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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

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

Opinion No. 2025-UP-082

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

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

AND

Builders FirstSource-Southeast Group, LLC, ...Appellant,
v.
MW Manufacturers, Inc.,...Third Party Defendant.

PETITION FOR WRIT OF CERTIORARI

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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. When a contractor files a general third-party claim against its subcontractor seeking to recover in contractual indemnity for all damages for which it might be held liable, does such claim include those damages for which the subcontractor is either solely or concurrently responsible?
2. Should a contract provision imposing an obligation to indemnify – specifically as it relates to a contractor's claim for damages for which its subcontractor is either solely or concurrently responsible – be construed in accordance with precedent and with the laws governing contracts generally, or should it for the first time be subject to the heightened "clear and unequivocal" standard that would be applicable if the contractor were solely seeking indemnity for its *own* negligence?
3. Should the court restrict its inquiry to the provision of the contract directly at issue, that is, the indemnification provision set forth in the first paragraph of the indemnity section of the contract, rather than considering provisions under which no cause of action has been brought in this case, and should the inquiry into the meaning of the contract always give defined terms in the parties' contract the limited meaning ascribed to them in the contract?
4. Does the court's refusal to honor the severance language in this contract, and its consequent refusal to sever the offending language and thus save the contract, violate the Supreme Court's precedent?
5. 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?
6. Did the court of appeals err in upholding summary judgment despite the existence of genuine issue of material fact as to Respondent's alleged negligence?

Statement of the Case

Builders FirstSource-Southeast Group, LLC ("Petitioner") respectfully petitions this Court to grant a writ of certiorari to review the court of appeals' revised Opinion dated June 25, 2025, which affirmed the trial court's order granting partial summary judgment to Hurley Services, LLC ("Respondent").

The underlying dispute arises from alleged defects in construction of a single-family residence, including alleged defects in the window installation work Respondent performed for Petitioner. Petitioner and Respondent's agreement contains an indemnity provision that Petitioner contends covers claims for damages caused by Respondent's negligent work. The trial court granted partial summary judgment to Respondent, finding that the indemnity provision was

unenforceable as contrary to public policy and statutory law, and further finding that the contractual indemnity claim was barred by collateral estoppel. The court of appeals affirmed, but its reasoning is internally inconsistent: while the revised Opinion correctly recognizes that Petitioner's claims are premised on Respondent's negligence in Respondent's installation of windows, it erroneously analyzed the contractual indemnity claim as if Petitioner were seeking recovery for damages resulting only from Petitioner's negligence. Because the court of appeals failed to analyze Petitioner's contractual indemnity claim for Respondent's negligence, this Court must grant certiorari to review and correct the lower court's mistake.

Dag and Susan Pavic Appeal

This litigation arises out of alleged deficiencies in construction of the Plaintiffs' residence, located at 1368 Penshell Place, Mount Pleasant, South Carolina. [R. pp. 68-69]. The residence was constructed by general contractor Saussy Burbank, and was completed on or about May 13, 2013. [Id]. By their First Amended Complaint, filed February 28, 2019, Plaintiffs Pavic alleged Petitioner was responsible for "defective/improper installation of windows and related flashing" during original construction. [R. p. 69]. By their Second Amended Complaint, filed March 18, 2019, the Plaintiffs, Pavic, designated Respondent as an additional defendant which, as a subcontractor to Petitioner, installed the windows and doors at the subject residence. The Plaintiffs also reiterated prior allegations of "defective/improper installation of windows and related flashing". Accordingly, Petitioner filed cross-claims against Respondent who actually performed the window installation work and Petitioner filed third-party claims against MW Manufacturers, Inc. who manufactured the windows. Contrary to Respondent's and the lower courts' contention, the Petitioner's claims against Respondent were and remain premised upon the Respondent's alleged negligence in the installation of the windows. See R. pp. 91-97, 124-130, 251-257, 260.

