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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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2021-001050

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

v.

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

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

v.

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

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman

Quality Exteriors, Inc.; and L&G Construction Group, LLC are the …….....Respondents.

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FINAL REPLY BRIEF OF APPELLANT

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## ARGUMENTS

The eight Respondents in this matter have filed seven[1] different Briefs, arguing various combinations of the following, (all of which are contested by the Appellant):

> - Appellant's pleadings and contracts support the position that Appellant is seeking indemnification for its own negligence, and the heightened standard of Concord & Cumberland was thus correctly applied.
>
> - Appellant is collaterally estopped from arguing this case by the prior trial court rulings, regardless of the fact that Appellant is seeking a different remedy than the one ruled on by those courts, and regardless of the fact that those rulings are on appeal and thus not sufficiently "final."
>
> - The Contracts at issue violate South Carolina Code Section 32-2-10, despite the fact that the statute specifically authorizes the relief sought by Appellant and despite the fact that the statute does not apply to attorneys' fees.
>
> - The Contracts at issue are unconscionable, even though the Contracts inure to the benefit of both parties, and even though no evidence has been presented regarding the bargaining power of the relevant parties.
>
> - The Contracts at issue are not subject to severance, despite the presence of a valid severance clause, and despite South Carolina law favoring the practice of severance.

Appellant has attempted to respond comprehensively to the unusually wide scope of arguments leveled against it. To that end, Appellant sought and was granted leave by the Court to exceed the 25-page limit typically imposed on reply briefs by

[1] Respondent L&G Construction Group, LLC, did not file its own brief but joined in the brief of Respondent Hurley Services, LLC.

Rule 208 of the South Carolina Rules of Appellate Practice.[2] Additionally, Appellant incorporates herein by reference all arguments made in its opening brief.

## I. Both the pleadings and the relevant contractual provisions establish that Appellant is seeking recovery against its subcontractors ONLY for the subcontractors' negligence, and thus the heightened standard articulated in Concord and Cumberland was improperly applied by the lower court.

Respondents acknowledge that Appellant has repeatedly represented that it is not seeking indemnification for its own negligence but only for the negligence, whether sole or concurrent, of its subcontractors. However, Respondents have argued that, despite these representations, Appellant's crossclaims and/or contracts necessitate a finding that Appellant is seeking recovery for its own negligence.

### A. Appellant's crossclaims limit Appellant's recovery to liability for damages caused by its subcontractors.

Appellant's crossclaims were cited and discussed in detail in Appellant's opening brief. To reiterate, Appellant plead:

> 134. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Fourth Amended Complaint.
> …
> 137. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the Cross Claim Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

[2] The Court, in its Order, instructed Appellant that the Reply Brief should not exceed 40 pages; this brief complies with said limitation.

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

[R. pp. 440, 441] (emphasis added). In these paragraphs, Appellant has denied all wrongdoing. The pleadings nonetheless acknowledge that, even though Appellant is faultless, Appellant may still end up being liable to the Plaintiff on a theory of vicarious liability due to the work of its subcontractors. And because Appellant denies all wrongdoing, Appellant could be liable to Plaintiffs only on a theory of vicarious liability. Thus, when Appellant's pleadings state that the subcontractors are liable to Appellant for any sums which Appellant may pay to Plaintiffs, those sums are necessarily the result only of Appellant's vicarious liability arising from the negligence and/or other deficiency in the work of its respective subcontractors.

Respondents argue that Appellant's explanation of its pleadings "ignores the very real possibility that [Appellant] may be held liable to Plaintiffs for its own negligence as alleged in Plaintiffs' Fourth Amended Complaint . . . ." [See, e.g., Pohlman Brief, p. 5.] But Respondents have confused the function of the pleading at this stage of the analysis. The question that the Court must answer is: "By its crossclaims, is Appellant seeking recovery for its own negligence?"; the question is ***not*** whether the facts later bear out Appellant's worldview. In determining the

relief sought by Appellant, facts that will develop or come to light later in the case are irrelevant. Thus, Plaintiff's allegations and its expert's opinion are irrelevant, as is whether a jury would ultimately find Appellant liable on Plaintiff's claims.

Consider the pleadings filed in the Concord & Cumberland case so frequently cited by parties to this action. Superior Construction, the general contractor, plead:

> The Plaintiff has alleged in its Complaint a number of allegedly improper and/or defective items of workmanship and materials, and various resulting damages regarding the Subject Property that directly arises out, or, relates to the respective scope of work of, or materials supplied by, the Subcontractors. While Superior has denied these allegations, the claims and allegations by the Plaintiff, if proven substantiated, ***entitle Superior to full recovery*** pursuant to the various claims in law and equity enumerated below.

[Superior Construction's Answer, Cross Claims, and Third-Party Complaint, ¶ 103] (emphasis added). Superior plead that it was entitled to "full recovery," not simply recovery limited to the negligence of the subcontractors***. And despite this pleading, the Concord & Cumberland Court allowed Superior to recover in indemnity for the negligence of its subcontractors.*** Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 645, 819 S.E.2d 166, 169–70 (Ct. App. 2018) (affirming the Circuit Court's finding limiting "indemnification to damages resulting from the work [subcontractor] performed.").

Appellant's pleading is limited to seeking recovery for the negligence of its subcontractors because its crossclaims are premised solely upon vicarious liability. However, even if, like Superior Construction in Concord & Cumberland, Appellant's pleading could be read to be seeking indemnity for its own negligence,

Appellant is nonetheless entitled to the same relief granted to Superior – that is, indemnification limited to the negligence of its subcontractors.

B. Appellant's contracts limit Appellant's recovery in this case to liability for damages caused by its subcontractors.

The applicable language in both the 2005 Contracts and in the Later Contracts limits Appellant's rights to indemnification to damages arising out of the negligence of its subcontractors.

*1. The 2005 Contracts*

Respondent East Coast argues in its brief that the language of the 2005 Contract contradicts Appellant's contention that it is not seeking indemnification for its own negligence. Specifically, East Coast points to the following language:

> Subcontractor agrees that **Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages** to Subcontractor, its employees agents, and subcontractors and to any other parties arising from or **relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors.** Subcontractor will indemnify, defend, and hold Contractor harmless against any such injuries and claims.

