RECEIVED
Feb 27 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

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.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado;
Defendants,

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

v.

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

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

Appellate Case No. 2021-001050

PETITION FOR REHEARING

Stephen P. Hughes
William H. Cox, III
P.O. Box 40
Beaufort, South Carolina 29901
Attorneys for Appellant
Builders FirstSource-Southeast Group, LLC

Appellant Builders FirstSource-Southeast Group, LLC (hereinafter "BFS") respectfully petitions this Court for rehearing.

The Court's February 12, 2025 Opinion (hereinafter "Opinion") (a) overlooks multiple allegations in BFS' pleadings limiting the contractual indemnity claims to recovery of damages resulting from the negligence of the subcontractors, (b) misapprehends the plain language of the contracts that limit the subcontractors' obligations therein, (c) erroneously applied the "clear and unequivocal" standard to claims seeking indemnification against liability for the negligence of the subcontractors, (d) relies on factual findings which are completely without evidentiary support[1], (e) ignores authoritative statutory law, and (f) deviates from long-standing precedent to erroneously determine that the contracts and the indemnity provisions therein are unconscionable and unenforceable as a matter of law.

The Opinion, whether by design, or otherwise, ostensibly creates new and unprecedented law governing contractual relationships between parties. By ignoring Section 32-2-10's explicit authorization of indemnity and abandoning the principles set forth in *Concord & Cumberland*, the Opinion has effectively created new and harmful law that will undo established relationships between parties far beyond this case: every construction related contract in South Carolina is now subject to challenge and potentially left without legal support. Because of the significant and adverse consequences of the Opinion's ruling, and other considerations more fully set hereinafter,

[1] The Opinion in its recitation of the facts incorrectly states that "BFS used fasteners of an improper type and inadequate length to assure the embedment of fasteners into the framing; and that BFS installed the fasteners at spacing intervals exceeding those required by the manufacturer's installation criteria." The Opinion also incorrectly states in footnote 3, "BFS supplied building materials, including windows and window fasteners, for Pohlman's use." The Opinion in its footnote cites to the factual findings of the circuit court which does not include BFS supplying or installing fasteners. Contrary to the Court's belief, the subcontractors supplied and installed the fasteners for any and all work the subcontractors performed. This is yet one more issue the Court has completely misapprehended and the Opinion and all of the Court's analysis must be revised consistent with the actual facts of the case.

BFS requests that the Court carefully reconsider and revise the Opinion to be consistent with the considerations set forth hereinafter.

I. The Opinion overlooked multiple allegations in the relevant pleadings limiting the indemnity claims to damage resulting from the subcontractors' negligence, and thus erroneously applied the heightened *Concord & Cumberland* standard in evaluating and applying the relevant contractual indemnity provisions.

While the relevant contracts were drafted to encompass the broadest possible scope of circumstances the parties may encounter, their separate and distinct provisions, including the separate indemnity provisions, are subject specifically "to the fullest extent permitted by law." Pursuant to South Carolina law and the severance provisions of the contracts, any provision that is found to violate the law is to be severed accordingly. Equally importantly, the only indemnity provisions relied upon in pursuit of the instant claims are those imposing upon the subcontractors the obligation to indemnify BFS against property damage claims resulting from the subcontractors' negligence. Consistent therewith, BFS' indemnity claims, as set forth within the relevant pleadings, are premised upon BFS' contention that any damage suffered by the Plaintiffs necessarily resulted from the negligence of the subcontractors.

Specifically, Paragraphs 133 and 162 allege that the plaintiff has sued BFS for damages resulting from deficiencies in framing and installation of material components. These allegations are critical to BFS indemnity claims against the subcontractors because the subcontractors are the parties that supplied the fasteners and labor for installation of the material components. Paragraphs 134 and 163 allege that BFS has denied the material allegations asserted against BFS. Paragraphs 135 and 164 allege that the respective subcontracts between BFS and subcontractors provide for contractual indemnity in favor of BFS. Paragraphs 136 and 165 allege that there exists a special relationship between the parties to impose an indemnity obligation on the subcontractors in favor of BFS. Paragraphs 137 and 166 allege:

"[t]hat 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 [subcontractors], 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."

The Court, despite citing to these specific allegations at pages 20-21 of the Opinion, somehow overlooks, or purposefully ignores, these allegations regarding BFS' contractual indemnity claims for damages resulting from the subcontractors' negligence. Instead, the Court focuses on Paragraphs 138 and 167 that allege:

"[t]hat BFS is entitled to full contractual and common law indemnification from the [subcontractors], 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 [subcontractors], entitling BFS to recover from the [subcontractors], its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the [subcontractors] 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."

