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
Civil Action 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.; 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, 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; Miguel 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 is the Respondent.

BRIEF OF RESPONDENT HURLEY SERVICES, LLC

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II. Whether the circuit court correctly held that based on the undisputed facts, the indemnity provisions at issue are unenforceable as a matter of law when they require a subcontractor to indemnify its general contractor for the general contractor's sole or concurrent negligence but the indemnity provisions are neither clear nor unequivocal as required by this Court's decision in Concord and Cumberland HPR v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).

III. Whether the circuit court correctly held that Appellant's indemnity provisions violate South Carolina law and public policy when they require a subcontractor to indemnify its general contractor against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the general contractor and are overly broad and confusing, and select portions of the indemnity provisions cannot be severed from the agreement.

STATEMENT OF THE CASE

This litigation arises out of alleged construction defects at Six Fifty-Six Coleman Boulevard, a twelve-building townhome community in Mount Pleasant, South Carolina ("the Project"). **(Third Am. Compl. ¶ 4, R. p. 117).** Appellant Builders FirstSource-Southeast Group, LLC is a licensed general contractor who provided building supplies and turn-key contracting services on the portion of the Project developed by The Ryland Group, Inc.[1] **(Third Am. Compl. ¶ 60, R. p. 130); (Hurley Memo. in Support of its Mot. for Summ. J. dated March 3, 2020, Ex. 2, R. p. 229).** Respondents Hurley Services, LLC ("Hurley Services" or "Hurley") and Charleston Exteriors, LLC ("Charleston Exteriors") served as subcontractors to Builders

[1] Plaintiffs filed a separate suit against The Ryland Group, Inc., in a case styled as Six Fifty Six Owners Association Inc. et al. v. The Ryland Group, Inc. et al., in the Charleston County Court of Common Pleas, Civil Action No.: 2016-CP-10-03456.

FirstSource-Southeast Group, LLC. **(Third Am. Compl. ¶¶ 68-69, R. p. 132)**. Hurley Services' scope of work was limited to providing labor services related to the installation of windows. Hurley Services performed its work on the Project pursuant to a master subcontractor agreement with Builders FirstSource-Southeast Group, LLC (the "Master Subcontractor Agreement"). See **(Hurley Mot. for Summ. J., Ex. A, R. pp. 196-207)**. The Master Subcontractor Agreement entered into between Hurley and Builders FirstSource is a Builders FirstSource form contract bearing "Version – 5/17/06." **(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 196-207)**.

Plaintiffs initiated this suit on July 5, 2015. **(Compl., R. pp. 20-34)**. Plaintiffs added claims against the Builders FirstSource entities.[2] **(First Am. Compl., R. pp. 35-57); (Second Am. Compl., R. pp. 58-84)**. Builders FirstSource then asserted third-party claims against Hurley Services, Charleston Exteriors, and DVS, Inc., its subcontractors on the Project, for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. See **(BFS Ans. to Second Am. Compl. ¶¶ 117-145, R. pp. 85-114)**.

Plaintiffs subsequently asserted direct claims against Hurley Services and other third-party defendants. **(Third Am. Compl., R. pp. 115-146)**. Accordingly, Builders FirstSource's claims against its subcontractors, including Hurley Services, are now cast as crossclaims. **(BFS Ans. to Third Am. Compl. ¶¶ 116-143, R. pp. 186-192)**. Builders FirstSource's crossclaims seek

[2] Builders FirstSource, Inc., Builders FirstSource-Atlantic Group, LLC, Builders FirstSource-Florida a/k/a Builders FirstSource-Florida Design Center, LLC, and Builders FirstSource-Southeast Group, LLC are parties-defendants to this suit. They have appeared collectively through the same counsel and answered in the same pleadings, but Builders FirstSource-Southeast Group, LLC is the party with whom Respondents entered Master Subcontractor Agreements and who brings claims against them here. Builders FirstSource-Southeast Group, LLC will be referred to hereinafter as "Builders FirstSource" or "BFS."

recovery of the sums it "may pay in satisfaction" of Plaintiffs' claim "plus costs for defense, inclusive of attorneys' fees." **(BFS Ans. to Third Am. Compl. ¶¶ 139, R. p. 191).**

While denying any and all liability, Hurley Services and Builders FirstSource have both settled with Plaintiffs. **(Hr'g Tr. March 5, 2020, p. 19, ll. 1-2, p. 20, ll. 3-18, R. pp. 432-433); (App. Br. p. 1).** Builders FirstSource did not pay Plaintiffs any sums for the alleged negligence of Hurley Services. **(Hr'g Tr. March 5, 2020, p. 19, ll. 3-7, p. 34, ll. 1-13, R. pp. 432, 447).**