[Brief of East Coast, p. 13] (emphasis in East Coast's Brief). East Coast then argues that "BFS cannot argue that its claims for contractual indemnity are for those sums that are solely attributable to the negligence of East Coast when its contractual indemnity provisions clearly say 'Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages.'" Id. The problem is that East Coast only considers half of the sentence in its analysis. The text of the contract clearly says that the Subcontractor "shall be responsible for all injuries, losses, or damages . . . ***relating in any way to the performance of the Work . .***

***. of Subcontractor . . . . .***" [R. p. 1455] (emphasis added). In the 2005 Contract, "Work" is a defined term limited to the materials provided by and/or services performed by the subcontractor. [R. p. 1451]. Thus, in this case, the indemnification obligation extends only to the services provided by East Coast. Understanding this nuance, the Contract actually supports *Appellant's* position that Appellant is seeking indemnification only for damages arising from the negligent work of its subcontractors (and not from its own negligence).

*2. The Later Contracts*

Other Respondents have pointed to Section 3, Section 5, and/or Section 8 of Appellant's Later Contracts as containing indemnification language that demonstrates that Appellant is seeking to be indemnified for its own negligence in this case. Appellant here addresses each section in turn.

*i. Section 3. Warranty*

Respondent Hurley argues that Appellant is seeking indemnification for its own negligence because Section 3 of the Later Contracts "contains indemnity provisions in favor of BFS relating to materials selected and sold by BFS." [Hurley's Brief, p. 8]. Specifically, Respondent alleges that three provisions of the warranty section have the effect of making Respondent liable for Appellant's negligence.

First, Respondent highlights the language that provides that "Subcontractor guarantees the Work against defects in design, workmanship, and materials." Respondent alleges that the only possible interpretation of this sentence is that it requires the subcontractor to guarantee materials provided by BFS against defects

in design. Respondent reaches this interpretation because it avers that Hurley had no part in the "design" of the project.

Hurley's interpretation of the contract ignores the limited definition of "Work" and results in what Hurley later argues is an illegal provision. However, a more logical and more licit interpretation exists. And when a Court has a "choice of alternative interpretations, with one interpretation saving the contract and the other voiding it, [the issue] should be resolved in favor of the interpretation that saves the contract." Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 416, 756 S.E.2d 148, 152 (2014) (internal quotations omitted).

Throughout the Later Contracts, "Work" is a defined term that specifically excludes materials provided by BFS and only includes materials and/or services provided or performed by the subcontractor; thus, Respondent's reading **---** that "Subcontractor guarantees the Work against defects in design, workmanship, and materials" could require the subcontractor to guarantee materials provided by BFS **---** ignores the limiting definition of Work. Substituting "the Work" with its true definition, the obligation reads that "Subcontractor guarantees **the materials and/or services provided or performed by the Subcontractor** against defects in design, workmanship, and materials." [R. pp. 1501, 1504] (emphasis added). If a subcontractor provided materials, the Subcontractor guarantees them against defects in design, workmanship, and materials. If the Subcontractor performed services, "design" may be inapplicable in that specific situation, but the Subcontractor still guarantees its workmanship (and any materials that it does provide in tandem with its services). Thus, this provision does not require the

subcontractor to warrant any materials provided by Appellant and does not support Respondents' theory that Appellant is improperly seeking indemnification for its own negligence.

The second warranty provision that Respondent challenges provides that "This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three years for all Work except, (b) ten (10) years for all Work consisting of any structural application of any home, building, or other structure…" [R. p. 1504]. Here, Respondent challenges the fact that although BFS provided the product, Respondent guarantees "all Work consisting of any structural application." Again, the definition of "Work" matters here. [See "Work," R. p. 1501]. This contractual language provides that Respondent is guaranteeing the materials and/or services provided or performed by Respondent consisting of any structural application. Respondent did not provide the windows, so it is not guaranteeing the windows, but only the services and/or materials that Respondent *did* perform or provide.

The third provision at issue is what Respondent has termed the hidden indemnity language, whereby: "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." [R. p. 1504]. Again, understanding that "Work" relates *only* to materials and/or services provided or performed by the Subcontractor, this provision only requires Subcontractor to correct its own work (or, as the case may

be, any materials that Subcontractor may have provided) and to indemnify other parties for costs incurred relating to the demand that Subcontractor correct its own work. This provision does not provide any support for the contention that Appellant is illicitly seeking indemnification for its own negligence.

*ii. Section 5. Indemnity*

Neither does Section 5 support Respondents' contention that Appellant is seeking indemnification for its own negligence in this case. Section 5 is comprised of four paragraphs, only two of which are relevant to this litigation.

Paragraph One sets forth the applicable indemnity language for property damage claims caused by the subcontractor's negligence. [R. p. 1506]. By the specific provisions of the first paragraph, the subcontractor has undertaken to defend and indemnify BFS ("to the fullest extent permitted by law") against liability or loss ***arising out of the negligent acts or omissions of the subcontractor*** in the performance of its work for BFS. [R. p. 1506] (emphasis added).

By contrast, the indemnification provisions of the second paragraph of Section 5 relate only 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…" [R. p. 1506] (emphasis added). The liability obligations of the second paragraph exist, "to the fullest extent permitted by law," regardless of the ultimate liability of the subcontractor. [R. p. 1506]. The instant litigation, however, does not involve claims arising out of bodily injury to the subcontractor, and thus Paragraph Two is

irrelevant; no one can claim that Appellant is attempting to use Paragraph Two in this litigation to recover for its own negligence.

Paragraph Three provides that the duty to defend exists regardless of the ultimate liability of the subcontractor. [R. p. 1507]. In this paragraph, Appellant is not seeking indemnification for its own negligence, but rather is seeking attorneys' fees incurred in defending itself in actions arising from the subcontractors' work. As discussed at length in the following section, indemnification for damages is distinctly separate from demands for attorneys' fees.

Paragraph Four makes clear that the defense and indemnification obligations do not require the subcontractor to indemnify anyone for claims resulting from defects in plan or design. [R. p. 1507]. This paragraph is not at issue in this litigation.

None of the four paragraphs of "Section 5. Indemnity" support Respondents' proposition that the Contract itself shows that Appellant is seeking indemnification for its own negligence in this litigation.

