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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
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2021-001050
Civil Action No. 2016-CP-10-03738

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

v.

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

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

v.

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

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

FINAL BRIEF OF RESPONDENT ECC CONTRACTING, LLC

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I. Did the circuit court correctly apply the clear and unequivocal standard to contractual indemnity provisions in the Master Agreement where the pleadings of BFS seek indemnity for any liability BFS is found to have to Plaintiffs?

II. Was the circuit court correct in finding that the indemnity provisions of the Master Agreement violate S.C Code Ann. 32-2-10 by requiring ECC to indemnify BFS for its sole negligence?

III. Was the circuit court correct in applying the doctrine of collateral estoppel as to bar BFS's contractual indemnity claims?

IV. Whether the circuit court erred in failing to sever the ambiguous, unlawful provisions of the master agreement when doing so would have frustrated the purpose of the agreement, or was the circuit court correct in not severing such provisions because res judicata prevented BFS from raising the severability provision?

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

STATEMENT OF THE CASE

Plaintiffs in the underlying litigation filed suit on July 22, 2016, against the developer of the Project, Winston Carlyle Charleston National, LLC, and the general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually, alleging construction deficiencies in the common elements of the Retreat at Charleston National Country Club, a townhome community in Mount Pleasant, South Carolina ("the Retreat Project" or "the Project"). The Complaint specifically 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, setting forth causes of action against additional defendants, including Appellant Builders FirstSource-Southeast Group, LLC, (hereinafter "BFS" or "Appellant") for negligence, gross negligence, and breach of implied warranties. The Amended Complaint alleged, 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 filed third-party claims against ECC Contracting, LLC ("ECC") on June 30, 2017. **(R. pp. 208-47)**. 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. **(R. pp. 248-74) (R. pp. 275-309)**. Plaintiffs amended their complaint two more times and BFS's operative cross-claims are now contained in BFS's Amended Answer, Cross-claims, and Third-Party Complaint that was filed in response to Plaintiffs' Fourth Amended Complaint on November 13, 2019. ECC timely answered all cross-claims asserted against it by BFS and raised relevant affirmative defenses.

On December 20, 2019, ECC filed a motion for summary judgment with regard to BFS's cross-claims. On October 15, 2020, ECC filed an amended motion for summary judgment as to all cross-claims asserted against it by BFS. ECC's amended motion for summary judgment was argued in the circuit court on or about November 6, 2020. ECC submitted memoranda and exhibits in support of its position, BFS did not.

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. In her Order, Judge McCoy:

- Granted summary judgment in favor of ECC and dismissed BFS's cross-claims for breach of express and implied warranties, breach of contract, and negligence, ruling those causes of action were disguised equitable indemnity claims and were not viable as alternative causes of action 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. BFS has not appealed this ruling.

- Granted partial summary judgment in favor of ECC and dismissed BFS's claim for contractual indemnity, ruling that the indemnity and duty to defend provision of the Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 5/17/06]") drafted by BFS were (1) unconscionable, ambiguous, conflicting, and unenforceable; (2) neither clear nor unequivocal, and thus, fail as a matter of law; (3) that such provisions violate South Carolina public policy and S.C. Code § 13-2-10, and thus, are illegal and unenforceable; and (4) that BFS was collaterally estopped by prior decisions from contending such provisions are clear and unequivocal, do not violate South Carolina public policy, and/or meet the requirements of South Carolina law. BFS has appealed these Rulings.

BFS filed a motion for reconsideration on July 19, 2021, which was denied by Judge McCoy on August 23, 2021. BFS 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. Some issues are common amongst the eight appeals, while others are not. ECC submits this brief in response

to BFS's brief insomuch as BFS's brief presents issues related to the Order Granting Partial Summary Judgment to ECC.

STANDARD OF REVIEW

An appellate court "reviews a grant of a summary judgment motion under the same standard as the [circuit] court." Montgomery v. CSX Transp., Inc., 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008). Rule 56(c), SCRCP provides the circuit court shall grant a summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. 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, 353 S.E.2d 312, 314 (Ct. App. 1987).