Based on the aforesaid allegations, the Court determines that BFS is seeking indemnity, not only for the subcontractors' negligence, but also for BFS' negligence. However, in order to reach such a conclusion, the Court must necessarily overlook and ignore the allegations set forth in Paragraphs 133-137 and 162-166. When Paragraphs 138 and 167 are properly read in conjunction with Paragraphs 133-137 and 162-166, the pleadings are clear in limiting the BFS indemnity claims to damage occasioned by the negligence of the subcontractors.

Aside from the allegations limiting the extent of its claims, BFS has also stipulated multiple times on the record that it is only seeking indemnity for damages resulting from the negligence of its subcontractors.

Even if BFS had pled only paragraphs 138 and 167 as the Court suggests (by its analysis focusing solely thereon), nothing within the Rules of Civil Procedure precludes BFS from seeking more expansive recovery than the evidence might support. Rule 13(g), SCRCP specifically

authorizes that a "***cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.***" Moreover, Rule 8(e)(1), SCRCP states that "no technical form of a pleading is required." Rule 8(e)(2), SCRCP provides that a party may set forth two or more statements of a cause of action alternatively or hypothetically either in one count or in separate counts. Further, Rule 8(e)(2), SCRCP provides that a pleading is not made insufficient by the insufficiency of one or more of the alternative statements. Rule 8(f), SCRCP provides "[a]ll pleadings shall be so construed as to do substantial justice to all parties." The Court's Opinion clearly ignores these foregoing rules of civil procedure and has effectively penalized BFS for the way in which it pled its contractual indemnity claims.

Nevertheless, having determined that BFS had sought recovery in indemnity for its own negligence and for the negligence of its subcontractors, the Court proceeded to evaluate both claims under the heightened "clear and unequivocal" standard set forth in *Concord & Cumberland.* Such application is in error, as the contractual provisions authorizing indemnity for the subcontractors' negligence should have been evaluated in accordance with the rules of construction of contracts generally. Therefore, the Court should have recognized BFS' right to recover in contractual indemnity against liability caused by the subcontractor's negligence, while denying indemnity for damages which might ultimately be determined to have resulted from BFS' negligence.

A. In construing and applying indemnification language nearly identical to that at issue in this case, the Court in *Concord & Cumberland*, while precluding the general contractor from recovering indemnity for its own negligence, nonetheless allowed indemnity for damages caused by the subcontractor's negligence.

The Opinion found, based upon the Court's misconstruction of the BFS' pleadings, that BFS sought recovery not only for the negligence of its subcontractors, but also for its own negligence.

The Court then determined that all claims failed as a matter of law, because the contractual provisions were not sufficiently clear and unequivocal. As noted more fully hereinafter, such a broad application of the "clear and unequivocal" standard is contrary to established law, including this Court's own precedent.

The general contractor in *Concord & Cumberland,* pled one paragraph of allegations for its contractual indemnity claim:

"104. Superior is entitled by contractual provisions, to the fullest extent permitted by law, full indemnity from the Subcontractors and Suppliers, to include the assumption of Superior's defense, as a result of the allegations and claims made by the Plaintiff, if substantiated."

Notably, the general contractor **did not** limit its contractual indemnity claims against the subcontractors whatsoever. Moreover, the general contractor, by its motion for partial summary judgment, explicitly sought recovery in indemnity against liability for damages occasioned by both the negligence of its subcontractor, and the negligence of the general contractor itself.

This Court, prior to its analysis, recognized specifically that "[t]ypically, courts will construe an indemnification contract 'in accordance with the rules for the construction of contracts generally.' " *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170 (Ct. App. 2018) (*quoting Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. This Court also noted " 'the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.' " *Id.* (*quoting Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989).

As such, this Court, in applying the contractual provision at issue in *Concord & Cumberland,* which is virtually identical to the provision at issue here, determined that the language of the provision was not sufficiently clear and unequivocal to require the subcontractor to indemnify the

general contractor against liability for damages caused by the general contractor's own negligence. However, the Court nonetheless, in affirming the ruling of the trial court, specifically determined that the subcontractor's obligation to indemnify the general contractor encompassed claims and damages to the extent caused in whole or in part by any negligence of the subcontractor. *See Concord & Cumberland*, 424 S.C. at 652–53:

> "Specifically, we agree with the *Mautz* and *Braegelmann* courts that the phrase, 'to the extent caused ... in whole or in any part by any negligent act or omission of [Muhler],' limits Muhler's obligation to indemnify to damages and losses but only to the extent they were caused by the negligence of Muhler and its subcontractors. Muhler's indemnity obligation extends to losses Muhler only causes in part, but does not clearly and unequivocally require Muhler to indemnify for the negligence of others that contributed to the same loss."