*iii. Section 8(i). Liens*

Respondents identify Section 8(i) as further proof that Appellant is seeking to recover for its own negligence. Section 8(i) is entitled "Indemnification for Liens" and pertains specifically to mechanics' and materialmen's liens. [R. p. 1511]. It provides, in relevant part, as follows:

> To the fullest extent permitted by law, subcontractor hereby agrees to indemnify, defend, and hold harmless the contractor . . . 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.

[R. p. 1511] (bold and caps removed for ease of reading). As with the other contractual provisions addressed hereinabove, this section provides for indemnification against loss arising from the services and/or materials provided by the subcontractor, and specifically protects the contractor from liens arising from the subcontractor's failure to pay its own employees, subcontractors, and/or suppliers. Moreover, any "amounts paid in settlement" under this provision are specifically limited to damages "arising out of the services, labor, equipment, or materials furnished by subcontractor, or its employees, suppliers, or subcontractors." [R. p. 1511]. This section does not address negligence at all, and it does not support the proposition that Appellant is seeking indemnification for its own negligence.

## II. The Contracts at issue do not violate South Carolina Code Section 32-2-10, and Appellant has properly preserved all such arguments.

Respondents attempt to wield South Carolina Code Section 32-2-10 to invalidate the respective contracts or portions thereof. The different parties argue some combination of the following arguments: (1) that Appellant is seeking indemnification for its own negligence in violation of Section 32-2-10; (2) that Appellant's claims for attorneys' fees violates Section 32-2-10, and any argument to the contrary has been abandoned; and (3) that if one provision violates the statutes, the entire section or contract is unenforceable. Each argument is refuted in turn below.

A. Because Appellant is seeking indemnification for damages caused by its subcontractors, Section 32-2-10 specifically authorizes its claims.

Without citing to any specific contractual provision, Respondent Hurley's Brief generally concludes that "BFS is seeking indemnification for its sole or concurrent negligence in violation of S.C. Code Ann. 32-2-10 (2007)." [Hurley Brief p. 12]. Interestingly, the only problematic action alleged by Hurley is that Appellant is violating the statute by "seeking indemnity for materials when it is undisputed that Hurley provided no materials." Id. Both this brief and Appellant's opening brief have discussed in detail that Appellant is not seeking indemnification for its own negligence, nor indemnification from Hurley for materials provided by any other party, including Appellant. As argued above, Appellant's pleading does not seek such recovery, nor does Appellant's contract provide an avenue for such recovery. All such arguments are incorporated in their entirety herein by reference.

Appellant is only seeking indemnification for damages caused by its subcontractors. Section 32-2-10 "allows [a contractor] and [a subcontractor] to agree that [the subcontractor] will indemnify [the contractor] for damages caused by [the subcontractor] or its subcontractors." D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018). Appellant and its subcontractors entered into contracts agreeing that the subcontractors would indemnify Appellant for damages caused by the subcontractors. Thus, the contracts are authorized by Section 32-2-10 and Appellant is entitled to seek indemnification for damages caused by its subcontractors.

B. As Appellant argued extensively in its opening brief, Attorneys' fees are not encompassed by the statute.

Some Respondents have argued that Paragraph Three of the Indemnity Provision, which governs the payment of attorneys' fees, violates Section 32-2-10. However, Section 32-2-10 is silent as to attorneys' fees, governing only agreements providing for indemnification for damages.

As an initial matter, Respondent ECC argues that "because BFS cites no specific authority in its brief that attorney's fees cannot fall within the scope of indemnity, this BFS argument should be considered abandoned." [ECC Brief p. 14]. Respondent ECC relies for this proposition on the First Savings Bank case, which observed that a single conclusory statement, unsupported by argument or citations, was considered abandoned. First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994).

Appellant's brief argues *in detail* over the course of multiple pages, and with several citations to authority, that attorneys' fees do not fall within the scope of indemnity. [See Brief of Appellant, pp. 30-32]. Specifically, Appellant argued the following:

> As noted by 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."

[Appellant's Brief, p. 31]. And again, Appellant argued:

> The duty to defend and the duty to indemnify are two separate and distinct contractual obligations. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009).

> "Although these duties are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the judgment, the duty to defend exists regardless of the [indemnitor's] ultimate liability to the [indemnitee]." Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977).

[Appellant's Brief, pp. 31-32]. Regardless of whether this Court ultimately agrees with Appellant's arguments, it cannot find that Appellant abandoned them on appeal.

Section 32-2-10 only governs agreements for indemnification. Indemnity is well understood to mean "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. As quoted by the South Carolina Supreme Court, "[i]t is generally held that where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, ***should be treated as the legal consequences of the original wrongful act*** and may be recovered as damages. Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) (emphasis added). Thus, attorneys' fees are tied not to indemnity but rather to the "original wrongful act." In other words, attorneys' fees are a separate element of damages recoverable in conjunction with an indemnity claim, but they are separate from the indemnity claim itself. And Section 32-2-10 only governs the indemnification obligation; it is completely silent as to the separate obligation to pay attorneys' fees. Because this statute is in derogation of the common law practice, it must be strictly construed. Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d

693, 696 (2012). As such, the restrictions of Section 32-2-10 cannot be extrapolated to extend to agreements regarding payment of attorneys' fees, and Appellant should be allowed to continue to pursue such claims against its subcontractors.

C. Even if one paragraph in the indemnity provision violated Section 32-2-10, the remainder of the contract would remain enforceable.

Respondents have taken different positions regarding whether the failure of one portion of the "Section 5. Indemnity" Provision invalidates the entire contract. Writing about Section 32-2-10, Respondent Pohlman's brief states: "If Pohlman could be required to indemnify BFS for BFS's own negligence, the **Paragraph** requiring such is unenforceable under the laws of this State." [Pohlman's Brief, p. 12 (emphasis added)]. ECC, on the other hand, claims (without any citation to authority) that the indemnity clauses must fail altogether – that is, if one paragraph violates Section 32-2-10, all four paragraphs in the indemnity section must fail. [ECC's Brief, p. 15 (emphasis added)]. Respondents WS Contractors and East Coast Carpentry take an even more extreme position, saying that if the attorneys' fees provision violates Section 32-2-10, the entire contract is unenforceable. [WS Contractors Brief, p. 27; East Coast Carpentry Brief, p. 10].

