

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

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

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SC Court of Appeals

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.

RECORD ON APPEAL, VOLUME TWO

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF CHARLESTON) CIVIL ACTION NO: 2016-CP-10-03455

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

Plaintiffs,

vs.

Winsor South, LLC and Jeffrey M. Thomas,
 individually, and on behalf of a class of
 construction defendants; Southeastern
 Recapitalization Group, LLC; WCM
 Construction, LLC; Jonathan J. Thomas; AC
 Heating and Air Conditioning Service, Inc.;
 ACME Doors, Inc.; Alpha Omega Construction
 Group, Inc.; Atlantic Construction Services, Inc.;
 Buck Lumber and Building Supply, Inc.;
 Builders FirstSource, Inc.; Builders FirstSource-
 Atlantic Group, LLC, Builders FirstSource-
 Florida, LLC a/k/a Builders FirstSource-Florida
 Design Center, LLC; Builders FirstSource-
 Southeast Group, LLC; Charlotte Flooring, Inc.;
 Diria Tawi Painting, Inc.; East Coast Wall
 Systems, Inc.; Fogel Services, Inc.; G&S Home
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 Construction; RB's Trim, Inc.; Sharon's Painting
 and Construction a/k/a Sharon's Painting, LLC;

**BUILDERS FIRSTSOURCE-
 SOUTHEAST GROUP, LLC'S
 MOTION FOR
 RECONSIDERATION AND/OR
 ALTERATION/AMENDMENT**

Davis Tile; Timothy Mitchell; Electrical Design & Construction, Inc.; Fine Builders, LLC; Speedtruss, Inc.; Argentino Jose Campos d/b/a as Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating & Air, Inc.; Cahill Contracting, LLC; Cohen's Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting, LLC; David Tile; Timothy Mitchell; Electrical Design & Construction, Inc.; Hurley Services, LLC; Charleston Exteriors LLC; Jorge Diaz aka Jorge Louis Paz; San Luis Construction, Inc. nka Roofing America Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC; Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vasquez aka Alfonso Rodriguez, Sr.; and John Does 55-75

Defendants.

Defendants.

**TO: IAN W. FREEMAN, ESQ., COUNSEL OF RECORD FOR HURLEY SERVICES,
LLC AND CLAY W. OLSON, ESQ., COUNSEL OF RECORD FOR CHARLESTON
EXTERIORS, LLC**

YOU WILL PLEASE TAKE NOTICE that the Defendant, Builders FirstSource-Southeast Group, LLC, by and through its undersigned counsel, Howell, Gibson and Hughes, P.A., will appear before the Honorable Roger Young, presiding Judge, Charleston County Court of Common Pleas, on the tenth (10th) day after service hereof, or at such other time and place as may be directed by the Court, and then and there move for reconsideration and appropriate alteration and/or amendment of the Court's Order of April 29, 2020.

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

1. The Court failed to consider evidence of the sole or concurrent negligence of Hurley Services, LLC and Charleston Exteriors LLC, and correspondingly erred in determining that there are no genuine issues of any material fact;
2. The Court erred in its determination that Builders FirstSource, by its claims for contractual indemnity, seeks recovery of payments made to the plaintiffs, without regard to the fault of either Builders FirstSource or its subcontractors.
3. The Court erred in its determination that the Builders FirstSource crossclaims are barred by the doctrine collateral estoppel, inasmuch as the order upon which the Court relied in such determination is subject to a pending appeal, and is thus not final;
4. The Court erred in its application of the “clear and unequivocal” standard in barring the claims of BUILDERS FIRSTSOURCE:
 - (a) Builders FirstSource currently seeks recovery of attorney’s fees and costs, pursuant to the defense obligations imposed by the

relevant provisions of its master subcontractor agreements. To the extent that the “clear and unequivocal” standard, as articulated by the Court of Appeals in the matter of Concord and Cumberland, may be applicable to such claims, that standard is satisfied by the contract provisions at issue here;

- (b) To the extent that this Court may determine that recovery upon the Builders FirstSource crossclaims is limited to attorney’s fees arising out of the negligent acts or omissions of the subcontractor indemnitors, the Court was in error in its application of the “clear and unequivocal” standard, which is relevant only in those instances where the indemnitee seeks recovery of losses occasioned by its own negligent acts or omissions.

ARGUMENT

- 1. The Court failed to consider evidence of the sole or concurrent negligence of Hurley Services and Charleston Exteriors, and thus erred in determining that there is no genuine issue of any material fact.**

Summary judgment is only proper if “... there is no genuine issue as to any material fact”, and the moving party is “entitled to judgment as a matter of law.” Rule 56(c) SCRCP. To determine whether summary judgment is appropriate, the Court must view “the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the non-moving party” Hancock v. Mid-SMgmt. Co., 381 S.C. 326, 329, 673 S.E.2nd 801, 802 (2009). To survive a motion for summary judgment, the non-moving

party need only show a mere scintilla of evidence. Id. (holding that “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit am mere scintilla of evidence in order to withstand the motion for summary judgment”).

The Plaintiffs’ claims, as asserted against Builders FirstSource and its subcontractors, Hurley Services, LLC and Charleston Exteriors, LLC, are premised upon alleged deficiencies in installation of windows during original construction of the nine (9) Ryland buildings. In support of those allegations, the Plaintiffs offered testimony of their primary forensic expert, professional engineer Russell T. Mease. Mr. Mease determined that the window installations were defective, based upon his finding that they failed to include the application of caulk inboard of any of the perimeter nailing fins of the windows, contrary to the requirements imposed by the window manufacturer.

Subcontractors Hurley Services and Charleston Exteriors have represented, incorrectly, that the only deficiency in installation, identified by the plaintiffs’ expert, Mease, was the omission of caulk inboard of the sill nailing fin (flange). The subcontractors have argued further that any failure to install caulk inboard of the sill nailing fin was a result of specific instructions from Builders FirstSource, effectively precluding any Builders FirstSource recovery in indemnity.

Contrary to the representations of the subcontractors, however, Mr. Mease in fact testified that, notwithstanding the installation criteria imposed by the window manufacturer, no caulk had been installed inboard of any of the perimeter nailing fins (flanges) of the windows at the Ryland buildings. The testimony of Mr. Mease, in addressing window installation issues, included the following:

3 As I understand it, your criticism
4 relative to window installation on the Ryland
5 side of the project relates to a document that
6 was produced to us last night, this MI window --
7 I believe you referred to it as a cut sheet --
8 that's been marked as Exhibit 100.

9 A. Yes.

10 Q. And concerning that sheet, there's a
11 reference there that says, Caulk under mounting
12 fin entire perimeter before fastening.
13 And that detail and statement on the
14 Exhibit 100 is the basis of your opinion that
15 there's something wrong with the installation of
16 the windows as to the MI windows?

17 A. Yes.

Deposition of Russell T. Mease, p. 595 l. 3 – 17.

Mr. Mease continued and explained how he was able to determine the absence of the required sealant under the nailing fins:

18 Q. What's your basis for determining that
19 there is not caulk installed under the perimeter
20 fin?

21 A. Well, last night I went through my
22 pictures and looked at every window fin that was
23 exposed during our investigation and the
24 defense's investigation, and there's no evidence
25 at all of sealant behind the nailing fin.

1 If sealant is placed behind the nailing
2 fin, you always see it in the nail holes, and
3 quite often behind the perimeter as it is
4 squeezed out behind the fin. And there was no
5 evidence of that in any of the windows that were
6 exposed.

Deposition of Russell T. Mease, p. 595 l. 18 - p. 596 l. 6.

Mr. Mease confirmed his opinion in subsequent testimony as follows:

23 Can you definitively opine that there's
24 a complete absence of caulk behind the nailing
25 fins of the windows installed on the Ryland

1 buildings?

2 A. I have no evidence of it. I was able to
3 see the window corners at the jamb-sill
4 intersection. That's another area where I would
5 typically see sealant exposed from behind the
6 fin.

7 And, again, I have no evidence that
8 there's any sealant behind these windows, and I
9 believe that to be the case.

Deposition of Russell T. Mease, p. 598 l. 23 – p. 599 l. 9.

Moreover, although it is undisputed that the Builders FirstSource installation practices included the substitution of Fortiflash at the sill in lieu of caulking inboard of the sill nailing fin (flanges), it is equally undisputed that the Builders FirstSource installation practices included the application of caulk inboard of the remaining window perimeter nailing fins (flanges) (at jambs and head). The Builders FirstSource window installation practices were specifically addressed within the testimony of Terry Rosamond, the Builders FirstSource 30(b)(6) designee, as follows:

1 Q. How were the windows installed at 656?

2 A. How were they installed? To my
3 understanding, the windows were put in level,
4 plumb and square with sealant behind three --
5 well, first there's a sill pan created with

6 Fortifiber flashing in the bottom sill and up
7 approximately 6 inches each side.

8 The window is installed with sealant
9 behind the three flanges, two jambs and a head.
10 Then it's put in with fasteners, and I think
11 there's a fastener in every nail slot, best I
12 understand. Then you tape your jamb tape on each
13 side of the jambs. Then you take your head
14 flashing and then pull your house wrap down over
15 the head flashing for the tape.

Deposition of Terry Rosamond, p. 150 l. 1 – 15.

Mr. Rosamond continued as follows:

18 Q. So you set your window in. Walk me
19 through it, really basic. What's next after you
20 set the window? Or did I skip a step? You show
21 up, the rough opening is there, and it may or may
22 not have been cut. If it's not cut, then the
23 window installer cut it. Then what?

24 A. Like I said, you create what we call a
25 sill pan in the bottom using the FortiFlash

1 flashing. Normally cut it 12 inches longer than
2 the opening so it can wrap 6 inches up each jamb
3 side. And then on the corners, we normally would
4 put like a butterfly patch on those corners, to
5 seal any of those corners so there's no water
6 penetration.

7 Next step would be to install your
8 window. You'd apply a 3/8 bead of caulk around
9 three sides of the window, the sides, the top and
10 the head. And sometimes they require you to do a
11 skip caulk on the bottom. That's -- a lot of
12 times that's required by the builder which way
13 they want it done.

Deposition of Terry Rosamond, p. 151 l. 18 – p. 152 l. 13.

Equally importantly, Edward Taylor, the 30(b)(6) designee for Charleston Exteriors, confirmed that the Builders FirstSource subcontractors were advised of these Builders FirstSource installation practices, offering testimony as follows:

17 Q. And he didn't give you any field
18 instructions before you started the work?

19 A. Not anything further than what we were
20 already instructed on, how they expect the
21 windows to be installed. There's nothing to add
22 to that. But he inspects everything from the
23 time -- taping the windows, butterflying the
24 corners, to caulking the windows,

Deposition of Edward Taylor p. 46 ll. 17 – 24.

Mr. Taylor walked through the Builders FirstSource window installation instructions in detail which confirmed installation of caulk inboard of the three nailing fins:

14 Q. Okay. And then what's the next step?

15 A. Next step is to install the window
16 itself. You've got to caulk. We used a whole
17 tube of caulk on the nail flange, three -- the
18 two sides and the top. Put your shims in the
19 bottom at the sill, set your window, plumb,
20 level, nail your corners. Once you nail off your
21 corners, you nail off the rest of the window, and
22 you have to stop.

Deposition of Edward Taylor p. 49 ll. 14 – 22.

The record before the Court is clear in establishing that the installation criteria, to

be followed by the Builders FirstSource installation subcontractors, included the application of caulk inboard of the jamb and head nailing fins (flanges), procedures which were consistent with the requirements of the window manufacturer. The record is equally clear that the plaintiffs' retained expert, Russell Mease, determined that the such caulking had been omitted, not only inboard of the sill fin, but also inboard of the remaining perimeter fins of the windows installed at the subject complex.

The aforesaid testimony by Mr. Mease is consistent with a factual determination that the window installers, notwithstanding instructions by Builders FirstSource requiring the installation of caulk inboard of three of the perimeter nailing fins, nonetheless failed to install such caulking inboard of any of the perimeter fins. Such a failure, if established, would be attributable to the negligence, not of Builders FirstSource, but of the installation subcontractors. It is for losses resulting from such subcontractors' negligence that Builders FirstSource is currently seeking contractual indemnity.

Under the circumstances, the Court determination of an absence of any genuine issue of material fact is not supported by the record, and is contrary to the specific evidence presented.

At the very least, the aforesaid testimony, offered, respectively, by Russell Mease, Terry Rosamond, and Edward Taylor, establishes a scintilla of evidence sufficient to present a genuine issue of material fact as to whether the subcontractors were negligent, such as to entitle Builders FirstSource to the contractual indemnity which it seeks. Such an issue of material fact precludes an award of summary judgment in favor of Hurley Services or Charleston Exteriors.

2. The Court erred in its determination that Builders FirstSource, by its claims for contractual indemnity, seeks recovery of payments made to the plaintiffs without regard to the fault of either Builders FirstSource or its subcontractors.

As emphasized during the course of oral argument on the subcontractors' motions for summary judgment, the indemnity claims, as asserted by Builders FirstSource in this action, are premised upon rights afforded pursuant to its master subcontractor agreements. Those master subcontractor agreements include not only specific provisions relating to "Indemnity" (at section 5, subparagraph 1), and to "the duty to defend" (at section 5, subparagraph 3), but also specific severability provisions, as set forth in section 9. Each of those provisions, and the rights afforded thereunder, are specifically subject to relevant law, and the rights pursued by Builders FirstSource are consistent with such law, as articulated by the Court of Appeals in the matter of Concord and Cumberland 424 S.C. 639, 645, 819 S.E.2d 166, 169–70 (Ct. App. 2018), reh'g denied (Oct. 18, 2018).

Contrary to the implicit determinations of this Court, Builders FirstSource, by its indemnity claims, is seeking recovery against subcontractors, not for payments in satisfaction of the plaintiffs' claims, arising out of any negligence of Builders FirstSource itself, but rather for recovery of attorney's fees, arising out of sole or concurrent negligent acts or omissions of its subcontractors in the performance of their work. Moreover, and notwithstanding the Builders FirstSource contention that any deficiencies in window installation arose solely from the negligent acts or omissions of its subcontractors, it has nonetheless declined to pursue recovery of payments made in satisfaction of the plaintiffs' damage claims. Builders FirstSource seeks recovery only, to the extent allowed by law, attorney's fees and costs incurred in defending against the plaintiffs' claims which include

alleged negligent acts or omissions of its subcontractors in the performance of their work.

It bears repeated emphasis that the Builders FirstSource claims, as asserted against its subcontractors, are premised upon the provisions of subparagraphs 1 and 3 of Section 5 of the Master Subcontractor Agreement. Section 5, at subparagraph 1, states, in its entirety as follows:

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDENIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITY, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEYS FEES (SUCH LEGAL COSTS TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLEGENT

ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THE SUBJECT AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

Master Subcontractor Agreement, p. 6, Section 5 paragraph 1.

By the specific provisions of paragraph 1 of Section 5, the subcontractors have undertaken to defend and indemnify Builders FirstSource against losses arising out of negligent acts or omissions of the subcontractors in the performance of their work for Builders FirstSource.

Equally importantly, and as more fully detailed under Argument 4 hereof, the relevant provisions of the Master Subcontractor Agreement, as set forth in subparagraph 3 of section 5, are clear and unequivocal in imposing, upon the subcontractors, the duty to defend BUILDERS FIRSTSOURCE, a duty which is "...independent and separate from the duty to indemnify...". The duty to defend exists "regardless of any ultimate liability or negligence of the contractor [indemnatee]...".

By contrast, the indemnification provisions of paragraph 2 of Section 5 relate solely to claims

"...ARISING OUT OF OR RESULTING FROM BODILY INJURY TO,

**OR SICKNESS, DISEASE, OR DEATH OF, THE
SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR
REPRESENTATIVES OF THE SUBCONTRACTOR, OR ANY OF
ITS SUBCONTRACTORS...**

Master Subcontractor Agreement, p. 6 Section 5 paragraph 2 (Emphasis added).

The provisions of the paragraph 2 of Section 5 address potential claims entirely distinct from those involved in the instant action, and are irrelevant to the Court's consideration of the propriety of the Builders FirstSource claims.

Paragraphs 1, 2, and 3 of Section 5 of the Master Subcontractor Agreement impose obligations upon the subcontractors, and afford rights to Builders FirstSource, "to the fullest extent permitted by law", and are clearly subject to any limitations imposed thereunder.

Moreover, Section 9 of the Master Subcontractor Agreement, at subsection (f), states clearly that

"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 Subcontractor Agreement, p. 12 Section 9(f).

Under the circumstances, to the extent that the Court may determine that any provision of the Master Subcontract Agreement may be invalid, such provision is subject to reformation.

Finally, Builders FirstSource would note that the Court, in implicit support for its conclusion that Builders FirstSource has sought indemnity, against payments made to plaintiffs, allegedly occasioned by its own negligence, purports to quote nonexistent paragraphs of the Builders FirstSource pleadings. Nowhere within its pleadings does Builders FirstSource seek recovery of payments made to plaintiffs “without regard to the fault of either Hurley or Builders FirstSource.” By contrast, Builders FirstSource has, as confirmed by explicit representations to this Court, sought recovery only of such attorney’s fees and costs as are authorized under the relevant provisions of its Master Subcontract Agreement and by law.

3. Judge Newman’s February 3, 2020 Order is on appeal and therefore the Court cannot find that the Builders FirstSource crossclaims are barred by the doctrine of collateral estoppel.

The Court incorrectly determined that the Builders FirstSource crossclaims are barred by the doctrine of collateral estoppel, relying upon Judge Clifton Newman’s Order filed on February 3, 2020 in the case of Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al, Case No. 2018-CP-08-2547. The February 3, 2020 Order of Judge Newman is currently on appeal, and affords no basis for a finding of collateral estoppel.

The doctrine of collateral estoppel is available only when issues of fact or law are actually litigated and determined by *valid and final judgment*. Carman v. South Carolina

Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) (emphasis added). Under the doctrine of collateral estoppel, once a *final judgment* on the merits has been reached in a prior claim, re-litigation of those issues actually and necessarily litigated and determined in the first suit are precluded in any subsequent action based upon a different claim. Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 450 S.E.2d 616 (S.C. App. 1994) (emphasis added). Here, as previously noted to the Court during oral arguments and indicated on the record, the referenced Order of Judge Newman is on appeal, and thus it cannot represent a “final” judgment. (See “Notice of Intent to Appeal,” attached hereto as Exhibit A). Because the February 3, 2020 Order of Judge Newman is not final, it cannot be used as the basis for collateral estoppel.

4. The Court erred in its application of the “clear and unequivocal” standard in barring the claims of Builders FirstSource:

- a. Builders FirstSource currently seeks recovery of attorney’s fees and costs, pursuant to the defense obligations imposed by the relevant provisions of its master subcontractor agreements. To the extent that the “clear and unequivocal” standard, as articulated by the Court of Appeals in the matter of Concord and Cumberland, may be applicable to such claims, that standard is satisfied by the contract provisions at issue here;**

Hurley Services and Charleston Exteriors have argued that the Builders FirstSource claims for contractual indemnity are based upon provisions that are neither clear nor unequivocal, and thus fail as a matter of law, (citing Concord and Cumberland Horizontal Property regime v. Concord and Cumberland, LLC, 424 S.C. 639 (S.C. Ct. App. 2018)). In support of this assertion, Hurley and Charleston Exteriors argue, erroneously, that there are multiple conflicting indemnity provisions within the relevant master subcontractor agreement, that those provisions are unclear, and that such

provisions, imposing obligations upon the contractors, are prohibited by law.

The instant action is distinguishable from Concord and Cumberland in that Builders FirstSource is not seeking indemnity, for payments made in satisfaction of the plaintiffs' claims, to the extent that such claims may arise out the negligent acts and omissions of Builders FirstSource itself. Builders FirstSource is seeking only recovery of attorney's fees and costs, expended in defending against the plaintiffs' claims, arising out of the performance of the subcontractors' work.

The contractual provisions by which the subcontractor indemnitors have undertaken to defend Builders FirstSource meet any heightened burden which might be imposed by Concord and Cumberland. The duty to defend, as imposed by the contractual provisions, is "...independent and separate from the duty to indemnify, and the duty to defend exist regardless of any ultimate liability of negligence of the contractor, ...".

The contractual provision is thus clear in imposing an obligation to defend, regardless of the negligence of the indemnitee, Builders FirstSource.

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

Similarly, §32-2-210, prohibiting indemnification against liability occasioned by the

sole negligence of the indemnitee, neither addresses nor prohibits separate obligations to defend.

The obligations imposed by the subcontractors here, to defend the interests of Builders FirstSource, are clearly and unequivocally set forth within the relevant Master Subcontract Agreements, are not violative of any public policy of the State of South Carolina, and should be upheld by this Court. The Court's grant of summary judgment, precluding such attorneys' fees, was an error.

- (4) (b) To the extent that this Court may determine that recovery upon the Builders FirstSource crossclaims is limited to attorney's fees arising out of the negligent acts or omissions of the subcontractor indemnitors, the Court was in error in its application of the "clear and unequivocal standard, which is relevant only in those instances where the indemnitee seeks recovery of losses occasioned by its own negligent acts or omissions.**

Assuming arguendo that the Court of Appeals analysis applies to claims for defense costs, the Court nonetheless erred in granting summary judgment. The Court, in granting summary judgment to the defendants, misconstrued the ruling of the Court of Appeals in Concord and Cumberland, and erroneously applied the "clear and unequivocal" standard in construction of the contractual provisions at issue. Such standard, if applicable to claims for defense costs, is appropriate only where the indemnitee seeks indemnity against losses occasioned by its own negligence. The provisions at issue here, where Builders FirstSource seeks indemnity against losses occasioned by the negligence of its subcontractors, should have been interpreted "in accordance with the rules for construction of contracts generally." Concord and Cumberland, citing Campbell vs Beacon Mfg. Company, 313 S.C. 451, 438 S.E.2nd 271 (Ct. App. 1993)

In granting Hurley Services' and Charleston Exteriors' motions for summary judgment, the Court has misunderstood the rule adopted by the Court of Appeals in Concord and Cumberland, 424 S.C. 639, 645, 819 S.E.2d 166, 169–70 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). In that case, the general contractor sought indemnity from its subcontractor/indemnitor, not only for losses caused by the negligence of the subcontractor, but also for losses occasioned by the negligence of the general contractor /indemnatee itself. The Court determined that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from the indemnitee's own negligent acts unless such intention to indemnify is expressed in "clear and unequivocal" terms.

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

*The Concord and Cumberland Court, (consistent with appropriate rules of contract construction) did **not** hold that the general contractor could not recover from the subcontractor for the subcontractor's own negligence, nor did it impose the heightened standard of linguistic scrutiny to that set of circumstances.*

As confirmed during oral argument upon Hurley Services' and Charleston Exteriors' motions, the contracts at issue in this case contain indemnity provisions virtually identical to the indemnity provisions considered by the Court of Appeals in Concord and Cumberland. To the extent that the Court of Appeals would apply the same analysis to

attorney's fees, the Court has nonetheless misconstrued by application of the clear and convincing standard. Unlike in Concord and Cumberland, Builders FirstSource is not seeking to have the subcontractors indemnify Builders FirstSource for Builders FirstSource's own negligence; Builders FirstSource is, by contrast, seeking to have the subcontractors indemnify Builders FirstSource for the *subcontractors'* own negligence. Thus, the heightened standard of "clear and unequivocal" has not been triggered under Concord and Cumberland, and applying it to the contract here was in error. As in Concord and Cumberland, the Court should have allowed Builders FirstSource to recover from its subcontractors for the subcontractors' own negligence.

Appropriate application of the Concord and Cumberland standards, even if applicable, to the contractual provisions at issue in the instant proceeding clearly authorizes pursuit of contractual indemnity for damages caused by Hurley Services' and Charleston Exteriors' own negligence (as opposed to losses occasioned by the sole or concurrent negligence of Builders FirstSource), and, equally clearly, precludes summary judgement in favor of Hurley Services and Charleston Exteriors. Thus, the April 29, 2020 Order must be altered and amended accordingly such as to deny the subcontractors' motions for summary judgment.

