

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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; Liollo 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.

RECORD ON APPEAL
VOLUME V

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 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
Contruccion, 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

**MEMORANDUM IN OPPOSITION TO
HURLEY SERVICES, LLC'S AMENDED
MOTION FOR SUMMARY JUDGMENT**

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.	)
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.	)
	)
	)

This Memorandum is submitted in opposition to the amended motion of Hurley Services, LLC, by which Hurley Services has sought summary judgment as to the crossclaims asserted by Builders FirstSource-Southeast Group, LLC. Based upon those considerations set forth hereinafter, it is respectfully submitted that the Hurley Services motion should be denied.

FACTUAL ALLEGATIONS

The captioned action is one by which the plaintiffs, The Retreat at Charleston National Country Club Homes Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime, have sought recovery of damages allegedly occasioned by deficiencies in original construction of the subject project, a multi-family development, located in Mount Pleasant, South Carolina.

The plaintiffs' claims, as asserted against Builders FirstSource-Southeast Group, LLC (hereinafter referred to as "BFS") and its subcontractor, Hurley Services, LLC (hereinafter referred to as "Hurley"), are premised upon alleged deficiencies in installation of house wrap, windows and exterior doors during original construction. Hurley installed house wrap for BFS at Buildings 25 and 26 and Hurley installed windows and exterior doors, inclusive of related flashings and other components, for BFS at Buildings 25, 26, 27 and 30. Hurley installed the materials for BFS pursuant to a Master Subcontractor Agreement executed between those parties on May 14, 2012. The Master Subcontractor Agreement included specific provisions by which Hurley undertook to defend and indemnify BFS against liability, loss, or damage arising out of the negligent acts or omissions of Hurley in the performance of its work.

The plaintiffs have alleged that the weather resistive barrier, windows, exterior doors and related flashings were improperly installed, resulting in water infiltration and associated damages. In support of those contentions, the plaintiffs have offered testimony of their primary forensic expert, professional engineer Gary Freeman. Mr. Freeman, premised upon alleged findings during visual and destructive investigation, claimed, within his relevant reports, and upon deposition testimony, to have identified deficiencies in the installation of the weather resistive barrier, windows, exterior doors and related flashings resulting in damages and necessary repairs.

HURLEY'S AMENDED MOTION FOR SUMMARY JUDGMENT

Hurley asserts in its amended motion for summary judgment the following bases:

1. There exists no issue as to any material fact and Hurley is entitled to judgment dismissing BFS' cross-claims as a matter of law.

2. The cross-claims for breach of express and implied warranty, breach of contract, negligence, and contractual indemnity are merely disguised claims for equitable indemnity and fail as a matter of law under *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group*, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clearview Construction, LLC*, 776 S.E.2d 426 (S.C. Ct. App. 2015).
3. The cross-claim for contractual indemnity is based on contractual provisions that are neither clear nor unequivocal, and are against public policy and the laws of South Carolina and fail as a matter of law under *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 819 S.E.2d 166, 172 (S.C. Ct. App. 2018).
4. That BFS holds an unlimited general contractor's license, provided Hurley with windows, doors, and other materials for installation on a labor-only basis under an agreement drafted by BFS, that all work Hurley performed was under the license of BFS and pursuant to the directions, instructions, inspections and with the approval of BFS, that some of the materials selected and provided by BFS are alleged to be defective and not in compliance with the plans, specifications, applicable building codes, and industry standards, that if there were installation deficiencies by Hurley or deficiencies in material provided by BFS, then BFS shares responsibility for those deficiencies and its crossclaim for equitable indemnity is barred by operation of law.
5. The cross-claims for breach of express and implied warranty, negligence, breach of contract and contractual indemnity are barred by the doctrine of collateral estoppel.
6. That the Master Subcontract, including indemnification provisions, is a contract of adhesion which was drafted by BFS and should be strictly construed against BFS and in favor of Hurley.
7. That the Master Subcontract of BFS is ambiguous, contains conflicting provisions, is unconscionable, gives Hurley no meaningful choices, and the inequality is so gross as to shock the conscience of the court.
8. That BFS provided windows and other materials to Hurley for installation in the project, that the experts for Plaintiff have testified that the windows and materials are deficient and defective, that

the Master Subcontract drafted by BFS provides that Hurley warranty, guarantee, and indemnify BFS for loss or damage caused by these windows and materials, which BFS provided to Hurley; that these terms are so oppressive that no responsible person would make them and if understood, no fair and honest person would accept them.

9. That the Master Subcontract drafted by BFS violates South Carolina public policy, and South Carolina law, including but not limited to Section 32-2-10 S.C. Code.

In its Memorandum in support of its motion for summary judgment, Hurley has combined basis 6 through 9 into one basis. Hurley also requests that the Court take judicial notice of:

- a. the order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of *Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC*, 2016-CP-10-3455;
- b. the order of the Honorable Clifton Newman filed February 3, 2020 in the Court of Common Pleas for Berkeley County in the case of *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al.* as Civil Action No. 2018-CP-08-2547;
- c. the memorandum filed by BFS on September 25, 2020 in opposition to Hurley's motion for partial summary judgment in *Dag Pavic and Stela Susan-Pavic v. Saussy Burbank, LLC*, 2019-CP-10-00772.

For the reasons set forth herein, the court should deny Hurley's amended motion for summary judgement.

BFS ARGUMENT IN OPPOSITION

- 1. The evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to BFS, present genuine issues of material fact, which preclude summary judgment in favor of Hurley.**

Summary judgment is proper if "...there is no genuine issue as to any material fact", and the moving party is "entitled to judgment as a matter of law." Rule 56(c) SCRCP. To determine whether summary judgment is appropriate, the court must view "the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the non-moving party". *Hancock v. Mid Management Company*, 381 S.C. 326, 329, 673 S.E. 2nd 801, 802 (2009). To survive a motion for summary judgment, the non-moving party need only show a mere scintilla of evidence. *Id.* (holding that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand the motion for summary judgment").

As demonstrated hereinafter, the testimony, offered on behalf of the plaintiffs by their retained expert, Gary D. Freeman, PE, is sufficient to establish a genuine issue of material fact, precluding summary judgment in favor of Hurley.

Hurley installed the building wrap, windows, exterior doors and associated flashings at Buildings 25 and 26 and Hurley installed the windows, exterior doors, and associated flashings at Buildings 27 and 30, pursuant to obligations undertaken by Hurley under the Master Subcontractor Agreement executed with BFS.

Hurley's counsel examined Plaintiffs' expert Freeman during Mr. Freeman's deposition on May 8, 2019. Therein, Mr. Freeman testified that he had identified deficiencies in the installation of the building wrap, windows, exterior doors and

associated flashings at Buildings 25, 26, 27, and 30. Specifically, Mr. Freeman determined that

- (a) In all instances where Tyvek had been installed, it was reverse lapped with any intersecting flashings; See Exhibit A deposition transcript of Gary Freeman, May 8, 2019, at line 25 page 208 through line 7 page 209 and lines 15-19 page 210;
- (b) the fasteners for windows at Buildings 25 and 26 were at varied spacings which exceeded the manufacturer's requirements and the length of the fasteners did not meet the manufacturer's requirements; See Exhibit A Freeman deposition transcript at lines 6-25 page 211;
- (c) the problem with the French door was the installation or the penetration of the threshold into the sill plate in order to accommodate the fastening pin. This breached any kind of barrier that would have existed there and caused water intrusion. See Exhibit A Freeman deposition transcript at line 14 page 215 through line 7 page 216.

During his November 9, 2018 deposition, at which Hurley's counsel was present, Mr. Freeman opined that the windows are improperly installed, are not in compliance with the manufacturer's tested documentation and information. Specifically, the windows are installed with improper anchors or fasteners, lack of a sealant, the spacing of the fasteners and the length of the fasteners. See Exhibit B Freeman Deposition Transcript November 9, 2018 p. 114 lines 15-25.

With regard to knee wall construction, Mr. Freeman observed a lack of house wrap in violation of the code. See Exhibit B p. 115 lines 1-4. Mr. Freeman also observed reverse lapped house wrap and in many instances wood completely void of any kind of barrier protection. See Exhibit B p. 115 lines 10-16. Mr. Freeman found that the weather-resistive barrier was cut at the corner creating a weakness in the wall

system, and that such installation was not compliant with the manufacturers' instructions of wrapping the corner with 2 to 3 feet of material. See Exhibit B p. 122 lines 8-25.

Mr. Freeman also noted that the French door installation had caused water intrusion damage. Mr. Freeman also observed that the weather-resistive barrier was not lapped to the door assembly to direct water to the outside – the door installation was not proper. See Exhibit B p. 139 lines 7-20.

As noted above, plaintiffs have alleged that the weather resistive barrier, windows, exterior doors and associated flashings were installed improperly, and that the plaintiffs have sustained or will sustain damages resulting from the improper installation of these components. Plaintiffs have imputed fault associated with the improper installation, by Hurley, to BFS. Thus, the evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to BFS, clearly suggest negligent acts or omissions by Hurley in its installations of the weather resistive barrier, windows, exterior doors and related flashings, causing the water intrusion and associated damages at the subject project. At the very least, the testimony of Mr. Freeman establishes a scintilla of evidence adequate to preclude summary judgment in favor of Hurley.

2. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group*, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015) is valid law.

BFS acknowledges that *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group*, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015) sets forth the current status of relevant law as determined by the South Carolina Court of Appeals. BFS therefore concedes that, under the law as articulated in its crossclaims for breach

of expressed and implied warranties, breach of contract, and negligence are subject to dismissal. Hurley's further contention, however, that it is entitled to summary judgment as to the BFS crossclaims in contractual indemnity are not supported by the authority of *Stoneledge*, and should be rejected by this Court.

The *Stoneledge* Court confirmed summary judgment, against the purported indemnity, upon its cause of action in contractual indemnity. The determination of the Court of Appeals was, however, premised solely upon its finding that the purported indemnity had failed to offer evidence sufficient to establish the existence of a written contract to indemnify. That is not case before this Court, wherein the evidence clearly establishes a written undertaking, by Hurley Services, to indemnify BFS against liability for damages occasioned by the subcontractor's negligent acts or omissions.

Moreover, a cause of action in equitable indemnity is clearly distinct from a cause of action in contractual indemnity. The South Carolina Courts have historically recognized that rights in indemnity may arise by contract or in equity. See e.g. *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992); *Stuck v. Pioneer Loggins Machinery, Inc.*, 279 S.C. 22, 301 S.E.2d 552 (1983); *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971); *South Carolina Electric & Gas Co. v. Utilities Construction Co.*, 244 S.C. 79, 135 S.E.2d 613 (1964) Equally importantly, equitable defenses, available against a cause of action in equitable indemnity, will not preclude recovery under a separate legal claim asserted in contractual indemnity.

Unlike the circumstances before the *Stoneledge* Court, BFS in this instance has provided specific evidence of a written contract of indemnity, affording rights separate

from and in addition to any rights afforded under a theory of equitable indemnity. Arguments to the contrary are simply unsupported by the relevant law.

3. The BFS cross-claim for contractual indemnity is based on contractual provisions that comply with South Carolina law.

The indemnity claims, as asserted by BFS in this action, are premised upon rights afforded pursuant to its Master Subcontractor Agreement, executed between BFS and Hurley on May 14, 2012. A copy of the aforesaid Master Subcontractor Agreement is attached hereto and fully incorporated by reference as Exhibit C. The Master Subcontractor Agreement includes not only specific provisions relating to “Indemnity” at Section 5, but also specific severability provisions, as set forth in Section 9. All of those provisions, and the rights afforded thereunder, are specifically subject to relevant law, and the rights pursued by BFS are consistent with such law, as articulated by the Court of Appeals, in the matter of *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 819 S.E.2d 166 (S.C. Ct. App. 2018), reh’g denied (Oct. 18th, 2018).

Hurley argues that the BFS cross-claim for contractual indemnity is based on contractual provisions that are neither clear nor unequivocal and fail as a matter of law under *Concord & Cumberland*.

It bears repeated emphasis, however, that BFS, by its cross-claim, is seeking indemnity, from its subcontractor, Hurley, not against liability for loss or damage arising out of any negligence of BFS itself, but rather is seeking indemnity only against liability for damage or loss arising out of the sole or concurrent negligent acts or omissions of its subcontractor, Hurley, in the performance of the subcontractor’s work. Under the

circumstances, the clear and unequivocal standard, as articulated by the Court of Appeals in *Concord & Cumberland*, does not apply.

As noted hereinabove, BFS undertook to supply and install weather resistive barrier, windows, exterior doors and related flashings in connection with original construction of the subject project. Actual installation of the weather resistive barrier, windows, exterior doors and related flashings was, in turn, implemented by Hurley, pursuant to a subcontract agreement with BFS. BFS was thereafter subjected to claims asserted by the plaintiffs, which sought recovery of damages allegedly occasioned by purported deficiencies in installation of the weather resistive barrier, windows, exterior doors and related flashings.

BFS now seeks indemnification pursuant to the relevant provision of the Master Subcontractor Agreement as executed between BFS and Hurley. The relevant indemnity provision is the first paragraph of Section 5 Indemnity and states as follows:

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 FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITY, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEYS FEES (SUCH LEGAL COSTS 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 NEGLENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THE SUBJECT AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.
(Emphasis Supplied)

Exhibit C, Section 5 paragraph one.

By the specific provisions of paragraph one of Section 5 Indemnity, Hurley as a subcontractor has undertaken to indemnify BFS against losses arising out of negligent acts or omissions of Hurley in the performance of its work for BFS.

BFS, by its cross-claim, has sought indemnity only against liability for loss or damage caused by the negligent acts and/or omissions of Hurley in the performance of its work for BFS. BFS is not seeking indemnification against liability for loss or damage arising from its own negligence, whether sole or concurrent.

In *Concord & Cumberland*, the Court of Appeals considered indemnification provisions which were virtually identical to those at issue in the instant litigation. In that case, the general contractor, Superior Construction, sought indemnification from its window installation subcontractor, Muhler, against damages arising from both (a) the negligence of the subcontractor, and (b) the concurrent negligence of Superior (the general contractor) itself. The Circuit Court found that the indemnification provisions of the Subcontract Agreement were not sufficiently "clear and unequivocal" as to require Muhler to indemnify Superior for Superior's own negligence. However, the Circuit Court specifically determined that those indemnity provisions did in fact obligate the

subcontractor, Muhler, to indemnify the general contractor, Superior, against claims and damages caused by the negligent acts or omissions of Muhler. The Court of Appeals affirmed the determination of the Circuit Court, noting, repeatedly within its opinion, that, although the indemnification provision of the relevant subcontract agreement was not sufficiently clear and unequivocal to require indemnification against the general contractor's own negligence, such indemnification provision nonetheless obligated the subcontractor to indemnify the general contractor against loss or damage caused by the negligence acts or omissions of the subcontractor.

At the crux of *Concord & Cumberland* was the fact that the general contractor was trying to recover from its subcontractor for the general contractor's own negligence. **That is not the case here.** BFS is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from Hurley's negligence. When, as here, a contractor does not seek indemnity for its own negligence, the clear and unequivocal standard does not apply, and the indemnity provision is not invalid.

Appropriate application of the *Concord & Cumberland* standard to the contractual provision at issue in the instant proceeding clearly authorizes pursuit of contractual indemnity for damages caused by Hurley's negligence, whether sole or concurrent, (as opposed to damages occasioned by the sole or concurrent negligence of BFS), and, equally clearly, precludes summary judgement in favor of Hurley. The *Concord & Cumberland* opinion, in specifically authorizing indemnity in favor of a contractor, against losses occasioned by the negligent acts of its subcontractor, is controlling here,

and requires denial of Hurley's motion for summary judgment as to the BFS cross-claim for contractual indemnity.

Hurley argues that the Warranty provisions, as set forth in section 3 of the Master Subcontractor Agreement, require the subcontractor (Hurley) to indemnify BFS against defects in materials provided by BFS itself. Hurley's assertions are based upon a misconstruction of section 3.

Section 3, by its specific terms, provides that Hurley

- (a) Warrants its "Work", and
- (b) Guarantees such "Work" against defects and design, workmanship, and materials, and
- (c) Requires that Hurley indemnify BFS against defects in those materials included within Hurley's "Work".

The term "Work", as utilized repeatedly within section 3, is specifically defined at section 1 (a) of the agreement to include the "materials" provided by and/or the "services" performed by the subcontractor. It is thus clear from a plain reading of the relevant provisions of the contract that the warranty and/or indemnity obligations imposed by section 3 of the Master Subcontractor Agreement apply only to those materials under services provided by Hurley (the subcontractor), and not to those materials which may be provided by Builders FirstSource.

The arguments urged upon this Court by Hurley are simply not supported by the evidence, and should be given no consideration.

Moreover, and contrary to the assertions set forth within the Hurley Memorandum, there is no assertion or evidence that the windows, installed during the

course of original construction of The Retreat project, are or have been subject to a class action.

BFS also contests any assertion, as suggested by Hurley, that the provisions of its Master Subcontractor Agreement are ambiguous, or that the indemnity provisions thereof are conflicting.

The Section 5 Indemnity portion of the Master Subcontractor Agreement is comprised of four (4) separate paragraphs. Each paragraph pertains to a specific set of factual circumstances. South Carolina courts have made it clear that there can be multiple provisions, even within one paragraph, that afford separate and distinct rights for the parties. See *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 65 (Ct. App. 2002) (finding a single subparagraph was comprised of three discrete provisions because “separate and distinct rights” were implicated in each provision).

Each of the four paragraphs of Section 5 Indemnity of the Master Subcontractor Agreement addresses separate and distinct rights and obligations of the parties.

The first paragraph of Section 5 is the applicable indemnity language for property damage claims caused by the subcontractor’s negligence. By the specific provisions of the first paragraph, the subcontractor has undertaken to defend and indemnify (“to the fullest extent permitted by law”) BFS against liability or loss arising out of negligent acts or omissions of the subcontractor in the performance of its work for BFS.

By contrast, the indemnification provisions of the second paragraph of Section 5 relate solely to claims

“...arising out of or resulting from bodily injury to, or sickness, disease, or death of, the subcontractor, any agent,

employee, or representatives of the subcontractor, or any of its subcontractors..."

The provisions of the second paragraph (which impose indemnity obligations "to the fullest extent permitted by law") of Section 5 address potential claims entirely distinct from those involved in the instant action, and are irrelevant to this Court's consideration of the propriety of the BFS claims.

The third paragraph of Section 5 deals with the duty to defend and specifically states that it is separate from the duty to indemnify.

The fourth paragraph of Section 5 makes clear that the defense and indemnification obligations are not intended to and shall not impose any requirement upon the subcontractor to indemnify anyone for claims resulting from defects in plan or design.

The specific provisions of paragraph one of Section 5, pursuant to which BFS seeks indemnity, authorize such indemnity ("to the fullest extent permitted by law") against liability for loss occasioned by the negligent acts or omissions of the BFS subcontractor, Hurley. Such indemnity provisions are not subject to the clear and unequivocal standard imposed by the *Concord & Cumberland* Court, and those provisions clearly authorize the relief sought by BFS in the instant litigation.

By contrast, the provisions of paragraph three of Section 5 impose, upon the subcontractor, a duty to defend. This 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".

The provisions of paragraph three of Section 5 are “clear and unequivocal” in imposing, upon the subcontractor, the duty to defend BFS, and are clearly adequate to satisfy any heightened burden which might be imposed by *Concord & Cumberland*.

Moreover, there is nothing within the statutory law of South Carolina which would prohibit such an undertaking to defend, notwithstanding the negligence of the indemnitee. The prohibitions as set forth in S.C. Code Ann. § 32-2-10 (cited by Hurley), apply only to contract provisions agreeing to indemnify a party against liability for damages resulting from the sole negligence of the indemnitee. The statute specifically does not prohibit, or even address, agreements to defend against the sole or concurrent negligence of an indemnitee.

Similarly, S.C. Code Ann. § 32-2-210, prohibiting indemnification against “liability for damages” occasioned by the sole negligence of the indemnitee, neither addresses nor prohibits separate obligations to defend.

The obligations imposed upon the subcontractor here, to defend the interests of BFS, are clearly and unequivocally set forth within the relevant Master Subcontract Agreements, are not violative of any laws or public policy of South Carolina, and should be upheld by this Court.

In light of the foregoing, any grant of summary judgment, premised upon the arguments as asserted by the movant, Hurley, would be inconsistent with South Carolina law. Therefore, the Court must deny Hurley’s motion for summary judgment.

4. BFS is not the general contractor for this project and did not utilize any license for supplying materials for Hurley to install.

Hurley argues that under S.C. Code Ann. Section 40-11-270(E) BFS owed a non-delegable duty to supervise the unlicensed subcontractor performing work. Hurley

also contends that S.C. Code Ann. Section 40-11-270(E) makes the licensee fully responsible for any violation of Chapter 11 resulting from the actions of unlicensed subcontractors performing work for the licensee.

First and foremost, Hurley has failed to present any evidence supporting this argument. Hurley has presented no evidence that it is an unlicensed subcontractor. More importantly, assuming Hurley is an unlicensed subcontractor, Hurley has failed to allege or acknowledge what Chapter 11 violation it has caused. In any event, Hurley's argument is flawed as BFS was not the general contractor and did not utilize any license for construction on this project.

BFS was not the general contractor for this project. More importantly BFS did not utilize its general contractor's license or any license for this project. The general contractor for this project was Winston Carlyle Charleston National, LLC, Colin R. Campbell Construction, Inc., and/or Colin Campbell individually. The general contractor used its license to pull the permits for the different phases of construction for this project. The general contractor hired BFS as a subcontractor to supply and install framing, windows, exterior doors and related flashings and components. BFS in turn hired Hurley to install weather resistive barrier, windows, exterior doors and related flashings at select buildings. Supply and installation of weather resistive barrier, windows and exterior doors does not require a license as contemplated by Hurley in this argument. As such, BFS and its subcontractor, Hurley, were both working under the license of the general contractor for this project. Thus, viewing the evidence in the light most favorable to BFS, there is a mere scintilla of evidence creating a question of fact that requires dismissal of Hurley's motion on this basis.

To the extent that Hurley may be arguing that BFS, as a general contractor, is automatically responsible and/or strictly liable for Hurley's negligence, it is mistaken. Such an argument has been summarily are rejected by our appellate courts. See *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 566, 658 S.E.2d 80, 91 (2008) (holding that general contractor is not automatically responsible for negligence of subcontractor and strict liability not applicable to contractor's building service).

There is nothing within either relevant law or the circumstances prevailing here which require Builders FirstSource to conduct individual inspections of every window installed by its subcontractor. BFS is clearly entitled to rely upon the expertise, experience, and ability of those subcontractors to implement the scope of work which they have undertaken. The evidence before the Court is simply insufficient to establish any negligence by Builders FirstSource in its supervision or inspection of the work of its subcontractors, such as would preclude BFS recovery upon claims in equitable indemnity.

It appears Hurley may be asserting the unclean hands defense. Proof of this affirmative defense requires a showing that the party seeking equity has acted inequitably toward the party against which equity is sought. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010). Moreover, Hurley bears the burden of proof in seeking summary judgment on an affirmative defense. Yet Hurley has failed to come forward with any evidence that BFS has unclean hands as a matter of law. In order to succeed on this motion, Hurley must show that evidence in the record requires that any reasonable factfinder must determine that BFS has

engaged in inequitable conduct toward Hurley, such that BFS may not seek equity for itself. Hurley has presented no evidence in support of this contention.

Hurley has no evidence of negligence or other wrongful conduct by BFS, and certainly not evidence sufficient to foreclose BFS's defense to the same as a matter of law. Hurley appears to argue that because BFS might be held liable to Plaintiffs, it must be presupposed to have unclean hands and therefore be precluded from equitable indemnity against Hurley. However, the very gravamen of equitable indemnity is recovery against another for liability without fault. Therefore, the apparent rationale underlying Hurley's motion falls completely flat.

5. The BFS cross-claims are not barred by the doctrine of collateral estoppel.

Hurley argues that the BFS cross-claims for breach of express and implied warranty, breach of contract, negligence, and contractual indemnity are barred by the doctrine of collateral estoppel. Hurley repeats its incorrect *Stoneledge v. BFS* argument that this Court should go beyond the holding of the Court of Appeals and find that a contractual indemnity claim is a merely disguised equitable indemnity claim, even though an applicable contract for exist this project. Hurley also requests that the Court take judicial notice of the order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of *Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC*, 2016-CP-10-3455 and the order of the Honorable Clifton Newman filed February 3, 2020 in the Court of Common Pleas for Berkeley County in the case of *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al.* as Civil Action No. 2018-CP-08-2547 in support of its argument.

The doctrine of collateral estoppel is available when 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). Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, re-litigation of those issues actually and necessarily litigated and determined in the first suit are precluded in any subsequent action based upon a different claim. *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616 (S.C. App. 1994) (emphasis added). A party may be collaterally estopped only by a prior final judgment. See e.g. *Jenkins v. Atlantic Coast Line Railroad Company*, 89 S.C. 408, 71 S.E. 1010 (1911)(recognizing estoppel by judgment as distinguished from *res judicata*); *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944)(discussing equitable basis for estoppel by judgment); *Graham v. State Farm Fire & Casualty Insurance Co.*, 277 S.C. 389, 287 S.E.2d 495 (1982) (lack of privity does not preclude collateral estoppel by judgment); *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct.App.1984)(further litigation of the identical issue was precluded by the former judgment); *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 684 S.E.2d 779 (Ct.App.2009)(collateral estoppel prevents relitigating an issue necessary to support the prior judgment).

Collateral estoppel is only applied when “the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action.” *Graham v. State Farm Fire and Cas. Ins. Co.*, 277 S.C. 389, 391, 287 S.E.2d 495, 496 (1982); *Irby v. Richardson*, 278 S.C. 484, 298 S.E.2d 452 (1982)(where a party had a full and fair opportunity to litigate an issue he should be collaterally estopped to adjudicate the

same issue in a subsequent case). BFS will not have had a full and fair opportunity to litigate the issues decided by Judge's Newman and Young until the resolution of any appeals and entry of final judgment. Only at that time could collateral estoppel be applied and then only as to the issues actually litigated and necessary to the judgment.

Here, the referenced orders of Judge Newman and Judge Young are on appeal, and thus cannot represent a final judgment for purposes of collateral estoppel. Copies of the "Notices of Intent to Appeal," are attached hereto and fully incorporated herein by referenced as collective Exhibit D. Because the orders of Judge Newman and Judge Young are not final, they cannot be used as the basis for collateral estoppel.

6. Hurley's sixth argument contains 4 sub-arguments addressed below:

a. BFS Master Subcontractor Agreement is not a contract of adhesion.

Hurley's first sub-argument is that the subcontract, including the indemnification provisions, is a contract of adhesion and should be strictly construed against BFS and in favor of Hurley.

A contract of adhesion is generally thought of as a standard form contract offered on a take-it-or-leave-it basis. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901–02 (Ct. App. 1998). The terms of the contract of adhesion are not negotiable. *Id.* An offeree faced with such a contract has two choices: complete adherence or outright rejection. *Id.* **Moreover, the fact that a contract is one of adhesion does not make it unconscionable. *Id.* at 395 (emphasis added).** Determining whether a contract is one of adhesion is merely the beginning point in the analysis. *Id.* Unconscionability, on the other hand, requires a greater showing. *Id.* Unconscionability is characterized by the "absence of meaningful choice on the part of

one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Id.* quoting *Fanning v. Fritz's Pontiac–Cadillac–Buick Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996).

BFS denies that the subcontract is one of adhesion and explains below in why the agreement is also not unconscionable. Hurley’s counsel has not submitted any evidence whatsoever in support of its argument that the subcontract is one of adhesion. Therefore, the Court must deny Hurley’s motion as this argument is wholly lacking in merit and the requisite evidence needed to support a granting of summary judgment.

b. The BFS Master Subcontractor Agreement is not unconscionable.

Whether one party lacks a meaningful choice in entering the agreement at issue typically speaks to the fundamental fairness of the bargaining process. *Gladden v. Boykin*, 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013). In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668–69 (2007). However, if a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. *Id.* citing S.C. Code Ann. § 36–2–302(1) (2003). As always, when construing a contract, the primary objective of the court must be to ascertain and

give effect to the intention of the parties. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004).

Hurley and BFS entered into a Master Subcontractor Agreement in May 2012 and again in December 2014. A copy of the December 18, 2014 Master Subcontractor Agreement is attached hereto and fully incorporated herein by referenced as Exhibit _____. Any amendments to the agreement were to be in writing. See Master Subcontractor Agreement Section 1(a). Hurley could terminate the agreement by written notice to BFS within 24 hours after any amendment that materially increased the cost or difficulty of performance by Hurley. *Id.* The Subcontractor may perform Work on multiple projects at multiple locations with the specifics thereof to be described in Work Orders that are incorporated into the Master Subcontractor agreement by reference. See Master Subcontractor Agreement Section 1(b). The term of the Master Subcontractor agreement is for three (3) years with automatic renewals for one (1) year periods unless either party gives written notice to the other that it is electing to terminate at the end of the term. See Master Subcontractor Agreement Section 1(c).

Hurley voluntarily entered into the Master Subcontractor Agreement in May 2012 and entered into a second Master Subcontractor Agreement in December 2014. Hurley was free to terminate the May 2012 Agreement, but instead chose to execute the December 2014 Agreement. Any argument that the Agreement is one-sided and unconscionable is simply not supported by the provisions of the Agreement itself or the actions of Hurley. At the very least, these facts are certainly more than a scintilla of evidence which precludes summary judgment in Hurley's favor. Thus, the Court must deny Hurley's motion for summary judgment on the BFS claim for contractual indemnity.

In the alternative, Section 9(f) of the Master Subcontractor Agreement states clearly that the provisions are independent and severable, and any invalid provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. Also in Section 9(f), the parties agreed that it was their intent that any invalid provision be reformed to the extent necessary to make it enforceable to the maximum extent of the law. BFS denies that the Master Subcontractor Agreement or any provision therein is unconscionable. However, if the Court finds that it needs to strike a provision, as Hurley argues, the provisions are severable and may stand on their own, as the parties intended.

c. BFS master subcontractor agreement complies with South Carolina law.

Hurley's fourth and final sub-argument under its sixth argument claims that the subcontract violates Section 32-2-10 of the South Carolina Code.

S.C. Code Ann. § 32-2-10 provides:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building ... purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. (Emphasis added)

As more fully detailed hereinabove, the BFS claims for contractual indemnity are premised upon rights afforded under its Master Subcontractor Agreement with Hurley.

BFS, by its crossclaims, is seeking indemnity not against liability for loss or damage arising out of any negligence of BFS itself. BFS is, by contrast, seeking indemnity only against liability for loss or damage arising out of the sole or concurrent negligent acts or omissions of its subcontractor, Hurley, in the performance of Hurley's work.

The propriety of claims in indemnity, as asserted by BFS in the instant action, are specifically recognized by S.C. Code Ann. Section 32-2-10. Moreover, the relevant provisions of the Master Subcontractor Agreement, pursuant to which BFS seeks indemnity from Hurley, are equally consistent with the provisions of S.C. Code Ann. § 32-2-10. BFS is not seeking indemnity against liability for damages arising out of its own negligence, whether sole or concurrent. BFS is seeking indemnity solely against liability for damages occasioned by the negligent acts or omissions of its subcontractor Hurley. Under the circumstances, the provisions of § 32-2-10 are irrelevant, and afford no basis for an award of summary judgment in favor of Hurley.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court should deny Hurley's motion for summary judgment.

HOWELL, GIBSON & HUGHES, P.A.

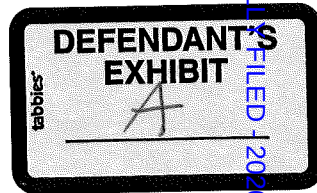
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Beaufort, South Carolina

October 30, 2020

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

DEPOSITION OF GARY FREEMAN
VOLUME 2



THE RETREAT AT CHARLESTON NATIONAL COUNTRY CLUB
HOMEOWNERS ASSOCIATION, INC., AND THE RETREAT AT
CHARLESTON NATIONAL COUNTRY CLUB HORIZONTAL
PROPERTY REGIME,

Plaintiffs,

vs.

CASE NO. 2016-CP-10-3783

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; DINO SCHWARTZ, INDIVIDUALLY;
CHARLESTON EXTERIORS, LLC; ECC CONTRACTING, LLC;
HURLEY SERVICES, LLC; MCDANIEL CONSTRUCTION CO.,
LLC; AC CONSTRUCTION GROUP, INC.; L&G
CONSTRUCTION GROUP, LLC; POHLMAN QUALITY
CONTRACTORS; POHLMAN QUALITY EXTERIORS, INC.;
LIOLLIO ARCHITECTURE; JC CONTRACTORS, LLC; SOTO &
VAZQUEZ CONSTRUCTION, LLC; COSTA DE OLIVEIRA
CONSTRUCTION, LLC, a/k/a COSTA DE OLIVEIRA
CONSTRUCTION, LLC; AND SOLESMAR JESUS DE
OLIVEIRA,

Defendants.

DEPONENT: GARY FREEMAN

DATE: MAY 8, 2019

TIME: 10:07 A.M.