Appellant does not concede that any portion of its contracts violates Section 32-2-10; Section 32-2-10 specifically authorizes contracts, such as the one at issue, where the indemnitee may recover for the negligence, whether sole or concurrent, of the indemnitor. However, even if a part of the "Section 5. Indemnity" provision *did* violate the statute, only the problematic language – and not the entire Section (or Contract) – would be unenforceable. This Court in D.R. Horton said

that an indemnity provision was unenforceable "to the extent" that it violated Section 32-2-10, but explicitly disagreed with the lower court that the remainder of the indemnity provision – the part that would allow D.R. Horton to recover from BFS for damages caused by BFS's own negligence – was void:

> This statute allows D.R. Horton and BFS to agree that BFS will indemnify D.R. Horton for damages caused by BFS or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree. However, we agree that the indemnification clause is void as against public policy to the extent it purports to require BFS to indemnify D.R. Horton for damages caused by its negligence or the negligence of its subcontractors.

D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018). Likewise, in this case, the agreement would only be void to the extent that it may violate Section 32-2-10. Appellant would still be allowed to pursue recovery for damages occasioned by the subcontractors' negligence, in accordance with the statute.

Respondent Hurley would have this Court dismiss the above language from the D.R. Horton case as mere dicta simply because it is inconvenient to Hurley. However, D.R. Horton is the only South Carolina appellate case to have considered Section 32-2-10, and as such, its treatment of contractual indemnity provisions vis-à-vis the statute is instructive. Additionally, the D.R. Horton Court's treatment of the indemnity clause – voiding it only to the extent that it violates existing law – is consistent with logic, general contract interpretation, and South Carolina precedent. See D.R. Horton, 422 S.C. 144; see also Concord & Cumberland, 424 S.C. 639 (affirming the Circuit Court's finding limiting "indemnification to damages resulting from the work [subcontractor] performed.");

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).

## III. Appellant is not collaterally estopped from arguing its position in this case, and it has properly preserved all arguments in support thereof.

In its opening brief, this Appellant argues that, contrary to the lower court's relevant holdings, collateral estoppel does not bar its recovery because (1) the present issue **---** whether the contract's language allows Appellant to recover for Respondent's negligence **---** has never been addressed by a court; and (2) the cases cited by the lower court's order are on appeal and thus not sufficiently final to provide the requisite foundation for collateral estoppel.

Respondents have leveled several challenges at both the procedural and substantive propriety of Appellant's position, which are addressed in turn below.

### A. Appellant has properly preserved its Collateral Estoppel Arguments.

All of the orders cited by Respondents and the lower court as grounds for collateral estoppel held that Appellant could not recover for its own negligence. See, generally, 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 [R. p. 146]; Order of Judge Young filed April 29, 2020 in Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455 [R. p. 157]; and Order of Judge

McCoy filed January 25, 2021 in Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772 [R. p. 162]. In this case, Appellant is seeking only to recover for the negligence of its subcontractors. Thus, the issue in the prior cases is not the same as the issue before the lower court in this case, as required by collateral estoppel.

In its brief, Respondent Hurley Services argues that Appellant did not preserve its argument that the issues of law and fact differ *in the memorandum that Appellant filed with the lower court prior to oral arguments*. This observation erroneously suggests that Appellant did not properly preserve the issue. Respondent Hurley wrote:

> BFS filed a memorandum in opposition to Hurley's amended motion for summary judgment on November 2, 2020. With respect to the collateral estoppel issue, BFS argued only that the orders of Judges Young and Newman were not final orders. It did not raise the issue of whether the same issues of fact or law were decided in those orders.
>
> To the extent that BFS failed to properly raise this issue as to the Pavic appeal during oral arguments on November 6, 2020, the issue cannot be raised for the first time on a motion for reconsideration. Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of relief under Rule 59(e), SCRCP, and the issues are waived.
>
> Even if the identical issue question were properly raised in the court below…

[Hurley Brief pp. 15-16 (internal citations omitted)]. The wording of Hurley's brief duplicitously implies that the "identical issue question" was *not* properly raised in the court below. Hurley knows this to be false. Counsel for Appellant made this argument as to all defendants' motions at oral arguments:

> The specific determination of both Judges Young and Newman was that my client was seeking indemnification from its subcontractors for my client's own negligence. That was the specific factual finding of the court. And the Court went on to say, as a matter of law, that, under those circumstances, the contractual provisions at issue here were not sufficiently clear and unequivocal under the doctrine enunciated by Concord and Cumberland to impose that obligation upon the clients. ***Those issues are simply radically different from those before the Court today. . .*** . The rulings of Judge Young and Judge Newman, under the circumstances, are simply not relevant. ***They do not address the same factual issues. They don't even (indiscernible) to the same legal issues we're relying upon here, and they are simply inadequate to establish a barrier of collateral estoppel.***

[R. p. 1423 l. 22 – p. 1424 l. 19] (emphasis added). Counsel's argument did not address Judge McCoy's order in the Pavic case for the simple reason that, at the time of oral arguments, Judge McCoy had not yet issued her order in the Pavic case. When counsel for Respondents drafted their proposed orders for Judge McCoy, however, some of the proposed orders, all of which were later adopted by the lower court in their entirety, included references to the Pavic case. Thus, some of Appellant's subsequent motions to reconsider also contained references to the Pavic case, as did Appellant's opening brief. To the extent that references to Pavic are inappropriate, the fault lies with Respondents' counsel and the lower court, not with Appellant – Appellant was simply responding the arguments and holdings against it.

Regardless of whether Pavic is included in the collateral estoppel analysis, Appellant properly preserved the "identical issue question" for this Court's review by raising it to the Court during its oral arguments. See Pikaart v. A & A Taxi, Inc., 393 S.C. 312, 324, 713 S.E.2d 267, 273 (2011) (observing that an issue is properly

preserved for appeal when it has been raised to and ruled upon by the court below).

B. While no binding authority exists in this jurisdiction regarding the finality of an order on appeal for purposes of collateral estoppel, this Court should follow the example of other jurisdictions and hold that an order on appeal cannot be grounds for collateral estoppel.