CONCLUSION

Based on the foregoing, it is respectfully submitted that this Court should revise the April 29, 2020 Order and deny Hurley Services' and Charleston Exteriors' motions for summary judgment.

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May 11, 2020

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

vs.

Winsor South, LLC; et al.,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2016-CP-10-03455

**HURLEY SERVICES, LLC'S
MEMORANDUM IN OPPOSITION TO
BUILDERS FIRSTSOURCE
SOUTHEAST GROUP, LLC'S MOTION
FOR RECONSIDERATON AND/OR
ALTERATION/AMENDMENT**

Defendant Hurley Services, LLC ("Hurley"), submits this Memorandum in Opposition to Co-Defendant Builders FirstSource-Southeast Group, LLC's ("BFS") Motion for Reconsideration and/or Alteration or Amendment filed on May 11, 2020 (the "Motion"). Hurley respectfully requests that BFS's Motion be denied as there is no basis for it under Rule 52, SCRCPC, and BFS has not established the basis required under Rule 59, SCRCPC, for this Court to reverse its Order entered April 29, 2020, granting Hurley's and Charleston Exteriors' Motions for Summary Judgment against the cross-claims of BFS (the "Order"). This Court's April 29th Order Granting Summary Judgment is proper in all respects and should stand.

Background

BFS, Hurley, and Charleston Exteriors have independently settled with Plaintiffs. Hurley and Charleston Exteriors filed separate Motions for Summary Judgment against BFS on grounds that BFS's cross-claims a) improperly seek indemnification, and b) fail because BFS's Master Subcontractor Agreement ("Master Agreement") is violative of South Carolina law. On December 6, 2019, the Honorable Clifton Newman previously entered summary judgment against BFS in another construction action, Builders Firstsource-Southeast Group, LLC v. MI Windows and

Doors, Inc., et al., Case No. 2018-CP-08-02547, pending in this Circuit. Judge Newman ruled that the indemnification clause in the same BFS Master Agreement failed to meet the requisite standards under South Carolina law and, thus, was unenforceable as a matter of law. In asking Judge Newman to reconsider the court's grant of summary judgment, BFS admitted in its signed and filed motion papers that Judge Newman correctly found that the Master Agreements do not comply with the clear and unequivocal standard imposed by South Carolina law.¹ Although Judge Newman entered an Amended Order on February 3, 2020, that court's grant of summary judgment as to BFS's claims for indemnity on grounds that BFS Master Agreement is unenforceable as a matter of law was maintained.

In this action, BFS did not file with the Court any opposing memorandum or affidavits in opposition to Hurley's and Charleston Exteriors' Motions for Summary Judgment in this case. A hearing was held on the Motion for Summary Judgment on March 5, 2020 before the Honorable Roger M. Young. At the hearing, counsel for BFS stipulated on the record that BFS was reducing and limiting its claim for indemnity to only attorneys' fees and costs incurred by BFS in defending this suit, and that BFS was not seeking to recover its costs to settle with Plaintiffs despite the broad allegations of its cross-claims. Such concessions, however, did not save BFS's Master Agreement from being violative of South Carolina law.

Attorneys' fees are merely a form of damage claimed by BFS. The terms of the Master Agreement upon which BFS relies for recovery of such defense costs do not meet the applicable clear and unequivocal standard or South Carolina's Anti-Indemnity Statute and, thus, they fail as a matter of law. In its April 29th Order, this Court properly found that no genuine issue of material

¹ Charleston Exteriors was one of the successful movants in the prior action where Judge Newman dismissed BFS's cross-claims as a matter of law.

fact existed and that Hurley and Charleston Exteriors were entitled to have their Motions for Summary Judgment granted. This Court correctly found that the Master Agreement's indemnification clauses are unenforceable as a matter of law. Hurley submits that the Court should maintain its Order dismissing BFS's cross-claims and thereby deny BFS's Motion.

ARGUMENT

1. BFS's Motion to Reconsider, Alter, or Amend is an improper restatement of its prior oral arguments to the Court and otherwise an improper attempt at new arguments.

Under SCRCP Rule 59(f), a Rule 59(e) motion may in the discretion of the court be determined on the briefs filed by the parties without oral argument. Hence, the grant or denial of a Rule 59(e) motion is within the discretion of the circuit court. Such motions are limited in scope and are not to be used to repeat the same arguments previously presented. Dockins v. Benchmark Commc'n, 180 F.R.D. 294, 295 (D.S.C. 1998). A motion to alter or amend cannot be granted where the moving party simply seeks to have the Court rethink its decision. Id.

Our South Carolina Supreme Court has explained that, "our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24 (2004). A party may file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. Id. A party must file such a motion when an issue or argument has been raised, but not ruled upon, in order to preserve it for appellate review. Id. Additionally, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." Anderson Mem'l Hosp., Inc. v. Hagen, 313 S.C. 497, 498 (Ct. App. 1994) (citation omitted).

Here, BFS does not assert that the Court misunderstood or failed to fully consider its arguments. Further, there is no assertion that the Court failed to rule upon an issue raise by BFS.

BFS's Memorandum in Support of its Motion is merely 1) a restatement of some of the unsuccessful oral arguments previously made by counsel, and 2) an improper attempt to inject some new arguments previously unraised. BFS's motion should be denied on these grounds.

2. This Court correctly determined that BFS's cross-claims for contractual indemnity are barred by the doctrine of collateral estoppel.

This Court correctly found that principles of collateral estoppel serve to bar BFS's cross-claims because the Honorable Clifton Newman's Amended Order of February 3rd recently found this same version of the BFS Master Agreement to be unenforceable as a matter of law on grounds that the indemnification clauses are not clear and unequivocal and they violate South Carolina's rules of contract construction. See Exhibit 9; Amended Order Granting Charleston Exteriors, LLC and ECC Contracting, LLC's Motions for Summary Judgment in the matter of Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., Case No. 2018-CP-08-02547 (S.C.Com.Pl. Feb. 3, 2020).² In striking down BFS's Master Agreement's indemnity clauses, Judge Newman determined that the indemnification provisions "are confusing at best and deceptive at worst." Id. at 6. Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct.App. 2009).

BFS's only substantive challenge to this Court's finding that collateral estoppel prevents BFS from relitigating the enforceability of its Master Agreement (which was found by Judge Newman to be against public policy and unlawful), is that the February 3rd Amended Order of Judge Newman is on appeal. However, the appeal of a final judgment does not undermine its

² All references to Exhibits herein are to those filed with Hurley's and Charleston Exteriors' Motions for Summary Judgment.

status as a final judgment; the law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's judgment, and thus, will not be a barrier to applying collateral estoppel. See Huron Holding Corporation v. Lincoln Mine Operating Co., 312 U.S. 183, 189, 61 S. Ct. 513, 515, 85 L. Ed. 725 (1941) (finding finality of a court's judgment is not lost because appeal is pending until and unless reversed); see also Finality not lost because appeal is pending, 6 Annotated Patent Digest § 38:36.

A final judgment is one that "finally determines the rights' of the parties." First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992). Rule 201(a) SCACR, provides that an: "[a]ppeal may be taken, as provided by law, from any final judgment or appealable order." The status of Judge Newman's Amended Order as a final judgment is what makes the order appealable in the first instance. BFS's argument that Judge Newman's Amended Order is not final is unsupported by settled law.

Refusing to recognize the finality of trial court orders on appeal for collateral estoppel purposes, as BFS would have this Court do, would undermine judicial efficiency at the trial court and appellate court levels and potentially result in conflicting opinions and duplicitous appeals on the exact same legal issues. This Court's prior decision that collateral estoppel applies to prevent re-litigation of the issues by BFS was the right one and should remain in force.

3. BFS should be further estopped from relitigating the issue of enforceability because BFS admitted in its Motion to Reconsider before Judge Newman that the Master Agreement's indemnification provision does not comply with South Carolina law.

In moving Judge Newman's court to reconsider its ruling granting summary judgment, BFS made an admission that is fatal to the indemnification provisions in its Master Agreement. In its Motion to Reconsider filed with the court, BFS admitted as follows:

This Court's December 6, 2019 Order correctly finds that the indemnity language at issue does not meet the elevated standard of being clear and unequivocal and thus the Plaintiff cannot maintain indemnification claims for Plaintiff's negligence.

See Exhibit C to Charleston Exteriors' Motion for Summary Judgment, p. 3.

Under South Carolina law, a party is bound by an admission contained in a court filing prepared and signed by his attorney. See Youn v. Martin, 254 S.C. 50, 58 (S.C. 1970) (finding that judicial admissions by counsel for a party apply to matters of law, as well as factual issues, and where such a mixed question is admitted by a party's attorney the conclusion of law has been waived). An admission in one action may be received in evidence in another action involving a different party. Id. BFS's admission that the indemnity language does not comply with the clear and unequivocal standard applied under South Carolina is binding and BFS should be estopped by this Court from now contradicting that admission. To hold otherwise would frustrate the judicial integrity of our courts. Because BFS has admitted that the indemnification provisions in its Master Agreement do not meet the legal standard under South Carolina law, therefore, this Court should continue to find the provisions unenforceable.

4. This Court correctly determined that BFS's cross-claims for indemnity fail as a matter of law because they are based on contractual provisions that are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law.

BFS's contractual indemnity claims are based upon a BFS "Master Subcontractor Agreement," labeled "Version – 5/17/06," that Hurley executed on May 14, 2012 (the "Master Agreement"). The Master Agreement contains multiple indemnity clauses, including Sections 5 and 8.i. The indemnity provisions must be viewed as a whole, and, against the relevant statutory and case law South Carolina relating to indemnity agreements. This Court was correct in finding that the indemnity provisions contained in the Master Agreement, are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law.

BFS admitted at both the hearing on the motions for summary judgment and in its Motion for Reconsideration that it is no longer seeking indemnification for amounts BFS paid to settle with Plaintiffs, but now only seeks to be indemnified for the attorneys' fees it has incurred. "[BFS] has ... declined to pursue recovery of payments made in satisfaction of the plaintiffs' damage claims. Builders FirstSource seeks recovery only ... [of] attorney's fees and costs incurred in defending against the plaintiffs' claims." BFS Motion, p. 11. This admission does not rescue the unlawful indemnification provisions found in the BFS Master Agreement; rather, a closer review of the indemnity provisions highlights how the Master Agreement fails to comport with the clear and unequivocal standard, violates South Carolina's Anti-Indemnity Statute found at S.C. Code § 32-2-10, and is against public policy.

a. BFS's recently stipulated limitation of its claim for indemnification of damages to the attorneys' fees incurred in defense does not alter the result that its indemnification clauses are unenforceable as a matter of South Carolina law.

Under South Carolina law, recoverable damages may include attorneys' fees when so provided by contract or statute. See Rimer v. State Farm Mut. Auto. Ins. Co., 148 S.E.2d 742, 746 (S.C. 1966). However, when recovery of attorneys' fee is by contract, the contractual terms providing for indemnification of such damages must still comply with South Carolina law and, here, the BFS Master Agreement fails to do so. The indemnification for attorneys' fees provision is tied with the defense costs clause in Section 5 of the Master Agreement labeled "Indemnity." Contrary to BFS's assertions, Section 5 does not identify separately enumerated subparagraphs – all the terms are bundled in Section 5. Significantly, the defense costs clause provides in pertinent part: "... **THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES.**" Exhibit A to Motion for Summary Judgment,

Master Agreement, Section 5 (Emphasis added). BFS is identified as the “Contractor” in the Master Agreement. Accordingly, by its terms, **even if BFS was solely liable for causing the loss that gave rise to the claim for defense, the Master Agreement purports to place entire the duty to defend and responsibility to indemnify for the costs to defend upon BFS’s subcontractor.**

Ultimately, BFS could be solely liable for the entire loss, but the Master Agreement provides for the indemnification from the subcontractor in favor of BFS for defense costs regardless of BFS’s negligence and proven liability. Section 5 of the Master Agreement provides that the defense costs obligation ends once its finally proven in court that the claims against BFS are barred by the applicable statute of limitations, but contains no exception to the extent the claims are the result of the negligence or sole negligence of BFS. Although the end of Section 5 provides an exception for defense and indemnity for claims arising from design defects and the professional negligence of architects and engineers, it does not provide any exception relative to the fault of BFS in whole or part. Section 8.i. of the Master Agreement also provides for indemnification of attorneys’ fees and expenses and amounts paid in settlement without regard to the fault of BFS. See Exhibit A. All of these indemnity provisions which disregard the negligence of BFS violate South Carolina law and are unenforceable.

b. The Master Agreement does not comply with the clear and unequivocal standard imposed by the Concord and Cumberland Court.

Sections 5 and 8 of the Master Agreement are replete with confusing and contradictory terms, including that BFS be indemnified for defense costs regardless of its fault, even its sole negligence and ultimate liability on a claim. For these reasons, the Master Agreement’s indemnity clauses are, as both this Court and Judge Newman previously properly found, not “clear and unequivocal” as required by South Carolina law. BFS’s recent strategic limitation of its indemnity claims (as argued) to the recovery of attorneys’ fees does not serve to distinguish or except the instant action from the clear and unequivocal standard referenced in Concord and Cumberland, and BFS’s argument in this

respect rings hollow. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 172 (S.C. App. 2018), reh'g denied (Oct. 18, 2018) (finding that contractual indemnification clauses that fail to meet the standard of being clear and unequivocal when an indemnitee is seeking to recover against an indemnitor for an indemnitee's concurrent negligence are against public policy). Even though BFS's counsel may contend that BFS does not intend to recover in indemnity for BFS's concurrent or sole negligence, that is not what the BFS Master Agreement provides for or what BFS's cross-claims in this action allege. For all of the aforementioned reasons, the defense and attorneys fees' terms of the Master Agreement remain "confusing at best and deceptive at worst" and still do not meet the clear and unequivocal standard. BFS's recent concessions about the scope of its indemnity claims do not cure, but rather bring focus upon the defects in the BFS Master Agreement.

c. The indemnity and defense provisions of the Master Agreement are violative of S.C. Code of Laws § 32-2-10.

Contrary to BFS's newly-proffered argument that Section 32-2-10 does not apply to its claim for attorneys' fees,³ liability for attorneys' fees equates to liability for "damages" within the meaning of South Carolina's Anti-Indemnity Statute. To the extent, if any, attorneys' fees are owed under a contractual defense obligation, such would be a recoverable element of "damages" under South Carolina law. See Rimer v. State Farm, supra 148 S.E.2d at 746. Accordingly, when BFS seeks indemnification of attorneys' fees incurred "REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR [BFS]", BFS is seeking the recovery of money damages

³ Upon information and belief, this argument was not previously presented to the Court during oral argument at the hearing on the Motions for Summary Judgment and should not be properly considered now. Case law is clear that a party cannot use a Rule 59 motion "to present an issue that could have been raised prior to the judgment but was not so raised." Anonymous v. State Board of Medical Examiners, 323 S.C. 260, 473 S.E.2d 870, 880 (Ct. App. 1996);

regardless of whether BFS is ultimately found to be solely negligent. Therefore, BFS's indemnity provisions run afoul of the prohibitions of South Carolina's Anti-Indemnity Statute, are against public policy, and unenforceable. The Court's Order granting Summary Judgment should stand.

d. This Court should reject BFS's improper invitation to rewrite its unenforceable Master Agreement ex-post facto.

Apparently acknowledging now that there are parts of its Master Agreement that violate South Carolina law, BFS relents on its position that the Master Agreement indemnity provisions are without issue, and falls back to the position that the Master Agreement should be reformed and the contract re-written by the Court to comply with South Carolina law. BFS's argument that the Master Agreement should be judicially rewritten is without support and ultimately unavailing. "It is not the function of the court to rewrite contracts for parties." ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011).

South Carolina law is settled that if any of the indemnity provisions of the Master Agreement fail and are unenforceable under South Carolina law, all of the indemnity provisions fail – including the duty to defend provisions contained Sections 5 and 8.i. of the Master Agreement. South Carolina courts will not "blue pencil" an agreement and rewrite a contract's terms to make it comply with the law. See Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 694 S.E.2d 15, 18 (S.C. 2010) (recognizing that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy). Such a reformation effort would prove fatal to BFS's strategically restricted claims for attorneys' fees because it would necessarily involve removing the defense provisions of the Master Agreement which by their unlawful terms apply regardless of the negligence and ultimate liability of BFS.

This Court properly found that the indemnity provisions of the Master Agreement are against public policy and fail as a matter of law. It should reject the request in BFS's Motion for the Court to rewrite its unlawful contract.

5. BFS's recent concessions about damages obviate the need to consider the window installation issue, however, further admissions by BFS reflect that BFS is indeed seeking to recover for its negligence.

Because BFS has stipulated that it is no longer seeking to recover amounts paid to Plaintiffs to settle their claims and the Master Agreement's terms for indemnification of defense costs are on their face unenforceable as a matter of law, the BFS Motion's lengthy discussion about caulking and the manner of window installation at the project is a superfluous distraction; the issue does not need to be reached to dismiss BFS's cross-claims on summary judgment. However, further admissions in BFS's Motion underscore that BFS is seeking to recover for its negligence.

BFS's Motion admits "it is undisputed that the **Builders FirstSource installation practices included the substitution of Fortiflash at the sill in lieu of caulking inboard of the sill nailing fin (flanges)....**" BFS Motion, p. 7 (Emphasis added). When BFS's corporate designee was asked during a Rule 30(b)(6), SCRCF, deposition "how the windows were installed at 656 [the Project]", he admitted that "the window is installed with sealant behind the three flanges [fins], two jambs and a head. Id. 7, 8. These admissions prove fatal to BFS's claims for indemnity under the flawed Master Agreement. As Charleston Exteriors' corporate designee testified, BFS's superintendent "inspects everything from the time – taping the windows, butterflying the corners, to caulking the windows." Taylor Dep., BFS Motion, p. 10. It is undisputed that BFS directed and supervised the window installation work by its unlicensed subcontractors at the Project, including the manner of caulking the nailing fins.

Plaintiffs' expert Russ Mease's only criticism about the window installations at the 656 Coleman Project was that, from his review of window installation photographs, he did not see the presence of caulk squeezed out from behind the window sill fin. Ex. 5 p. 595, l. 3 – p. 596, l. 6. Mease did not look for this condition during destructive testing at the Project and it's not featured in his 146-page report; only in hindsight did he look for exposed caulk during a review of photographs before his third day of deposition. Id. Mease admitted, however, that the caulk would have been applied behind and obscured by each window's nailing fin, but he was looking for signs where it may have squeezed out from behind the fin upon installation. Ex. 5, p. 596, l. 15–22. Mease further admitted that neither he nor the defense experts removed any window from a rough opening in the Ryland Phase of the Project. Exhibit 5, p. 596 l. 7 – 14. Significantly, windows that were inspected by Mease and the experts had flashing tape that completely covered the jamb fins along either side of the window and the head fin at the top of the window. Ex. 5, p. 597 l. 3 - 6. Accordingly, with the jamb and head fins covered by tape (and with removing any window from the rough opening), Mease had no basis for knowing whether caulk was in fact present or not because he could not see those fins.

BFS's Motion addresses at length Mease's unfounded opinion that he never saw caulk anywhere, but BFS omits Mease's testimony that the flashing tape covered the window jamb and head fins and that Mease never removed a window itself. Without doing so, Mease never exposed the areas to confirm whether caulk was present at the jambs and heads. The only opinion with any foundation, however weak it may have been, that Mease gave at deposition was that he did not see caulk squeezed out from behind a window's *sill fin* or extrude through a *sill fin* nail hole. Significantly, BFS admittedly instructed its subcontractors not to apply caulk at these *sill fin* locations as a best practice so that any incidental water could weep out of the window and

wall assembly. Ex. 6 p. 168 l. 7 – p. 168 l. 6. BFS’s Motion admits the substitution of flashing tape behind the sill flange in lieu of caulk was BFS’s practice and, thus, confirms BFS’s concurrent if not sole negligence was the basis of Plaintiffs’ claims. Thus, there is no genuine issue of material fact that Plaintiffs’ claims were predicated upon BFS’s negligence concerning installation of the subject windows in the Ryland phase and/or in the supervision of such work.

Accordingly, this Court should deny BFS’s Motion to Reconsider, Alter, or Amend the Judgment.

6. As a licensed Contractor, BFS is as a matter of law liable for all acts of its unlicensed subcontractors, and, therefore, BFS’s argument that its indemnity claims are limited to subcontractors’ concurrent negligence is legally flawed.

BFS is a licensed contractor that supplied the subject windows and provided turn-key installation of the windows for Ryland Group; such installation work was performed by unlicensed subcontractors, including Hurley under BFS’s direction and supervision. Under South Carolina law, the “licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.” S.C. Code Ann. § 40-11-27(E). Thus, as a matter of law, BFS had an obligation to supervise the work of its subcontractors and BFS is by statute fully responsible if the subcontractors committed any violation of the building code (if any).

While Hurley and Charleston Exteriors flatly deny any negligence in the performance of their work under the direction and supervision of BFS, it bears pointing out that BFS is legally “fully responsible” for the unlicensed subcontractors’ work under Section 40-11-127(E). Such full and total responsibility by statute completely undermines BFS’s assertion that it is seeking to recover only for negligence of its unlicensed subcontractors (which negligence is denied). Put differently, as a matter of law, under Section 4-11-127(E), the negligence of an unlicensed

subcontractor is the negligence of the licensed general contractor. This statute reinforces that BFS is seeking to recover in indemnity for its own negligence under the circumstances and that all of the attendant requirements under South Carolina law apply in this context. This Court's April 29th Order properly found that BFS's Master Agreement failed to meet those requirements and was unenforceable.

WHEREFORE for the foregoing reasons, Hurley respectfully requests this Court deny BFS's Motion to Reconsider its Order Granting Summary Judgment in favor of Hurley and Charleston Exteriors.

Respectfully submitted,

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Charleston, South Carolina
May 26, 2020

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Six Fifty-Six Owners Association, Inc.

Plaintiffs,

v.

Winsor South, LLC, et al.

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2016-CP-10-03455

CHARLESTON EXTERIORS, LLC'S BRIEF IN
OPPOSITION OF BUILDERS FIRST SOURCE
SOUTHEAST GROUP'S MOTION TO
RECONSIDER JUDGE ROGER YOUNG'S
ORDER GRANTING SUMMARY JUDGMENT

Charleston Exteriors, LLC (hereinafter collectively referred to as "Defendant") files this memorandum in opposition to Third Party Plaintiffs Builders First Source Southeast Group's ("BFS") Motion to Reconsider the Court's Order granting the Defendants Charleston Exteriors and Hurley Services Motions or Summary Judgment. As counsel for Hurley Services ("Hurley") filed a memorandum in opposition on May 26th, 2020, the Defendant would assert that it joins in those arguments already articulated to the court by Hurley. Additionally, Charleston Exteriors would renew its position that the claims made by BFS are barred by collateral estoppel and res judicata with regard to Charleston Exteriors.

For the following additional reasons, this Court's April 29th 2020 Order should stand, and the Motion to Alter or Amend should be denied.

BACKGROUND

Six Fifty-Six Owners Association filed suit against numerous defendants seeking damages related to alleged construction defects. On May 17th, 2017, Builders First Source ("BFS") served its Third-Party Complaint on Charleston Exteriors, LLC. The claims made by BFS against Charleston Exteriors arise from the latter's role as a subcontractor at the Project in 2013. BFS also named Hurley Services as a Third-Party Defendant under identical legal theories. Hurley installed windows for the remaining eight buildings in which BFS was involved.

Both Hurley and Charleston Exteriors have resolved all claims asserted by the Plaintiffs and the Project developer and general contractor, Ryland Homes.

The claims asserted by BFS are for negligence, breach of contract, breach of warranties, contractual indemnity, and equitable indemnity. While these claims were properly dismissed by the Honorable Roger Young, Sr.'s Order dated April 29th, 2020, Charleston Exteriors would show this Court that BFS has failed to bring any information or argument(s) such that reconsideration might be warranted.

