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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2016-CP-10-03738
Appellate Case No. 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; Liollio Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Colleen 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,

of which Hurley Services, LLC is the .....Respondent,

AND

Builders FirstSource-Southeast Group, LLC is the ..... Appellant.

FINAL BRIEF OF RESPONDENT

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II. Did the Circuit Court err in finding that the contractual indemnity provisions drafted by BFS violate S.C. Code Ann. 32-2-10 (2007) by requiring the subcontractors of BFS to indemnify it for its sole negligence, including its negligence in the selection and sale of products to third parties?

III. Did the Circuit Court err in applying the doctrine of collateral estoppel as a bar to the contractual indemnity claims of BFS?

IV. Did the Circuit Court err in finding that there are so many objectionable provisions that run throughout the Master Subcontractor Agreement that it is not possible to sever or reform them?

V. Was the Master Subcontractor Agreement drafted by BFS a contract of adhesion which is unconscionable, oppressive, and unenforceable?

STATEMENT OF THE CASE

Plaintiffs filed suit on July 22, 2016 against the developer, Winston Carlyle Charleston National, LLC, and general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually alleging construction deficiencies in the common elements of a multi-family project known as The Retreat at Charleston National Country Club. The complaint alleged causes of action for negligence, gross negligence, breach of express and implied warranties, and breach of fiduciary duty as to the developer.

Plaintiffs filed an amended complaint on May 1, 2017 naming additional defendants including Builders FirstSource-Southeast Group, LLC, hereinafter "BFS", for negligence, gross negligence, and breach of implied warranties. The amended complaint asserted, among other things, that BFS used and supplied defective materials, installed materials not in accordance with the plans and specifications, and constructed the project in violation of the applicable building codes.

BFS is a large supplier of building materials and components who sold windows, doors, and other building materials to the general contractor and/or developer and agreed to install them in the project. BFS holds an unlimited general contractor's license. It hired Hurley Services, LLC, hereinafter "Hurley", as a labor-only subcontractor for the installation of windows, doors, and weather-resistant materials on four two-story buildings at the project. Hurley was paid $5,319.50 for its work. Plaintiffs' expert found deficiencies in the windows provided by BFS for installation by Hurley. Hurley provided no materials or components in connection with its work, and all work performed by Hurley was under a Master Subcontractor Agreement drafted by BFS.

In its answer to the amended complaint, BFS asserted a third-party complaint against Hurley and other subcontractors. The third-party complaint against Hurley alleges claims for

contractual and common-law indemnity, breach of express and implied warranties, negligence, and breach of contract.

On June 19, 2018, Plaintiffs filed a second amended summons and complaint naming both BFS and Hurley and others as defendants and alleging construction deficiencies and defective materials arising from negligence, gross negligence, and breach of implied warranties of defendants.

On July 3, 2018, BFS filed an answer to Plaintiffs' Second Amended Complaint. BFS denied it supplied materials and it asserted crossclaims against Hurley for contractual and common-law indemnity, breach of express and implied warranties, negligence, and breach of contract. These are the same claims BFS asserted against Hurley in its third-party complaint. In its crossclaims against Hurley, BFS alleges in multiple places that Hurley provided and warranted materials, had a duty of care in selecting materials, and was contractually obligated for procuring adequate materials in connection with its work.

Plaintiffs amended their complaint two more times, and BFS answered each complaint denying it supplied materials and reiterated the same crossclaims against Hurley even though Hurley supplied no materials. Hurley answered all of the aforementioned claims asserted against it by BFS.

On August 27, 2020, Hurley filed a motion for partial summary judgment with regard to the crossclaims of BFS. On October 7, 2020, Hurley filed an amended motion for summary judgment as to all crossclaims asserted by BFS.

Respondent's amended motion for summary judgment was argued in the Circuit Court on or about November 6, 2020. Both Appellant and Respondent submitted memoranda and exhibits in support of their respective positions.

On July 7, 2021, the Honorable Jennifer B. McCoy, Circuit Court judge, signed and filed an order granting partial summary judgment in favor of Hurley. BFS filed a motion for reconsideration on July 19, 2021, which was denied on August 23, 2021. Appellant filed a notice of appeal on September 22, 2021.

