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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

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

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

v.

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

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

PETITION FOR CERTIORARI

Stephen P. Hughes, Esquire
Bar No.: 002805
William H. Cox, III, Esquire
Bar No.: 101991
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
SPHughes@hghpa.com
WCox@hghpa.com

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Certification

Counsel for the Petitioner certifies that the petition for rehearing was made and finally ruled upon by the court of appeals on June 25, 2025.

Questions Presented

1. Does S.C. Code Section 32-2-10 by its specific provisions apply only to agreements in indemnification, and does its silence regarding attorneys' fees reflect both legislative intent and a common law imperative that attorneys' fees do not fall within the scope of Section 32-2-10?

2. Is the Agreement's duty to defend provision subjected to the heightened clear and unequivocal standard that indemnity for liability provisions are required to meet and if so, does the Agreement's language meet the heightened standard?

3. Is a trial court's order that is on appeal, and thus on which judgment has not yet been finally entered, considered sufficiently "final" for collateral estoppel or res judicata purposes?

4. Does the court's refusal to view the evidence in the light most favorable to the non-moving party violate the rule of civil procedure and the Supreme Court's precedent regarding summary judgment?

Statement of the Case

This litigation arises out of alleged construction defects at Six Fifty Six Coleman Boulevard, a townhome community in Mount Pleasant, SC. [R. pp. 20-34]. Appellant Builders FirstSource – Southeast Group, LLC supplied windows and doors for the nine buildings constructed in 2013 and 2014 known as the "Ryland" phase, and Appellant's subcontractors, Respondents Hurley Services, LLC and Charleston Exteriors, LLC installed the windows and doors. Respondents Hurley Services and Charleston Exteriors performed their installation services pursuant to subcontract agreements entered into with Appellant in 2012. [R. pp. 196, 314]. Each Subcontract Agreement is derivative of the Master Subcontract Agreement Version 5/17/06, and each contains a provision that requires the subcontractor to defend and indemnify Appellant from

all suits resulting from property damage alleged to have arisen out of the subcontractor's performance of its work. [R. pp. 196, 314]. After being served with Plaintiffs' complaint, BFS filed third-party claims and subsequently cross-claims against Hurley Services and Charleston Exteriors for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. [R. pp. 85-114].

In discovery, the parties learned from Plaintiff's forensic engineer, Mr. Russell Mease, P.E., that notwithstanding the installation criteria imposed by the window manufacturer, no caulk had been installed inboard of *any* of the four perimeter nailing fins (flanges) of the windows at the Ryland buildings. [R. pp. 488, 489]. Mr. Mease explained that he determined the caulk was omitted because he saw no evidence at all of sealant behind the exposed nailing fins. Id. Further, Mr. Mease explained that he would expect to see it at the window corners and there was no evidence of the sealant at the jamb-sill intersection. [R. p. 491]. Petitioner's 30(b)(6) designee, Mr. Terry Rosamond, testified that Respondents were instructed to install the windows with sealant behind the jams and window head nailing flanges and to use Fortifiber FortiFlash self adhered flexible flashing at the sill nailing flange. R. p. 505. Mr. Rosamond reiterated that the Respondents were instructed to "apply a 3/8 bead of caulk around three sides of the window, the sides, the top and the head. And sometimes they require you to do a skip caulk on the bottom. That's -- a lot of times that's required by the builder which way they want it done." [R. p. 506]. Equally importantly, Edward Taylor, the 30(b)(6) designee for Respondent Charleston Exteriors, confirmed that the Petitioner's subcontractors were advised of these installation practices. [R. p. 513]. Mr. Taylor walked through Petitioner's window installation instructions in detail which confirmed installation of caulk inboard of the three nailing fins. [R. p. 514]. All of this evidence, taken together, establishes the following: (1) Petitioner's window installation instructions, which were to be

followed by Respondents, included the application of caulk inboard of the three nailing fins of the window at the jamb and head; but, (2) the Plaintiffs' retained forensic engineer determined that such caulking had been omitted, not only inboard of the bottom sill fin, but also inboard of the three remaining perimeter fins of the windows. This evidence creates a question of material fact as to the alleged negligence of the parties and should have precluded summary judgment. Under the circumstances, the trial court's determination and court of appeal's affirmation of an absence of any genuine issue of material fact is not supported by the record, and is contrary to the specific evidence presented.