LEGAL ARGUMENTS

The Supreme Court of South Carolina has enunciated "two basic situations in which a party should consider filing a Rule 59(e) motion." *See Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). First, "[a] party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id.* Additionally, "[a] party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.*

BFS's memorandum in support of the motion to reconsider provides no new or additional argument or evidence to support his motion and, therefore, the motion to reconsider should be denied.

The Defendant Charleston Exteriors joins co-defendant Hurley Services on the following arguments, each of which was previously asserted in Charleston Exteriors Memorandum in Support of its successful Motion for Summary Judgment.

1. Charleston Exteriors would reiterate its legal position that the claims made by Builders First Source-Southeast Group, LLC for breach of contract, breach of express and implied warranty, and negligence are "merely disguised . . . claims for equitable indemnity" and fail as a matter of law. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634, (Ct. App. 2015) Charleston Exteriors joins Hurley's position in its filed memorandum.

2. Charleston Exteriors further echoes Hurley's arguments regarding the "clear and unequivocal" standard set forth by the Court of Appeals in the Concord and Cumberland decision. *See Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 2018 WL 3748616 (S.C. Ct. App. 2018) In order for the Charleston Exteriors to be contractually obligated to indemnify BFS, the Court of Appeals held that the language must clearly and unequivocally

provide for such indemnity. By BFS own admission, the language in the subcontract is neither clear or unequivocal and must, therefore, cause its contractual indemnity claims to fail.

3. Charleston Exteriors further asserts that the issues before this Court are barred by collateral estoppel. The collateral ruling upon which Charleston Exteriors relies is none other than Judge Clifton B. Newman's Order Granting Charleston Exteriors Motion for Summary Judgment in a 2019 Berkeley County matter. *See Builders First Source Southeast Group v. MI Window & Door, et al.* Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was "actually litigated and determined by a valid and final judgment" in a prior suit. *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same. *Id.* It applies only if "the precluded party has had a full and fair opportunity to litigate the issue in the first action." *Id.* Charleston Exteriors would rely on its initial memorandum to show that the issues were identical with regard to contractual indemnification in that the subject matter was the same subcontractor agreement which is before this Court.

4. Additionally, Charleston Exteriors would assert that BFS's claims against it in this matter are barred by the doctrine of Res Judicata. The doctrine of res judicata bars a litigant from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. *Hilton Head Ctr. v. Public Serv. Comm'n*, 294 S.C. 9, 362 S.E.2d 176 (1987). See also *Johnson, supra* (res judicata bars subsequent action by same parties on same issues). "Res judicata also bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992).

Additionally, "for a judgment to bar the maintenance of a subsequent action, there must be identity of the cause of action as well as identity of the subject matter." *Nunnery*, 289 S.C. at 209, 345 S.E.2d at 743. *HN4* If it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. *Griggs v. Griggs*, 214 S.C. 177, 51 S.E.2d 622 (1949). When applying principles of res judicata, a fundamental test used for comparing causes of action is to determine whether the primary right and duty and the delict or wrong are the same in each action. *Nunnery, supra*. "Under this test, there is but one cause of action where there is but one right in the plaintiff and one wrong on the part of the defendant

involving that right." Id. at 210, 345 S.E.2d at 743 (quoting 46 AM. JUR. 2D Judgments § 406 at 575 (1969)).

For the reasons stated above, as well as those reasons articulately discussed in Hurley Services Memorandum in Opposition to Builders First Source Southeast Group's Motion to Reconsider, the Defendant Charleston Exteriors would pray that this Court deny BFS Motion to Alter and Amend Judge Young's Order of April 29th, 2020.

Respectfully submitted,

CHARLESTON EXTERIORS, LLC

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF CHARLESTON) CIVIL ACTION NO: 2016-CP-10-03455

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

Plaintiffs,

vs.

Winsor South, LLC and Jeffrey M. Thomas,
 individually, and on behalf of a class of
 construction defendants; Southeastern
 Recapitalization Group, LLC; WCM
 Construction, LLC; Jonathan J. Thomas; AC
 Heating and Air Conditioning Service, Inc.;
 ACME Doors, Inc.; Alpha Omega Construction
 Group, Inc.; Atlantic Construction Services, Inc.;
 Buck Lumber and Building Supply, Inc.;
 Builders FirstSource, Inc.; Builders FirstSource-
 Atlantic Group, LLC, Builders FirstSource-
 Florida, LLC a/k/a Builders FirstSource-Florida
 Design Center, LLC; Builders FirstSource-
 Southeast Group, LLC; Charlotte Flooring, Inc.;
 Diria Tawi Painting, Inc.; East Coast Wall
 Systems, Inc.; Fogel Services, Inc.; G&S Home
 Remodeling, LLC; Guaranteed Framing, LLC; J.
 Mora Brick & Block Mason, LLC; Land/Site
 Services, Inc.; Landmark Construction
 Company, Inc.; Lutzen Construction, Inc.; New
 Horizon Shutters, Inc. a/k/a New Horizon
 Shutters International, LLC; PJ Sanchez
 Masonry, LLC; Screens Plus, Inc., Simons
 Construction Company, LLC; Stucco by Design,
 LLC; Fine Builders, LLC; Speedtruss, Inc.; AS
 Construction; Javier Morales Merino; Novac
 Construction, Inc.; MJG Construction, Inc.;
 Advance Plumbing, Heating, & Air, Inc.; Ashley
 Steel, Inc.; Cahill Contracting, LLC; Cohen's
 Drywall, Inc.; Bob Porter d/b/a Custom Interior
 Construction; RB's Trim, Inc.; Sharon's Painting
 and Construction a/k/a Sharon's Painting, LLC;

**REPLY TO HURLEY SERVICES,
 LLC'S AND CHARLESTON
 EXTERIORS, LLC'S MEMORANDA
 IN OPPOSITION TO BUILDERS
 FIRSTSOURCE-SOUTHEAST
 GROUP, LLC'S MOTION FOR
 RECONSIDERATION AND/OR
 ALTERATION / AMENDMENT**

Davis Tile; Timothy Mitchell; Electrical Design & Construction, Inc.; Fine Builders, LLC; Speedtruss, Inc.; Argentino Jose Campos d/b/a as Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating & Air, Inc.; Cahill Contracting, LLC; Cohen's Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting, LLC; David Tile; Timothy Mitchell; Electrical Design & Construction, Inc.; Hurley Services, LLC; Charleston Exteriors LLC; Jorge Diaz aka Jorge Louis Paz; San Luis Construction, Inc. nka Roofing America Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC; Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vasquez aka Alfonso Rodriguez, Sr.; and John Does 55-75

Defendants.

Builders FirstSource-Southeast Group, LLC (“BFS”), submits this Reply to the memoranda of Hurley Services, LLC’s and Charleston Exteriors, LLC, in Opposition to the BFS Motion for Reconsideration and/or Alteration or Amendment, filed on May 11, 2020. Although the instant Reply responds specifically to the aforesaid memoranda, BFS also specifically reiterates and incorporates herein its position and all arguments made previously within the Builders FirstSource motion for reconsideration and upon oral arguments. Those arguments include, but are not limited to, its position that any construction defects for which claims have been made against BFS in the underlying case have been occasioned solely by the negligence of the BFS subcontractors, and thus, BFS

is entitled to recovery of all of its attorneys fees under the relevant provisions of its contracts with its subcontractors; however, even if BFS is found by a trier of fact to have been concurrently negligent, BFS is still entitled to recovery of its attorneys fees under the relevant provisions of its contracts to the extent that such fees were incurred in defending against the concurrently negligent work of its subcontractors. Based upon those considerations set forth herein, and those incorporated herein by reference, it is respectfully submitted that the Court's order, entered April 29, 2020, should be amended, and summary judgment denied to Hurley and Charleston Exteriors.

In Recounting the "Background" of this Case, Hurley Services and Charleston Exteriors Misrepresent and Misconstrue the Position of Builders FirstSource in Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al.

In their recitation of the "background" of the instant litigation, Hurley Services and Charleston Exteriors misrepresent and misconstrue both the arguments asserted and the concessions made by Builders FirstSource in the matter of Builders FirstSource-Southeast Group, LLC vs MI Windows and Doors Inc., et al, case number 2018-CP-08-02547. That case is currently before the South Carolina Court of Appeals, upon a challenge, by Builders FirstSource, to the court's grant of summary judgment.

Hurley is correct in its assertion that BFS, in the prior litigation, conceded that the specific indemnity provisions considered by the court were not sufficiently clear and unequivocal to grant rights of indemnity against losses resulting from the sole negligence of BFS. However, such a concession was irrelevant in the prior litigation where, as here, Builders FirstSource seeks indemnity not against losses occasioned by its sole negligence, but rather seeks indemnification against losses occasioned by the alleged negligence of its subcontractors.

The select sentence that serves as the only basis for Hurley's argument is taken out of context and must be read in its entirety. The purported BFS "admission" is as follows:

This Court's December 6, 2019 Order correctly finds that the indemnity language at issue does not meet the elevated standard of being clear and unequivocal and thus the Plaintiff cannot maintain indemnification claims for Plaintiff's negligence. **Nevertheless, pursuant to *Concord and Cumberland*, the Plaintiff still has valid indemnification claims for Defendants' negligence.** See *Concord and Cumberland*, 424 S.C. at 645, where the Honorable Clifton Newman found the subcontract's language did not clearly and unequivocally require Muhler to indemnify Superior for Superior's own negligence and limited indemnification to damages resulting from the work Muhler performed. Thus, the December 6, 2019 Order must be altered and amended accordingly such that the Plaintiff's claims for indemnification are limited to only those damages resulting from the work the Defendants' performed. (emphasis added).

BFS Motion for Reconsideration attached hereto as Exhibit A.

The BFS concession, that the language at issue does not meet the elevated standard of being clear and unequivocal, is irrelevant to the validity of the BFS claims as asserted here because *the language at issue is not required to meet the standard of being clear and unequivocal*. Pursuant to *Concord and Cumberland*, indemnification provisions need only be clear and unequivocal when the indemnitee is seeking indemnification for its own negligence. Here, as in *BFS v. MI Windows and Doors*, BFS is not seeking indemnification for its own negligence, but rather for the negligence of its subcontractors. Contractual provisions granting such rights of indemnification are construed in accordance with the rules for the construction of contracts generally.

BFS' Motion for Reconsideration Satisfies Rules 52 and 59 of the South Carolina Rules of Civil Procedure.

Those considerations set forth within the BFS motion satisfy the criteria for reconsideration and/or alteration/amendment of the Court's prior orders granting summary judgment.

Contrary to the assertions of Hurley Services and Charleston Exteriors, Builders FirstSource, within its motion, has argued specifically that the Court failed to consider evidence critical to an appropriate resolution of the motions for summary judgment, including evidence tending to establish the sole or concurrent negligence of the moving parties. Moreover, the Builders FirstSource assertions of error in the Court's legal and factual determinations are clearly premised upon the Court's misunderstanding of, or failure fully to consider, the BFS arguments in opposition to the motion for summary judgment.

The aforesaid considerations, as more fully detailed within the BFS motion, are well within the appropriate grounds for alteration or amendment, and such reconsideration should be properly addressed by this court.

The Doctrine of Collateral Estoppel does not Bar this Action Because the Judgment was Not Final and did not Address the Issue Before this Court.

Hurley argues that the law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's judgment, and thus does not bar the application of collateral estoppel. Notwithstanding this assertion, Hurley is unable to cite any apposite law in support of its position. Hurley cites *Huron Holding Corporation vs Lincoln Mine Operating Company*, 312 US 183, a 1941 case wherein the US Supreme Court addressed the validity of attachment proceedings, under New York law, against a

judgment rendered by federal district court in Idaho. The Supreme Court specifically did not address issues of collateral estoppel or res judicata. Moreover, final judgment on the New York claim was not rendered, or execution upon the Idaho judgment pursued, until after the Idaho judgment had been affirmed upon appeal. The Huron Holdings Corporation opinion provides no authority for the proposition that a lower court opinion, subject to further appellate consideration, constitutes estoppel as asserted by Hurley and by Charleston Exteriors.

Hurley also cites to a South Carolina case, and argues that a “final judgment is one that finally determines the rights of the parties.” *First Union National Bank vs Hitman, Inc.*, 306 S.C. 327 (Ct. App. 1991), aff’d, 308 S.C. 421, 418 S.E.2d 545 (1992). The *First Union National Bank* case involves proceedings in which the trial judge initially made an oral ruling, subsequently changed his mind, and then entered a written order refusing to set aside a judgment. The Court of Appeals affirmed, recognizing that, until an order is in writing, the trial judge retains jurisdiction to rule as he deems appropriate.

Neither of the cases cited by Hurley is analogous to the facts before this Court, neither case involved determinations of collateral estoppel or res judicata, and neither case supports the arguments by Hurley and/or Charleston Exteriors.

A judgment, subject to reconsideration upon appeal, cannot be considered “final” until the ultimate appellate court has made its determination. The arguments of Hurley Services and Charleston Exteriors, if adopted, would potentially endow the lower courts with authority not contemplated by the judicial system, and, correspondingly, deprive the appellate courts of the authority reserved to those bodies.

Hurley also argues that refusing to recognize, for estoppel purposes, the finality of a trial court order, where that order is subject to further appellate consideration, would undermine the judicial efficiency at the trial court and appellate court levels, and potentially result in conflicting opinions and duplicitous appeals on the exact same legal issues. This last argument actually provides support for BFS' argument - if this Court does not reverse its decision on summary judgment, BFS will be forced to file a "duplicitous appeal on the exact same legal issues." For this reason, among others, an order, on appeal, should not serve as the basis for collateral estoppel.

Even if Judge Newman's order on appeal in *BFS v. MI Windows* could be considered "final" for the purpose of collateral estoppel, it does not preclude BFS' claims in this case. Judge Newman's order specifically holds that:

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

See Judge Newman's Amended Order filed February 3, 2020, attached hereto as Exhibit B (emphasis added). In the case before this Court, **BFS is not seeking indemnification for its own negligent acts or omissions**, but rather is seeking attorneys fees pursuant to the provisions of its subcontract agreements. Because it is not seeking indemnity for its own negligence, BFS is not required to meet the "clear and unequivocal" standard in order to pursue its claims. Thus, the issues are not the same, collateral estoppel has not been triggered, and Judge Newman's order is not relevant to the analysis required by this case.

Likewise, the Doctrine of Res Judicata does not Bar this Action Because the Judgment was Not Final and did not Address the Issue Before this Court.

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Id.* Here, Charleston Exteriors has failed to satisfy the second and third elements. The subject matter between the parties is not the same, as it involves the application of the BFS contract to two very different factual matters – not “the same transaction or occurrence.” Additionally, as BFS has already explained, in the case before this Court, **BFS is not seeking indemnification for its own negligent acts or omissions**, but only for attorneys’ fees pursuant to its subcontract agreements. This issue was never adjudicated by Judge Newman, whose order focused solely on whether BFS could be indemnified against its own negligence. Thus, Charleston Exteriors has failed to satisfy the elements of res judicata and cannot use this doctrine to bar the claims of BFS in the current suit.

Builders FirstSource’s Position in Other Cases has not Affected its Rights in This Case.

As noted above, Hurley materially misrepresents BFS’ argument in the matter of *Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al.*, Case No. 2018-CP-08-02547. The select sentence that serves as the only basis for Hurley’s Section 3 argument is taken out of context and must be read in its entirety. Builders FirstSource argued that

the indemnity language at issue does not meet the elevated standard of being clear and unequivocal and thus the Plaintiff cannot maintain indemnification claims for Plaintiff's negligence. **Nevertheless, pursuant to *Concord and Cumberland*, the Plaintiff still has valid indemnification claims for Defendants' negligence.** . . . Thus, the December 6, 2019 Order must be altered and amended accordingly such that the Plaintiff's claims for indemnification are limited to only those damages resulting from the work the Defendants' performed. (emphasis added).

BFS Motion for Reconsideration attached hereto as Exhibit A.

BFS, within its motion for reconsideration in the prior litigation, conceded only that the indemnity provisions of its master subcontractor agreement were not sufficiently clear and equivocal as to authorize indemnity for damages occasioned by the sole negligence of BFS. Builders FirstSource specifically did not concede that those same indemnity provisions would preclude it from seeking indemnity against loss or attorneys fees occasioned by the negligence of its subcontractors.

BFS's argument - that it is entitled to indemnification from its subcontractors, Hurley and Charleston Exteriors for damages stemming from negligence in the implementation of their scopes of work - is entirely consistent and permitted pursuant to Judge Newman's ruling in *Concord and Cumberland*, a ruling that was ultimately upheld by the Court of Appeals. BFS is confident that the Court of Appeals will reaffirm its ruling in *Concord and Cumberland*, and reverse Judge Newman's order issued in *BFS v. MI Windows*.

The Relevant Portions of the Builders FirstSource Subcontract are not Required to be Clear and Unequivocal.

Hurley erroneously argues that the Court correctly found that the BFS crossclaims for indemnity must fail because they are based upon provisions that are neither clear nor

unequivocal and are against public policy and the laws of South Carolina. Hurley breaks this argument down into 4 subsections, which Builders FirstSource refutes as follows:

1. *The Applicable Builders FirstSource Indemnity Provisions are Valid, Enforceable, and Severable.*

Hurley argues that the fact that BFS is only seeking indemnification for attorney's fees incurred in defense does not alter the result that the indemnification clauses are unenforceable as a matter of South Carolina law. Hurley begins its argument by claiming that the applicable indemnification provision is tied to the defense costs clause because they are both in "Section 5. Indemnity," and goes on to argue that the defense obligation violates South Carolina law because it is not limited to instances of BFS' own negligence. However, Hurley cites no law or standard that this defense obligation allegedly violates. To the extent Hurley believes that the duty to defend violates public policy under Section 32-2-10, discussed below, that statute does not apply to attorneys' fees.

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

The first paragraph of Section 5 is the applicable indemnity language for property damage claims. Therein, the subcontractor agrees to the fullest extent permitted by law to indemnify, defend, and hold harmless BFS from and against any and all claims, suits, losses, causes of action, damages, liabilities, fines penalties, and expenses of any kind

including court costs and attorney's fees resulting from property damage arising out of the subcontractor's performance BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT of the subcontractor.

The second paragraph is similar but deals with bodily injury claims asserted by employees or agents of the subcontractors.

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

The fourth paragraph speaks to the defense and indemnification obligations with respect to architects, engineers and claims resulting from defective plans or designs.

Despite these separate and distinct rights enumerated in the four different paragraphs, Hurley would have this court believe that they are all bundled together in one section and "confusing at best and deceptive at worst."

As noted above, the applicable indemnity provision in this case is the first paragraph, which limits recoverable indemnity to the negligence of the subcontractor. As pointed out by Hurley, BFS is seeking indemnification for the attorney's fees incurred in defending against the negligence of Hurley and/or Charleston Exteriors. Hurley claims the indemnity provision violates South Carolina law, however the memorandum is absent of any citation substantiating the same.

2. *Concord and Cumberland Allows BFS to Recover in Indemnity for Hurley's Scope of Work.*

Hurley next argues that the subcontract agreement does not comply with the clear and unequivocal standard imposed by *Concord and Cumberland*. Hurley correctly contends that *Concord and Cumberland* requires that contractual provisions, purporting to indemnify an indemnitee against the consequences of its own negligence, must be set

forth in clear and unequivocal terms. By contrast, contractual provisions requiring indemnification from the consequences of negligence of the indemnitee are not subject to such a heightened standard. Thus, BFS is allowed to recover indemnification from its subcontractors for damages resulting from their work. In such situations, the contractual language is not required to rise to the level of clear and unequivocal.

3. South Carolina Code § 32-2-10 Neither Address nor Prohibits Recovery of Attorneys' Fees.

Hurley next argues that the indemnity provisions and defense provisions of the subcontract violate South Carolina Code § 32-2-10.

Hurley's argument here, like its entire memorandum, is nothing more than a game of *smoke and mirrors*. The prohibitions as set forth in South Carolina Code Section 32-2-10 apply only to contract provisions agreeing to indemnify a party against liability for damages resulting from the sole negligence of the indemnitee. The statute specifically does not prohibit, or even address, agreements to defend against the concurrent negligence of an indemnitee.

More importantly, Section 32-2-10, while prohibiting indemnification against liability occasioned by the sole negligence of the indemnitee, neither addresses nor prohibits what our courts have recognized is a separate obligation 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). And while

a duty to indemnify may not be apparent until questions of fact are ultimately resolved at trial, “the existence of a duty to defend may be established by the allegations in the injured party's complaint.” *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 596, 748 S.E.2d 781, 787 (2013) (quoting *Guar. Nat'l Ins. Co. v. Beeline Stores, Inc.*, 945 F.Supp. 1510, 1514 (M.D.Ala.1996)).

The obligations imposed by the subcontractors here, to defend the interests of Builders FirstSource, are clearly and unequivocally set forth within the relevant Master Subcontract Agreements. These obligations do not violate § 32-2-10 or any public policy of the State of South Carolina, and they should be upheld by this Court.

4. *Builders FirstSource is not Asking the Court to Re-Write its Contract.*

Hurley argues that BFS is asking the Court to re-write its contract. That is simply not the case.

The parties to the subcontract appreciated at the time of signing that laws are fluid and subject to change by legislative bodies, as well as by courts, as time moves forward. As such, the parties specifically agreed that paragraphs 1, 2, and 3 of the “Section 5. Indemnity” provision impose obligations upon the subcontractors, and afford rights to BFS, “to the fullest extent permitted by law.” Similarly, Section 9 of the subcontract, at subsection (f), states clearly that the provisions are independent and severable, and any invalid provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. Also in Section 9(f), the parties agreed that it was their intent that any invalid provision be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

Hurley cites *Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010), and claims that South Carolina law does not allow courts to “blue-pencil” and revise contractual provisions that are against public policy. Again, Hurley is trying to mislead the Court with its smoke and mirrors.

First, the *Poynter* case involved an overly broad non-compete agreement, where the Court of Appeals considered whether the trial court had the authority to decrease the geographical limitation of the noncompete by inserting one where none existed. The *Poynter* Court determined that it would violate public policy to allow a court to insert a limitation where none existed and that such reformation would be void as it would add a term to the contract that the parties had neither negotiated nor agreed to. The *Poynter* Court held that in South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms and therefore, that the trial judge erred in rewriting the territorial restriction in the parties' contract. See *Poynter*, 387 S.C. at 588.

Here, we are not dealing with a non-compete agreement, but a contract for construction services. As always, when construing a contract, the primary objective is of the Court must be to ascertain and give effect to the intention of the parties. Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). Here, BFS is not asking the Court to re-write its subcontract, but it is asking the Court to honor the intentions of the parties and to require that Hurley to abide by the provisions and obligations therein. No new provisions are needed. If the Court finds that it needs to strike a provision, as argued above, the other provisions are severable and may stand on their own, as the parties intended.

The Unsettled Factual Determinations of Negligence and Fault Highlighted by Hurley Only Underscore that Summary Judgment is Inappropriate at this Juncture.

Hurley argues that the testimony of (a) Plaintiffs' forensic expert, (b) BFS' 30(b)(6) designee, and (c) Charleston Exteriors' designee all confirm that Plaintiffs' window installation claims are predicated upon BFS' negligence and that therefore BFS is seeking indemnification for its own negligence. Although Hurley attempts to undermine the foundation for the contested testimony of the plaintiffs' expert, the credibility of such expert is ultimately a matter for resolution by the factfinder, and not subject to determination by the Court. Moreover, the fact that Hurley is able to put forth any credible argument concerning the testimony of the fact and expert witnesses in this matter proves that there is at least a question of fact as to the window installation claims. It is for a jury to decide which factual interpretation is correct, and therefore summary judgment must be denied.

Section 40-11-270(E) does not Address Liability Between Subcontractors.