Judge McCoy also issued orders granting summary judgment in favor of seven other subcontractor defendants on crossclaims of BFS. BFS has appealed from those orders. The South Carolina Court of Appeals subsequently consolidated all appeals of BFS in this case.

STANDARD OF REVIEW

Summary Judgment is appropriate where there are no genuine issues of fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP. The purpose of Summary Judgment is to obviate delay where there is no material issue of fact involved. Hammond v. Scott, 268 S.C. 137, 232 S.E.2d 336 (1977). Summary Judgment is appropriate in those cases in which plain, palpable, and undisputed facts exist on which reasonable minds cannot differ. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993).

The party "opposing a properly supported motion for summary judgment ... may not rest on mere allegations or denials of his pleadings but must set forth or point to specific facts showing that there is a genuine issue of material fact." Bravis v. Dunbar, 316 S.C. 263, 264, 449 S.E.2d 495, 496 (Ct. App. 1994). However, it is not sufficient for a party to create an interference which is not reasonable or an issue of fact that is not genuine. Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990).

ARGUMENTS

I. The Trial Court Correctly Applied The Clear And Unequivocable Standard To The Contractual Indemnity Provisions Drafted By BFS Where Its Pleadings Seek Indemnity For Its Sole Or Concurrent Negligence.

BFS argues that the elevated clear and unequivocable standard enunciated in Concord & Cumberland does not apply in this case because it is not seeking indemnity for its sole or concurrent negligence. It asserts that it is only seeking indemnification for loss or damage arising from Hurley's negligence. Appellant goes on to explain its position in detail on pages 13 and 14 of its brief:

> Appellant's pleading takes as a premise that Appellant has committed no negligence and has no liability. In this world constructed by Appellant's pleading, where Appellant has committed no negligence, the only possible way Appellant could be liable is if the negligence was committed by Appellant's subcontractor and not by Appellant itself. Thus, in a world, and in context, Respondents, as the sole source of the negligence, would be liable to Appellant for all damages, as plead in paragraphs 138 and 168, and Appellant, in seeking indemnity, is seeking recovery only for Respondents' negligence and not for Appellant's own negligence (because Appellant's negligence is nonexistent). Whether the facts later bear out Appellant's worldview does not affect the analysis of what Appellant's pleadings seek.

Appellant's tutorial on basic pleading is not persuasive. It ignores the allegations against it contained in the complaint. It ignores the language of its own pleadings and subcontractor agreements which it drafted, and it also ignores undisputed facts which have been developed in this case.

Plaintiffs allege in paragraphs 9 and 10 of their Fourth Amended Complaint that BFS furnished materials at the project. They also allege in paragraphs 88(a) and 88(d) that BFS is negligent and grossly negligent in "failing to properly supervise their work and the work of other trades..." and "in using and supplying defective materials". (R. pp. 346, 366.) In paragraphs 3, 4, and 26 of its Amended Answer to Plaintiff's Fourth Amended Complaint, BFS denies that it

furnished any materials. (R. pp. 416, 420.) It asserts in its crossclaims against Hurley, that Hurley supplied the materials in connection with its work. BFS seeks indemnity "for any liability BFS is found to have to Plaintiffs or others in this action..." (R. p. 441.)

BFS is a division of one of the largest building supply corporations in the United States. It is a merchant within the meaning of S.C. Code Ann. 36-2-104(1) (2007) 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 as an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
> (emphasis added)

At Retreat, BFS is a turnkey contractor which provides both labor and material. (R. p. 976, line 1 – p. 981, line 15.) It sold windows to the developer and/or general contractor and gave those windows to its subcontractor Hurley for installation in 4 of the 32 buildings in the project. (R. p. 943.) (R. pp. 951-969.) It is undisputed that Hurley supplied no materials in connection with its work at the project. (Br. of Appellant, p. 23.)

