defendants would show that any and all available remedies have been properly and effectively disclaimed by these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Resolution by Arbitration)

82. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

83. That these Defendants would show that, to the extent that the claims against these Defendants are subject to resolution by arbitration, the instant action against these Defendants should be dismissed.

FOR AN AFFIRMATIVE DEFENSE
(Failure to Comply with Contractual Conditions Precedent)

84. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

85. That these Defendants would show that the Plaintiffs have failed properly to comply with contractual conditions precedent to the assertion of those claims set forth in the 2nd Amended Complaint, which failure is a bar to all claims against these Defendants.

FOR AN AFFIRMATIVE DEFENSE
(Failure to comply with Statutory Conditions Precedent)

86. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

87. That these Defendants would show that the Plaintiffs have failed to comply with the statutory conditions precedent to the assertion of claims set forth in the 2nd Amended Complaint.

FOR AN AFFIRMATIVE DEFENSE
(Failure to give notice of breach of warranty)

88. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

89. That these Defendants would show that the Plaintiffs have failed to give reasonable notice of any alleged breach of any applicable warranty, which breach of warranty or warranties is hereby specifically denied.

FOR AN AFFIRMATIVE DEFENSE
(Insufficient Service of Process)

90. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

91. That this Defendant would show that there has been insufficient service of process upon the person of this Defendant, and the Plaintiffs' claims should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE
(Reservation and Non-Waiver)

92. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

93. That these Defendants do not waive, and hereby specifically reserve, any additional and/or further defenses, the propriety of which may be indicated

by additional information which may be acquired by these Defendants or their counsel during the course of discovery or otherwise.

FOR AN AFFIRMATIVE DEFENSE
(Joint Tort Feasors Act)

94. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
95. That these Defendants would show that, in the event of a verdict rendered jointly against these Defendants and the remaining Defendants, these Defendants are entitled to contribution from said remaining Defendants, pursuant to the provisions of the South Carolina Uniform Contribution Among Joint Tort Feasors Act and/or other provisions of law.

FOR AN AFFIRMATIVE DEFENSE

96. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
97. That these Defendants would allege that any recovery against these Defendants must be set off or reduced or abated or apportioned to the extent that any other party's actions caused or contributed to any damages, if any, or as otherwise provided pursuant to relevant sections of the South Carolina Contribution Among Joint Tort Feasors Act, Section 15-38-10, et seq. SC Code Amended.

FOR AN AFFIRMATIVE DEFENSE

98. That each and every allegation set forth in preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

99. That these Defendants would show that the design and materials used in the construction of subject property in question were developed, selected, and/or approved by other defendants, thereby reliving these Defendants of any liability or responsibility for damages resulting from design deficiencies or materials which may not have been suitable for incorporation into the subject property.

FOR AN AFFIRMATIVE DEFENSE

100. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
101. That these Defendants would show that the Plaintiffs' claims are barred by the applicable statute and/or statutes of repose.

FOR AN AFFIRMATIVE DEFENSE
(Statute of Frauds)

102. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
103. That these Defendants would show that the claims of the Plaintiffs are barred by the Statute of Frauds.

FOR AN AFFIRMATIVE DEFENSE
(Spoliation of Evidence)

104. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
105. Without admitting that its products were installed on the subject structure, these Defendants submit that repairs may have been made to the subject structure and further, that the alleged defective products may have been

destroyed. To the extent that these Defendants have not been afforded the opportunity to inspect and examine the alleged defective products and/or their components, these Defendants plead the Spoliation of Evidence Doctrine as a complete defense to this action.

FOR AN AFFIRMATIVE DEFENSE

106. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
107. That any products designed, manufactured, and/or distributed by these Defendants are found to be the cause of damages suffered by Plaintiffs, which these Defendants hereby specifically deny, the Plaintiffs cannot recover against these Defendants if and to the extent that the use of such products was under circumstances constituting an alteration or modification of the products as provided in South Carolina Code Section 15-73-10, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

108. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
109. In the event that the products designed, manufactured, and/or distributed by this Defendant are found to be the cause of damages suffered by Plaintiffs, which these Defendants specifically hereby deny, Plaintiffs cannot recover against these Defendants if and to the extent that the use of the products was under circumstances constituting a lack of reasonable

or diligent care, and/or was an unreasonable use as defined in South Carolina Code Section 15-73-10, and/or otherwise.