Hurley's last argument cites three different code sections, none of which actually exist in the South Carolina Code: "S.C. Code Ann. § 40-11-27(E)," "Section 40-11-127(E)," and "Section 4-11-127(E)".

Hurley attempts to cite to S.C. Code Ann. Section 40-11-270(E) for the position that BFS, as a licensed contractor, is fully responsible for any violations resulting from the actions of an unlicensed subcontractor performing work for the licensee. First, the record before the Court is void of any evidence to support Hurley's recent position that it is an unlicensed subcontractor. Second, and more importantly, Chapter 40 of the South Carolina Code only deals with the licensing of construction professionals and the

jurisdiction of the South Carolina Department of Labor, Licensing and Regulations to regulate the same. See S.C. Code Ann. Section 40-11-10. Neither Plaintiffs, nor Hurley have plead any allegations or claims that are subject to SC LLR jurisdiction and therefore the Court should dismiss this argument. Additionally, while Section 40-11-270(E) may make a licensed contractor liable *to third parties* for the acts of its unlicensed subcontractor, that protection exists for the benefit of the third party, not for the subcontractor. The statute does not affect the rights or liabilities of the parties between themselves.

Further supporting this position, the law is clear that BFS is not automatically responsible for its subcontractor's defective work, as Hurley suggests. See *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545 (2008) (general contractor not automatically responsible for a subcontractor's defective work). Rather, the general contractor owes the homeowner a duty to exercise a reasonable degree of skill in supervising the subcontractor's work. See *id.* Thus, if BFS was the general contractor, it could only be liable to Plaintiffs for failing to supervise Hurley's work, not for any violations as suggested by Hurley. Here, there is evidence before the Court that points to at least a question of fact as to whether or not the windows are improperly installed and which parties were responsible for the alleged improper installation. Therefore, summary judgment is not appropriate.

CONCLUSION

The Memoranda filed by Hurley Services and/or by Charleston Exteriors in this case repeatedly misrepresent South Carolina case law, the contract at issue between the parties, and the parties' previous dealings with each other. While this reply memorandum

has attempted to make right these misrepresentations, this Defendant would ask that the Court, in deciding this motion, conduct its own, independent review of the contract at issue and the case law cited by Hurley Services and/or Charleston Exteriors. This Defendant believes such an examination of the contract and South Carolina law will support its position, and thus respectfully asks the Court to reverse its order granting summary judgment to Hurley Services and to Charleston Exteriors.

HOWELL, GIBSON & HUGHES, P.A.

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Beaufort, South Carolina

June 4, 2020

CERTIFICATE OF SERVICE

I certify that the foregoing Reply to Hurley Services LLC's and Charleston Exterior's LLC Memorandum in Opposition to Builders Firstsource-Southeast Group, LLC's Motion for Reconsideration and/or Alternation/Amendment was served upon all counsel of record, in this proceeding, via electronic mail, and/or via United States Postal Service, with proper postage affixed thereto, to counsels' last known email address and/or mailing address on the 4th day of June, 2020.

By: /s/Catherine L. Floeder

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

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

2014-CP-08-02424

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

vs.

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

NOTICE OF INTENT TO APPEAL

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

{Signature Page Follows}

HOWELL, GIBSON & HUGHES, P.A.

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Beaufort, South Carolina

March 2, 2020

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Builders Firstsource-Southeast Group, LLC

Plaintiff,

V

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

Defendant,

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2018-CP-08-02547

**AMENDED ORDER GRANTING
CHARLESTON EXTERIORS,
LLC'S AND ECC CONTRACTING,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

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

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

BACKGROUND

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

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

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

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

LEGAL STANDARD APPLICABLE TO RULE 56 MOTIONS

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

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

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

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

B. DISGUISED INDEMNITY CLAIMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Clifton B. Newman Presiding Judge



Berkeley Common Pleas

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

So Ordered

s/ Clifton B. Newman, 2127

Electronically signed on 2020-02-01 21:45:57 page 11 of 11

1 STATE OF SOUTH CAROLINA) COMMON PLEAS COURT
 2 COUNTY OF CHARLESTON)
 3)
 4)
 5 SIX FIFTY SIX OWNERS,) CASE NO.
 6 ASSOCIATION, et al,) 2016-CP-10-03455
 7)
 8)
 9 Plaintiffs,) Transcript of Record
 10 vs.) Date: March 5, 2020
 11 WINSOR SOUTH, LLC,)
 12 BUILDERS FIRSTSOURCE)
 13 SOUTHEAST GROUP, LLC, et al))
 14 Defendants.

10 * * * * *
 11 B E F O R E:

12 The Honorable Roger M. Young

13 * * * * *

14

15 Krista Nicole Carney, Stenographic
 16 Court Reporter, transcribed by a
 17 Stenographic Court Reporter

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1 A P P E A R A N C E S

2

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1 (These proceedings were had March 5,
2 2020, Charleston County Common Pleas Court.)

3 THE COURT: Okay. Who's going first?

4 MR. FREEMAN: Your Honor, Ian Freeman
5 on behalf of Hurley Services. And if it please the
6 Court, I'll go first.

7 Your Honor, we're here on motions for
8 summary judgment filed by both Hurley Services, and
9 Charleston Exteriors by Mr. Olson on that, his
10 client.

11 Mr. Olson and I both represent
12 subcontractors of Builders FirstSource, who is
13 represented by Mr. Steve Hughes here to my right.

14 This is an alleged construction defect
15 action involving the Six Fifty Six Coleman
16 Boulevard in Mount Pleasant located at Six Fifty
17 Six Coleman Boulevard.

18 The parties here before you today have
19 all settled with the Plaintiffs. Most parties
20 have. And it's my understanding that the case is
21 up for trial, as to the remaining parties of the
22 plaintiffs, as well as Builders FirstSource
23 cross-claim against Hurley Services and Charleston
24 Exteriors that we're here on for a motion for
25 summary judgment about today.

1 The 656 town homes were constructed in
2 2013, 2014. Builders FirstSource supplied the
3 windows, window supplier, and installer as a
4 subcontractor of the Ryland Group.

5 The separate case against Ryland has
6 also been settled and resolved. So Ryland is not a
7 party to this either.

8 Our clients, Hurley Services and
9 Charleston Exteriors, respectfully is simply to
10 serve this window installers for Builders
11 FirstSource. Builders FirstSource supplied the
12 windows, deflated fasteners, caulking materials
13 necessary for the window installations. We were
14 labor only.

15 My client entered into a master
16 subcontract agreement with Builders FirstSource
17 allegedly, as well as Mr. Olson's client. Those
18 contracts happen to be the exact same burden of the
19 BFS master agreement that -- and if you look at the
20 bottom of the left corner of the master agreement,
21 mine is attached as exhibit A to my original motion
22 filing. It says Version 5-17-06.

23 And that happens to be the same version
24 that Mr. Olson's client entered. Although, the
25 parties may have signed them on different dates.

1 And happens to also be the same version of a master
2 agreement that Judge Newman in another matter, in
3 this circuit, although be it in Berkeley County,
4 recently granted Charleston Exteriors' motion for
5 summary judgment on the grounds that that master
6 agreement is unenforceable, as a matter of law,
7 because the indemnifications provisions do not
8 comport and apply with South Carolina law,
9 including but not limited to the clear and
10 unequivocal standard, whereby it's applicable, and
11 when a contractor asks its subcontractor to
12 indemnify it for its negligence.

13 And so that -- Judge Newman's order, in
14 that regard, is attached here to my motion of
15 Exhibit 9. I believe Mr. Olson has it attached.

16 And we'll talk -- the subject of our
17 motions are to defeat Builders FirstSource's master
18 subcontract agreement, which I would submit to the
19 Court is unenforceable, as a matter of law, and I
20 believe you're free to apply collateral estoppel
21 principles. I also believe you're free to
22 independently, likewise, find with the agreement's
23 unenforceable as a matter of law, for the reasons
24 discussed in my brief and Mr. Olson's brief. And
25 I'll argue here to the Court today.

1 Notably, I would direct the Court's
2 attention to Builders FirstSource's cross-claims,
3 which are its pleadings against my client and
4 Mr. Olson's client. And the operative cross-claims
5 are now found in Builders FirstSource's answer to
6 Plaintiff's third amended complaint.

7 And those cross-claims say that
8 Builders FirstSource -- and I'm reading from
9 paragraph 126 -- is entitled to full contractual
10 one-sided indemnification from the cross-claimant
11 Defendants.

12 And all of these causes of action,
13 basically, you know, end with the same thing that
14 Builders FirstSource is entitled to complete
15 indemnification. Separately they're entitled to
16 recover all attorney's fees and costs in the
17 defense of the claims.

18 And so they're not predicated in any
19 way saying, we're only seeking indemnification to
20 the extent that the subcontractor Defendants were
21 negligent or at fault. We're seeking everything.

22 Everything that he paid to satisfy the
23 claims and demands of the Plaintiffs. And so they
24 are seeking, no matter what Ms. Hughes may say,
25 Builders FirstSource is seeking, by virtue of its

1 claims, to recover for their sole -- if not
2 concurrent, if not the sole negligence in this
3 case.

4 Now, the parties are judicially bound
5 by their pleadings. Postal v Mann 308 S.C. 385
6 says they're bound by that.

7 I would also note to you that Judge
8 Newman found that this same master agreement of
9 clauses that are basically the cross-claim language
10 derives from to say, we're entitled to get full
11 satisfaction of everything we paid the Plaintiffs.

12 Judge Newman simply found that these
13 master agreement terms are unenforceable, as a
14 matter of law, because they do not comply with
15 South Carolina law. They're confusing
16 contradictory acceptance, looking at the agreement
17 as a whole.

18 Now, I'd like to talk just a little bit
19 about the underlying allegations of Plaintiffs'
20 case and a little bit about the Six Fifty Six
21 Coleman project, because I believe it also comes to
22 bear on this matter.

23 Plaintiffs hired Russ Mease of RTM
24 Engineering. And he's been deposed, I think, maybe
25 six times. And he produced a report of almost a

1 150 pages. And he did lots and lots of destructive
2 testing throughout the project, including the
3 Ryland phase of the project. And Mr. Mease found
4 that the windows installed, allegedly by client,
5 Mr. Olson's client, were installed into the
6 building's framing in accordance with a protocol
7 that's acceptable in the industry.

8 I think this is actually the first
9 time -- and I've probably been in a hundred with
10 Mr. Mease -- that I've ever actually heard him
11 saying that the window installer installed the
12 windows properly.

13 Now, he went on, ultimately, to find a
14 window test cut sheet from this window manufacturer
15 in 2007 submitted in Florida, which he, Mr. Mease,
16 contended called for application of sealant behind
17 the nailing bend. And he went on to say that he
18 didn't see that sealant at the sill, at the bottom
19 sill behind that nailing bend. Even though he
20 never removed a window, he just said, well, I'm not
21 seeing it somehow ooz so I just assume it's just
22 not there.

23 Well, the Plaintiffs' attorney latched
24 onto that and said, ah-ha, there's a defect in
25 regards to the installation of the windows, there's

1 no sealant behind the sill bend.

2 And they went on to depose Builders
3 FirstSource, vis-a-vie 30(b)(6) deposition. And
4 Mr. Terry Rosenman was presented as a witness to
5 Builders FirstSource.

6 By the way, Builders FirstSource is a
7 licensed, unlimited general contractor with the
8 State of South Carolina. My client is not
9 licensed. I don't believe Mr. Olson's client is
10 not licensed. And I'm supporting that information
11 regarding that in our brief and the accompanying
12 attachments.

13 And Mr. Rosenman went on to testify and
14 say -- and when they questioned him, well, isn't
15 this a problem if there's no sealant behind the
16 sill bend. And he said, no. As a matter of fact,
17 that's best practice is not to put sealant behind
18 the sill bend at the base because you want any
19 water that gets into the window to simply to come
20 out, to weed out, not be trapped in there.

21 And so -- he said the BFS instructed
22 its subcontractors, my client, Mr. Olson's client,
23 not to install sealant at the sill bend location.

24 The bottom line is the theory of
25 Plaintiffs alleged defect regarding the windows is

1 what BFS told our clients to do at the project.
2 And Mr. Rosenman testified as to such. And that
3 attachments there to my motion, which includes his
4 deposition testimony on behalf as a corporate
5 designee for BFS.

6 Now, I'd like to turn a little bit to
7 the terms to the master agreement that are found on
8 Pages 4, 5, and 6 of my memorandum. And I'll just
9 generally go on to say that Builders FirstSource
10 loaded up its master agreement with lots and lots
11 of indemnities.

12 I was going to say they got a whole
13 bucket of indemnities in this contract. But it's
14 not a bucket. They've got a 50-gallon drum of
15 indemnities in this contract. And they're slurring
16 together. And they all say different things. And
17 some things say it's these subcontractors'
18 negligence, some things say that you got to
19 indemnify Builders FirstSource, regardless of its
20 negligence. And you have to indemnify Builders
21 FirstSource for its negligence and notably its sole
22 negligence. And then other indemnities provisions
23 say, no matter what, even if Builders FirstSource
24 is ultimately liable for everything, you have to
25 pay and indemnify us for all of our attorney's fees

1 and you have to defend this, even if we're at
2 fault, regardless of our fault you have defend and
3 indemnify us for our attorney's fees and costs.

4 And then on Page 6 of my brief they've
5 got this additional indemnity that -- and some of
6 the language in their cross-claims is right out
7 this indemnity, that no matter what, there's no
8 mention of fault by anybody whatsoever. You,
9 subcontractor, have to indemnify and pay Builders
10 FirstSource for all amounts it pays in settlement
11 of claims, pays them by resolution of demands of
12 Plaintiffs, all attorney fees, discharge judgments,
13 discharge settlements, everything, no matter what,
14 satisfy those demands. And that satisfies demands,
15 satisfies settlements, et cetera. That language is
16 in each one of the cross-claims.

17 So there's several instances in here
18 where we're obligated -- my client is obligated to
19 indemnify Builders FirstSource for its sole
20 negligence.

21 And I would submit to the Court that
22 those terms violate Section 32-2-10 of the South
23 Carolina Statutory Code, that it's entitled to full
24 clause in certain construction contracts. And I've
25 got a copy here. I'm happy to provide it to you.

1 That says -- that code section says, any -- and I
2 cited in our brief -- contract in a construction
3 context that says subcontractor has to indemnify a
4 contractor for its sole negligence is
5 unenforceable, as a matter of law, and it's against
6 public policy. Can't do it. Do not pass go. You
7 failed. Your contract fails, as a matter of law.
8 And in that regard Builders FirstSource's contract
9 fails a couple of times over.

10 Again, I would submit that, as well, to
11 the extent that they're separately asking for all
12 attorney's fees, regardless of whether BFS is
13 ultimately found liable, which is what the contract
14 says, is again basically saying, you shall
15 indemnify us, irrespective of our sole negligence.
16 That violates the anti -- in South Carolina
17 indemnity statute that I just cited.

18 Now here the parties have settled.
19 Builders FirstSource has asked of us to pay -- my
20 clients paid to settle, Mr. Olson's client paid to
21 settle, Mr. Hughes' client has paid to settle.

22 They're now after us for everything
23 they've paid to settle and all of Builders
24 FirstSource's attorney's fees. They're after us
25 for their concurrent, if not sole negligence, in

1 violation of South Carolina law.

2 Now, the first argument that we
3 present -- and I'll just briefly touch on this, is
4 the Stoneledge -- what I'll refer to as the
5 Stoneledge defense. And Stoneledge is 776 S.E. 2d
6 434. And Judge Newman also ruled accordingly that
7 all Builders FirstSource has, you know, four causes
8 of action in its cross-claim, maybe five, for
9 breach of contract, breach of express warranty,
10 breach of implied warranty, breach of indemnity
11 clause, negligence, et cetera. That every one of
12 those causes of action is predicated on Builders
13 FirstSource saying Plaintiff has sued us, we're
14 having to defend this claim. If there's anything
15 wrong with the work you'll be liable to us, you
16 have to indemnify us. You have to pay to satisfy
17 the damages, resolve the case, pay our attorney's
18 fees.

19 That's the gist of every single cause
20 of action. And the Stoneledge case basically says
21 -- the Court said, we don't care if you pitch this
22 as four or five different causes of action. This
23 is all just really a disguise claim for indemnity.
24 It's one cause of action, so be it.

25 And so to the extent that BFS has got

1 multiple causes of action here, we would submit
2 that the Stoneledge offense really condenses this
3 down.

4 So I'm just going to move on then and
5 talk about the heart of the issue, which I believe,
6 is the master agreement here.

7 THE COURT: On Page 4, I guess it is of
8 your brief, in bold you have -- or highlighted in
9 bold, the one part is the last sentence that's in
10 bold where it says, comma, but only to the extent
11 caused in whole or in part by any negligent act or
12 admission of the subcontractor.

13 MR. FREEMAN: Yes, Your Honor.

14 THE COURT: Aren't they saying all the
15 things that say it says, but they're limited to
16 only being asked to be reimbursed for what your sub
17 did wrong?

18 MR. FREEMAN: That's only one part of
19 this contact. And, again, I think what they've
20 done here is they've thrown a whole lot of
21 indemnity mud on the wall to see what would stick.

22 And that's not the way South Carolina
23 law operates. That there are multiple indemnity
24 provisions in here. And that is one. And what
25 Judge Newman ruled and found was you've got one

1 that says that. And I guess I would point you
2 to -- and I discussed this on Page 9 of my brief --
3 on the one issue, that Judge Newman found this
4 compelling and dispositive. On the one hand,
5 you've got the master agreement contemplates
6 indemnification of all attorney's fees incurred
7 that the Defense of BFS, as well amounts paid and
8 settled or satisfied demands. On the other hand,
9 the master agreement refers to indemnification in
10 favor of BFS, regardless of its sole and concurrent
11 negligence. And then another place is the one that
12 you just pointed to that it says, it's qualified to
13 the extent of the lost cause or more to the
14 subcontractor.

15 So it's confusing. It's contradictory.
16 They are parts of this that are down right
17 deceptive. And the bottom line is, because they
18 pled, and I believe under the facts of the case,
19 and the fact that they're licensed and my client is
20 not -- and I'll get into this -- as a matter of
21 law, pursuant to the statute, they're fully
22 responsible for everything the subcontractors did
23 by virtue of that licensure.

24 They are seeking recovery for their
25 concurrent, if not sole negligence. They are.

1 It's inescapable. And by virtue of that, they're
2 held to what's called the clear and unequivocal
3 standard. It's a strict exacting standard of
4 contract construction. And because of that -- and
5 Judge Newman found it -- this contract does not
6 meet that clear and unequivocal standard. You
7 can't say, you know, A, B, C, D and E, and then
8 ultimately pick which ones you want to apply.

9 It's confusing. It's contradictory.
10 It's unclear. It's downright deceptive. And it
11 doesn't meet the clear and unequivocal standard.

12 And here's something that I think is
13 fatal to them, to Builders FirstSource; they
14 downright -- I believe, first of all, the clear and
15 unequivocal standard does apply. And I'll go
16 further to explain that. But they downright
17 admitted in a filed signed pleading by Mr. Hughes,
18 in the other case that Mr. -- before Judge Newman.
19 They admitted in their motion to reconsider that,
20 in fact, Charleston Exteriors, supporting their
21 memorandum yesterday, that Judge Newman got it
22 right.

23 They admitted that their contract does
24 not meet the clear and unequivocal standard, as set
25 forth, and in order. They admitted that. And, you

1 know, they specifically said in the pleadings
2 submitted by Mr. Hughes, signed by Mr. Hughes, this
3 Court's, December 6th, 2019 order, correctly finds
4 that the indemnity language at issue does not meet
5 the elevated standard of being clear and
6 unequivocal. And, thus, the Plaintiffs cannot
7 maintain indemnification for Plaintiffs' claims.
8 Its motion to reconsider attached is Exhibit C.

9 I would submit to you that the case in
10 Young v. Martin 254 S.C. 50 stands for the
11 proposition that the party is bound by an admission
12 of its attorney contained in a court filing,
13 prepared and signed by the attorney, and further an
14 admission in one action may be received in evidence
15 and action, even with a different party.

16 BFS has admitted that its contract
17 provisions, in this very same master agreement --
18 let me be clear, the master agreement here is the
19 exact same master agreement ruled upon by Judge
20 Newman. They've even admitted that its contract
21 indemnity provisions don't meet the standard that
22 applies, the clear and unequivocal standard. And
23 that's a judicial admission and BFS should be
24 estopped from asserting otherwise.

25 THE COURT: Well, let me ask you this:

1 Your sub paid money to settle out; right?

2 MR. FREEMAN: Yes, sir.

3 THE COURT: All right. And then BFS
4 has paid money, in addition?

5 MR. FREEMAN: Yes, sir. BFS did not --
6 BFS exonerated BFS. BFS did not pay anything to
7 exonerate my client.

8 THE COURT: Well, I'm trying to
9 understand what they would be getting
10 indemnification for, if your client paid money to
11 the owner of the property for your negligence.

12 MR. FREEMAN: Correct.

13 THE COURT: So that party has been made
14 whole, presumably, by your settlement with them?

15 MR. FREEMAN: Correct.

16 THE COURT: So BFS is saying, you've
17 got to pay us back what we paid out on behalf of
18 you, even though we didn't pay out anything on
19 behalf of you?

20 MR. FREEMAN: BFS only paid out to
21 settling the claims against BFS.

22 THE COURT: But you're saying they want
23 you to reimburse them for everything else?

24 MR. FREEMAN: Yes, they do. Yes, they
25 do, Your Honor. They're asking us to -- you hit

1 the nail on the head, Your Honor. BFS -- we paid
2 for our negligence.

3 First of all, let me say, we deny that
4 we were negligent. Therefore, we deny liability.

5 But we have paid the plaintiffs
6 handsomely. BFS has paid the Plaintiffs with
7 respect to whatever the claims are against BFS.
8 BFS is now turning to us saying, hey, we paid the
9 Plaintiffs. And oh, by the way, our master
10 agreement provides that we're entitled to be paid
11 back any amounts paid in settlement, any amounts
12 paid in settlements.

13 So they paid in settlement for their
14 negligence, alleged negligence. And I'm not saying
15 that they were negligent. But their alleged
16 negligence. And now they're asking us to pay them
17 for their alleged negligence, plus all attorney's
18 fees and we've paid the Plaintiffs.

19 So, Your Honor, by the very nature of
20 this, they are seeking to recover for their sole or
21 concurrent negligence. And I would add some
22 further reasons that go along with that.

23 THE COURT: That sort of sounds like a
24 windfall.

25 MR. FREEMAN: It was a lot like a

1 windfall to BFS. It sure does.

2 And so, as I mentioned before -- and
3 let me just hit on these points, if you don't mind,
4 because I think it supports what you're hitting on
5 there, Your Honor. BFS, as the licensed
6 contractor, is fully responsible, as a matter of
7 law, pursuant to S.C. Code 40-11-27(e) for any and
8 all acts or omissions, wrongful or not, of its
9 subcontractors, unlicensed subcontractors, Hurley
10 Services and Charleston Exteriors, as a matter of
11 law.

12 So by the very nature of this -- of
13 their cross-claims they're seeking, as a matter of
14 law, to recover for their concurrent, if not, sole
15 negligence under that statutory scheme.

16 Furthermore, again I refer back to the
17 fact that BFS's 30(b)(6) witness admitted that --
18 as to the very issue that the Plaintiffs' expert
19 identified as an issue, as a problem, that the
20 subcontractor simply followed the instructions of
21 what BFS's superintendant's told them to do.

22 Third, BFS's cross-claims, as I've hit
23 on, seek full indemnification of the amounts of the
24 settlement, plus attorney fees.

25 And, four, if you look at the

1 provision -- and this is important -- it was within
2 the master agreement. The provision that discusses
3 attorney's fees that they seek indemnification for,
4 Your Honor, say that the duty to defend and
5 indemnify for attorney's fees exist regardless of
6 any ultimate liability or negligence of the
7 contractor. Contractor being BFS.