BFS has an installation manager, and is the holder of an unlimited general contractor's license. It also has superior knowledge regarding construction practices, installation means and methods, building code requirements, and industry standards. It also has nondelegable statutory and common law duties to inspect and supervise the work of its subcontractors. *S.C. Code 40-11-270(E) (Supp. 2021);* Fields v. J. Haynes Waters Builders, *376 S.C. 545, 658 S.E.2d 80, 88 (2008);* Fountain v. Fred's, Inc., *429 S.C. 533, 553, 839 S.E.2d 475, 486 (Ct. App. 2020).* BFS inspected the work of Hurley as it progressed. The Master Subcontractor Agreement also requires Hurley to follow the directions of BFS. (R. pp. 905-906.) (R. p. 944.)

The fact that Hurley furnished no materials except for those given to it by BFS for installation has been known to BFS since the inception of this lawsuit. Nevertheless, BFS has asserted a third-party complaint and multiple crossclaims against Hurley alleging that Hurley provided and warranted materials, that Hurley had a duty of care in selecting materials, and that Hurley was contractually obligated for procuring adequate materials and services in connection with its work. Paragraphs 126, 140, 141, 149, and 153 from its most recent crossclaim are as follows: (R. pp. 436-445.)

> 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.
> (emphasis added)
>
> 140. 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.
> (emphasis added)
>
> 141. That the respective sub-contract agreements between BFS and the Cross Claim Defendants include provisions, by which the **Cross Claim Defendants have expressly undertook to provide materials and services in accordance with the contract documents**.
> (emphasis added)
>
> 149. 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.
> (emphasis added)

153. 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. (emphasis added)

It is obvious that BFS is trying to transfer to Hurley the risk associated with potential defective products which it selected and sold for use at the project. BFS denies in its pleadings that it provided materials, and it alleges in substance that any deficiencies in materials are the responsibility of Hurley. BFS admits in its Statement of the Case that Plaintiffs' forensic expert has opined that the windows at the project are characterized by inadequate DP ratings requiring comprehensive replacement of those windows. (Br. of Appellant, p. 1.)

These unfounded claims of BFS against Hurley are not the result of a mistake in pleading, but represent a course of conduct which BFS has also employed in other cases. BFS relies upon the unconscionable and oppressive language hidden in the fine print of the Master Subcontractor Agreements in an effort to obtain indemnity for its sole negligence.

Interestingly, BFS has designated for inclusion in the Record on Appeal the order granting partial summary judgment to Hurley on BFS crossclaims in the case of Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772. BFS has appealed from that order.

However, it is worth noting that in Pavic, BFS sold windows to the general contractor, which it knew or should have known were defective and which were the subject of a class-action lawsuit and settlement. BFS filed identical crossclaims against Hurley contending that Hurley was responsible for materials, when it is undisputed that Hurley furnished no materials to the residence except those which BFS gave to it for installation. The conduct of BFS in the Pavic case is further evidence that BFS routinely seeks indemnification under the terms of its Master Subcontractor Agreement for its sole negligence in selecting and selling defective products.

BFS drafted two Master Subcontractor Agreements as 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 although the 2014 agreement is relevant on the issue of disparity in bargaining power. (R. pp. 898-909.) (R. pp. 910-923.)

Buried in the fine print of **SECTION 3 Warranty** of the Subcontractor Agreement are disguised indemnity provisions in favor of BFS relating to materials selected and sold by BFS. Stoneledge at Lake Keowee Owners' Ass'n. v. Builders FirstSource – SE Group, 413 S.C. 630, 776 S.E.2d 434, 439 (Ct. App. 2015). That section reads as follows:

> **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, materials**, 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 .... (R. pp. 901-902.) (emphasis added)

The language in **SECTION 3 Warranty** that "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 had no responsibility for the design of the project or any of its components. Hurley's work was limited to installation of Tyvek, windows, and doors in a few buildings.

In addition, **SECTION 3** requires Hurley to give a guarantee and indemnity for ten years on any "structural applications". The only structural applications are the windows and doors which BFS selected and sold and gave to Hurley for installation. Plaintiffs' expert has opined that the design pressure ratings on the windows do not meet applicable codes. This provision provides indemnification for the sole negligence of BFS in selecting and selling the applicable windows.