LOCATION: MULLEN WYLIE
CHARLESTON, SOUTH CAROLINA

REPORTED BY: DARAH NEKOLA, RPR, CSR(IA)
CLARK & ASSOCIATES, INC.
CHARLESTON, SC 29415
843-762-6294
WWW.CLARK-ASSOCIATES.COM

Deposition of Gary Freeman

1 GARY FREEMAN,
2 having been first duly sworn, was examined and
3 testified as follows:

4 EXAMINATION

5 BY MR. CLARKE:

6 Q. Mr. Freeman, I am Finley Clarke. Good
7 morning.

8 A. Good morning.

9 Q. Can you hear me okay?

10 A. Yes, I can.

11 Q. Okay. Have you documented any
12 installation deficiencies in the Tyvek or WRB on
13 Building 25?

14 A. Would you -- I'd like a resource -- I'd
15 like to look at a map, I guess, to see what
16 Building 25 is or where it is.

17 I'm not even sure I've got that. If
18 you'll hold on one second, please.

19 Q. Be glad to.

20 (Discussion off the record.)

21 A. Mr. Clarke, this is Gary Freeman again.

22 I'm looking at a map of the development,
23 and I've narrowed down where exactly Building 25
24 is.

25 I can't say this morning that I have

1 documented anything in one way or formed any
2 opinions with regard to the installation of the
3 Tyvek or the weather-resistant barrier on that
4 building; however, at every building installation
5 or at every building that I did investigate, I
6 did note deficiencies with all instances where
7 the Tyvek or the WRB had been installed.

8 Q. But you cannot say today whether you
9 have actually documented deficiencies on
10 Building 25?

11 A. Not this morning, no.

12 Q. Okay. I'm going to ask you the same
13 question with regard to Building 26.

14 A. And my answer would be the same.

15 Q. All right. I'm going to ask you the
16 same question with regard to Building 27.

17 A. My answer would be the same.

18 Q. All right. Now, the deficiencies that
19 you say you have found at the project, describe
20 those for me in the Tyvek installation.

21 A. The Tyvek installation, the
22 manufacturer's instructions require it to be
23 installed with properly taped joints, and I did
24 not see where that had been done in my
25 investigation.

Deposition of Gary Freeman

1 In other words, the lap in the product
2 was just an open lap. It did not have the
3 manufacturer's required tape on it.

4 Q. Any other deficiencies in the Tyvek
5 installation?

6 A. I would associate reverse lapping of the
7 Tyvek with intersecting substrates such as roofs
8 and so forth with a faulty installation of the
9 Tyvek.

10 Did you understand what I was getting at
11 there?

12 Q. And in relation to -- excuse me.

13 A. Did you understand what I was getting
14 at?

15 In other words, the -- I saw numerous --
16 actually, I believe, all instances where Tyvek or
17 the other -- the polyolefin WRB had been
18 installed. It was reverse lapped with any
19 intersecting flashings.

20 And I will note another deficiency if
21 you would like. Where the band board was
22 installed at the first-floor level, the building
23 was first wrapped with the Tyvek product or the
24 WRB product. And as the flashing was installed
25 through the Tyvek, the Tyvek was cut, which

Deposition of Gary Freeman

1 created a water intrusion point of entry at the
2 laps in the flashing.

3 Q. Gotcha. Any other Tyvek installation
4 deficiencies?

5 A. I do not have any others at this time.

6 Q. All right. Did you document any
7 installation deficiencies with respect to windows
8 in Building 25?

9 A. None that I recall.

10 Q. Did you document any installation
11 deficiencies with respect to windows in
12 Building 26?

13 A. One moment, please.

14 (Document review.)

15 Okay. Let me go back. I have reviewed
16 some notes, sir. And Units 1534, which I believe
17 is Building 25, and Unit 1550, which is in
18 Unit -- I mean Building 26, I did measure the
19 length of fasteners for windows at both of those
20 buildings, and both of them were at varied
21 spacings, which exceeded the manufacturer's
22 requirements.

23 And also, the length of the fasteners
24 were -- did not meet the manufacturer's
25 requirements.

1 installation or the window types that were used,
2 and then the --

3 MR. IAN FREEMAN: May 6th of what year?

4 THE WITNESS: I'm sorry. May 6th of
5 2016.

6 And the December 6th of 2017 report also
7 outlined those same issues.

8 Q. (MR. CLARKE) Are you saying the windows
9 didn't meet the DP required -- required DP
10 ratings?

11 A. Yes, sir.

12 Q. Okay. I want to move on to my final
13 line of questioning.

14 Did you document any installation
15 deficiencies in doors in Building 25?

16 A. (Document review.)

17 Yes, sir, I did, at Unit 1530,
18 Strathene.

19 Q. Is that on your matrix?

20 A. Yes, it is.

21 Q. And what was the problem?

22 A. The overall problem with every French
23 door that I have observed was the installation or
24 the penetration of the threshold, I guess, down
25 into the sill plate below in order to accommodate

1 the fastening pin or the locking pin mechanism
2 for the doors. This breached the -- any kind of
3 barrier that would have existed there.

4 If there was a flashing element there,
5 it would have breached the flashing and caused
6 interior water intrusion to the interior or led
7 to water intrusion into the interior of the unit.

8 Q. Did you document any damage at that
9 location?

10 A. I'm not sure.

11 Q. Okay.

12 A. I have it documented with photographs.
13 I'm not sure if it's documented with any damage.

14 Q. Okay. And did you document any improper
15 door installation at Building 26?

16 A. (Document review.)

17 No, I did not.

18 Q. Did you document any improper door
19 installation at Building 27?

20 A. No, I did not.

21 MR. CLARKE: Okay. Thank you very much
22 for letting me get my questions out of the way.
23 That's all I have.

24 THE WITNESS: Sure.

25 EXAMINATION

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

DEPOSITION OF GARY FREEMAN, VOL. 1
THE RETREAT AT CHARLESTON NATIONAL COUNTRY CLUB
HOMEOWNERS ASSOCIATION, INC., AND THE RETREAT AT
CHARLESTON NATIONAL COUNTRY CLUB HORIZONTAL
PROPERTY REGIME,

Plaintiffs,

vs. CASE NO. 2016-CP-10-3783

WINSTON CARLYLE CHARLESTON NATIONAL, LLC; COLIN
R. CAMPBELL CONSTRUCTION, INC.; COLIN CAMPBELL,
INDIVIDUALLY; BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP, LLC; AMERICO ROOFING CONCEPTS, INC.; DVS,
INC.; ADVANCED BUILDING CONNECTION, LLC; GUY C.
LEE BUILDING MATERIALS, LLC; DINO SCHWARTZ,
INDIVIDUALLY; CHARLESTON EXTERIORS, LLC; ECC
CONTRACTING, LLC; HURLEY SERVICES, LLC; MCDANIEL
CONSTRUCTION CO., LLC; AC CONSTRUCTION GROUP,
INC.; L&G CONSTRUCTION GROUP, LLC; POHLMAN
QUALITY EXTERIORS, INC.; AND LIOLLIO
ARCHITECTURE,

Defendants.

BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC,
Third-Party Plaintiff,

vs.

WS CONTRACTORS; ECC CONTRACTING, LLC; HURLEY
SERVICES, LLC; MCDANIEL CONSTRUCTION COMPANY,
LLC; AC CONSTRUCTION CORP.; L&G CONSTRUCTION
GROUP, LLC; POHLMAN QUALITY CONTRACTORS; AND
POHLMAN QUALITY EXTERIORS, INC.

Third-Party Defendant.

DEPONENT: GARY FREEMAN, VOL. 1

DATE: NOVEMBER 9, 2018

TIME: 10:06 A.M.

LOCATION: MULLEN WYLIE

CHARLESTON, SOUTH CAROLINA

REPORTED BY: RONDA K. BLANTON, RPR

REGISTERED PROFESSIONAL REPORTER
CLARK & ASSOCIATES, INC.

P.O. BOX 73129

CHARLESTON, SC 29415

843-762-6294

office@clark-associates.com

WWW.CLARK-ASSOCIATES.COM

Deposition of Gary Freeman

1 A. Yes.

2 Q. Okay. And was it largely upon the
3 findings to date following the completion of that
4 testing that you issued your next report?

5 A. Yes.

6 Q. Okay. Can you -- without -- you can
7 refer to the report, if you like, of course; but
8 can you provide to me a listing of the general
9 opinions at which you have arrived for purposes
10 of this litigation?

11 A. I'm going to have to look at the -- at
12 the reports to do that.

13 Q. That's fine.

14 A. With regard to construction and
15 construction deficiencies, I feel that the --
16 that some of the windows -- I'm not sure if all
17 of them, but some of the windows out at The
18 Retreat are not properly -- well, the ones that
19 I've looked at are improperly installed with
20 regard to manufacturer's tested documentation and
21 information.

22 That's through the use of improper
23 anchors or fasteners, lack of a sealant, the
24 space -- the spacing of those fasteners, and the
25 length of the fasteners as well.

Deposition of Gary Freeman

1 With regard to the knee wall
2 construction out there, the pure lack of any
3 weather-resistive barrier is a violation of the
4 code; and I find major fault in that, as well as
5 the flashing of all of the components that are
6 adjacent to those wing walls, including the
7 columns that are exposed both on the front and at
8 the rear of the buildings. And that's the
9 corrugated columns that I'm talking about.

10 Reverse lapped weather-resistive barrier
11 and laps -- well, reverse lapped weather-
12 resistive barrier laps is an area of concern that
13 I find at fault; and as I said earlier, many
14 places -- in many places, what I find is exposed
15 wood completely void of any kind of barrier
16 protection.

17 The entry steps to each of the
18 buildings -- I measured multiple buildings,
19 multiple sets of steps; and I think one of my
20 later reports may address that.

21 I -- I brought it up on my earlier
22 report, but the spacing or the vertical spacing
23 of the risers exceeds the 3/8-inch maximum delta
24 that the code allows.

25 I found problems with the flashing of

Deposition of Gary Freeman

1 you, but it's open to the weather and open to the
2 water coming down that slope.

3 Q. Was the condition you've just described
4 something you attributed to the construction or
5 design of the roofing elements or something else
6 in terms of this water intrusion and the ultimate
7 damage to the floor beams?

8 A. Well, it could be the wall and the roof.
9 I mean, what happened in that instance, we
10 started at the base of the wall where we saw some
11 discolored trim at the floor line at the -- at
12 the first floor line; and we started pulling that
13 off, and then we looked up. We got on the lift,
14 looked up and said, "Well, here's where it's
15 coming from.

16 So I don't know if I would just say it's
17 the roof; but in tying in with issues that I saw,
18 I noticed in some photographs where the weather-
19 resistive barrier was cut at the corner.

20 In other words, they started a roll at
21 the corner of the wall when, actually, the
22 manufacturers ask you to wrap that corner 2 or 3
23 feet with the material. And -- and there again,
24 you have a possible weakness in the wall system
25 because of that. So I would not limit it to just

1 topic?

2 A. For french doors?

3 Q. Yes, sir.

4 A. No. We're not through with french doors
5 yet.

6 Q. All right.

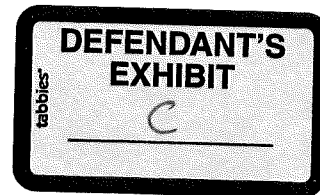
7 A. The -- and this might be in the line of
8 the general statement. It happens to be at a
9 french door in this case, but these french doors
10 were not thin units. They were just cased
11 members that would come out and be installed into
12 a rough opening.

13 What we found, though, when we removed
14 the trim around -- at the head of the door, which
15 was in line with the trim at the head of the
16 finned windows, was that the weather-resistive
17 barrier was not lapped in any way with the door
18 assembly to direct water to the outside.

19 In other words, the -- the door
20 installation in that opening was not proper; and
21 I will direct you to another long and lengthy
22 photograph number, if you would like.

23 Q. Certainly.

24 A. And then you can come over and look at
25 it. There are a series of photographs that show



**BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT**

THIS MASTER SUBCONTRACTOR AGREEMENT (this “Agreement”) is entered into effective as of May 14, 2012, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, Texas 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com (“Contractor”), and Hurley Services, LLC, address: 201 Spar Klubby Lane, Ladson, SC 29456, telephone: 843-425-5100, fax: 803-972-6563, Contact: Giovanni N. Mendes, e-mail: Hurley Services LLC @ gmail.com (“Subcontractor”).

SECTION 1. Introduction.

a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the “Work”) from time to time for Contractor on any project (the “Project”). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor’s customer (the “Owner”). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the “Contract Documents”) and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor’s only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, “Work Order”) delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s)

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Subcontractor

Contractor

are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

c. **Term.** This Agreement shall be for an initial term of three (3) years. Upon the expiration of such initial term or any renewal term, this Agreement shall automatically renew for subsequent one (1) year periods unless either party gives written notice to the other party that it is electing to terminate this Agreement at the end of the then current term. Such written notice of intent to terminate must be given at least sixty (60), but not more than one hundred twenty (120), days prior to the end of the then current term. The provisions of Sections 3, 4, and 5 shall survive termination of this Agreement. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

d. **Notice.** Any notice or communication hereunder or in any agreement entered into in connection with the transactions contemplated hereby must be in writing and given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, and registered or certified with return receipt requested, or by delivering the same in person or by facsimile transmission. Such notice shall be deemed received on the date on which it is hand-delivered or received by facsimile transmission or on the third business day following the date on which it is so mailed. For purposes of notice, the addresses of the parties shall be as set forth on the front page of this Agreement. Any party may change its address for notice by written notice given to the other parties in accordance with this Section.

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and/or omissions.

b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

d. **Safety and Environmental.**

(1) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans, and specifications for conformity with all local, state, and Federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety, health, and environmental rules and regulations established by or pursuant to Federal, state, and local safety and environmental laws. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges, in-kind training or supplies, or penalties related to the Work, including, without limitation, fines, charges, and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials, or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

(2) **The Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA").** Regulations have been promulgated by OSHA and EPA ("Regulations") that require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractor agrees as follows:

(A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.

(B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.

(C) **TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF SUBCONTRACTOR TO COMPLY WITH THE REGULATIONS.**

(D) Subcontractor will assist Contractor in complying with the Regulations.

(E) Subcontractor will not use any chemicals in its performance of the Work for

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Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.

(3) **Subcontractor's Safety Program.** Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage, protective barriers, and other warnings against hazards. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.

(4) **Default.** If Subcontractor fails to immediately comply with safety and environmental requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of \$200 per hour for a minimum ten (10) hour day until construction at the Project can be safely resumed.

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be

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Contractor

intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

SECTION 4. Insurance.

At all times while performing the Work, and continuing thereafter until the expiration of the applicable statute of limitations for any claims, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

- a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.
- b. **Employer's Liability Insurance** - \$1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.
- c. **Commercial-General Liability** - \$1,000,000 per occurrence, \$1,000,000 products-completed operations aggregate, \$1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.
- d. **Business Auto Liability**, including hired and non-owned auto coverage - \$500,000 combined single limit.

Insurance policies shall (a) be issued by companies with a "Best's Rating A" and a "Financial Size Category of VIII", (b) be on an "occurrence" form, and (c) list Contractor and if requested, Owner, as additional insureds per Form CG 20 10 edition 11/85 or its equivalent on the General Liability and Automobile Liability Policies. For purposes of this additional insured requirement, the term "equivalent" means coverage for liability arising out of Subcontractor's Work performed for Contractor and includes both ongoing and products-completed operations coverage. The Workers' Compensation Policy shall include an Alternate Employer's Endorsement naming the Contractor. If Subcontractor utilizes any leased employees, Contractor must also be listed on an Alternate Employer's Endorsement on the Workers' Compensation Policy covering the leased employees.

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and Alternate Employer's Endorsement must be supplied with the certificate of insurance.

If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment); the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

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SECTION 5. INDEMNITY.

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 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 DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT 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 PART, 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

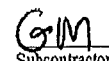
OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE 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 (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDERING 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 (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

SECTION 6. Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America.

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of


Subcontractor

Contractor

construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) shall be lawfully entitled to work under the laws of the United States of America.

SECTION 7. Default and Damages.

a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.
- (2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.
- (3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.
- (4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)
- (5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.
- (6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.
- (7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. **Damages.**

(1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

(2) **Subcontractor's Liability to Contractor upon Termination.** If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to

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perform under this Agreement or other Contract Documents (including, without limitation, the amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

- c. **Reimbursement for Fines.** Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold harmless Contractor regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including, without limitation, their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

- a. **Payment by Owner is Condition Precedent.** Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("Cost of Work") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accepts Subcontractor's Work and Contractor receives payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including, without limitation, the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.

- b. **Partial Payments.** Partial payments ("Partial Payments") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including, without limitation, materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, safety meeting sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("Employee Time Sheets") for the period of time since the last submission for payment, evidence of payment, waivers (including, without limitation, lien-waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the application for payment by Contractor and receipt of payment by Contractor from Owner.

- c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "Retainage Amount") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.

d. **Grounds for Withholding Payments.** Contractor may withhold any Partial Payments or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

e. **Work Covered by Partial Payments.** All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.

f. **Final Payment.** Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:

- (1) The Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;
- (2) Subcontractor has submitted satisfactory evidence of payments to, waivers by, and releases from all claims by, Subcontractor and any persons, firms, or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including, without limitation, lien waivers) if requested by Contractor;
- (3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, warranties, and bonds;
- (4) Subcontractor has provided safety meeting sheets and Employee Time Sheets for the period of time since the last submission for payment;
- (5) Owner, any general contractor, any lender, any architect, and Contractor have accepted the Work; and
- (6) Contractor has received payment from Owner.

g. **Release of Retainage.** Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.

h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

1. **INDEMNIFICATION FOR LIENS.** TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS. UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.

SECTION 9. Miscellaneous.

a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including, without limitation, the pertinent provisions of this Agreement (including, without limitation, Section 5) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.

b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its

subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.

c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

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

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:

Hurley Services, LLC

By:

Giovanni M. Mendes

Name: Giovanni N. Mendes

Title: owner

80-0203713

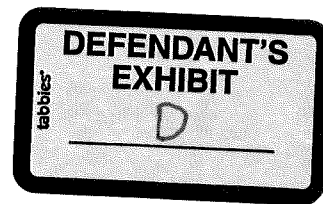
Subcontractor Social Security No. or Federal I.D.
No.

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC

By:

Deryl Ward

Name: Deryl Ward
Title: Vice President



THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Honorable Clifton B. Newman, Circuit Court Judge

2014-CP-08-02424

RECEIVED
MAR 05 2020
SC Court of Appeals

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

vs.

MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and
Charleston Exteriors, LLC.....Respondents,

NOTICE OF INTENT TO APPEAL

Builders FirstSource-Southeast Group, LLC, appeals the Order of the
Honorable Clifton B. Newman, dated February 1, 2020, a copy of which is
attached hereto. Counsel for the Appellant received written notice of this Order
on February 3, 2020.

{Signature Page Follows}

HOWELL, GIBSON & HUGHES, P.A.

By: Catherine L. Floeder
Stephen P. Hughes
Mary Bass Lohr
William H. Cox, III
Catherine L. Floeder
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorneys for Builders FirstSource-
Southeast Group, LLC

Beaufort, South Carolina

March 2, 2020

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Builders Firstsource-Southeast Group, LLC

Plaintiff,

V

MI Windows And Doors, INC.; ECC
Contracting, LLC; Hurley Services, LLC;
and Charleston Exteriors, LLC,

Defendant,

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2018-CP-08-02547

AMENDED ORDER GRANTING
CHARLESTON EXTERIORS,
LLC'S AND ECC CONTRACTING,
LLC'S MOTION FOR SUMMARY
JUDGMENTRECEIVED
MAR 05 2020
SC Court of Appeals

This matter came before the Court on Friday, October 18th on the Motion for Summary Judgment of the Defendant Charleston Exteriors, LLC seeking dismissal of the Plaintiff's causes of action for breach of contract, negligence, breach of warranties, and indemnity. Present and participating in the argument were the movants counsel, C. Clay Olson, Esquire of Harper Little, PLLC and the Plaintiff was represented by Witt Cox, Esquire of Howell Gibson & Hughes.

ECC Contracting filed a similar, if not identical motion which was also heard. Counsel for ECC, Heyward Grimbail, Esquire of Richardson Plowden was in attendance to advocate and advance the arguments of ECC Contracting. The ECC Motion for Summary Judgment was heard concurrently with the Charleston Exteriors motion. The Court hereby rules on both Charleston Exteriors, LLC's Motion for Summary Judgment as well as ECC's Motion for Summary Judgment.

BACKGROUND

The Plaintiff, Builders First Source Southeast Group, Inc. ("BFS") is a supplier of building materials and components, as well as a provider of construction services for new construction and remodeling projects. BFS provided materials and services at a construction

project known as the "Abbey at Spring Grove" which is located in Moncks Corner, South Carolina.

The Abbey at Spring Grove (the "Abbey") is a 69-home residential community situated in Berkeley County, South Carolina. The Abbey was developed by Lennar Carolinas¹. To be precise, the Abbey is a portion, or phase, of the larger Spring Grove Plantation development.

A lawsuit was filed in 2014 by Patricia Damico on behalf of herself and other owners within the Abbey at Spring Grove. *See Patricia Damico and Lenna Lucas, individually and behalf of all other similarly situated v. Lennar Carolinas, LLC, et al., Case No. 2014-CP-08-02424 (the "Underlying Class Action")*. The underlying matter was amended on more than one occasion as the Plaintiff asserted exterior window claims on November 23rd, 2015.

On November 25th, 2015, Lennar Carolinas answered the Amended Complaint and asserted Third-Party claims against several of its contractors and suppliers. Among these Third-Party Defendants was Builders First Source who signed its responsive pleading on December 15th, 2015 and filed it on December 21st, 2015.

The case before the Court was filed on December 21st, 2018 in Berkeley County, South Carolina. The allegations made against Charleston Exteriors, LLC are derived from allegations made by the Plaintiff Damico and Lennar in the underlying lawsuit. Specifically, the Plaintiff and Lennar Carolinas have alleged that BFS was negligent in the installation of windows at the Abbey; that BFS breached its subcontract agreement with Lennar by virtue of the allegations made by the Plaintiff against Lennar; that BFS breached express and implied warranties as alleged in the underlying lawsuit; that Lennar is entitled to both contractual indemnification or, alternatively, equitable indemnification from BFS due to the claims made in the underlying

¹ Lennar Carolinas is not a party to this litigation. Lennar is a Defendant in the matter styled Damico v. Lennar Carolinas, LLC.

lawsuit. As a consequence of these claims made in the underlying lawsuit, BFS has brought this lawsuit alleging that Charleston Exteriors and ECC breached their subcontract with BFS, that Charleston Exteriors and ECC breached certain implied and/or express warranties with BFS; that BFS is entitled to contractual/equitable indemnification from Charleston Exteriors and ECC; and that Charleston Exteriors and ECC were negligent in the installation of the windows at the Project.

FINDINGS OF FACT

1. Builders First Source "BFS" was on actual notice of potential claims against Charleston Exteriors, LLC on December 15, 2015. There can be no other conclusion with regard to this issue upon reviewing the Answer of Builders First Source dated December 15th, 2015. See Exhibit "A"

2. BFS has not submitted a Memorandum of Law to rebut Charleston Exteriors argument that BFS was on notice of a potential claim against Charleston Exteriors on or before December 15th, 2015.

3. Uncontroverted testimony from the hearing, coupled with a review of the D'amico record shows that at no time did BFS attempt to amend its pleadings in the underlying suit against Charleston Exteriors, LLC.

4. BFS began defending the underlying lawsuit on or before December 15, 2015.

5. BFS began incurring costs and attorneys fees when it began to defend this case on or before December 15, 2015.

6. The Subcontract Agreements entered into by ECC and Charleston Exteriors with BFS contain language concerning indemnity and the prospect of these Defendants being forced to indemnify BFS for the negligence of BFS.

7. The contractual indemnification language referenced in Paragraph 6 is both confusing and contradictory at times. The language fails to clearly and unequivocally explain that these Defendants are obligated to indemnify BFS for BFS's negligence.

8. BFS failed to present any evidence suggesting that this lawsuit seeks damages for any acts or omissions which are separate or distinct from the underlying lawsuit. The Court concludes that the claims made in this lawsuit are wholly derivative of those brought in the Damico litigation.

9. BFS entered into a Master Subcontractor Agreement with Charleston Exteriors on October 17th, 2012.

LEGAL STANDARD APPLICABLE TO RULE 56 MOTIONS

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; see *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 487 S.E.2d 187 (1997)). "Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings." *Grant v. Mount Vernon Mills*, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984). "[W]hen plain, palpable, and

indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” *Hedgepath v. AT&T*, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

A. THE CLAIMS OF THE PLAINTIFF FOR NEGLIGENCE, BREACH OF CONTRACT, AND BREACH OF WARRANTIES ARE TIME BARRED

South Carolina recognizes the “discovery rule” when considering an action to be time barred. Under the discovery rule, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. *Burgess v. American Cancer Society*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). Also, *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999) The statute of limitations for negligence, breach of contract, and breach of warranties is three years. Compelling portions of the record in the underlying matter were presented by the Defendants which illustrates that the Plaintiff was on direct and actual notice of its potential claims against Charleston Exteriors and BCC on December 15th, 2015. Subsequently, more than three years went by before this lawsuit was filed on December 21st, 2018. These causes of action fail for being untimely.

B. DISGUISED INDEMNITY CLAIMS

Although the Court has already determined that claims of BFS for negligence, breach of contract, breach of warranties (“Non-Indemnity Claims) are each barred by the three-year statute of limitations, the Court will consider the Defendants’ additional argument. The Defendants have alleged that the Non-Indemnity claims must fail pursuant to the “Stoneledge Defense” which bars claims that are disguised indemnification claims cloaked within separate

causes of action.² Upon hearing the oral arguments and reviewing memoranda presented to the Court, it is evident that the Plaintiff's Non-Indemnity claims do not exist outside of the derivative Damico lawsuit. They must, therefore, fail.

The allegations in this case make no separate or unique contention(s) which are in addition to the allegations made by Lennar and the Plaintiff in the *Damico* matter. Builders First Source has failed to provide any admissible record evidence that it sustained any separate or independent damages outside the scope of the Damico lawsuit. *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross-claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim");

C. MASTER SUBCONTRACT AGREEMENT INDEMNITY PROVISIONS ARE NEITHER CLEAR NOR EQUIVOCAL

The Defendants seek Summary Judgment as to Builders First Source's contractual indemnification claim on the ground that it violates South Carolina rules of contract construction. Section 5 of the Master Subcontract Agreement is confusing at best and deceptive at worst.

Section 5 contains two Paragraphs. The first paragraph seems to suggest that BFS may only seek indemnification for damages.....

ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR

² Counsel for ECC and Charleston Exteriors presented memoranda and oral arguments consistent with the reasoning in a recent S.C. appellate case which is known as "Stoneledge" and is specifically cited as *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp.*, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015)

INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

Below this lengthy paragraph is an almost identically constructed paragraph which is slightly altered to indicate that BFS may seek indemnification from Charleston Exteriors for damages caused by the negligence of any person or entity. Specifically, the second paragraph suggests a duty to indemnify BFS.....

REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.

The Court can only conclude that the Master Subcontract Agreement is not what our courts had in mind when setting precedent regarding "anti-indemnity" clauses in contracts. Typically, courts will construe an indemnification contract *"in accordance with the rules for the construction of contracts generally."* *Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. However, when an indemnity clause purports *"to relieve an indemnitee from the consequences of its own negligence,"* our case law requires strict construction of the clause. *Laurens*, 355 S.C. at 111, 584 S.E.2d at 378-79. *"Indeed, most courts agree with 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."* *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). See *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018) see also *Murray v. Texas Co.*, 172 S.C. 399, 402, 174 S.E.231, 234 (1934) (finding *"broad and comprehensive"* language was insufficient to prove the contract relieved a party from its own negligence).

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question

as to BFS seeking indemnification for its own negligent acts or omissions, BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contractual indemnity claims.

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal when seeking to be indemnified for its own negligence, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

D. BUILDERS FIRST SOURCE'S CONTRACTUAL INDEMNIFICATION CLAIM IS ALSO BARRED PURSUANT TO THE RELEVANT STATUTE OF LIMITATIONS

The contractual indemnity claim(s) made by Builders First Source against ECC and Charleston Exteriors have also been challenged pursuant to the statute of limitations. As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. *Choate v. United States*, 233 F. Supp. 463 (D.C. Okla. 1964) *First Gen. Servs. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Our courts, however, have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fld. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 (Ct. App. 2015). In this case, BFS has pled that it is "entitled to full

contractual and common law indemnification for and against Liability”. *See Complaint, Paragraph 34.*

The Court draws further distinction in this case because the relief prayed for in the BFS complaint seeks consequential damages for attorney’s fees. Specifically, the Complaint against ECC and Charleston Exteriors states that, “....BFS has been subjected to liability and has incurred consequential damages in having to expend attorney’s fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.” *See Complaint, Paragraph 33; See also Paragraph 34* (“...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney’s fees, costs, and other expenses incurred in defending the underlying action... ”)

BFS began to incur liability for attorney’s costs and fees – damages it seeks in this litigation when its Answer was drafted and served. BFS’s Answer was executed and served more than three years prior to the filing of the present action. Thus BFS’s claims for “contractual and common law indemnification against Liability” are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

The facts before the Court are distinguishable from the *First General Services* case in that BFS is seeking indemnification for damages which have begun to accrue more than three years prior to filing and, as a result, the Court is inclined to agree with the Defendants that consequential damages, as defined by the Complaint, began to accrue prior to December 15th, 2015 and, therefore, these damages cannot be recovered as Builders First Source discovered them more than three years prior to the filing of its lawsuit against Charleston Exteriors and ECC.

IT IS ORDERED that the Defendants Charleston Exteriors, LLC and ECC Contracting,

LLC's Motion for Summary Judgment is granted as to the following causes of action only:

- a. Negligence
- b. Breach of Contract
- c. Breach of Warranties
- d. Contractual Indemnity

IT IS ORDERED that these causes of action are hereby dismissed with prejudice and this ruling should serve precedent in the Damico matter as well.

THIS COURT FINDS THAT two claims remains which are subject to the Motion to Consolidate brought simultaneously by Builders First Source. The claims are for equitable indemnification and contribution. The Court finds that these claims are subject to consolidation with the related D'Amico matter which remain stayed until further notice or order.

IT IS FURTHER ORDERED that the cause of action for equitable indemnification involves a question for the jury and the Motion for Summary judgment is, therefore, denied as to that cause of action. The Plaintiff's Contribution claim survives as it was not before me as part of this motion for summary judgment.

AND IT IS SO ORDERED this ____ day of __, 2020, at ____, South Carolina.

Clifton B. Newman Presiding Judge



Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And
Doors, Inc. , defendant, et al
Case Number: 2018CP0802547
Type: Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127

Electronically signed on 2020-02-01 21:46:57 page 11 of 11

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Honorable Clifton B. Newman, Circuit Court Judge

2014-CP-08-02424

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

vs.

MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and
Charleston Exteriors, LLC.....Respondents,

PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing
Notice of Intent to Appeal upon all counsel of record by affixing same with proper
postage and placing same with the United States Postal Service on ____ day of
March, 2020 addressed to the following:

L. Dean Best, Esquire
M. Shanter Chaparro
Best Honeycutt, PA
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Charleston, SC 29422

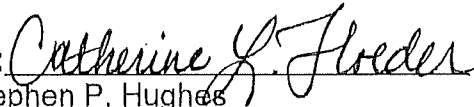
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MAR 05 2020
SC Court of Appeals

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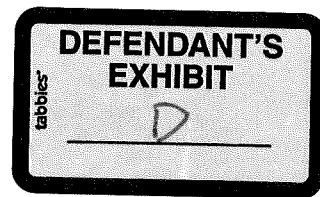
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Attorneys for Builders FirstSource-
Southeast Group, LLC

Beaufort, South Carolina

March 2, 2020



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.

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

vs.

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, LLC a/k/a Builders FirstSource-Florida Design Center, LLC;
Builders FirstSource-Southeast Group, LLC; Charlotte Flooring, Inc.; Dirla Tawi
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, & 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, Inc.; Fine Builders, LLC; Speedtruss, Inc.; Argentino Jose
Campos d/b/a as Construction; Javier Morales Merino; Novac Construction, Inc.;
MJG Construction, Inc.; Advance Plumbing, Heating & Air, Inc.; Cahill
Contracting, LLC; Cohen's Drywall, Inc.; Bob Porter d/b/a Custom Interior
Construction; RB's Trim, Inc.; Sharon's Painting, LLC; David Tile; Timothy
Mitchell; Electrical Design & Construction, Inc.; 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 Oliveira dba Four Season Siding; Sunrise Siding;
Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC; Horacio Jasso;

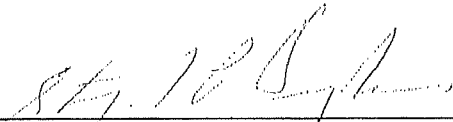
Standard Precast Walls, LLC; Alfonso Rodriguez Vasquez aka Alfonso Rodriguez, Sr.; and John Does 55-75
Defendants.