8 They could be 100 percent at fault.
9 But they're saying we have to indemnify them for
10 attorney fees.

11 I would submit to the Court, Your
12 Honor, that that violates Section 32-2-10 S.C.
13 indemnity statute, and makes this contract illegal.

14 Finally, the contract has got to be
15 read as a whole. And I know you hit on that one
16 clause in one paragraph there. That indemnity
17 section is huge and there's multiple indemnities
18 that have been found in the agreement. And you
19 have to take the four corners of the contract and
20 read the whole contract, and construe the whole
21 contract together, as a whole.

22 And I would submit to you that it's
23 replete with unenforceable illegal terms. It
24 doesn't meet the clear and unequivocal standard.
25 It violates Section 32-2-10. And as the D.R.

1 Horton case 42 S.C. at 152 says -- and BFS was a
2 party to that case. In fact, it was -- BFS was on
3 the receiving end of a favorable ruling striking
4 down the D.R. Horton's contract. The D.R. Horton
5 says, an illegal contract is unenforceable. You
6 know, it's unenforceable as a matter of law. And
7 the whole thing -- and it's unenforceable in any
8 respect that fails in all respects.

9 The contract either swims or it sinks.
10 It stands or it falls on its terms. South Carolina
11 is not a blue pencil state.

12 The Court cannot say, well, yeah,
13 you've got these other enforceable provisions over
14 here that violate the anti-indemnity statute that
15 aren't clear and unequivocal, but we're going to
16 ignore them. We're strike through them with a
17 pencil.

18 It doesn't work like that under South
19 Carolina law. Here, if the contract was
20 unenforceable in any of the indemnity provisions
21 are unenforceable, in any respect, they fail all
22 together.

23 And I would submit to the Court, Your
24 Honor, that here these indemnity provisions failed,
25 they're against public policy, and are

1 unenforceable, not only pursuant to 32-2-10, but
2 also pursuant to the clear and unequivocal
3 standard, which BFS has admitted in a pleading, in
4 court in this circuit, that it doesn't meet.

5 Lastly, Your Honor, I'm going to touch
6 on that I believe collateral estoppel does apply
7 with Judge Newman's order. It's an order granting
8 summary judgment, finding this very same contract
9 is unenforceable for these very same reasons, that
10 it doesn't meet the clear and unequivocal standard.
11 And for these reasons collateral estoppel applies.
12 And that's found on the last -- towards the end of
13 our brief.

14 I believe Charleston Exteriors -- who
15 was actually a party to that case. But let me add,
16 the collateral estoppel arguments apply to my
17 client, even though we were not joined in those
18 motions in that case.

19 But since Mr. Olson -- that was his
20 motion before Judge Newman. I'm going to allow him
21 to really flush out the collateral estoppel and res
22 judicata arguments. And I join and adopt in those
23 arguments set forth in his motion that he'll argue
24 today further. And I will yield to him, and if you
25 have any follow-ups that you may request.

1 THE COURT: All right.

2 MR. OLSON: Good morning, Your Honor.
3 I'll be very brief.

4 THE COURT: Every lawyer says that.
5 They always say, I'm only going to talk a short
6 time on collateral estoppel.

7 MR. OLSON: Well, the good thing about
8 that is we've incorporated Mr. Freeman's arguments
9 into our memorandum, which was a motion for summary
10 judgment. We were seeking to join his previously
11 filed motion for summary judgement.

12 I will expound a little further on the
13 estoppel argument, in that what Mr. Freeman says is
14 correct. A Berkeley County lawsuit involves
15 Charleston Exteriors, who I represent, and Builders
16 FirstSource involving the exact same subcontract --
17 or in this case it's called a master vendor
18 agreement, which is not an agreement that's per
19 individual project. It's signed sometimes on a
20 year-to-year basis.

21 In this case, it's a broad agreement
22 that controls not only the Six Fifty Six project,
23 but also it controlled the project in Goose Creek,
24 which is -- or I think Monks Corner may be the
25 subject of the Newman decision in Berkeley County.

1 But, basically, that Court -- I mean,
2 that Court found -- and it wasn't a form four
3 decision. I mean, there's a thorough opinion.

4 And I want to say that I think Judge
5 Newman's order puts the language and describes the
6 language very well when he says, it's confusing at
7 best, deceptive at worst.

8 There are numerous times where the
9 indemnity allegations are simply flipped around,
10 turned around, and spun. It's thing -- it's one of
11 the most confusing documents I've ever had to read.
12 And, candidly, I don't really know that anybody
13 completely understands it. Certainly not a company
14 like Charleston Exteriors, which is a subcontractor
15 and installed some windows on this job.

16 I really point at that decision more
17 though, because we think that in terms of
18 collateral estoppel and essentially res judicata.
19 We would, at least, ask the Court to consider it
20 here. There is not an issue in that matter that's
21 any different than the ones here. Because the
22 subject matter is not really the construction
23 project. The subject matter is actually the vendor
24 agreement that we keep talking about.

25 Mr. Freeman has covered most of what I

1 would cover. I will say further, though, we argued
2 the same motion for summary judgment, I want to
3 say, it was the end of October in front of Judge
4 Newman. He granted it after some time and
5 considered both orders.

6 His first course, you know, is file a
7 motion to alter and reconsider. They were heard on
8 that argument. And Judge Newman stated that he
9 felt and unconvincing the arguments to reconsider
10 an order to flip his opinion. And my assumption is
11 that if they just filed a notice of appeal before
12 the Court of Appeals in that case, depending on how
13 this Court decides this issue again today, I'm not
14 sure what we can do. But I assume they will
15 probably appeal again. And maybe they would
16 consolidate all those deals on another level. I'm
17 not really sure.

18 But, in the meantime, we do feel that
19 Judge Newman's decision is precedential, in that it
20 involves the same issues, the same parties.

21 As far as res judicata, we say it
22 involves the same subject matter, and that subject
23 matter being the documents.

24 I don't think I have a whole lot more
25 to add, other than we appreciate Mr. Freeman's

1 argument. And I think it's probably time to hear
2 from Mr. Hughes. And we'll hopefully get a chance
3 to respond, if needed.

4 THE COURT: Well, it boils down to your
5 argument is, Judge Newman is a good judge and I
6 should do what he did.

7 MR. OLSON: We hope you do.

8 THE COURT: Don't overlook it.

9 MR. OLSON: We hope you will.

10 THE COURT: A good authority, in my
11 book. He's not as authoritative as me.

12 MR. FREEMAN: I would add, Your Honor,
13 one thing to that, is that we're actually giving
14 you more ammunition, I believe, here to find that
15 BFS's master agreement is unenforceable, as a
16 matter of law, than it was presented Judge Newman.

17 And we've actually presented broader
18 grounds. We cited to additional provisions of the
19 contract, and additional -- unlike that case, this
20 case is -- actually discovery has been had. We're
21 now ready for trial. That case is actually a
22 threshold of the case. And I believe we've given
23 you the ammunition in our brief and supporting
24 attachments that actually further support
25 additional grounds for granting of summary

1 judgment. Thank you, Your Honor.

2 THE COURT: So if they were out this
3 master agreement, you'd still have -- basically,
4 equitable indemnification principles would apply.

5 It would just be what the -- I think
6 what the law is trying to say is, you're
7 responsible for your negligence. And if I have to
8 pay something out for your negligence, in fairness,
9 you ought to pay me.

10 Now, if I messed something up, I ought
11 to pay for what I did. But you should pay me back
12 if I have to pay out something you did. And it
13 doesn't seem fair to say, well, you got to pay out
14 what -- you got to pay for what you did, but I
15 should get reimbursed by you for what I did, even
16 though I didn't have to technically pay out
17 anything for what you did wrong.

18 That's the kind of unfairness of this
19 situation.

20 MR. FREEMAN: You're absolutely right,
21 Your Honor. The only thing that would remain would
22 be that equitable indemnity claim. And I would
23 submit to the Court, as well -- and, you know, our
24 motion for summary judgment files a -- the very
25 first ground is they exist no genuine issue as to

1 any material fact, public services, and private
2 judgement dismissing all cross-claims against this,
3 as a matter of law.

4 And you hit the nail on the head,
5 again, Your Honor. Their equitable indemnity claim
6 would fail, as a matter of law, because of fairness
7 principles that you just --

8 THE COURT: They haven't paid out
9 anything on your behalf.

10 MR. FREEMAN: You're absolutely right,
11 Your Honor. And moreover, based on the very
12 deposition testimony that I've cited, as well as
13 the licensure and everything else, under equitable
14 indemnity principles well settled under South
15 Carolina law, one party can only -- a contractor
16 can only get equitable indemnity from its
17 subcontractor, if it has unclean hands and is
18 100 percent free of fault.

19 The very allegation that Plaintiffs'
20 expert says was wrong with these windows was the
21 absence of sill caulk at the base of the windows.
22 Keep that in mind.

23 Builders Firstsource's own 30 (b) (6)
24 witness admitted at deposition that that was the
25 best practice at the time, still is the best

1 practice today, and the BFS would have instructed
2 the subs to do that.

3 If we follow and do what they tell us
4 to do, they can't come against us in equitable
5 indemnity, because we did what they told us to do.

6 They've got unclean hands, as a matter
7 of law. It's unfair. And the unpaid equitable
8 indemnity claims would fail, as I matter of law
9 too. And I'd be happy to cite to you -- I mean,
10 I'm happy to supplement and cite any law to that
11 you want.

12 But the law of equitable indemnity is
13 fatal to the BFS's equitable indemnity claims, as
14 well, Your Honor. Thank you.

15 THE COURT: Mr. Hughes.

16 MR. HUGHES: Your Honor, Steve Hughes
17 here on behalf of Builders FirstSource.

18 As you've heard, the movant's position
19 is founded primarily on its contention that the
20 contractual provisions here are unconscionable and
21 don't comply with the requirements of South
22 Carolina law, and preclude us from seeking
23 indemnity, as a matter of law.

24 The motion, obviously, is supported by
25 a memorandum, which has a superficial appeal. And

1 I believe under more careful scrutiny.

2 The Plaintiffs in support of their
3 motion rely primarily upon the Court of Appeals'
4 opinion in the matter of Concord and Cumberland.
5 And I'm sure that the Court is aware of that.

6 In that case, the Court determined that
7 where a party seeks to be -- indemnify against the
8 consequences of its own negligence, the contractual
9 provisions imposing such an obligation must be
10 clear and unequivocal in the imposition of that
11 responsibility.

12 Although, the Concord and Cumberland
13 case is not specific to what we're talking about
14 here, its provisions do also bear examination. And
15 I have no doubt the Court is familiar with that
16 case. However, I would like to review it.

17 The contractual provisions in that
18 case, which were subject to examination by the
19 Court of Appeals, are almost virtually identical in
20 terms of substance to those provisions we're
21 talking about here today.

22 Those required that the subcontractor
23 Defendant indemnify the general contractor against
24 all liability loss or damage, arising from personal
25 injury or property damage, arising out of or

1 resulting from the scope of work performed by the
2 subcontractor, and limited liability to the extent
3 that those damages were occasioned by some
4 negligence of the contractor.

5 Those, again, are virtually identical
6 in terms of substance to the contractual
7 provisions, upon which we are relying, in support
8 of our contention, that they owed us indemnity
9 against the losses paid to the Plaintiffs.

10 Both parties in that case are situated
11 exactly as are the parties here.

12 THE COURT: Before you go any further,
13 let me see if I -- educate me on what it is that
14 you want to be indemnified for. Because he's
15 telling me we paid the owner of the property, so
16 they're not out anything --

17 MR. HUGHES: Let me correct certain
18 misimpressions that Mr. Freeman may have
19 inadvertently led the Court toward.

20 Our initial claims were for recovery of
21 all damages paid to the Plaintiff. Our contention
22 being that they were solely responsible for those
23 damages. Our contention also was that we were
24 entitled to attorney's fees, pursuant to the
25 specific provisions of our contract.

1 At the time of the motions, we were
2 unaware of any specific settlement of the
3 Plaintiffs' claims against this subcontractor,
4 Hurley Services. We are not, contrary to what the
5 Court has been led to believe, currently seeking
6 any further indemnification against the losses paid
7 and satisfied to the Plaintiffs' claims.

8 That is simply not before the Court.
9 And it would have been more formally identified,
10 had we been provided the documentation, in terms of
11 the releases that clearly show that we had been
12 released of any further liability upon their
13 claims. Having said that --

14 THE COURT: You're seeking attorney's
15 fees and what?

16 MR. HUGHES: We are seeking attorney's
17 fees.

18 THE COURT: That's it?

19 MR. HUGHES: Yes, sir.

20 Let me explain to the Court. Although
21 we are no longer seeking indemnification against
22 the losses paid to the Plaintiffs, our contention
23 has been from day one that the losses, to which we
24 have been exposed, were a consequence, not of
25 anything that we did improperly, but specifically

1 as a consequence of the negligence or other
2 transgressions of our subcontractors.

3 We have never conceded it. And we are
4 not conceding it today, that we were responsible
5 for those damages. Having said that, we are not
6 pursuing recovery of amounts that we have now paid
7 in satisfaction of the Plaintiffs' claims.

8 So the sole issue here really addresses
9 the extent to which we're entitled to attorney's
10 fees incurred in defending against the allegations.
11 Is that clear to the Court?

12 THE COURT: That's fair. It's fairer.
13 I mean, because originally -- I mean, what I was
14 hearing, as a result of my questioning, was it
15 sounded like you were seeking to be reimbursed for
16 not only your attorney's fees, but for things that
17 you had to pay out that they weren't responsible
18 for.

19 And that doesn't -- it doesn't seem
20 fair, number one. And, two, I've always kind of
21 looked at the law as it doesn't reward windfalls.
22 And it would be a windfall for you to get
23 reimbursed by them for something that they didn't
24 do.

25 But if they were responsible for you

1 having to hire a lawyer to defend their negligence,
2 and then they pay out for the physical things that
3 were wrong to be fixed, equity isn't an offendant
4 by you saying, well, I thought I had to go out and
5 get an attorney to make them do that and defend
6 myself so that I could sue. That's fair.

7 MR. HUGHES: Yes, Your Honor.

8 And, again, just so the record is
9 clear, our initial claims for indemnification
10 relate to losses which we might be exposed to the
11 Plaintiffs. We're focused on, again, our
12 contention is that those losses relate solely to
13 the transgressions or shortcomings or negligence of
14 our subcontractors.

15 Having said that, we have now resolved
16 those claims and we're only seeking attorney's fees
17 here.

18 THE COURT: How big does that check
19 need to be?

20 MR. HUGHES: The check to the
21 Plaintiffs, Your Honor?

22 THE COURT: Well, you want money?
23 That's what we're talking about; right? You said
24 we're only seeking attorney's fees.

25 MR. HUGHES: It is not --

1 THE COURT: How much is it?

2 MR. HUGHES: Listen, I can't quote you
3 book and page, but this litigation has been ongoing
4 for nearly four years, I believe. And it does have
5 a significant amount. I can certainly provide the
6 documentation to the Court.

7 THE COURT: I'm just curious.

8 What's the number that it takes to make
9 all of this go away, before the trial date?

10 MR. HUGHES: The attorney's fees in
11 this case have been significant, because of the
12 nature of the litigation, the quality of counsel,
13 the discovery that has been necessary, in order to
14 properly defend against these claims, and
15 everything else that goes into the defense against
16 a major litigation. And I don't think it's any
17 surprise to the Court and certainly to Mr. Freeman.

18 THE COURT: I'm staggered by the
19 numbers that we talked about in these cases.

20 MR. HUGHES: Yes, sir. That's fine.

21 In any event, just so the record is
22 clear, if the Court has no other questions thus
23 far, I would like to point out that the --
24 notwithstanding the similarity of the contractual
25 provisions that were addressed in the Concord and

1 Cumberland Court and that are before the Court
2 today, there are differences.

3 Again, the fact is that the parties are
4 the same. The parties in that case, as are the
5 parties here, were involved in installation of
6 windows. The parties were subsequently sued for
7 their alleged concurrent negligence in installation
8 of the windows.

9 And the parties in that case, the
10 Defendants contractor and subcontractor ultimately
11 reached separate settlements with the Plaintiffs'
12 counsel.

13 Once those settlements had been
14 entered, the contractor, unlike the contractor
15 here, sought recovery against what it appears to
16 have acknowledged were damages occasioned by its
17 own negligence. That is not what we are seeking
18 before the Court today.

19 The Court in that case, again, looking
20 at -- the trial Court in Concord and Cumberland
21 determined that the Defendant's subcontractor
22 acknowledged that the contract provisions, which
23 are identical to those here, imposed upon the
24 subcontractor, the obligation to indemnify the
25 general contractor against losses arising out of

1 the negligence of the sub.

2 The Court of Appeals said the same
3 thing. It said this language, independent of any
4 clear and unequivocal language, was sufficient to
5 impose the obligation to indemnify.

6 This language about which we're arguing
7 today clearly imposed upon the subcontractor the
8 obligation to indemnify the general contractor.

9 That case, although it stands for the
10 proposition that indemnification against one's own
11 negligence, must be set forth in terms that are
12 clear and unequivocal. It does not invalidate
13 provisions we're addressing here today, which
14 simply have sought indemnification against the
15 negligence of our subcontractor, any argument to
16 the contrary, with all due respect to the arguments
17 of Plaintiffs' counsel is simply without merit.

18 With regard to our assertion of claims
19 for attorney's fees, the contract provisions, about
20 which Mr. Freeman complains are clear. The first
21 of those, which we've been talking about thus far,
22 clearly imposes upon the subcontractor the
23 obligation to indemnify my client against the
24 consequences of the subcontractor's negligence.

25 There is a second portion of that in a

1 separate indemnification provision, which requires
2 that to the extent permitted by law -- to the
3 extent permitted by law, the subcontractor defend
4 and indemnify against all liability occasioned by
5 personal injury or death, regardless of the
6 negligence of the indemnitee.

7 That provision is not relevant here.
8 It is not a basis for any claim that we've asserted
9 and it is not before the Court in a meaningful
10 capacity.

11 Secondly, although it might be
12 considered to be contrary to the requirements of
13 Section 32-2-10, nonetheless is part of a contract,
14 which I understand is used in multiple states. And
15 it simply allows the indemnitee, to the extent
16 permitted by state law, to recover damages
17 occasioned by death. It's not relevant here.

18 THE COURT: If I understand your
19 argument, it would be -- there may be troublesome
20 language in that agreement, but it doesn't apply
21 because you're only seeking attorney's fees
22 reimbursement, and since that doesn't apply, you
23 can't go in nitpicking for something else in this
24 agreement that doesn't apply?

25 MR. HUGHES: Absolutely.

1 But beyond that, even if it were
2 applicable, by its very terms, it is subservant to
3 South Carolina law and the public policy of the
4 State set forth in Section 32-2-10, which purports
5 to preclude. That's our understanding.

6 So it simply is not a matter at issue
7 here. It might be a matter of issue in a court
8 outside of South Carolina where the public policy
9 would allow indemnification against sole liability
10 and indemnity under these circumstances. It is not
11 relevant here, because it's not --

12 THE COURT: It's not what you're
13 seeking?

14 MR. HUGHES: And it's not relevant in
15 South Carolina. It's not relevant to our claims in
16 South Carolina. It only applies to the extent the
17 law might allow. If we were dealing with an injury
18 or a death here, we would assert those claims.
19 But, obviously, in South Carolina, as I understand
20 it, would not allow those specific claims.

21 It would allow us to seek
22 indemnification in that context, but not for those
23 claims. And aside from that, to the extent that
24 the Court might deem it problematic, this contract
25 has a specific severability provision. As the

1 Court is well aware, severability is a question of
2 the intent of the parties. In this case the
3 contract specifically, not only in that section,
4 states that in the event that any portion -- any
5 portion or section of this contract is contrary to
6 South Carolina law or otherwise potentially
7 invalid, the Court can segregate and sever it from
8 any contract.

9 THE COURT: Let me ask you this: How
10 many subs were there -- are there in this case or
11 were there in this case?

12 MR. HUGHES: We had two ultimately,
13 these Charleston Exteriors and Hurley Services.

14 THE COURT: Those are the only two?

15 MR. HUGHES: Yes, sir.

16 THE COURT: All right. So to the
17 extent that you are seeking attorney's fees and
18 you're saying, well, we have a lot of attorney's
19 fees, because we got brought into this lawsuit as a
20 result of their negligence; but you might have a
21 little bit of your own negligence, from what I'm
22 hearing from them is it more fair to a portion of
23 your attorney's fees amongst all of the subs and
24 for the portion that your general contractor client
25 did something wrong, as opposed to say, okay,

1 Hurley Services you owe me \$500,000 in attorney's
2 fees, and the other sub, you owe me 500,000?

3 You can't get it twice. It's not fair,
4 on an indemnity claim, to get a hundred percent
5 from both. And then maybe you've got a little bit
6 of your own negligence there. So you would have
7 been brought in -- it wouldn't be fair to say that
8 you have to pay for my attorney's fees for my
9 negligence, any more than it would be fair to say
10 that you have to pay for my negligence.

11 MR. HUGHES: Let me address that in
12 this manner, Your Honor, regardless of the
13 equities -- and I'm not here to address that. That
14 is the specific contract, to which the
15 subcontractors were a party. Within Section 5
16 thereof it states specifically that notwithstanding
17 the foregoing -- I beg your pardon. It states
18 specifically within Section 5, the duty to defend
19 under this section is independent and separate
20 from the duty to indemnify.

21 This contract, I believe, clearly and
22 unequivocally imposes upon the subcontractor the
23 obligation of the Defendant to indemnify. And,
24 again, the claims are brought against us.

25 THE COURT: Even if it turns out that

1 they weren't negligent at all?

2 MR. HUGHES: Yes. That's exactly what
3 it says. And that is a clear and unequivocal
4 imposition of responsibility upon these
5 subcontractors.

6 THE COURT: I don't disagree with you.
7 I just want know about of what the reading of that
8 is.

9 MR. HUGHES: And beyond that, Your
10 Honor -- again, respecting the Court's suggestion
11 that perhaps we were independently negligent -- our
12 position has always been, and I think correctly so,
13 that the negligence that has resulted in the --
14 that has allegedly resulted in claims,
15 counter-claims here, was solely that of our
16 subcontractors. We have never conceded that
17 Builders FirstSource could be responsible for any
18 damages allegedly sustained. We have always
19 contended that that their actions resulted in the
20 Plaintiffs damages

21 I will address Mr. Freeman's comments
22 about the testimony in a moment.

23 We've always contended that they
24 deviated from that to the extent that Plaintiffs'
25 claims are correct. To the extent that

1 Mr. Mease's (sic) clients did the window
2 installation. But to the extent that the
3 subcontractors failed to install sealant inboard of
4 the fins, that indicates a violation of the
5 instructions that were given.

6 Therefore, under those circumstances to
7 the extent we are held liable or responsible, we
8 would expect them to pay attorney's fees.

9 Other circumstances might justify --
10 and, of course, the Court can justify an
11 appropriate allocation of attorney's fees between
12 the parties. And the Court may find in the case
13 here an allocation based upon this negligence.

14 THE COURT: Well, if I understand him,
15 in his portion, they don't admit that they were
16 negligent. They just paid some money to settle the
17 claim. So nobody is forcing you to accept
18 liability. It's just equal payout, sometimes to
19 make things go away.

20 MR. HUGHES: Well, I understand that.
21 And that's exactly what --

22 THE COURT: That's your position and
23 that's also their position.

24 MR. HUGHES: And we have paid to make
25 these claims to go away.

1 THE COURT: You're just seeking all of
2 your attorney's fees?

3 MR. HUGHES: To the extent, consistent
4 to the law, we certainly are. And I think our
5 contract imposes the obligation.

6 THE COURT: And I'm not trying to force
7 you into saying something that you're not trying to
8 say. I'm just saying that's your position.

