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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

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No. 2020-001328

Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually, and on behalf of others similarly situated, Plaintiffs,

v.

Winsor South, LLC and Jeffrey M. Thomas, individually, and on behalf of a class of construction defendants; Southeastern Recapitalization Group, LLC; WCM Construction, LLC; Jonathan J. Thomas; AC Heating and Air Conditioning Service, Inc.; ACME Doors, Inc.; Alpha Omega Construction Group, Inc.; Atlantic Construction Services, Inc.; Buck Lumber and Building Supply, Inc.; Builders FirstSource, Inc.; Builders FirstSource-Atlantic Group, LLC; Builders FirstSource - Florida a/k/a Builders FirstSource-Florida Design Center, LLC; Builders FirstSource-Southeast Group, LLC; Charlotte Flooring, Inc.; Dirla Tawl Painting, Inc.; East Coast Wall Systems, Inc.; Fogel Services, Inc.; G&S Home Remodeling, LLC; Guaranteed Framing, LLC; J. Mora Brick & Block Mason, LLC; Land/Site Services, Inc.; Landmark Construction Company, Inc.; Lutzen Construction, Inc; New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC; PJ Sanchez Masonry, LLC; Screens Plus, Inc.; Simons Construction Company, LLC; Stucco by Design, LLC; Fine Builders, LLC; Speedtruss, Inc.; AS Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating, and Air, Inc.; Ashley Steel, Inc.: Cahill Contracting, LLC; Cohen;s Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting and Construction a/k/a Sharon's Painting, LLC; Davis Tile; Timothy Mitchell; Electrical Design & Construction; Hurley Services, LLC; Charleston Exteriors LLC; Jorge Diaz aka Jorge Louis Paz; San Luis Construction, Inc. nka Roofing America Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vazquez aka Alfonso Rodriguez, Sr.; and John Does 55-75, Defendants,

Of which Builders FirstSource-Southeast Group, LLC is the Appellant and Hurley Services, LLC and Charleston Exteriors, LLC are the Respondents.

PETITION FOR REHEARING

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

The March 12, 2025 Opinion (herein after "Opinion") (a) misrepresents and ignores nearly all of the relevant testimony from Plaintiff's expert witness and BFS and Charleston Exteriors fact witnesses that creates a genuine issue of material fact which should preclude summary judgment; (b) erroneously affirms collateral estoppel without the issues in this matter being litigated and determined by a valid and final judgment; (c) confirms that the Court failed to review the record on appeal and adopted the rationale of other courts pertaining to issues not before the trial court or presently before this Court on appeal.

BFS requests that the Court carefully reconsider and revise the Opinion to be consistent with issues before this Court and the relevant law.

I. The Opinion misrepresents nearly all of the relevant testimony that creates a genuine issue of material fact necessary to preclude summary judgment.

The Opinion states that "[t]he circuit court properly rejected BFS' argument that the testimony of its expert, Russell T. Mease, PE, established genuine issues of material fact regarding BFS' claim that Hurley negligently failed to install caulk on the inboard faces of the window nailing fins." The Opinion is incorrect, as Russell T. Mease, PE is the expert witness hired by Plaintiffs Six Fifty Six Owners Association, Inc. and Robert John Nutley, not BFS.

Next, the Opinion appears to dismiss the merits of Mr. Mease's investigation and determination that the required caulk was not installed behind the windows' nailing fins. More importantly, the Opinion confirms that the Court has ignored multiple sections of relevant testimony offered by Mr. Mease to support his opinion. Specifically, the Court ignored that Mr. Mease testified that he reviewed "*every window fin exposed during [his] and the defense's investigation.*" R. p. 350, ll. 22-24 (emphasis added). The Court also ignored that Mr. Mease