SECTION 3 also exposes Hurley to liability and indemnity claims arising from property damage and personal injury relating to defects of design and materials. If a window sold by BFS leaks or blows out because of inadequate design pressure resistance, the property could be damaged or occupants of the unit could be injured. This is but another outrageous example of BFS attempting to transfer the risk of its own negligent conduct to its subcontractors under the "design" or "structural application" language it drafted.

BFS argues that the warranty and indemnity provisions under **SECTION 3** do not apply because under **SECTION 1** of the Agreement, the "**Work**" is defined as materials and/or services provided by Hurley. **SECTION 1** reads as follows:

> "**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**") ...."

However, **SECTION 2** of the Master Subcontractor Agreement expands the definition of work as follows:

> **SECTION 2. Materials and Workmanship.**

> Subcontractor agrees to commence Work on the 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." (R. p. 899.)
> (emphasis added)

BFS argues that **SECTION 2 (c)** merely describes the duties of a bailee. However, the bailment argument and the interpretation BFS now places on Sections 1, 2, and 3 do not explain why BFS asserted crossclaims for materials against Hurley when Hurley furnished no materials. In fact, BFS offers no explanation whatsoever for these claims in its 49-page Initial Brief. It is obvious from its pleadings that BFS has interpreted Sections 1, 2, and 3 to mean that the **Work** includes materials supplied by BFS so that it can assert indemnification claims against its subcontractors for the materials it selects and sells for use at the project. Parties are bound by their pleadings and are precluded from advancing arguments contrary to those assertions. Johnson v. Alexander, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015).

Additional evidence of the interpretation BFS places on these contract provisions which it drafted, is found in **SECTION 8(i)**. **SECTION 8(i)** deals with indemnification of BFS by its subcontractors in connection with mechanic's and materialmen's liens. It provides, in pertinent part, for indemnification of BFS for "[A]ttorney's fees and expenses, amounts paid in settlement,

and amounts paid to discharge judgments arising out of the services, labor, equipment, or materials furnished by subcontractor, or its employees, **suppliers**, or subcontrators ...". (emphasis added)

BFS is a supplier of materials to the project. If BFS were to file a mechanic's lien, and if it suffered an adverse judgment for costs and attorney's fees under S.C. Code 29-5-10 (2007) *et seq.* as a result of supplying and selling defective products, it could seek indemnification for these attorney's fees and costs from its subcontractors, even though BFS would be 100% at fault. **SECTION 8(i)** is in conflict with **SECTION 5**, paragraph 1, where indemnity for costs and attorney's fees are only triggered upon the negligence of the subcontractor. (R. pp. 903, 908.)

In asserting its contractual indemnity claims against Hurley, BFS relies primarily upon **SECTION 5 Indemnity**, paragraph 1. The lower court correctly applied the standard in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 645, 819 S.E.2d 166, 170 (Ct. App. 2018) in holding that BFS could not recover against Hurley for its own negligence under the language of that paragraph.

BFS contends, however, that dicta in Concord & Cumberland at 424 S.C. 652-653, 819 S.E.2d 173-174 regarding the liability of the subcontractor Muller permits BFS to recover from Hurley to the extent of its own negligence. However, the facts in that case are distinguishable from those in this case. Here, there are multiple conflicting, deceptive, unconscionable, and oppressive indemnity provisions which were not considered by the court in Concord & Cumberland but would have affected the decision of the court.

Although BFS selects **SECTION 5 INDEMNITY**, paragraph 1, as the controlling paragraph for indemnification of BFS, 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). 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. Serrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945).

SECTION 5, paragraph 1 clearly conflicts with the language of **SECTIONS 1, 2, 3**, and **8 (i)** which provide for indemnification of BFS for its sole negligence in selecting and selling building supplies. It is undisputed that Hurley furnished no materials to the project except those given to it by BFS.