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

NOTICE OF APPEAL

Builders FirstSource - Southeast Group, LLC, appeals the Order of the Honorable Roger M. Young, Sr., dated and filed April 29, 2020, a copy of which is attached hereto (Exhibit A). Counsel for the Appellant received written notice of this Order on Wednesday, April 29, 2020, and subsequently served and filed a timely motion for alteration and/or amendment of said Order. Builders FirstSource-Southeast Group, LLC also appeals the Order of the Honorable Roger M. Young, Sr., dated August 26, 2020, and filed August 27, 2020, whereby the Court denied the aforesaid motion for alteration and/or amendment. A copy of the Order denying the motion is also attached hereto (Exhibit B). Counsel for the Appellant received written notice of the latter Order on August 27, 2020.

HOWELL, GIBSON & HUGHES, P.A.

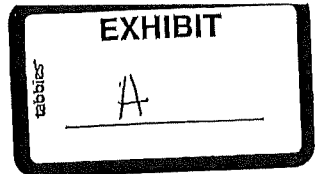
By: 
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William H. Cox, III Bar No. 101991
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Beaufort, South Carolina
September 24, 2020

Other Counsel of Record:

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Harper Little Law
Attorney for Charleston Exteriors, LLC



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Six Fifty Six Owners Association, Inc., et al.,
Plaintiffs,

vs.

Winsor South, LLC, et al.,
Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2016-CP-10-3455

**ORDER GRANTING DEFENDANTS
HURLEY SERVICES, LLC AND
CHARLESTON EXTERIORS' MOTION
FOR SUMMARY JUDGMENT AGAINST
THE CLAIMS OF BUILDERS FIRST
SOURCE-SOUTHEAST GROUP, LLC**

This matter came before the Court on March 5, 2020 on Defendants Hurley Services, LLC and Charleston Exteriors' Motion for Summary Judgment against the claims of Builders First Source-Southeast Group, LLC.

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at Six Fifty Six Coleman Boulevard, a twelve-building townhome community in Mount Pleasant, SC ("the Project"). Builders First-Source is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that Builders First-Source holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is Builders First-Source's representative that serves as the "qualifying party" for such licensure in this state. Defendant supplied and installed windows and doors as a subcontractor of the Ryland Group for only the "Ryland Phase" buildings at the Project, which consists of nine (9) buildings that were constructed in 2013 and 2014. It is undisputed that Builders First-Source furnished the windows, related flashings, and caulk and provided superintendents to oversee such installation for the Ryland Phase buildings at the Project.

Builders First-Source filed a third-party complaint in the present litigation on May 9, 2017 asserting third-party claims against Hurley for contractual indemnity, breach of express and implied

warranties, breach of contract, and negligence. Hurley was ultimately made a direct defendant by Plaintiffs and Builders First-Source then asserted cross-claims against Hurley in lieu of it previously asserted third-party claims, but on all the same causes of action and grounds. Builders First-Source's operative cross-claims are contained in Builders First-Source's Answer to Plaintiffs' Third Amended Complaint filed on January 24, 2019. Builders First-Source's cross-claims allege that they are entitled to be indemnified in the amount which Builders First-Source "may pay in satisfaction" of Plaintiffs' claim "plus Builders First-Source [sic] costs for defense, inclusive of attorneys' fees, without regard for the fault of either Hurley or Builders First-Source.

Defendant Hurley Services, LLC is now before the Court on their Motion for Summary Judgment against the claims of Builders First-Source. Charleston Exteriors joins the Motion.

STANDARD OF REVIEW

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). A party's "response to the motion must set forth specific facts, *admissible in evidence*, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him." *Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (Ct. App. 1988) (emphasis added). Summary judgment "is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 388, 701 S.E.2d 776, 779 (2010).

DECISION

Based on the submitted Motions and Oral Arguments the Court hereby finds:

- (1) There exists no genuine issue as to any material fact and Hurley Services and Charleston Exteriors are entitled to judgment dismissing all cross-claims against it as a matter of law;
- (2) Builders First Source-Southeast Group, LLC's cross-claims are barred by the doctrine of collateral estoppel because of Judge Clifton Newman's order filed on February 3, 2020 in the case of Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al, Case No. 2018-CP-08-2547. Specifically, the Court references and adopts the court's analysis in Paragraphs B and C therein.
- (3) Builders First Source-Southeast Group, LLC's cross-claims for breach of contract, breach of express and implied warranty, and negligence are "merely disguised . . . claims for equitable indemnity" and fail as a matter of law, *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634, (Ct. App. 2015);
- (4) Builders First Source-Southeast Group, LLC's cross-claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law, *See Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 2018 WL 3748616 (S.C. Ct. App. 2018).

CONCLUSION

Therefore, it is ordered that Defendants Hurley Services, LLC and Charleston Exterior's Motion for Summary Judgment against the claims of Builders First Source-Southeast Group, LLC is GRANTED.

And it is SO ORDERED.

Charleston, South Carolina



Charleston Common Pleas

Case Caption: Six Fifty Six Owners Association Inc , plaintiff, et al VS Winsor South Llc , defendant, et al
Case Number: 2016CP1003455
Type: Order/Summary Judgment

It is so ordered.

/s Roger M. Young, Sr, S.C. Circuit Judge 2134

Electronically signed on 2020-04-29 11:33:10 page 5 of 5

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003455

Six Fifty Six Owners Association Inc et al
PLAINTIFF(S)

Jonathan J Thomas et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant Builders First-Source's Motion for Reconsideration of the Court's Order granting summary judgment on April 29, 2020 is denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

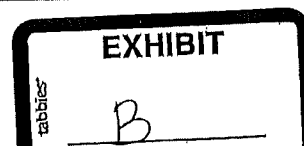
☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/26/2020 .

Builders First Source Southeast Group
John 58 75 Doe
Doe, John 58 75
Sunrise Siding LLC
Davis Tile
Jonathan J Thomas
Acme Doors Inc
Garcia Roofing LLC

NAMES OF TRADITIONAL FILERS SERVED BY MAIL



Court Reporter:

E-Filed Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filed or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Six Fifty Six Owners Association Inc , plaintiff, et al VS Winsor
South Llc , defendant, et al
Case Number: 2016CP1003455
Type: Order/Electronic Form 4

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Electronically signed on 2020-08-26 15:50:07 page 3 of 3

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.

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

vs.

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, LLC a/k/a Builders FirstSource-Florida Design Center, LLC;
Builders FirstSource-Southeast Group, LLC; Charlotte Flooring, Inc.; Dirla Tawi
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, & 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, Inc.; Fine Builders, LLC; Speedtruss, Inc.; Argentino Jose
Campos d/b/a as Construction; Javier Morales Merino; Novac Construction, Inc.;
MJG Construction, Inc.; Advance Plumbing, Heating & Air, Inc.; Cahill
Contracting, LLC; Cohen's Drywall, Inc.; Bob Porter d/b/a Custom Interior
Construction; RB's Trim, Inc.; Sharon's Painting, LLC; David Tile; Timothy
Mitchell; Electrical Design & Construction, Inc.; Hurley Services, LLC; Charleston
Exteriors LLC; Jorge Diaz aka Jorge Louls 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; Miguel Painting, LLC; Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vasquez 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.

PROOF OF SERVICE

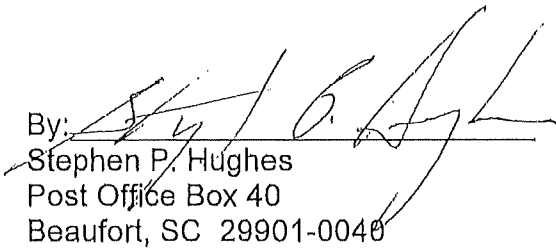
The undersigned counsel hereby certifies that he has served the foregoing Notice of Appeal upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 24 day of September, 2020 addressed to the following:

Ian W. Freeman, Esquire
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Charleston, SC 29413

C. Clay Olson, Esquire
Harper Little PLLC
164 Market Street
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HOWELL, GIBSON & HUGHES, P.A.

By: 

Stephen P. Hughes

Post Office Box 40

Beaufort, SC 29901-0040

(843) 522-2400

Attorney for Builders FirstSource -
Southeast Group, LLC

Beaufort, South Carolina
September 23, 2020

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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;
L&G Construction Group, LLC; Builders
FirstSource-Southeast Group, LLC, et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-10-3783

DEFENDANT

L&G Construction Group, LLC's

NOTICE OF JOINDER

IN DEFENDANTS

East Coast Carpentry's

and

WS Contractors, LLC's

AMENDED

MOTIONS FOR SUMMARY

JUDGMENT

AS TO DEFENDANT

Builders FirstSource-Southeast Group, LLC's

CROSSCLAIMS

TO ALL PARTIES: TAKE NOTICE that the defendant L&G Construction Group, LLC ("L&G") hereby joins in the defendants East Coast Carpentry's ("East Coast") and WS Contractors, LLC's ("WS") amended motions for summary judgment as to defendant Builders FirstSource-Southeast Group, LLC's crossclaims and adopts East Coast's and WS's arguments articulated in their motions, filed with this Court on October 15, 2020 and October 19, 2020, respectively.

s/Michal Kalwajtys

Thomas F. Dougall, SC Bar No. 1729

Michal Kalwajtys, SC Bar No. 100950

DOUGALL & COLLINS

1700 Woodcreek Farms Road, Suite 100

Elgin, South Carolina 29045

Tel: (803) 865-8858

Attorneys for Defendant

L&G Construction Group, LLC

October 21, 2020

Columbia, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

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, Americo Roofing)
Concepts, Inc., DVS, Inc., Advanced Building)
Connections, 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 & Vazquez)
Construction, LLC, Costa De Oliveira)
Construction, LLC a/k/a Costa De Oliveira)
Construction, LLC, Solesmar Jesus De)
Oliveira, 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, Juan Garza Ramos)
d/b/a Juan Constructors, Jessica Marroquin,)
Jessica Marroquin d/b/a Marroquin)
Construction, Carlos Marroquin Construction,)
Carolos Marroquin, Carolos and Marroquin 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,)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C/A NO.: 2016-CP-10-03783

**THIRD-PARTY DEFENDANT
POHLMAN QUALITY EXTERIORS, INC.'S
MOTION FOR SUMMARY JUDGMENT
AGAINST THE CLAIMS OF
BUIDLERS FIRSTSOURCE – SOUTHEAST
GROUP, LLC**

v.

Pohlman Quality Contractors, Pohlman Quality
Exteriors, Palmetto Trim and Renovation,
Edward Bruce Witham and East Coast
Carpentry,

Third-Party Defendants.

**TO: STEPHEN P. HUGHES, ESQUIRE AND WILLIAM H. COX, III, ESQUIRE,
COUNSEL BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC:**

Third-Party Defendant Pohlman Quality Exteriors, Inc. (hereinafter Pohlman), by and through its undersigned counsel, moves for an Order Dismissing Builders FirstSource-Southeast Group, LLC's (hereinafter BFS) claims against Pohlman Quality Exteriors, Inc. pursuant to Rule 12 of the South Carolina Rules of Civil Procedure. The grounds for the Motion are as follows:

1. All of BFS's claims are barred by the applicable Statute of Limitations, SC Code § 15-3-530 et seq.;
2. All of BFS's claims are barred by the applicable Statute of Repose, SC Code § 15-3-640 et seq.;
3. The subcontract produced by BFS is dated after Pohlman completed its work at this project, so the only viable claim BFS may have against Pohlman is for equitable indemnification.
4. BFS's claims for breach of contract, breach of express and implied warranty, and negligence are "merely disguised...claims for equitable indemnity" and fail as a matter of law pursuant to *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630,634, (Ct. App. 2015);
5. Even if the subcontract is applicable, BFS's claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal and thus they fail as a matter of law. *Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 2018 WL 3748616 (S.C. Ct. App. 2018).

WHEREFORE, for the foregoing reasons, Pohlman Quality Exteriors, Inc. respectfully requests this Court enter an Order dismissing Builders First-Source Southeast Group, LLC's claims. This Motion will be supported by a Memorandum of Law. Pohlman Quality Exteriors,

Inc. reserves the right to supplement this Motion and present additional arguments.

AIKEN, BRIDGES, ELLIOTT,
TYLER & SALEEBY, P.A.

/s/ E. Glenn Elliott

E. GLENN ELLIOTT
SC Bar No. 7838
Counsel for Defendant
POHLMAN QUALITY EXTERIORS, INC.
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P. O. Drawer 1931
Florence, SC 29503
(843) 669-8787

Florence, South Carolina
October 22, 2020

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C/A NO.: 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,

v.

Winston Carlyle Charleston National, LLC,
Colin R. Campbell Construction, Inc., Colin
Campbell, Individually, Builders FirstSource-
Southeast Group, LLC, Americo Roofing
Concepts, Inc., DVS, Inc., Advanced Building
Connections, 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 & Vazquez
Construction, LLC, Costa De Oliveira
Construction, LLC a/k/a Costa De Oliveira
Construction, LLC, Solesmar Jesus De
Oliveira, 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, Juan Garza Ramos
d/b/a Juan Constructors, Jessica Marroquin,
Jessica Marroquin d/b/a Marroquin
Construction, Carlos Marroquin Construction,
Carolos Marroquin, Carolos and Marroquin 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,

**THIRD-PARTY DEFENDANT
POHLMAN QUALITY EXTERIORS, INC.'S
SECOND AMENDED
MOTION FOR SUMMARY JUDGMENT
AGAINST THE CLAIMS OF
BUIDLERS FIRSTSOURCE – SOUTHEAST
GROUP, LLC**

v.

Pohlman Quality Contractors, Pohlman Quality
Exteriors, Palmetto Trim and Renovation,
Edward Bruce Witham and East Coast
Carpentry,

Third-Party Defendants.

**TO: STEPHEN P. HUGHES, ESQUIRE AND WILLIAM H. COX, III, ESQUIRE,
COUNSEL BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC:**

Third-Party Defendant Pohlman Quality Exteriors, Inc. (hereinafter Pohlman), by and through its undersigned counsel, moves for an Order Dismissing Builders FirstSource-Southeast Group, LLC's (hereinafter BFS) claims against Pohlman Quality Exteriors, Inc. pursuant to Rule 12 of the South Carolina Rules of Civil Procedure. The grounds for the Motion are as follows:

1. The subcontract produced by BFS is dated after Pohlman completed its work at this project, so the only viable claim BFS may have against Pohlman is for equitable indemnification.
2. BFS's claims for breach of contract, breach of express and implied warranty, and negligence are "merely disguised...claims for equitable indemnity" and fail as a matter of law pursuant to *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630,634, (Ct. App. 2015).
3. BFS has not met the requirements to assert a claim for contribution pursuant to the SC Contribution Amongst Joint Tortfeasors Act, § 15-38-10, et seq Code of Laws of South Carolina (1976, as amended).
4. Even if the subcontract is applicable, BFS's claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal and thus they fail as a matter of law. *Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 2018 WL 3748616 (S.C. Ct. App. 2018), and § 32-2-10 Code of Laws of South Carolina (1976, as amended).

WHEREFORE, for the foregoing reasons, Pohlman Quality Exteriors, Inc. respectfully requests this Court enter an Order dismissing Builders First-Source Southeast Group, LLC's claims. This Motion will be supported by a Memorandum of Law. Pohlman Quality Exteriors,

Inc. reserves the right to supplement this Motion and present additional arguments.

AIKEN, BRIDGES, ELLIOTT,
TYLER & SALEEBY, P.A.

/s/ E. Glenn Elliott

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SC Bar No. 7838
Counsel for Defendant
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Florence, SC 29503
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Florence, South Carolina
October 22, 2020

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C/A NO.: 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,

v.

Winston Carlyle Charleston National, LLC,
Colin R. Campbell Construction, Inc., Colin
Campbell, Individually, Builders FirstSource-
Southeast Group, LLC, Americo Roofing
Concepts, Inc., DVS, Inc., Advanced Building
Connections, 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 & Vazquez
Construction, LLC, Costa De Oliveira
Construction, LLC a/k/a Costa De Oliveira
Construction, LLC, Solesmar Jesus De
Oliveira, 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, Juan Garza Ramos
d/b/a Juan Constructors, Jessica Marroquin,
Jessica Marroquin d/b/a Marroquin
Construction, Carlos Marroquin Construction,
Carolos Marroquin, Carolos and Marroquin 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,

**MEMORANDUM OF
POHLMAN QUALITY EXTERIORS, INC.
IN SUPPORT OF
SECOND AMENDED
MOTION FOR SUMMARY JUDGMENT
AS TO THE CLAIMS OF
BUIDLERS FIRSTSOURCE – SOUTHEAST
GROUP, LLC**

v.

Pohlman Quality Contractors, Pohlman Quality
Exteriors, Palmetto Trim and Renovation,
Edward Bruce Witham and East Coast
Carpentry,

Third-Party Defendants.

Third-Party Defendant Pohlman Quality Exteriors, Inc. (hereinafter Pohlman), by and through its undersigned counsel, submits this memorandum in support of its Motion for Summary Judgment as to the third-party claims asserted by Builders FirstSource-Southeast Group, LLC's (hereinafter BFS).

RELEVANT BACKGROUND FACTS

The Retreat at Charleston National project consists of 31 buildings that were constructed in 4 phases. Campbell R. Campbell Construction, Inc. (Campbell) served as the General Contractor for phases I, II, & III. Builders FirstSource-Southeast Group, LLC (BFS) entered into a subcontract with Campbell to provide labor and materials to accomplish the rough framing for certain buildings of the project. BFS then sought out carpenters to hire to provide the labor necessary meet the obligations of its contract with Campbell (BFS provided all materials). One of the carpenters hired by BFS was Pohlman Quality Exteriors (Pohlman). Pohlman provided labor only to install windows on buildings 11 and 21 at the project.

ARGUMENT

BFS has asserted third-party claims against Pohlman on the theories of contractual indemnification, breach of express and implied warranties, breach of contract, and for contribution pursuant to the SC Contribution Amongst Joint Tortfeasors Act. As will be explained below, the only viable claim BFS has against Pohlman is for equitable indemnification.

In its Second Amended Motion, Pohlman listed four reasons why it is entitled to Summary Judgement. Each of those reasons will be discussed in the order they are listed in the Motion.

The subcontract produced by BFS is dated after Pohlman completed its work at this project, so none of the terms and conditions of that subcontract do not apply to any claims arising out of the Retreat at Charleston National project. As a result, BFS cannot maintain a claim against Pohlman for contractual indemnification.

In its Answers to Pohlman's Interrogatories, BFS states that Pohlman worked on only two buildings at this project - buildings 11 and 21:

8. For every building of The Retreat at Charleston National construction project identified in response to Interrogatory No. 7, set forth a detailed explanation of the scope of work the responding party alleges performed, either quoting the scope of work directly from a 3 subcontract and/or providing a detailed explanation of the alleged scope of work. Also, set forth a complete list of all documents and/or witnesses which the responding party claims supports its response to this Interrogatory.

ANSWER: This Defendant subcontracted with Pohlman Quality Exteriors to install exteriors windows and doors at Buildings 11 and 21. This Defendant will rely upon the testimony of its witnesses and documents to establish the same.

BFS Answers to Pohlman's Interrogatories, page 8

Also, when asked in Interrogatories to identify all documents which support its contention that a contract exists by which BFS has a claim for contractual indemnification against Pohlman for claims related to this project, BFS says it will rely upon the documents it has produced:

11. BFS alleges the subcontract between it and Pohlman provides for, "contractual indemnification in favor of BFS" (see Third-Party Complaint, Paragraph 165). Set forth a complete and detailed list for identifying each and every document, photograph, witness, or other piece of tangible evidence which BFS believes support each of these allegations.

ANSWER: This Defendant will rely upon the testimony of its witnesses and documents produced herewith.

BFS Answers to Pohlman's Interrogatories, page 9

BFS produced approximately 6,000 pages of documents in this case. Of those 6,000 pages, Counsel could locate only seven pages directly related to Pohlman, and three of those pages were transmittal-type documents. The four pages of documents produced by BFS which refer to Pohlman and which are directly relevant to the issues at hand are

- two pages from a compilation of computer-generated documents; and
- two pages from a "Master Subcontract Agreement" between BFS and Pohlman.

As part of its production BFS produced a 76-page document which contains information on what subcontractor did what work on which building, and when that work was completed. Only two of the 76 pages contain any reference to Pohlman. Those two pages are attached as **Exhibit A**. As the Court will see, those two pages show that Pohlman accomplished "Window Install" on buildings 11 and 21. The Court will also see that the documents indicate

- Pohlman completed the installation of windows on building 11 on **February 9, 2007**
- Pohlman completed the installation of windows on building 21 on **March 2, 2007**.

The other two pages produced by BFS which are relevant to this discussion are from a "Master Subcontract Agreement" between BFS and Pohlman. Those two pages are attached as **Exhibit B**. As the Court will see, the date on that "Master Subcontract Agreement" is **October 10, 2007** - seven months after Pohlman completed its work at this project. It is

therefore obvious that the “Master Subcontract Agreement” produced by BFS is not in any way applicable to Pohlman’s work at the Retreat at Charleston National project.

The Court may have also noticed that the second page of the “Master Subcontract Agreement” produced by BFS has the number “12” on the bottom. Although BFS only produced the two pages of the “Master Subcontract Agreement” which are attached, it appears the original document may have consisted of twelve pages. However, because that “Master Subcontract Agreement” did not take effect until more than seven months after Pohlman completed its work at this project, whatever language may be included in those other pages is irrelevant to the claims made in this lawsuit.

BFS’s claims for breach of contract, breach of express and implied warranty, and negligence are “merely disguised...claims for equitable indemnity” and fail as a matter of law pursuant to Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630,634, (Ct. App. 2015).

In its claim against Pohlman and the other Third-Party Defendants for “full contractual and common law indemnification”, BFS asks for the following relief

168. That BFS is entitled to full contractual and common law indemnification from the Third-Party 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 Third-Party Defendants, entitling BFS to recover from the Third-Party Defendants, its attorneys’ fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the Third-Party 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.

BFS Answer and Third-Party Complaint, page 37

The relief sought by BFS pursuant to its claims against the Third-Party Defendants for breach of express warranties, breach of implied warranties, negligence, and breach of contract, as stated by BFS in paragraphs 173, 177, 181, and 185 of its Answer and Third-Party Complaint, respectively, are worded in a similar fashion:

173. That BFS is entitled to judgment against the Third-Party Defendants in the amount of any judgment which the Plaintiffs may obtain against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of any **express warranties** on the part of the Third-Party Defendants, plus BFS costs for defense, inclusive of attorneys' fees.

BFS Answer and Third-Party Complaint, page 38-39

177. That BFS is entitled to judgment against the Third-Party Defendants in the event, and to the extent that the Plaintiffs may obtain judgment against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for **breach of implied warranties**, including such warranty of workmanlike service.

BFS Answer and Third-Party Complaint, page 37

181. In the event that the Plaintiffs obtains judgment against BFS as a direct, foreseeable and proximate result of the **negligence** of the Third-Party Defendants, then and in that event BFS is entitled to judgment against the Third-Party Defendants for the amount of any such judgment, or any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, plus costs of defense, inclusive of attorneys' fees.

BFS Answer and Third-Party Complaint, page 38

185. That BFS is entitled to judgment against the Third-Party Defendants in the event, and to the extent that the Plaintiffs may obtain judgment against BFS for breach of contract, or for any amount Builders FirstSource-Southeast Group, LLC may pay in satisfaction of claims, and BFS is further entitled to recover the costs of defense, inclusive of attorneys' fees.

BFS Answer and Third-Party Complaint, page 39

This Court is no doubt familiar with the opinion issued by the SC Court of Appeals in the case of *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., supra*. Simply put, no matter how many causes of action a party might allege, and no matter what labels a party may put on its alleged damages, if that party seeks to recover from another party only the damages it may be adjudged to owe a plaintiff, or the costs it incurs in defending itself, then all of those other causes are subsumed into a claim for indemnification.

Based upon the wording of BFS's Third-Party Complaint, BFS's claims for breach of express warranties, breach of implied warranties, negligence, and breach of contract should be dismissed.

BFS has not met the requirements to assert a claim for contribution pursuant to the SC Contribution Amongst Joint Tortfeasors Act, § 15-38-10, et seq Code of Laws of South Carolina (1976, as amended).

In a previous pleading in this case, BFS included a claim against Pohlman for contribution. However, BFS's current, operative pleading, its Answer and Third-Party Complaint filed November 11, 2019, does not include that cause of action against Pohlman. Pohlman therefore withdraws this portion of the current Motion without prejudice.

Summary

Based upon the facts, documents, legal authorities, and arguments set forth herein, Pohlman is entitled to the following relief:

1. An Order holding that as a matter of law the "Master Subcontract Agreement" between BFS and Pohlman dated October 10, 2007 is in no way applicable to any claims BFS may have against Pohlman which are in any way related to Pohlman's work at the Retreat at Charleston National project.
2. Dismissal with prejudice of BFS's claim against Pohlman for contractual indemnification.
3. Dismissal with prejudice of BFS's claims against Pohlman for breach of express warranties, breach of implied warranties, negligence, and breach of contract.

AIKEN, BRIDGES, ELLIOTT,
TYLER & SALEEBY, P.A.

/s/ E. Glenn Elliott

E. GLENN ELLIOTT
SC Bar No. 7838
Counsel for Defendant
POHLMAN QUALITY EXTERIORS, INC.
181 E. Evans Street, Suite 409 (29506)
P. O. Drawer 1931 (29503)
Florence, South Carolina
(843) 669-8787
ege@aikenbridges.com

Florence, South Carolina
October 29, 2020

Exhibit

A

Job View - Ref#: 211063 Job Type: Window Template: Window Install
 Desc: Builder: C R Campbell Subd: Charleston National Lot: 11 Unit: Super: Jim Gallagher Job Colors?

Task Status: Active Waiting Completed Inactive | Priority: High Normal Low

Due From: To: *Search*: = ☐ Milestones Only?

Job Type: Task: *Search*: =

- Checked item action - Go/Refresh Ref#: 211063

1 - 19 of 19 >>>

☒	More Job Info	Task	Assigned		Due	Completed
☐		100% ☐ Order Entry	mscantland	☒	Tue 09/19/06	Fri 10/13/06
☐		100% ☐ Attach PO/Quote	mscantland	☒	Tue 09/19/06	Mon 10/23/06
☐		100% ☐ Create Labor POs	mscantland	☒	Tue 09/19/06	Wed 09/20/06
☐		100% ☐ Pre Walk	aahl	☒	Mon 11/06/06	Tue 11/28/06
☐		100% ☐ Attach Pre Walk Form	aahl	☒	Mon 11/06/06	Tue 11/28/06
☐		100% ☐ Confirm Delivery	aahl	☒	Tue 11/07/06	Tue 11/28/06
☐		100% ☐ Customer Invoice	Tracy.Norwood	☒	Mon 01/15/07	Wed 01/24/07
☐		100% ☐ Attach Invoice Showing Sell/Cost	Tracy.Norwood	☒	Mon 01/15/07	Wed 01/24/07
☐		100% ☐ Denote Installed Account Invoices in Job Notes	Tracy.Norwood	☒	Mon 01/15/07	Wed 01/24/07
☐		100% ☐ Window Install	Pohlman Quality	☒	Fri 02/02/07	Fri 02/09/07
☐		100% ☐ Post Walk / Generate Punch List	aahl	☒	Mon 02/05/07	Fri 02/09/07
☐		100% ☐ Attach Post Walk Form	aahl	☒	Mon 02/05/07	Fri 02/09/07
☐		100% ☐ Confirm Delivery Date of Backorders	aahl	☒	Mon 02/05/07	Fri 02/09/07
☐		100% ☐ Schedule Install of Backorders/Punch	aahl	☒	Mon 02/05/07	Fri 02/09/07
☐		100% ☐ Backorders/Punch Complete	aahl	☒	Tue 02/06/07	Fri 02/09/07
☐		100% ☐ Sub Pay	aahl	☒	Wed 02/07/07	Fri 02/09/07
☐		100% ☐ Order Screens	mscantland	☒	Wed 02/07/07	Fri 01/26/07
☐		100% ☐ Screen Delivery/Install	ccarroll	☒	Fri 03/16/07	Mon 03/19/07
☐		100% ☐ Customer	C R Campbell	☒	Mon 03/19/07	Fri 07/20/07

bldg

Job View - Ref#: 211905 Job Type: Window Template: Window Install
 Desc: Builder: C R Campbell Subd: Charleston National Lot: 21 Unit: Super:Jim Gallagher ☒ Job Colors?

Task Status: ☒ Active ☒ Waiting ☒ Completed ☐ Inactive | Priority: ☒ High ☒ Normal ☒ Low

Due From: To: *Search*: = ? ☐ Milestones Only?

Job Type: Task: *Search*: =

- Checked item action - Go/Refresh

Ref#: 211905

1 - 18 of 18

☒	More Job Info	Task	Assigned	☒	Due	Completed
☐		100% ☐ Order Entry	mscantland	☒	Fri 11/10/06	Fri 11/10/06
☐		100% ☐ Attach PO/Quote	mscantland	☒	Fri 11/10/06	Fri 11/10/06
☐		100% ☐ Create Labor POs	mscantland	☒	Mon 11/13/06	Fri 11/10/06
☐		100% ☐ Pre Walk	aahl	☒	Tue 11/14/06	Sun 01/07/07
☐		100% ☐ Attach Pre Walk Form	aahl	☒	Tue 11/14/06	Sun 01/07/07
☐		100% ☐ Confirm Delivery	aahl	☒	Wed 11/15/06	Sun 01/07/07
☐		100% ☐ Window Install	Pohlman Quality	☒	Thu 02/22/07	Fri 03/02/07
☐		100% ☐ Post Walk / Generate Punch List	aahl	☒	Fri 02/23/07	Fri 03/02/07
☐		100% ☐ Attach Post Walk Form	aahl	☒	Fri 02/23/07	Fri 03/02/07
☐		100% ☐ Confirm Delivery Date of Backorders	aahl	☒	Fri 02/23/07	Fri 03/02/07
☐		100% ☐ Schedule Install of Backorders/Punch	aahl	☒	Fri 02/23/07	Fri 03/02/07
☐		100% ☐ Backorders/Punch Complete	aahl	☒	Mon 02/26/07	Fri 03/02/07
☐		100% ☐ Sub Pay	aahl	☒	Tue 02/27/07	Fri 03/02/07
☐		100% ☐ Customer Invoice	Tracy.Norwood	☒	Wed 02/28/07	Thu 04/12/07
☐		100% ☐ Attach Invoice Showing Sell/Cost	Tracy.Norwood	☒	Wed 02/28/07	Thu 04/12/07
☐		100% ☐ Denote Installed Account Invoices in Job Notes	Tracy.Norwood	☒	Wed 02/28/07	Thu 04/12/07
☐		100% ☐ Screen Delivery/Install	c Carroll	☒	Fri 10/12/07	Thu 04/12/07
☐		100% ☐ Customer	C R Campbell	☒	Mon 10/15/07	Thu 04/12/07

Exhibit

B



BUILDERS FIRSTSOURCE - SOUTHEAST GROUP, L.L.C.
MASTER SUBCONTRACTOR AGREEMENT

OCT 18 2007

THIS MASTER SUBCONTRACTOR AGREEMENT (this "Agreement") is entered into effective as of 10/16/07, 2007, between Builders FirstSource - Southeast Group, L.L.C., a Delaware limited liability company, address: 2001 Bryan St. Suite 1600, Dallas, TX 75201, telephone: (843) 553-5252, fax: (843) 777-1710, Contact: Bill Crabtree, e-mail: bill.crabtree@bldr.com ("Contractor"), and Thomas P. N. M. Bohlman Quality Exteriors, address: 106 Galloway Dr. P.O. Box 500, SE 27445, telephone: 314-5496, fax: 314-5496, Contact: Thomas P. N. M. Bohlman, e-mail: thomas@bohlmans.com ("Subcontractor").

SECTION 1. Introduction.

a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "Work") from time to time for Contractor on any project (the "Project"). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor's customer (the "Owner"). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the "Contract Documents") and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor's only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, "Work Order") delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s) are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

OCT 18 2007

c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

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

EXECUTED to be effective as of the date first above written.

SUBCONTRACTOR:

BUILDERS FIRST SOURCE -
SOUTHEAST GROUP, LLC

By

Polina's Quality Exteriors

Name: James Polina's

Title: President

SS. 2117596.2

Subcontractor Social Security No. or Federal I.D.
No.

By:

Deryl Ward

Name: Deryl Ward

Title: Senior Attorney

Subcontractor
Signature

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF CHARLESTON) CIVIL ACTION NO: 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;
 Liollo 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

MEMORANDUM IN OPPOSITION TO
POHLMAN QUALITY EXTERIORS,
INC.'S SECOND AMENDED MOTION
FOR SUMMARY JUDGMENT

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.	)
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.	)
	)
	)
	)

This Memorandum is submitted in opposition to the second amended motion of Pohlman Quality Exteriors, Inc., which Pohlman has sought summary judgment as to the crossclaims asserted by Builders FirstSource-Southeast Group, LLC. Based upon those considerations set forth hereinafter, it is respectfully submitted that the Pohlman's motion should be denied.