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, 579, 556 S.E.2d 732, 736 (Ct. App. 2001). However, it is not sufficient for a party to create an inference which is not reasonable or an issue of fact that is not genuine. Priest v. Brown, 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct. App. 1990). 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).

STATEMENT OF FACTS

The Project is a townhome community in Mount Pleasant, South Carolina consisting of thirty-one buildings. **(R. p. 59) (R. p. 344)**. BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services through its unlimited commercial

general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"). **(R. p. 59)**. 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 approximately twenty-four (24) of the thirty-one (31) buildings at the Project. **(R. p. 59) (R. p. 594)**.

Respondent ECC Contracting, LLC ("ECC") served as a subcontractor of BFS and in that capacity performed deck repair work on Unit 2001[1], and installed windows and doors on one two-unit building[2] – ECC did not perform any other work on the Project. **(R. p. 59)**. ECC was paid approximately $1,506.00 for its work on the Project. **(R. pp. 601-04)**. According to BFS, ECC's work at the Project was performed pursuant to "Version – 5/17/06" of a BFS "Master Subcontract Agreement" dated February 26, 2008 (hereafter "Master Agreement"). **(R. p. 59) (R. pp. 605-16)**.

In its cross-claims against ECC, BFS alleges in multiple places that ECC provided and warranted materials, had a duty of care in selecting materials, and was contractually obligated to for procuring adequate materials in connection with its work, even though ECC supplied no materials. **(R. pp. 436, 442, 444-45)**. BFS's cross-claims also allege that BFS is entitled to be indemnified in the amount which BFS "may pay in satisfaction" of Plaintiffs' claim "plus [BFS's] costs for defense, inclusive of attorneys' fees", without regard to the fault of either ECC or BFS. See **(R. pp. 441-55)**. Additionally, BFS seeks to recover from ECC full contractual indemnification "for any liability BFS is found to have to the Plaintiffs or to other in this action" as well as "any sums for which BFS may be held liable to the Plaintiffs or to others, or which [BFS] may pay in satisfaction of such claims," under the terms of the Master Agreement. **(R. p. 441) (R. p. 68) (R. pp. 605-16)**.

[1] No deficiencies have been documented by Plaintiffs at Unit 2001.
[2] Units 2200 & 2201 located at 3036 Fraserburg and 3038 Fraserburg Way, Mt. Pleasant SC.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY APPLIED THE CLEAR AND UNEQUIVOCAL STANDARD TO CONTRACTUAL INDEMNITY PROVISIONS IN THE MASTER AGREEMENT BECAUSE BFS'S PLEADINGS SEEK INDEMNITY FOR BFS'S SOLE OR CONCURRENT NEGLIGENCE:

Section I of BFS's arguments focus on the lower court's application of the clear and unequivocal standard enunciated in Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166, (Ct. App. 2018). Specifically, BFS argues that the lower court (1) should not have applied clear and unequivocal standard because BFS is not seeking indemnity for its sole or concurrent negligence, and (2) if the clear and unequivocal standard applies to the indemnification provisions in the Master Agreement, such provisions clearly and unequivocally provide for indemnification in favor of BFS. Br. of Appellant, pp. 9-14. As set forth below, BFS's position is unsupported by ignore the language of and relief requested in its own pleadings, the ambiguous and confusing provisions of the Master Agreement, the lower court's order, and well settled South Carolina case law.

a. The clear and unequivocal standard applies because BFS is bound by its operative pleading, which seeks full contractual indemnification from ECC for any liability BFS is found to have to Plaintiffs.

"It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (citing Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964)). Here, BFS's operative pleading provides:

> 137. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of the Cross Claim Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

> 138. That **BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action**, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and **further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others**, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.
>
> (*emphasis added*) **(R. p. 441)**.