SECTION 5, paragraphs 1 and 2 are also in conflict. Paragraph 1 deals with both personal injury and property damage claims whereas paragraph 2 only deals with personal injury claims. Paragraph 1 only allows indemnification based upon the negligence of the subcontractor. Paragraph 2 allows indemnification even if BFS is solely negligent. Even though this is not a personal injury action, paragraph 2 is relevant because it demonstrates how BFS has intentionally drafted the Master Subcontractor Agreement in a conflicting, confusing and deceptive manner in furtherance of its own purposes. These paragraphs drafted by BFS should be read together and strictly construed against BFS.

SECTION 5, paragraph 3, is a disguised indemnity provision for defense costs in favor of BFS even if BFS is solely at fault. It conflicts with **SECTION 5**, paragraph 1, where attorney's fees and costs are payable only upon the fault of the subcontractor.

BFS argues that attorney's fees do not fall within the scope of an indemnity clause because they are not paid by the first party to the second party for loss or damage the second party incurs to the third party. However, BFS elected to include this paragraph in the bold print **SECTION 5 Indemnity** section of the contract. Paragraph 3 is in effect an indemnity provision for attorney's fees and defense costs. 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 contractual indemnification.

As previously discussed, **SECTION 1(a) Work** conflicts with **SECTION 2(c) Protection of Work**, and **SECTION 1(a) Work** also conflicts with **SECTION 3 Warranty**.

This court has no obligation or authority to rewrite the contractual indemnity provisions of BFS. Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002); Poynter Inves., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15, 17-18 (2010). All of these conflicting paragraphs were drafted by BFS, and any uncertainty as to the meaning of the terms should be resolved against BFS. Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 683 S.E.2d 814, 817 (Ct. App. 2009). The conflicting, ambiguous, and deceptive language drafted by BFS fails to meet the clear and convincing standard for contractual indemnity.

II. The Contractual Indemnity Provisions Drafted By BFS Violate S.C. Code Ann. 32-2-10 (2007) By Requiring Its Subcontractors To Indemnify It For Its Sole Negligence, Including Its Negligence In The Selection And Sale Of Products To Third Parties.

S.C. Code Ann. 32-2-10 (2007) 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).

An analysis of the pleadings and the Master Subcontractor Agreements drafted by BFS as well as the undisputed facts of the case demonstrate that BFS is seeking indemnification for its sole or concurrent negligence in violation of S.C. Code Ann. 32-2-10 (2007). Actions speak louder than words. BFS has asserted numerous crossclaims against Hurley seeking indemnity for materials when it is undisputed that Hurley provided no materials. All materials were furnished

by BFS including windows which are alleged by Plaintiffs to be defective. Hurley had no role in the selection and sale of these products, and despite its denial, BFS is seeking indemnity for its own negligence under the terms of the Master Subcontractor Agreement it drafted.

BFS cites D.R. Horton v. Builders FirstSource – SE Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) as authority for the proposition that the language of **SECTION 5**, paragraph 1, does not violate S.C. Code Ann 32-2-10 (2007). However, the holding in that case is the opposite of what BFS cites it for. The court held that D.R. Horton could not obtain indemnification from its subcontractor, BFS, for its own negligence.

There is dicta in the case which opines that a portion of the indemnity agreement obligating BFS to indemnify Horton for its own negligence did not violate public policy. D.R. Horton at 810 S.E.2d 45. The opinion of the court was based upon an unusual and deficient arbitration award which made no findings of fact or conclusions of law. There is no evidence in that case that the arbitrator or the court considered conflicting, deceptive, and oppressive indemnity provisions which are similar to those present in the BFS Master Subcontractor Agreement.

The conflicting, confusing, oppressive, and deceptive language of the Master Subcontractor Agreement drafted by BFS has been discussed elsewhere in this brief. These provisions should be strictly construed against BFS. Springs & Davenport, Inc., 683 S.E.2d at 817, and they clearly show that BFS is seeking indemnity for its own negligence.

The Master Subcontractor Agreements drawn by BFS are sophisticated documents. Each word was drafted with much thought and care in an effort to transfer all risk from BFS to its subcontractors. The lower court correctly read the deceptive language and conflicting provisions together and properly concluded that they collectively violated S.C. Code Ann. 32-2-10 (2007).