The second reason that the doctrine of collateral estoppel does not bar Appellant's claims for relief is because the previous orders relied upon by the trial court and Respondents are currently on appeal. Logic would dictate that by its very nature, an issue on appeal has not been finally resolved, as required by collateral estoppel.

Respondent AC Construction argues in its brief that because Appellant cited no authority for this position, Appellant has abandoned it. Respondent relies upon First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994). In First Savings Bank, however, the Court held that a position was considered abandoned when Appellant failed "to provide ***arguments or supporting authority*** for his assertion." Id. at 363 (emphasis added). Likewise, South Carolina courts have considered positions abandoned when "[o]n the last page of his brief, [Appellant] mentions the issue of the seven days' unpaid compensation ***in a single sentence without argument or supporting authority***," Matthews v. City of Greenwood, 305 S.C. 267, 270, 407 S.E.2d 668, 669 (Ct. App. 1991), and likewise when an "argument is embraced ***in a single sentence*** on the last page of his brief, is ***not supported by any authority whatever***, and is ***found in the formal conclusion to his brief***," Williams v. Leventis, 290 S.C. 386, 390, 350 S.E.2d 520, 523 (Ct. App. 1986).

All of these cases recognize that abandoned positions are those which lack both arguments and supporting authority. Appellant in this case provided ample argument for its position. Additionally, the question that Appellants are asking this Court to consider is novel in this jurisdiction, and as such there is no binding authority to cite.

Neither South Carolina Courts nor the Fourth Circuit have considered the issue of whether an order that is considered "final" for purposes of appeal is also sufficiently "final" for the purposes of collateral estoppel. For this reason, not even AC Construction can point the Court to binding authority on this position.

"Authorities differ as to whether a judgment from which an appeal is pending has the finality requisite for the application of claim preclusion by res judicata." 50 C.J.S. Judgments § 940. "By one standard, the pendency of an appeal from the judgment deprives the judgment of the finality necessary to be effective for claim preclusion by res judicata. By another standard, the pendency of an appeal does not affect a judgment's finality and conclusive effect in bar of a second action." Id. If this Court does not resolve the collateral estoppel arguments on the "identical issue question" argued above, then this Court must consider this issue of first impression in South Carolina.

Other states have considered the issue. Within the geographic bounds of the Fourth Circuit, the Virginia Supreme Court has held that "[a] judgment, to be relied upon for the application of the doctrine of res judicata, must be final, and a judgment which is being appealed is not final for res judicata purposes." Arkansas

Best Freight Sys., Inc. v. H.H. Moore, Jr. Trucking Co., 244 Va. 304, 307, 421 S.E.2d 197, 198 (1992) (internal citations omitted).

Corpus Juris Secundum advises that "the pendency of an appeal from a judgment is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded." 50 C.J.S. Judgments § 940. Regardless of whether this Court adopts the Virginia Supreme Court's rationale or the advice of CJS, the issue of collateral estoppel should not have been resolved against Appellant, and the lower court's holding should be reversed.

## IV. The Contract can and should be validly severed under the mutually-agreed-upon severance provision.

Respondents have offered many arguments against severing any potentially problematic language. At the heart of many of these arguments is the contention that the contract is *too* problematic and cannot be saved even by severance. Appellant maintains that its contracts are valid in their entirety, but even if the court were to find part of the contract problematic, the allegedly problematic language could be cleanly severed. Such severance honors the intent of both parties when the contract was entered into.

### A. Respondents' contention that the entire contract is full of invalid provisions is without merit.

Respondents Hurley Services and ECC contend that severance is inappropriate because the contract is so full of invalid provisions that it cannot be saved. In support of this contention, they identify problems with "Section 5.

Indemnity," "Section 3. Warranty," and Section 8(i), "Liens," all of which have been defended at length above.

When faced with an unconscionable provision in a contract, "this Court generally would encourage severability of an unconscionable provision" as opposed to throwing out the entire clause, section or contract. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 35, n.9, 644 S.E.2d 663, 674 (2007). This is especially true when a contract (1) contains a severability clause, and (2) contains only one unenforceable or invalid provision. 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.); Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020) (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); Simpson, 373 S.C. at 35, n.9 (citing the following cases for the proposition that courts have severed isolated unenforceable language in contracts: Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir.2006) (severing a provision in an arbitration clause that prohibited the award of treble damages); Safranek v. Copart, Inc., 379 F.Supp.2d 927 (D.Ill.2005) (severing a provision in an arbitration clause that violated Title VII by requiring each party to bear its own attorney's fees and costs); Ex parte Celtic Life Ins. Co., 834 So.2d 766 (Ala.2002) (severing a provision in an arbitration clause that was void as a violation of public policy by prohibiting the award of punitive damages); Healthcomp Evaluation Servs. Corp. v. O'Donnell, 817 So. 2d 1095 (Fla. Dist. Ct.

App. 2002) (severing a provision in an arbitration clause that violated state law by not permitting the parties to appeal or review an arbitration award)); see also D.R. Horton, 422 S.C. at 144 (severing indemnity provision "to the extent" it was against public policy); see also Concord & Cumberland, 424 S.C. at 639 (allowing partial recovery under the valid portion of an indemnity provision that otherwise did not completely comport with South Carolina law).

The Court in Simpson distinguished itself from the above precedent by pointing out that the contract before it contained *numerous* unenforceable provisions and thus could not be effectively severed. In order to bring themselves more in line with the Simpson Court, Respondents have attempted to identify multiple provisions of the contracts here that violate South Carolina law. Among them are Sections 3, 5, and 8 of the Contract. These sections have been discussed in great detail above, and those arguments are incorporated herein by reference; additionally, they are again briefly examined here in the context of severance.

Neither Section 3 nor Section 8 is implicated by this litigation – BFS has made no warranty claims or claims related to mechanics' liens. Nonetheless, Hurley argues that "Section 3. Warranty" is theoretically an invalid provision because it could attempt to force Hurley to warrant materials provided by BFS. This reading ignores the fact that "Work" is a defined term limited to the materials provided by or the services rendered by the subcontractor. In Section 3, the subcontractor warrants its Work. If the subcontractor provided no materials, then

it is not warranting materials. Nothing about Section 3 violates South Carolina law, and thus it does not need to be severed.