Essentially, Paragraph 137 of BFS's Amended Answer to Fourth Amended Complaint provides that, if BFS is held liable to Plaintiffs, then such liability could only be the result of the negligence of ECC and the other Cross-claim Defendants – BFS has adopted this position. (Br. of Appellant, p. 13). However, Paragraph 137 (and BFS's interpretation of said paragraph) ignores the many ways BFS may be held liable to Plaintiffs for its own negligence, including, *inter alia*:

- failing to properly supervises the work of its subcontractors to ensure that all work all work proceeded in accordance with the plans and specifications and in conformity with the customary and ordinary standards of the construction industry;
- in accepting non-conforming or defective material;
- in using and supplying defective materials;
- 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
- in failing to inform the architect, owner or general contractor of defects in the plans and specifications.

(R. pp. 366-67).

While BFS would have this Court read Paragraph 138 as stating, "if BFS is liable to the Plaintiffs, [ECC is] derivatively and contractually liable to BFS," Br. of Appellant, p. 13, the plain language of BFS's operative pleading does not allow for such an interpretation. Instead, the plain language Paragraph 138 signifies that BFS seeks **full contractual indemnification** from ECC for

any liability BFS is found to have to Plaintiffs and **recovery of any sums for which BFS may be held liable to Plaintiffs**. **(R. p. 441)**. Where an indemnitee alleges it is entitled to "full indemnity" from the indemnitor, which is true in the instant case, South Carolina courts have held the clear and unequivocal should be applied because such allegations show the indemnitee is seeking indemnification for its own negligence. See Concord and Cumberland, 424 S.C. at 642-50, 819 S.E.2d at 168-72 (explaining the circuit court correctly applied the clear and unequivocal standard where the indemnitee alleged it was entitled to "full indemnity" from the indemnitor because the allegation showed the indemnitee was seeking indemnification for its own negligence).

BFS may not now take a contradictory position from the statements in its pleadings by arguing that it "only" seeks contractual indemnity for ECC's own negligence to circumvent the application of the heightened clear an unequivocal standard. See Johnson v. Alexander, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015) (citing Elrod, 243 S.C. at 436, 134 S.E.2d at 416 ("The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible")).

It is also worth noting that Plaintiffs' expert has opined that there are issues with the materials supplied by BFS. Br. of Appellant, p. 1. Additionally, BFS has admitted partial fault by conceding that repairs to its work are necessary, by admitting its field superintendents supervised and inspected the work of ECC, and by its superintendent, who supervised the work of ECC testifying, that he had no complaints about ECC's work on this Project. **(R. pp. 596, 694, 701-07)**. Thus, with respect to contractual indemnification, BFS cannot obtain full contractual indemnification from ECC for any liability BFS is found to have to Plaintiffs and recovery of any

sums for which BFS may be held liable to Plaintiffs, unless ECC (or the other Cross-claim Defendants) indemnifies BFS for BFS's sole or concurrent negligence.

b. The indemnity provisions in the Master Agreement drafted by BFS are not clear and unequivocal and fail as a matter of law.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the heightened standard of being clear and unequivocal when an indemnitee seeks to recover for its own negligence; indemnification clauses that do not meet this standard are against public policy. See Concord & Cumberland, 424 S.C. 639, 819 S.E.2d 166 (affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity cross-claims of contractor based on application of the clear and unequivocal standard). Indemnity agreements are strictly construed, and ambiguous provisions are to be construed against the drafter of the provision. Id. at 647, 819 S.E. 2d at 171.

There are multiple indemnity provisions throughout the Master Agreement. For example, Section 5 INDEMNITY states:

> 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.
>
> **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 party, by the negligence of any of the Indemnitees**, it being the expressed intent of the contractor and the subcontractor that in such event the subcontractor is to indemnify, defend, and hold harmless the Indemnitees from the consequences of their own negligence, whether it is or is alleged to be the sole or concurrent cause of the bodily injury, sickness, disease, or death of the subcontractor, subcontractor's agent, employee, or representative, or the agent, employee, or representative of any of its subcontractors, the indemnification obligations under this paragraph shall not be limited by any limitation on the amount or type of damages, compensation, or benefits payable by or for Subcontractor under Workers Compensation acts, Disability Benefits Acts, or other employee Benefit acts, the subcontractor shall procure liability insurance covering its obligations under this Section 5.