III. The Contractual Indemnity Claims Of BFS Are Barred By The Doctrine Of Collateral Estoppel.

In its order granting summary judgment in favor of Hurley on the collateral estoppel issue, the lower court took judicial notice of two Circuit Court orders which have interpreted the contractual indemnity language found in **SECTION 5**, paragraph 1, of the BFS Master Subcontractor Agreement. 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. (R. pp. 146-156.) (R. pp. 157-161.)

BFS argues that the orders of Judges Young and Newman involved different issues of fact or law from those in this case. BFS asserts that the issues decided in those cases were whether Appellant may recover from its subcontractor for its own negligence whereas the issue in this case is whether Appellant may recover from its subcontractor Hurley for Hurley's negligence.

BFS filed a memorandum in opposition to Hurley's amended motion for summary judgment on November 2, 2020. With respect to the collateral estoppel issue, BFS argued only that the orders of Judges Young and Newman were not final orders. It did not raise the issue of whether the same issues of fact or law were decided in those orders. (R. pp. 1095-1097.)

To the extent that BFS failed to properly raise this issue as to the Pavic appeal during oral arguments on November 6, 2020, the issue cannot be raised for the first time on a motion for reconsideration. Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of relief under Rule 59(e), SCRCP, and the issues are waived. Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481, 482 (Ct. App. 1990); Patterson

v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995); Miller Constr. Co., v. PC Constr. Greenwood, 418 S.C. 186, 206, 791 S.E.2d 321, 332 (Ct. App. 2016).

Even if the identical issue question were properly raised in the court below, it is clear that BFS is seeking indemnity for its own negligence based upon the following:

1. BFS filed an amended answer to the Fourth-Amended Complaint in November, 2019 after it had been a defendant in the case for more than two years;

2. The amended answer of BFS denies that it supplied any materials at the project;

3. The crossclaims BFS filed against Hurley allege that Hurley had the responsibility for selecting and supplying adequate materials for its work;

4. BFS now concedes that it alone supplied all materials and that Hurley provided no materials;

5. BFS gave Hurley windows, doors and Tyvek for installation at the project;

6. Plaintiffs' expert has opined that windows at the project are deficient;

7. BFS has offered no explanation whatsoever in its brief for asserting crossclaims against Hurley relating to materials, especially when BFS knew that Hurley furnished no materials;

8. The only reasonable explanation for the conduct of BFS is that BFS interprets the deceptive provisions of the Master Subcontractor Agreement it drafted as requiring Hurley to indemnify BFS for materials supplied by BFS.

BFS also argues that the orders of Judges Young and Newman are not final judgments for the purposes of the application of the doctrine of collateral estoppel. However, 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 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 those orders unless they were final orders.

IV. The Lower Court Correctly Ruled That There Are So Many Objectionable Clauses That Run Throughout The Master Subcontractor Agreement That It Is Not Possible To Sever Or Reform Them.

Appellant makes four arguments regarding the ruling of the lower court relating to the severability clause in the Master Subcontractor Agreement.

The first is that the court failed to make a ruling on the severability issue. This assertion ignores numbered paragraph 14 on page 19 of the court's order: (R. p. 40.)

> 14. That the Master Subcontractor Agreement contains so many provisions that are deceptive and unconscionable, fail to meet the clear and unequivocable 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 Subcontractor Agreement, which this Court is not obligated to do.
> (emphasis added)

Section I of Respondent's Brief discusses in detail the magnitude of these conflicting and unconscionable provisions which precludes severance of the offending provisions as a realistic option for the lower court.

The second argument of Appellant is that the court stated that it lacked authority to sever provisions of the contract. Nowhere in the order does the court make such a statement. Rather, the court stated that it had no obligation or authority to rewrite the contractual indemnity provisions of BFS citing Poynter Invest., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d

15, 18 (2010); Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002). (R. p. 38.)

The third argument of Appellant is that the lower court is obligated to sever "problematic language" because of the existence of a severability clause in the contract of adhesion drafted by BFS. To the contrary, our courts have refused to sever oppressive contractual provisions when the sheer magnitude of unconscionability as is reflected in the BFS Master Subcontractor Agreement permeates the entire contract. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 673-674 (2007); 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).