On October 31, 2019, following some initial discovery, Plaintiffs entered a Stipulation that they "are not asserting or alleging within the instant litigation against any defendant in this litigation (including but not limited to Builders FirstSource-Southeast Group, LLC), or against any third party defendant in this action, any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the windows installed at the subject residence, (identified herein as MW Series 800 Windows), and/or any component part of such windows, and/or in any MW installation instructions or requirements for those windows installed at the subject residence." [R. p. 261]. Likewise, the Stipulation provided that the Plaintiffs were not seeking recovery against any defendant or third-party defendant in connection with such claims. [R. pp. 261, 262]. Based on Plaintiffs' Stipulation that they were not pursuing any window product defect claim, Petitioner entered into a separate Stipulation with the window manufacturer, MW Manufacturers, Inc., dismissing the manufacturer without prejudice from the litigation. [R. pp. 263-264]. However, Plaintiffs claims against Petitioner and Respondent for alleged deficiencies in window installation remained pending. As such, Petitioner's cross-claims against Respondent for alleged deficiencies in window installation remained pending.

In discovery, the parties learned that Plaintiffs' forensic engineer Russell T. Mease, PE observed and documented purported deficiencies in the installation of the windows and related flashings at the Pavic residence. Specifically, Mr. Mease determined that

(a) the flexible Fortiflash rough opening flashing at the windows had not been properly weather lapped outboard of the woven building wrap installed beneath the window sill; See R. pp. 352-354 (line 10 page 189 through line 11 page 190 and lines 6-19 page 195 of February 21, 2020 deposition transcript of Russell T. Mease);

(b) the flexible Fortiflash material had not been installed to a sufficient depth within the window rough opening framing and the material did not appear to turn up the vertical leg of the jam, rendering the flashing ineffective; See R. pp. 355, 356 (line 23 page 186 through line 11 page 187 of February 21, 2020 deposition transcript of Russell T. Mease); and

(c) the head flashing of the windows had not been properly integrated (i.e. weather-lapped) with a building wrap above the windows. See R. pp. 357-358 (line 25 page120 through line 12 page 121 of February 21, 2020 deposition transcript of Russell T. Mease).

Mr. Mease further opined that the deficiencies in the window installation flashing resulted in water intrusion and associated damages at or around the window locations. See R. p. 359 (lines 2-15 page 118). Mr. Mease also testified that the appropriate integration of window flashings and adjacent weather resistant barrier were addressed within the relevant building code and he doesn't think it is necessary for guidance around that. [R. p. 360] (lines 11-19, page 166).

Notwithstanding the evidence in the record regarding Respondent's negligent window installation work, on August 27, 2020, Respondent filed a motion for partial summary judgment against the cross-claims of Petitioner. [R. pp. 265-267]. A hearing was held on the motion for partial summary judgment on October 1, 2020 before the Hon. Jennifer McCoy. [R. pp. 455-485]. On January 11, 2021, Judge McCoy issued a Form 4 Order granting Respondent partial summary judgment and requesting that Respondent's counsel submit a proposed order. [R. p. 1]. Respondent submitted a proposed order, and on January 22, 2021 Judge McCoy signed the Order which the trial court filed on January 25, 2021. [R. pp. 4-15]. Petitioner timely moved for reconsideration, but by a Form 4 Order dated February 16, 2021, the trial court denied Petitioner's motion. [R. pp. 16-18]. Petitioner filed a Notice of Appeal on March 18, 2021.

On appeal, this case was considered by a panel of judges composed of Judges McDonald, Vinson, and Bromell Holmes. Petitioner's final briefs were submitted on July 28, 2021, and oral arguments were held on December 5, 2023. The court of appeals issued its order as an unpublished 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 denied the petition for rehearing, but issued a revised Opinion. This petition for writ of certiorari follows.

Argument

I. Petitioner is not seeking indemnity for its own negligence, so the court of appeals erred by analyzing the contractual indemnity claim under such lens.