The duty to defend under this Section 5 is independent and separate from the Duty to indemnify, and **the duty to defend exists regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees**. The duty to defend arises immediately upon presentation of a claim by any party indemnified hereunder and written notice of such claim being provided to subcontractor. **Subcontractor's obligation to indemnify, defend, and hold harmless under this Section 5 will survive the expiration or earlier termination of this agreement until it is finally determined by a Court of competent jurisdiction or arbitration panel that a claim against the contractor, the owner, and any of their officers, directors, agents, and employees for the matter indemnified hereunder is fully and finally barred by the applicable statute of limitations**.

The Defense and indemnification obligations under this agreement are not intended to and shall not require the subcontractor or others to indemnify or hold harmless a Registered Architect, Licensed Engineer, or an agent, Servant, or Employee of a Registered Architect or licensed Engineer from Liability for damage that is (1) caused by or results from: (a) defects in Plans, Designs, or Specifications prepared, approved, or used by the Architect or Engineer; or (b) the Negligence of the Architect or Engineer in the Rendition or conduct of Professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract, and (2) arises from personal injury or death, property injury, or any other expense that arises from personal injury, death, or property injury.

(*emphasis added*, all caps in the original) **(R. pp. 1482-83)**.

As the circuit court correctly held, the provisions of Section 5, as set forth above, are ambiguous, conflict with each other, and do not meet the elevated clear and unequivocal requirement.

Specifically, Paragraph 1 of Section 5 of the Master Agreement, which relates to property damage, is based on the AIA form indemnification language and the key phrase for ECC's arguments at the circuit court level was "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." The South Carolina Court of Appeals issued an opinion in Concord & Cumberland, 424 S.C. 639, 819 S.E.2d 166, that specifically recognized that this contract language fails as a matter of law where an indemnitee seeks indemnification for its own negligence because it does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own liability.

However, BFS, contending that it can rewrite the contract and its operative pleading to seek merely indemnification for the sole negligence of ECC, would have the inquiry end here without regard to the remainder of this Section 5 of the Master Agreement. The third paragraph of Section 5 states (all caps omitted for ease of reading):

> 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**.
>
> (*emphasis added*, all caps in the original) **(R. p. 1483)**.

Again, there is no legal basis for separating a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement, and BFS claims its attorney's costs and fees as damages in its complaint. BFS cannot argue that its claims for contractual indemnity are for those sums that are solely attributable to the negligence of ECC when its contractual indemnity provisions clearly call for ECC for indemnify BFS for 100% of its attorney's costs and fees regardless of who is found to be at fault, and its pleadings seek to recover from ECC for "**any liability BFS is found to have to Plaintiffs or to others**" and "**any sums for which BFS may be held liable to the Plaintiffs or to others**." **(R. p. 441)**. "It is not the function of the court to rewrite contracts for parties." Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) (citation omitted).

BFS would also have this Court ignore that the indemnity provisions in Section 5 conflict with other indemnity provisions hidden throughout the Master Agreement, including, *inter alia*, those hidden in Section 2, Section 3, and Section 8. For purposes of brevity and to spare the court from reviewing duplicative arguments, ECC hereby adopts by reference the arguments set forth in Brief of Respondent Hurley Services, Arguments, Section I, to the extent such arguments are not inconsistent herewith, as additional or alternative sustaining grounds for the lower court's decision. Rule 208(b)(6), SCACR; I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

II. THE PROVISIONS OF THE MASTER AGREEMENT VIOLATE THE ANTI-INDEMNITY STATUTE, S.C. CODE ANN § 32-2-10:

The contract between BFS and ECC contains multiple indemnity provision including those which require ECC to indemnify BFS for damages incurred as a result of BFS's sole negligence in violation of S.C. Code Ann. § 32-2-10. The relevant indemnity provisions provided in Section 5 of the Master Agreement between BFS and ECC, are provided in full in the section above.