In the underlying suit, Appellant, Hurley Services, and Charleston Exteriors have each reached individual settlements with the Plaintiffs resolving Plaintiffs' claims against each party for their own respective liabilities. However, Appellant's third-party claims against its subcontractors for defense costs – specifically for attorneys' fees and costs incurred in defending itself against the Plaintiffs' claims of negligence for window installation – survived the settlement. Respondent Hurley Services moved for summary judgment against Appellant's claims on January 22, 2020. [R. pp. 194-207]. Charleston Exteriors joined in said motion on February 21, 2020. [R. p. 208]. After hearing oral argument on the motion, the Trial Court issued an order granting the motion for summary judgment on April 29, 2020. [R. p. 1]. Appellant filed a timely motion for reconsideration, and all parties submitted additional briefs. The Trial Court denied the motion for reconsideration without a hearing by a Form 4 Order on August 27, 2020. [R. p. 6]. This appeal followed.

On appeal, this case was considered by a panel of judges composed of Judges McDonald, Vinson and Bromell. Petitioner's final briefs were submitted on September 10, 2021, and oral arguments were held on December 5, 2023. The court of appeals issued its order as an un-

published opinion on March 12, 2025, affirming the trial court's order. Petitioner filed a petition for rehearing on March 27, 2025. On June 25, 2025, the court of appeals issued a substituted opinion denying the petition for rehearing. Appellant Builders FirstSource-Southeast Group, LLC (hereinafter "Petitioner") respectfully petitions this Court for certiorari.

ARGUMENT

I. Whether S.C. Code Section 32-2-10 prohibits a party's ability to recover attorney's fees is a novel issue in South Carolina, and the Supreme Court should hear this case to clarify that under strict statutory construction, Section 32-2-10, which is in derogation of common law and expressly applies only to indemnification, does not apply to attorneys' fees, which are a separate form of recovery.

Section 32-2-10 governs agreements for indemnity against liability for damages; it is silent regarding attorneys' fees, and no South Carolina Court has yet addressed the question of whether the statute was intended to apply expansively to attorneys' fees or whether it was intended, as written, to apply only to indemnification for damages.

Section 32-2-10 prohibits contracts that indemnify the indemnitee "for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee . . . ." In this case, the "damages arising out of . . . property damage" are those damages for which Petitioner would have been responsible to the Plaintiff. There are no bodily injury damages in Six Fifty Six. However, Petitioner is not seeking damages as contemplated by Section 32-2-10. Instead, Petitioner is seeking reimbursement of attorney's fees incurred in defending against Plaintiff's claims for damages allegedly resulting from deficiencies in work performed by Respondents.

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 specifically states that it governs agreements for *indemnity* against liability for damages. 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 Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646-47 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). 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 imposes restrictions unknown at common law, it must be strictly construed. Because it uses the term "indemnify," a term that "has a well-recognized meaning in the law," it must be read only to apply to agreements governing indemnification; its meaning may not be expanded by the court to include agreements governing attorneys' fees.

While Section 32-2-10 addresses agreements governing the duty to indemnify, the statute is silent as to agreements imposing a duty to defend. The duty to defend and the duty to indemnify are two separate and distinct contractual obligations. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). "Although these duties are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the judgment, the duty to defend exists regardless of the [indemnitor's] ultimate liability to the [indemnitee]." Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977).

Finally, even if the Court were to determine for some reason that the contractual provision regarding attorneys' fees violated Section 32-2-10, the Court should sever the offending provision; then, Petitioner's claim for attorneys' fees would instead be fully encompassed by Paragraph One of the Indemnity Provision. Paragraph One provides that Respondents would indemnify Petitioner 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 Section 5 INDEMNITY is the exact type of agreement exempted by the statute.

For all of the foregoing reasons, this Court should grant certiorari to review the Record on Appeal which will confirm that Paragraph Three of Section 5 INDEMNITY is neither addressed nor prohibited by Section 32-2-10 and in the alternative Paragraph One of Section 5 INDEMNITY is expressly authorized by Section 32-2-10.

II. Whether a trial court's order on appeal is "final" for purposes of collateral estoppel or res judicata is a novel issue in South Carolina and a split issue in the Fourth Circuit; the South Carolina Supreme Court should hear this case to resolve the uncertainty and clarify the state of the law in South Carolina.

The issue of whether a trial court decision on appeal is sufficiently "final" for purposes of collateral estoppel is an issue of first impression in South Carolina. There are no cases on point. Even the cases cited by the parties herein have reached different conclusions, and the issue is split

amongst states in the Fourth Circuit. *Compare* Arkansas Best Freight Sys., Inc. v. H.H. Moore, Jr. Trucking Co., 244 Va. 304, 307, 421 S.E.2d 197, 198 (1992) ("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.") to Warwick Corp. v. Maryland Dep't of Transp., 573 F. Supp. 1011, 1014 (D. Md. 1983) ("Such a consequence would also be laughable. If a judgment was denied its *res judicata* effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation.")