The revised Opinion opens with the court's recognition that Petitioner's claims against Respondent are premised upon Respondent's alleged negligence in the installation of the windows. See Opinion p. 1. The revised Opinion further recognizes that the Plaintiffs Pavic, by their stipulation, had specifically confirmed that they were not asserting or alleging any defect in the window products themselves. Nonetheless, not two paragraphs later, the revised Opinion affirms summary judgment by erroneously reasoning that "because … BFS sought 'indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation,' [t]he circuit court did not err in finding 'the indemnity and duty to defend provisions of the [Agreement] violate South Carolina public policy and § 32-2-10.'" The court's reasoning, and its conclusion, are flawed in several particulars. In the first instance, the court of appeals completely ignored the fact that Petitioner's contractual indemnity claim is premised only upon Respondent's negligence. See Opinion p. 1. Moreover, the court's conclusion conflicts with the fact that claims for defective window products were explicitly eliminated by Stipulation of Plaintiffs Pavic and by Stipulation of Petitioner. See R. pp. 260-264. Contrary to the court of appeals' errant reasoning, no defective window claims were made by Petitioner against Respondent. See R. p. 260; Opinion p. 1.

Moreover, the court's errant affirmation assumes without any supporting evidence in the record that the windows supplied by Petitioner were defective, and that the mere assertion of window defect claims in this or any litigation is equivalent to a dispositive determination of a

product defect. Equally importantly, the assertion of window defect claims in this or any other separate litigation has no bearing upon Petitioner's claims against Respondent for damages resulting only from Respondent's negligent acts or omissions in the installation of the windows.

The court of appeals was in error in its determination that Petitioner sought indemnity against damages resulting from window defects, when the uncontradicted evidence in the Record clearly established that no such claims had been asserted by the Plaintiffs against either Petitioner or against any other entity to the action. The Court relied upon such erroneous determination in support of its equally erroneous determination that the assertion of such claims by Petitioner, and the contract provision upon which Petitioner relied, were violative of public policy and of the provisions of §32-2-10. Due to such error, and because the Court overlooked the fact that Petitioner's claims are premised only upon the alleged negligence of the Respondent in the installation of the windows, this Court must grant certiorari to correct the error to assure appropriate consideration of the Petitioner's claims.

II. The court of appeals failed to follow precedent when it erroneously applied the heightened "clear and unequivocal" standard to Petitioner's contractual indemnification claim seeking recovery of damages resulting from only Respondent's negligence.

A. In applying the heightened "clear and unequivocal" standard to Petitioner's claim seeking indemnity for Respondent's negligence, the court of appeals ran afoul of this Court's precedent.

Section 2 of the revised Opinion erroneously affirms the trial court's application of the "clear and unequivocal" standard from Concord & Cumberland because "the relevant provisions of the Agreement are not sufficiently clear and unequivocal to require Hurley to indemnify BFS for BFS's own negligence." As highlighted above, the opening paragraph of the revised Opinion correctly noted that no claims by the Plaintiffs had alleged defects in window products, and that Petitioner's claims are premised on Respondent's negligence in window installation. Because

Petitioner is not seeking to require Respondent to indemnify for Petitioner's own negligence, it was error for the court of appeals to affirm the trial court's application of the heightened "clear and unequivocal standard."

The revised Opinion is not consistent with South Carolina precedent which has historically recognized that contractual indemnity provisions are to be construed in accordance with rules of construction of contracts generally. See Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989); Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). The revised Opinion is also not consistent with South Carolina precedent which recognizes the basic rule that when a party seeks to be indemnified from its own negligent acts, the heightened "clear and unequivocal terms" standard will be applied to the indemnity provision. See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 490, 763 S.E.2d 19, 20 (2014); Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003). In Concord & Cumberland, the court of appeals acknowledged and attempted to clarify those circumstances under which the respective standards are to be applied. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). However, here, the court of appeals' opinion runs afoul of and directly contradicts these precedential cases, including Concord & Cumberland.