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. In fact, neither the plain language of S.C. Code Ann. § 32-2-10 nor Concord & Cumberland, exclude attorney's fees from being within the scope of an indemnity provision. 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. S.C. Code Ann. §32-2-10. Further, BFS claims its attorney's costs and fees as damages in its operative pleading. **(R. pp. 441, 443-45)**.

Section 5 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." Master Agreement, "§5 INDEMNITY" (*emphasis added*, all caps in the original) **(R. pp. 1482-83)**. This is an explicit violation of S.C. 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 because 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., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (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. See S.C. Code Ann. § 32-2-10 (setting forth limitations of contracts for indemnity against liability for damages entered into in connection with construction projects).

Additionally, the middle paragraph 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 party, by the negligence of any of the Indemnitees." This provision also obviously violates S.C. Code Ann. §32-2-10.

As BFS should well know, 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. See 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, 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.

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

Moreover, because BFS cites no specific authority in its brief that attorney's fees cannot fall within the scope of indemnity, this argument should be considered abandoned. Rule 208(b)(l)(E), SCACR (requiring the citation of authority in the argument portion of an appellant's brief); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal).

a. South Carolina's legal contract construction rules support striking the Master Agreement's indemnification clauses in their entirety.

"[F]or a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement." Davis v. Greenwood Sch. Dist., 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). "A contract is read as a whole document…." McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). 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", which here, is BFS. Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 368 S.C. 198, 687 S.E.2d 714, 718 (Ct. App. 2009). "Words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed." Id.; see also Erie Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011) ("It is not the function of the court to rewrite contracts for parties."). Accordingly, South Carolina courts will not "blue pencil" an agreement and rewrite a contract's terms to make it comply with the law. Poynter Invs., Inc. v. Cent. Builders, 387 S.C. 583, 587-588, 694 S.E.2d 15, 18 (2010). Under South Carolina law, contracts "must stand or fall on their own terms." Id. If part of the contract's covenant fails, the agreement is unenforceable. Id.

In this case, the indemnification clauses set forth in the Master Agreement must fail altogether. Because at least one of the indemnification clauses fails, they all must fail. And the Court cannot rewrite the contract to save the legally defective indemnity clauses. The Master Agreement's indemnification clauses are unenforceable as a matter of law. Thus, the Court should grant ECC's Motion for Summary Judgment.

ECC raises this matter now as an alternative sustaining ground for the lower court's decision. I'On L.L.C., 338 S.C. 406, 526 S.E.2d 716.

III. THE CIRCUIT COURT CORRECTLY HELD THAT APPELLANT'S CLAIM FOR CONTRACTUAL INDEMNITY AGAINST ECC WAS BARRED BY 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).

Here, the Concord and Cumberland argument against BFS's contractual indemnity claims are identical to those previously raised and ruled upon in a prior action: 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 (the "Prior Action"). **(R. pp. 665-75)** (the "Newman Order"). In that case, the issues were actually litigated, directly determined, and necessary to support the judgment. In striking down BFS's Master Agreement's indemnity clauses, Judge Newman determined that the indemnification provisions "are confusing at best and deceptive at worst." **(R. p. 670)**.

The Master Agreement and indemnity provisions that BFS now wishes to use to support its claims against ECC involve the same agreement and indemnity provisions that were at issue in the Prior Action. BFS has already litigated the issue of the enforceability of its indemnification provisions, so it should not be permitted to now relitigate the same exact issue on the same exact

form contract.

Furthermore, in asking Judge Newman to reconsider the court's grant of summary judgment, BFS admitted in the motion papers that it signed and filed with the court that Judge Newman correctly found that the Master Agreements do not comply with the clear and unequivocal standard imposed by South Carolina law. **(R. pp. 677)**. Under South Carolina law, a party is bound by an admission contained in a court filing prepared and signed by his attorney. See Young v. Martin, 254 S.C. 50, 58, 173 S.E.2d 361, 365 (1970) (finding that judicial admissions by counsel for a party apply to matters of law, as well as factual issues, and where such a mixed question is admitted by a party's attorney the conclusion of law has been waived). Thus, BFS is barred from arguing contrary to this admission. Because Judge Newman has already ruled on the issues of the Concord and Cumberland defenses, summary judgment should be granted in ECC's favor.