Section 8 of the Contract provides for indemnification against loss arising from the services and/or materials provided by the subcontractor, and specifically protects the contractor from liens arising from the subcontractor's failure to pay its own employees, subcontractors, and/or suppliers. Nothing about this provision, by which recovery is limited to "loss arising from the services and/or materials provided by the subcontractor," is unconscionable or inconsistent with South Carolina law.

The most universally-attacked section of the contract is Section 5, Paragraph Two which, ironically, is irrelevant to this litigation because it deals with the unique situation of cases arising out of bodily injury to the subcontractor, its employees, and its representatives (which is not the case here). Appellant would argue that the issue of whether Section Five Paragraph Two violates Section 32-2-10 and South Carolina law is not yet ripe as there is no underlying controversy surrounding the indemnification obligations articulated by this paragraph. Nevertheless, the Court could strike Paragraph Two and it would not change a single indemnity obligation of *any* of the respondents.

Some Respondents suggest that the only proper use of the severance clause would be to strike both Paragraphs One and Two of Section 5 because the paragraphs are inextricably linked. The two paragraphs, however, govern completely different situations – property damage versus bodily injury to the subcontractor, its employees, and its representatives. One can absolutely stand

without the other. As stated above, Paragraph two could be struck and Paragraph One would still be valid. No Respondent has articulated an independent legal justification for striking any part of Paragraph One.

Paragraph Three governs the payment of attorneys' fees, which is not addressed either by 32-2-10 or by Concord & Cumberland. Nevertheless, to the extent the Court may hold to the contrary, the Court could sever this stand-alone paragraph without effecting any change as to the underlying duty to indemnify articulated in Paragraph One.

Based on Respondents' arguments, the Court in this case could be faced with severing one – *maybe* two – paragraphs of the four-paragraph indemnity provision. This distinguishes the case at bar from Simpson, in which the Court would have had to sever three or more illegal provisions, and puts this case more in line with the cases cited by the Simpson Court in which a single invalid provision was successfully severed.

As a final note, the South Carolina Supreme Court recently issued an opinion in Damico v. Lennar, Appellate Case No. 2020-001048 (filed September 14, 2022), in which it declined to sever unconscionable provisions of an arbitration agreement. The Court clearly articulated that it based its decision on several important factors: first, that severance would leave "essentially nothing left" of the arbitration provision; second, that the disparity between the parties indicated that this provision had not been negotiated; and third, that the contract governed a consumer transaction, and South Carolina has a long history of public policy that protects new home buyers. Id. at pp. 20-21. These factors are simply not relevant

here. As discussed below, severing potentially problematic language in this contract would still leave a robust indemnity provision; any possible disparity between the parties in this case, both of whom operate professionally in the world of construction, is much less pronounced than the disparity in Damico between a large construction company and an individual consumer; and finally, the public policy protecting consumers in Damico simply does not apply to the relationship between Appellant and its Respondents in this case – rather, the applicable public policy in this case favors the ability of one party to recover from its subcontractor for the subcontractor's own negligence, as enshrined in South Carolina Code Section 32-2-10.

B. Severing the offending provision does not amount to re-writing the contract.

Respondents often allege that severing the contract in any capacity would be akin to "re-writing" the contract – something that South Carolina Courts are allegedly loathe to do. However, the simple act of invoking the severance clause to strike a portion of the contract is *not* the same as "re-writing" the contract. The Simpson Court quoted that "[i]f illegality pervades the … agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." Simpson, 373 S.C. at 34 (internal citations omitted). As Appellant argued above, if this Court were to sever Section 5, Paragraph Two – and even Section 5, Paragraph Three – a robust indemnity provision would still exist at Section 5, Paragraph One. Rather that leaving "a disintegrated fragment," severance would leave the clear articulation of the rights of the parties in cases

such as the one at bar. In asking the Court to consider severance, Appellant is not asking the Court to re-write the contract between the parties, but rather to honor the intent of the parties such that the strong and valid contract remains in place.

C. No Procedural Hurdles bar the Court's ability to sever the Contracts.

*1. Contrary to the assertion of certain Respondents, the issue of severability should be considered by this court.*

Respondent AC Construction argues in its brief that that Court should not address the severability issue because "resolution of other issues" "dispose[s] of the appeal." [AC Construction Brief, p. 13]. In fact, the other issues are NOT dispositive of the appeal because, even if the Court determines that a portion of the contract is unenforceable, it does not follow that the entire contract is void. As argued above, other provisions could survive if the court finds, for example, that Section 32-2-10 invalidates only a portion of the contract. Thus, if the Court determines that any part of the contracts at issue is problematic, the Court must then determine whether those problematic portions are severable.

*2. The issue is properly preserved as to the 2005 Contracts*

In its brief, Respondent East Coast Carpentry argues that Appellant has failed to properly preserve its arguments regarding severance as to the 2005 Contracts. East Coast makes the specific argument that because Appellant did not offer an example of a version of the 2005 contract that could survive severance, the severance argument should be considered abandoned. In support of its position, East Coast relies ***not*** on cases requiring that such a specific, proposed contract be reproduced, but rather on cases that stand for the propositions that an

argument cannot be made for the first time on appeal, or, alternatively, for the first time in a reply brief.

Appellants argued the issue of severance extensively both before the lower court and in Appellant's opening brief. [See, e.g., BFS Motion to Reconsider Order granting partial summary judgment to East Coast, pages 10-12, found at R. p. 1335-1337; see also Appellant's opening brief, p. 39]

The argument that the 2005 Contracts are subject to severance was argued in detail in the opening brief, with many citations to authority. Specifically, this Appellant argued:

> 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); **2005 Contract, Section 9, Paragraph (f)**.] This language, ***which is present in both the 2005 Contracts*** and the Later Contracts, unequivocally reflects the intention of all 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.

[Opening Brief of Appellant, p. 39] (emphasis added). This argument specifically addressed the severance provision of the 2005 Contracts.

East Coast argues that because Appellant did not reproduce an example of a version of the 2005 Contract that could survive severance, the severance argument should be considered abandoned. This position is problematic for two reasons. First, East Coast cites to no authority requiring appellant to replicate a specific example of what the 2005 Contract would look like in order to properly preserve its argument. Second, Appellant *did* provide a framework for arriving at a successfully severed 2005 Contract. Appellant cited to the relevant severance provision and argued that "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**." [Opening Brief of Appellant, p. 39] (emphasis added).

