RECEIVED
Mar 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

Case No. 2019-CP-10-00772
Appellate Case No. 2021-000290

Dag Pavic and Stela Susac-Pavic.....Plaintiffs,

v.

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

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

AND

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

v.

MW Manufacturers, Inc.,.....Third Party Defendant.

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 March 12, 2025 Opinion (hereinafter "Opinion") correctly captures the nature of BFS' claims: "***BFS's claims for*** breach of contract, breach of express and implied warranties, negligence, ***contractual indemnity, and equitable indemnity were premised upon Hurley's alleged negligence in the installation of the windows BFS provided.***" Opinion p. 1 (emphasis added). The Opinion, however, never once considers whether BFS can actually recover from Hurley for Hurley's negligence; instead, the Opinion only considers whether BFS may recover for BFS's negligence, which, by the Court's own observation, is not the issue before the Court. Because the Opinion's rationale and rulings focus on the wrong legal issues (and, at times, erroneous facts), and for other considerations more fully set hereinafter, BFS requests that the Court carefully reconsider and revise the Opinion to be consistent with the South Carolina law.

I. BFS is not seeking indemnity for its own negligence, and the contract provisions do not violate South Carolina public policy or statutory law.

As identified by the Court, BFS's indemnity claims are premised upon Hurley's negligence in installing the windows, ***not*** on BFS's alleged own negligence. Such claims are explicitly permitted under South Carolina law, and the Court has not identified any reason why BFS should not be able to proceed with such a claim. This is especially true in this case because a material issue of fact exists as to whether Hurley was negligent, and this issue of fact should have precluded summary judgment.

a. BFS is seeking indemnity for liability for damages occasioned by Hurley, which is explicitly permitted under Section 32-2-10.

Despite the correct finding in the opening paragraph of the Opinion that BFS's claim for indemnity is premised on Hurley's negligent installation of the windows, only two paragraphs

later, in Section 1 of the Opinion, the Court erroneously states "because ... BFS sought 'indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation,' [t]he circuit court did not err in finding 'the indemnity and duty to defend provisions of the [Agreement] violate South Carolina public policy and § 32-2-10.'" This first affirmation by the Court is incorrect for multiple reasons. First, the Court completely ignores the fact that the Court has already correctly acknowledged that BFS's contractual indemnity claims are premised only upon the alleged negligence of Hurley. Second, the Section 1 affirmation conflicts with the Court's prior background recitation in the second paragraph of the Opinion that acknowledges that claims for defective windows were dismissed by Stipulations of Plaintiff Pavic and BFS. Moreover, the Court assumes, without any supporting evidence, that the windows supplied by BFS were defective, and that the mere assertion of window claims in unspecified class litigation, is equivalent to a dispositive determination of a product defect. Further, the assertion of window defect claims in this or in separate litigation has no bearing upon BFS's claims against Hurley for damages resulting only from Hurley's negligent acts or omissions in the installation of the windows.

The *correct and incorrect pattern* in the Opinion continues with subsequent language in Section 1 correctly noting that Section 32-2-10 allows BFS and Hurley to agree that "Hurley would indemnify BFS for damages caused by Hurley or Hurley's agents." The scope of the indemnity agreement at issue does encompass such claims, but the Court did not acknowledge this. The Opinion incorrectly states that "the terms of the Agreement seek to obligate Hurley not only to warrant the design and suitability of the defective materials BFS provided for installation but also to indemnify and defend BFS from property damage or personal injury resulting from the moisture intrusion issues related to the faulty windows." Again, as the Court has already correctly found in

the opening paragraphs of the Opinion, the parties dismissed any and all claims relating to purported deficiencies in the windows, and the only claims that remained pending related to the purported deficiencies in installation of the windows. The Court must revise the Opinion to be consistent with its finding that BFS's indemnity claim is premised only upon Hurley's negligence in installation of the windows, and that thus it is permissible under Section 32-2-10.

b. The agreement uses "Work" as a defined term to limit Hurley's guarantee and warranty to only the work performed by Hurley, consistent with South Carolina law.