Thus, despite overt representations by the general contractor that it was seeking indemnity for damages resulting from its own negligence, this Court, in *Concord & Cumberland*, nonetheless allowed the general contractor to recover from its subcontractor damages resulting from the work of the subcontractor.[2]

Here, the Opinion, contrary to the Court's own precedent, appears to have applied the heightened standard to all purported claims of BFS, when the relevant contractual indemnity provisions should have been evaluated under general rules of contract construction for BFS claims seeking indemnity for the subcontractors' negligence. The Opinion precludes BFS from <u>any</u> recovery in contractual indemnity, even if the jury determines that the subcontractor has been solely or concurrently negligent in causing the damages at issue.

---

[2] Later in its Opinion, this Court points to our warranty provision as a reason why BFS should not be able to recover from its subcontractors. Notably, the contract between the general contractor and subcontractor in *Concord & Cumberland* also contained a warranty provision which provided, in part, that "[t]he subcontractor warrants its work against all deficiencies and defects in materials and/or workmanship as called for in the Contract Documents." The contract does not explicitly limit "defects in materials" to those materials provided by the subcontractor. Even despite this warranty provision, however, this Court still allowed the general contractor to recover for damages arising out of the subcontractor's negligence.

The rights sought by Builders FirstSource, under the *relevant* provisions of its respective contracts, are no different and no more expansive than those specifically afforded to the general contractor, by this Court, in *Concord & Cumberland.* The Court should amend the Opinion to follow *Concord & Cumberland* and allow BFS contractual indemnity claims for damages occasioned by the negligence of its subcontractors to proceed to trial.

II. In ruling that BFS' indemnity claims fail as a matter of law, the Court overlooked that §32-2-10 specifically allows agreements whereby the promisor/indemnitor agrees to indemnify the promisee/indemnitee against liability for damages resulting from the negligence, in whole or in part, of the indemnitor.

This Court has acknowledged that "§32-2-10 allowed BFS and the 2005 Subcontractors to agree the 2005 Subcontractors will indemnify BFS for damages caused by the 2005 Subcontractors or their subs" and "the statute allows BFS and the Later Subcontractors to agree that the Later Subcontractors will indemnify BFS for damages caused by the Later Subcontractors or their subs." Opinion p. 25. As pled and redundantly set forth on the record, this is the exact recovery that BFS seeks here, and it is explicitly authorized for by §32-2-10.

The Court, however, has gone on to explain why other theories of recovery (which have not been asserted by BFS), might violate §32-2-10. Those other cited sections, as explained in greater detail below, do not violate the statute once properly understood. However, even if those separate sections did entail violations of the statute, they would not, and do not, affect the ability of BFS to recover from the subcontractors for damages occasioned by the subcontractors' negligence-such recovery is explicitly authorized by the statute, and contemplated by the relevant indemnity provisions at issue here.

III. The Court, in determining that the Appellant's claims were barred by the doctrine of collateral estoppel, overlooked the fact that the specific issue before the Court had not been previously resolved by any court judgment, and further overlooked that South Carolina law is silent regarding whether a decision on appeal is final for purposes of res judicata.

The issue of whether a trial court decision on appeal is sufficiently "final" for purposes of collateral estoppel is an issue of first impression in South Carolina. There are no cases on point. Even the cases cited by the parties herein have reached different conclusions. Because the issue is one of novel impression in South Carolina, it was inappropriate for the matter to be resolved by summary judgment.

Moreover, this Court has overlooked that no court has yet answered the question of whether BFS can recover, under the relevant indemnity provisions of the respective contracts, for the negligence of its subcontractors, regardless of whether BFS can recover for its own negligence. All prior cases cited by the Court as its basis for collateral estoppel have involved the lower courts' consideration of BFS claims purportedly seeking indemnity against BFS negligence. No prior court has specifically addressed the issue – the specific claims as presented by BFS in this litigation. The doctrine of collateral estoppel is available ***when the same issues of fact or law*** are actually litigated and determined by valid and final judgment. Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) (emphasis added). The issue before the trial court in this case was ***whether BFS may recover under the relevant indemnity provisions for the subcontractors' negligence*** (whether sole or concurrent). This issue has not been ruled upon by a single court to date, and thus, it is not subject to collateral estoppel. Therefore, this Court should answer the novel question, which is not precluded by collateral estoppel.