FACTUAL ALLEGATIONS

The captioned action is one by which the plaintiffs, The Retreat at Charleston National Country Club Homes Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime, have sought recovery of damages allegedly occasioned by deficiencies in original construction of the subject project, a multi-family development, located in Mount Pleasant, South Carolina.

The plaintiffs' claims, as asserted against Builders FirstSource-Southeast Group, LLC (hereinafter referred to as "BFS") are premised upon alleged deficiencies in installation of windows and exterior doors during original construction. BFS subcontractor, Pohlman Quality Exteriors, Inc. (hereinafter referred to as "Pohlman"), installed windows and exterior doors, inclusive of related flashings and other components, for BFS at Buildings 11 and 21. Pohlman installed the materials for BFS pursuant to a Master Subcontractor Agreement executed between those parties on August 18, 2006. The Master Subcontractor Agreement included specific provisions by which Pohlman undertook to defend and indemnify BFS against liability, loss, or damage arising out of the negligent acts or omissions of Pohlman in the performance of Pohlman's work.

The plaintiffs have alleged that the windows, exterior doors and related flashings were improperly installed, resulting in water infiltration and associated damages. In support of those contentions, the plaintiffs have offered testimony of their primary forensic expert, professional engineer Gary Freeman. Mr. Freeman, premised upon alleged findings during visual and destructive investigation, claimed, within his relevant report, and upon deposition testimony, to have identified deficiencies in the installation of windows, exterior doors, and related flashings resulting in damages and necessary repairs.

POHLMAN'S AMENDED MOTION FOR SUMMARY JUDGMENT

Pohlman asserts in its amended motion for summary judgment the following bases:

1. The subcontract produced by BFS is dated after Pohlman completed its work at the project, so the only viable claim BFS has is equitable indemnity.
2. The cross-claims for breach of express and implied warranty, breach of contract, and negligence are merely disguised claims for

equitable indemnity and fail as a matter of law under *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group*, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015).

3. BFS has not met the requirements to assert a claim for contribution pursuant to the SC Contribution Amongst Joint Tortfeasors Act, Section 15-38-10 of S.C. Code Ann.
4. Even if BFS contract is applicable, BFS' contractual indemnity claim is based on contractual provisions that are neither clear nor unequivocal, and are against public policy and the laws of South Carolina and fail as a matter of law under *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 819 S.E.2d 166, 172 (S.C. Ct. App. 2018).

For the reasons set forth herein, the court should deny Pohlman's second amended motion for summary judgement.

BFS ARGUMENT IN OPPOSITION

- 1. The evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to BFS, present genuine issues of material fact, which preclude summary judgment in favor of Pohlman.**

Summary judgment is proper if "...there is no genuine issue as to any material fact", and the moving party is "entitled to judgment as a matter of law." Rule 56(c) SCRPC. To determine whether summary judgment is appropriate, the court must view "the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the non-moving party". *Hancock v. Mid Management Company*, 381 S.C. 326, 329, 673 S.E. 2nd 801, 802 (2009). To survive a motion for summary judgment, the non-moving party need only show a mere scintilla of evidence. *Id.* (holding that "in cases applying the preponderance of the evidence burden of proof, the non-moving party

is only required to submit a mere scintilla of evidence in order to withstand the motion for summary judgment”).

The windows and associated flashings at the plaintiffs’ residence were installed by Pohlman, pursuant to obligations undertaken by Pohlman under the Master Subcontractor Agreement executed with BFS.

As demonstrated hereinafter, the testimony, offered on behalf of the plaintiffs by their retained expert, Gary D. Freeman, PE, is sufficient to establish a genuine issue of material fact, precluding summary judgment in favor of Pohlman.

Pohlman installed the windows, exterior doors and associated flashings at Buildings 11 and 21, pursuant to obligations undertaken by Pohlman under the Master Subcontractor Agreement executed with BFS.

During his November 9, 2018 deposition, Mr. Freeman testified that he observed that the windows are improperly installed with regard to manufacturer’s tested documentation and information. Specifically, the windows are installed with improper anchors or fasteners, lack of a sealant, the spacing of the fasteners and the length of the fasteners. See Exhibit A, Freeman Deposition Transcript p. 114 lines 15-25.

Mr. Freeman also testified that the French door installation is an issue that caused water intrusion damage. Mr. Freeman also observed that the weather-resistive barrier was not lapped to the door assembly to direct water to the outside – the door installation was not proper. See Exhibit A, p. 139 lines 7-20.

As noted above, plaintiffs have alleged that the windows, exterior doors and associated flashings were installed improperly and that the plaintiffs have sustained or will sustain damages resulting from the improper installation of these components.

Plaintiffs have imputed fault associated with the improper installation, by Pohlman, to BFS. Thus, the evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to BFS, clearly suggest negligent acts or omissions by Pohlman in its installations of the windows, exterior doors and related flashings, causing the water intrusion and associated damages at the subject residence. At the very least, the testimony of Mr. Freeman establishes a scintilla of evidence adequate to preclude summary judgment in favor of Pohlman.

2. The applicable contract predates Pohlman's scope of work and governs BFS' claims for this matter.

Pohlman and BFS entered into a Master Subcontractor Agreement executed between those parties on August 18, 2006. See Exhibit B. Pohlman installed windows and exterior doors, inclusive of related flashings and other components, for BFS at Buildings 11 and 21 of this project. Pohlman installed the windows and doors at Building 11 on or before February 09, 2007. See Exhibit C. Pohlman installed the windows and doors at Building 21 on or before March 2, 2007. See Exhibit C. The initial Term of the aforementioned Master Subcontract Agreement is for three (3) years. Thus, Pohlman is simply mistaken that the applicable contract post-dates their scope of work for this project. Thus, the Court must deny Pohlman's motion for summary judgment on this basis.

3. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group*, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015) is valid law.

BFS acknowledges that *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group*, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015) sets forth the current status of relevant law as determined by the South Carolina Court of Appeals. BFS

therefore concedes that, under the law as articulated in its crossclaims for breach of expressed and implied warranties, breach of contract, and negligence are subject to dismissal.

4. BFS has not asserted a claim for contribution, but reserves the right to do so.

BFS has not asserted a cause of action for contribution against Pohlman. BFS reserves the right to assert a cause of action for contribution as noted in its affirmative defenses asserted in its Answer. Because, BFS has not asserted a cause of action for contribution, this issue is moot.

5. The BFS cross-claim for contractual indemnity is based on contractual provisions that comply with *Concord & Cumberland*.

The indemnity claims, as asserted by BFS in this action, are premised upon rights afforded pursuant to its Master Subcontractor Agreement, executed between BFS and Pohlman on August 18, 2006. The Master Subcontractor Agreement includes not only specific provisions relating to “Indemnity” at Section 5, but also specific severability provisions, as set forth in Section 9. All of those provisions, and the rights afforded thereunder, are specifically subject to relevant law, and the rights pursued by BFS are consistent with such law, as articulated by the Court of Appeals, in the matter of *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 819 S.E.2d 166 (S.C. Ct. App. 2018), reh’g denied (Oct. 18th, 2018).

Pohlman argues that the BFS cross-claim for contractual indemnity is based on contractual provisions that are neither clear nor unequivocal and fail as a matter of law under *Concord & Cumberland*.

It bears repeated emphasis, however, that BFS, by its cross-claim, is seeking indemnity, from its subcontractor, Pohlman, not against liability for loss or damage arising out of any negligence of BFS itself, but rather is seeking indemnity only against liability for damage or loss arising out of the sole or concurrent negligent acts or omissions of its subcontractor, Pohlman, in the performance of the subcontractor's work. Under the circumstances, the clear and unequivocal standard, as articulated by the Court of Appeals in *Concord & Cumberland*, does not apply.

As noted hereinabove, BFS undertook to supply and install windows and doors in connection with original construction of the subject residence. Actual installation of the windows and related flashings was, in turn, implemented by Pohlman, pursuant to a subcontract agreement with BFS. BFS was thereafter subjected to claims asserted by the plaintiffs, which sought recovery of damages allegedly occasioned by purported deficiencies in such window installation.

BFS now seeks indemnification pursuant to the relevant provision of the Master Subcontractor Agreement as executed between BFS and Pohlman. The relevant indemnity provision is the first paragraph of Section 5 Indemnity and states as follows:

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 FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITY, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING,

BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEYS FEES (SUCH LEGAL COSTS 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 DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THE SUBJECT AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER. (Emphasis Supplied)

Exhibit B, paragraph one Section 5.

By the specific provisions of paragraph one of Section 5 Indemnity, Pohlman as a subcontractor has undertaken to indemnify BFS against losses arising out of negligent acts or omissions of Pohlman in the performance of its work for BFS.

BFS, by its cross-claim, has sought indemnity only against liability for loss or damage caused by the negligent acts and/or omissions of Pohlman in the performance of its work for BFS. BFS is not seeking indemnification against liability for loss or damage arising from its own negligence, whether sole or concurrent.

In *Concord & Cumberland*, the Court of Appeals considered indemnification provisions which were virtually identical to those at issue in the instant litigation. In that case, the general contractor, Superior Construction, sought indemnification from its window installation subcontractor, Muhler, against damages arising from both (a) the

negligence of the subcontractor, and (b) the concurrent negligence of Superior (the general contractor) itself. The Circuit Court found that the indemnification provisions of the Subcontract Agreement were not sufficiently “clear and unequivocal” as to require Muhler to indemnify Superior for Superior’s own negligence. However, the Circuit Court specifically determined that those indemnity provisions did in fact obligate the subcontractor, Muhler, to indemnify the general contractor, Superior, against claims and damages caused by the negligent acts or omissions of Muhler. The Court of Appeals affirmed the determination of the Circuit Court, noting, repeatedly within its opinion, that, although the indemnification provision of the relevant subcontract agreement was not sufficiently clear and unequivocal to require indemnification against the general contractor’s own negligence, such indemnification provision nonetheless obligated the subcontractor to indemnify the general contractor against loss or damage caused by the negligence acts or omissions of the subcontractor.

At the crux of *Concord & Cumberland* was the fact that the general contractor was trying to recover from its subcontractor for the general contractor’s own negligence. **That is not the case here.** BFS is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from Pohlman’s negligence. When, as here, a contractor does not seek indemnity for its own negligence, the clear and unequivocal standard does not apply, and the indemnity provision is not invalid.

Appropriate application of the *Concord & Cumberland* standard to the contractual provision at issue in the instant proceeding clearly authorizes pursuit of contractual indemnity for damages caused by Pohlman’s negligence, whether sole or concurrent, (as

opposed to damages occasioned by the sole or concurrent negligence of BFS), and, equally clearly, precludes summary judgment in favor of Pohlman. The *Concord & Cumberland* opinion, in specifically authorizing indemnity in favor of a contractor, against losses occasioned by the negligent acts of its subcontractor, is controlling here, and requires denial of Pohlman's motion for summary judgment as to the BFS cross-claim for contractual indemnity.

CONCLUSION

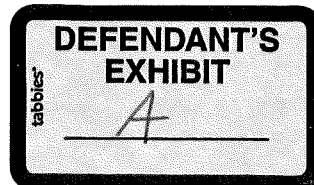
Based on the foregoing, it is respectfully submitted that this Court should deny Pohlman's motion for partial summary judgment.

HOWELL, GIBSON & HUGHES, P.A.

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Attorneys for Builders FirstSource-
Southeast Group, LLC

Beaufort, South Carolina

October 30, 2020



1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 CHARLESTON COUNTY
4 DEPOSITION OF GARY FREEMAN, VOL. 1
5 THE RETREAT AT CHARLESTON NATIONAL COUNTRY CLUB
6 HOMEOWNERS ASSOCIATION, INC., AND THE RETREAT AT
7 CHARLESTON NATIONAL COUNTRY CLUB HORIZONTAL
8 PROPERTY REGIME,
9 Plaintiffs,
10 vs. CASE NO. 2016-CP-10-3783
11 WINSTON CARLYLE CHARLESTON NATIONAL, LLC; COLIN
12 R. CAMPBELL CONSTRUCTION, INC.; COLIN CAMPBELL,
13 INDIVIDUALLY; BUILDERS FIRSTSOURCE-SOUTHEAST
14 GROUP, LLC; AMERICO ROOFING CONCEPTS, INC.; DVS,
15 INC.; ADVANCED BUILDING CONNECTION, LLC; GUY C.
16 LEE BUILDING MATERIALS, LLC; DINO SCHWARTZ,
17 INDIVIDUALLY; CHARLESTON EXTERIORS, LLC; ECC
18 CONTRACTING, LLC; HURLEY SERVICES, LLC; MCDANIEL
19 CONSTRUCTION CO., LLC; AC CONSTRUCTION GROUP,
20 INC.; L&G CONSTRUCTION GROUP, LLC; POHLMAN
21 QUALITY EXTERIORS, INC.; AND LIOLLIO
22 ARCHITECTURE,
23 Defendants.

24 BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC,
25 Third-Party Plaintiff,
26 vs.
27 WS CONTRACTORS; ECC CONTRACTING, LLC; HURLEY
28 SERVICES, LLC; MCDANIEL CONSTRUCTION COMPANY,
29 LLC; AC CONSTRUCTION CORP.; L&G CONSTRUCTION
30 GROUP, LLC; POHLMAN QUALITY CONTRACTORS; AND
31 POHLMAN QUALITY EXTERIORS, INC.
32 Third-Party Defendant.

33 DEPONENT: GARY FREEMAN, VOL. 1
34 DATE: NOVEMBER 9, 2018
35 TIME: 10:06 A.M.
36 LOCATION: MULLEN WYLIE
37 CHARLESTON, SOUTH CAROLINA
38 REPORTED BY: RONDA K. BLANTON, RPR
39 REGISTERED PROFESSIONAL REPORTER
40 CLARK & ASSOCIATES, INC.
41 P.O. BOX 73129
42 CHARLESTON, SC 29415
43 843-762-6294
44 office@clark-associates.com
45 WWW.CLARK-ASSOCIATES.COM

1 A. Yes.

2 Q. Okay. And was it largely upon the
3 findings to date following the completion of that
4 testing that you issued your next report?

5 A. Yes.

6 Q. Okay. Can you -- without -- you can
7 refer to the report, if you like, of course; but
8 can you provide to me a listing of the general
9 opinions at which you have arrived for purposes
10 of this litigation?

11 A. I'm going to have to look at the -- at
12 the reports to do that.

13 Q. That's fine.

14 A. With regard to construction and
15 construction deficiencies, I feel that the --
16 that some of the windows -- I'm not sure if all
17 of them, but some of the windows out at The
18 Retreat are not properly -- well, the ones that
19 I've looked at are improperly installed with
20 regard to manufacturer's tested documentation and
21 information.

22 That's through the use of improper
23 anchors or fasteners, lack of a sealant, the
24 space -- the spacing of those fasteners, and the
25 length of the fasteners as well.

1 topic?

2 A. For french doors?

3 Q. Yes, sir.

4 A. No. We're not through with french doors
5 yet.

6 Q. All right.

7 A. The -- and this might be in the line of
8 the general statement. It happens to be at a
9 french door in this case, but these french doors
10 were not thin units. They were just cased
11 members that would come out and be installed into
12 a rough opening.

13 What we found, though, when we removed
14 the trim around -- at the head of the door, which
15 was in line with the trim at the head of the
16 finned windows, was that the weather-resistive
17 barrier was not lapped in any way with the door
18 assembly to direct water to the outside.

19 In other words, the -- the door
20 installation in that opening was not proper; and
21 I will direct you to another long and lengthy
22 photograph number, if you would like.

23 Q. Certainly.

24 A. And then you can come over and look at
25 it. There are a series of photographs that show



**BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, L.L.C.
MASTER SUBCONTRACTOR AGREEMENT**

THIS MASTER SUBCONTRACTOR AGREEMENT (this “Agreement”) is entered into effective as of August 18, 2006, between Builders FirstSource – Southeast Group, L.L.C.

a Delaware limited liability company, address: 2001 Bryan St. Suite 1600, Dallas, TX 75201

telephone: (843) 553-5202 fax: (843) 797-1710, Contact: Bill Crabtree

e-mail: bill.crabtree @bldr.com (“Contractor”), and Tamara Pohlman Pohlman Quality

address: 106 Glenloch Dr. Glenloch, SC 29445 . Exteriors

telephone: 314-3496 fax: n/a, Contact: _____

e-mail: pohlman@pohlmanquality.net (“Subcontractor”).

SECTION 1. Introduction.

a. **Work.** This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the “Work”) from time to time for Contractor on any project (the “Project”). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by Contractor from Subcontractor at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by Contractor with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, Subcontractor will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for Contractor on any Project. Projects may or may not be owned or controlled by Contractor’s customer (the “Owner”). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of the Contractor (the “Contract Documents”) and incorporated into the Agreement by reference as if fully set forth. Contractor will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving Subcontractor written notice thereof. Subcontractor’s only remedy in the event an amendment or supplement to the Contractor Documents materially increases the cost or difficulty of performance by the Subcontractor is to terminate this Agreement by written notice to Contractor within 24 hours after Contractor delivers such amendment or supplement to Subcontractor.

b. **Work Orders.** It is contemplated under this Agreement that Subcontractor may perform Work on multiple projects at multiple locations. The description, completion date, special conditions, and cost of Work to be performed on a Project will be set forth in the written purchase order or work order (together, “Work Order”) delivered by Contractor to Subcontractor relating to that Project. Such Work Order(s) are incorporated herein by reference as if fully set forth. The Work described in Work Orders must be performed under the terms of this Agreement.

[Signature]
Subcontractor
[Signature]
Contractor

c. **Term.** This Agreement shall be for an initial term of three (3) years. Upon the expiration of such initial term or any renewal term, this Agreement shall automatically renew for subsequent one (1) year periods unless either party gives written notice to the other party that it is electing to terminate this Agreement at the end of the then current term. Such written notice of intent to terminate must be given at least sixty (60), but not more than one hundred twenty (120), days prior to the end of the then current term. The provisions of Sections 3, 4, and 5 shall survive termination of this Agreement. If Contractor terminates this Agreement, Contractor will pay to Subcontractor sums due for the Work performed to the date of termination, as provided in Section 8.

d. **Notice.** Any notice or communication hereunder or in any agreement entered into in connection with the transactions contemplated hereby must be in writing and given by depositing the same in the United States mail, addressed to the party to be notified, postage prepaid, and registered or certified with return receipt requested, or by delivering the same in person or by facsimile transmission. Such notice shall be deemed received on the date on which it is hand-delivered or received by facsimile transmission or on the third business day following the date on which it is so mailed. For purposes of notice, the addresses of the parties shall be as set forth on the front page of this Agreement. Any party may change its address for notice by written notice given to the other parties in accordance with this Section.

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

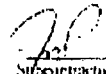
a. **Scope of Work; Knowledge of Site; Plans and Specifications.** Subcontractor shall take all action necessary to familiarize itself and its employees, agents, and subcontractors with the scope and requirements of the Work, the existing site conditions, and any work to be performed by others that may affect the performance of the Work. Subcontractor shall confirm that the Contract Documents are correct and immediately notify Contractor of any errors and/or omissions.

b. **Change Orders.** Contractor may make any changes to the nature or scope of the Work; provided, however, that any changes resulting in a change in price must be agreed to in writing by Subcontractor and Contractor prior to the Work being performed. Subcontractor shall be notified of changes by written change order. Subcontractor shall not perform any extra work without written authorization by Contractor.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

d. **Safety and Environmental.**

(i) **Compliance with Laws.** Subcontractor will carefully check the drawings, plans, and specifications for conformity with all local, state, and Federal laws, codes, rules, and regulations bearing on the Work (the "Law") before commencing the Work. Unless Contractor or Owner otherwise agrees in writing, before commencement of the Work Subcontractor will obtain at its sole


Subcontractor

Contractor

cost and expense all permits necessary for the Work. Subcontractor will comply with product manufacturer's specifications and will give all notices and comply with all Law bearing on the Work, including by way of enumerations and not limitation, safety, health, and environmental rules and regulations established by or pursuant to Federal, state, and local safety and environmental laws. Subcontractor at all times will furnish to its agents and employees a safe place of employment. If Subcontractor observes any violation of Law, it will immediately report such violation to Contractor in writing. Subcontractor will be responsible for any fines, charges, in-kind training or supplies, or penalties related to the Work, including, without limitation, fines, charges, and/or penalties related to the operation of equipment, the Subcontractor's performance of the Work, the handling of materials, or any other function that is in violation of the Law. All workmanship and materials will conform to Law and, if the Subcontractor performs or permits the performance of any Work not in compliance with Law, it will immediately cause such Work to be redone and bear all costs in connection therewith. The Work, as performed, will meet with the approval of, and pass any inspection of, any governmental authority having jurisdiction thereof. If the Work is being constructed under specifications of the Federal Housing Administration or the Veterans Administration, the Work will meet the requirements of these governmental agencies. No Work will be deemed complete until final inspection is made and approval is received from every governmental authority whose approval is required.

(2) **The Occupational Safety and Health Administration ("OSHA") and the Environmental Protection Agency ("EPA").** Regulations have been promulgated by OSHA and EPA ("Regulations") that require all contractors and subcontractors to exchange Material Safety Data Sheets ("MSDS") and share information about precautionary measures necessary to protect all workers on a building project.

Subcontractor agrees as follows:

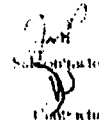
(A) Subcontractor will fully comply with the Regulations and will cooperate with Contractor and/or Owner and all subcontractors of Owner in order to assure compliance with the Regulations.

(B) Subcontractor hereby accepts full responsibility and liability for the training of its employees as to all precautionary measures necessary to protect such employees during both routine and emergency situations on the Project.

(C) **TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF SUBCONTRACTOR TO COMPLY WITH THE REGULATIONS.**

(D) Subcontractor will assist Contractor in complying with the Regulations.

(E) Subcontractor will not use any chemicals in its performance of the Work for Contractor or incorporate any chemicals into materials or products supplied to Contractor or to the Project unless Subcontractor has given Contractor prior written notice of the existence and the possible exposure to such chemical, has delivered an MSDS to Contractor, and has received a written consent of Contractor to use such chemicals.


Subcontractor
Contractor

(3) **Subcontractor's Safety Program.** Subcontractor's safety program must specifically address, among other safety issues, scaffolding, fall hazards, trenching, and shoring, as may be applicable. For "hard hat" jobs, approved safety helmets and hard soled shoes must be worn at the Project at all times. Safety glasses must be worn when power equipment is used. Subcontractor shall erect and maintain all reasonable safeguards for safety and protection, including, but not limited to, necessary signage, protective barriers, and other warnings against hazards. Subcontractor shall furnish all flagmen, barricades, and other items required for public safety and right-of-way maintenance required by the installation of the Work. Safety vests shall be worn in the public right-of-way.

(4) **Default.** If Subcontractor fails to immediately comply with safety and environmental requirements after verbal or written notice from Contractor, Contractor may correct the violation and deduct the cost from any Partial Payment or final payment in addition to all other remedies available to Contractor, including, without limitation, consequential damages. Subcontractor shall pay any fines assessed to Owner or Contractor due to the acts, omissions, or negligence of Subcontractor. If construction at the Project in whole or in part is delayed or halted by any governmental authority as a result of Subcontractor's Work, Subcontractor shall pay to Contractor as liquidated damages, and not as a penalty, the amount of \$200 per hour for a minimum ten (10) hour day until construction at the Project can be safely resumed.

SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners of such homes or structures, and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

-1


Subcontractor
Contractor

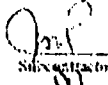
SECTION 4. Insurance.

At all times while performing the Work, and continuing thereafter until the expiration of the applicable statute of limitations for any claims, Subcontractor will maintain for the benefit of itself and Contractor (and Owner, when requested), the following minimum insurance coverage:

- a. **Workers' Compensation Insurance** - statutory limits in the state where each Project is located.
- b. **Employer's Liability Insurance** - \$1,000,000 or such other higher limits imposed in accordance with the requirement, if any, of the laws of the states where Subcontractor is engaged in business.
- c. **Commercial General Liability** - \$1,000,000 per occurrence, \$1,000,000 products-completed operations aggregate, \$1,000,000 general aggregate, and broad form contractual liability coverage to cover the indemnity obligations undertaken herein.
- d. **Business Auto Liability**, including hired and non-owned auto coverage - \$500,000 combined single limit.

Insurance policies shall (a) be issued by companies with a "Best's Rating A" and a "Financial Size Category of VIII", (b) be on an "occurrence" form, and (c) list Contractor and if requested, Owner, as additional insureds per Form CG 20 10 edition 11/85 or its equivalent on the General Liability and Automobile Liability Policies. For purposes of this additional insured requirement, the term "equivalent" means coverage for liability arising out of Subcontractor's Work performed for Contractor and includes both ongoing and products-completed operations coverage. The Workers' Compensation Policy shall include an Alternate Employer's Endorsement naming the Contractor. If Subcontractor utilizes any leased employees, Contractor must also be listed on an Alternate Employer's Endorsement on the Workers' Compensation Policy covering the leased employees.

Subcontractor will provide to Contractor certificates of insurance or other satisfactory evidence of compliance with the provisions of this Section promptly after the date of this Agreement and thirty (30) days before the expiration date of each policy or at any time upon request of Contractor. A copy of the actual additional insured endorsement and Alternate Employer's Endorsement must be supplied with the certificate of insurance. If such evidence is not furnished, Contractor will have the immediate right, but not the obligation, to procure at Subcontractor's expense (which Contractor may offset such costs against any Partial Payment or final payment), the required insurance on behalf of Subcontractor. The reference to "endeavor to" and "but failure to mail such notice will impose no obligation or liability of any kind upon the company, its agents or representatives" in the cancellation notification portion of the certificate and/or endorsement to the policy must be deleted. To the fullest extent permitted by law, any provision on the face of any certificate of insurance provided by Subcontractor that states anything to the effect that the certificate of insurance does not confer rights to insurance upon Contractor is hereby deemed deleted from such certificate of insurance. The insurance provided herein by Subcontractor shall be primary and non-contributory to any other insurance available to the additional insureds. Waivers of subrogation shall be provided in favor of Contractor and Owner on all insurance policies carried by Subcontractor. Subcontractor hereby releases Contractor and Owner from all claims and causes of action resulting from or related to any loss covered or that should have been covered by insurance required to be maintained by Subcontractor including the deductible and any uninsured portion. Additionally, Subcontractor shall comply with any additional insurance requirements set forth in any other Contract Documents.

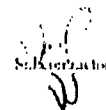

Subcontractor

Contractor

SECTION 5. INDEMNITY.

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 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 DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT 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 PART, 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


Subcontractor
Signature

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 BENEFIT 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 (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) 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 (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

SECTION 6. Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America.

Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of construction of the Work. Further, Subcontractor warrants and agrees it will independently verify that it and

Subcontractor
Contractor

its employees, agents, and subcontractors (and their employees, agents, and subcontractors) shall be lawfully entitled to work under the laws of the United States of America.

SECTION 7. Default and Damages.

a. **Subcontractor's Default.** The following acts on the part of Subcontractor will, at Contractor's option, result in the immediate termination of this Agreement and all Work Orders, and dismissal of Subcontractor from each site.

- (1) Any delays of the Work caused by Subcontractor's failure or refusal to supply enough skilled labor or materials to meet Contractor's schedule.
- (2) Subcontractor's failure to promptly pay any labor, material suppliers, or lien claimants with respect to any Work.
- (3) Adjudication of Subcontractor to be bankrupt or insolvent either by Contractor or any court or governmental entity.
- (4) If Subcontractor or any of its employees, subcontractors, or agents (or employees, subcontractors, or agents of any subcontractor retained by Subcontractor to perform Work) consume, use, or are under the influence of alcohol or illegal drugs while on the site. (Subcontractor agrees to strictly enforce rules to this effect and to inform all employees, agents, and subcontractors that such rules will be strictly enforced.)
- (5) Failure of Subcontractor or its agents, subcontractors, or employees to (a) operate motorized vehicles or equipment in a safe and orderly manner, (b) comply with safe labor and material installation practices designated by Contractor or Owner or otherwise accepted by the industry, or (c) leave the Project site in a safe condition (as determined by Contractor in its sole discretion) during or after construction.
- (6) Subcontractor's failure to comply with the provisions of this Agreement regarding assignment or subcontracting.
- (7) Any other violations of the Contract Documents including, without limitation, this Agreement.

b. **Damages.**

(1) **No Damages for Delay.** Notwithstanding anything to the contrary in this Agreement and to the fullest extent permitted by law, Contractor will not be liable for any loss, claim, cost, liability, or damage incurred by Subcontractor, whether direct or indirect or whether related to efforts by Contractor to accelerate the Work, on account of any delay, disruption, hindrance, or any other impediment whatsoever, no matter by what, or by whom caused. Rather, the Cost of Work (defined in Section 8) is understood and agreed to include and cover all expenses and costs due to delays, disruptions, hindrances, or any other impediments regardless of their cause. Subcontractor agrees not to make, and hereby waives, any such claim for damages.

(2) **Subcontractor's Liability to Contractor upon Termination.** If this Agreement is terminated at Contractor's option as provided in this Section 7, Subcontractor will be liable to Contractor for all costs and damages incurred by Contractor due to Subcontractor's failure to perform under this Agreement or other Contract Documents (including, without limitation, the


Subcontractor

Contractor

amount by which the cost to complete the Project exceeds the cost of the Work), Subcontractor's failure to keep up the progress of the Work as required, or Subcontractor's failure to execute the Work as directed by Contractor. In addition to all costs and damages incurred by Contractor, Subcontractor shall be liable to Contractor for an additional amount equal to 25% of all costs and damages for Contractor's additional overhead and related costs.

- c. **Reimbursement for Fines.** Subcontractor shall promptly reimburse to Contractor and shall indemnify, defend, and hold harmless Contractor regarding any fines or penalties incurred by Contractor or Owner as a result of the actions or inaction of Subcontractor or its employees, agents, or subcontractors, relating to performance of Work or otherwise, including, without limitation, their failure to abide by the requirements of Section 2(d).

SECTION 8. Payment to Subcontractor.

- a. **Payment by Owner is Condition Precedent.** Subcontractor agrees and acknowledges that Contractor shall seek payment from Owner for the price of the Work ("Cost of Work") performed pursuant to Work Orders and that Contractor has no duty or obligation to pay Subcontractor for any Work until Contractor has been paid by Owner. Therefore, all obligations of Contractor to make Partial Payments and final payment are subject to the express conditions precedent that Owner accepts Subcontractor's Work and Contractor receives payments from Owner for all payments to Subcontractor. It is expressly agreed that any basis for non-payment by Owner, including, without limitation, the bankruptcy or insolvency of Owner, will not excuse this condition precedent and Subcontractor expressly assumes the risk of delayed payment or non-payment by Owner.

- b. **Partial Payments.** Partial payments ("Partial Payments") for portions of the Work that have been completed will be made by Contractor to Subcontractor as the Work progresses, but not more often than in accordance with Contractor's regular payment procedures. As a condition precedent to Partial Payments, Subcontractor must submit written applications that provide a description of the portion of the Work that has been completed during the payment period (including, without limitation, materials and supplies used therein if provided by Subcontractor), an estimate of the percentage of completion of the Work, a copy of each change order for the payment period, safety meeting sheets for the period of time since the last submission for payment, sheets indicating the number of hours worked by any employees of Subcontractor or any of its subcontractors ("Employee Time Sheets") for the period of time since the last submission for payment, evidence of payment, waivers (including, without limitation, lien waivers), and supplier affidavits in form satisfactory to Owner and Contractor, for itself, its subcontractors and material suppliers, and all other information Contractor is required to provide to Owner as a condition to Contractor's right to receive payment. Contractor reserves the right to modify such estimates in its sole and exclusive discretion and such modifications will bind Subcontractor for the purpose of Partial Payments. Partial Payments will be made to Subcontractor on or about the thirtieth day following approval of the application for payment by Contractor and receipt of payment by Contractor from Owner.

- c. **Retainage.** Contractor will retain at least ten percent (10%) of each Partial Payment (the "Retainage Amount") or any greater amount Contractor chooses to retain in its sole discretion. Contractor may, in its sole discretion, waive its right to retain any Retainage Amount from any Partial Payments or final payment.



Contractor

d. Grounds for Withholding Payments. Contractor may withhold any Partial Payments or the final payment in whole or in part upon the occurrence of any breach of this Agreement by Subcontractor until a cure satisfactory to Contractor has been completed.