Judge Roger Young recently ruled, in the matter of 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), that Judge Newman's Amended Order constitutes a prior final judgment that determined BFS's Master Agreement was unenforceable as a matter of law, and that the Newman Order precludes BFS from relitigating those issues. **(R. p. 682-86)** (the "Young Order"). A similar ruling was set forth in Pavic v. Carolina Cottage Homes, LLC, et al., Case No. 2019-CP-10-00772, Appellate Case No. 2021-000290 ("Pavic").

To invoke collateral estoppel, a party need not have also been a party in 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 Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627

(1991). Thus, not only is BFS collaterally estopped by the Newman Order and the Young Order, or Pavic, but it is also collaterally estopped from arguing that the Newman Order does not support a finding of collateral estoppel in this matter.

Neither BFS's appeal of the Newman Order nor BFS's appeal the Young Order undermine each Order's status as a final judgment as 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, 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).

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), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992). Rule 201(a) SCACR, provides that an: "[a]ppeal may be taken, as provided by law, from any final judgment or appealable order." The status of the Newman Order, the Young Order, and the Order in Pavic as a final judgment is what makes the orders appealable in the first instance. Accordingly, there is no reason BFS can provide this Court which supports a finding that Summary Judgment is not warranted based on collateral estoppel.

IV. THE CIRCUIT COURT DID NOT ERR IN FAILING TO SEVER INDEMNITY PROVISIONS IN THE MASTER AGREEMENT:

a. Severability is not appropriate.

BFS cites Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 34, 644 S.E.2d 663, 673–74 (2007) in support of its argument against the findings that its Contracts are unconscionable. However, BFS seems not to have considered the full text of that opinion or its ultimate holding with regard to severance. In Simpson, the Court stated:

At the same time, courts have acknowledged that severability is not always an

> appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." Booker v. Robert Half Intn'l Inc., 413 F.3d 77, 84–85 (D.C.Cir.2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties. Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).
>
> Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 34, 644 S.E.2d at 673–74 (citations in the body).

The Simpson Court went on to rule that the arbitration provision in question had to be severed in its entirety because severing multiple unenforceable provisions would amount to "rewriting" the provision. Id. at 34-35, 644 S.E.2d at 674 ("While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions."). It is important to note that State and Federal Courts nationwide have a strong policy of favoring arbitration, but due to multiple unenforceable provisions the Court ruled the entire provision had to be severed. Id. at n. 9. In this case there is no strong public policy favoring indemnity – to the contrary all of the public policy and statutes in issue specifically limit parties' ability transfer liability via contract. See S.C. Code Ann. § 32-2-10; Concord and Cumberland, 424 S.C. 639, 819 S.E.2d 166. In this case, the Court would have to sever multiple portions of multiple provisions the Master Agreement in order to come up with some rough facsimile of a legal indemnity provision. Arguably finer linguistic surgery, than the Court was willing to do in Simpson and in a scenario where our Courts are less inclined to do so. In short, severance is not appropriate in this case.

ECC hereby adopts by reference the arguments set forth in Brief of Respondent Hurley

Services, Arguments, Section IV, and Brief of Respondent AC Construction, Arguments, Section III, to the extent such arguments are not inconsistent herewith, as additional or alternative sustaining grounds for the lower court's decision. Rule 208(b)(6), SCACR; I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

b. Res judicata prevents BFS from relying on the severability provision of the Master Agreement.

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.

Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (alteration in original) (citations omitted), cited with approval in Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). Res judicata may be applied if (1) a final, valid judgment was entered on the merits of the first suit; 2) the parties to both suits are the same; and 3) the subsequent action involves matters properly included in the first action. Plott v. Justin Ent., 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. App. 2007).