FOR AN AFFIRMATIVE DEFENSE

110. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
111. To the extent that any petition in bankruptcy has been filed by or on behalf of this Defendant, this Defendant would plead discharge in bankruptcy as a complete defense to any and all claims.

FOR AN AFFIRMATIVE DEFENSE

112. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
113. That these Defendants would show that the Plaintiff lacks sufficient legal privity with these Defendants to permit imposition of liability.

FOR AN AFFIRMATIVE DEFENSE

114. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
115. That these Defendants would show that they have made no representations of warranties inducing the purchase for use of its products by Plaintiffs or others, except such warranties which may be express and in writing, and such express warranties are the only and best evidence of their content and legal effect, and include lawful disclaimers of implied warranties of merchantability and fitness for a particular purpose, and include limitations and responsibility to these Defendants. These

Defendants are not responsible for any warranties or representations of purchases and resellers of its products.

FOR AN AFFIRMATIVE DEFENSE

116. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
117. That the Plaintiffs are without standing to assert those claims set forth within the relevant Amended Complaint, and the Plaintiffs' claims should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

118. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
119. That these Defendants would show that the Plaintiffs have failed to comply with those conditions precedent to litigation, as set forth within the relevant Master Deed, and the Plaintiffs' Amended Complaint, and all causes of action set forth therein, should therefore be dismissed.

FOR AN AFFIRMATIVE DEFENSE

120. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
121. That these Defendants are informed and believes that the Plaintiffs have failed to comply with the provisions of Sections 40-59-10 et seq., and/or Section 40-11-10 et seq., South Carolina Code of Laws (1976), as amended, and the Plaintiffs' Amended Complaint should, therefore, be stayed and/or dismissed.

FOR AN AFFIRMATIVE DEFENSE

122. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
123. That, to the extent that the Plaintiff has failed to comply with the requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act (Section 40-59-810 through 40-59-860), and/or Sections 40-11-500 through 40-11-570, South Carolina Codes of Laws (1976), including the provision of the required notice to the Defendant, and the provisions to the Defendant of an opportunity to cure, the Plaintiffs' action must be stayed and/or otherwise barred.

FOR AN ADDITIONAL AFFIRMATIVE DEFENSE AND BY WAY OF CROSS CLAIMS AGAINST WS CONTRACTORS, LLC, ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL CONSTRUCTION CO., LLC, AC CONSTRUCTION, CORP., AC CONSTRUCTION, INC., L&G CONSTRUCTION GROUP, LLC, POHLMAN QUALITY CONTRACTORS, AND POHLMAN QUALITY EXTERIORS, INC.

124. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
125. That Builders FirstSource-Southeast Group, LLC, (hereinafter sometimes "this defendant" and/or "BFS") is informed and believes that ECC Contracting, LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that ECC Contracting, LLC provided materials and services in connection with framing, including, but not limited to the installation of

windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

126. That this Defendant is informed and believes that Hurley Services, LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Hurley Services, LLC provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

127. That this Defendant is informed and believes that McDaniel Construction Co., LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that McDaniel Construction Co., LLC provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

128. That this Defendant is informed and believes that AC Construction, Corp. is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that AC Construction, Corp. provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.
129. That this Defendant is informed and believes that AC Construction, Inc. is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that AC Construction, Inc. provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.
130. That this Defendant is informed and believes that L&G Construction Group, LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation

was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that L&G Construction Group, LLC provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

131. That these Defendants are informed and believes that WS Contractors, is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; these Defendants are further informed and believes that WS Contractors provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

132. That this Defendant is informed and believes that Pohlman Quality Contractors was a South Carolina entity, which entity was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Pohlman Quality Contractors provided materials and services in connection with framing, including, but not limited to the installation of windows, doors,

and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

133. That this Defendant is informed and believes that Pohlman Quality Exteriors, Inc., is a corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Pohlman Quality Exteriors, Inc. provided materials and services in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures within The Retreat at Charleston National Country Club townhome condominium complex.