9 MR. HUGHES: Yeah.

10 THE COURT: We don't admit that we did
11 anything wrong, but we still paid some money out to
12 make it go away. And they're saying we didn't do
13 anything wrong. And you're saying, though, we
14 think under the contract you owe us for 100 percent
15 of the attorney's fees that we incurred in this
16 lawsuit by virtue of the language in the agreement.
17 Is that correct, or not?

18 MR. HUGHES: That is our position. At
19 the very least, the position of the Court is -- at
20 the very least, we would be entitled to a
21 percentage of attorney's fees purportedly
22 attributable to what they have done wrong, at the
23 least.

24 But, again, the contract provisions by
25 their specific terms, which I would contend are

1 consistent with Concord and Cumberland, impose the
2 obligation to defend against the subcontractor's
3 negligence.

4 If we allow negligence to be determined
5 without the benefit of this language, perhaps their
6 might be an appropriate allocation. But I don't
7 think this language is inappropriate. I don't
8 think it transgresses with South Carolina law.

9 It did not invalidate any provision
10 regarding the contract. And, again, the Court of
11 Appeal's concern was always that the effect of
12 imposing an obligation to indemnify against one's
13 own negligence would undermine the performance down
14 the road.

15 I would like to address Mr. Freeman's
16 comments concerning the basis of the liability
17 here. It is his contention that Mr. Mease
18 testified that the sole deviation from the
19 appropriate process to install these windows was
20 the failure to install sealant at the sill.

21 As the Court may or may not know,
22 because of perhaps experience in theses cases, many
23 window manufacturers require that sealant be
24 installed inboard of the nailing fins at the sills.

25 The installation instructions here

1 appear to have required installation of sealants
2 inboard of head, jams, and possibly sills.

3 What Mr. Mease testified was that he
4 found no evidence of sealant behind any of the
5 fins. He said specifically -- I'm going to refer
6 to the limited testimony provided by Mr. Freeman on
7 that.

8 He said, first, they lacked sealant.
9 Mr. Freeman questioned him as to how to determine
10 that. He said, there was no evidence. And he
11 said, in his opinion, there's no evidence of
12 installation of sealant behind any of the fins.

13 And that is what the testimony was.
14 Not what Mr. Freeman led the Court to believe.

15 Beyond that -- and I do have some more
16 testimony, Mr. Rosemand, who is the designee for
17 Builders FirstSource clearly testified that the
18 procedure required by Builders FirstSource in the
19 installation entailed the installation of sealant
20 inboard of the nailing fins. And substitution of
21 that sealant at the sills, which we contend is
22 consistent with the manufacturer's protocols.

23 And which, in this case, has actually
24 been authorized by the manufacturer in response to
25 how it's done. Moreover, the testimony of the

1 principal witness of Charleston Exteriors also
2 testified that they routinely installed caulk
3 around the head and jams. And I forget the exact
4 words, but he said, quote, and ton of caulk, I
5 believe. So clearly the installation
6 subcontractors had an appropriate instruction to
7 install sealant.

8 To the extent that that sealant was
9 missing behind any or all the windows, that is a
10 direct consequence of a failure of the
11 subcontractors to act in accordance with those
12 criteria.

13 That is not our fault. It is the sole
14 issue upon which Mr. Mease contended that the
15 windows were improperly installed. And, there
16 again, lies our argument that our subcontractors
17 are responsible.

18 And I will pass up some portion of the
19 testimony, if it suits the Court. With regard to
20 Mr. Judge Newman's --

21 THE COURT: Let's take five-minutes to
22 use the restroom. All right.

23 (A brief recess was had.)

24 THE COURT: All right. Go ahead.

25 MR. HUGHES: I just want to address

1 briefly the testimony again offered by Mr. Mease.

2 And this is within the portions of testimony

3 offered by Mr. Freeman.

4 The Mease deposition, which as I recall
5 encompassed over five days, over a period of
6 several months. It concluded, I believe, on
7 May 22, 2018. At Page 590 -- at page 593 of that
8 testimony, Mr. Mease was asked commencing at Page
9 593, Line 10. And concerning that sheet -- which
10 Mr. Mease was making reference to -- there's a
11 reference there that says caulk before fastening.
12 And that detail and statement on the
13 Exhibit 10-100. Is the basis of your opinion that
14 there's something wrong with the installation of
15 the windows as to the amount. And Mr. Mease said
16 yes. Clearly this opinion concerns deficiencies
17 and installation of sealants to the perimeters of
18 the fins.

19 He continues in response to his
20 examination by Mr. Freeman. Mr. Freeman asks him
21 at Page 598, commencing at Line 23. Can you
22 definitively opine that there's a complete absence
23 of caulk behind the nailing fins of the windows
24 installed at the rod and buildings. His response
25 is, I have no evidence of it. I was able to see

1 the window corner --

2 COURT REPORTER: I'm sorry. If you
3 could slow down a little, please.

4 MR. HUGHES: The response was I have no
5 evidence of it. I was able to see the window
6 corners at the jam sill section. There's no
7 evidence of sealant behind the fins.

8 Again, I have no evidence that there's
9 any sealant behind the windows. And believe that
10 to be the case. Clearly that was evidence offered
11 by Mr. Mease.

12 I was about to address Mr. -- I was
13 about to address the order issued by Judge Newman,
14 in front of Judge Newman. It is our position --
15 and I would note that that order is currently on
16 appeal -- there's been no disposition from the
17 Court of Appeals. But it is our position and I
18 think correctly that the Newman opinion is
19 completely inconsistent with the Court of Appeals'
20 ruling in Concord and Cumberland. His findings
21 concerning an omission of language of clear and
22 unequivocal -- again, is irrelevant to any of those
23 cases.

24 The contract clearly authorizes us to
25 assert negligence of our subcontractors. That is

1 exactly what we have been doing. And I anticipate
2 a favorable resolution from the Court of Appeals on
3 that issue. Again, the Court of Appeals in Concord
4 and Cumberland in addressing language, which was
5 identical in substance to that before the Court,
6 found that that language imposed upon the
7 subcontractor the obligation to indemnify.

8 With regard to estoppel, again, the
9 case is up on appeal. That case has no
10 precedential value or collateral estoppel. It is
11 the Court's determination.

12 Beyond that, as the Court, I think,
13 stated earlier, although Judge Newman is a fine
14 judge, and his caliber is not in question. I think
15 upon your review of the order itself, as it applies
16 to these facts, you will agree that Judge Newman's
17 opinion is simply incorrect. And is not worthy of
18 any consideration on this issue.

19 Finally, Mr. Freeman has argued
20 incessantly that the provisions of these contracts
21 are confusing, and unclear, and not sufficiently
22 clear and unequivocal, et cetera. And, thus,
23 violated the South Carolina law, policy, et cetera.
24 And, thus, furthermore not entitled to any
25 enforcement whatsoever.

1 As I stated earlier, these provisions
2 are clear in their respective imposition of
3 responsibility upon our subcontractors. I don't
4 believe that, notwithstanding the superficial
5 appeal of the arguments of Plaintiff's counsel, the
6 contents of his memorandum are in any way supported
7 by the facts before this Court. And they certainly
8 aren't supported by the contents of the documents.

9 And in closing, I would like to submit
10 to the Court portions of the deposition of
11 Mr. Rosemond, which was also taken this in this
12 case on May 16th, 2019. Specifically, 150
13 commencing at Line 2 through Page 153, including
14 Line 25. And the deposition testimony of Mr.
15 Taylor, who is the designee for Charleston
16 Exteriors. I would direct the Court's attention --

17 THE COURT: Are these things that you
18 have already sent me?

19 MR. HUGHES: Your Honor, we have not.
20 We weren't advised of the hearing until two days
21 ago.

22 THE COURT: I'm just wondering if it's
23 in this pile of stuff.

24 MR. HUGHES: No. No, sir, it's not.

25 I'd like to add to the Court's reading.

1 The only testimony that we would reference to the
2 Court here is Page 46 at Line 19 and running
3 through Line 21. And then beginning at Page 49,
4 commencing at Line 14 and running through Line 18.

5 I would also submit, for the benefit of
6 the Court, a copy of the notice of appeal to the
7 Court of Appeals from the order of summary
8 judgement. That issue is, in fact, on appeal. I
9 think that concludes my argument, Your Honor. I
10 appreciate your time. Thank you.

11 MR. FREEMAN: May I respond, Your
12 Honor?

13 THE COURT: Well, sure.

14 MR. FREEMAN: Your Honor, with all due
15 respect to Mr. Hughes -- he's a colleague and I
16 consider him a friend of mine. I would submit to
17 the Court that several of the arguments and
18 positions that he has presented to the Court in the
19 course of his argument there are actually fatal to
20 be up as cross-claims and further support your
21 grant of summary judgment in favor of the
22 subcontractor defendants.

23 And I accept his admission, that
24 they're no longer seeking indemnity with respect
25 settlement amounts paid to the Plaintiffs.

1 However, I will say that's not what's stated in the
2 pleadings and that's not what's been communicated
3 to us before today.

4 But I guess I accept his admission on
5 that respect, that he's just seeking attorney's
6 fees now. However, what Mr. Hughes said to the
7 Court is they're entitled to get 100 percent of
8 their attorney's fees regardless -- notwithstanding
9 the ultimate liability or negligence of contractor,
10 BFS, which is exactly the language in and is cited
11 on the bottom of Page 5 of our brief taken right
12 from the contract.

13 And, by the way, there's no to the
14 fullest extent permitted by law there. It's just a
15 separate paragraph. And what's that seeking, even
16 though it characterizes in a duty to defend, it's
17 saying they're seeking their attorney's fees.

18 Well, attorney's fees, that's just
19 damages. They're just seeking damages in the
20 amount of their attorney's fees, and they say they
21 get 100 percent of them, irrespective of the fault
22 of ultimate liability and negligence and default of
23 BFS.

24 I would submit to the Court that that
25 very provision that they're now relying upon

1 violates Section 32-2-10 South Carolina indemnity
2 statute that purports to indemnify BFS with respect
3 to its negligence.

4 So, even as they recast their position
5 now, as to what they're asking for, defense cost
6 are an indemnity obligation set forth in this
7 master agreement. And what they're saying is, even
8 if they're solely liable and ultimately liable,
9 they get 100 percent. That violates the law in
10 South Carolina. The whole contract fails.

11 Mr. Hughes also stated -- he said,
12 yeah, well, we do have this provision within
13 Section 5 of the master agreement indemnity section
14 that says we -- you know, we can recovery even in
15 the event of our sole negligence from this other
16 stuff, but that doesn't apply. Yeah, you can just
17 ignore that.

18 That's not the law of South Carolina.
19 Again -- and I don't care about the part that says
20 to the fullest extent permitted by law. 32-2-10
21 says if your contract purports, and specifically
22 these reports to indemnify in any way, based on the
23 sole negligence, that clause fails. It can't be
24 severed out. It's a big chunk of Paragraph 5 in
25 master agreement in the indemnity section.

1 The D.R. Horton case didn't allow the
2 BFS to rely upon to its favor. The Court in D.R.
3 Horton didn't allow any severance. If the
4 indemnity clause fails, it fails as a whole.
5 That's the law, Your Honor.

6 And in South -- there's plenty of law
7 in South Carolina where there's provisions of
8 contracts that are unenforceable. It's against
9 public policy to which 32-2-10 clearly makes --
10 makes it's clear, it's unenforceable against public
11 policy. A court is not going to put binders on or
12 blue pencil, or White-Out, or whatever you want to
13 call the unenforceable sections.

14 Attorney's fees or damages -- and
15 they're seeking those damages in an indemnity, and
16 nothing about their change in position changes the
17 fact that this contract is fatally flawed and it
18 sinks all together.

19 The Concord and Cumberland case, the
20 contract clause there that he's referring to are
21 different to the ones here. And we're relying
22 simply on Concord and Cumberland for proposition
23 that they're clear and the unequivocal standard
24 applies here. Because they are seeking for
25 attorney's fees. But in whole or in part in

1 they're negligence, they're 100 percent of them.

2 And so we are relying on Concord and
3 Cumberland that says clear and unequivocal standard
4 applies. BFS has admitted in a file pleading in
5 this circuit, signed by Mr. Hughes, that the
6 contract does not meet that standard. That in and
7 of itself is fatal.

8 Regarding -- and I'll touch briefly on
9 this, the comments about Mr. Mease. I would direct
10 the Court to Exhibit 5 to our brief. What Mr. --
11 regarding the caulk behind nailing -- I don't want
12 to get hung up on this issue. Mr. Hughes was not
13 at Mr. Mease's deposition, or not there in person.
14 I was. And I was the one doing the questioning.

15 What Mr. Mease said is he only went
16 back and looked -- he only came up with this theory
17 about the caulk behind the nailing vent, not from
18 any inspections. But in the eve before his
19 deposition, getting this so-called 2007 cut sheet
20 from MI Windows. And he said he went back and
21 looked at pictures in his file. And he said, I
22 didn't see any caulk from the pictures behind
23 nailing vent. Well, you can't see the caulk behind
24 the nailing vent, because it would be behind the
25 nailing vent any way.

1 But what I said is, so let me get this
2 straight, there's peal and seal tape that goes up
3 the jams of the sides of the windows and across the
4 head. So even if there was any caulk ever that did
5 ooze out from behind the sill, the only place you'd
6 ever see it is behind -- in the sill. Because,
7 otherwise, the tape is covering it. Yeah, that's
8 right, is what he said.

9 So he really only -- he never removed a
10 window. So he -- Mr. Mease lacked any foundation
11 whatsoever, but to say anything other than his
12 contention was that there was no caulk behind the
13 sill vent. He had no foundation.

14 And with that, Your Honor I believe
15 that Judge Newman got it right. I believe that we
16 have given you other ample ammunition to further
17 find that this master agreement is unenforceable,
18 as well as their equitable indemnity claims failed.
19 Thank you.

20 THE COURT: Do you need to say anything
21 else?

22 MR. OLSON: I don't think anything
23 else. I think we have thoroughly covered it.

24 THE COURT: So is everybody settled out
25 except this issue, is that what I heard? This case

1 is set to go on the 16th.

2 MR. OLSON: We have other claims from
3 other parties I think that are still open.

4 THE COURT: I'm trying to figure out if
5 this --

6 MR. FREEMAN: I think Josh Evans
7 emailed you recently a list of four or five other
8 parties that are still in the case that Plaintiffs
9 are going against. But, you know, whether they may
10 settle out between now and the time of trial, I
11 don't know.

12 THE COURT: They don't join you in this
13 issue?

14 MR. FREEMAN: This issue is discreet
15 amongst the three parties in this room, Your Honor.
16 And the Plaintiffs have not claims against us.

17 THE COURT: Those four or five parties
18 that are left, they weren't subs?

19 MR. FREEMAN: They were, but they have
20 nothing to do with us. They were subs of Builders
21 FirstSource.

22 MR. HUGHES: We have a limited scope,
23 Your Honor, as a subcontractor to the GC. We
24 installed and provided windows. And the window
25 issue have been resolved entirely with the

1 Plaintiff.

2 MR. FREEMAN: There's a separate phase
3 to this project, Your Honor. It's called the
4 Windsor phase. We have nothing to do with them.
5 There may be separate claims being adjudicated
6 regarding Windsor phase. I don't know, but we have
7 nothing to do with Windsor.

8 THE COURT: Because we're not going to
9 be coming in and going -- whatever I rule on this,
10 me too.

11 MR. FREEMAN: No, Your Honor. The
12 BFS -- you're looking at the only parties here that
13 have -- the agreement only affects us.

14 THE COURT: I guess I was just -- the
15 clerk's office did indicate, well, if you heard
16 this, it might help that other case. It might help
17 the trial go away. Clearly it will not. It's not
18 related issues.

19 MR. FREEMAN: It will help a portion of
20 it.

21 THE COURT: Okay. All right.

22 Well, how about -- you had some things
23 that you wanted me to look at. Why don't you email
24 those and I will look at this stuff and let y'all
25 know. It's helpful to have the oral arguments.

1 You can hand the documents to me. Do
2 we have all of the briefs on both sides?

3 MR. FREEMAN: Thank you, Your Honor.
4 And thank you for accommodating us and getting this
5 set on short notice.

6 THE COURT: All right. You're welcome.
7 (The proceedings concluded.)

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1 State of South Carolina)

2 County of Charleston)

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4 I, Krista Nicole Carney, Official Court
5 Reporter for the Ninth Judicial Circuit of the
6 State of South Carolina do hereby certify that the
7 foregoing is a true, accurate and complete
8 Transcript of Record in the Court of Common Pleas
9 Court for Charleston County, South Carolina, on the
10 5th of March, 2020.

11 I do further certify that I am neither of
12 kin, counsel, nor interest to any party hereto.

13

14 February 4, 2021

15

16

17 *Krista Nicole Carney*

18 Krista Nicole Carney,

19 Official Stenographic Court Reporter

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Deposition of Russell T. Mease, P.E.

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

4 DEPOSITION OF RUSSELL MEASE, PE
5 Volume 1

6 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
7 ROBERT JOHN NUTLEY, Individually and on Behalf of
8 All Others Similarly Situated,

9 Plaintiffs,

10 vs. CASE NO. 2016-CP-10-03455

11 WINSOR SOUTH, LLC, and JEFFREY
12 M. THOMAS, Individually and on Behalf of a Class
13 of Construction Defendants:, SOUTHEASTERN
14 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
15 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
16 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
17 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
18 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
19 BUILDING SUPPLY, INC., et al.,

20 Defendants.

21 DEPONENT: RUSSELL MEASE, PE

22 DATE: JANUARY 25, 2018

23 TIME: 10:03 AM

24 LOCATION: LUCEY LAW FIRM
25 MOUNT PLEASANT, SOUTH CAROLINA

26 REPORTED BY: DARAH L. NEKOLA, RPR, CSR(IA)
27 NCRA CERTIFIED REPORTER
28 CLARK & ASSOCIATES, INC.
29 CHARLESTON, SC 29415
30 843-762-6294
31 WWW.CLARK-ASSOCIATES.COM
32 Darahnekola@gmail.com



1 mouse again.

2 A. You can see just a little edge here that
3 is open. You can see where the house wrap was
4 cut a little less -- you know, just a little bit
5 lower.

6 So we should have seen, you know, 2 or
7 3 inches of adhesive material exposed, if you
8 really want it to bond to the wall. If you cover
9 the whole thing over the back of it with Tyvek,
10 well, it's not going to stick to anything but the
11 Tyvek. It's like trying to put the band-aid on
12 without taking the wrapper off.

13 Q. Did you observe that lack of sufficient
14 sticky area on more windows than 601?

15 A. That's the first one that popped in my
16 head. I'd have to dig through these and try
17 to -- to try to find another example, and I will
18 be glad to do that if you want me to.

19 Q. I think I will hold off for now. What
20 were the deficiencies with the installation of
21 the Ryland windows?

22 A. Again, without the installation
23 instructions from MI, I can't say with
24 100 percent certainty. What I will say is they
25 followed generally a protocol that's acceptable

Deposition of Russell T. Mease, P.E.

1 in the industry, so it wasn't the worst I have
2 ever seen, but I can't confirm it with the
3 manufacturer's instructions.

4 Q. And how about the windows on building
5 400?

6 A. That was a whole other set of issues,
7 and they were actually done the worst of any.

8 Q. Do you have a photograph of that?

9 A. I do.

10 All right. I'm going to step you
11 through what we found. This is unit 405.
12 They've had a chronic water intrusion problem at
13 this first floor window that faces the parking
14 lot on the front of the building. It's the
15 window adjacent to the front entryway door.

16 Q. And what Bates number?

17 A. Oh, I'm sorry. This is Bates RTM4081.
18 Now, we've already removed the exterior trim that
19 was on the wall at the head of the window, so
20 what you're seeing is some blocking at the head
21 of the window, and you can see the bottom of the
22 the precast concrete panel.

23 So once we removed -- I'm going to step
24 through some pictures here. I just wanted you to
25 have a footing.

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

4 DEPOSITION OF RUSSELL MEASE, PE
5 Volume 2

6 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
7 ROBERT JOHN NUTLEY, Individually and on Behalf of
8 All Others Similarly Situated,

9 Plaintiffs,

10 vs. CASE NO. 2016-CP-10-03455

11 WINSOR SOUTH, LLC, and JEFFREY
12 M. THOMAS, Individually and on Behalf of a Class
13 of Construction Defendants:, SOUTHEASTERN
14 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
15 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
16 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
17 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
18 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
19 BUILDING SUPPLY, INC., et al.,

20 Defendants.

21 DEPONENT: RUSSELL MEASE, PE
22 DATE: JANUARY 26, 2018
23 TIME: 9:06 AM
24 LOCATION: LUCEY LAW FIRM
25 MOUNT PLEASANT, SOUTH CAROLINA

26 REPORTED BY: DARAH L. NEKOLA, RPR, CSR(IA)
27 NCRA CERTIFIED REPORTER
28 CLARK & ASSOCIATES, INC.
29 CHARLESTON, SC 29415
30 843-762-6294
31 WWW.CLARK-ASSOCIATES.COM
32 Darahnekola@gmail.com



1 about the installation of the rowlocks?

2 A. Yes.

3 Q. Please describe your opinion about how
4 the brick veneer is installed next to the windows
5 and the doors.

6 A. Yes. We have two dissimilar materials.
7 We have the window units, and then we have the
8 brick veneer. The window manufacturer
9 requirements for MI Windows and Andersen Windows
10 say that you're supposed to leave a quarter-inch
11 gap between the window and the brick and provide
12 a proper sealant application.

13 That's also a standard within the BIA.
14 And as you can see in photo 94 and 95, we just
15 have a raw vinyl window meeting the brick. There
16 is no protection at all. It's just an open
17 joint. So that's the first problem I have
18 identified here.

19 But also, when you abut the brick veneer
20 to a window, you also have the opportunity to
21 deform the window because the brick is going to
22 move over its life.

23 The reason you want to leave gaps
24 between the windows and the brick is because when
25 a brick comes out of the kiln, it is as dry as

1 it's ever going to be in its entire life. And
2 when you put it on a building and expose it to
3 the elements, that clay is going to slowly absorb
4 moisture over time, and these brick are going to
5 grow. So we need to give space between these
6 elements so that we're not stressing the windows
7 from brick growth as well.

8 And one very disturbing finding is shown
9 on photo 100 and 101. This was on building 305.
10 They actually shimmed the lintel to the top of
11 the window. We could see wooden shims between
12 the window unit and the lintel. There's no way
13 the veneer should be supported in any way, shape,
14 or form by the window unit.

15 Q. So the installation of the brick next to
16 the windows and doors you contend does not have a
17 proper sealant. Did you observe that condition
18 on both Ryland buildings and Winsor South
19 buildings?

20 A. Yes. Now, I will point out, in photo
21 100, you can see there has been a smear of
22 sealant placed between the brick and the window
23 in that location.

24 But again, the brick is still abutted to
25 the window, and that prevents you from putting in

1 a proper sealant joint. This is just a finger
2 smear. It's not anything close to a proper
3 sealant application. And you still have the
4 opportunity of stressing the window because
5 you're still abutted to the brick.

6 Q. As the first housekeeping matter, can
7 you identify the unit depicted in photograph 94
8 through 102 for us?

9 A. Sure. 94 is 506. Same with 95. 96 is
10 unit 705, along with 97, 98, and 99.

11 Q. All 705?

12 A. Yes. 100 through 102 are all 305.

13 Q. Thank you. Did you observe any water
14 entering the system as a result of the brick
15 being installed next to the windows or doors?

16 A. I will just quickly go back to unit 603
17 since I have those pictures available. But you
18 can see in RTM4407, the same condition exists.
19 There's been a surface smear of sealant between
20 the brick and the window frame.

21 Q. In the top right-hand corner?

22 A. Yes.

23 Q. Thank you.

24 A. But again, this is an area where we saw
25 water intrusion in the wall, and certainly, this

1 is a contributing factor.