In Concord & Cumberland, Superior was a general contractor who hired Muhler as its subcontractor. When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to their contract. Superior claimed that the contractual provisions required Muhler to indemnify Superior, and that Superior's right to indemnity included not only damages occasioned by Muhler's negligence, but also liability for the

negligence of Superior itself. Id. at 645. Muhler countered that the contract did not require it to indemnify Superior for Superior's wrongdoing. Id.

The trial court found, and the court of appeals agreed, that in order for Superior to prevail on a claim seeking indemnity *for its own negligence* (as opposed to indemnity for the negligence of its subcontractor), it was required to show that the contract language granting that right was set forth in clear and unequivocal terms. Id. at 649. The court of appeals noted that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence (but notably not for Muhler's sole or concurrent negligence). Id.

Because the court found that the language in Superior's contract did not meet the heightened standard, it held that the contract did not require Muhler to indemnify Superior for Superior's own negligence, and instead affirmed the trial court's decision that the language "*limited indemnification to damages resulting from the work Muhler performed.*" Concord & Cumberland at 645 (emphasis added). Thus, despite overt representations by the general contractor that it was seeking indemnity for damages resulting from both its own negligence and the negligence of its subcontractor, the court in Concord & Cumberland nonetheless allowed the general contractor to recover from its subcontractor for damages resulting from the work of the subcontractor. To arrive at this conclusion, not only did the Concord & Cumberland court recognize that Superior's claims for contractual indemnification encompassed both a claim to be indemnified for its own negligence as well as a claim to be indemnified for the negligence of the subcontractors, but the court then also separately analyzed the two types of claims: to the claim for indemnification for Superior's own negligence, the court applied the heightened clear and unequivocal standard and found that the contract could not meet that heightened standard;

however, for the second type of claim – Superior's claim to recover for its subcontractor's negligence – it then applied the analysis used with contracts generally (i.e., *not* the heightened standard), and under such analysis the court allowed Superior to recover for damages caused by its subcontractor (regardless of whether Muhler's negligence was sole or concurrent).

The court of appeals in this case, under factual circumstances nearly identical to those presented in Concord & Cumberland, has nonetheless reached a diametrically opposed result. Rather than apply the heightened "clear and unequivocal" standard only to the portion of claims allegedly seeking recovery for Petitioner's own negligence, the court applied the heightened standard to *every* contractual indemnity claim – including Petitioner's claim to recover for the negligence of its subcontractors. Applying the heightened standard, the court then determined that Petitioner's contractual indemnity claims failed as a matter of law, because the contractual provisions were not sufficiently clear and unequivocal to pass the heightened test. Such a broad application of the "clear and unequivocal" standard is contrary to established law, including the court's own precedent. However, here, Petitioner's contractual indemnity claim does not involve indemnity for its own negligence, so the court should have applied ordinary contract principles, not a heightened standard. By misapplying this standard, the court of appeals effectively imposed a burden on Petitioner that South Carolina law does not require under these facts. Moreover, the revised Opinion effectively rejects established and recognized precedent regarding indemnity claims such as Fed. Pac. Elec., Campbell, Ashley II, and Laurens Emergency Med. Specialists. Remarkably, nowhere did the court of appeals in this case attempt to distinguish its holding from that in Concord & Cumberland, and nowhere did the court criticize its previous analysis, its holding, or its results. By failing to do so, the revised Opinion disregards additional precedent regarding changing precedent. See Coleman v. Page's Est., 202 S.C. 486, 25 S.E.2d 559, 560

(1943)(A decision which is to overrule all former precedents and to establish a principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside.)

Unless the Supreme Court weighs in, the result is that the legal landscape will be filled with instability, unpredictability, and confusion regarding how to proceed in a situation where appellate courts are divided over whether or not a party may recover from its subcontractor in contractual indemnity for that subcontractor's negligence.

B. The Supreme Court should take this case because the consequence of allowing the ruling of the court of appeals to stand will upend the entire construction industry in ways the court never intended.