In the 2005 Contracts, East Coast has challenged Section 6, subsection (b)(1), and Section 6, subsection (b)(2)(iii). The Court could sever either or both, "leaving the remaining provisions intact," and a valid 2005 Contract would still provide for recovery.

The first provision challenged by East Coast is Section 6, subsection (b)(1), which requires the subcontractor to indemnify Appellant, to the fullest extent permitted by law, in actions arising out of bodily injury or property damage *sustained by the subcontractor and arising out of the subcontractor's Work*. [R. p. 1455, 1456] (emphasis added). As argued above, this paragraph is valid, but even if it were not, the Court, as outlined in Appellant's opening brief, could sever this provision and the indemnification obligation at issue in this case would still stand. Similarly, if the Court found that Section 6, subsection (b)(2)(iii), which allows

Appellant to recover even for its failure to supervise, violated South Carolina law, the Court could cleanly sever that language. [R. p. 1456]. Even without these two provisions, under the remaining indemnification language, East Coast would still be required to indemnify Appellant "to the extent of liability resulting from Subcontractor's negligence" for "any alleged . . . property damage arising from or connected with the Work" performed by the Subcontractor – which is the exact recovery sought in this case. [See Section 6(b)(2)(i), R. p. 1456].

Appellant properly preserved the severance argument as to the 2005 Contracts both before the lower court and in its opening brief. This Court should thus consider the issue of severance as applied to the 2005 Contracts and, if the Court finds any language incompatible with South Carolina law, the Court should honor the intent of the parties and sever such language, leaving the remaining portions of the indemnity provision intact.

*3. Res Judicata does not impede Appellant's ability to argue severance*

Respondent ECC argues in its brief for the first time that res judicata should bar Appellant's ability to request that the Court consider severing any offending provisions because Appellant did not make a similar request of the court in the MI Windows case. Once again, Respondent makes an argument explicitly contradicted by the facts.

ECC was party to the MI Windows case, and as it should remember, at the trial court level, severance was not discussed because no one at that time was attempting to argue that any contractual provisions were unconscionable or violated Section 32-2-10 (these arguments came later). The analysis at that point

in time was whether the contractual provisions were required to satisfy the heightened standard imposed by Concord and Cumberland, and if so, whether the provisions did so satisfy. Judge Newman's order contained no mention of Section 32-2-10.

Respondents in the MI Windows appeal – including ECC – raised for the first time the issue of the contract violating Section 32-2-10. In response to this novel argument, Appellant in its reply brief argued the following:

> "Should the Court decide to consider paragraph two, and should it hold that paragraph two does violate the statute (which Appellants do not concede), the severability provisions of the contract would compel the Court to sever paragraph two and leave the rest of the contract intact."

[Appellant's Final Reply Brief in MI Windows, pp. 5-6]. Appellants went on to cite case law and contractual provisions in support of its argument. Because severance was not relevant until Respondents first argued on appeal that the provisions themselves violated South Carolina law, the law cannot have required Appellant to have raised the severance argument earlier, when it would have been completely irrelevant.

## V. Neither evidence nor contractual provisions support Hurley's claim and the lower court's finding that the Contract is unconscionable.

Respondent Hurley Services argues that the Contract is one of adhesion and is unconscionable. Many other Respondents adopt by reference Hurley's argument.

In its brief, Hurley does not engage with the arguments made by Appellant; instead Hurley simply reiterates its position. Appellant will again explain why Hurley's arguments that the Contract is unconscionable are unfounded.

A. The available evidence does not enable the Court to make a judicial finding that the contract was so one-sided that Hurley likely had no bargaining power.

Hurley asked the lower court for the same favor that it now puts before this Court: that "this Court take judicial cognizance of the fact that the Master Subcontractor Agreement of BFS is so one-sided, that a subcontractor executing the agreement, more than likely lacks any meaningful bargaining power." Under South Carolina law, a judicially noticed fact must be "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." SCRE 201.

The only evidence that Hurley offers in support of its request for a finding that it lacked meaningful bargaining power are purchase orders showing that Hurley was compensated for its work. Respondent maintains that the value of the purchase orders "reflect[] a lack of bargaining power." [Hurley Brief, p. 21]. However, Appellant maintains that the value of the purchase orders reflects that Hurley was paid a competitive wage for its work. The truth is that there is *no* evidentiary context for the purchase orders that would allow this Court (or the lower court) to determine one way or another whether or not the payments Hurley received reflect that Hurley was in a disparate position when entering the contract.

Thus, Hurley's request, and the lower court's ensuing adoption thereof, are entirely inappropriate.

B. The Contractual provisions highlighted by Hurley are not deceptive.

Respondent Hurley Services has argued ad nauseum that the Contract is unconscionable because it is replete with deceptive terms, particularly Sections 1, 2, 3, 5, and 8. The validity and conscionability of these sections has been addressed above. In this context, however, Hurley's brief highlights Section 3 and Section 2(c), and Appellant will address these sections in turn.

*1. Section 3. Warranty*

Hurley alleges that "Section 3. Warranty" contains a "buried" indemnity provision that is not in bold type, and notes that the Simpson Court invalidated an arbitration provision written in small print that "functioned to contract away certain significant rights and remedies otherwise available to Simpson by law." See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007).

Section 3 operates in a limited scope and requires Hurley to indemnify Appellant when a warranty demand is made on faulty work performed by Hurley. [R. p. 1504]. No warranty demand is at play in this case. Moreover, because the indemnification obligation in Section 3 is limited to damages resulting from Work performed by Hurley, the terms of Section 3 are protected by law. See S.C. Code § 32-2-10. Thus, Section 3 is fundamentally distinguishable from the problematic language in Simpson. In that case, the language "contract[ed] away certain significant rights and remedies otherwise available to Simpson by law." Simpson,

373 S.C. at 28. Here, the language enshrines significant rights and remedies protected by South Carolina law.

Hurley goes on to argue that the content of Section 3 is deceptive because it obligates Hurley to indemnify Appellant for defects in design, workmanship, materials, and structural application "which obviously relates to manufactured products selected and sold by BFS." Hurley offers no explanation for why this statement is "obvious." Appellant argued at length both above and in its opening brief that Section 3 does NOT require Hurley to make any warranty or incur any indemnification obligation regarding products provided by any other entity. Appellant walked the Court through Section 3 of the contract and illustrated how different terms apply in different situations. *Hurley's Brief refutes none of that.* Hurley does not engage with Appellant's argument and does not point to anything in the Contract that supports its reading of Section 3 to include an obligation to indemnify Appellant for defects in "manufactured products selected and sold by BFS." Thus, Section 3 does not provide any support for the argument that the contract at issue is unconscionable.