2 Q. And what sort of joint should have been
3 there between the window and that brick?

4 A. There needs to be a space of a minimum
5 of a quarter inch. That's the standard with the
6 window manufacturers, and it's a standard with
7 the sealant manufacturers, with the ASTM sealant
8 application guide.

9 All those say the same thing. You have
10 a minimum of a quarter inch. And we should see
11 sealant that's bonded between the window frame
12 and the brick veneer between that gap. That
13 gives you the space you need and allows for the
14 movement.

15 Q. To whom do you attribute the
16 responsibility for that joint not being there?

17 MR. ROGERS: Object to the form.

18 A. In this case, it has to be the mason. I
19 mean, the mason is placing the brick. So when
20 the brick touches something, that's because the
21 mason put it there.

22 But -- and again, I have not said this
23 yet in this deposition, we always have to look
24 back to the general contractor for everything
25 that is done on any of these projects because

1 they are the licensed individuals who have pulled
2 the permit from the state, and they primarily
3 have two jobs.

4 Number one, they're there to organize
5 people and materials to do the job, and the
6 second thing is quality control. That's why they
7 have a license. They're supposed to understand
8 and know how things are to be constructed.
9 They're supposed to know how to read plans and
10 specs and to ensure that things are done
11 properly.

12 So in any of these things that we
13 discuss, there's always the general oversight of
14 the general contractor on any project.

15 Q. And aren't general contractors able to
16 rely upon specific trades to be experts in their
17 specific fields?

18 MR. FLOYD: Object to the form.

19 MS. STEPHENS: Objection.

20 MS. DUPRE: Objection.

21 MR. ROGERS: Objection.

22 A. I always go to my favorite quote when I
23 talk about this, and that was Mr. Ronald Reagan.
24 He says, yes, you can trust, but you must verify.
25 So we do trust our subs, but we need to verify

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

4 DEPOSITION OF RUSSELL MEASE, PE
5 Volume 3

6 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
7 ROBERT JOHN NUTLEY, Individually and on Behalf of
8 All Others Similarly Situated,

9 Plaintiffs,

10 vs. CASE NO. 2016-CP-10-03455

11 WINSOR SOUTH, LLC, and JEFFREY M. THOMAS,
12 Individually and on Behalf of a Class of
13 Construction Defendants, SOUTHEASTERN
14 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
15 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
16 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
17 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
18 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
19 BUILDING SUPPLY, INC., et al.,

20 Defendants.

21
22 DEPONENT: RUSSELL MEASE, PE

23 DATE: MAY 22, 2018

24 TIME: 9:24 AM

25 LOCATION: Young Clement Rivers
 25 Calhoun Street
 Charleston, South Carolina

26
27 REPORTED BY: DARAH L. NEKOLA, RPR, CSR(IA)
28 NCRA CERTIFIED REPORTER
29 CLARK & ASSOCIATES, INC.
30 CHARLESTON, SC 29415
31 843-762-6294
32 WWW.CLARK-ASSOCIATES.COM
33 Darahnekola@gmail.com

Clark and Associates Inc.

1 porch or not, you would still believe that there
2 would be problems with the decks due to the lack
3 of slope and issues with waterproofing, correct?

4 A. Yes.

5 Q. And irrespective of whether there was
6 this piece of wood under the screened porch, you
7 would still be calling for repairs and removal
8 and replacement of the decks?

9 A. Yes.

10 Q. And it's fair to say you don't know who
11 installed that piece of wood?

12 A. I do not.

13 Q. I also represent another company
14 called -- well, let me just go -- stick with
15 Screens Plus.

16 Have you ever heard of the company
17 Screens Plus?

18 A. No.

19 Q. You don't have any opinion about their
20 general reputation or the quality of their work,
21 do you?

22 A. I do not.

23 Q. Okay. I also represent a company called
24 Hurley Services that would have worked on or is
25 alleged to have worked on the Ryland side of the



1 project; whereas, Screens Plus only worked on the
2 Winsor side of the project.

3 As I understand it, your criticism
4 relative to window installation on the Ryland
5 side of the project relates to a document that
6 was produced to us last night, this MI window --
7 I believe you referred to it as a cut sheet --
8 that's been marked as Exhibit 100.

9 A. Yes.

10 Q. And concerning that sheet, there's a
11 reference there that says, Caulk under mounting
12 fin entire perimeter before fastening.

13 And that detail and statement on the
14 Exhibit 100 is the basis of your opinion that
15 there's something wrong with the installation of
16 the windows as to the MI windows?

17 A. Yes.

18 Q. What's your basis for determining that
19 there is not caulk installed under the perimeter
20 fin?

21 A. Well, last night I went through my
22 pictures and looked at every window fin that was
23 exposed during our investigation and the
24 defense's investigation, and there's no evidence
25 at all of sealant behind the nailing fin.

1 If sealant is placed behind the nailing
2 fin, you always see it in the nail holes, and
3 quite often behind the perimeter as it is
4 squeezed out behind the fin. And there was no
5 evidence of that in any of the windows that were
6 exposed.

7 Q. Did you -- as to the Ryland buildings,
8 did you actually remove any window from a rough
9 opening?

10 A. No.

11 Q. With regard to the Ryland buildings, did
12 the defense remove any window from a rough
13 opening?

14 A. I don't believe so.

15 Q. Okay. So your -- the basis for your
16 opinion about the lack of sealant having been
17 applied around the -- behind the nailing fin is
18 that in pictures that you saw, you didn't see it
19 either having been forced out from behind the
20 nailing fin or through nail holes -- through
21 holes in the fin?

22 A. Correct.

23 Q. Am I correct that the jamb fins and head
24 fins that would have been exposed during any
25 testing would have had peel-and-seal tape over

1 them?

2 A. Yes, generally.

3 Q. And so that peel-and-seal tape would
4 have covered up the holes in the fins as well as
5 the perimeter of the fins themselves?

6 A. Yes, in those areas.

7 Q. So is it fair to say that the -- really
8 the areas that you're talking about not seeing
9 any evidence of sealant is at the sills of the
10 windows?

11 A. Predominantly, yes.

12 Q. Is it also true that -- and I know
13 you're going to say that the MI window talks
14 about the sealant being installed all the way
15 around the perimeter, but that many window
16 manufacturers instructions and, indeed, best
17 practices these days, call for no sealant to be
18 installed behind the nailing fin at the sills of
19 the windows.

20 A. That is the case. However, the code
21 very clearly states that you must install the
22 windows per the manufacturer's instructions.

23 And a lot of times the sealant behind
24 the nailing fin is important for the performance
25 of the window meeting all the testing for air

1 infiltration. A lot of manufacturers require
2 that sealant application around the windows to
3 seal the window to the wall to meet the
4 standards.

5 You do have to be concerned about the
6 lack of weep at the base of the window; but,
7 again, we are forced to follow what the
8 manufacturer requires.

9 Q. Okay. And so when you say "lack of
10 weep," it could be that the installation of
11 sealant behind the sill fin and flange of the
12 window could actually serve to trap water that
13 infiltrated in through or around the window at
14 the sill location?

15 A. I mean, there is that potential. But,
16 again, per the code, we don't get to make that
17 call. We have to follow the manufacturer's
18 instructions.

19 Q. Can you definitively rule out that
20 there -- that there is a complete absence of --
21 or can you -- I'm sorry. Just let me strike
22 that.

23 Can you definitively opine that there's
24 a complete absence of caulk behind the nailing
25 fins of the windows installed on the Ryland

1 buildings?

2 A. I have no evidence of it. I was able to
3 see the window corners at the jamb-sill
4 intersection. That's another area where I would
5 typically see sealant exposed from behind the
6 fin.

7 And, again, I have no evidence that
8 there's any sealant behind these windows, and I
9 believe that to be the case.

10 Q. Based on your review of the photographs?

11 A. Correct. And, you know, I was there on
12 the property, so the photographs are just
13 documentation of what I saw.

14 At the time, I was not aware of this
15 document that we have as Exhibit 100, so I wasn't
16 specifically looking for that. But I've looked
17 at a lot of windows, and sealant, when it's used,
18 is typically visible because it gets all over
19 everything.

20 So the fact that I looked through all of
21 my pictures and didn't see one stitch of sealant
22 on anything leads me to believe clearly that
23 there hasn't been any installed on the backs of
24 the fins. It's sticky, messy stuff that gets on
25 almost everything.

1 Q. You said earlier that sealant may be
2 required by some manufacturers behind the sill
3 fin in order to prevent air infiltration,
4 correct?

5 A. Yes.

6 Q. Is excessive air infiltration something
7 that you are complaining about relative to the
8 656 Coleman project?

9 A. No.

10 Q. You did remove one or more windows from
11 the rough opening on the -- relative to the
12 Winsor buildings, correct?

13 A. We removed the one fixed window in Unit
14 405.

15 Q. Aside from the sealant issue that we've
16 just been discussing, based on your, you know,
17 review of this MI window cut sheet marked as
18 Exhibit 100, is it -- is it still your testimony,
19 sealant aside, that the window installer,
20 relative to the Ryland buildings, still followed
21 a general protocol that's acceptable in the
22 industry?

23 MR. FLOYD: Objection.

24 A. Yes, that's true. As I've said many
25 times, I would love to see the specific

1 instructions by the manufacturer, but he did
2 follow general protocols.

3 Q. If we look at -- I believe this is
4 Exhibit 11 that we have blown up on the screen
5 here.

6 Exhibit 11 is a spreadsheet that you
7 prepared, giving an overview of the various
8 deficiencies that you found at the project and
9 stating the location where you found them,
10 correct?

11 A. Yes. At the time of development of this
12 document. I've done more since.

13 Q. And kind of in the middle of that,
14 under -- is a section entitled Windows, and I
15 have three categories there: Damage to window
16 frame, trim abutted to window, and window abutted
17 to brick; is that correct?

18 A. Yes.

19 Q. And I believe we talked at length during
20 the course of your deposition that -- let's just
21 start with the trim abutted to window.

22 That would be a condition that you would
23 blame on whatever trade installed the trim?

24 A. Yes. It has to be held off of the
25 window. You can't make the window smaller.

1 Q. And the point of that is you want that
2 quarter-inch space left for an engineered caulk
3 joint around the window, correct?

4 A. Yes. You need the space to properly
5 install sealant.

6 Q. And the point of that sealant is to keep
7 the water out and to remove a pathway for water
8 to intrude around the window?

9 A. Yes. And also to allow for thermal
10 expansion and contraction of the materials around
11 each other so they don't stress or create stress
12 in the windows or the trim.

13 Q. And then there's a similar issue with
14 regard to window abutted to brick, which is
15 another one of your columns here.

16 You also want a space left for an
17 engineered caulk joint around the brick, correct?

18 A. Yes. Same condition.

19 Q. So, number one, prevent water from
20 intruding around the window vis-à-vis the
21 engineered caulk joint and, two, to allow for
22 thermal expansion of the window.

23 A. Yes.

24 Q. And you found the absence of those
25 engineered caulk joints such that, in your

1 opinion, water has been allowed to intrude around
2 those?

3 A. Yes. As I've said, I found two
4 conditions. It was either omitted or improperly
5 installed. Those are the two conditions I
6 observed on all the buildings in the community.

7 Q. And like the trim abutment, whoever
8 installed the brick would be responsible for it
9 being -- having abutted it too close to the
10 window?

11 A. Yes.

12 Q. Damage to the window frame, is that
13 something that you found relative to deformation
14 of the window because of brick bind or --

15 A. Yes.

16 Q. Okay. So that's damage to the window
17 frame due to other components surrounding it that
18 have deformed the window?

19 A. Yes.

20 Q. None of these conditions that are
21 described here are ones -- in the middle there
22 under Windows -- are ones that you blame on the
23 window installer, correct?

24 A. Correct.

25 Q. I believe your report is marked as

1 Exhibit 5; is that right?

2 MS. CHASE: Yes.

3 A. I didn't confirm it, but I believe
4 that's true.

5 Q. Turning to page 41 of your report, photo
6 61.

7 A. Okay.

8 Q. I believe you have previously testified
9 that this is Unit 10- -- this is a photograph of
10 Unit 101.

11 A. Correct.

12 Q. As well as the photos 62 and 63 on the
13 next page.

14 A. Yes. This continues on until page 46.

15 Q. And what you are documenting in these
16 photos is some evidence, you believe, of water
17 intrusion from above the windows?

18 A. Correct. And I misspoke. You're
19 correct. Unit 101 is only photos 61 through 63.

20 But, yes, documenting water intrusion
21 damage to the interior trim around the window.

22 Q. Okay. And then if we flip to photo 79
23 on page 52, and this is your beginning of section
24 Roman numeral III of your report concerning brick
25 veneer cladding.

1 A. Yes.

2 Q. These photos, 79, 80, and 81, and maybe
3 82 -- you tell me -- are also from Unit 101?

4 A. That's correct.

5 Q. And is that the same -- the window that
6 we see there the same window that we see in
7 photos 61, 62, and 63?

8 A. It is.

9 Q. Okay. So photos 61 through 63, you're
10 inside the unit, you say, Aha, I see some water;
11 we've got an issue here. Correct?

12 A. Yes.

13 Q. Photos 79, 80, 81, 82, you go outside,
14 you look at the window, you do some destructive
15 testing and you say, Aha, I think I found what's
16 causing this.

17 A. Yes. This is one of the contributing
18 factors to the problem inside.

19 Q. And so who would have installed the
20 peel-and-seal flashing that we see in photos 80
21 and 81 over top of the lintel?

22 A. I would assume the mason, but I don't
23 have any concrete evidence of that.

24 Q. And it does appear that that flashing
25 does come and lap on top of at least a portion of

1 the lintel, correct?

2 A. Yes.

3 Q. And you found the lintel to be
4 negatively sloped so that water actually runs
5 from side to side and then goes down into the
6 wall?

7 A. Correct.

8 Q. Fair to say that the window gets
9 installed before the masonry work and the lintel
10 that we see in photos 80 and 81 is in place?

11 A. To that elevation, yes.

12 Q. And this is an area where you believe
13 there's -- what we see in photos 80 and 81 are
14 conditions that are contributing to the water
15 intrusion that we saw in your earlier photos, 61
16 through 63?

17 A. Yes.

18 Q. And is that a condition that you believe
19 repeats itself at the project?

20 A. Yes. I think intrusive observations
21 bears that out.

22 Q. Why are you calling for the windows to
23 be replaced?

24 MR. FLOYD: Objection.

25 A. I'm recalling -- excuse me. I called

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

4 DEPOSITION OF TERRY ROSAMOND
5 As 30(b)(6) representative of
6 BUILDERS FIRSTSOURCE

7 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
8 ROBERT JOHN NUTLEY, Individually and on Behalf of
9 All Others Similarly Situated,

10 Plaintiffs,

11 vs.

12 CASE NO. 2016-CP-10-03455

13 WINSOR SOUTH, LLC, and JEFFREY M. THOMAS,
14 Individually and on Behalf of a Class of
15 Construction Defendants: SOUTHEASTERN
16 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
17 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
18 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
19 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
20 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
21 BUILDING SUPPLY, INC., et al.,

22 Defendants.

23
24 DEPONENT: TERRY ROSAMOND
25 DATE: APRIL 16, 2019
 TIME: 10:09 AM
 LOCATION: LUCEY LAW FIRM
 MOUNT PLEASANT, SOUTH CAROLINA
26 REPORTED BY: VALERIE G. MELKUS, RPR
 NCRA REGISTERED PROFESSIONAL
 REPORTER
 CLARK & ASSOCIATES, INC.
 CHARLESTON, SC 29415

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

4 EXAMINATION

5 BY MR. FULLER:

6 Q. Good morning, sir.

7 A. Good morning.

8 Q. Thanks for coming in today. My name is
9 Collin Fuller. I represent the homeowners and
10 the association in the 656 Coleman matter. Are
11 you familiar with the townhomes at 656 Coleman?

12 A. Yes, I am.

13 Q. And you are the designee for Builders
14 FirstSource, correct?

15 A. Correct.

16 Q. And are you the person who is best able
17 to answer questions about the work that Builders
18 FirstSource did on the 656 townhomes?

19 A. I think so.

20 Q. And would you state your full name for
21 the record, please?

22 A. Terry Eugene Rosamond.

23 Q. At the time that Builders FirstSource
24 was working on the 656 townhomes, were you
25 employed by BFS?

1 A. No, I did not.

2 Q. After that license expired, what was
3 your next educational advancement or license that
4 you got?

5 A. The next license I got was when I was at
6 BFS. We had a gentleman who was getting ready to
7 retire who -- he had the builder's license, and
8 he was the qualifier for BFS. And my boss --
9 who's deceased now, but he was the COO at the
10 time in the east. He said, I need you to go get
11 your builder's license, so that's what I did. I
12 went and did the -- it's called a NASCLA, which
13 you take the builder's exam, and that qualifies
14 you for that portion of it.

15 And then in each state, some of them may
16 require that you do a business license part also.
17 And at the time because he was the holder of the
18 license for South Carolina, they wanted me to be
19 sure and get that one. So I got that one, did
20 the business exam also. Those licenses are
21 reciprocal to other states, but some of them I
22 would still have to go do a little small business
23 exam if I wanted to activate them.

24 Q. How is a NASCLA license different from a
25 residential builder's license?

1 A. Well, it's more -- it gives you higher
2 qualifications. In other words, it's a general
3 contractor's license versus just residential.

4 Q. What did you have to do to get that
5 license?

6 A. I had to study for about a month and a
7 half. Then it's like an 8- or 10-hour exam that
8 you have to go take.

9 Q. And that one is not state-specific?

10 A. You can do a state-specific, but when
11 you do the NASCLA, it already qualifies you for
12 like eight different states. And there may be
13 more now. That was back when I got it, and I've
14 had it now about seven or eight years or six or
15 seven years.

16 It's no different than if I wanted to
17 just go and do the general contractor's license
18 for South Carolina. But by doing the NASCLA, you
19 get qualified and approved for other states. And
20 then, like I said, all you'd have to do is do a
21 small business exam.

22 Q. The work that Builders FirstSource does
23 on the install side, that work is done under your
24 license?

25 A. Correct.

1 Q. What all turnkey installation services
2 were being offered by Moncks Corner in 2013?

3 A. Best of my knowledge, they were doing
4 installed framing, they were doing installed
5 trim. They may have been doing a little bit of
6 installed siding. Other than that, I don't know
7 of anything else they were doing.

8 Q. What all falls under framing?

9 A. Typically just framing a building. You
10 know, installing trusses, you know, putting --
11 no -- unless they get to building in the dry,
12 does not mean installing shingles and new
13 roofing. But normally doing all the framing,
14 putting the roof on, wall sheathing, those kinds
15 of things.

16 Q. And they were doing windows and doors
17 too, right?

18 A. Yes.

19 Q. Anything else?

20 A. I don't think there was anything else
21 they were doing at the time.

22 Q. Does BFS have its own product lines?

23 A. We have a few product lines or items.
24 We have a manufacturing facility that does
25 windows and all in Texas. They don't do anything

1 Q. How were the windows installed at 656?

2 A. How were they installed? To my
3 understanding, the windows were put in level,
4 plumb and square with sealant behind three --
5 well, first there's a sill pan created with
6 Fortifiber flashing in the bottom sill and up
7 approximately 6 inches each side.

8 The window is installed with sealant
9 behind the three flanges, two jambs and a head.
10 Then it's put in with fasteners, and I think
11 there's a fastener in every nail slot, best I
12 understand. Then you tape your jamb tape on each
13 side of the jambs. Then you take your head
14 flashing and then pull your house wrap down over
15 the head flashing for the tape.

16 Q. What does it look like when you show up
17 and the installer hasn't started yet, what does
18 the opening look like?

19 A. I don't know without being there
20 personally. Sometimes the house wrap is just
21 covering the opening complete, sometimes they
22 might have cut it. I don't know without being
23 there.

24 Q. So it may have been already cut or the
25 window installer may have cut it?

1 A. Correct.

2 Q. And if the window installer doesn't cut
3 it, would you expect the person who installed the
4 house wrap to cut it?

5 A. In some cases they do, they go ahead and
6 cut it, fold it back inside. And normally it
7 requires like a modified I cut straight across
8 the top, down the middle on the 45s on the bottom
9 edges, and they wrap everything inside and they
10 nail it off.

11 Some cases they go ahead and do it, some
12 they don't. We had one just recently where
13 strong winds came in and blew the house wrap off
14 because it wasn't already cut out in the
15 openings. So the wind got inside the building
16 and blew the house wrap off the building. Just
17 ripped it apart.

18 Q. So you set your window in. Walk me
19 through it, really basic. What's next after you
20 set the window? Or did I skip a step? You show
21 up, the rough opening is there, and it may or may
22 not have been cut. If it's not cut, then the
23 window installer cut it. Then what?

24 A. Like I said, you create what we call a
25 sill pan in the bottom using the FortiFlash

1 flashing. Normally cut it 12 inches longer than
2 the opening so it can wrap 6 inches up each jamb
3 side. And then on the corners, we normally would
4 put like a butterfly patch on those corners, to
5 seal any of those corners so there's no water
6 penetration.

7 Next step would be to install your
8 window. You'd apply a 3/8 bead of caulk around
9 three sides of the window, the sides, the top and
10 the head. And sometimes they require you to do a
11 skip caulk on the bottom. That's -- a lot of
12 times that's required by the builder which way
13 they want it done.

14 Q. What is the skip caulk?

15 A. Exactly -- instead of a continuous feed,
16 it would be a skip. You leave holes. Because
17 the purpose of the sill pan is to let water drain
18 out. If there's any leak for any reason, to not
19 get into the wall cavity and damage the cavity.

20 Q. All right. I just want to make sure I
21 understand you. When you say sometimes they
22 require you to do a skip caulk on the bottom, are
23 you talking about behind the nailing fin?

24 A. Yes.

25 Q. And would this be prior to setting the

1 window?

2 A. Yes. You have to do that before you set
3 the window.

4 Q. And that's not a continuous bead, it's
5 just --

6 A. No.

7 Q. And who requires that sometimes?

8 A. Different builders require different
9 methods.

10 Q. Does the manufacturer ever require that?

11 A. ASTM standards talks about doing a skip
12 caulk or noncontinuous bead of caulk.

13 Q. And what would you be following to look
14 for instruction as to whether or not you do this
15 skip call stuff?

16 A. Brand of product that you're using,
17 window manufacturer. Also your tape manufacturer
18 and also the builders. You're kind of combining
19 those three to come up with a standard.

20 Q. If the builder's instructions are in
21 conflict with the manufacturer's instructions,
22 which one would you follow?

23 A. You contact the manufacturers and tell
24 them how you're going to do it and see if they're
25 acceptable with that.

1 where do you hold it?

2 Q. That makes sense.

3 A. And you're out on a ladder 20 feet in
4 the air and you're trying to hold a window that's
5 got caulk on all three or four sides, and you're
6 trying to put it in an opening.

7 Q. So we can agree looking at item 4 that
8 there should be sealant behind the nailing fin on
9 all sides, correct?

10 MR. HUGHES: Object to the form.

11 A. No. I do not agree with that.

12 Q. So you don't believe that the installer
13 had an obligation to follow the installation
14 instructions?

15 A. I think these installation
16 instructions -- there's better practices that
17 have been implemented since 2007.

18 Q. What practices are that?

19 A. Creating a sill pan to allow for any
20 water infiltration to drain out of the wall; and
21 therefore, you would not caulk the bottom flange.

22 Q. Is that what the installer was
23 instructed to do for these windows?

24 A. I feel certain he was.

25 Q. Who would have instructed him to do

1 that?

2 A. Probably Bill Crabtree or Rooster.

3 Q. They would have instructed him to do
4 that in lieu of following the installation
5 instructions?

6 A. Yes.

7 Q. And did Bill specifically tell you that
8 he had that conversation?

9 A. No, he has not.

10 Q. Did you ask him?

11 A. No, I haven't asked him.

12 Q. Same question as to Rooster.

13 A. No.

14 Q. So you're guessing?

15 MR. FREEMAN: Object to form.

16 MR. HUGHES: Same objection.

17 A. I'm not guessing. I just think that's
18 what they would have told -- because that was
19 more of a standard practice in 2012 than in 2007.