The revised Opinion creates new and unprecedented law governing contractual relations between parties. Specifically, it unsettles established South Carolina law regarding the allocation of risk between contractors and their subcontractors, and it upends the recognized contractual requirements for indemnity provisions. In ignoring and abandoning precedential cases, such as Laurens, Ashley II, and Concord & Cumberland, the court of appeal's revised Opinion has effectively created new and harmful law that will cause turbulence to the relationships of parties far beyond this case; virtually every contract currently in effect in the industry is now subject to challenge and left potentially without support.[1]

The contractual indemnity provision to which the court of appeals applied the heightened clear and unequivocal standard in this case are virtually identical to those provisions reviewed by

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1 See **South Carolina Ruling Has Major Implications on Indemnity Provisions and Collateral Estoppel** https://www.jdsupra.com/legalnews/south-carolina-ruling-has-major-9011993/

the court of appeals in Concord & Cumberland, where the court found such provisions to be adequate to support the contractor's claim for indemnity against liability caused by the negligence of its subcontractor – these provisions were not subjected to the clear and unequivocal standard. Moreover, these provisions are based on provisions promulgated by the AIA. This means they are standard terms, and they are present in nearly *every single contract* used in the industry. Never before had a court required these provisions to withstand the heightened clear and unequivocal analysis in order for one party to recover from a second party for that second party's negligence; instead courts analyzed them under the rules governing contracts generally, and under that level of scrutiny, the indemnification provisions were found acceptable. Thus, year after year, they were incorporated into contracts and year after year, serve as the basis for a contractual indemnification claim.

Now, for the first time, the holding of the court of appeals will require that a party's entire contract must meet the clear and unequivocal standard in order for that party to recover in contractual indemnity *at all*. The court of appeals looked at this standard AIA indemnification language and, by this opinion, has already held that this language fails to meet the heightened standard. [Opinion p. 3]. While the revised Opinion stands, no contractor who used AIA language will be able to recover from any negligent subcontractor for that subcontractor's negligence. Contractors will be left to bear the financial burdens of the mistakes of others, and subcontractors who performed negligently will face no consequences. To emphasize the magnitude of the situation, Petitioner points out that the contract at issue to this litigation contains a version of this AIA language that dates back to 2012, which means that thirteen (13) years of construction work is implicated in this upheaval. See R. pp. 486-497.

Petitioner does not believe that the court of appeals intended to create new law or to upend an entire industry. It thus asks that the Supreme Court take this case to clarify (1) that Petitioner has preserved a claim for contractual indemnity for the negligence of Respondent; and (2) that this portion of the claim for contractual indemnity is subject only to the general rules of construction for contracts generally, and not to the heightened "clear and unequivocal" standard.

III. The manner in which the court of appeals indefensibly parsed the parties' contract violated the long-established rules of contract interpretation memorialized in the precedential opinions of this Supreme Court.

The revised Opinion in Section 1 incorrectly states that "the terms of the Agreement seek to obligate Hurley not only to warrant the design and suitability of the defective materials BFS provided for installation but also to indemnify and defend BFS from property damage or personal injury resulting from the moisture intrusion issues related to the faulty windows." The court of appeals argues in Footnote 3 that the relevant agreement violates 32-2-10 because in Section 3 of the Agreement, Respondent must guarantee "the Work against defects in design, workmanship, and materials;" and because Respondent did not provide the windows, the Agreement attempts to make Respondent liable for more than its scope of work. Again, the record is clear and even the court confirmed in the opening paragraphs of the revised Opinion that the parties dismissed any and all claims relating to purported deficiencies in the windows and the only remaining claims were for purported deficiencies in window installation. Moreover, the court has overlooked that "Work" is a defined term in the Agreement and its definition is limited to *materials provided or services performed by Respondent.* [R. p. 486].