further testified that "[*i*]*f sealant is placed behind the nailing fin*, you *always* see it in the nail holes, and quite often behind the perimeter as it is squeezed out behind the fin. And there was no evidence of that in any of the windows that were *exposed*." R. p. 350, ll. 1-6 (emphasis added). The Opinion, without any supporting basis, incorrectly finds that "the windows Mease and other experts inspected had peel-and-seal flashing tape that completely covered the jamb fins along either side of each window as well as the head fin at the top of each window." However, in order to reach this conclusion, the Court must ignore the fact that Mr. Mease testified that he reviewed EXPOSED nailing fins. Exposed nailing fins, means that there is no material or component covering the nailing fin, i.e. there is no peel-and-seal flashing covering the nailing fin, and therefore one can see whether the required caulk was installed by evidence of the caulk extruding out at the nail holes of the exposed nailing fin or from extruding out from the sides of the exposed nailing fins.

Further, the Opinion acknowledges that BFS instructed the subcontractors not to install caulk at the SILL FIN locations so that water could weep from the window and wall assembly. (emphasis added). However, the Opinion incorrectly finds that BFS' substitution of flashing tape behind the sill flange in lieu of caulk confirms BFS' sole – or, at best, concurrent – negligence as the basis for the window claims. The Opinion cites to a select portion of testimony offered by Charleston Exteriors corporate designee, presumably for the unwritten proposition of the Court that BFS' supervision is the sole – or, at best, concurrent – cause of the omitted caulk. This section of the Opinion continues to confirm that the Court ignored that Mease testified that there was no evidence of caulk at ANY of the nailing fins, not only the sill (or "bottom") nailing fins. Moreover, this section of the Opinion confirms that the Court ignored Charleston Exteriors corporate designee testimony that "[y]ou've got to caulk. We used a whole tube of caulk in the nail flange, three - -

the two sides and the top." R. p. 353, ll. 16-18. And that this installation protocol is what BFS instructed and expected Charleston Exteriors to perform in the window installation. R. p. 353, ll. 17-21.

The standard of review requires this Court to consider ALL the *evidence* AND all *inferences* MUST be viewed in the light most favorable to the *nonmoving* party. See Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005) (emphasis added). As detailed above, the Court has clearly failed to apply the appropriate standard of review as evidenced by the findings and decisions set forth in its Opinion.

Because the Court has misconstrued[1] and failed to consider the relevant testimony of the expert and fact witnesses in affirming the lower court's ruling that there exists no genuine issue of material fact to preclude summary judgment, the Opinion must be revised to reverse the order of the trial court.

II. The Opinion erroneously applies collateral estoppel where the claim and provision at issue were not litigated, much less discussed or contemplated by the prior court.

This Opinion confirms that the author of the Court's recent Opinions continues to ignore the plain language in the pleadings of BFS and even the plain language of the Orders on appeal.

Here, the Opinion incorrectly finds that "[t]he indemnity clauses in the Agreement are the same clauses from the same form agreement that BFS previously litigated in *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc.*, 2018-CP-08-2547 (Berkeley, S.C., Ct.

[1] The Opinion in Footnote 2 states that BFS holds an unlimited commercial general contractor's license and is responsible by statute for the work of its unlicensed subcontractors and cites to S.C. Code Ann. Section 40-11-270(E). This argument by Respondents and subsequent adoption by the Court flies in the face of reason. The fact that BFS holds an unlimited commercial general contractor's license is immaterial to the *Six Fifty Six* litigation as BFS was not the general contractor and did not use its general contractor's license or any other licenses that it holds for construction of the Six Fifty Six project.

Common Pleas, Dec. 6, 2019)." Further, the Opinion incorrectly states that "[t]he fact that an appeal in *MI Windows & Doors* was pending at the time of the circuit court's orders here does not change the result—the prior, unreversed judgment had preclusive effect."