FOR A FIRST CAUSE AS TO WS CONTRACTORS,
ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL
CONSTRUCTION CO., LLC, AC CONSTRUCTION, CORP., AC
CONSTRUCTION, INC., L&G CONSTRUCTION GROUP, LLC, POHLMAN
QUALITY CONTRACTORS, AND POHLMAN QUALITY EXTERIORS, INC.

134. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
135. 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.

136. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' 2nd Amended Complaint.
137. That the Cross Claim Defendants, WS Contractors, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co., LLC, AC Construction, Corp., AC Construction, Inc., L&G Construction Group, LLC, Pohlman Quality Contractors, and Pohlman Quality Exteriors, Inc. (hereinafter sometimes "Cross Claim Defendants") were responsible for provision of materials and services in connection with the installation of the aforesaid components of construction, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of relevant building codes. In the event that the Plaintiffs establish that the materials and/or services of the Cross Claim Defendants were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event the Cross Claim Defendants have failed properly to execute their duties, which failure has allegedly caused the Plaintiffs' damages.
138. That the respective subcontracts between this Defendant and the Cross Claim Defendants, provide for contractual indemnification in favor of BFS.
139. 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.

140. 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.

141. 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.

FOR A SECOND CAUSE AS TO WS CONTRACTORS, ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL CONSTRUCTION CO., LLC, AC CONSTRUCTION, CORP., AC CONSTRUCTION, INC., L&G CONSTRUCTION GROUP, LLC, POHLMAN QUALITY CONTRACTORS, AND POHLMAN QUALITY EXTERIORS, INC.

142. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
143. That the Cross Claim Defendants made express warranties that materials, services, and/or workmanship provided in conjunction with their services at the subject structures, would be as required by and in accordance with the contract documents, applicable building codes, and industry standards.
144. That the respective sub-contract agreements between BFS and the Cross Claim Defendants include provisions, by which the Cross Claim Defendants expressly undertook to provide materials and services in accordance with the contract documents.
145. That in the event that the Plaintiffs prove that the materials and/or services provided by the Cross Claim Defendants are not in accordance with the requirements of the contract documents, industry standards, or relevant building requirements, then and in that event the Cross Claim Defendants have materially breached their express warranties.
146. That BFS is entitled to judgment against the Cross Claim Defendants in the amount of any judgment which the Plaintiffs may obtain against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of any express warranties on the part of the Cross Claim Defendants, plus BFS costs for defense, inclusive of attorneys' fees.

FOR A THIRD CAUSE AS TO WS CONTRACTORS,
ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL
CONSTRUCTION CO., LLC, AC CONSTRUCTION, CORP., AC
CONSTRUCTION, INC., L&G CONSTRUCTION GROUP, LLC,
POHLMAN QUALITY CONTRACTORS, AND POHLMAN QUALITY
EXTERIORS, INC.

147. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
148. That the Cross Claim Defendants made implied warranties of workmanlike services, merchantability, and fitness for particular purpose, in connection with its services in renovation, repair, and/or construction at the subject residence.
149. That in the event that the Plaintiffs prove that the services of the respective Cross Claim Defendants were deficient, then and in that event the Cross Claim Defendants have materially breached their implied warranties.
150. That BFS is entitled to judgment against the Cross Claim Defendants in the event, and to the extent that the Plaintiffs may obtain judgment against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of implied warranties, including such warranty of workmanlike service.

FOR A FOURTH CAUSE AS TO WS CONTRACTORS,
ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL
CONSTRUCTION CO., LLC, AC CONSTRUCTION, CORP., AC
CONSTRUCTION, INC., L&G CONSTRUCTION GROUP, LLC,
POHLMAN QUALITY CONTRACTORS, AND POHLMAN QUALITY
EXTERIORS, INC.

151. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
152. That Cross Claim Defendants owed a duty of due care in providing services and materials in connection with construction and/or repair of the subject structures.
153. In the event that the Plaintiffs prove that due care was not exercised in the provision of materials and services by the Cross Claim Defendants, then and in that event the Cross Claim Defendants have breached their duties of due care.
154. In the event that the Plaintiffs obtains judgment against BFS as a direct, foreseeable and proximate result of the negligence and/or gross negligence of the Cross Claim Defendants, then and in that event BFS is entitled to judgment against the Cross Claim Defendants for the amount of any such judgment, or any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, plus costs of defense, inclusive of attorneys' fees.

FOR A FIFTH CAUSE AS TO WS ONTRACTORS,
ECC CONTRACTING, LLC, HURLEY SERVICES, LLC, McDANIEL
CONSTRUCTION CO., LLC, AC CONSTRUCTION, CORP., AC
CONSTRUCTION, INC., L&G CONSTRUCTION GROUP, LLC,
POHLMAN QUALITY CONTRACTORS, AND POHLMAN QUALITY
EXTERIORS, INC.

155. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

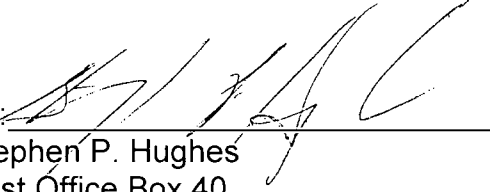
156. That the Cross Claim Defendants were contractually responsible for provision of adequate materials and services in connection with their respective undertakings regarding construction of the subject structures.
157. That in the event that the Plaintiffs prove that the BFS contract was breached due to improper or inadequate materials and/or services provided by the respective Cross Claim Defendants, then and in that event the Cross Claim Defendants have materially breached their sub-contracts, by failing properly and adequately to provide materials and services in connection with construction of the subject structures.
158. That BFS is entitled to judgment against the Cross Claim Defendants in the event, and to the extent that the Plaintiffs may obtain judgment against BFS for breach of contract, or for any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, and BFS is further entitled to recover the costs of defense, inclusive of attorneys' fees.

WHEREFORE, having fully answered the Second Amended Complaint of the Plaintiffs, and having set forth the Cross Claims, Builders FirstSource-Southeast Group, LLC these defendants prays as follows:

- a. That the Plaintiff's Second Amended Complaint be dismissed, as to these Defendants, with costs to these Defendants;
- b. That Builders FirstSource-Southeast Group, LLC be granted judgment on its Cross Claims;
- c. That these Defendants have jury trial on all matters so triable;

- d. That these Defendants be granted such other and further relief as this Court may deem just and proper.

HOWELL, GIBSON & HUGHES, P.A.

By: 

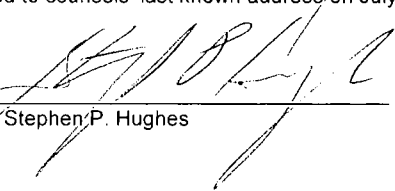
Stephen P. Hughes
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Builders FirstSource-
Southeast Group, LLC

Beaufort, South Carolina

July 2nd, 2018

CERTIFICATE OF SERVICE

I certify that I served the foregoing Answer upon all counsel of record by affixing same with proper postage placing same with the United States Postal Service addressed to counsels' last known address on July 2nd, 2018.

By: 

Stephen P. Hughes

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July 2, 2018

Julie J. Armstrong, Clerk
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: The Retreat at Charleston National Country Club Home Owners
Association, Inc., et al vs. Winston Carlyle Charleston National, LLC,
Builders FirstSource-Southeast Group, LLC, etc.
Civil Action No: 2016-CP-10-03783
Our File No: 11981 SPH

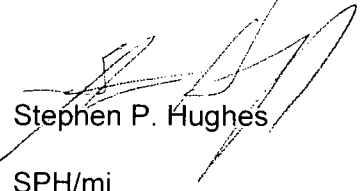
Dear Ms. Armstrong:

Please find enclosed herein to be filed the Answer of Defendant Builders First Source-Southeast Group, LLC to the plaintiffs second amended complaint and cross claims served on behalf of Builders FirstSource-Southeast Group, LLC in connection with the above captioned matter. Please file the same and returned a clocked copy in the self-addressed envelope.

If you should have any questions regarding this matter, please feel free to contact me.

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A


Stephen P. Hughes

SPH/mi
Enclosures