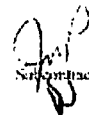
e. Work Covered by Partial Payments. All the completed Work covered by Partial Payments or final payment made to Subcontractor will thereupon become the sole property of Contractor, but this provision will not be construed as relieving Subcontractor from the sole responsibility for all Work upon which Partial Payments have been made, for the restoration of any damaged Work, for the correction of defective Work, or as a waiver of Contractor's right to require fulfillment of all of the terms of this Agreement. Payment to Subcontractor is specifically agreed not to imply acceptance by Contractor or Owner of any portion of the Work that fails to comply with the Contract Documents.

f. Final Payment. Final payment constitutes the entire unpaid balance of the Cost of Work minus any amounts retained. Final payment will be made by Contractor to Subcontractor upon satisfaction of the following conditions:

- (1) The Work is fully performed in accordance with the requirements of the Contract Documents, and Subcontractor is not in default under this Agreement or the Contract Documents;
- (2) Subcontractor has submitted satisfactory evidence of payments to, waivers by, and releases from all claims by, Subcontractor and any persons, firms, or corporations having performed work, labor, or services or furnished materials, equipment, tools, or supplies to Subcontractor for the Work (including, without limitation, lien waivers) if requested by Contractor;
- (3) Subcontractor has delivered to Contractor all as-built drawings, certifications, maintenance manuals, operating instructions, written guaranties, warranties, and bonds;
- (4) Subcontractor has provided safety meeting sheets and Employee Time Sheets for the period of time since the last submission for payment;
- (5) Owner, any general contractor, any lender, any architect, and Contractor have accepted the Work; and
- (6) Contractor has received payment from Owner.

g. Release of Retainage. Contractor will release any Retainage Amount thirty (30) days after all conditions precedent to Subcontractor's receipt of the final payment are met.

h. Subcontractor's Agreement to Pay. Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and the Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.


Subcontractor
Contractor

1. **INDEMNIFICATION FOR LIENS.** TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBRANCES, OR DEMANDS.

SECTION 9. Miscellaneous.

a. **Assignment and Successors.** Subcontractor may not assign or subcontract any portion of the Work or its other obligations or rights hereunder without the prior written consent of Contractor. If Subcontractor assigns or subcontracts any portion of the Work (with the prior written consent of Contractor), Subcontractor will require each such assignee or sub-tier subcontractor to comply with the Contract Documents, including, without limitation, the pertinent provisions of this Agreement (including, without limitation, Section 5) by written agreement, a copy of which must be provided to Contractor. Subcontractor hereby unconditionally guarantees the compliance of each such assignee or sub-tier subcontractor with this Agreement. Subject to the preceding provisions of this Section, this Agreement will be binding on and will inure to the benefit of the parties and their respective heirs, administrators, executors, successors, and permitted assigns.

b. **Acts of Affiliates.** For the purpose of this Agreement, any action of any agent, employee, subcontractor, director, officer, or invitee of Subcontractor or any of their agents, employees, subcontractors, officers, or invitees shall be deemed an act of Subcontractor. For the purposes hereof, any obligation or liability imposed on Subcontractor with regard to its employees or agents shall also be deemed an obligation or liability of Subcontractor with regard to employees or agents of its subcontractors. Subcontractors of Subcontractor shall include any suppliers of Subcontractor other than Contractor.

c. **Offset.** In addition to any other right provided hereunder, Contractor shall be entitled to offset any amount owed to it by Subcontractor hereunder against any Partial Payments or final payment under this Agreement or any other agreement.

d. **Clean up.** Subcontractor will at all times keep the Project safe and free from the accumulation of waste materials or rubbish caused by its operations or related to the Work. Upon completion of the Work and each portion thereof, Subcontractor will remove all rubbish and waste produced by its operations or Work hereunder from the Project as well as all of its tools, equipment, machinery, and surplus materials no longer needed and leave the Project in a "broom clean" or equivalent condition and safe for Subcontractor's employees and subsequent contractors to perform their work, unless otherwise specified in writing. If Subcontractor fails to clean up, Contractor may do so after written notice to Subcontractor and the cost thereof will be charged to Subcontractor.

e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

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

EXHIBIT D to be effective as of the date first above written.

SUBCONTRACTOR:

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC

By: Pollman Quality Exteriors
Name: Tasha Pollman
Title: President

By: [Signature]
Name: Deryl Ward
Title: Senior Attorney

SS. 2445962
Subcontractor Social Security No. or Federal I.D.
No.

[Signature]
Subcontractor
[Signature]
Contractor

bldg

Job View - Ref#: 211063 Job Type: Window Template: Window Install
Desc: Builder: C R Campbell Subd: Charleston National Lot: 11 Unit: Super: Jim Gallagher ☒ Job Colors? ☒

Task Status: ☒ Active ☒ Waiting ☒ Completed ☐ Inactive | Priority: ☒ High ☒ Normal ☒ Low
Due From: To: *Search*: =
Job Type: Task: *Search*: =

1 - 19 of 19

Ref#: 211063

Go/Refresh

Checked Item Action

☒	More Job Info	Task	Assigned	Due	Completed
☐	100% ☐ Order Entry		mscantland	Tue 09/19/06	Fri 10/13/06
☐	100% ☐ Attach PO/Quote		mscantland	Tue 09/19/06	Mon 10/23/06
☐	100% ☐ Create Labor POs		mscantland	Tue 09/19/06	Wed 09/20/06
☐	100% ☐ Pre Walk		aahl	Mon 11/05/06	Tue 11/28/06
☐	100% ☐ Attach Pre Walk Form		aahl	Mon 11/05/06	Tue 11/28/06
☐	100% ☐ Confirm Delivery		aahl	Tue 11/07/06	Tue 11/28/06
☐	100% ☐ Customer Invoice		Tracy Norwood	Mon 01/15/07	Wed 01/24/07
☐	100% ☐ Attach Invoice Showing Sell/Cost		Tracy Norwood	Mon 01/15/07	Wed 01/24/07
☐	100% ☐ Denote Installed Account Invoices in Job Notes		Tracy Norwood	Mon 01/15/07	Wed 01/24/07
☐	100% ☐ Window Install		Pohlman Quality	Fri 02/02/07	Fri 02/09/07
☐	100% ☐ Post Walk / Generate Punch List		aahl	Mon 02/05/07	Fri 02/09/07
☐	100% ☐ Attach Post Walk Form		aahl	Mon 02/05/07	Fri 02/09/07
☐	100% ☐ Confirm Delivery Date of Backorders		aahl	Mon 02/05/07	Fri 02/09/07
☐	100% ☐ Schedule Install of Backorders/Punch		aahl	Mon 02/05/07	Fri 02/09/07
☐	100% ☐ Backorders/Punch Complete		aahl	Tue 02/06/07	Fri 02/09/07
☐	100% ☐ Sub Pay		aahl	Wed 02/07/07	Fri 02/09/07
☐	100% ☐ Order Screens		mscantland	Wed 02/07/07	Fri 01/26/07
☐	100% ☐ Screen Delivery/Install		ccarroll	Fri 03/16/07	Mon 03/19/07
☐	100% ☐ Customer		C R Campbell	Mon 03/19/07	Fri 07/20/07

DEFENDANT'S EXHIBIT

tabbies

C

6165

Job View - Ref#: 211905 Job Type: Window Template: Window Install
Desc: Builder: C R Campbell Subd: Charleston National Lot: 21 Unit: Super: Jim Gallagher

Task Status: ☒ Active ☒ Waiting ☒ Completed ☐ Inactive Priority: ☒ High ☒ Normal ☒ Low
Due From: To: *Search*: = ☐ Milestones Only?
Job Type: Task: *Search*: =

Ref#: 211905

Go/Refresh

Checked item action

More Job Info		Task	Assigned	Due	Completed
☐	☐	Order Entry	☒	Fri 11/10/06	Fri 11/10/06
☐	☐	Attach PO/Quote	☒	Fri 11/10/06	Fri 11/10/06
☐	☐	Create Labor POS	☒	Mon 11/13/06	Fri 11/10/06
☐	☐	Pre Walk	☒	Tue 11/14/06	Sun 01/07/07
☐	☐	Attach Pre Walk Form	☒	Tue 11/14/06	Sun 01/07/07
☐	☐	Confirm Delivery	☒	Wed 11/15/06	Sun 01/07/07
☐	☐	Window Install	☒	Thu 02/22/07	Fri 03/02/07
☐	☐	Post Walk / Generate Punch List	☒	Fri 02/23/07	Fri 03/02/07
☐	☐	Attach Post Walk Form	☒	Fri 02/23/07	Fri 03/02/07
☐	☐	Confirm Delivery Date of Backorders	☒	Fri 02/23/07	Fri 03/02/07
☐	☐	Schedule Install of Backorders/Punch	☒	Fri 02/23/07	Fri 03/02/07
☐	☐	Backorders/Punch Complete	☒	Mon 02/26/07	Fri 03/02/07
☐	☐	Sub Pay	☒	Tue 02/27/07	Fri 03/02/07
☐	☐	Customer Invoice	☒	Wed 02/28/07	Thu 04/12/07
☐	☐	Attach Invoice Showing Sell/Cost	☒	Wed 02/28/07	Thu 04/12/07
☐	☐	Denote Installed Account Invoices in Job Notes	☒	Wed 02/28/07	Thu 04/12/07
☐	☐	Screen Delivery/Install	☒	Fri 10/12/07	Thu 04/12/07
☐	☐	Customer	☒	Mon 10/15/07	Thu 04/12/07

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

The Retreat at Charleston National) CASE NO. 2016-CP-10-03783
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; C.R.)
Campbell Construction Co., Inc.; Colin)
Campbell Construction, LLC; 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; ECC Contracting, LLC;)
Hurley Services, LLC; McDaniel)
Construction Co., LLC; AC Construction)
Corp.; AC Construction, Inc.; L&G)
Construction Group, LLC; Liollo)
Architecture; JC Construction d/b/a JC)
Construction, LLC a/k/a JC Contractors)
a/k/a JC Contractors, LLC; Soto &)
Vasquez Construction, LLC a/k/a Costa)
De Oliveira Construction, LLC a/k/a Costa)
De Oliveira Construction, LLC; Solesmar)
Jesus De Oliveira; Wilson Lucas Sales)
d/b/a Miracle Siding; Miracle Siding,)
LLC; Royal Homes of SC, Inc.; Colleen)
Batissa; Christopher Batissa; Norma)
Ferreira Bruno; Mendez Construction,)
LLC; Juan Garza Ramos; Juan Garza)
Ramos d/b/a Juan Constructors; Jessica)
Marroquin; Jessica Marroquin d/b/a)
Marroquin Construction; Carlos)
Marroquin; Carlos Marroquin and Jessica)

**DEFENDANT AC CONSTRUCTION, INC.
A/K/A AC CONSTRUCTION CORP.'S
NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT AS TO
CROSS-CLAIMS ASSERTED BY
BUILDERS FIRSTSOURCE SOUTHEAST
GROUP, LLC**

Marroquin d/b/a Marroquin Construction;)
 Feliciano Cruz Silva Garcia Roofing,)
 LLC; Givair De Caris; and Mario Salgado,)
)
 Defendants.)
 _____)

TO: TO STEPHEN P. HUGHES, ESQ. AND WILLIAM H. COX, III, ESQ., COUNSEL
 FOR BUILDERS FIRSTSOURCE SOUTHEAST GROUP, LLC:

The Defendant, AC Construction, Inc. a/k/a AC Construction Corp. (“AC Construction”),
 by and through its undersigned counsel, will move before the Presiding Judge of the Court of
 Common Pleas at the Charleston County Courthouse, for an Order dismissing the cross-claims of
 Builders FirstSource Southeast Group, LLC (“BFS”) on the following grounds:

1. BFS’s claims for breach of contract, breach of express and implied warranty, and
 negligence are “merely disguised . . . claims for equitable indemnity” and fail as a matter
 of law pursuant to *Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Builders
 FirstSource-Se, Grp.*, 413 S.C. 630, 634 (S.C. Ct. App. 2015);
2. BFS has not met the requirements to assert a claim for contribution pursuant to the South
 Carolina Contribution Amongst Joint Tortsfeasors Act, S.C. Code § 15-38-10, *et. seq.*;
3. BFS’s claims for contractual indemnity are based on contractual provisions that are
 neither clear nor unequivocal and thus they fail as a matter of law. *Concord and
 Cumberland HPR v. Concord and Cumberland, LLC*, 2018 WL 3748616 (S.C. Ct. App.
 2018); S.C. Code § 32-2-10, *et. seq.*; and
4. BFS’s claims for equitable indemnity are barred by its unclean hands.

AC Construction moves herein in accordance with Rule 10(c), *SCRCP*, permitting
 statements in a pleadings to be adopted by reference in another pleading or in any motion. The
 grounds for AC Construction’s argument is set forth in in the motions and memoranda submitted

on behalf of Pohlman Quality Exteriors, Inc., East Coast Carpentry, ECC Contracting, LLC and Hurley Services, LLC.

LUZURIAGA MIMS, LLP

By: s/W. Chase McNair

Kevin W. Mims. SC Bar No. 69418

W. Chase McNair, SC Bar No. 100695

50 Immigration St, Suite 200

Charleston, SC 29403

(843) 410-4713

kmims@lmlawllp.com

cmcnair@lmlawllp.com

***Attorneys for the Defendants AC Construction,
Inc. and AC Construction Corp***

Charleston, South Carolina

October 29, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 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
Contruccion, 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

**MOTION TO RECONSIDER AND/OR
AMEND ORDER GRANTING IN PART
AC CONSTRUCTION, INC.'S MOTION
FOR SUMMARY JUDGMENT**

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.	)
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.	)
	)
	)

TO: ALL COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Defendant, Builders FirstSource-Southeast Group, LLC ("BFS"), by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Honorable Jennifer B. McCoy, Charleston County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of July 7, 2021, granting AC Construction, Inc. ("AC Construction") partial summary judgment as to the claims of BFS.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina and Rules 52 and 59, South Carolina Rules of Civil Procedure, is premised upon the following considerations:

1. The Court misunderstood the relief requested by BFS and thus incorrectly ruled that BFS's contractual indemnity claim against AC Construction for AC Construction's own negligence was barred by collateral estoppel.
2. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland.
3. The Court misunderstood the application of the indemnity and warranty provisions of the Master Subcontract Agreement.
4. The Court failed to address the Master Subcontract Agreement's severability provision.
5. The Court improperly concluded that Section 32-2-10 bars Defendants' recovery for damages and the separate remedy of attorneys' fees.

I. The Court misunderstood the relief requested by BFS and thus incorrectly ruled that BFS's contractual indemnity claim against AC Construction for AC Construction's own negligence was barred by collateral estoppel.

BFS is not collaterally estopped because, while previous courts have ruled that BFS cannot recover damages indemnity against liability for its own negligence, no court has yet considered the issue here, namely, whether BFS can recover indemnity against liability for loss or damage resulting from its subcontractor's negligence.

The Court has held that BFS is collaterally estopped from proceeding with its contractual indemnification claim. The Court's holding is based upon its erroneous determination that the courts in Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al., Civil Action No. 2018-CP-08-2547; Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455; and Doug Pavic et al. v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, have considered and ruled on the identical issue before the trial court.

The doctrine of collateral estoppel is available only 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). Collateral estoppel is unavailable here because (1) the factual and legal issues considered in prior cases are not the same issues before this Court, and (2) even if they were, the prior orders are not final because they are currently on appeal.

The Court has concluded that the issues presented in the aforementioned cases are identical to the issue before this Court. Specifically, the Court found that “BFS seeks full contractual indemnification from AC Construction for any liability BFS is found to have to Plaintiffs or others in this action, which is identical to the relief sought by BFS” in the other cases. Order p. 7. This conclusion is incorrect; the Court has misunderstood the relief sought by BFS in this case. The Court acknowledged that the prior rulings all held that BFS’s subcontractors could not be “forced to indemnify BFS for BFS’s own negligence.” Order p. 6. In this case, however, BFS is not seeking to be indemnified for BFS’s own negligence; rather, BFS is only seeking indemnity against liability for damages caused by the negligent acts of the subcontractor. Because this issue was not considered by the prior orders in BFS v. MI, Six Fifty-Six, and Pavic, the doctrine of collateral estoppel does not apply here.

Additionally, the Court’s order does not acknowledge that all three of the orders referred to are currently on appeal, and until they are finally disposed of on appeal, BFS will not have had its “full and final” opportunity to litigate the issues therein.

II. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland

The Court erred in its application of the heightened clear and unequivocal standard, which applies only where a party seeks indemnification against liability for damages occasioned by its own negligence. Such standard is not applicable where, as here, BFS seeks indemnification only against liability for damages occasioned by the negligence of its subcontractor.

The applicable rule for construction of indemnification contracts was succinctly stated by the Concord & Cumberland Court:

“Generally, we will construe an indemnification contract ‘in accordance with the rules for construction of contracts.’ Campbell, 313 S.C. at 453, 438 S.E.2d at 272. However, as explained above, when an indemnity clause purports ‘to relieve an indemnitee against the consequences of its own negligence,’ our case law requires strict construction of the clause. Laurens, 855 S.C. at 111, 584 S.E.2d at 378:379.’ Indeed most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee from losses unless such language is expressed in clear and unequivocal terms.’ Fed. Pac. Elec., 298 S.C. at 26, 378 S.E.2d at 57.”

Had the Court conducted the appropriate analysis, it would have determined that Concord & Cumberland does not apply to this situation, and, thus, the Master Subcontract Agreement does not need to meet the “clear and unequivocal” standard. In Concord & Cumberland, the court refused to allow a contractor to recover from its subcontractor for the contractor’s own negligence when the purported language on which it sought to recover was not “clear and unequivocal.” Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct. App. 2018). The unique issue before the Concord & Cumberland Court was whether a general contractor could require its subcontractor to pay for damages caused by the general contractor’s own negligence. In this specific factual situation, the court held that a heightened standard of “clear and unequivocal” will be applied to the contract language.

Id. In reviewing the language at issue in that case, the Concord & Cumberland Court determined that the language did not meet the clear and unequivocal standard, and thus that the general contractor could not recover from the subcontractor for the general contractor's own negligence; instead, the Court limited indemnification to damages resulting from the work that the subcontractor had performed.

The Concord & Cumberland Court did **not** hold that the general contractor could not recover from the subcontractor for the subcontractor's own negligence, nor did it impose the heightened standard of linguistic scrutiny to that set of circumstances. The Concord & Cumberland Court was very clear that "[g]enerally, we will construe an indemnification contract 'in accordance with the rules for the construction of contracts.'" Id. at 650, 172. As noted above, the Concord & Cumberland Court was very clear, only "when an indemnity clause purports 'to relieve an indemnitee from the consequences of its own negligence,' [does] our case law requires strict construction of the clause." Id.

Thus, the first question the Court in this case should have asked was whether the indemnity clause "purports to relieve an indemnitee from the consequences of its own negligence." If so, it is subject to the heightened standard. If not, it is subject only to the general "rules for the construction of contracts." In this case, BFS is seeking indemnification for damages occurring as a result of property damage caused by the negligence of its subcontractor, AC Construction. The governing clause of the indemnification agreement is Section 5, Paragraph One – the only section that covers indemnification for property damage. This provision limits BFS's ability to recover from its subcontractor "ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR." Consistent with its

agreement and with South Carolina law, at oral argument, counsel for BFS represented to this Court that BFS is only seeking indemnification from its subcontractor for damages to the extent caused by the subcontractor. Because BFS is not seeking “to be relieved from the consequences of its own negligence,” but is only seeking to be made whole by recovering from its subcontractor for damages caused by said subcontractor, the Concord & Cumberland heightened standard should not have been applied to this contract.

III. The Court misunderstood the application of the indemnity and warranty provisions of the Master Subcontract Agreement

The Court held that “the indemnification provisions in “Section 5. INDEMNITY” of the Master Agreement . . . are unclear, [and] conflict with each other and the indemnification provision in the fine print of ‘Section 3. WARRANTY’” This holding was also the foundation for the Court’s holding that these sections violated Concord & Cumberland. In arriving at this conclusion, the Court quoted excerpts of multiple provisions of the contract, but did not read them in context. Read within the totality of their respective sections of the Master Subcontract Agreement, these provisions are not unclear or confusing, and do not conflict with each other.

The Court’s order impliedly concludes, without explaining, that the “Section 3. Warranty” provision includes an improper requirement that the subcontractor indemnify BFS when BFS makes a warranty demand on defective Work performed by the subcontractor. In Section 3, the subcontractor warrants and guarantees “the Work,” which is a defined term found in Section 1(a) of the Contract. [Master Subcontract Agreement, p. 4]. As defined, the “Work” encompasses only the materials that the subcontractor agrees to provide and/or the services that the subcontractor agrees to perform. [Master Subcontract agreement, p. 1]. Thus, in Section 3, the subcontractor

warrants and guarantees only the materials that the subcontractor provides and/or the services that the subcontractor performs. The Warranty provision also provides that the subcontractor will indemnify BFS for all nonconforming “Work” – which, again, is a defined term, indicating that the indemnification obligation on a demand made pursuant to the Warranty Provision encompasses only the materials and/or services provided by or rendered by the subcontractor. This section includes nothing improper, confusing, or contrary to South Carolina law.

The next section that the Court quoted is “Section 5. Indemnity.” Section Five is comprised of four paragraphs, but only three were discussed by the Court. The first paragraph governs indemnification in cases including those arising out of property damage, such as the underlying action. The second paragraph governs indemnification in cases arising out of bodily injury to the subcontractor (AC), its agents, employees, or subcontractors. The third paragraph governs the subcontractor’s separate duty to defend. Each is addressed here in turn.

Paragraph One provides, in relevant part, that BFS may seek indemnification for losses arising out of, among other things, property damage:

ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY
NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR
ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE
SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE
SUBCONTRACTOR MAY BE LIABLE.

[Master Subcontract Agreement, page 6]. This paragraph expressly permits BFS to recover from its subcontractor for the negligent acts or omissions of said subcontractor in cases, such as the one before this Court, arising out of property damage. This paragraph is the only paragraph within Section 5 of the Master Subcontract Agreement which

specifically provides for indemnification against loss resulting from property damage, and thus is the only paragraph relevant to determining indemnification for damages.

Paragraph Two governs the relationship between the parties in cases arising out of claims of bodily injury to the subcontractor, its agents, employees, and/or subcontractors. This case does not arise out of bodily injury, and thus this paragraph is irrelevant and not currently before the Court. Nonetheless, the Court has taken issue with this paragraph because, in cases involving bodily injury to the subcontractor, its agents, employees, and/or subcontractors, the contract allows BFS to seek indemnification for losses to the fullest extent allowed by law, "REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES." [Master Subcontract Agreement, p. 6]. This paragraph, governing indemnity obligations arising out of bodily injury, does not affect BFS's right to pursue indemnification pursuant to Paragraph One in a case arising out of property damage. There is also nothing ambiguous or confusing about when this Paragraph Two applies as opposed to when Paragraph One applies: Paragraph One deals with indemnification for damages to personal property; Paragraph Two deals with indemnification ("to the fullest extent permitted by law") for bodily injury to the subcontractor, its agents, employees, and/or subcontractors.

Paragraph Three of the Indemnity Section governs the subcontractor's duty to defend. Paragraph Three provides that:

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.

[Master Subcontract Agreement, p. 7]. This paragraph is also abundantly clear as to when it applies and what it imposes.

Understood in the context of their full sections as opposed to the excerpts highlighted by the Court, the following is clear:

- “Section 3. Warranty” requires the subcontractor to warrant its Work, repair damages to its warranted work, and indemnify anyone involved for costs that that party may have incurred relating to the warranty demand on the subcontractor’s Work.
- “Section 5. Indemnity,” Paragraph One, imposes an indemnity obligation on the subcontractor in cases involving property damage to the extent the damage was caused in whole or in part by the subcontractor.
- “Section 5. Indemnity,” Paragraph Two, imposes an indemnity obligation on the subcontractor, to the fullest extent allowed by law, in cases involving bodily injury (among other things) to the subcontractor or its agents regardless of the ultimate liability of the subcontractor.
- “Section 5. Indemnity,” Paragraph Three, imposes on the subcontractor the duty to defend the contractor regardless of the ultimate liability of the subcontractor.

While AC Construction, and potentially the Court, may take issue with the content of some of these paragraphs, it was error for the Court to conclude that they were “unclear” and “conflict[ed] with each other.” The terms are abundantly clear.

IV. The Court failed to address the Master Subcontract Agreement’s severability provision.

Furthermore, to the extent that the Court believed any provision of the Master Subcontract Agreement to be invalid, the Court had a duty to sever the offending provision and leave the remainder of the contract intact. The Court did not address its duty to sever, and BFS requests that it now do so.

BFS does not concede that any provisions of the Master Subcontract Agreement contain problematic language; nonetheless, to the extent that the Trial Court took issue with any specific language, it should have simply severed such language and left the

remainder of the Contract intact. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

South Carolina law provides that “[c]ourts have discretion ... to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive.” Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020). “Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). The presence of a severability clause should be treated as strong evidence of the parties’ intent to sever unenforceable language. See Doe, 430 S.C. at 615, 846 S.E.2d at 880-81 (determining that parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable). The severability provision of the Contract here demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

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.

[Master Subcontract Agreement, Section 9, Paragraph (f).] This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or

reformed, and thus, to the extent that any portion of the Contract may be invalid, the Court should honor the intent of the parties and sever any offending provision, leaving the remaining provisions intact.

The Court appears to take issue, for various reasons, with Section Five (Indemnity), Paragraphs Two (Bodily Injury) and Three (Duty to Defend); as well as with Section Three (Warranty). While BFS maintains that all of these provisions are valid, the Court could sever all of them, and BFS would still be entitled to pursue its claim for contractual indemnity under Section Five Paragraph One (Property Damage), which was never criticized by this or any other Court. Thus, it was an error for the Court to grant summary judgment.

V. The Court improperly concluded that Section 32-2-10 bars Defendants' recovery for damages and the separate remedy of attorneys' fees.

The Court held that the indemnity provision in Section Five, Paragraph Two (regarding bodily injury); Section Five, Paragraph Three (regarding attorneys' fees); and Section 8(i) (regarding mechanics' liens) violate South Carolina Code Section 32-2-10.

As articulated above, Paragraph Two deals with cases involving bodily injury and is irrelevant to this litigation; to the extent that the Court nonetheless finds it to be problematic, the Court is required by the contract's severance language to sever the offending language of Paragraph Two.

Paragraph Three, which provides for attorneys' fees, does not violate the statute because Section 32-2-10 addresses general damages and not recovery of attorneys' fees. The very terms of the statute limit its application to agreements to indemnify for damages. 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.

Section 32-2-10 governs agreements for indemnity. As noted by the Court in Concord & Cumberland, 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 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; the Court has exceed its jurisdiction by expanding the definition 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 [indemnatee].” 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 Section 8(i) of the Master Agreement as violative of Section 32-2-10. Section 8(i) deals with mechanics' liens, which are completely irrelevant to this litigation. The section is nonetheless compliant with 32-2-10, to the extent that the statute applies to this section, because it provides for indemnification for expenses paid by BFS in fulfillment of liens and judgments "arising out of the services, labor, equipment, or materials furnished by subcontractor." Because the indemnification is limited to the services provided by the subcontractor, BFS, by this provision, is not seeking indemnification for its own negligence. Therefore, the paragraph complies with Section 32-2-10.

Finally, even if the statute were found to apply to attorneys' fees, the Court should sever the offending provision of the Contract, as discussed above; then, BFS's claim for attorneys' fees would instead be fully encompassed by Paragraph One of the Indemnity Provision. Paragraph One provides that the subcontractor would indemnify BFS 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" Paragraph One of the Indemnity Provision is the exact type of agreement exempted by the statute.

The Court cited to D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152 (Ct. App. 2018) for the proposition that “indemnification provisions calling for the Indemnitor to indemnify the Indemnitee ‘for damages caused by [the Indemnitee’s] negligence or the negligence of its subcontractors’ are void as against public policy.” Order p. 11. What the Court lost sight of in its abridged citation was that the D.R. Horton case held that such indemnity provisions are invalid *only* “to the extent” that they require the indemnitor to indemnify the indemnitee for damages caused by the indemnitee’s own negligence. To the extent, therefore, that the same provision requires the indemnitor to indemnify the indemnitee for the *indemnitee’s* negligence, the provision is valid and severable from the invalid provision.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court reconsider and deny AC Construction’s motion for summary judgment.

HOWELL, GIBSON & HUGHES, P.A.

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Attorneys for Builders FirstSource-
Southeast Group, LLC

Beaufort, South Carolina
July 19, 2021

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 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
Contruccion, 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

**MOTION TO RECONSIDER AND/OR
AMEND ORDER GRANTING IN PART
ECC CONTRACTING, LLC'S MOTION
FOR SUMMARY JUDGMENT**

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.	)
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.	)
	)
	)

TO: ALL COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Defendant, Builders FirstSource-Southeast Group, LLC ("BFS"), by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Honorable Jennifer B. McCoy, Charleston County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of July 7, 2021, granting ECC Contracting, Inc. ("ECC") partial summary judgment as to the claims of BFS.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina and Rules 52 and 59, South Carolina Rules of Civil Procedure, is premised upon the following considerations:

1. The Court misunderstood the relief requested by BFS and thus incorrectly ruled that BFS's contractual indemnity claim against ECC for ECC's own negligence was barred by collateral estoppel.
2. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland.
3. The Court misunderstood the application of the indemnity and warranty provisions of the Master Subcontract Agreement.
4. The Court failed to address the Master Subcontract Agreement's severability provision.
5. The Court improperly concluded that Section 32-2-10 bars Defendants' recovery for damages and the separate remedy of attorneys' fees.

I. The Court misunderstood the relief requested by BFS and thus incorrectly ruled that BFS's contractual indemnity claim against ECC for ECC own negligence was barred by collateral estoppel.

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The Court has held that BFS is collaterally estopped from proceeding with its contractual indemnification claim. The Court's holding is based upon its erroneous determination that the courts in Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al., Civil Action No. 2018-CP-08-2547; Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455; and Doug Pavic et al. v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, have considered and ruled on the identical issue before the trial court.

The doctrine of collateral estoppel is available only 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). Collateral estoppel is unavailable here because (1) the factual and legal issues considered in prior cases are not the same issues before this Court, and (2) even if they were, the prior orders are not final because they are currently on appeal.

The Court has concluded that the issues presented in the aforementioned cases are identical to the issue before this Court. Specifically, the Court found that “BFS seeks full contractual indemnification from ECC for any liability BFS is found to have to Plaintiffs or others in this action, which is identical to the relief sought by BFS” in the other cases. Order p. 7. This conclusion is incorrect; the Court has misunderstood the relief sought by BFS in this case. The Court acknowledged that the prior rulings all held that BFS’s subcontractors could not be “forced to indemnify BFS for BFS’s own negligence.” Order p. 6. In this case, however, BFS is not seeking to be indemnified for BFS’s own negligence; rather, BFS is only seeking indemnity against liability for damages caused by the negligent acts of the subcontractor. Because this issue was not considered by the prior orders in BFS v. MI, Six Fifty-Six, and Pavic, the doctrine of collateral estoppel does not apply here.

Additionally, the Court’s order does not acknowledge that all three of the orders referred to are currently on appeal, and until they are finally disposed of on appeal, BFS will not have had its “full and final” opportunity to litigate the issues therein.

II. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland

The Court erred in its application of the heightened clear and unequivocal standard, which applies only where a party seeks indemnification against liability for damages occasioned by its own negligence. Such standard is not applicable where, as here, BFS seeks indemnification only against liability for damages occasioned by the negligence of its subcontractor.

The applicable rule for construction of indemnification contracts was succinctly stated by the Concord & Cumberland Court:

“Generally, we will construe an indemnification contract ‘in accordance with the rules for construction of contracts.’ Campbell, 313 S.C. at 453, 438 S.E.2d at 272. However, as explained above, when an indemnity clause purports ‘to relieve an indemnitee against the consequences of its own negligence,’ our case law requires strict construction of the clause. Laurens, 855 S.C. at 111, 584 S.E.2d at 378:379.’ Indeed most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee from losses unless such language is expressed in clear and unequivocal terms.’ Fed. Pac. Elec., 298 S.C. at 26, 378 S.E.2d at 57.”

Had the Court conducted the appropriate analysis, it would have determined that Concord & Cumberland does not apply to this situation, and, thus, the Master Subcontract Agreement does not need to meet the “clear and unequivocal” standard. In Concord & Cumberland, the court refused to allow a contractor to recover from its subcontractor for the contractor’s own negligence when the purported language on which it sought to recover was not “clear and unequivocal.” Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct. App. 2018). The unique issue before the Concord & Cumberland Court was whether a general contractor could require its subcontractor to pay for damages caused by the general contractor’s own negligence. In this specific factual situation, the court held that a heightened standard of “clear and unequivocal” will be applied to the contract language.

Id. In reviewing the language at issue in that case, the Concord and Cumberland Court determined that the language did not meet the clear and unequivocal standard, and thus that the general contractor could not recover from the subcontractor for the general contractor's own negligence; instead, the Court limited indemnification to damages resulting from the work that the subcontractor had performed.

The Concord & Cumberland Court did **not** hold that the general contractor could not recover from the subcontractor for the subcontractor's own negligence, nor did it impose the heightened standard of linguistic scrutiny to that set of circumstances. The Concord & Cumberland Court was very clear that "[g]enerally, we will construe an indemnification contract 'in accordance with the rules for the construction of contracts.'" Id. at 650, 172. As noted above, the Concord & Cumberland Court was very clear, only "when an indemnity clause purports 'to relieve an indemnitee from the consequences of its own negligence,' [does] our case law requires strict construction of the clause." Id.