The revised Opinion cites to S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) for the point that the application of offensive collateral estoppel is appropriate because the legality of the Agreement was actually litigated and directly determined in a prior action (BFS v MI Windows) and the legality of the Agreement issue was essential to the judgment. The revised Opinion also cites to Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) for the point that collateral estoppel prevents a party from relitigating an issue that was litigated and "determined by a valid and **FINAL** judgment" in a previous action. Emphasis added. Petitioner has repeatedly argued to the lower courts that the lower court's judgment on appeal is not *final* for res judicata or collateral estoppel purposes.

In S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., this Court officially adopted the general rules as set forth in the Restatement (Second) of Judgments. See Id. at 213. Consistent with what Petitioner has argued, the Restatement provides:

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

Restatement (Second) of Judgments § 13 (1982).

The Restatement's commentary on *finality* provides, "[i]t has often been suggested that finality for appellate review is the same as finality for purposes of res judicata, but that has probably never been quite true." Restatement (Second) of Judgments § 13 Requirement of Finality (1982). The Restatement commentary continues that, "a judgment will ordinarily be considered final in respect to a claim" if "it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular kind of adjudication." Id. Further, the Restatement commentary notes that "the test of finality" is "whether the conclusion in question is procedurally definite." Id.

The Restatement's definition of *finality* and test thereof are consistent with the approach taken by the United States Supreme Court which has noted that a decision of a lower court is not binding precedent in either a different or the same lower court or even on the same judge in a different case. Camreta v. Greene, 563 U.S. 692, 709, 131 S. Ct. 2020, 2033, 179 L. Ed. 2d 1118 (2011).

Here, the trial court invoked collateral estoppel using a judgment which is not final because it has been and remains subject to pending appellate review. Here, consistent with the Restatement, Petitioner argued to the lower court that it was inappropriate to consider such judgment for purposes of collateral estoppel. Id. ("The pendency of a motion for new trial or to set aside a judgment, or 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.").

Moreover, the court of appeals overlooked that no trial court has yet answered the question of whether Petitioner can recover, under the relevant indemnity provision of the respective contract, for the negligence of Respondent, regardless of whether Petitioner can recover indemnity for its own negligence. All prior cases cited as the basis for the lower court's collateral estoppel have involved the lower courts' consideration of Petitioner's claims purportedly seeking indemnity against Petitioner's negligence. No prior court has specifically addressed the issue – the specific claim Petitioner contends that it is seeking in litigation – of whether Petitioner may recover attorney's fees for Respondents' negligence in the window installation work performed by Respondents.

Additionally, the revised Opinion erroneously applies collateral estoppel where the claim and provision at issue were not litigated, much less discussed or contemplated by the prior court. Collateral estoppel requires that: (1) the issue in the current case was actually litigated in the prior action; (2) the issue was directly determined in the prior action; and (3) the issue was necessary to support the prior judgment. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Not one of the three elements necessary for collateral estoppel is present in Six Fifty Six. Here, in Six Fifty Six, BFS is seeking recovery of attorney's fees pursuant to paragraph three of Section 5 INDEMNITY of the Agreements and if necessary, alternatively, attorney's fees resulting from only Respondents' negligence pursuant to paragraph one of Section 5 INDEMNITY of the Agreements. The claims for attorney's fees and the provisions set forth in paragraph 3 of Section 5 of the Agreements were not at issue in the prior BFS v MI Windows litigation. Contrary to the court of appeals' mistaken belief, the parties in BFS v MI Windows did not litigate, much less discuss, nor did Judge Newman consider, much less rule upon, the issue before Judge Young in Six Fifty Six - Petitioner seeking recovery of

attorney's fees pursuant to paragraph three of Section 5 INDEMNITY of the Agreements. As such, Judge Newman's Order from BFS v MI Windows cannot serve as the basis for Judge Young to invoke collateral estoppel and grant summary judgment. Because the revised Opinion confirms that the court of appeals failed to review the record on appeal in Six Fifty Six, the Court must grant certiorari to correct the lower courts actions with respect to collateral estoppel.

The doctrine of collateral estoppel is only available *when the same issues of fact or law* are actually litigated and directly determined by valid and final judgment. Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) (emphasis added). The issue before the trial court in this case was *whether Petitioner may recover attorneys fees under the relevant provisions of the parties contract.* This issue has not been ruled upon by a single court to date, and thus, it is not subject to collateral estoppel.