IV. The Court misapprehended and misconstrued relevant provisions of the contracts by failing to account for limitations imposed by defined terms.

The Court in its Opinion interprets the "warranty, guaranty, and indemnity" provisions of the contracts such that they "violate § 32-2-10, are ambiguous, conflict with each other, and do not

meet the clear and unequivocal standard articulated in Concord & Cumberland." Opinion, p. 29. This conclusion is based on a flawed understanding of the contracts and on a failure to honor the given meaning of defined terms.

A. The "Section 3. Warranty" Provision of the Later Contracts limits the subcontractors' warranties to the services or materials supplied by the subcontractor.

Throughout its Opinion, the Court quoted extensively from sections describing the relationship of the parties vis-à-vis the "Work." However, ***the Court never once acknowledged that "Work" is a defined term***, and by definition the Work is limited to the materials provided and/or services performed by the subcontractor. See Section 1 Work in 2005 and Later Contracts. The Work limitation brings the purportedly problematic sections well within the scope of §32-2-10 and allows for a harmonious reading of the contract, consistent with South Carolina law and the intention of the parties.

Specifically, regarding Section 3, the Opinion states that:

> [T]he indemnity provision buried in the fine print of Section 3 of the Later Contracts contains a warranty provision that would allow BFS to seek indemnity for personal injuries and property damage arising from the sole negligence of BFS in selecting and selling the products **BFS provided** to the Later Subcontractors for installation[,]

and further that:

> Sections 3 and 5 of the Later Contracts obligate the Later Subcontractors not only to warrant the design and suitability of the defective materials and building components at the Project but also to indemnify and defend BFS from any property damage or personal injury resulting from the water intrusion issues related to the provided materials and building components.

Opinion pp. 22, 25 (emphasis in original).

The Court reaches this conclusion by adopting Respondents' position that:

> The language in Section 3 of the Later Contracts stating, "Subcontractor guarantees **the Work** against defects in design, workmanship, and materials" only makes sense

> if the words "design, workmanship, and materials" refer to the defective materials and building components provided by BFS because the Later Subcontractors had no responsibility for the design of the Project or any of its components—including the materials. Further, even though BFS provided the structural components, the Later Contracts appear to require the Later Subcontractors to provide a ten-year warranty on "structural applications."

Opinion pp. 25-26, n. 7 (emphasis added).

This reading overlooks the definition of **Work** as a term that excludes such defective materials and building components provided by BFS. The subcontractor guarantees only the labor it performed or the materials it supplied. If the subcontractor provided no materials, Section 3 does not require the subcontractor to guarantee any materials, and certainly not any materials provided by BFS. Instead, the subcontractor guarantees only its **Work**, and its obligations to indemnify are limited to claims and damages resulting from its **Work – ie, the materials supplied and/or services performed by the subcontractor itself**[3].

More importantly at this juncture, however, is that this Court overlooked the rightful, legitimate, and licit interpretation of the contracts. When such a licit interpretation exists, courts are compelled to adopt it. *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 416–17, 756 S.E.2d 148, 153 (2014)(quoting that "[b]ecause it must be assumed that the parties intended to form a binding contract, the court should favor an interpretation that saves the contract instead of voiding it," and further, that "an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous"). **"Work"**

[3] As noted in Footnote 1, the subcontractors were responsible for providing appropriate fasteners for use in the implementation of their services, and for compliance with relevant manufacturer installation instructions in installation of materials. It should be noted that the Opinion, in its recitation of particulars of negligence set forth by Plaintiff's Fourth Amended Complaint, sets forth numerous allegations implicating the materials and/or services provided by the subcontractor, including Paragraph 88 subparagraphs d) -in using and supplying defective materials; f) -by installing materials in violation of manufacturer's instructions; and h) -in constructing the project in violation of applicable building codes.

is a defined term used throughout the contracts, including in Section 3 Warranty. Because **Work** is a defined term, this Court must honor a reading of the contract that limits warranty of **Work** to materials supplied and/or services performed by the subcontractors. The warranty provisions of section 3, when properly construed, comply with the laws of South Carolina.