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting McGill v. Moore, 381 S.C. 179, 185, 672

S.E.2d 571, 574 (2009)). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (quoting McGill, 381 S.C. at 185, 672 S.E.2d at 574). When a contract is unambiguous, a court must construe its provisions according to the terms the parties used and as understood in their plain and ordinary meaning. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

Despite the explicit prohibition against creating an ambiguity by pointing out a single sentence or clause, the court of appeals has done exactly that. It points to the unrelated Warranty provision of the contract, where the subcontractor agrees to provide a warranty for the Work the subcontractor performed on the project. The court of appeals found this provision unconscionable because, by the court's interpretation, the provision purports to require the subcontractor to warrant work that Petitioner, rather than the subcontractor, performed. But this erroneous interpretation was reached only because the court read this provision in isolation AND the court ignored and did not address the fact that "Work" is a defined term, limited, by *the explicit provisions of the contract*, to the *materials provided and/or services performed by the subcontractor*. [R. p. 486]. The opinion evidences that the court of appeals failed to give credit to the defined term "Work" as required under the contracts. The court of appeals' failure to do so directly contradicts this Court's precedent on honoring terms used by the parties in the contract. See Schulmeyer, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (explaining courts must interpret a contract "according to the terms the parties used"). When read with the proper definition, as the parties intended, the Warranty section no longer can be interpreted to require something illicit, and thus, the Warranty section can no longer be the basis of *any* the court's holdings listed above.

In addition to failing to acknowledge defined terms in the contract, the lower court and court of appeals reviewed terms and provisions of the contract which have absolutely no relevance whatsoever to the claims pending before the court. For example, the court focused on the warranty provisions of the contract despite the fact that there is no *warranty* claim before the court[2].

The court of appeals in picking and choosing select language from non-relevant provisions to create conflicting terms, directly contradicts this Court's precedent that a court may not review isolated portions of a contract or single sentences or clauses to create ambiguities. See McGill, 381 S.C. at 185, 672 S.E.2d at 574; Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975); Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014). Because the court of appeal's opinion conflicts with this Court's precedent on basic rules of contract interpretation, this Court should grant certiorari.

Here, Respondent contracted with Petitioner to perform services which included and were limited to installation of windows and doors. Stated differently, Respondent did not contract to provide windows. Accordingly, there is no obligation by Respondent to guarantee against the window products themselves, nor against the design of the windows. The only guarantee Respondent made in the Pavic case relates to the workmanship Respondent performed in the installation of the windows. Therefore, the warranty provision and contractual indemnity claim remain well within the bounds of South Carolina public policy and statutory law.

Because Section 1 of the revised Opinion confirms that the court overlooked and/or misapprehended the plain language of the Agreement limiting the obligations of Respondent to only Work performed by Respondent, the relevant contract provisions do not violate South

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[2] While Petitioner pled breach of warranty causes of action, Petitioner conceded during oral arguments at the trial court that Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630 (Ct. App. 2015) is valid law and renders the warranty claims as disguised indemnity claims and thus it did not appeal the trial court's ruling granting summary judgment on such basis.

Carolina public policy or Section 32-2-10 and the Court must grant certiorari to correct the errors of the lower courts.

IV. The failure of the court of appeals to sever any problematic language in the contract conflicts with this Court's precedent regarding severance provisions and severability of contracts.

Section 4 of the revised Opinion states, "[b]ecause the Agreement's indemnity provisions are replete with terms that violate South Carolina law and public policy, these terms cannot be appropriately severed; thus the circuit court did not err in declining to address the severability provision of the Agreement." Section 4 of the revised Opinion does not identify the specific provisions that purportedly violate South Carolina law and public policy, nor does it identify the specific South Carolina law or public policy at issue. Nevertheless, Section 1 of the revised Opinion discusses the circuit court finding " 'the indemnity and duty to defend provisions of the [Agreement] violate South Carolina public policy and Section 32-2-10' because, through these provisions, BFS sought 'indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation.' " However, as explained above in Section I of the Petition, this portion of Section 1 of the revised Opinion is incorrect as Petitioner's indemnity claim is premised only on Respondent's negligence in installing the windows and the parties dismissed any and all claims for defective window products. Moreover, as explained in Section I of the Petition, the court's issue with the guarantee language in the Agreement is eliminated by a proper understanding of the pending claims and a proper reading of the plain and unambiguous language of the Agreement's Section 1 Work and Section 3 Warranty. As noted above, none of the foregoing provisions violate South Carolina law or public policy. Section 2 of the revised Opinion discusses the application of "the clear and unequivocal standard of Concord & Cumberland to the relevant language of the Agreement." Section 2 of the revised Opinion