Because the issue is one of novel impression in South Carolina, because the judgment is pending appellate review, because the issue in this matter has not been ruled upon by a single court to date, and because the claim and provisions at issue were not before Judge Newman in BFS v MI Windows, the Court should grant certiorari to provide clarity on *finality* and correct the lower court's errant application of collateral estoppel.

III. The Agreement's duty to defend provision is not required to meet the heightened clear and unequivocal standard, however, if it is, the language meets the same and provides that Respondent must defend Petitioner in clear and unequivocal terms.

The primary claim that Petitioner is seeking to pursue against the Respondents in Six Fifty Six is for all of the attorney's fees incurred in defending against the Plaintiff's claims for defective installation work performed by the Respondents. Petitioner is seeking reimbursement of the attorney's fees pursuant to the provision in the third paragraph of Section 5 INDEMNITY. The

specific language of the Agreements provide that the duty to defend is "...independent and separate from the duty to indemnify, ***and the duty to defend exist regardless of any ultimate liability or negligence of the contractor*** . . . ." **R. p. 548 (emphasis added).** Notably, the Concord & Cumberland case did not explicitly address whether the "clear and unequivocal" standard applied to claims for attorneys' fees. To the extent that this Court determines that the "clear and unequivocal" standard applies, Petitioner submits that the contractual provision is clear in imposing an obligation to defend regardless of any potential concurrent-negligence of Petitioner. By imposing the duty to defend "regardless of any ultimate liability or negligence of the contractor," the provision "clearly shows the parties' intent to absolve [Petitioner] of the consequences of its own concurrent negligence." Concord & Cumberland, 424 S.C. at 657 ("Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in an indemnity clause that clearly shows the parties' intent to absolve the indemnitee of the consequences of its own concurrent negligence.").

The Court should grant certiorari because the issue is of novel impression as to whether a defense provision is subjected to the heightened clear and unequivocal standard.

IV. The revised Opinion conflicts with the rule of civil procedure promulgated by this Court, as well as this Court's precedent regarding the summary judgment standard.

In affirming summary judgment despite the presence of a question of material fact, the revised Opinion evidences the court of appeals' disregard for Rule 56 (c) and this Court's precedent regarding the summary judgment standard. Specifically, the court of appeals revised Opinion rejects the Rule 56(c) requirement that judgment shall only be rendered if there is no genuine issue as to any material fact. Moreover, the court of appeals' revised Opinion disregards this Court's precedent that the evidence, and all the inferences that can be reasonably drawn from

the evidence, must be viewed in the light most favorable to the nonmoving party. Med. Univ. of S.C. v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004) (citing Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003)).

a. The court confirms that there is evidence in record that may establish the negligence of Respondent and serve as basis for Petitioner's window claims.

In the revised Opinion, the court of appeals concedes that Plaintiff's expert witness Russell T. Mease, PE, testified that he found no evidence al all that the required caulk was installed behind the windows' nailing fins. O. p. 2. While the revised Opinion sets forth what appears to be the court of appeals' criticisms regarding Mr. Mease's testimony, investigation, and findings, importantly, the court of appeals did not find the testimony or findings of Mr. Mease to be not relevant, or inadmissible. More importantly, the court of appeals also specifically acknowledged that the omission of caulk is evidence of the possible "concurrent" negligence of BFS in the installation of the windows at the project. The court's acknowledgment suggests corresponding concurrent negligence on the part of the Respondent. The respective negligence of Petitioner and Respondent is, notwithstanding the ruling of the lower courts, a matter of fact subject to jury determination. Thus, it was an error for the court of appeals to affirm the trial court's grant of summary judgment, as the revised Opinion confirms that there is a genuine issue of material fact pertaining to Respondent's installation of the windows, and that the court of appeals failed to consider the testimony and findings of Mr. Mease in the light most favorable to Petitioner, the non-moving party.

b. The court of appeals ignored relevant, admissible evidence in the record that creates a question of material fact to preclude summary judgment.