*2. Section 2(c). Protection of Work.*

Hurley's arguments rely in large part upon its expansion of the meaning of the defined term "Work." Under Section 1(a), "Work" is laid out as a defined term encompassing only materials provided by or services rendered by the subcontractor. [R. p. 1501]. In a scenario where a subcontractor installed, but did not supply, the windows, the "Work" would consequently be limited to the subcontractor's installation. Hurley alleges that Section 2 (c) of the contract

expands the definition of "Work" to include materials supplied by BFS. However, nowhere in its brief does Hurley explain why this is so. On page 10 of its brief, Hurely quotes Section 2(c) but does not analyze it. Hurley emphasized the language that requires the subcontractor to protect its labor and materials "(regardless of who supplied such materials)," but it does not explain why this language is problematic, nor how it expands the definition of "Work." Hurley acknowledges, but does not refute, Appellant's argument that this provision is consistent with the duties of a bailee. Instead, Hurley points to the crossclaims articulated in Appellant's pleading. Not only does Hurley's strategy violate the basic principles of contract interpretation, but it also does nothing to advance Hurley's position.

"Contract interpretation begins with the plain language of the agreement." Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 416, 756 S.E.2d 148, 152 (2014) (quoting Gould Inc. v. United States, 935 F.2d 1271, 1274 (Fed.Cir.1991)). As stated once already, "[c]ourts are to assume that the parties intended that a binding contract be formed, and [t]hus, any choice of alternative interpretations, with one interpretation saving the contract and the other voiding it, should be resolved in favor of the interpretation that saves the contract." Id. (internal quotations omitted). Additionally,

> If a contract's language is clear and capable of legal construction, this [c]ourt's function is to interpret its lawful meaning and the intent of the parties as found in the agreement. A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense. Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract. However,

> where a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties."

Cullen v. McNeal, 390 S.C. 470, 481–82, 702 S.E.2d 378, 384 (Ct. App. 2010). Because the term Work is clearly and unambiguously defined within the four corners of the contract, Hurley cannot point to extrinsic evidence such as Appellant's pleading to try to obfuscate its definition.

Even if Appellant's pleadings could be properly considered in the analysis, the cross-claims do not indicate that Appellant is attempting to hold Hurley liable for any materials it did not provide. Initial pleadings often precede the close of discovery. The exact nature of the alleged damage, and the responsible parties, are still often unknown. Appellant's pleading broadly covers a host of possible scenarios that could play out – if Hurley provided materials, even materials other than windows, and those materials are found to have been faulty, Appellant's pleading covers that situation. If Hurley truly only provided labor, Appellant's pleading covers that situation. If it is later found that Hurley did not provide materials, the language relating to materials becomes irrelevant.

C. The Contract contains terms that inure to the benefit of both parties.

Respondent has, on appeal, compiled a laundry list of twenty contractual terms to which it now objects. This list was never before the lower court. Appellant does not believe that it would be a helpful or efficient use of the limited space available in this brief, or of the Court's time, for Appellant to attempt to refute or explain each and every allegation (although Appellant is prepared to do so at the Court's request). However, many of these contractual provisions have already been discussed herein and do not stand for the propositions articulated by

Respondent (see, e.g., complaints numbered 2, 6, 7, 9, 17, and 20). Many of the remaining items are twisted or taken out of context. Some of the complained-about provisions actually benefit Respondent.

In entering into the Agreement, both Respondent and Appellant contracted for many rights – some of which inure to the benefit of one, some to the other. Respondent, for example, has the right to be paid for its work, the right to work in OSHA-compliant conditions, the right to withdraw from the contract, the right to renegotiate the contract, etc. The fact that Appellant also has some rights under the Contract does not make it oppressive or unenforceable.

## VI. Nothing prohibits Appellant's recovery of Attorney's fees from W.S. Contractors.

Respondent W.S. Contractors is in the unique position of having obtained an issue release from the Plaintiffs in favor of Appellant with respect to the scope of work of WS Contractors. Thus, Appellant has agreed that, as to W.S. Contractors, Appellant is only pursuing its claims for attorneys' fees.

Respondent W.S. Contractors has argued that Appellant cannot recover against it because the claim for attorneys' fees is barred by Section 32-2-10. This argument has been addressed at length above.

Respondent W.S. Contractors also argues that an unappealed order granting summary judgment to another subcontractor, McDaniel, in the underlying Retreat case can now collaterally estop Appellant from recovering from W.S. Contractors. In opposing McDaniel's motion for summary judgment, one of the many arguments made by Appellant was that it was allowed to seek attorneys' fees from McDaniel under the contract. McDaniel's motion was granted by a Form

4 Order without any indication of the grounds upon which the court relied in making its decision. Collateral estoppel requires that "the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Kunst v. Loree, 404 S.C. 649, 653, 746 S.E.2d 360, 362 (Ct. App. 2013). A Form 4 Order that provides no analysis of the Court's reasoning fails both the second and third elements required for collateral estoppel. The Court made no explicit ruling on the specific issue of attorneys' fees, and thus the issue was never "directly determined." Likewise, it is unclear that arguments made by McDaniel regarding attorneys' fees were "necessary" to support the judgment. Thus, collateral estoppel cannot be invoked here to prevent Appellant from pursuing its claims against W.S. Contractors.

## CONCLUSION

Because Appellant is not seeking indemnification for its own negligence, because Appellant is not collaterally estopped from pursuing its arguments, because Section 32-2-10 does not bar the relief sought, because the contracts are not unconscionable, and because any invalid contractual provisions are subject to severance, Appellant respectfully requests that this Court reverse the lower court's orders and allow Appellant to proceed on its contractual indemnity claims.

SIGNATURE PAGE TO FOLLOW

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