In *Six Fifty Six*, BFS is seeking recovery of attorney's fees pursuant to paragraph three of Section 5 of the contracts and if necessary, alternatively, attorney's fees resulting from only the subcontractors' negligence pursuant to paragraph one of Section 5 of the contracts. The claims for attorney's fees and the provisions set forth in paragraph 3 of Section 5 of the contracts were not at issue in the prior *BFS v MI Windows* litigation or the subsequent *BFS v. Palmetto Trim & Renovation* litigation. Contrary to the Opinion, the parties in the prior action did not discuss, much less litigate, nor did Judge Newman consider, much less rule upon, the issues before Judge Young in *Six Fifty Six*. Collateral estoppel requires that: (1) the issue in the current case was actually litigated in the prior action; (2) the issue was directly determined in the prior action; and (3) the issue was necessary to support the prior judgment. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Not one of the three elements necessary for collateral estoppel is present in *Six Fifty Six*. As such, Judge Newman's Order from *BFS v MI Windows* cannot serve as the basis for Judge Young to invoke collateral estoppel and grant summary judgment.

Further, 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.

Because the Opinion confirms that the Court has failed adequately to review the record on appeal in *Six Fifty Six* and erroneously misapplied the doctrine of collateral estoppel to ban BFS's claims, the Court must revise the Opinion to reverse the trial court order granting summary judgment on the collateral estoppel basis.

III. The Opinion re-confirms that the appellate court has misapprehended the plain language in pleadings, contract provisions, and relevant statutory and case law.

In Section 3 of the Opinion, this Court opines that the provisions of the contract at issue are not sufficiently clear and unequivocal to require the subcontractors to indemnify BFS for BFS's own negligence. The Opinion mischaracterizes the relief sought in this matter as indemnity; in fact, in this case, BFS seeks only its attorneys' fees. Therefore, the Court's instruction on indemnity is irrelevant and the Opinion should be modified to instead focus on the contractual provisions relating to attorneys' fees.

Our courts "have consistently defined indemnity as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.'" Concord & Cumberland, 424 S.C. at 646-47. Attorneys' fees fall outside that definition. BFS seeks recovery of its attorneys' fees by one of two means: full recovery as provided by the clear and unequivocal language of the third paragraph of Section 5 of its contract; or, alternatively, if the Court does not grant it under said paragraph, then BFS seeks recovery of its attorneys' fees in proportion to the degree of negligence to which its subcontractors are found liable.

a. BFS' entitlement to complete recovery of its attorneys' fees

The primary claim that BFS is seeking to pursue against the subcontractors in *Six Fifty Six* is for all of the attorney's fees incurred in defending against the Plaintiff's claims, and the contractual language supporting this claim has never been held to fail to meet the clear and

unequivocal standard (even assuming such a standard applies to attorneys' fees). BFS is seeking reimbursement of the attorney's fees pursuant to the provision in the third paragraph of Section 5. It is not clear from the Opinion whether the Court specifically considered the language of this paragraph; however, it provides that the duty to defend 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*** . . . ." **R. p. 548 (emphasis added).** Notably, the *Concord and Cumberland* case did not explicitly address whether the "clear and unequivocal" standard applied to claims for attorneys' fees. To the extent that this Court determines that the "clear and unequivocal" standard applies, BFS submits that the contractual provision is clear in imposing an obligation to defend regardless of the negligence of BFS. By imposing the duty to defend "regardless of any ultimate liability or negligence of the contractor," the provision "clearly shows the parties' intent to absolve [BFS] of the consequences of its own concurrent negligence." Concord & Cumberland, 424 S.C. at 657 ("Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in an indemnity clause that clearly shows the parties' intent to absolve the indemnitee of the consequences of its own concurrent negligence."). Thus, the third paragraph of Section 5 meets the heightened "clear and unequivocal" standard, and summary judgment is not proper.

b. BFS' alternative claim for pro-rated attorney's fees

BFS' alternative basis for recovery of its attorney's fees proposed imposing liability on its subcontractor for said fees in proportion to the negligence the subcontractor is ultimately found culpable for. This theory of recovery limits damages to those incurred by the subcontractors' own negligence. While disallowing this recovery, the Opinion fails to identify or even discuss the

contract provisions or language at issue. Thus, BFS will try to explain based on speculation from the Court's case law citations.