In support of its position, Appellant cites One Belle Hall Property Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). That case is distinguishable both on the facts and the law. It involved a determination of the unconscionability of an arbitration agreement embedded in a warranty contract which contained oppressive terms. It also involved the application of the Prima Paint doctrine which holds that an arbitration clause is separate from a contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). There is no requirement in this case that each unconscionable, conflicting, and oppressive provision of the contract be interpreted separately from the contract as a whole.

In its final argument, Appellant cites Doe v. TCSC, LLC, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020), for the proposition that the presence of a severability clause in the agreement is strong evidence of the intent of the parties to sever unenforceable language.

Doe is distinguishable because it also involved the validity of an arbitration provision and the application of the Prima Paint doctrine. The court also emphasized the strong South Carolina

and federal policies favoring arbitration and that arbitration agreements are presumed valid. Doe at 430 S.C. 607, 846 S.E.2d 876. In addition, the decision in Doe did not discuss whether the severability clause in the agreement was conspicuous. However, in this case, the severability clause upon which Appellant places so much reliance is buried in fine print in **SECTION 9 Miscellaneous (f) Other** on page 12 of the contract.

> **SECTION 9. Miscellaneous.**
>
> **f. Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. **The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof.** It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.
> (emphasis added)

Our courts have refused to enforce contractual provisions inconspicuously buried in the fine print which were drafted by the superior party and which function to contract away impair the legal rights of the less sophisticated party. *See* Simpson at 644 S.E.2d 670; *see also* Doe at 430 S.C. 612, 846 S.E.2d 879.

V. The Master Subcontractor Agreement Drafted By BFS Is A Contract Of Adhesion Which Is Unconscionable And Oppressive.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-side 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); Doe at 430 S.C. 612, 846 S.E.2d 879.

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process. Simpson at 644 S.E.2d 669. Among the factors considered by the court in determining whether a contract was tainted by an absence of meaningful choice are the nature of the injuries suffered by plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the party's bargaining power; the party's relative sophistication; whether there is an element of surprise in the inclusion of the challenged language; and the conspicuousness of the clause. Simpson, 644 S.E.2d at 669; Doe, 846 S.E.2d at 879.

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. The parent of BFS is one of the largest building supply companies in the United States. Respondent requests that this Court take judicial cognizance of the fact that the Master Subcontractor Agreement of BFS 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) quoting Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 343, 384 S.E.2d 730, 735-736 (1989) (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 fact that Hurley was paid only $5,319.50 for installing Tyvek, windows,

and exterior doors on four two-story, multi-family buildings reflects a lack of bargaining power. (R. pp. 951-969.)

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. 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.

The deceptive nature of the definitional, warranty, guaranty, and indemnity provisions contained in Sections 1, 2, 3, 5 and 8 of the agreement have been discussed in detail elsewhere in this brief. It should be noted, however, that the disguised indemnity provisions in **SECTION 3 Warranty** were buried in fine print unlike the bold type found in **SECTION 5 Indemnity**.

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.

In addition, although Hurley provided no material in connection with the installation of windows, doors, and Tyvek, the fine print language of **SECTION 3 Warranty** obligates Hurley for "defects in design, workmanship and materials" and "structural applications" which obviously relates to manufactured products selected and sold by BFS. Hurley was not involved in the design of any of the manufactured materials or any portion of the project. These provisions expose Hurley

to liability for property damage and personal injury claims arising from deficient materials selected and sold by BFS.

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

BFS continues to insist that under **SECTION 1 (a)**, "**Work**" is defined as including materials only provided by Hurley and Hurley provided no materials. However, BFS overlooks **SECTION 2 (c)** of the agreement it drafted expanding the definition of "**Work**" to include materials supplied by BFS. In addition, in its Initial Brief, BFS has offered no explanation whatsoever for why it has filed multiple crossclaims against Hurley relating to materials. It is abundantly clear that BFS interprets its contract language to include materials it provides to Hurley for installation as being within the definition of "**Work**".

It is equally clear that the Master Subcontractor 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. The best evidence of this is the fact that BFS has filed multiple crossclaims against Hurley alleging product deficiencies when BFS alone supplied materials for construction at the project.