The Opinion argues in Footnote 3 that the relevant agreement violates Section 32-2-10 because in Section 3, Hurley must guarantee "the Work against defects in design, workmanship, and materials;" because Hurley did not provide materials, the Court asserts the Agreement attempts to make Hurley liable for more than its scope of work. However, the Court has overlooked that "Work" is a defined term in the agreement, and its definition is limited to the labor performed by or the materials provided by the subcontractor. **R. p. 492**. This limitation should mollify the Court, because it limits liability to the subcontractor's exact scope of work – nothing more. Thus, Hurley's ***Work*** may include "design, workmanship, and materials" **IF** Hurley agrees and contracts with BFS to supply and perform such Work. **IF** Hurley does not contract with BFS to supply materials or perform workmanship or design Work, then there is no obligation by Hurley to *guarantee* against such materials or services. The provision thus remains well within the scope of Section 32-2-10.

Because Section 1 of the Opinion confirms that the Court has overlooked the fact that BFS's claims are premised only upon the alleged negligence of Hurley's installation of the windows, and because Section 1 of the Opinion confirms that the Court has overlooked and/or misapprehended the plain language of the Agreement limiting the obligations of Hurley to only

Work performed by Hurley, the Court must revise the Opinion to be consistent with the Agreement of the parties and claims asserted by BFS in this litigation. Once the Opinion is revised to be consistent therewith, BFS submits that the Court should reverse the trial court's Order as BFS's claims and contract provisions do not violate South Carolina public policy or Section 32-2-10.

II. BFS is not seeking indemnity for its own negligence and therefore the relevant contract provision should not be subjected to the heightened clear and unequivocal standard.

Section 2 of the Opinion erroneously affirms the trial court's application of the clear and unequivocal standard from *Concord and Cumberland* because "the relevant provisions of the Agreement are not sufficiently clear and unequivocal to require Hurley to indemnify BFS for BFS's own negligence." As highlighted above, the opening paragraph of the Opinion correctly notes that the Court found that all of the claims set forth by BFS are premised only on Hurley's negligence in installing the windows. Because BFS is not seeking to require Hurley to indemnify BFS for BFS's own negligence, it was error for the trial court to apply the heightened clear and unequivocal standard. Instead, the trial court should have applied general rules of contract construction. Accordingly, the Court must revise Section 2 of the Opinion to be consistent with the claims asserted by BFS in this litigation and apply the correct standard from *Concord and Cumberland.* Once revised, BFS submits that the Court should reverse the trial court's Order and deny Hurley summary judgment as BFS's contractual indemnity claim and relevant indemnity provision are specifically authorized by and consistent with South Carolina law.

III. The Agreement does not have any provisions that violate South Carolina law or public policy; however, to the extent that the Court takes issue with certain language therein, the Court must honor the intent of the parties and sever accordingly.

Section 4 of the Opinion states, "[b]ecause the Agreement's indemnity provisions are replete with terms that violate South Carolina law and public policy, these terms cannot be appropriately

severed; thus the circuit court did not err in declining to address the severability provision of the Agreement."

Section 4 of the Opinion does not identify the specific provisions that purportedly violate South Carolina law and public policy. Nevertheless, Section 1 of the Opinion discusses the circuit court finding " 'the indemnity and duty to defend provisions of the [Agreement] violate South Carolina public policy and Section 32-2-10' because, through these provisions, BFS sought 'indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation.' " However, as explained above in Section I of the Petition, this portion of Section 1 of the Opinion is incorrect as BFS's indemnity claim is premised only on Hurley's negligence in installing the windows and the parties dismissed any and all claims for defective windows. Moreover, as explained in Section I of the Petition, the Court's issue with the *guarantee* language in the Agreement is eliminated by a proper understanding of the pending claims and a proper reading of the plain and unambiguous language of *Section 1 Work* and *Section 3 Warranty*. Further, as noted in the Opinion's opening paragraphs, the parties dismissed any and all claims for defective windows. The only claim remaining is relating to the purportedly improper installation of the windows. In *Pavic*, Hurley did not perform design Work, but it did supply fasteners and workmanship in installation of the windows and doors. Therefore, in *Pavic*, Hurley is only obligated to guarantee the fasteners – the materials Hurley supplied – and its workmanship – the installation of the windows and doors. Hurley is not obligated to guarantee any design Work in Pavic. None of the foregoing provisions violate South Carolina law or public policy.