The Court cites to the recent Palmetto Trim opinion for support that the language of the contracts is neither clear nor unequivocal. The contracts at issue here, in *Six Fifty Six*, are similar form agreements that were at issue in *MI Windows* and *Palmetto Trim* matters; however, the relevant issues are different. The contracts include a section *5 Indemnity* which sets forth four (4) separate paragraphs of contract provisions that pertain to separate and distinct facts and circumstances. As previously explained, in *MI Windows* and *Palmetto Trim* matters, the trial courts, and now the Court of Appeals, have ignored the plain limiting language in BFS' pleadings and subsequent Rule 11 certifications by BFS counsel that BFS was seeking indemnification for damages only resulting from the subcontractors' negligence. *MI Windows* and *Palmetto Trim* matters involve property damage claims of owners allegedly resulting from negligent acts or omissions in construction of the respective properties. Accordingly, there is ONLY one indemnity provision that obligates the subcontractors to indemnify BFS for property damages resulting from the negligent acts or omissions of the subcontractors in the Work performed by the subcontractors for BFS. That one indemnity provision is set forth in the first paragraph of Section 5 Indemnity. Consistent with the ruling issued by the Court of Appeals in *Concord and Cumberland,* BFS has previously acknowledged that the indemnity provision in the first paragraph of Section 5 Indemnity does not meet the clear and unequivocal standard required to impose the obligation that the subcontractors indemnify BFS for BFS' own negligence, whether sole or concurrent. However, as the Court in *Concord and Cumberland* found and held, and the Court in *Palmetto Trim* even alluded to, there is nothing confusing, illegal, or unenforceable about the indemnity provision based on the AIA standard indemnification provision that limits the obligation to

indemnify for damages resulting from the subcontractors' negligence. Such a provision is an industry standard provision and complies with statutory law.

In this case, *Six Fifty Six*, BFS is only seeking to be indemnified by the subcontractors for attorney's fees resulting from the subcontractors' negligence as an *alternative claim*. The Opinion confirms that the Court has failed to appreciate the finding and holding in *Concord and Cumberland* that limited indemnification to damages resulting from the subcontractors' negligence. For this reason, the Court must revise the Opinion to reverse the trial court's Order to deny summary judgment and accurately reflect the correct application of the law.

IV. The Court relied on irrelevant cases to hold that the relief requested here violates public policy and laws of South Carolina.

The Opinion goes beyond Concord and Cumberland and finds that the language of the contract also violates "public policy and the laws of South Carolina." The Court did not identify to what public policy, or to what laws, it was referring. Additionally, Judge Newman's Order does not address public policy or any other law besides the common law articulated by the Concord and Cumberland case (discussed above). The Opinion affirms the trial court's ruling without any analysis, but merely provided a string of citations. BFS will now address those citations.

Section 32-2-10 prohibits contracts that indemnify the indemnitee "for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee . . . ." In this case, the "damages arising out of . . . property damage" are those damages for which BFS would have been responsible to the Plaintiff. There are no bodily injury damages in *Six Fifty Six*. However, BFS is not seeking damages as contemplated by Section 32-2-10. Instead, BFS is seeking reimbursement of attorney's fees incurred in defending Plaintiff's claims, about which Section 32-2-10 is silent. When approaching statutory interpretation, courts must assume that the legislature was aware of the common law, "and where a statute uses a term

that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Additionally, when, as here, a statute is "in derogation of the common law," it must be strictly construed. Id. Attorney's fees do not fall within the scope of indemnity because they are not paid by a first party to "a second party for loss or damage the second party incurs to a third party." Rather, they are consequential damages of an indemnity claim. Because Section 32-2-10 must be strictly construed, and because it uses the term "indemnify," a term that "has a well-recognized meaning in the law," it must be read only to apply to agreements governing indemnification; its meaning may not be expanded by the Court to include agreements governing attorneys' fees. While Section 32-2-10 addresses agreements governing the duty to indemnify, the statute is silent as to agreements imposing a duty to defend. The duty to defend and the duty to indemnify are two separate and distinct contractual obligations. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). "Although these duties are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the judgment, the duty to defend exists regardless of the [indemnitor's] ultimate liability to the [indemnitee]." Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977).