20 Q. And you don't dispute -- like we looked
21 at earlier, you don't dispute that the code
22 requires the installer to follow the inspector's
23 installation instructions, do you?

24 A. There again, if there have been
25 modifications or better practices established

1 standards during that time -- codes are written,
2 and they don't address every application in the
3 field. And when -- the manufacturers over the
4 years have improved installation practices. And
5 if the best practice at the time they were being
6 done did not require that, then I wouldn't think
7 you would want to do that.

8 MR. FREEMAN: I'd like to just have
9 a standing objection to this line of questioning.
10 You haven't established the set of instructions
11 that you've provided and marked as that exhibit
12 are the applicable -- as you marked as
13 Exhibit 885 are the applicable instructions in
14 2012. You haven't laid that foundation, so I'd
15 object to the form of this whole line of
16 questioning about this.

17 MR. HUGHES: To the extent
18 necessary, we are voicing identical objections.

19 MR. FULLER: Okay. Can we go off
20 the record?

21 (Off-the-record discussion.)

22 Q. Sir, you told me that you're going on
23 your 19th year with Builders FirstSource,
24 correct?

25 A. Correct.

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

4 DEPOSITION OF EDWARD TAYLOR,
5 as 30(b)(6) representative of
6 CHARLESTON EXTERIORS

7 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
8 ROBERT JOHN NUTLEY, Individually and on Behalf
9 of All Others Similarly Situated,

10 Plaintiffs,

11 vs.

12 CASE NO. 2016-CP-10-03455

13 WINSOR SOUTH, LLC, and JEFFREY M. THOMAS,
14 Individually and on Behalf of a Class of
15 Construction Defendants, SOUTHEASTERN
16 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
17 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
18 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
19 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
20 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
21 BUILDING SUPPLY, INC., et al.,

22 Defendants.

23 DEPONENT: EDWARD TAYLOR
24 DATE: MARCH 21, 2019
25 TIME: 10:06 AM
26 LOCATION: LUCEY LAW FIRM
27 MOUNT PLEASANT, SOUTH CAROLINA

28 REPORTED BY: TERI L. KENNELLY, RPR, CRR
29 NCRA CERTIFIED REPORTER
30 CLARK & ASSOCIATES, INC.
31 CHARLESTON, SC 29415
32 843-762-6294
33 WWW.CLARK-ASSOCIATES.COM

1 A. Probably not before we started, no.

2 Q. Did you meet with Rooster at any time?

3 A. Yes.

4 Q. How many times?

5 A. I don't recall.

6 Q. More than five?

7 A. I'm sure.

8 Q. So you would meet with him pretty
9 regularly?

10 A. Yes.

11 Q. He would swing by?

12 A. Yes.

13 Q. How often was Rooster on site?

14 A. He inspected every job that I've done.

15 Q. At 656, was he on site every day?

16 A. Yes.

17 Q. And he didn't give you any field
18 instructions before you started the work?

19 A. Not anything further than what we were
20 already instructed on, how they expect the
21 windows to be installed. There's nothing to add
22 to that. But he inspects everything from the
23 time -- taping the windows, butterflying the
24 corners, to caulking the windows, to nailing the
25 windows, to taping the windows, to taping the

1 second-story windows?

2 A. Go out, pull the window up, and look
3 out, and look at it.

4 Q. Oh, he looks from the inside?

5 A. If he can't see it from the outside,
6 yeah, just open the window and look out.

7 Q. And he'll look at -- all right, let's go
8 back to the different stages you have to stop and
9 wait for him. So you're taping the windows, you
10 have to wait for Rooster, right?

11 A. You tape the sills with rubber tape.
12 You butterfly the corners. Gives it extra
13 strength. He inspects that.

14 Q. Okay. And then what's the next step?

15 A. Next step is to install the window
16 itself. You've got to caulk. We used a whole
17 tube of caulk on the nail flange, three -- the
18 two sides and the top. Put your shims in the
19 bottom at the sill, set your window, plumb,
20 level, nail your corners. Once you nail off your
21 corners, you nail off the rest of the window, and
22 you have to stop.

23 Q. Okay.

24 A. Because it's got to be inspected for
25 your nail's position. It has to be inspected

1 that there's the right amount of caulk and make
2 sure that the Town -- then the Town comes and
3 inspects it and looks for the same stuff. Once
4 that's done, we can tape the window, which you
5 rubber tape the sides of the windows, you rubber
6 tape the top of the window, and you tape the flap
7 on top of the Tyvek, and you put the clear tape
8 on it, so everything flaps over the window and
9 everything -- the water -- if the water was on
10 the wall, it would run straight down and around
11 it. And that's inspected at the end as well.

12 Q. And I'm going to ask you to walk me
13 through an installation in just a few minutes,
14 but right now I'm trying to understand what
15 stages that BFS is going to check your work. And
16 I've got, after you tape the rough opening. Am I
17 understanding that correctly?

18 A. Yes.

19 Q. And then -- so Rooster will come look at
20 that. And then after you set the window and
21 you've got your shims in and everything, then
22 he'll come look again?

23 A. Yes, yes.

24 Q. And then after that, you move on to
25 basically the final step? Is that --

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* Certified Mediator

March 6, 2020
VIA EMAIL ONLY

Hon. Roger M. Young
Chief Administrative Judge Common Pleas
Ninth Judicial Circuit
Charleston County Judicial Center
100 Broad Street, Suite 336
Charleston, SC 29401-2236

Re: Six Fifty Six Owners Asso., et al vs. Winsor South, LLC,
Builders FirstSource-Southeast Group, LLC, etc.
Civil Action No.: 2016-CP-10-03455
Our File No.: 11925 SPH

Dear Judge Young:

Pursuant to your request, I have enclosed herewith copies of the following materials:

(a) Page 1 (cover page) and pages 150-153, of the deposition of Terry Rosamond, taken April 16, 2019 in the captioned litigation;

(b) Page 1 (cover page), and pages 46, 49, and 50 of the deposition of Edward Taylor, taken March 21, 2019 in the captioned litigation;

(c) Notice of Intent to Appeal, dated March 2, 2020, filed by the appellant, Builders FirstSource-Southeast Group, LLC in litigation, commenced in Berkeley County, designated by civil action number 2014-CP-08-02424, and captioned Builders FirstSource-Southeast Group, LLC vs. MI Windows and Doors Inc., ECC Contracting LLC, Hurley Services, LLC, and Charleston Exteriors, LLC, along with cover correspondence,

certificate of insurance, and the amended order, issued by Judge Newman on February 1, 2020, filed on February 3, 2020, and refiled March 3, 2020.

You will recall that originals of these documents were submitted during the hearing on the motions for summary judgment, conducted before the Court on Thursday, March 5, 2020.

Consistent with my comments during the course of oral argument, I would draw the Court's specific attention to pages 150 , lines 1-15, and pages 151 line 24- page 152 line 13 of the Rosamond deposition, and to page 49, line 11, through page 50, line 11, of the Taylor deposition. The referenced portions of those depositions have been highlighted in the copies provided herewith.

In the event that you require anything further, please feel free to contact me.

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

s/Stephen P. Hughes

Stephen P. Hughes

SPH/mi

Enclosures

cc: Clay Olson
Ian Freeman

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

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

2014-CP-08-02424

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

vs.

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

NOTICE OF INTENT TO APPEAL

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

{Signature Page Follows}

HOWELL, GIBSON & HUGHES, P.A.

By: Catherine L. Floeder
Stephen P. Hughes
Mary Bass Lohr
William H. Cox, III
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Southeast Group, LLC

Beaufort, South Carolina

March 2, 2020

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Builders Firstsource-Southeast Group, LLC

Plaintiff,

V

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

Defendant,

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL CASE NO. 2018-CP-08-02547

**AMENDED ORDER GRANTING
CHARLESTON EXTERIORS,
LLC'S AND ECC CONTRACTING,
LLC'S MOTION FOR SUMMARY
JUDGMENT**

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

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

BACKGROUND

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

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

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

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

LEGAL STANDARD APPLICABLE TO RULE 56 MOTIONS

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

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

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

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

B. DISGUISED INDEMNITY CLAIMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Clifton B. Newman Presiding Judge



Berkeley Common Pleas

Case Caption: Builders Firstsource-Southeast Group, Llc VS Mi Windows And Doors, Inc. , defendant, et al

Case Number: 2018CP0802547

Type: Order/Summary Judgment

So Ordered

s/ Clifton B. Newman, 2127

Electronically signed on 2020-02-01 21:45:57 page 11 of 11

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

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

2014-CP-08-02424

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

vs.

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

PROOF OF SERVICE

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

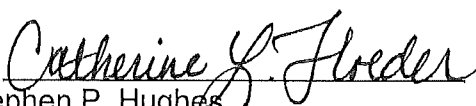
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Attorneys for Builders FirstSource-
Southeast Group, LLC

Beaufort, South Carolina

March 2, 2020

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

4 DEPOSITION OF TERRY ROSAMOND
5 As 30(b)(6) representative of
6 BUILDERS FIRSTSOURCE

7 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
8 ROBERT JOHN NUTLEY, Individually and on Behalf of
9 All Others Similarly Situated,

10 Plaintiffs,

11 vs.

12 CASE NO. 2016-CP-10-03455

13 WINSOR SOUTH, LLC, and JEFFREY M. THOMAS,
14 Individually and on Behalf of a Class of
15 Construction Defendants: SOUTHEASTERN
16 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
17 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
18 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
19 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
20 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
21 BUILDING SUPPLY, INC., et al.,

22 Defendants.

23
24 DEPONENT: TERRY ROSAMOND
25 DATE: APRIL 16, 2019
 TIME: 10:09 AM
 LOCATION: LUCEY LAW FIRM
 MOUNT PLEASANT, SOUTH CAROLINA
26 REPORTED BY: VALERIE G. MELKUS, RPR
 NCRA REGISTERED PROFESSIONAL
 REPORTER
 CLARK & ASSOCIATES, INC.
 CHARLESTON, SC 29415

1 Q. How were the windows installed at 656?

2 A. How were they installed? To my
3 understanding, the windows were put in level,
4 plumb and square with sealant behind three --
5 well, first there's a sill pan created with
6 Fortifiber flashing in the bottom sill and up
7 approximately 6 inches each side.

8 The window is installed with sealant
9 behind the three flanges, two jambs and a head.
10 Then it's put in with fasteners, and I think
11 there's a fastener in every nail slot, best I
12 understand. Then you tape your jamb tape on each
13 side of the jambs. Then you take your head
14 flashing and then pull your house wrap down over
15 the head flashing for the tape.

16 Q. What does it look like when you show up
17 and the installer hasn't started yet, what does
18 the opening look like?

19 A. I don't know without being there
20 personally. Sometimes the house wrap is just
21 covering the opening complete, sometimes they
22 might have cut it. I don't know without being
23 there.

24 Q. So it may have been already cut or the
25 window installer may have cut it?

1 A. Correct.

2 Q. And if the window installer doesn't cut
3 it, would you expect the person who installed the
4 house wrap to cut it?

5 A. In some cases they do, they go ahead and
6 cut it, fold it back inside. And normally it
7 requires like a modified I cut straight across
8 the top, down the middle on the 45s on the bottom
9 edges, and they wrap everything inside and they
10 nail it off.

11 Some cases they go ahead and do it, some
12 they don't. We had one just recently where
13 strong winds came in and blew the house wrap off
14 because it wasn't already cut out in the
15 openings. So the wind got inside the building
16 and blew the house wrap off the building. Just
17 ripped it apart.

18 Q. So you set your window in. Walk me
19 through it, really basic. What's next after you
20 set the window? Or did I skip a step? You show
21 up, the rough opening is there, and it may or may
22 not have been cut. If it's not cut, then the
23 window installer cut it. Then what?

24 A. Like I said, you create what we call a
25 sill pan in the bottom using the FortiFlash

1 flashing. Normally cut it 12 inches longer than
2 the opening so it can wrap 6 inches up each jamb
3 side. And then on the corners, we normally would
4 put like a butterfly patch on those corners, to
5 seal any of those corners so there's no water
6 penetration.

7 Next step would be to install your
8 window. You'd apply a 3/8 bead of caulk around
9 three sides of the window, the sides, the top and
10 the head. And sometimes they require you to do a
11 skip caulk on the bottom. That's -- a lot of
12 times that's required by the builder which way
13 they want it done.

14 Q. What is the skip caulk?

15 A. Exactly -- instead of a continuous feed,
16 it would be a skip. You leave holes. Because
17 the purpose of the sill pan is to let water drain
18 out. If there's any leak for any reason, to not
19 get into the wall cavity and damage the cavity.

20 Q. All right. I just want to make sure I
21 understand you. When you say sometimes they
22 require you to do a skip caulk on the bottom, are
23 you talking about behind the nailing fin?

24 A. Yes.

25 Q. And would this be prior to setting the

1 window?

2 A. Yes. You have to do that before you set
3 the window.

4 Q. And that's not a continuous bead, it's
5 just --

6 A. No.

7 Q. And who requires that sometimes?

8 A. Different builders require different
9 methods.

10 Q. Does the manufacturer ever require that?

11 A. ASTM standards talks about doing a skip
12 caulk or noncontinuous bead of caulk.

13 Q. And what would you be following to look
14 for instruction as to whether or not you do this
15 skip call stuff?

16 A. Brand of product that you're using,
17 window manufacturer. Also your tape manufacturer
18 and also the builders. You're kind of combining
19 those three to come up with a standard.

20 Q. If the builder's instructions are in
21 conflict with the manufacturer's instructions,
22 which one would you follow?

23 A. You contact the manufacturers and tell
24 them how you're going to do it and see if they're
25 acceptable with that.

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

4 DEPOSITION OF EDWARD TAYLOR,
5 as 30(b)(6) representative of
6 CHARLESTON EXTERIORS

7 SIX FIFTY SIX OWNERS ASSOCIATION, INC., and
8 ROBERT JOHN NUTLEY, Individually and on Behalf
9 of All Others Similarly Situated,

10 Plaintiffs,

11 vs.

12 CASE NO. 2016-CP-10-03455

13 WINSOR SOUTH, LLC, and JEFFREY M. THOMAS,
14 Individually and on Behalf of a Class of
15 Construction Defendants, SOUTHEASTERN
16 RECAPITALIZATION GROUP, LLC, WCM CONSTRUCTION,
17 LLC, JONATHAN J. THOMAS, AC HEATING AND AIR
18 CONDITIONING SERVICE, INC., ACME DOORS, INC.,
19 ALPHA OMEGA CONSTRUCTION GROUP, INC., ATLANTIC
20 CONSTRUCTION SERVICES, INC., BUCK LUMBER AND
21 BUILDING SUPPLY, INC., et al.,

22 Defendants.

23 DEPONENT: EDWARD TAYLOR
24 DATE: MARCH 21, 2019
25 TIME: 10:06 AM
26 LOCATION: LUCEY LAW FIRM
27 MOUNT PLEASANT, SOUTH CAROLINA

28 REPORTED BY: TERI L. KENNELLY, RPR, CRR
29 NCRA CERTIFIED REPORTER
30 CLARK & ASSOCIATES, INC.
31 CHARLESTON, SC 29415
32 843-762-6294
33 WWW.CLARK-ASSOCIATES.COM

1 A. Probably not before we started, no.

2 Q. Did you meet with Rooster at any time?

3 A. Yes.

4 Q. How many times?

5 A. I don't recall.

6 Q. More than five?

7 A. I'm sure.

8 Q. So you would meet with him pretty
9 regularly?

10 A. Yes.

11 Q. He would swing by?

12 A. Yes.

13 Q. How often was Rooster on site?

14 A. He inspected every job that I've done.

15 Q. At 656, was he on site every day?

16 A. Yes.

17 Q. And he didn't give you any field
18 instructions before you started the work?

19 A. Not anything further than what we were
20 already instructed on, how they expect the
21 windows to be installed. There's nothing to add
22 to that. But he inspects everything from the
23 time -- taping the windows, butterflying the
24 corners, to caulking the windows, to nailing the
25 windows, to taping the windows, to taping the

1 second-story windows?

2 A. Go out, pull the window up, and look
3 out, and look at it.

4 Q. Oh, he looks from the inside?

5 A. If he can't see it from the outside,
6 yeah, just open the window and look out.

7 Q. And he'll look at -- all right, let's go
8 back to the different stages you have to stop and
9 wait for him. So you're taping the windows, you
10 have to wait for Rooster, right?

11 A. You tape the sills with rubber tape.
12 You butterfly the corners. Gives it extra
13 strength. He inspects that.

14 Q. Okay. And then what's the next step?

15 A. Next step is to install the window
16 itself. You've got to caulk. We used a whole
17 tube of caulk on the nail flange, three -- the
18 two sides and the top. Put your shims in the
19 bottom at the sill, set your window, plumb,
20 level, nail your corners. Once you nail off your
21 corners, you nail off the rest of the window, and
22 you have to stop.

23 Q. Okay.

24 A. Because it's got to be inspected for
25 your nail's position. It has to be inspected

1 that there's the right amount of caulk and make
2 sure that the Town -- then the Town comes and
3 inspects it and looks for the same stuff. Once
4 that's done, we can tape the window, which you
5 rubber tape the sides of the windows, you rubber
6 tape the top of the window, and you tape the flap
7 on top of the Tyvek, and you put the clear tape
8 on it, so everything flaps over the window and
9 everything -- the water -- if the water was on
10 the wall, it would run straight down and around
11 it. And that's inspected at the end as well.

12 Q. And I'm going to ask you to walk me
13 through an installation in just a few minutes,
14 but right now I'm trying to understand what
15 stages that BFS is going to check your work. And
16 I've got, after you tape the rough opening. Am I
17 understanding that correctly?

18 A. Yes.

19 Q. And then -- so Rooster will come look at
20 that. And then after you set the window and
21 you've got your shims in and everything, then
22 he'll come look again?

23 A. Yes, yes.

24 Q. And then after that, you move on to
25 basically the final step? Is that --



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

THIS MASTER SUBCONTRACTOR AGREEMENT (this "Agreement") is entered into effective as of May 14, 2012, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, Texas 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com ("Contractor"), and Hurley Services, LLC, address: 201 Sparkleberry Lane, Ladson, SC 29456, telephone: 843-425-5100, fax: 888-992-6563, Contact: Giovanni N. Mendes, e-mail: Hurley Services, LLC @ gmail.com ("Subcontractor").

SECTION 1. Introduction.

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

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


Subcontractor

Contractor

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

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

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

SECTION 2. Materials and Workmanship.

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

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

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

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

d. **Safety and Environmental.**

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

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

Subcontractor agrees as follows:

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

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

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

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

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

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

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

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

SECTION 3. Warranty.

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

GM
Subcontractor
Contractor

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

SECTION 4. Insurance.

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

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

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

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

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

SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION

OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

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

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

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

SECTION 7. Default and Damages.

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

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

b. **Damages.**

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

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

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Subcontractor

Contractor

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

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

SECTION 8. Payment to Subcontractor.

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

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

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

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

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

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

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

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

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

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

SECTION 9. Miscellaneous.

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

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

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

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

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

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

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

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

SUBCONTRACTOR:

Hurley Services, LLC

By: Giovanni N. Mendes

Name: Giovanni N. Mendes

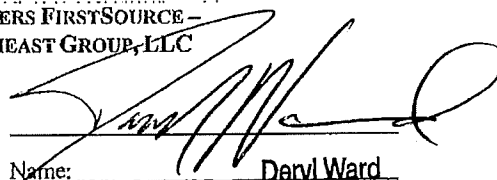
Title: Owner

80-0803713

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

BUILDERS FIRSTSOURCE -
SOUTHEAST GROUP, LLC

By:



Name: Daryl Ward

Title: Vice President



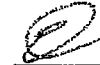
BUILDERS FIRSTSOURCE – SOUTHEAST GROUP, LLC
MASTER SUBCONTRACTOR AGREEMENT

THIS MASTER SUBCONTRACTOR AGREEMENT (this “Agreement”) is entered into effective as of 10/17, 2012, between Builders FirstSource – Southeast Group, LLC, a Delaware limited liability company, address: 2001 Bryan Street, Suite 1600, Dallas, Texas 75201, telephone: _____, fax: _____, Contact: _____, e-mail: _____@bldr.com (“Contractor”), and Charleston Exteriors, LLC. address 610 Black Oak Blvd, Summerville, SC 29485, telephone 843-771-1494, fax: 843-771-1495, Contact: Eddie Taylor, e-mail: etaylor@charlestonexteriors.com (“Subcontractor”).

SECTION 1. Introduction.

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

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


Subcontractor

Contractor

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

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

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

SECTION 2. Materials and Workmanship.

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

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

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

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

d. **Safety and Environmental.**

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

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

Subcontractor agrees as follows:

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

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

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

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

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


Subcontractor

Contractor

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

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

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

SECTION 3. Warranty.

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


Subcontractor

Contractor

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

SECTION 4. Insurance.

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

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

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

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

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Subcontractor

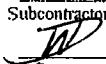
Contractor

[Version - 5/17/06]

SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION


Subcontractor

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OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

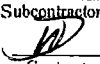
THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGE THAT IS (a) CAUSED BY OR RESULTS FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

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

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

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Subcontractor

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

SECTION 7. Default and Damages.

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

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

b. **Damages.**

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

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


Subcontractor

Contractor

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

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

SECTION 8. Payment to Subcontractor.

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

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

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

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

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

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

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

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

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


Subcontractor

Contractor

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

SECTION 9. Miscellaneous.

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

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


Subcontractor

Contractor

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

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

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

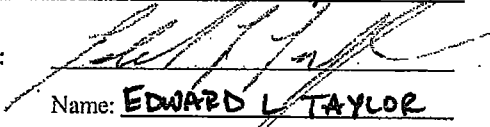
e. **Lien waiver.** Subcontractor hereby waives and relinquishes any right, whether granted by statute or not, to file or claim any lien for Work performed hereunder.

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

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

SUBCONTRACTOR:

CHARLESTON EXTERIORS, LLC

By: 

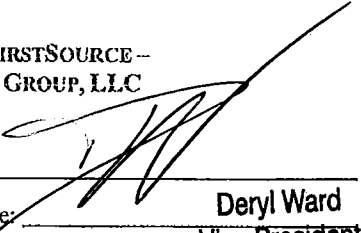
Name: EDWARD L. TAYLOR

Title: OWNER

45-4549180

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

BUILDERS FIRSTSOURCE --
SOUTHEAST GROUP, LLC

By: 

Name: Deryl Ward

Title: Vice President

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

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

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

v.

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

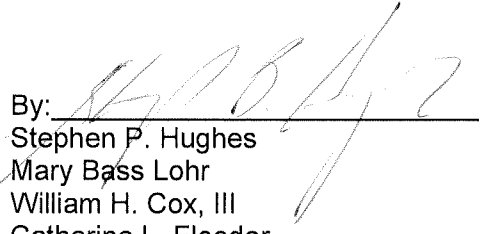
Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vazquez aka Alfonso Rodriguez, Sr.; and John Does 55-75, Defendants,

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

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Record on Appeal has been reviewed and redacted (where necessary) and complies with the Supreme Court's Order of August 13, 2007.

HOWELL, GIBSON & HUGHES, P.A.

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Beaufort, South Carolina
September 10, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

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

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

v.

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

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Sep 10 2021

SC Court of Appeals

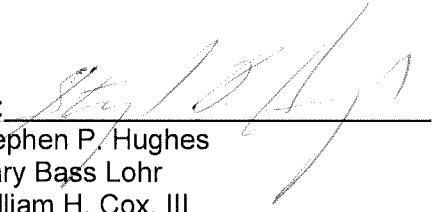
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Of which Builders FirstSource-Southeast Group, LLC is the Appellant and Hurley Services, LLC and Charleston Exteriors, LLC are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal contains all material proposed to be included of any of the parties, and no other material.

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September 10, 2021