The revised Opinion confirms that the court of appeals ignored pertinent evidence in the record. Specifically, the court of appeals ignored that Mr. Mease testified that he reviewed "*every*

window fin exposed during [his] and the defense's investigation." R. p. 350, ll. 22-24 (emphasis added). The revised Opinion also confirms that the court of appeals ignored that Mr. Mease further testified that "*[i]f sealant is placed behind the nailing fin*, you *always* see it in the nail holes, and quite often behind the perimeter as it is squeezed out behind the fin. And there was no evidence of that in any of the windows that were *exposed.*" R. p. 350, ll. 1-6 (emphasis added). Moreover, the revised Opinion confirms that the court of appeals ignored Charleston Exteriors corporate designee testimony that "[y]ou've got to caulk. We used a whole tube of caulk in the nail flange, three - - the two sides and the top." R. p. 353, ll. 16-18. And that this installation protocol is what BFS instructed and expected Charleston Exteriors to perform in the window installation. R. p. 353, ll. 17-21. Further, the revised Opinion ignores that Mr. Mease testified that he has "no evidence of [caulk]" installed behind the nailing fins of the windows. R. pp. 251, ll 23-25, 252, ll1-2. Mr. Mease also testified that he "was able to see the window corners at the jamb-sill intersection" which is "another area where [he] would typically see sealant exposed from behind the fin." R. p. 252, ll 2-6. Moreover, Mr. Mease testified that when [sealant] is used, it "is typically visible because it gets all over everything." R. p. 252, ll 16-19. Mr. Mease explained, "the fact that I looked through all of my pictures and didn't see one stitch of sealant on anything leads me to believe clearly that there hasn't been any installed on the backs of the fins. It's stick, messy stuff that gets on almost everything." R. p. 252, ll 20-25.

The standard of review requires this Court to consider ALL the *evidence* AND all *inferences* MUST be viewed in the light most favorable to the *nonmoving* party. See Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005) (emphasis added). Because the court of appeals has misconstrued and/or failed to consider the relevant admissible testimony of

the Plaintiff's expert witness and a fact witness, the Court should grant certiorari to reverse the revised Opinion, as there is clearly evidence to support Petitioner's claims and certainly a question of material fact to preclude summary judgment.

c. The court of appeals misconstrued and inappropriately applied the provisions of S.C Code Ann. §40-11-270 (F) in support of its erroneous adoption of the Respondent's arguments.

The revised Opinion includes a footnote that states "BFS holds an unlimited commercial general contractor's license and is responsible – by statute – for the work of its unlicensed subcontractors. See S.C. Code Ann. Section 40-11-270(E) (Supp. 2024) ("The licensee is fully responsible for any violation of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee."). First, the court of appeals includes this footnote without any explanation and, more importantly, without any evidence in the record to support the argument advanced by Respondents. Moreover, the fact that Petitioner holds an unlimited general contractors license and Respondents do not, has no bearing on the fact that Respondents failed to install required caulk behind the window jamb fins and window head fins as instructed by Petitioner and as required by the building code and manufacturer installation instructions. Equally importantly, Petitioner too was an unlicensed contractor as it too was working under the license of the general contractor as no license by Petitioner was used for construction of the project.

Further, as South Carolina courts have previously noted, the pertinent licensing statutes are intended to protect the public interest. See S.C.Code Ann. § 40–1–10(A)–(B) (2011); Teseniar v. Pro. Plastering & Stucco, Inc., 407 S.C. 83, 97, 754 S.E.2d 267, 274 (Ct. App. 2014). The purpose of protecting the public interest by denying enforceability of contracts does not exist when dealing with claims between contractors. Teseniar at 407 S.C. 97 (quoting Kennoy v. Graves, 300 S.W.2d 568 (Ky.App.1957) ("The statute involved, and similar ones, are designed to protect the public

from being imposed upon by persons not qualified to render a professional service. The reason for the rule denying enforceability [of contracts] does not exist when persons engaged in the same business or profession are dealing at arm['s] length with each other. In the case before us, appellant was in a position to know, and did know, the qualifications of appellee. No reliance was placed upon the existence of a license, as presumptively would be the case if appellee was dealing with the general public."). Accordingly, at Six Fifty Six, neither Petitioner nor Respondents were required to have a license under the applicable statutory chapter, and, thus, section 40–11–270(E) does not preclude Petitioner from bringing claims against Respondents and the court of appeals' footnote citation is misplaced and in error.

This Court must grant certiorari to correct the court of appeals revised Opinion which, notwithstanding the presence of relevant, admissible evidence of Respondent's negligence in the record, errantly affirms the lower court's "finding that there exists no genuine issue of material fact precluding summary judgment."

CONCLUSION

Because the June 25, 2025 revised Opinion of the court of appeals contradicts the summary judgment rule promulgated by this Court and flies in the face of precedent, the Supreme Court should grant certiorari in this case and provide guidance to the courts, the parties, and the industry on the correct analysis of contractual claims.

HOWELL, GIBSON & HUGHES, P.A.

By: _____

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

Beaufort, South Carolina

July 25, 2025