Section 2 of the Opinion discusses the application of "the clear and unequivocal standard of *Concord & Cumberland* to the relevant language of the Agreement." Section 2 of the Opinion continues, "the relevant provisions of the Agreement are not sufficiently clear and unequivocal to

require Hurley to indemnify BFS for BFS's own negligence." Section 2 of the Opinion reiterates this position, "[b]ecause the challenged provisions of the Agreement are not sufficiently clear and unequivocal to require Hurley to indemnify BFS for BFS's negligence, the circuit court correctly granted partial summary judgment." However, as noted above in Section II of the Petition, Section 2 of the Opinion is incorrect and must be revised as BFS is not seeking Hurley to indemnify BFS for BFS's own negligence. As the Court notes in the opening section of the Opinion, BFS claim for indemnity is premised only on Hurley's alleged negligence in installation of the windows.

Because Section 4 of the Opinion relies upon incorrect positions taken by the Court in Sections 1 and 2, the Court must revise the Opinion to reverse the trial court's grant of summary judgment.

Alternatively, to the extent that the Court intends to identify specific language in the Agreement it finds to be violative of South Carolina law or public policy, the Court must honor the intent of the parties and sever any offending language from the Agreement pursuant to Section 10(g). **See R. p. 497 ("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.").**

IV. The Court, in determining that the Appellant's claims were barred by the doctrine of collateral estoppel, overlooks the fact that the specific issue before the trial court has 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

other than the *MI Windows and Doors* case, which is still an active and ongoing appeal. 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 provision of the Agreement, for the negligence of Hurley, 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 ONLY 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 *Pavic* trial court was ***whether BFS may recover indemnity for Hurley's negligence in installation of the windows.*** **See Opinion, p. 1.** 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.

V. The Court acknowledges that a question of fact exists based off the evidence in the record.

A genuine issue of material fact exists regarding whether Hurley was negligent in its installation of windows. Specifically, the expert testimony in this matter creates an issue of fact that should have precluded summary judgment.

In this case, Saussy Burbank, LLC, as the general contractor, used its general contractor's license to pull the building permit to construct the Pavic residence. Saussy Burbank, as the general

contractor, contracted with various parties to supply and install materials to construct the Pavic residence. Saussy Burbank contracted with BFS, a material supplier that provides limited installation services, to supply and install the windows and exterior doors at the Pavic residence. BFS contracted with Hurley to install the windows and exterior doors and corresponding flashings and materials at the Pavic residence. Per that agreement, BFS supplied the windows, exterior doors, self-adhered flashing, and caulk and Hurley supplied the fasteners and workmanship to install the materials. Hurley was responsible for installing the windows and doors pursuant to the manufacturer's installation instructions, which the manufacturer provides and adheres to each and every window and door product.

The Opinion acknowledges in Section 6 that Plaintiff's expert witness, Russ Mease, testified that the windows were improperly installed (although the Opinion incorrectly identifies Mr. Mease as BFS's expert). However, the Opinion appears to hold that, despite such testimony that the windows were improperly installed, summary judgment was nonetheless appropriate because BFS "provided instructions for and supervision of Hurley's installation," and because BFS inspected the installation. The Opinion fails to consider that Hurley may have still negligently installed the windows in spite of proper instruction, supervision, and inspection by BFS. As the non-moving party on a summary judgment motion, BFS was entitled to have the inference of liability resolved in its favor, which would have precluded summary judgment. Thus, the improperly installed window testimony by Mr. Mease is relevant evidence that creates a genuine issue of material fact and should preclude summary judgment for Hurley. For this reason, the Court must revise the Opinion to reverse the trial court's Order granting summary judgment on this basis.

CONCLUSION

Because the Court finally correctly acknowledged that BFS's claims are premised only on Hurley's negligence in installation of windows, and because all of the Opinion's subsequent affirmations and findings are premised on the incorrect notion that BFS is seeking to be indemnified for BFS's own negligence, the Court must revise the Opinion to reverse the trial court Order granting summary judgment as BFS's claims and Agreement comply with relevant South Carolina public policy and law, and there is a genuine issue of material fact as to Hurley's negligence which precludes summary judgment.

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

March 27, 2025

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

March 27, 2025

CERTIFIED MAIL
9589 0710 5270 0188 1751 84

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. Hurley Services, LLC Pavic
Civil Action No.: 2021-000290
Our File No.: 12313.1 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