The Court also cites to two other opinions as evidence for why the language at issue here violates Section 32-2-10. First, the Court cites to *D.R. Horton v. Builders FirstSource*. That case, as evidenced by the parenthetical the court used, explicitly considered whether BFS could be forced to indemnify D.R. Horton for D.R. Horton's own negligence. As already articulated, at issue here is not indemnity but recovery for attorney's fees. Second, the Court cites to the recent

Palmetto Trim Opinion, an opinion which is subject to continuing challenge and has not yet been resolved by any final judgment.

Finally, even if the Court *were* to determine for some reason that the contractual provision regarding attorneys' fees violated Section 32-2-10, the Court should sever the offending provision, as discussed above; then, Appellant's claim for attorney's fees would instead be fully encompassed by Paragraph One of the Indemnity Provision. Paragraph One provides that Respondents would indemnify Appellant for all losses, "including, but not limited to . . . attorney's fees" arising out of claims for property damage, "but only to the extent caused, in whole or in part, by any negligent act of the subcontractor . . . ." Because recovery under Paragraph One is limited to attorneys' fees caused by the negligence of the subcontractor, it is not covered by the alleged prohibition of Section 32-2-10; in fact, it is specifically authorized by the statute, because the statute says that it does not affect or void "a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee . . . against liability for damages resulting from the negligence, in whole or in part, of the promisor . . . ." To the extent that claims for attorney's fees might properly be characterized as claims in contractual indemnity, Paragraph One of the Indemnity Provision is the exact type of agreement exempted by the statute.

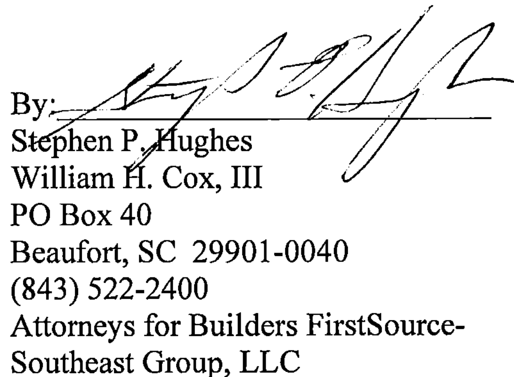
The obligations imposed on the subcontractors here, to defend the interests of Builders FirstSource, are clearly and unequivocally set forth within the relevant Master Subcontract Agreements. These obligations do not violate § 32-2-10 or any public policy of the State of South Carolina, and the Court should not have granted summary judgment against these claims.

CONCLUSION

Because the March 12, 2025 Opinion (a) misrepresents and ignores nearly all of the relevant testimony from Plaintiff's expert witness and BFS and Charleston Exteriors fact witnesses

that creates a genuine issue of material fact which should preclude summary judgment; (b) erroneously affirms collateral estoppel without the issues in this matter being litigated and determined by a prior valid and final judgment; (c) confirms that the Court failed to review the record on appeal and adopted the rationale of other courts pertaining to issues not before the trial court or presently before this Court on appeal, the Court should revise its Opinion to reverse the Order of the trial court to allow BFS's claims for attorney's fees to proceed to trial.

HOWELL, GIBSON & HUGHES, P.A.



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Re: Builders FirstSource - Southeast Group, LLC v. Hurley Services, LLC and Charleston Exteriors, LLC
Civil Action No.: 2020-001328
Our File No.: 11925.1 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