As discussed in Section III above, BFS and ECC were parties to BFS v. MI Windows, wherein Judge Newman granted ECC's motion for summary judgment as to BFS's cross-claim for contractual indemnity. Thus, the first and second requirements of res judicata are met. 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.); see e.g., Hapgood v. City of Warren, 127 F.3d 490 (6th Cir. 1997) ("the pendency of an appeal, however, does not prohibit application of claim preclusion. The prior state court judgment remains 'final' for preclusion purposes, unless or until overturned by the appellate

court."); Planned Parenthood of the Columbia/Willamette, Inc. v. Bray (In re Bray), 256 B.R. 708, 711 (Bankr. D. Md. 2000) (internal citations omitted) ("pendency of an appeal does not affect the finality of a judgment for purposes of res judicata or collateral estoppel.").

In determining whether second prong is satisfied, courts in South Carolina should consider: (1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases; and (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action. Judy v. Judy, 393 S.C. at 173, 712 S.E.2d at 414 (holding these four elements should be considered merely as factors in a conceptual framework to ensure no one is twice sued for the same cause of action.")

Like the present case, in BFS v. MI Windows, BFS asserted a derivative cause of action against ECC for contractual indemnification pursuant to the terms of the Master Agreement, and BFS also sought "full indemnity" from ECC for any liability it was found to have to Plaintiffs' in the underlying case. Additionally, in both cases the question before the court was whether the contractual indemnification provisions in the Master Agreement met the clear and unequivocal standard set forth in Concord & Cumberland such that BFS could recover from ECC for BFS's own negligence where BFS sought "full indemnity" from ECC for any liability BFS was found to have to Plaintiffs. Moreover, the evidence – i.e., the Master Agreement between BFS and ECC – is the same in both cases, and both cases arise out of the same transaction or occurrence – i.e., BFS and ECC entering into the Master Agreement.

Given that the questions of law, facts, evidence, and subject matter at issue in BFS v. MI Windows are the same as those at issue in the present case, res judicata should apply and the court should not use the severability provision to re-write Master Agreement to bring its terms in

accordance with the clear and unequivocal standard as BFS could have raised the provision in BFS v. MI Windows but failed to do so.

ECC raises res judicata now as an alternative sustaining ground for the lower court's decision. I'On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

V. THE MASTER AGREEMENT IS A CONTRACT OF ADHESION, UNCONSIONABLE, AND OPPRESSIVE:

Finally, BFS argues that its contracts are not unconscionable and unenforceable. ECC joins in the arguments of the other Respondents as to why BFS' contracts are unconscionable and unenforceable. However, ECC, briefly, sets forth why it is entitled to benefit from this ruling if affirmed.

a. It will be the law of the case that BFS's Master Agreements are unconscionable if this court affirms.

If the lower court rulings are upheld, they will become the Law of the Case and will apply, to the extent the contracts are the same, to all parties regardless of whether or not the Lower Court rulings mentioned one issue or another in each order. See Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."); Hudson v. Lancaster Convalescent Ctr., 393 S.C. 1, 7, 709 S.E.2d 65, 68 (Ct. App. 2011) (stating a circuit court ruling that is appealed but subsequently withdrawn is the law of the case); see also Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (holding an un-appealed ruling, right or wrong, is the law of the case). Thus, the "discrepancies" in the various orders BFS focuses so heavily upon at various stages of its brief are immaterial.

CONCLUSION

It is clear that BFS seeks indemnification for its own negligence. The lower court's findings of facts and application of the "clear and unequivocal" standard was proper and is supported by the record on appeal. The indemnity provisions in the Master Agreement are confusing, ambiguous, irreconcilable, illegal, violate public policy and are unenforceable. The provisions were drafted by BFS such that they are inextricably linked, so it is impossible for the Court to use the Severability clause to remove one or more from the Subcontract without rewriting the subcontract. Thus, BFS' claims fail as a matter of law. Wherefore, ECC hereby requests that this Court AFFIRM the findings and Order of the lower court in favor of Respondent ECC.

Respectfully Submitted,

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