continues, "the relevant provisions of the Agreement are not sufficiently clear and unequivocal to require Hurley to indemnify BFS for BFS's own negligence." However, as noted above in Section II of the Petition, Section 2 of the revised Opinion is incorrect as Petitioner is not seeking to have Respondent indemnify Petitioner for Petitioner's own negligence. As the court notes in the opening section of the revised Opinion, Petitioner's claim for indemnity is premised only on Respondent's alleged negligence in installation of the windows. Because Section 4 of the revised Opinion relies upon incorrect positions taken by the court in Sections 1 and 2 of the revised Opinion, the Court must grant certiorari to reverse the revised Opinion's affirmation of the trial court's grant of partial summary judgment.

Contrary to the finding of the court of appeals, the contract, when the terms and provisions are given their proper, reasonable, and plain meaning, is not replete with illegal or unconscionable terms. As such there is no basis to support the court's failure to sever, when the provisions in fact comply with relevant law. Petitioner is not asking any court to re-write the contracts; however, to the extent necessary, it is asking the Court to honor the intent of the parties and sever any provision that violates South Carolina law.

"Whether an illegal provision in an otherwise valid contract may be separated from the contract is a matter of intent of the parties" The Beach Company v. Twillman, Ltd., 351 S.C. 56, 64, 56 S.E.2d 63, 867 (Ct. App. 2002). The presence of a severability clause, such as the clause incorporated within each of the contracts at issue here, should be treated as strong evidence of the parties' intent to sever unenforceable language. Jane Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880-81 (Ct. App. 2020). Equally importantly, this Court has long since held that the primary purpose in the construction of contracts is to discover the intention of the parties, which,

when discovered, will be given effect regardless of technical forms of expression. Am. Nat. Bank of Winter Haven, Fla., v. Caldwell, 166 S.C. 194, 164 S.E. 613, 615 (1932).

The Agreement, at issue here, contains separate distinct sections relating to separate matters, including, respectively, *Section 1 Introduction, Section 2 Materials and Workmanship, Section 3 Warranty, Section 4 Insurance, Section 5 Indemnity, Section 6 Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America, Section 7 Default and Damages, Section 8 Payment to Subcontractor*, and *Section 9 Miscellaneous*. [R. pp. 486-497]. Moreover, each section includes separately numbered sub-sections and or separate paragraphs and some of the sub-sections or separate paragraphs include separately numbered provisions or clauses. For example, Section 5 Indemnity, the section that provides for Petitioner's contractual indemnity claim, in addition to its first paragraph upon which Petitioner relies in support of its indemnity claim, is further characterized by three other separate paragraphs, each addressing separate and distinct circumstances under which an obligation to indemnify may arise between the parties. [R. pp. 491-492]. Each of the separate sections of the Agreement, and the distinct sub-sections or paragraphs within the respective sections, relate to separate rights and or responsibilities and are all subject to severance if needed without compromising the goals of the contracting parties.

Moreover, the contract also includes a severability provision that explicitly states

> "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."

[R. p. 497].

In light of the format of the Agreement and the severability provision, there can be no dispute that the parties intended for any unenforceable language to be severed and the remainder of the contract be left intact and in effect. Moreover, the revised Opinion declining to honor the severance provision defies reason as certainly, no party to the contract intended that the contract be rendered wholly unenforceable, as all parties to the contract relied upon the contract for business purposes and their livelihood.