B. The Section 5 Indemnity Provisions are reconcilable because they address two separate situations.

Regarding Section 5, the Opinion states that:

> [T]he second paragraph of Section 5 contradicts the first paragraph by purportedly requiring the Later Subcontractors to indemnify BFS (and others) even if it is alleged that the loss was caused by BFS. The language of these two paragraphs cannot be reconciled.

Opinion p. 23.

The Court here has overlooked that the first paragraph of Section 5, insofar as relevant to the BFS claims in this matter, applies to losses arising out of property damage resulting from the negligence of the subcontractor, while the second paragraph applies to bodily injury or property damage sustained by the subcontractor, its employees, agents, or representatives.

Here, there are no claims, much less any allegations, of bodily injury or property damage sustained by the subcontractors. Instead, the claims in this matter are for property damages allegedly sustained by the Retreat at Charleston National Property Owners Association and which they allege resulted from both BFS' and the subcontractors' negligence.

The Second paragraph of Section 5 deals with potential obligations to indemnify for losses not at issue here, has not been cited by BFS in support of its claims, and is irrelevant to the assertion of these claims.

The separate indemnity obligation imposed upon the subcontractor by Paragraph 1 of Section 5 is explicitly limited to liability for property damage caused by the negligence of the

subcontractor. This indemnity provision is expressly authorized by Section 32-2-10 and is what BFS relied upon in its contractual indemnity claims.

To claim that these two separate and distinct indemnity provisions cannot be reconciled, is simply incorrect; they cover different scenarios and do not contradict each other. Accordingly, the Court must revise its Opinion to be consistent with the aforementioned South Carolina law.

C. The Court has failed to recognize that the indemnification obligation imposed by Section 8(i) applies only to the "fullest extent permitted by law", and relates only to liability for damages occasioned by mechanics' and materialmen's liens, arising out of the services, labor, equipment, or materials furnished by subcontractors.

The clear intent of Section 8(i) is for the subcontractor to indemnify BFS against damages arising from the failure of the subcontractor to satisfy liens resulting from the subcontractor's failure to pay its own subcontractors or suppliers for services and materials provided in conjunction with the Work performed by the subcontractor. More importantly, and as stated hereinabove, the indemnity obligations of Section 8(i) are imposed only to the "fullest extent permitted by law," are set forth in a subsection of Section 8, ***have not been relied upon by BFS in the pursuit of its contractual indemnity claims in this matter, and are completely irrelevant to the assertion of the contractual indemnity claims here.***

As more thoroughly detailed in following argument, the indemnity provisions of Subsection 8(i), to the extent those may be found to be inconsistent with law, can be severed without impacting the independent indemnity obligations as set forth in Paragraph 6 of the 2005 contracts and in Section 5 of the Later Contracts.

V. The two potentially offending indemnity provisions are easily severable once the Court's misapprehension is corrected.

The Court misapprehended the basic provisions of the contracts and declined to sever the purportedly offending provisions that provide for indemnification regardless of the negligence of

BFS, reasoning that "because the indemnity provisions are replete with terms that violate South Carolina law and public policy, these terms cannot be effectively severed." Opinion p. 28. The majority of the Court's concerns regarding offending provisions should be eliminated once the Court takes into account that *Work* is a defined term used throughout the contract, and necessarily limits the terms and provisions of the contracts accordingly.

The only two sections that might provide for potentially problematic indemnification - Section 6(b)(2)(iii) of the 2005 Contracts and Section 5, Paragraph 2 of the Later Contracts - could be cleanly and easily stricken from the respective contracts, leaving behind licit indemnity provisions in each set of contracts. Because the contracts are no longer "replete with terms that violate South Carolina law and public policy," the Court may with confidence honor the severability provision and strike the offending language with no ramifications to the remaining terms of the contracts. Moreover, as authoritatively determined by the appellate courts, "whether an illegal provision in an otherwise valid contract may be separated from the contract is a matter of intent of the parties" *The Beach Company v. Twillman, Ltd.,* 351 S.C. 56, 64, 56 S.E.2d 63, 867 (Ct. App. 2002). The presence of a severability clause such as the clause incorporated within each of the contracts at issue here, should be treated as strong evidence of the parties' intent to sever unenforceable language. *Jane Doe v. TCSC, LLC,* 430 S.C. 602, 615, 846 S.E.2d 874, 880-81 (Ct. App. 2020).