Thus, the first question the Court in this case should have asked was whether the indemnity clause "purports to relieve an indemnitee from the consequences of its own negligence." If so, it is subject to the heightened standard. If not, it is subject only to the general "rules for the construction of contracts." In this case, BFS is seeking indemnification for damages occurring as a result of property damage caused by the negligence of its subcontractor, ECC. The governing clause of the indemnification agreement is Section 5, Paragraph One – the only section that covers indemnification for property damage. This provision limits BFS's ability to recover from its subcontractor "ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR." Consistent with its agreement and with

South Carolina law, at oral argument, counsel for BFS represented to this Court that BFS is only seeking indemnification from its subcontractor for damages to the extent caused by the subcontractor. Because BFS is not seeking “to be relieved from the consequences of its own negligence,” but is only seeking to be made whole by recovering from its subcontractor for damages caused by said subcontractor, the Concord & Cumberland heightened standard should not have been applied to this contract.

III. The Court misunderstood the application of the indemnity and warranty provisions of the Master Subcontract Agreement

The Court held that “the indemnification provisions in “Section 5. INDEMNITY” of the Master Agreement . . . are unclear, [and] conflict with each other and the indemnification provision in the fine print of ‘Section 3. WARRANTY’” This holding was also the foundation for the Court’s holding that these sections violated Concord & Cumberland. In arriving at this conclusion, the Court quoted excerpts of multiple provisions of the contract, but did not read them in context. Read within the totality of their respective sections of the Master Subcontract Agreement, these provisions are not unclear or confusing, and do not conflict with each other.

The Court’s order impliedly concludes, without explaining, that the “Section 3. Warranty” provision includes an improper requirement that the subcontractor indemnify BFS when BFS makes a warranty demand on defective Work performed by the subcontractor. In Section 3, the subcontractor warrants and guarantees “the Work,” which is a defined term found in Section 1(a) of the Contract. [Master Subcontract Agreement, p. 4]. As defined, the “Work” encompasses only the materials that the subcontractor agrees to provide and/or the services that the subcontractor agrees to perform. [Master Subcontract agreement, p. 1]. Thus, in Section 3, the subcontractor

warrants and guarantees only the materials that the subcontractor provides and/or the services that the subcontractor performs. The Warranty provision also provides that the subcontractor will indemnify BFS for all nonconforming “Work” – which, again, is a defined term, indicating that the indemnification obligation on a demand made pursuant to the Warranty Provision encompasses only the materials and/or services provided by or rendered by the subcontractor. This section includes nothing improper, confusing, or contrary to South Carolina law.

The next section that the Court quoted is “Section 5. Indemnity.” Section Five is comprised of four paragraphs, but only three were discussed by the Court. The first paragraph governs indemnification in cases including those arising out of property damage, such as the underlying action. The second paragraph governs indemnification in cases arising out of bodily injury to the subcontractor (ECC), its agents, employees, or subcontractors. The third paragraph governs the subcontractor’s separate duty to defend. Each is addressed here in turn.

Paragraph One provides, in relevant part, that BFS may seek indemnification for losses arising out of, among other things, property damage:

ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY
NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR
ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE
SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE
SUBCONTRACTOR MAY BE LIABLE.

[Master Subcontract Agreement, page 6]. This paragraph expressly permits BFS to recover from its subcontractor for the negligent acts or omissions of said subcontractor in cases, such as the one before this Court, arising out of property damage. This paragraph is the only paragraph within Section 5 of the Master Subcontract Agreement which

specifically provides for indemnification against loss resulting from property damage, and thus is the only paragraph relevant to determining indemnification for damages.

Paragraph Two governs the relationship between the parties in cases arising out of claims of bodily injury to the subcontractor, its agents, employees, and/or subcontractors. This case does not arise out of bodily injury, and thus this paragraph is irrelevant and not currently before the Court. Nonetheless, the Court has taken issue with this paragraph because, in cases involving bodily injury to the subcontractor, its agents, employees, and/or subcontractors, the contract allows BFS to seek indemnification for losses to the fullest extent allowed by law, "REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES." [Master Subcontract Agreement, p. 6]. This paragraph, governing indemnity obligations arising out of bodily injury, does not affect BFS's right to pursue indemnification pursuant to Paragraph One in a case arising out of property damage. There is also nothing ambiguous or confusing about when this Paragraph Two applies as opposed to when Paragraph One applies: Paragraph One deals with indemnification for damages to personal property; Paragraph Two deals with indemnification ("to the fullest extent permitted by law") for bodily injury to the subcontractor, its agents, employees, and/or subcontractors.

Paragraph Three of the Indemnity Section governs the subcontractor's duty to defend. Paragraph Three provides that:

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.

[Master Subcontract Agreement, p. 7]. This paragraph is also abundantly clear as to when it applies and what it imposes.

Understood in the context of their full sections as opposed to the excerpts highlighted by the Court, the following is clear:

- “Section 3. Warranty” requires the subcontractor to warrant its Work, repair damages to its warranted work, and indemnify anyone involved for costs that that party may have incurred relating to the warranty demand on the subcontractor’s Work.
- “Section 5. Indemnity,” Paragraph One, imposes an indemnity obligation on the subcontractor in cases involving property damage to the extent the damage was caused in whole or in part by the subcontractor.
- “Section 5. Indemnity,” Paragraph Two, imposes an indemnity obligation on the subcontractor, to the fullest extent allowed by law, in cases involving bodily injury (among other things) to the subcontractor or its agents regardless of the ultimate liability of the subcontractor.
- “Section 5. Indemnity,” Paragraph Three, imposes on the subcontractor the duty to defend the contractor regardless of the ultimate liability of the subcontractor.

While ECC, and potentially the Court, may take issue with the content of some of these paragraphs, it was error for the Court to conclude that they were “unclear” and “conflict[ed] with each other.” The terms are abundantly clear.

IV. The Court failed to address the Master Subcontract Agreement’s severability provision.

Furthermore, to the extent that the Court believed any provision of the Master Subcontract Agreement to be invalid, the Court had a duty to sever the offending provision and leave the remainder of the contract intact. The Court did not address its duty to sever, and BFS requests that it now do so.

BFS does not concede that any provisions of the Master Subcontract Agreement contain problematic language; nonetheless, to the extent that the Trial Court took issue with any specific language, it should have simply severed such language and left the

remainder of the Contract intact. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

South Carolina law provides that “[c]ourts have discretion ... to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive.” Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020). “Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). The presence of a severability clause should be treated as strong evidence of the parties’ intent to sever unenforceable language. See Doe, 430 S.C. at 615, 846 S.E.2d at 880-81 (determining that parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable). The severability provision of the Contract here demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

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.

[Master Subcontract Agreement, Section 9, Paragraph (f).] This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or

reformed, and thus, to the extent that any portion of the Contract may be invalid, the Court should honor the intent of the parties and sever any offending provision, leaving the remaining provisions intact.

The Court appears to take issue, for various reasons, with Section Five (Indemnity), Paragraphs Two (Bodily Injury) and Three (Duty to Defend); as well as with Section Three (Warranty). While BFS maintains that all of these provisions are valid, the Court could sever all of them, and BFS would still be entitled to pursue its claim for contractual indemnity under Section Five Paragraph One (Property Damage), which was never criticized by this or any other Court. Thus, it was an error for the Court to grant summary judgment.

V. The Court improperly concluded that Section 32-2-10 bars Defendants' recovery for damages and the separate remedy of attorneys' fees.

The Court held that the indemnity provision in Section Five, Paragraph Two (regarding bodily injury); Section Five, and Paragraph Three (regarding attorneys' fees) violate South Carolina Code Section 32-2-10.

As articulated above, Paragraph Two deals with cases involving bodily injury and is irrelevant to this litigation; to the extent that the Court nonetheless finds it to be problematic, the Court is required by the contract's severance language to sever the offending language of Paragraph Two.

Paragraph Three, which provides for attorneys' fees, does not violate the statute because Section 32-2-10 addresses general damages and not recovery of attorneys' fees. The very terms of the statute limit its application to agreements to indemnify for damages. 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.

Section 32-2-10 governs agreements for indemnity. As noted by the Court in Concord & Cumberland, 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 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; the Court has exceed its jurisdiction by expanding the definition 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 [indemnatee].” Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977).

Finally, even if the statute were found to apply to attorneys' fees, the Court should sever the offending provision of the Contract, as discussed above; then, BFS's claim for attorneys' fees would instead be fully encompassed by Paragraph One of the Indemnity Provision. Paragraph One provides that the subcontractor would indemnify BFS 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" Paragraph One of the Indemnity Provision is the exact type of agreement exempted by the statute.

The Court cited to D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152 (Ct. App. 2018) for the proposition that "indemnification provisions calling for the Indemnitor to indemnify the Indemnitee 'for damages caused by [the Indemnitee's] negligence or the negligence of its subcontractors' are void as against public policy." Order p. 11. What the Court lost sight of in its abridged citation was that the D.R. Horton case held that such indemnity provisions are invalid *only* "to the extent" that they require the indemnitor to indemnify the indemnitee for damages caused by the indemnitee's own negligence. To the extent, therefore, that the same provision requires the indemnitor to indemnify the indemnitee for the *indemnitee's* negligence, the provision is valid and severable from the invalid provision.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court reconsider and deny ECC's motion for summary judgment.

HOWELL, GIBSON & HUGHES, P.A.

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July 19, 2021

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 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

**MOTION FOR RECONSIDERATION OF
ORDER GRANTING PARTIAL
SUMMARY JUDGMENT TO HURLEY
SERVICES, LLC**

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.	)
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.	)
	)
	)

TO: ALL COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Defendant, Builders FirstSource-Southeast Group, LLC, ("BFS") by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Honorable Jennifer B. McCoy, Charleston County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of July 7, 2021 granting Hurley Services, LLC ("Hurley") partial summary judgment as to the claims of BFS.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina, and Rules 52 and 59, South Carolina Rules of Civil

Procedure, is based upon the following grounds that the Court failed to understand and/or take into account:

1. The Court improperly applied the clear and unequivocal standard when BFS has only sought recovery against loss occasioned by the negligence of Hurley.
2. The Court without foundation identified the contract as unconscionable and unenforceable and one of adhesion.
3. The Court's Order did not address the contract's severability provision.
4. The Court failed to recognize that the provisions of Section 32-2-10 specifically authorize recovery as sought by BFS pursuant to the indemnity provision of Section 5 Paragraph One.
5. BFS is not collaterally estopped from arguing against summary judgment because the issues litigated in the earlier cases are different from the one at bar.

Each of these points is examined in further detail below.

1. The Court improperly applied the clear and unequivocal standard when BFS has only sought recovery against loss occasioned by the negligence of Hurley.

BFS, by its cross-claim, is seeking indemnity, from its subcontractor, Hurley, not against liability for loss or damage arising out of any negligence of BFS itself, but rather only against liability for damage or loss arising out of the negligent acts or omissions of Hurley in the performance of Hurley's work. Under the circumstances, the clear and unequivocal standard, as articulated by the Court of Appeals in *Concord & Cumberland*, does not apply.

While acknowledging the stated position of BFS, the Court nonetheless disregarded the same, and noted that "a review of the indemnification and defense provisions in Sections 3 and 5 and the crossclaims filed by BFS" render such assertions to be "without merit." Order p. 11. Despite previously acknowledging that Section 3

Warranty is not applicable to the facts of this case – Order p. 9 - the Court nonetheless applied the inapplicable provisions thereof to support another basis, and inappropriately grant Hurley summary judgment as to BFS' contractual indemnity claim.

The Court is correct, and Hurley agrees, that in *Concord & Cumberland*, the Court of Appeals considered indemnification provisions which were virtually identical to those at issue in the instant litigation. In *Concord & Cumberland*, the general contractor, Superior Construction, sought indemnification from its window installation subcontractor, Muhler, against damages arising from both (a) the negligence of the subcontractor, and (b) the concurrent negligence of Superior (the general contractor) itself. The circuit court found the contract's language did not clearly and unequivocally require Muhler to indemnify Superior for Superior's own negligence **AND limited indemnification to damages resulting from the work Muhler performed.** Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 645, 819 S.E.2d 166, 169–70 (Ct. App. 2018) (emphasis added).

The Court of Appeals affirmed the determination of the Circuit Court, noting repeatedly within its opinion, that, although the indemnification provision of the relevant subcontract agreement was not sufficiently clear and unequivocal to require indemnification against the general contractor's own negligence, **such indemnification provision nonetheless obligated the subcontractor to indemnify the general contractor against loss or damage caused by the negligent acts or omissions of the subcontractor.** Concord at 653, 173-174 (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).

Concord at 653, 174 (The Subcontract's terms...plainly state Muhler's obligation to indemnify is limited to claims and damages "to the extent caused ... in whole or in any part by any negligent act or omission of Muhler"). Concord at 653, 174 (As noted above, article 12.1 limits Muhler's obligation to indemnify to damages "arising out of or resulting from the performance of [Muhler]'s work"). Concord at 654, 174 (We find the meaning of the limiting phrase in article 12.1(a) is to limit Muhler's obligation to indemnify to damages and losses caused by the negligence of Muhler and its subcontractors).

At the crux of *Concord & Cumberland* was the fact that the general contractor was trying to recover from its subcontractor for the general contractor's own negligence. **That is not the case here.** BFS is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from Hurley's negligence. When, as here, a contractor does not seek indemnity for its own negligence, the clear and unequivocal standard does not apply, and the indemnity provision is not subject to that heightened standard.

Appropriate application of the *Concord & Cumberland* standard to the contractual provision at issue in the instant proceeding clearly authorizes pursuit of contractual indemnity for damages caused by Hurley's negligence, whether sole or concurrent, (as opposed to damages occasioned by the sole or concurrent negligence of BFS), and, equally clearly, precludes summary judgment in favor of Hurley. The *Concord & Cumberland* opinion, in specifically authorizing indemnity in favor of a contractor, against losses occasioned by the negligent acts of its subcontractor, is controlling here, and requires denial of Hurley's motion for summary judgment as to the BFS cross-claim for contractual indemnity.

The Court has determined that BFS seeks to recover indemnity against liability for losses occasioned by its own negligence. Such a finding, contrary not only to the allegations of the BFS pleadings, but also to the specific representations of BFS counsel, is completely without support.

The Court has also erroneously determined that the provisions of paragraph 3 of Section 5, authorizing recovery of defense cost notwithstanding any negligence of BFS is somehow violative of Section 32-2-10 and/or the public policy of South Carolina. However, as instructed by the Concord & Cumberland Court, indemnity is defined as, “that form of compensation in which a first party is liable to a second party for loss or damage the second party incurs to a third party.” Clearly, attorney’s fees are not encompassed within the definition of indemnity as specifically articulated by the Concord & Cumberland Court. Moreover, neither counsel nor the Court has cited any authority, whether statutory or otherwise, precluding recovery of defense costs.

2. The Court without foundation found the contract to be unconscionable and unenforceable and one of adhesion.

There has been no evidence presented that the Contract is unconscionable, much less unenforceable. There is also no evidence that the Contract is one of adhesion.

Hurley and BFS entered into a Master Subcontractor Agreement in May 2012. Any amendments to the agreement were to be in writing. See Master Subcontractor Agreement Section 1(a). Hurley could terminate the agreement by written notice to BFS within 24 hours after any amendment that materially increased the cost or difficulty of performance by Hurley. *Id.* The Subcontractor may perform Work on multiple projects at multiple locations with the specifics thereof to be described in Work Orders that are

incorporated into the Master Subcontractor agreement by reference. See Master Subcontractor Agreement Section 1(b). The term of the Master Subcontractor agreement is for three (3) years with automatic renewals for one (1) year periods unless either party gives written notice to the other that it is electing to terminate at the end of the term. See Master Subcontractor Agreement Section 1(c).

Hurley voluntarily entered into the Master Subcontractor Agreement in May 2012, and entered into a second one in December 2014. Hurley was free to terminate the May 2012 agreement, but instead chose to execute a second agreement incorporating identical terms in December 2014. The agreement is written such that Hurley is free to provide services thereunder, at its discretion, on a case by case basis, and there is no evidence that Hurley was not equally free to contract with other entities to provide similar services. In fact, Hurley is not obligated to perform any services under the May 2012 agreement unless it accepts a Work Order. Even then, Hurley is free to terminate its performance obligations as to any Work Order should BFS amend terms of the Work Order that materially increases the cost or difficulty of performance for Hurley. Any finding that the Contract is unconscionable is simply not supported by the provisions of the Contract itself or the actions of Hurley.

The Court cites to *Simpson v. MSA of Myrtle Beach, Inc.*, where that court held that the “inconspicuous nature of a provision” which (unlike the Section 5 Paragraph One indemnity provision at here) was not drafted in capital letters, made the provision unconscionable. 373 S.C. 14, 644 S.E.2d 663, 670 (2007). The Court also cites that the *Simpson* court considered both the absence of meaningful choice from the contract, and disparity in bargaining power, in addition to surprise and the inconspicuous nature of the

challenged language. There is no evidence, in the case currently before the Court, of any such disparity or absence of meaningful choice. Moreover, the indemnity provision relied upon by BFS, contained in paragraph one of Section 5 of the agreement, is set forth in fully capitalized, bold print and clearly conspicuous in nature. The Court also failed to recognize that the challenged provision in *Simpson* was an arbitration provision, a provision which is always subject to a heightened level of scrutiny, as opposed to the general rules applicable to construction agreements.

The Court recognized that Hurley entered into two agreements with BFS, and the Hurley had the right to terminate the agreements. Moreover, and equally importantly, there is NO EVIDENCE that Hurley was not sophisticated or that it was not represented by legal counsel. Nevertheless, the Court, without evidentiary foundation, took judicial notice that BFS is large supplier of materials and found that Hurley more than likely lacked meaningful bargaining power. The Court cited *Smith v. D.R. Horton*, where that court took judicial cognizance of the fact that a modern buyer of a residential home is normally in an unequal bargaining position as against the multi-state seller. 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016). The Court's analogy was both erroneous and inappropriate, inasmuch as the typical residential home purchaser has relatively little, if any, experience when dealing with large corporate building contractors. By contrast, the record here clearly demonstrates significant and longstanding business dealings between Hurley and BFS over the course of a number of years. Moreover, those business dealings were mutually beneficial to both Hurley and BFS. As the *Simpson* court noted, a determination that a contract is unconscionable depends upon ALL the facts and circumstances of a particular case. The Court has mistakenly ignored the facts which demonstrate the true nature of

the parties' relationship.

Additionally, this Court's Order provides that, "BFS uses the language in Sections 1, 2, and 3 in combination with the indemnity and duty to defend provisions found in the first three paragraphs of Section 5, to assert claims for contractual indemnity...against its subcontractors..." Order p. 8. The Court, in so finding, has completely ignored the pleadings of BFS and the representations of its counsel, specifically that BFS is seeking indemnity pursuant ONLY to the applicable provision set forth in paragraph 1 of Section 5 of the Master Agreement. The Court has incorrectly interpreted the Section 3 Warranty to apply to materials supplied by BFS.

The Court's order concludes, without evidence, that the "Section 3. Warranty" provision includes an improper requirement that the subcontractor indemnify BFS when BFS makes a warranty demand on defective Work performed by the subcontractor. In Section 3, the subcontractor warrants and guarantees "the Work," which is a defined term found in Section 1(a) of the Contract. [Master Subcontract Agreement, p. 4]. As defined, the "Work" encompasses only the materials that the subcontractor agrees to provide and/or the services that the subcontractor agrees to perform. [Master Subcontract agreement, p. 1]. Thus, in Section 3, the subcontractor warrants and guarantees only the materials that the subcontractor provides and/or the services that the subcontractor performs. The Warranty provision also provides that the subcontractor will indemnify BFS for all nonconforming "Work" – which, again, is a defined term, indicating that the indemnification obligation on a demand made pursuant to the Warranty Provision encompasses only the materials and/or services provided by or rendered by the

subcontractor. This section includes nothing improper, confusing, or contrary to South Carolina law.

Because this is not a case involving either a Section 3 Warranty claim or a Section 5 Paragraph Two bodily injury claim, the provisions should not be “read together” – or even read at all – for the purposes of this case. The Court has found nothing unconscionable about the Section 5 Paragraph One property damage provision under which BFS seeks indemnification. Indeed, the provision virtually identical to paragraph one of Section 5 was considered by the Court in Concord & Cumberland, where the court found such a provision to be legally adequate to support recovery as sought by BFS here. Thus, the Court should not have granted summary judgment on the grounds that the Contract is unconscionable.

Additionally, the Court’s determination that the contract is one of adhesion is completely without evidentiary support.

3. The Court’s Order did not address the Contract’s Severability Provision.

The Court’s Order does not address the Contract’s severability provision, by which (1) any offending provision of the Contract (although BFS does not concede that there is any such provision) should be severed, and (2) the remaining provisions – including, in this case, the provision regarding indemnification for property damage – should be left intact. See *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 65 (Ct. App. 2002) (explaining that “[w]hether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties”).

The severability provision of the Contract demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

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 or 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.

Master Subcontract Agreement, Section 9, Paragraph (f). This language unequivocally reflects the intention of the parties that any unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the Contract may be invalid, the Court should simply sever it and leave the remaining provisions intact.

The Court cites *Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc.* and claims that it has no authority to rewrite contractual indemnity provisions. The Court is correct that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy. See *Poynter*. However, the Court fails to recognize that BFS is not asking for any provision to be rewritten. BFS is only asking that, to the extent necessary (which BFS contends is not), the Court sever any offending provisions and give credence to the parties' intention: appropriate application of the applicable indemnity provision.

Moreover, the *Poynter* case involved an overly broad non-compete agreement. The issue before the Court of Appeals was whether the trial court had authority to decrease a geographical limitation imposed by the parties' contract. The *Poynter* Court determined that it would violate public policy to allow a court to decrease the geographical limitation agreed upon by the parties, by which action the Court would have effectively rewritten the parties' contract. The *Poynter* Court held in South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms and therefore, that the trial judge

erred in rewriting the territorial restriction in the parties' contract. See *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010).

Here, we are not dealing with a non-compete agreement, but a contract for construction services. Moreover, the agreement specifically includes an indemnity provision which has been recognized as valid by the Concord & Cumberland Court. More importantly, BFS is not asking the Court to re-write its subcontract, but it is asking the Court to honor the intentions of the parties and for Hurley to do the same.

The Court also cites *Smith v. D.R. Horton*, and states “that there are so many objectionable clauses that run throughout the agreement that it is not possible to sever or reform them.” However, the court in *Smith* invalidated the arbitration provision set forth in a general article should not be severed from the numerous unconscionable provisions due to D.R. Horton's attempt to waive any seller liability for “monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.” 403 S.C. 10, 17, 742 S.E.2d 37, 41 (Ct. App. 2013), aff'd, 417 S.C. 42, 790 S.E.2d 1 (2016). The Contract at issue contains no such language and thus *Smith* is not applicable to the facts of this case. Moreover, and unlike the circumstances in *Smith*, the contractual provision by which BFS seeks indemnity has been specifically considered and found valid by Concord & Cumberland.

Section 3 Warranty, by its clear terms (as discussed above), imposes obligations upon Hurley, only when Hurley's own materials or services are determined to be defective. Section 5 Paragraph Two, which deals with cases of indemnity for bodily injury, is completely irrelevant to the claims before the Court. Moreover, and equally importantly, the severability provision of the Contract should nonetheless have precluded summary

judgment. The Court should have honored the stated intent of the parties and severed the two offending provisions, leaving intact Section Five Paragraph One, which governs indemnification in cases, such as this one, involving property damage. Notably, the Court did not find either that Section Five Paragraph One was unconscionable or that it violated South Carolina law. Thus, had the Court honored the severability provision, it would have been compelled to deny summary judgment and allow BFS's claim for indemnity under Section Five Paragraph One to proceed.

4. The Court failed to recognize that the provisions of Section 32-2-10 specifically authorize recovery as sought by BFS pursuant to the indemnity provision of Section 5 Paragraph One.

In its Order, the Court finds that the indemnity provisions violate § 32-2-10, are against public policy, and are unenforceable. Order p. 16. Contrary to the Court's finding, Section 32-2-10 specifically authorizes the indemnity sought by BFS here.

S.C. Code Ann. § 32-2-10 provides:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. (Emphasis added in whole or in part).

Section 32-2-10, by its specific language, states simply that an agreement to indemnify a party against liability for damages arising out of party's **sole** negligence is against public policy, and thus unenforceable.

By contrast, the provisions of Section 32-2-10, as emphasized herein and above, specifically authorizes agreements 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. The indemnity provision of Section 5 Paragraph One, relied upon by BFS in support of its claims in the instant action, is, therefore, specifically authorized by Section 32-2-10. By the provisions of paragraph one of Section 5, Hurley undertook to indemnify BFS for Hurley's own negligence (as opposed to BFS's own negligence). Furthermore, a contractual provision authorized by statute cannot logically be against public policy. Thus, the indemnity provision does not violate Section 32-2-10 or public policy, and provides no basis for an award of summary judgment in favor of Hurley.

The Court's Order also appears to find that the indemnity provision violates S.C. Code Ann. Section 32-2-10 because BFS will seek reimbursement of attorney's fees regardless of any ultimate liability or negligence of BFS.

The propriety of claims in indemnity, as asserted by BFS in the instant action, is specifically recognized by S.C. Code Ann. Section 32-2-10. Moreover, the relevant provisions of the Contract, pursuant to which BFS seeks indemnity from Hurley, are equally consistent with the provisions of S.C. Code Ann. § 32-2-10. BFS is not seeking indemnity against liability for damages arising out of its own negligence, whether sole or concurrent. BFS is only seeking indemnity solely against liability for damages occasioned

by the negligent acts or omissions of its subcontractor Hurley. Section 5 Paragraph One notes that the “damages” include court costs and attorney’s fees including costs incurred in establishing the indemnification and other rights agreed to in this paragraph.

As noted here and above, attorney’s fees, are not encompassed by the judicially recognized definition of indemnity. Moreover, no provision of Section 32-2-10 even addresses, much less prohibits, recovery of attorney’s fees under the circumstances we are dealing with here. For these reasons, the Court’s Order must be revised accordingly.

5. BFS is not collaterally estopped from arguing against summary judgment because the findings in the other cases are different from the issues at bar.

The Court’s Order also found that the BFS cross-claims are barred by collateral estoppel, based upon the Court’s erroneous determination that identical issues had previously been determined in *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al.*, Civil Action No. 2018-CP-08-2547 and *Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al.*, Civil Action No. 2016-CP-10-3455.

The doctrine of collateral estoppel is available only when 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). The Court’s Order notes that other courts found that the indemnification provisions fail to meet the clear and unequivocal [*sic*] standard. Order p. 14. In fact, what the other courts actually found was as follows:

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question **as to BFS seeking indemnification for its own negligent acts or omissions**. BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee **for the indemnitee’s own negligence**.

See Amended Order of Judge Newman filed February 3, 2020 in *Builders FirstSource – Southeast Group, LLC v. MI Windows and Doors et al.*, Civil Action No. 2018-CP-08-02547 (emphasis added), which order was also adopted by Judge Young in *Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al.*, Civil Action No. 2016-CP-10-3455. As evidenced by the language of the order, Judge Newman only ruled on the issue of whether BFS could recover for its own negligence, finding that:

- (a) BFS was seeking to be indemnified for its own negligence, and
- (b) the relevant contract provision was not sufficiently clear and unequivocal to require the subcontractor to indemnify BFS for BFS's own negligence.

By significant contrast, the issue before this Court is whether BFS can recover for the negligence of its subcontractor, which is a separate issue from the one ruled upon by Judge Newman (and subsequently, by Judge Young). This issue has not yet been “actually litigated” within the context of collateral estoppel. Here, because BFS is not seeking to be indemnified against BFS's own negligence, but only against liability for damages caused by the negligence of its subcontractor, neither Judge Newman's Order nor Judge Young's Order can, as a matter of law, operate to estop BFS from seeking indemnification for Hurley's negligence in this action.

This Court's holding regarding collateral estoppel is also problematic because it mischaracterizes the prior rulings as having found that the Master Agreement in totality is unenforceable. As discussed above, the holding of Judge Newman was limited to the issue of whether BFS could recover for its own negligence. That Court did not determine that the provisions fail to meet the requirements of South Carolina law or that the entire

agreement itself was not enforceable. Judge Newman did not determine that the indemnity provision violated South Carolina law, but only that, in light of *Concord & Cumberland*, the indemnity provision was not sufficient to require the subcontractor to indemnify BFS for BFS's own negligence. When, as here, BFS is seeking indemnity only for its subcontractor's negligence (whether sole or concurrent), no court has ever held that the indemnity provision is insufficient grounds for recovery, and thus, it is impossible for collateral estoppel to apply to the situation before this Court.

Additionally, the Court's order does not acknowledge that all three of the orders referred to are currently on appeal, and until they are finally disposed of on appeal, BFS will not have had its "full and final" opportunity to litigate the issues therein.

CONCLUSION

Because the Court's Order did not address or failed to comprehend multiple important points of fact and issues of law, BFS respectfully requests that the Court reconsider its Order dated July 7, 2021 and deny Hurley's motion for summary judgment as to BFS' contractual indemnity claim.

HOWELL, GIBSON & HUGHES, P.A.

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July 19, 2021

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 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
Contruccion, 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

**MOTION FOR RECONSIDERATION OF
ORDER GRANTING PARTIAL
SUMMARY JUDGMENT TO POHLMAN
QUALITY EXTERIORS, INC.**

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.)

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.)

TO: ALL COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Defendant, Builders FirstSource-Southeast Group, LLC ("BFS"), by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Honorable Jennifer B. McCoy, Charleston County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of July 7, 2021, granting Pohlman Quality Exteriors, Inc. ("Pohlman") partial summary judgment as to the claims of BFS.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina and Rules 52 and 59, South Carolina Rules of Civil Procedure, is premised upon the following considerations:

1. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland.
2. The Court misunderstood the application of the different sections of the indemnity provision.
3. The Court failed to address the Master Subcontract Agreement's severability provision.
4. The Court improperly concluded that Section 32-2-10 bars Defendants' recovery.

I. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland

The Court erred in its application of the heightened clear and convincing standard, which applies only where a party seeks indemnification against liability for damages occasioned by its own negligence. Such standard is not applicable where, as here, BFS seeks indemnification only against liability for damages occasioned by the negligence of its subcontractor. The applicable rules for construction of indemnification contracts was succinctly stated by the Concord & Cumberland Court:

"Generally, we will construe an indemnification contract 'in accordance with the rules for construction of contracts.' Campbell, 313 S.C. at 453, 438 S.E.2d at 272. However, as explained above, when an indemnity clause purports 'to relieve an indemnitee against the consequences of its own negligence,' our case law requires strict construction of the clause. Laurens, 855 S.C. at 111, 584 S.E.2d at 378:379.' Indeed most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee from losses unless such language is expressed in clear and unequivocal terms.' Fed. Pac. Elec., 298 S.C. at 26, 378 S.E.2d at 57."

Had the Court conducted the appropriate analysis, it would have determined that Concord & Cumberland does not apply to this situation, and, thus, the Master Subcontract

Agreement does not need to meet the “clear and unequivocal” standard. In Concord & Cumberland, the court refused to allow a contractor to recover from its subcontractor for the contractor’s own negligence when the purported language on which it sought to recover was not “clear and unequivocal.” Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct. App. 2018). The unique issue before the Concord & Cumberland Court was whether a general contractor could require its subcontractor to pay for damages caused by the general contractor’s own negligence. In this specific factual situation, the court held that a heightened standard of “clear and unequivocal” will be applied to the contract language. Id. In reviewing the language at issue in that case, the Concord and Cumberland Court determined that the language did not meet the clear and unequivocal standard, and thus that the general contractor could not recover from the subcontractor for the general contractor’s own negligence; instead, the Court limited indemnification to damages resulting from the work that the subcontractor had performed.

The Concord & Cumberland Court did **not** hold that the general contractor could not recover from the subcontractor for the subcontractor’s own negligence, nor did it impose the heightened standard of linguistic scrutiny to that set of circumstances. The Concord & Cumberland Court was very clear that “[g]enerally, we will construe an indemnification contract ‘in accordance with the rules for the construction of contracts.’” Id. at 650, 172. As noted above, the Concord & Cumberland Court was very clear, only “when an indemnity clause purports ‘to relieve an indemnitee from the consequences of its own negligence,’ [does] our case law requires strict construction of the clause.” Id.

Thus, the first question the Court in this case should have asked was whether the indemnity clause “purports to relieve an indemnitee from the consequences of its own negligence.” If so, it is subject to the heightened standard. If not, it is subject only to the general “rules for the construction of contracts.” In this case, BFS is seeking indemnification for damages occurring as a result of property damage caused by the negligence of its subcontractor, Pohlman. The governing clause of the indemnification agreement is Section 5, Paragraph One – the only section that covers indemnification for property damage. This provision limits BFS’s ability to recover from its subcontractor “ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR.” Consistent with its agreement and with South Carolina law, at oral argument, counsel for BFS represented to this Court that BFS is only seeking indemnification from its subcontractor for damages to the extent caused by the subcontractor. Because BFS is not seeking “to be relieved from the consequences of its own negligence,” but is only seeking to be made whole by recovering from its subcontractor for damages caused by said subcontractor, the Concord & Cumberland heightened standard should not have been applied to this contract.