The revised Opinion directly contradicts this Court's precedent which acknowledges that for centuries, the law has stricken illegal parts from contracts and upheld the legal parts, as long as the central purpose of the parties' agreement did not depend upon the illegal part. Huskins v. Mungo Homes, LLC, 444 S.C. 592, 595-96, 910 S.E.2d 474, 477-78 (2024)(citing Pigot's Case, 77 ER 1177, 1179 (1614); United States v. Bradley, 35 U.S. 343 (1836)). Moreover, our courts perform severance even where the parties may not have intended such action to take place. Id.

Accordingly, this Court must grant certiorari to review and correct the errors of the court of appeals.

V. 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 indemnity for Respondent's negligence in the window installation work performed by Respondent.

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 under the relevant indemnity provision for Respondent's negligence* (whether sole or concurrent). 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, and because the issue in this matter has not been ruled upon by a single court to date, the Court should grant certiorari to provide clarity on finality and correct the lower court's application of collateral estoppel.

VI. A genuine issue of material fact exists regarding Respondent's negligence.

The revised Opinion confirms in Section 6 that the record includes testimony from Plaintiff's forensic engineer Russ Mease that the windows were improperly installed. O. p. 5. The revised Opinion does not hold that the engineer's testimony is not relevant or not admissible evidence. Instead, the revised Opinion points to other facts not at issue, and to facts that are absolutely disputed between the parties, and appears to weigh the court's facts to affirm the trial court's grant of partial summary judgment. Such action by the court of appeals is in disregard of the rules of civil procedure promulgated by this Court which provide that the evidence, when viewed in the light most favorable to Petitioner, creates a genuine issue of material fact precluding

summary judgment. See Rule 56, S.C.R.C.P. The standard of review requires the courts 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 ignored the relevant admissible testimony of the Plaintiff's expert 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.

Further, the revised Opinion confirms that the court of appeals incorrectly concluded that Petitioner's instructions or inspections absolve Respondent of its independent duty to install the windows properly. To support this incorrect argument, the court of appeals included a footnote in the revised Opinion 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 Respondent's assertion that the lower court and now court of appeals wholesale adopted. Moreover, the fact that Petitioner holds an unlimited general contractors license and Respondent does not, has no bearing on the fact that Respondent failed to install the windows 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.

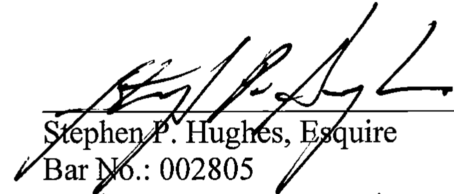
Further, as South Carolina courts have previously noted, the pertinent licensing statutes are intended to protect the public interest. See S.C.Code Ann. § 40–1–10(A)–(B) (2011); Teseniar v. Pro. Plastering & Stucco, Inc., 407 S.C. 83, 97, 754 S.E.2d 267, 274 (Ct. App. 2014). The purpose of protecting 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 the Pavic project, neither Petitioner nor Respondent was required to have a license under the applicable statutory chapter, and, thus, section 40–11–370(C) does not preclude Petitioner from bringing claims against Respondent, and the court of appeals' footnote citation to Section 40-11-270(E) is misplaced and in error.

For these reasons, the Court must reverse the court of appeals' revised Opinion and remand Petitioner's claims for trial as the question of whether Respondent was negligent should be decided by a jury, not by the court of appeals.

Conclusion

Because the revised Opinion of the court of appeals contradicts its own finding – that Petitioner's claims are premised solely on Respondent's negligence but then analyzes the claims as if they seek indemnity for Petitioner's sole negligence – warrants the Supreme Court granting review. Moreover, the revised Opinion misapprehends statutory law, misapplies controlling precedent, dismisses genuine issues of material fact, and fails to honor settled contract principles.

As such, 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 contract provisions and contractual indemnification claims.



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