The severability provisions of the contracts unequivocally reflect the intention of both BFS and its subcontractors that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the contract may be invalid, this Court should honor the intent of the parties and sever any offending provision, leaving the remaining provisions intact.

VI. The Court's conclusion that the indemnity provisions were unconscionable was based upon its misapprehension of the Contracts' terms.

As noted, the Court has misconstrued specific contractual provisions which impose upon the subcontractors limited obligations which are completely consistent with state law. Moreover, the Court has determined, without any supporting basis, that there is a disparity in bargaining power between the parties. There is absolutely no evidence in the record to support such a finding by the lower court or this Court. The contracts comply with South Carolina law and public policy, and provide for a judicially-recognized form of indemnification.

The provisions highlighted by this Court are completely unrelated to this litigation, and, as explained above, are, contrary to the Court's misapprehension, in fact limited and licit. At issue in this litigation is **ONLY** the initial paragraph of the Section 5 indemnity provision (or the initial paragraph of Section 6 in the 2005 Contracts). However, by relying on irrelevant provisions to invalidate the entire contract, this Court has potentially placed *all* similar contracts of *numerous* contractors at issue. The Later Contracts contain provisions identical or remarkably similar to such provisions in numerous contracts currently in force, including contracts utilized by many subcontractors in South Carolina. By its wholesale invalidation of the entire contract, this Opinion will destabilize contractual relationships within the industry, unsettle established South Carolina law regarding contractual allocations of risk, compromise the integrity of virtually identical provisions relied upon by contracting parties throughout the State of South Carolina, invite a flood of litigation, and ultimately make it practically impossible for *any* contractor to recover from its subcontractors.

These provisions are not unreasonable; they are industry-standard provisions that echo the basics of South Carolina indemnity law – that one party can recover from a second party for damages the first party incurred, to a third party, as a result of the negligence of the second party.

BFS respectfully requests that this Court reconsider its opinion in light of the points articulated herein.

HOWELL, GIBSON & HUGHES, P.A.

By: _____

Stephen P. Hughes
William H. Cox, III
PO Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorneys for Builders FirstSource-Southeast Group, LLC

Beaufort, South Carolina

February 27, 2025

RECEIVED
Feb 27 2025
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

2016-CP-10-03783

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

vs.

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

and

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

vs.

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

of which

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

and

Palmetto Trim and Renovation is.....Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing ***Petition for Rehearing*** upon all counsel of record by last known email addresses on this 27th day of February, 2025.

HOWELL, GIBSON & HUGHES, P.A.

By: _____

Stephen P. Hughes
William H. Cox, III
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorneys for Builders FirstSource-
Southeast Group, LLC

Beaufort, South Carolina

HOWELL, GIBSON AND HUGHES, P.A.
ATTORNEYS AT LAW
Post Office Box 40
Beaufort, South Carolina 29901-0040
www.hghpa.com

STEPHEN P. HUGHES
ROBERT W. ACHURCH III *
DAVID S. BLACK
THOMAS A. BENDLE, JR.
WILLIAM H. COX, III

NATHAN E. AKERS
ROBERT S. DENNIS

* Certified Mediator

25 RUE DU BOIS
LADY'S ISLAND
BEAUFORT, SOUTH CAROLINA 29907

TELEPHONE: 843 – 522-2400
FAX NUMBER: 843 – 522-2429
WRITER'S DIRECT: 843-522-2426
DIRECT E-MAIL: Sphughes@hghpa.com
PARALEGAL E-MAIL:
scombites@hghpa.com

VIA EMAIL & CERTIFIED MAIL
9589 0710 5270 0188 1752 07

RECEIVED
Feb 27 2025
SC Court of Appeals

February 27, 2025

Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: Builders FirstSource- Southeast Group, LLC v. Palmetto Trim and Renovations
Civil Action No.: 2021-001050
Our File No.: 11981 5 SPH

Dear Sir or Madam:

Please find enclosed herewith for filing an original and one copy of the ***Petition for Rehearing***, together with the Certificate of Service, with regard to the above referenced matter. Also enclosed please find the applicable filing fee in the amount of $50.00. I would appreciate your filing the Petition for Rehearing and returning a filed clocked copy to me via email at sphughes@hghpa.com, wcox@hghpa.com, and scombites@hghpa.com. If return of the clocked copy must be via U.S. Mail, please advise and I will provide a self-addressed, stamped envelope provided for same.

With kindest regards, I am
Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

Stephen P. Hughes

SPH/sc
ENCLOSURES
cc: All Counsel of Record