II. The Court misunderstood the application of the indemnity provisions of the Master Subcontract Agreement

Regarding the indemnity provision, the Court found that “the second paragraph contradicts the first paragraph . . . [and] [t]he language of those two paragraphs are in conflict and cannot be reconciled.” Order p. 6. This holding was also the foundation for the Court’s holding that these sections violated Concord & Cumberland. In arriving at this conclusion, the Court quoted excerpts of two provisions of the contract, but did not read them in context. Read within the totality of their respective sections of the Master

Subcontract Agreement, these provisions are not unclear or confusing, and do not conflict with each other.

The Court quoted selections from the first two paragraphs of "Section 5. Indemnity." The first paragraph governs indemnification in cases including those arising out of property damage, such as the underlying action. The second paragraph governs indemnification in cases arising out of bodily injury to the subcontractor (Pohlman), its agents, employees, or subcontractors.

Paragraph One provides, in relevant part, that BFS may seek indemnification for losses arising out of, among other things, property damage:

ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY
NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACOR OR
ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE
SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE
SUBCONTRACTOR MAY BE LIABLE.

[Master Subcontract Agreement, page 6]. This paragraph expressly permits BFS to recover from its subcontractor for the negligent acts or omissions of said subcontractor in cases, such as the one before this Court, arising out of property damage. This paragraph is the only paragraph within Section 5 of the Master Subcontract Agreement which specifically provides for indemnification against loss resulting from property damage, and thus is the only paragraph relevant to determining indemnification for damages.

Paragraph Two governs the relationship between the parties in cases arising out of claims of bodily injury to the subcontractor, its agents, employees, and/or subcontractors. This case does not arise out of bodily injury, and thus this paragraph is irrelevant and not currently before the Court. Nonetheless, the Court has taken issue with this paragraph because, in cases involving bodily injury to the subcontractor, its agents,

employees, and/or subcontractors, the contract allows BFS to seek indemnification for losses to the fullest extent allowed by law, “REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.” [Master Subcontract Agreement, p. 6]. This paragraph, governing indemnity obligations arising out of bodily injury, does not affect BFS’s right to pursue indemnification pursuant to Paragraph One in a case arising out of property damage. There is also nothing ambiguous or confusing about when this Paragraph Two applies as opposed to when Paragraph One applies: Paragraph One deals with indemnification for damages to personal property; Paragraph Two deals with indemnification (“to the fullest extent permitted by law”) for bodily injury to the subcontractor, its agents, employees, and/or subcontractors.

Understood in the context of their full sections as opposed to the excerpts highlighted by the Court, the following is clear:

- “Section 5. Indemnity,” Paragraph One, imposes an indemnity obligation on the subcontractor in cases involving property damage to the extent the damage was caused in whole or in part by the subcontractor.
- “Section 5. Indemnity,” Paragraph Two, imposes an indemnity obligation on the subcontractor, to the fullest extent allowed by law, in cases involving bodily injury (among other things) to the subcontractor or its agents regardless of the ultimate liability of the subcontractor.

While Pohlman, and potentially the Court, may take issue with the content of some of these paragraphs, it was error for the Court to conclude that they were irreconcilable and conflicted with each other. The terms are abundantly clear.

III. The Court failed to address the Master Subcontract Agreement's severability provision.

Furthermore, to the extent that the Court believed any provision of the Master Subcontract Agreement to be invalid, the Court had a duty to sever the offending provision and leave the remainder of the contract intact. The Court did not address its duty to sever, and BFS requests that it now do so.

BFS does not concede that any provisions of the Master Subcontract Agreement contain problematic language; nonetheless, to the extent that the Trial Court took issue with any specific language, it should have simply severed such language and left the remainder of the Contract intact. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

South Carolina law provides that “[c]ourts have discretion ... to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive.” Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020). “Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). The presence of a severability clause should be treated as strong evidence of the parties’ intent to sever unenforceable language. See Doe, 430 S.C. at 615, 846 S.E.2d at 880-81 (determining that parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision

of contract was not severable). The severability provision of the Contract here demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

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.

[Master Subcontract Agreement, Section 9, Paragraph (f).] This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the Contract may be invalid, the Court should honor the intent of the parties and sever any offending provision, leaving the remaining provisions intact.

The Court appears to take issue with Section Five (Indemnity), Paragraph Two (Bodily Injury). While BFS maintains that this provision is valid, the Court could sever it, and BFS would still be entitled to pursue its claim for contractual indemnity under Section Five Paragraph One (Property Damage), which was never criticized by this or any other Court. Thus, it was an error for the Court to grant summary judgment.

IV. The Court improperly concluded that Section 32-2-10 bars Defendants' recovery.

The Court held that the indemnity provision in Section Five, Paragraph Two (regarding bodily injury) violates South Carolina Code Section 32-2-10.

As articulated above, Paragraph Two deals with cases involving bodily injury and is irrelevant to this litigation; to the extent that the Court nonetheless finds it to be

problematic, the Court is required by the contract's severance language to sever the offending language of Paragraph Two.

Even if Paragraph Two were severed, BFS would still be able to pursue recovery under Paragraph One (as it is doing). Because recovery under Paragraph One is limited to damages 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" Paragraph One of the Indemnity Provision is the exact type of agreement exempted by the statute.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court reconsider and deny Pohlman's motion for summary judgment.

HOWELL, GIBSON & HUGHES, P.A.

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July 19, 2021

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 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
Contruccion, 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

**MOTION TO RECONSIDER AND/OR
AMEND ORDER GRANTING IN PART
L&G CONSTRUCTION GROUP, LLC'S
MOTION FOR SUMMARY JUDGMENT**

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.	)
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.	)
	)
	)

TO: ALL COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Defendant, Builders FirstSource-Southeast Group, LLC ("BFS"), by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Honorable Jennifer B. McCoy, Charleston County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of July 7, 2021, granting L&G Construction Group, LLC ("L&G") partial summary judgment as to the claims of BFS.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina and Rules 52 and 59, South Carolina Rules of Civil Procedure, is premised upon the following considerations:

1. The Court misunderstood the relief requested by BFS and thus incorrectly ruled that BFS's contractual indemnity claim against AC Construction for L&G Construction's own negligence was barred by collateral estoppel.
2. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland.
3. The Court misunderstood the application of the indemnity and warranty provisions of the Master Subcontract Agreement.
4. The Court failed to address the Master Subcontract Agreement's severability provision.
5. The Court improperly concluded that Section 32-2-10 bars Defendants' recovery for damages and the separate remedy of attorneys' fees.

I. The Court misunderstood the relief requested by BFS and thus incorrectly ruled that BFS's contractual indemnity claim against L&G for L&G Construction's own negligence was barred by collateral estoppel.

BFS is not collaterally estopped because, while previous courts have ruled that BFS cannot recover damages indemnity against liability for its own negligence, no court has yet considered the issue here, namely, whether BFS can recover indemnity against liability for loss or damage resulting from its subcontractor's negligence.

The Court has held that BFS is collaterally estopped from proceeding with its contractual indemnification claim. The Court's holding is based upon its erroneous determination that the courts in Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al., Civil Action No. 2018-CP-08-2547; Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455; and Doug Pavic et al. v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, have considered and ruled on the identical issue before the trial court.

The doctrine of collateral estoppel is available only 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). Collateral estoppel is unavailable here because (1) the factual and legal issues considered in prior cases are not the same issues before this Court, and (2) even if they were, the prior orders are not final because they are currently on appeal.

The Court has concluded that the issues presented in the aforementioned cases are identical to the issue before this Court. Specifically, the Court found that BFS “litigated the issue of enforceability of the Master Agreement’s indemnity clause and lost” Order p. 11. This is incorrect; the courts in BFS v. MI, Six Fifty-Six, and Pavic all found that *because BFS was seeking indemnity for its own negligence*, it could not recover under its contractual indemnity provision. No court has yet considered the issue in this case: that is, whether BFS can recover for the negligence of its subcontractor under its contractual indemnity provision.

Additionally, the Court’s order does not acknowledge that all three of the orders referred to are currently on appeal, and until they are finally disposed of on appeal, BFS will not have had its “full and final” opportunity to litigate the issues therein.

II. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland.

In this case, BFS is seeking indemnification for damages occurring as a result of property damage caused by the negligence of its subcontractor, L&G. There is only one paragraph in the indemnification provision that addresses claims for property damage. When the Court adopted wholesale L&G’s proposed order, it inadvertently misquoted and

misrepresented the party's contract. L&G's proposed order, and subsequently this Court's order, presents the entire "Section 5. Indemnity" provision as one, long paragraph. This is a misrepresentation. Instead, the provision is comprised of four separate paragraphs governing four completely separate scenarios.

The Court erred in its application of the heightened clear and unequivocal standard, which applies only where a party seeks indemnification against liability for damages occasioned by its own negligence. Such standard is not applicable where, as here, BFS seeks indemnification only against liability for damages occasioned by the negligence of its subcontractor.

The applicable rules for construction of indemnification contracts was succinctly stated by the Concord & Cumberland Court:

"Generally, we will construe an indemnification contract 'in accordance with the rules for construction of contracts.' Campbell, 313 S.C. at 453, 438 S.E.2d at 272. However, as explained above, when an indemnity clause purports 'to relieve an indemnitee against the consequences of its own negligence,' our case law requires strict construction of the clause. Laurens, 855 S.C. at 111, 584 S.E.2d at 378:379.' Indeed most courts agree with the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee from losses unless such language is expressed in clear and unequivocal terms.' Fed. Pac. Elec., 298 S.C. at 26, 378 S.E.2d at 57."

Had the Court conducted the appropriate analysis, it would have determined that Concord & Cumberland does not apply to this situation, and, thus, the Master Subcontract Agreement does not need to meet the "clear and unequivocal" standard. In Concord & Cumberland, the court refused to allow a contractor to recover from its subcontractor for the contractor's own negligence when the purported language on which it sought to recover was not "clear and unequivocal." Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct.

App. 2018). The unique issue before the Concord & Cumberland Court was whether a general contractor could require its subcontractor to pay for damages caused by the general contractor's own negligence. In this specific factual situation, the court held that a heightened standard of "clear and unequivocal" will be applied to the contract language. Id. In reviewing the language at issue in that case, the Concord & Cumberland Court determined that the language did not meet the clear and unequivocal standard, and thus that the general contractor could not recover from the subcontractor for the general contractor's own negligence; instead, the Court limited indemnification to damages resulting from the work that the subcontractor had performed.

The Concord & Cumberland Court did **not** hold that the general contractor could not recover from the subcontractor for the subcontractor's own negligence, nor did it impose the heightened standard of linguistic scrutiny to that set of circumstances. The Concord & Cumberland Court was very clear that "[g]enerally, we will construe an indemnification contract 'in accordance with the rules for the construction of contracts.'" Id. at 650, 172. As noted above, the Concord & Cumberland Court was very clear, only "when an indemnity clause purports 'to relieve an indemnitee from the consequences of its own negligence,' [does] our case law requires strict construction of the clause." Id.

Thus, the first question the Court in this case should have asked was whether the indemnity clause "purports to relieve an indemnitee from the consequences of its own negligence." If so, it is subject to the heightened standard. If not, it is subject only to the general "rules for the construction of contracts." In this case, BFS is seeking indemnification for damages occurring as a result of property damage caused by the negligence of its subcontractor, AC Construction. The governing clause of the

indemnification agreement is Section 5, Paragraph One – the only section that covers indemnification for property damage. This provision limits BFS’s ability to recover from its subcontractor “ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR.” Consistent with its agreement and with South Carolina law, at oral argument, counsel for BFS represented to this Court that BFS is only seeking indemnification from its subcontractor for damages to the extent caused by the subcontractor. Because BFS is not seeking “to be relieved from the consequences of its own negligence,” but is only seeking to be made whole by recovering from its subcontractor for damages caused by said subcontractor, the Concord & Cumberland heightened standard should not have been applied to this contract.

III. The Court misunderstood the application of the indemnity and warranty provisions of the Master Subcontract Agreement.

The Court held that the “Section 5. INDEMNITY” provision and the “Section 7. WARRANTY” provision (although BFS believes this to be a typo as there is no “Section 7. WARRANTY” provision but only a “Section 3. WARRANTY” provision) are “verbose” and unclear. Order p. 10. The Court gave no explanation for why these provisions were unclear. Although the Court quoted the indemnity provisions in fuller context at the top of the Order, in its analysis the Court ignored the important qualifiers for each provision and instead quoted misleading excerpts out of context. Read within the totality of their respective sections of the Master Subcontract Agreement, these provisions are not unclear or confusing, and do not conflict with each other.

The Court’s order impliedly concludes, without explaining, that the “Section 3. Warranty” provision includes an improper requirement that the subcontractor indemnify BFS when BFS makes a warranty demand on defective Work performed by the

subcontractor. In Section 3, the subcontractor warrants and guarantees “the Work,” which is a defined term found in Section 1(a) of the Contract. [Master Subcontract Agreement, p. 4]. As defined, the “Work” encompasses only the materials that the subcontractor agrees to provide and/or the services that the subcontractor agrees to perform. [Master Subcontract agreement, p. 1]. Thus, in Section 3, the subcontractor warrants and guarantees only the materials that the subcontractor provides and/or the services that the subcontractor performs. The Warranty provision also provides that the subcontractor will indemnify BFS for all nonconforming “Work” – which, again, is a defined term, indicating that the indemnification obligation on a demand made pursuant to the Warranty Provision encompasses only the materials and/or services provided by or rendered by the subcontractor. This section includes nothing improper, confusing, or contrary to South Carolina law.

The next section that the Court quoted is “Section 5. Indemnity.” Section Five is comprised of four paragraphs, but only three were discussed by the Court. The first paragraph governs indemnification in cases including those arising out of property damage, such as the underlying action. The second paragraph governs indemnification in cases arising out of bodily injury to the subcontractor (L&G), its agents, employees, or subcontractors. The third paragraph governs the subcontractor’s separate duty to defend. Each is addressed here in turn.

Paragraph One provides, in relevant part, that BFS may seek indemnification for losses arising out of, among other things, property damage:

ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY
NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR
ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE

SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE
SUBCONTRACTOR MAY BE LIABLE.

[Master Subcontract Agreement, page 6]. This paragraph expressly permits BFS to recover from its subcontractor for the negligent acts or omissions of said subcontractor in cases, such as the one before this Court, arising out of property damage. This paragraph is the only paragraph within Section 5 of the Master Subcontract Agreement which specifically provides for indemnification against loss resulting from property damage, and it is the only one relevant to the BFS claim for indemnification for damages.

Paragraph Two governs the relationship between the parties in cases arising out of claims of bodily injury to the subcontractor, its agents, employees, and/or subcontractors. This case does not arise out of bodily injury, and thus this paragraph is irrelevant and not currently before the Court. Nonetheless, the Court has taken issue with this paragraph because, in cases involving bodily injury to the subcontractor, its agents, employees, and/or subcontractors, the contract allows BFS to seek indemnification for losses to the fullest extent allowed by law, "REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES." [Master Subcontract Agreement, p. 6]. This paragraph, governing indemnity obligations arising out of bodily injury, does not affect BFS's right to pursue indemnification pursuant to Paragraph One in a case arising out of property damage. There is also nothing ambiguous or confusing about when this Paragraph Two applies as opposed to when Paragraph One applies: Paragraph One deals with indemnification for damages to personal property; Paragraph Two deals with indemnification ("to the fullest extent

permitted by law”) for bodily injury to the subcontractor, its agents, employees, and/or subcontractors.

Paragraph Three of the Indemnity Section governs the subcontractor’s duty to defend. Paragraph Three provides that:

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.

[Master Subcontract Agreement, p. 7]. This paragraph is also abundantly clear (and unequivocal) as to when it applies and what it imposes.

Understood in the context of their full sections as opposed to the excerpts highlighted by the Court, the following is clear:

- “Section 3. Warranty” requires the subcontractor to warrant its Work, repair damages to its warranted work, and indemnify anyone involved for costs that that party may have incurred relating to the warranty demand on the subcontractor’s Work.
- “Section 5. Indemnity,” Paragraph One, imposes an indemnity obligation on the subcontractor in cases involving property damage to the extent the damage was caused in whole or in part by the subcontractor.
- “Section 5. Indemnity,” Paragraph Two, imposes an indemnity obligation on the subcontractor, to the fullest extent allowed by law, in cases involving bodily injury (among other things) to the subcontractor or its agents regardless of the ultimate liability of the subcontractor.
- “Section 5. Indemnity,” Paragraph Three, imposes on the subcontractor the duty to defend the contractor regardless of the ultimate liability of the subcontractor.

While L&G, and potentially the Court, may take issue with the content of some of these paragraphs, it was error for the Court to conclude that they were verbose and thus unclear. The terms are abundantly clear.

IV. The Court failed to address the Master Subcontract Agreement’s severability provision.

Furthermore, to the extent that the Court believed any provision of the Master Subcontract Agreement to be invalid, the Court had a duty to sever the offending provision and leave the remainder of the contract intact. The Court did not address its duty to sever, and BFS requests that it now do so.

BFS does not concede that any provisions of the Master Subcontract Agreement contain problematic language; nonetheless, to the extent that the Trial Court took issue with any specific language, it should have simply severed such language and left the remainder of the Contract intact. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

South Carolina law provides that "[c]ourts have discretion ... to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive." Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020). "Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). The presence of a severability clause should be treated as strong evidence of the parties' intent to sever unenforceable language. See Doe, 430 S.C. at 615, 846 S.E.2d at 880-81 (determining that parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable). The severability provision of the Contract here

demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

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.

[Master Subcontract Agreement, Section 9, Paragraph (f).] This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the Contract may be invalid, the Court should honor the intent of the parties and sever any offending provision, leaving the remaining provisions intact.

The Court appears to take issue, for various reasons, with Section Five (Indemnity), Paragraphs Two (Bodily Injury) and Three (Duty to Defend); as well as with Section Three (Warranty). While BFS maintains that all of these provisions are valid, the Court could sever all of them, and BFS would still be entitled to pursue its claim for contractual indemnity under Section Five Paragraph One (Property Damage), which was never criticized by this or any other Court. Thus, it was an error for the Court to grant summary judgment.

V. The Court improperly concluded that Section 32-2-10 bars Defendants' recovery for damages and the separate remedy of attorneys' fees.

The Court held that “by providing for indemnity against liability arising from BFS’s own negligence, [Section 5] violates § 32-2-10.”

The ONLY paragraph in Section 5 that potentially provides “for indemnity against liability arising from BFS’s own negligence” is Paragraph Two, and even that is limited to

the fullest extent allowed by law. As articulated above, Paragraph Two deals with cases involving bodily injury and is irrelevant to this litigation; to the extent that the Court nonetheless finds it to be problematic, the Court is required by the contract's severance language to sever the offending language of Paragraph Two.

Paragraph Three, which provides for attorneys' fees, does not violate the statute because Section 32-2-10 addresses general damages and not recovery of attorneys' fees. The very terms of the statute limit its application to agreements to indemnify for damages. 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.

Section 32-2-10 governs agreements for indemnity. As noted by the Court in Concord & Cumberland, 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 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; the Court has exceed its jurisdiction by expanding the definition 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 [indemnatee]." Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977).

Finally, even if the statute were found to apply to attorneys' fees, the Court should sever the offending provision of the Contract, as discussed above; then, BFS's claim for attorneys' fees would instead be fully encompassed by Paragraph One of the Indemnity Provision. Paragraph One provides that the subcontractor would indemnify BFS 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" Paragraph One of the Indemnity Provision is the exact type of agreement exempted by the statute.

The Court cited to D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152 (Ct. App. 2018) for the proposition that an indemnification provision calling for the Indemnitor to indemnify the indemnitee regardless of the ultimate liability or negligence of the indemnitee “violates the proscription set forth in § 32-2-10 of the South Carolina Code and is therefore unenforceable.” Order pp. 10-11. What the Court lost sight of in its abridged citation was that the D.R. Horton case held that such indemnity provisions are invalid *only* “to the extent” that they require the indemnitor to indemnify the indemnitee for damages caused by the indemnitee’s own negligence. To the extent, therefore, that the same provision requires the indemnitor to indemnify the indemnitee for the *indemnitee’s* negligence, the provision is valid and severable from the invalid provision.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court reconsider and deny L&G’s motion for summary judgment.

HOWELL, GIBSON & HUGHES, P.A.

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July 19, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 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

**MOTION FOR RECONSIDERATION OF
ORDER GRANTING PARTIAL SUMMARY
JUDGMENT TO PALMETTO TRIM AND
RENOVATIONS**

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.	)
	)
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.	)
	)
	)

TO: ALL COUNSEL OF RECORD

YOU WILL PLEASE TAKE NOTICE that the Defendant, Builders FirstSource-Southeast Group, LLC ("BFS"), by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Honorable Jennifer B. McCoy, Charleston County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of July 26, 2021, granting Palmetto Trim and Renovations ("Palmetto") partial summary judgment as to the claims of BFS.

The within motion, made pursuant to the provisions of the statutory and common law of the State of South Carolina and Rules 52 and 59, South Carolina Rules of Civil Procedure, is premised upon the following considerations:

1. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland.
2. The Court inappropriately considered irrelevant clauses of the indemnity provision and improperly found, without any supporting basis, that the indemnity provision is unconscionable, ambiguous, unintelligible, conflicting and unenforceable.
3. The Court without support improperly found that the indemnity provision violates S.C. Code Section 32-2-10 and public policy.
4. The Court failed to address the contract's severability clause.

ARGUMENT

As represented repeatedly during the course of oral argument, BFS, in this action, has not sought indemnity against liability for damages occasioned by its own negligence, whether sole or concurrent. BFS has, by contrast, sought indemnity only against liability for damages resulting from the negligence of its subcontractors, including Palmetto. Under the circumstances, the indemnity provision of the relevant BFS/Palmetto contract should have been interpreted "in accordance with the rules of construction, and of contracts, generally", as opposed to the heightened "clear and unequivocal" standard which (as more fully detailed hereinafter), applies only when a party seeks to be indemnified against liability for damages occasioned by its own negligence, whether sole or concurrent.

Recent rulings from the South Carolina Circuit Courts have determined that the indemnity provisions of the BFS subcontractor agreements, similar to the one at issue here, were insufficient to support certain claims for indemnity under South Carolina law.

Those prior rulings were, however, premised upon the Courts' (incorrect) understanding that BFS, in each of those prior actions, was seeking indemnity against liability for damages occasioned by its own negligence. The specific issue before this Court (where BFS seeks indemnity only against liability for damages occasioned by the negligence of its subcontractor / indemnitor), was addressed only recently, in orders denying subcontractor Motions for Summary Judgement, issued by the Honorable Roger M. Young, Sr., in the matters of Shane v. D.R. Horton, Inc., et al., Civil Action No. 2020CP1002377 and JES Holdings vs. D.R Horton Inc., et al., Civil Action No. 2020CP1001828. Those orders (copies of which are attached hereto as Exhibits A and B respectively), are instructive, and provide appropriate guidance for this Court in the resolution of the instant motion for reconsideration.

Judge Young, after entertaining arguments nearly identical to those asserted by Palmetto in this action, determined, correctly, that the clear and unequivocal standard set forth by the Concord & Cumberland Court applies only in instances where the indemnitee seeks indemnification against liability for damages occasioned by its own negligence. Judge Young further determined that where, as here, the indemnitee is not seeking indemnity against damages occasioned by its own negligence (whether sole or concurrent), the rules of construction for contracts generally apply.

Moreover, and completely consistent with the arguments set forth both herein below, Judge Young further determined that the contractual terms at issue, pursuant to which BFS sought indemnity, were specifically authorized by the provisions of South Carolina Code Section 32-2-10, and thus, by definition, not against public policy or unenforceable.

Finally, in a finding of specific relevance to the issues before this Court, Judge Young determined that the Court was compelled by the relevant severability provision of the contract, to sever any language which was found to be unconscionable or violative of public policy, leaving the remaining provision intact and enforceable by the indemnitee.

1. Because BFS is not seeking indemnification for its own negligence, the Court inappropriately applied the heightened standard articulated by Concord & Cumberland.

The Court erred in its application of the heightened “clear and convincing” standard, which applies only where a party seeks indemnification against liability for damages occasioned by its own negligence. Such standard is not applicable where, as here, BFS seeks indemnification only against liability for damages occasioned by the negligence of its subcontractor.

The applicable rules for construction of indemnification contracts were succinctly stated by the Concord & Cumberland Court:

“Generally, we will construe an indemnification contract ‘in accordance with the rules for construction of contracts.’ Campbell, 313 S.C. at 453, 438 S.E.2d at 272. However, as explained above, when an indemnity clause purports ‘to relieve an indemnitee against the consequences of its own negligence,’ our case law requires strict construction of the clause. Laurens, 855 S.C. at 111, 584 S.E.2d at 378:379.’ Indeed most courts agree with the basic rule that a contract of indemnify will not be construed to indemnify the indemnitee from losses unless such language is expressed in clear and unequivocal terms.’ Fed. Pac. Elec., 298 S.C. at 26, 378 S.E.2d at 57.”

Had the Court conducted the appropriate analysis here, it would have determined that Concord & Cumberland does not apply to this situation, and, thus, the Master Subcontract Agreement need not satisfy the “clear and unequivocal” standard.

In Concord & Cumberland, the court refused to allow a contractor to recover from its subcontractor for the contractor’s own negligence when the purported language on

which it sought to recover was not “clear and unequivocal.” Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct. App. 2018). The unique issue before the Concord & Cumberland Court was whether a general contractor could require its subcontractor to pay for damages caused by the general contractor’s own negligence. In that specific factual situation, the court held that the heightened “clear and unequivocal” standard was applicable to the contract language. Id. In reviewing the language at issue in that case, the Concord & Cumberland Court determined that the language did not meet the “clear and unequivocal” standard, and thus that the general contractor could not recover from the subcontractor for the general contractor’s own negligence; instead, the Court limited indemnification to damages resulting from negligence in the work performed by the subcontractor.

In this case, BFS is seeking indemnification only against liability for damages occurring as a result of property damage caused by the negligence of its subcontractor, Palmetto. BFS is not seeking indemnity against liability for damages resulting from its own negligence, whether sole or concurrent. The BFS claims are based upon Section 6(b)(2) of its subcontractor agreement – the only clause that covers indemnification for property damage.

The indemnification clause at issue allows BFS to recover in indemnity only for damages caused by the negligence/gross negligence of Palmetto, which is exactly the type of recovery provided for by Concord & Cumberland. The indemnification clause provides:

[T]o the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend and hold harmless the Indemnitees for, and to save the harmless against, any and all Claims (together with reasonable attorneys’ fees), **to the extent of liability resulting from Subcontractor’s**

negligence or willful misconduct incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations.

Subcontract Agreement, Section 6(b)(2) (emphasis added). All indemnification is limited to the extent of Palmetto's negligence, including indemnification for "property damage," outlined in subsection (i), which is the underlying dispute in the case. This indemnity clause is thus expressly authorized by Section 32-2-10 and Concord & Cumberland. Moreover, indemnity provisions allowing a contractor to recover from its subcontractor for the subcontractor's negligence have been consistently upheld by our courts. See Concord & Cumberland, 424 S.C. 639; One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286, (Ct. App. 2016).

Because BFS is not seeking "to be relieved from the consequences of its own negligence," but is only seeking indemnity against liability for damages caused by its subcontractor, the Concord & Cumberland heightened standard should not have been applied to this contract.

2. The Court inappropriately considered irrelevant clauses of the indemnity provision and improperly found, without any supporting basis, that the indemnity provision is unconscionable, ambiguous, unintelligible, conflicting and unenforceable.

The Court's Order recognized that the indemnity provision in the BFS/Palmetto contract contains multiple clauses. See Order page 5. Equally importantly, the Court, recognizing that two of those clauses are irrelevant, correctly omitted consideration of such clauses. The Court, in omitting such consideration, noted that,

- a. The first clause, Section 6(a) applies only to workers compensation claims;

b. The second clause, Section 6(b)(1) applies only to personal injury claims.

See July 27, 2021 Order of Judge McCoy at page 5.

Notwithstanding the Court's clear recognition of the irrelevance of the above cited clauses, it nevertheless appears to have considered those clauses in its determination that the "language is inherently confusing insofar as it calls for Palmetto to indemnify BFS for BFS's sole negligence, while also claiming to limit indemnity 'to the extent' of Palmetto's negligence." See Order page 6. The Court appears, in its determination, also to have relied upon an incorrect construction of clause iii of Section 6(b)(2).

Section 6(b)(2), upon which BFS relies in the assertion of its claims, clearly imposes an obligation to indemnify against liability only to the extent that such liability "results from the Subcontractor's negligence or willful misconduct," and then, only to the "extent permitted by law." See BFS/Palmetto Contract at page 6. Contrary to the Court's determination, nothing within the entirety of Section 6 imposes an obligation upon Palmetto to indemnify BFS against liability occasioned by either the sole negligence or the concurrent negligence of BFS.

Moreover, as more fully explained in argument 4 below, to the extent that the Court determined that any provision is contrary to South Carolina law, the Court is required to honor the intent of the parties and sever any such provision.

3. The Court without support improperly found that the indemnity provision violates S.C. Code Section 32-2-10 and public policy.

The language of the BFS/Palmetto contract does not violate Section 32-2-10. Although Section 32-2-10 prohibits an agreement whereby the indemnitor undertakes to

indemnify against liability for damages caused by the sole negligence of the indemnitee, this statute also states specifically that:

Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees, or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents, or its employees. (Emphasis added).

The applicable indemnity clauses in Section 6(b)(2)(i) and (ii) are completely consistent with the indemnity language authorized by Code Section 32-2-10, and thus by definition, are not against public policy. Moreover, indemnity provisions allowing a contractor / indemnitee to recover from its subcontractor / indemnitor, against liability for damages arising from the subcontractor's negligence have been consistently upheld by our courts. See Concord & Cumberland, 424 S.C. 639; One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286, (Ct. App. 2016). As such, the Court's determination that the indemnity provision violates S.C. Code Section 32-2-10 and public policy is without foundation.

4. The Court failed to address the contract's severability provision.

The Court appears to take issue with the entirety of Section 6 of the contract, titled "Waiver, Release and Indemnification," and finds it to be unconscionable, ambiguous, unintelligible, conflicting, unenforceable, violative of public policy and S.C. Code Section 32-2-10 without any supporting factual or legal basis. The Court's Order is absent any supporting basis, much less any information, as to how the Court reached this conclusion. Moreover, to the extent that the Court believed any portion of the contract to be invalid, the Court had a duty to sever the offending portion and leave the remainder of the contract intact. The Court did not address its duty to sever, and BFS requests that it now do so.

BFS does not concede that any provision or clause of the contract contain problematic language; nonetheless, to the extent that the Court took issue with any specific language, it should have simply severed such language and left the remainder of the Contract intact. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to the presence of a severability clause; and (2) declining to invalidate entire contract).

South Carolina law provides that "[w]hether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). The presence of a severability clause should be treated as strong evidence of the parties' intent to sever unenforceable language. See Doe, 430 S.C. at 615, 846 S.E.2d at 880-81 (determining that parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable).

The severability provision of the contract here demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

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.

[BFS/Palmetto Contract, Section 9, Paragraph (f).] This language unequivocally reflects the intention of the parties that unenforceable portions be severed and/or reformed, and

thus, to the extent that any portion of the contract may be invalid, the Court should honor the intent of the parties and sever any offending portion, leaving the remaining portions intact.

The Court appears to take issue with Section Six. While BFS maintains that the provisions set forth therein are valid, the Court could sever any offending portion thereof, and BFS would still be entitled to pursue its claim for contractual indemnity under Section 6(b)(2)(i) or (ii), which have never been criticized by this or any other court. As such, the Court failed to honor the intent of the parties, warranting withdrawal of its Order granting partial summary judgment to Palmetto on this basis.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court reconsider and deny Palmetto's motion for summary judgment.

HOWELL, GIBSON & HUGHES, P.A.

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Beaufort, South Carolina
August 5, 2021

EXHIBIT A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 2020-CP-10-01828

JES Holding, LLC)

Plaintiff,)

vs.)

D.R. Horton, Inc., Fogel Services, Inc.,)
84 Lumber Company, Builders)
FirstSource – Southeast Group, LLC,)
Archer Exteriors, Inc., Professional)
Exteriors II, LLC f/k/a Professional)
Exteriors, LLC, and R D Z Services,)
LLC)

Defendant.)

Builders FirstSource-Southeast Group,)
LLC)

Third-Party Plaintiff,)

vs.)

ECC Contracting, LLC)

Third-Party Defendant.)

ORDER GRANTING IN PART
AND DENYING IN PART ECC
CONTRACTING, LLC'S MOTION
FOR SUMMARY JUDGMENT AS
TO THIRD-PARTY CLAIMS OF
BUILDERS FIRST-SOUTHEAST
GROUP, LLC

This matter came before the Court upon the motion of defendant, ECC Contracting, LLC, seeking summary judgement as to the third-party claims as asserted by Builders FirstSource Southeast Group, LLC. Oral arguments were heard on May 26, 2021, with Steve Hughes representing Builders FirstSource and Chandler Rowh and Catherine Chase representing ECC Contracting. Based upon

those considerations set forth herein, and for the reasons detailed herein, the motion of ECC Contracting is GRANTED in part and DENIED in part.