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, 541, 542 S.E.2d 360, 365 (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.

Examples of the oppressive and unconscionable nature of the 2012 Master Subcontractor Agreement are as follows:

1. In Section 1(a), limitation of Hurley's remedies in the event of a change order which increases costs.

2. In Sections 1(a) and 2(c), deceptive language defining the "work".

3. In Section 2(c), Hurley assumes risk of loss to the work.

4. In Section 2(d)(2)(C), indemnity of BFS in connection with environmental regulations.

5. In Section 2(d)(4), liquidated damages against Hurley for delay at $200 per hour for a minimum of 10 hour day until project can be resumed.

6. In Section 3, fine print indemnity of BFS for its own products and negligence.

7. In Section 3, unfavorable warranty, guaranty, and indemnity provisions relating to products selected and sold by BFS.

8. In Section 4, waiver of subrogation rights and release of all claims in favor of BFS.

9. In Section 5, indemnification and defense of BFS for its own negligence.

10. In Sections 6 and 7(b)(2), misleading provisions regarding BFS's right to direct and control work.

11. In Section 7(a), numerous events of default by subcontractor without any corresponding events of default on the part of BFS.

12. In Section 7(b)(1), waiver of claims and damages for delay in favor of BFS.

13. In Section 7(b)(2), liability of Hurley to BFS upon termination for all costs and damages of BFS plus 25% of all costs and damages of BFS.

14. In Section 7(c), fine print indemnity, defense, and hold harmless provisions in favor of BFS.

15. In Section 8(a), no obligation of BFS to pay Hurley until BFS receives payment from owner. If owner does not pay BFS, BFS does not pay and Hurley assumes risk of non-payment.

16. In Section 8(f), unreasonable conditions for obtaining final payment, including furnishing "as-built drawings" in Section 8(f)(3).

17. In Section 8(i), indemnification of BFS for liens and judgments including judgments arising from materials supplied by BFS.

18. In Section 8(i), waiver of rights against BFS.

19. In Section 9(e), Hurley waives the right to file a lien for its work.

20. In Section 9(f), buried fine print severability clause.

This Court is well aware that sophistication is another form of bargaining power. *See* Smith v. Horton at 417 S.C. 49, 790 S.E.2d 4 (2016). The high degree of sophistication of BFS is obvious in the language of the aforementioned provisions of the 2012 contract. BFS has taken advantage of any asymmetry in sophistication to include provisions that are either concealed in fine print or that its subcontractors are unlikely to fully appreciate. A subcontractor such as Hurley who installs windows in two-story multi-family buildings for $13 - $15 each typically does not have a Philadelphia lawyer standing by to review its installation contracts. (R. pp. 951-969.)

The 2014 agreement executed by Hurley is even more oppressive than the 2012 version because of the addition in fine print of Section 10(f):

> **f. Release.** Subcontractor hereby waives, releases, and forever discharges the Contractor, the Owner, and all of their officers, directors, agents, and employees from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities that Subcont may have against the Contractor, the Owner, and all of their officers, directors, agents, and employees. Specifically, Subcontractor agrees that Subcontractor shall not file, or cause to be filed, any demand, claim, suit or cause of action against Contractor and all of its officers, directors, agents, and employees hereunder. (R. p. 922.)

It is simply inconceivable that a party who understood the implications of the language of these agreements would sign them unless there were a total absence of a meaningful choice on the part of the subcontractor. The combination of an absence of a meaningful choice on the part of

Hurley, deceptive language, disparity in bargaining power and one-sided provisions in the adhesion contract drafted by BFS renders the warranty/indemnification provisions in **SECTION 3 Warranty** and the indemnity/duty to defend paragraphs in **SECTION 5 Indemnity** 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).

CONCLUSION

The findings of fact and conclusions of law of the lower court are fully supported by the Record on Appeal and controlling legal authorities. All issues were correctly decided, and justice requires that the order of the lower court granting partial summary judgment in favor of Hurley with regard to the crossclaims of BFS for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity be affirmed in full.

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