FACTUAL AND PROCEDURAL BACKGROUND

The matter arises out of damages allegedly occasioned by deficiencies in construction/development of the subject residence at 1033 Harbortowne Road, Charleston, South Carolina. Plaintiff has brought claims against Builders FirstSource, related to alleged deficiencies in installation of the windows. Builders FirstSource has contended that it did not perform work at or provide materials for the subject property. Rather, ProBuild had undertaken the supply and installation of windows. ProBuild then contracted with its subcontractor, ECC Contracting, LLC, to perform installation of the windows. More than a year after the completion of the project, ProBuild was acquired by Builders FirstSource.

Builders FirstSource, pursuant to the provisions of the referenced acquisition, has now responded to the Plaintiff's allegations, as set forth in the JES Holdings, LLC amended complaint. Based upon the Plaintiff's allegations of deficiencies in window installation, Builders FirstSource has asserted third-party claims against ECC Contracting, LLC, setting forth causes of action in (a) negligence/gross negligence, (b) breach of express warranties, (c) breach of implied warranties, (d) breach of contract, (e) contractual indemnity, and (f) equitable indemnity. By the aforesaid causes of action, Builders FirstSource has sought indemnity, from ECC Contracting, against liability for loss or damage resulting from the negligence or other deficiency in the performance of the work by ECC Contracting. Notwithstanding the assertions of ECC to the contrary, Builders

FirstSource has not sought indemnity against liability for damages occasioned by its own negligence, whether sole or concurrent, or any such negligence of ProBuild. Its claims are limited to damages occasioned by the negligence of the ProBuild subcontractor, ECC.

ECC has now moved for summary judgement as to the third-party claims of Builders FirstSource. The motion is premised generally upon the ECC contention that Builders FirstSource has sought indemnification against liability for its own negligence, and more specifically upon the provisions of a Master Subcontractor Agreement, executed between ECC and BFS (as opposed to ProBuild), dated February 26, 2008. A virtually identical agreement between ECC and BFS was subsequently executed on September 1, 2015. The Certificate of Occupancy was issued for the subject residence in 2014.

Neither party has yet produced a copy of the relevant contract between ProBuild and ECC, which would have governed their respective rights and responsibilities relating to the work performed. Moreover, prior to the hearing, counsel for BFS specifically advised the Court that discovery on critical issues in this case had barely commenced, much less been completed. Counsel further contended that, under the circumstances, any consideration of the ECC Motion for Summary Judgement was premature, and should be continued pending completion of discovery. No depositions have yet been taken, and much written discovery is still unanswered.

ORDER

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SC R. Civ. P. 56(c); Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In reviewing a motion for summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. 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). “[S]ummary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009).

1. The BFS Claims for breach of express and implied warranties, breach of contract, and negligence are dismissed pursuant to Stoneledge.

The BFS third party claims for breach of express and implied warranties, breach of contract, and negligence are merely disguised indemnity claims and subject to dismissal under Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015). ECC Contracting's motion is therefore granted as to those claims.

2. Issues of material fact preclude summary judgment.

It has been the consistent practice of this Court to consider motions for summary judgement **only** following completion of necessary discovery. Such a practice is in compliance with instructions from our appellate courts, which have

directed that summary judgment is “not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). As noted above, counsel for BFS, prior to the hearing, advised the Court that significant discovery, relating to matters addressed within the ECC motion, remained incomplete. Moreover, arguments of counsel during the hearing clearly confirm that there remain questions of fact concerning issues including the parties to the relevant contract, the provisions of the contract, and the respective negligence of the parties. Premised upon that consideration alone, this Court concludes that the ECC Motion for Summary Judgement is not, at this time, properly before this Court, and must therefore be denied.

A. The governing contract is the one between ECC and ProBuild.

At oral argument, ECC argued that the subcontract agreement between ECC and Builders FirstSource should govern the respective rights and responsibilities between those parties, even though (a) the ECC services were performed pursuant to its contract with Probuild and (b) at the time ECC performed the work at the project, ProBuild and BFS were two completely separate entities. ECC argued further that the indemnity provisions of the ECC/BFS contract have been previously invalidated by rulings from other trial courts, and that those provisions therefore provide no support for claims in contractual indemnity in this matter.

To support its position that the BFS contract governs, ECC attempts to make much of the following language from the BFS pleading: that ECC “provided

materials and/or services . . . pursuant to an agreement with [BFS] *and/or* is predecessor in interest” and that “the subcontract agreement, as executed between [ECC] and [BFS] (*and/or* its predecessor in interest), provided for contractual indemnification in favor of BFS *and/or* its predecessor in interest.” (Emphasis added by ECC). However, the fact that BFS has plead alternatives through the use of “and/or” – before any discovery would have confirmed whether the relationship was with BFS AND/OR its predecessor in interest – does not change the ultimate reality that the contractual relationship at issue was between ECC and ProBuild. To the extent that ECC contests that it had a contractual relationship with ProBuild, its motion is subject to the analysis below regarding insufficient discovery.

The Court notes that, had ECC in fact performed the work for BFS, the ECC/BFS contract in effect at the time would govern the relationship between those parties. However, where, as here, the ECC installation services were provided as a subcontractor to ProBuild (and not to Builders FirstSource), it is the contractual relationship between those parties (ECC and ProBuild), which determines the respective rights and responsibilities of the parties in this matter.

B. Insufficient discovery has been completed.

As the parties are well aware, summary judgment is appropriate only where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact” SC R. Civ. P. 56(c). Notably, there have been no depositions taken and very few interrogatories answered at this early stage of the litigation.

Our courts have further instructed that “summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” Doe ex rel. Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). Because discovery has barely begun in this case, and because the parties have not had a “full and fair opportunity to complete discovery,” ECC’s motion is premature and must be denied.

ECC argues that it is entitled to summary judgment because neither party has produced evidence of the contents of any contract, whether oral or written, between ProBuild and ECC. However, rather than supporting its right to summary judgment, the lack of evidence reflects the early stage of this litigation and the Court’s obligation to deny ECC’s motion.

ECC argues further that it is entitled to summary judgement because there is no genuine issue as to any material fact. However, where, as here, Builders FirstSource seeks indemnity against liability for damages occasioned by the negligence of ECC, questions as to the respective negligence of ECC and/or ProBuild are clearly relevant to appropriate disposition of the pending motion. Additionally, material issues of fact abound as to the proper identity of the parties involved in this litigation as well as to the contractual relationship between them. It is thus impossible for this Court to make the necessary determination that there exists no genuine issue of any material fact. Under the circumstances, any ruling upon the ECC motion for summary judgement would clearly be premature, and the motion, as to the BFS claims in contractual and equitable indemnity, is hereby denied.

3. Even if the ECC/BFS Contract governed, ECC's motion still fails as to the indemnity claims.

This Court has determined that the respective rights and responsibilities of the parties hereto (ECC v BFS) are governed by the contractual relationship between ProBuild and ECC, not by the BFS/ECC contract cited by ECC. However, even accepting ECC's argument that the BFS/ECC Contract governs ECC's relationship with ProBuild, ECC's motion fails.

The BFS/ECC Contract is nearly identical to other iterations that have come under fire before South Carolina Circuit Courts, including this one, which have found that, for various reasons, as a matter of law, the contract does not allow Builders FirstSource to seek indemnification for its own negligence.

This court agrees with previous trial court determinations that the indemnity provisions of the referenced BFS/ECC subcontract agreement are not sufficiently clear and unequivocal to impose an obligation to indemnify against liability for damages occasioned by the negligence of BFS. However, as noted hereinabove, BFS, in this action, has not sought indemnity against liability for damages occasioned by its own negligence, whether sole or concurrent. BFS has, by contrast, sought indemnity against liability for damages resulting from the negligence of ECC Contracting. No court has yet considered whether the specific indemnity provisions of the contract at issue here would allow such recovery. That question is addressed below in light of each of ECC's arguments.

A. The language of the Contract does not violate Section 32-2-10.

The relevant indemnity provision, which is Section Five Paragraph One, provides, in part, that Builders FirstSource may seek indemnification for losses arising out of the subcontractor's performance of the work:

BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

By limiting indemnification only to damages "TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR," Section 5, Paragraph One requires ECC to indemnify BFS only against liability for damages caused by the negligence, whether sole or concurrent, of ECC itself. This arrangement is exactly the type of agreement specifically authorized by the relevant provisions of Section 32-2-10. Although Section 32-2-10 prohibits an agreement whereby the indemnitor undertakes to indemnify against liability for damages caused by the sole negligence of the indemnitee, this statute, nonetheless, states specifically that:

Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees, or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents, or its employees. (Emphasis added).

The indemnity provision in Section 5, Paragraph One is completely consistent with the indemnity language authorized by Code Section 32-2-10, and thus by definition, is not against public policy or unenforceable. Contrary to the assertion of ECC's Counsel, the appellate court in D.R. Horton, Inc. v. Builders FirstSource specifically authorized the general contractor's recovery in indemnity

for negligence, whether sole or concurrent, of its subcontractor. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 149, 810 S.E.2d 41, 44 (Ct. App. 2018) (holding that an indemnification clause is void as against public policy to the extent that it requires a subcontractor to indemnify the general contractor for damages caused by the general contractor's negligence, while upholding the portion of an indemnity clause that allows the general contractor to recover from the subcontractor for that subcontractor's negligence, whether sole or concurrent).

Paragraph Two of Section 5 of the Master Subcontractor Agreement, cited by ECC Counsel, relates only to indemnity against liability for damages arising out of personal injury to the subcontractor indemnitor, its agents, employees, or representatives. The provisions of Paragraph Two (which, in any event, impose liability only "to the fullest extent permitted by law") are not relevant to the claims currently asserted by Builders FirstSource, which are limited to indemnity against liability for property damage.

ECC Contracting has also cited the provisions of Section 3 of the Master Subcontractor Agreement, dealing with "Warranty," and claims that the Warranty provision allows BFS to recover from its subcontractors for products that BFS provides. In Section 3, the subcontractor warrants and guarantees "Work", which is a defined term found in Section 1(a) of the contract [Master Subcontractor Agreement, p. 4]. As defined, "Work", encompasses only the materials that the subcontractor agrees to provide and/or the services that the subcontractor agrees to perform. [Master Subcontractor Agreement, p. 1]. Thus, in Section 3 the

subcontractor warrants and guarantees only the materials that the subcontractor provides and/or the services that the subcontractor performs.

The Warranty provision also provides that the subcontractor will indemnify Builders FirstSource for all non-conforming “Work” - which, again, is a defined term, indicating that the indemnification obligation on a demand made pursuant to the Warranty Provision encompasses only the materials and/or services provided by or rendered by the subcontractor. To the extent they are applicable to the claims at issue, the Warranty Provisions of Section 3 are completely consistent with Section 32-2-10 and provide no support for ECC’s motion for summary judgement.

B. The Contract does not violate Concord and Cumberland.

Concord & Cumberland stands for the proposition that when an indemnitee is seeking to recover against an indemnitor for the indemnitee’s own negligence, the contractual language it relies upon must meet a heightened standard of being “clear and unequivocal.” Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). Articulated in a manner that applies to our purposes, the Court in Concord & Cumberland held that the “clear and unequivocal” standard only applies when a general contractor seeks to recover from its subcontractor for the general contractor’s own negligence (whether sole or concurrent).

Typically, courts will construe an indemnification contract “in accordance with the rules for construction, and of contracts, generally,” as opposed to using a heightened “clear and convincing” standard. Id. Because Builders FirstSource is not seeking indemnity against damages caused by its (or ProBuild’s) own alleged

negligence, whether sole or concurrent, the heightened standard of “clear and unequivocal” is not applicable to an evaluation of its contractual provisions.

At the crux of Concord & Cumberland was the fact that the general contractor was trying to recover from its subcontractor for the general contractor’s own negligence. As articulated above, BFS cannot recover damages in indemnity against ECC for BFS’s (or ProBuild’s) own negligence. But when evaluating the BFS claim for indemnity against ECC for ECC’s negligence, the heightened standard articulated in Concord & Cumberland does not apply and thus is not relevant here.

C. The Contract is not unconscionable

A contract is considered one of adhesion if it “is a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007). While the Master Subcontract Agreement does appear to be a form contract, ECC has offered no evidence that the contract was either (1) offered on a take-it-or-leave-it basis, nor that (2) its terms were not negotiable.

Even if the Contract were one of adhesion, that would not end the analysis because “[a]dhesion contracts . . . are not per se unconscionable.” Simpson, 373 S.C. at 27. “In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Id. at 24–25.

Indemnity provisions allowing a contractor to recover from its subcontractor for the subcontractor's negligence have been consistently upheld by our courts. See Concord & Cumberland, 424 S.C. 639; One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286, (Ct. App. 2016). Additionally, the evidence here shows that ECC was contented enough with the terms of the contract that it accepted them not only once in 2008, but also chose to renew the same terms again in 2015. It would be inequitable for ECC to be released from terms it repeatedly agreed to simply because it has now become inconvenient for ECC to be bound by them.

D. The Court is required to sever offending provisions.

To the extent that any provision of the Master Subcontractor Agreement may be found to be unconscionable or violative of public policy, Section 32-2-10, or Concord & Cumberland, the Court is compelled to sever such provision pursuant to the specifics of the severance provision of the contract, and as required by relevant South Carolina law. One Belle Hall, 418 S.C. at 64 (holding that allegedly unconscionable language in the contract's warranty provision ought to be severed, due, in part, to the presence of severability clause; and declining to invalidate the entire contract).

"Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002). The severability provision of the contract at issue before this Court demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law. (Emphasis added).

[Master Subcontractor Agreement, Section 9(f) at p. 11.] This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed. Thus, to the extent that any portion or provision of the contract may be invalid, the Court, as instructed by One Bell Hall and Beach Co., supra, is compelled to honor the intent of the parties and sever any such offending provisions or portion thereof, leaving the remaining provisions – namely, Section Five, Paragraph One – intact.

E. The issue before this Court is not subject to collateral estoppel.

ECC argues that this Court is collaterally estopped from ruling on this issue because prior court rulings have held the BFS Contract unenforceable.

The doctrine of collateral estoppel is available when 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). The issue of law before this Court has not been previously litigated and determined. What other Courts, including this one, have found in prior cases is that under the language of the Contract, BFS cannot “seek[] indemnification for its own negligent acts or omissions.” Amended Order of Judge Newman filed February 3, 2020 in Builders FirstSource – Southeast Group, LLC v. MI Windows and Doors et al., Civil Action No. 2018-CP-08-02547; see also this Court’s order

in Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455; see also Judge Jennifer B. McCoy's order in Dag Pavic and Stela Susac-Pavic v. Carolina Cottage Homes, LLC et al., Civil Action No. 2019-CP-10-00772.¹ As this Court articulated above, the issue of whether BFS may recover in indemnity for its own negligence is not before this Court. Rather, this Court is considering whether BFS may recover in indemnity for the negligent acts of its subcontractor. Because no Court has yet ruled on that issue, the Court's holding is not barred by collateral estoppel.

CONCLUSION

Based on the above, the Court holds as follows:

ECC's motion for summary judgment as to the BFS claims for breach of express and implied warranty, breach of contract, and negligence is GRANTED.

ECC's motion for summary judgment as to the BFS claims for contractual and equitable indemnity is DENIED.

IT IS SO ORDERED!

ELECTRONIC SIGNATURE PAGE TO FOLLOW

¹ The Court notes that all of these orders are currently on appeal.



Charleston Common Pleas

Case Caption: Jes Holdings Llc , plaintiff, et al VS Dr Horton Inc , defendant, et al

Case Number: 2020CP1001828

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Electronically signed on 2021-07-29 09:26:17 page 16 of 16

EXHIBIT B

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO: 2020-CP-10-02377

ANDREA C. SHANE,

Plaintiff,

vs.

D.R. HORTON, INC., FOGEL
SERVICES, INC., 84 LUMBER
COMPANY, BUILDERS
FIRSTSOURCE – SOUTHEAST
GROUP, LLC, ARCHER EXTERIORS,
INC., PROFESSIONAL EXTERIORS
II, LLC F/K/A PROFESSIONAL
EXTERIORS, LLC, AND ALFONSO
RODRIGUEZ VASQUEZ; BUILDERS
FIRSTSOURCE-SOUTHEAST
GROUP, LLC84 LUMBER
COMPANY, ARCHER EXTERIORS,
INC., D.R. HORTON, INC., ECC
CONTRACTING, LLC, FOGEL
SERVICES, INC., PROFESSIONAL
EXTERIORS II, LLC AND
PROFESSIONAL EXTERIORS, LLC,

Defendant.

Builders FirstSource-Southeast Group,
LLC

Third-Party Plaintiff,

vs.

ECC Contracting, LLC

Third-Party Defendant.

ORDER GRANTING IN PART
AND DENYING IN PART ECC
CONTRACTING, LLC'S MOTION
FOR SUMMARY JUDGMENT AS
TO THIRD-PARTY CLAIMS OF
BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP, LLC.

This matter came before the Court upon the motion of defendant, ECC Contracting, LLC, seeking summary judgement as to the third-party claims as asserted by Builders FirstSource Southeast Group, LLC. Oral arguments were heard on May 26, 2021, with Steve Hughes representing Builders FirstSource and Chandler Rowh and Catherine Chase representing ECC Contracting. Based upon those considerations set forth herein, and for the reasons detailed herein, the motion of ECC Contracting is GRANTED in part and DENIED in part.

FACTUAL AND PROCEDURAL BACKGROUND

The matter arises out of damages allegedly occasioned by deficiencies in construction/development of the subject residence at 1053 Harbortowne Road, Charleston, South Carolina. Plaintiff has brought claims against Builders FirstSource, related to alleged deficiencies in installation of the windows. Builders FirstSource has contended that it did not perform work at or provide materials for the subject property. Rather, ProBuild had undertaken the supply and installation of windows. ProBuild then contracted with its subcontractor, ECC Contracting, LLC, to perform installation of the windows. More than a year after the completion of the project, ProBuild was acquired by Builders FirstSource.

Builders FirstSource, pursuant to the provisions of the referenced acquisition, has now responded to the Plaintiff's allegations, as set forth in the Andrea C. Shane amended complaint. Based upon the Plaintiff's allegations of deficiencies in window installation, Builders FirstSource has asserted third-party claims against ECC Contracting, LLC, setting forth causes of action in (a) negligence/gross negligence, (b) breach of express warranties, (c) breach of

implied warranties, (d) breach of contract, (e) contractual indemnity, and (f) equitable indemnity. By the aforesaid causes of action, Builders FirstSource has sought indemnity, from ECC Contracting, against liability for loss or damage resulting from the negligence or other deficiency in the performance of the work by ECC Contracting. Notwithstanding the assertions of ECC to the contrary, Builders FirstSource has not sought indemnity against liability for damages occasioned by its own negligence, whether sole or concurrent, or any such negligence of ProBuild. Its claims are limited to damages occasioned by the negligence of the ProBuild subcontractor, ECC.

ECC has now moved for summary judgement as to the third-party claims of Builders FirstSource. The motion is premised generally upon the ECC contention that Builders FirstSource has sought indemnification against liability for its own negligence, and more specifically upon the provisions of a Master Subcontractor Agreement, executed between ECC and BFS (as opposed to ProBuild), dated February 26, 2008. A virtually identical agreement between ECC and BFS was subsequently executed on September 1, 2015. The Certificate of Occupancy was issued for the subject residence in 2014.

Neither party has yet produced a copy of the relevant contract between ProBuild and ECC, which would have governed their respective rights and responsibilities relating to the work performed. Moreover, prior to the hearing, counsel for BFS specifically advised the Court that discovery on critical issues in this case had barely commenced, much less been completed. Counsel further contended that, under the circumstances, any consideration of the ECC Motion for

Summary Judgement was premature, and should be continued pending completion of discovery. No depositions have yet been taken, and much written discovery is still unanswered.

ORDER

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SC R. Civ. P. 56(c); Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In reviewing a motion for summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. 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). “[S]ummary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009).

1. The BFS Claims for breach of express and implied warranties, breach of contract, and negligence are dismissed pursuant to Stoneledge.

The BFS third party claims for breach of express and implied warranties, breach of contract, and negligence are merely disguised indemnity claims and subject to dismissal under Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group, 776 S.E. 2d 434, 439 (S.C. Ct. App. 2015). ECC Contracting's motion is therefore granted as to those claims.

2. Issues of material fact preclude summary judgment.

It has been the consistent practice of this Court to consider motions for summary judgement **only** following completion of necessary discovery. Such a practice is in compliance with instructions from our appellate courts, which have directed that summary judgment is “not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law.” Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). As noted above, counsel for BFS, prior to the hearing, advised the Court that significant discovery, relating to matters addressed within the ECC motion, remained incomplete. Moreover, arguments of counsel during the hearing clearly confirm that there remain questions of fact concerning issues including the parties to the relevant contract, the provisions of the contract, and the respective negligence of the parties. Premised upon that consideration alone, this Court concludes that the ECC Motion for Summary Judgment is not, at this time, properly before this Court, and must therefore be denied.

A. The governing contract is the one between ECC and ProBuild.

At oral argument, ECC argued that the subcontract agreement between ECC and Builders FirstSource should govern the respective rights and responsibilities between those parties, even though (a) the ECC services were performed pursuant to its contract with Probuild and (b) at the time ECC performed the work at the project, ProBuild and BFS were two completely separate entities. ECC argued further that the indemnity provisions of the ECC/BFS contract have been previously invalidated by rulings from other trial courts, and that those

provisions therefore provide no support for claims in contractual indemnity in this matter.

To support its position that the BFS contract governs, ECC attempts to make much of the following language from the BFS pleading: that ECC “provided materials and/or services . . . pursuant to an agreement with [BFS] *and/or* is predecessor in interest” and that “the subcontract agreement, as executed between [ECC] and [BFS] (*and/or* its predecessor in interest), provided for contractual indemnification in favor of BFS *and/or* its predecessor in interest.” (Emphasis added by ECC). However, the fact that BFS has plead alternatives through the use of “and/or” – before any discovery would have confirmed whether the relationship was with BFS AND/OR its predecessor in interest – does not change the ultimate reality that the contractual relationship at issue was between ECC and ProBuild. To the extent that ECC contests that it had a contractual relationship with ProBuild, its motion is subject to the analysis below regarding insufficient discovery.

The Court notes that, had ECC in fact performed the work for BFS, the ECC/BFS contract in effect at the time would govern the relationship between those parties. However, where, as here, the ECC installation services were provided as a subcontractor to ProBuild (and not to Builders FirstSource), it is the contractual relationship between those parties (ECC and ProBuild), which determines the respective rights and responsibilities of the parties in this matter.

B. Insufficient discovery has been completed.

As the parties are well aware, summary judgment is appropriate only where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact” SC R. Civ. P. 56(c). Notably, there have been no depositions taken and very few interrogatories answered at this early stage of the litigation. Our courts have further instructed that “summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” Doe ex rel. Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). Because discovery has barely begun in this case, and because the parties have not had a “full and fair opportunity to complete discovery,” ECC’s motion is premature and must be denied.

ECC argues that it is entitled to summary judgment because neither party has produced evidence of the contents of any contract, whether oral or written, between ProBuild and ECC. However, rather than supporting its right to summary judgment, the lack of evidence reflects the early stage of this litigation and the Court’s obligation to deny ECC’s motion.

ECC argues further that it is entitled to summary judgement because there is no genuine issue as to any material fact. However, where, as here, Builders FirstSource seeks indemnity against liability for damages occasioned by the negligence of ECC, questions as to the respective negligence of ECC and/or ProBuild are clearly relevant to appropriate disposition of the pending motion. Additionally, material issues of fact abound as to the proper identity of the parties involved in this litigation as well as to the contractual relationship between them. It

is thus impossible for this Court to make the necessary determination that there exists no genuine issue of any material fact. Under the circumstances, any ruling upon the ECC motion for summary judgement would clearly be premature, and the motion, as to the BFS claims in contractual and equitable indemnity, is hereby denied.

3. Even if the ECC/BFS Contract governed, ECC's motion still fails as to the indemnity claims.

This Court has determined that the respective rights and responsibilities of the parties hereto (ECC v BFS) are governed by the contractual relationship between ProBuild and ECC, not by the BFS/ECC contract cited by ECC. However, even accepting ECC's argument that the BFS/ECC Contract governs ECC's relationship with ProBuild, ECC's motion fails.

The BFS/ECC Contract is nearly identical to other iterations that have come under fire before South Carolina Circuit Courts, including this one, which have found that, for various reasons, as a matter of law, the contract does not allow Builders FirstSource to seek indemnification for its own negligence.

This court agrees with previous trial court determinations that the indemnity provisions of the referenced BFS/ECC subcontract agreement are not sufficiently clear and unequivocal to impose an obligation to indemnify against liability for damages occasioned by the negligence of BFS. However, as noted hereinabove, BFS, in this action, has not sought indemnity against liability for damages occasioned by its own negligence, whether sole or concurrent. BFS has, by contrast, sought indemnity against liability for damages resulting from the negligence of ECC Contracting. No court has yet considered whether the specific

indemnity provisions of the contract at issue here would allow such recovery. That question is addressed below in light of each of ECC's arguments.

A. The language of the Contract does not violate Section 32-2-10.

The relevant indemnity provision, which is Section Five Paragraph One, provides, in part, that Builders FirstSource may seek indemnification for losses arising out of the subcontractor's performance of the work:

BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

By limiting indemnification only to damages "TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR," Section 5, Paragraph One requires ECC to indemnify BFS only against liability for damages caused by the negligence, whether sole or concurrent, of ECC itself. This arrangement is exactly the type of agreement specifically authorized by the relevant provisions of Section 32-2-10. Although Section 32-2-10 prohibits an agreement whereby the indemnitor undertakes to indemnify against liability for damages caused by the sole negligence of the indemnitee, this statute, nonetheless, states specifically that:

Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees, or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents, or its employees. (Emphasis added).

The indemnity provision in Section 5, Paragraph One is completely consistent with the indemnity language authorized by Code Section 32-2-10, and

thus by definition, is not against public policy or unenforceable. Contrary to the assertion of ECC's Counsel, the appellate court in D.R. Horton, Inc. v. Builders FirstSource specifically authorized the general contractor's recovery in indemnity for negligence, whether sole or concurrent, of its subcontractor. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 149, 810 S.E.2d 41, 44 (Ct. App. 2018) (holding that an indemnification clause is void as against public policy to the extent that it requires a subcontractor to indemnify the general contractor for damages caused by the general contractor's negligence, while upholding the portion of an indemnity clause that allows the general contractor to recover from the subcontractor for that subcontractor's negligence, whether sole or concurrent).

Paragraph Two of Section 5 of the Master Subcontractor Agreement, cited by ECC Counsel, relates only to indemnity against liability for damages arising out of personal injury to the subcontractor indemnitor, its agents, employees, or representatives. The provisions of Paragraph Two (which, in any event, impose liability only "to the fullest extent permitted by law") are not relevant to the claims currently asserted by Builders FirstSource, which are limited to indemnity against liability for property damage.

ECC Contracting has also cited the provisions of Section 3 of the Master Subcontractor Agreement, dealing with "Warranty," and claims that the Warranty provision allows BFS to recover from its subcontractors for products that BFS provides. In Section 3, the subcontractor warrants and guarantees "Work", which is a defined term found in Section 1(a) of the contract [Master Subcontractor Agreement, p. 4]. As defined, "Work", encompasses only the materials that the

subcontractor agrees to provide and/or the services that the subcontractor agrees to perform. [Master Subcontractor Agreement, p. 1]. Thus, in Section 3 the subcontractor warrants and guarantees only the materials that the subcontractor provides and/or the services that the subcontractor performs.

The Warranty provision also provides that the subcontractor will indemnify Builders FirstSource for all non-conforming “Work” - which, again, is a defined term, indicating that the indemnification obligation on a demand made pursuant to the Warranty Provision encompasses only the materials and/or services provided by or rendered by the subcontractor. To the extent they are applicable to the claims at issue, the Warranty Provisions of Section 3 are completely consistent with Section 32-2-10 and provide no support for ECC’s motion for summary judgement.

B. The Contract does not violate Concord and Cumberland.

Concord & Cumberland stands for the proposition that when an indemnitee is seeking to recover against an indemnitor for the indemnitee’s own negligence, the contractual language it relies upon must meet a heightened standard of being “clear and unequivocal.” Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). Articulated in a manner that applies to our purposes, the Court in Concord & Cumberland held that the “clear and unequivocal” standard only applies when a general contractor seeks to recover from its subcontractor for the general contractor’s own negligence (whether sole or concurrent).

Typically, courts will construe an indemnification contract “in accordance with the rules for construction, and of contracts, generally,” as opposed to using a

heightened “clear and convincing” standard. Id. Because Builders FirstSource is not seeking indemnity against damages caused by its (or ProBuild’s) own alleged negligence, whether sole or concurrent, the heightened standard of “clear and unequivocal” is not applicable to an evaluation of its contractual provisions.

At the crux of Concord & Cumberland was the fact that the general contractor was trying to recover from its subcontractor for the general contractor’s own negligence. As articulated above, BFS cannot recover damages in indemnity against ECC for BFS’s (or ProBuild’s) own negligence. But when evaluating the BFS claim for indemnity against ECC for ECC’s negligence, the heightened standard articulated in Concord & Cumberland does not apply and thus is not relevant here.

C. The Contract is not unconscionable

A contract is considered one of adhesion if it “is a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007). While the Master Subcontract Agreement does appear to be a form contract, ECC has offered no evidence that the contract was either (1) offered on a take-it-or-leave-it basis, nor that (2) its terms were not negotiable.

Even if the Contract were one of adhesion, that would not end the analysis because “[a]dhesion contracts . . . are not per se unconscionable.” Simpson, 373 S.C. at 27. “In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions,

together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Id. at 24–25.

Indemnity provisions allowing a contractor to recover from its subcontractor for the subcontractor’s negligence have been consistently upheld by our courts. See Concord & Cumberland, 424 S.C. 639; One Belle Hall Prop. Owners Ass’n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286, (Ct. App. 2016). Additionally, the evidence here shows that ECC was contented enough with the terms of the contract that it accepted them not only once in 2008, but also chose to renew the same terms again in 2015. It would be inequitable for ECC to be released from terms it repeatedly agreed to simply because it has now become inconvenient for ECC to be bound by them.

D. The Court is required to sever offending provisions.

To the extent that any provision of the Master Subcontractor Agreement may be found to be unconscionable or violative of public policy, Section 32-2-10, or Concord & Cumberland, the Court is compelled to sever such provision pursuant to the specifics of the severance provision of the contract, and as required by relevant South Carolina law. One Belle Hall, 418 S.C. at 64 (holding that allegedly unconscionable language in the contract’s warranty provision ought to be severed, due, in part, to the presence of severability clause; and declining to invalidate the entire contract).

“Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002). The severability provision of the contract at

issue before this Court demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law. (Emphasis added).

[Master Subcontractor Agreement, Section 9(f) at p. 11.] This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed. Thus, to the extent that any portion or provision of the contract may be invalid, the Court, as instructed by One Bell Hall and Beach Co., supra, is compelled to honor the intent of the parties and sever any such offending provisions or portion thereof, leaving the remaining provisions – namely, Section Five, Paragraph One – intact.

E. The issue before this Court is not subject to collateral estoppel.

ECC argues that this Court is collaterally estopped from ruling on this issue because prior court rulings have held the BFS Contract unenforceable.

The doctrine of collateral estoppel is available when 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). The issue of law before this Court has not been previously litigated and determined. What other Courts, including this one, have found in prior cases is that under the language of the Contract, BFS cannot “seek[] indemnification for its own negligent acts or omissions.” Amended Order of Judge Newman filed

February 3, 2020 in Builders FirstSource – Southeast Group, LLC v. MI Windows and Doors et al., Civil Action No. 2018-CP-08-02547; see also this Court’s order in Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455; see also Judge Jennifer B. McCoy’s order in Dag Pavic and Stela Susac-Pavic v. Carolina Cottage Homes, LLC et al., Civil Action No. 2019-CP-10-00772.¹ As this Court articulated above, the issue of whether BFS may recover in indemnity for its own negligence is not before this Court. Rather, this Court is considering whether BFS may recover in indemnity for the negligent acts of its subcontractor. Because no Court has yet ruled on that issue, the Court’s holding is not barred by collateral estoppel.

CONCLUSION

Based on the above, the Court holds as follows:

ECC’s motion for summary judgment as to the BFS claims for breach of express and implied warranty, breach of contract, and negligence is GRANTED.

ECC’s motion for summary judgment as to the BFS claims for contractual and equitable indemnity is DENIED.

IT IS SO ORDERED!

ELECTRONIC SIGNATURE PAGE TO FOLLOW

¹ The Court notes that all of these orders are currently on appeal.



Charleston Common Pleas

Case Caption: Andrea C Shane , plaintiff, et al VS Dr Horton Inc , defendant, et al

Case Number: 2020CP1002377

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

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