On January 22, 2020, Hurley Services filed a Motion for Summary Judgment (the "Motion") with respect to the only claims that remained against it - Builders FirstSource cross-claims for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. **(Hurley Mot. for Summ. J. dated January 22, 2020, R. pp. 194-207).** In that Motion, Hurley Services asserted that Builders FirstSource's cross-claims fail because: (1) there is no genuine issue as to any material fact; (2) the contractual provisions of the Master Subcontractor Agreement (upon which Builders FirstSource's contractual indemnity claim rests) are neither clear nor unequivocal, are against public policy and the laws of South Carolina and, therefore, fail as a matter of law; and (3) Builders FirstSource should be estopped from asserting its cross-claims under the doctrine of collateral estoppel. **(Hurley Mot. for Summ. J. dated January 22, 2020, R. pp. 194-195).**[3]

Appellant Builders FirstSource did not file any memoranda, exhibits or affidavits in opposition to the Motion before it was heard. Hurley Services filed a memorandum in support of

[3] Hurley Services also asserted that Builders FirstSource's cross-claims for breach of express and implied warranties, breach of contract, and negligence were "merely disguised . . . claims for equitable indemnity" which fail under Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 634, 776 S.E.2d 434, 436 (Ct. App. 2015). **(Hurley Mot. for Summ. J. dated January 22, 2020, R. p. 194).** However, that issue is not before this Court.

its Motion on March 3, 2020. **(Hurley Mem. in Support of Mot. for Summ. J. dated March 3, 2020, R. pp. 209-223).**

The Honorable Roger M. Young, Sr. heard Hurley Services' Motion on March 5, 2020.[4] **(Hr'g Tr. March 5, 2020, R. pp. 414-476).** At the hearing, counsel for Builders FirstSource stated that Builders FirstSource was limiting its indemnity claim to the recovery of its attorneys' fees and costs incurred in defending this suit, but it was no longer seeking to recover any amounts Builders FirstSource paid Plaintiffs in settlement of their claims. **(Hr'g Tr. March 5, 2020, p. 34, ll. 14-22, R. p. 447).**

Judge Young granted summary judgment in favor of Hurley Services on April 29, 2020, finding that there was no genuine issue of material fact and Hurley Services was entitled to judgement as a matter of law on all of Builders FirstSource's claims against it. **(Order dated April 29, 2020, R. pp. 1-5).** Judge Young found that Builders FirstSource was collaterally estopped from re-litigating the exact same issues, which were decided by the Honorable Clifton Newman in the case of Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415, including the issue of enforceability of the BFS Master Subcontractor Agreement's indemnity provisions. **(Order dated April 29, 2020, R. p. 3)** (citing to Judge Newman's Order entered on February 3, 2020). Judge Young also found that the contractual indemnification provisions in the Master Subcontractor Agreement are unenforceable as matter of law because they are neither clear nor unequivocal as required by Concord and Cumberland HPR v. Concord & Cumberland, LLC, 424

[4] The circuit court also heard argument from Respondent Charleston Exteriors based upon its Motion to Join in Hurley Services' Motion for Summary Judgment. See **(Hr'g Tr. March 5, 2020, R. pp. 414-476).**

S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) and are against the public policy and laws of South Carolina. **(Order dated April 29, 2020, R. p. 3).**[5]

Builders FirstSource filed a Motion for Reconsideration and/or Alteration/Amendment (the "Motion for Reconsideration"). **(Mot. for Recons. and/or Alteration/Amendment dated May 11, 2020, R. pp. 345-365).** Hurley Services filed a Memorandum in Opposition to Builders FirstSource's Motion for Reconsideration on May 26, 2020, arguing that Builders FirstSource's purported limitation of its of damages to attorneys' fees and costs, does not alter the analysis or outcome in this case as Builders FirstSource is still seeking to recover damages as a result of its own negligence. **(Mem. in Opp. to Mot. for Recons. and/or Alteration/Amendment dated May 26, 2020, R. pp. 366-379).** Builders FirstSource filed a reply and additional exhibits on June 4, 2020. **(BFS Reply to Hurley Services, LLC and Charleston Exteriors, LLC's Mem. in Opp. to Mot. for Recons. and/or Alteration/Amendment dated June 4, 2020, R. pp. 384-400).** The circuit court denied Builders FirstSource's Motion for Reconsideration via Form 4 Order filed on August 27, 2020.[6] **(Form 4 Order dated August 26, 2020, R. pp. 6-8).**

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[5] Judge Young also found that Builders FirstSource's claims for breach of express and implied warranties, breach of contract, and negligence causes of action failed as a matter of law. **(Order dated April 29, 2020, R. p. 3).** Builders FirstSource did not argue against summary judgment concerning its breach of express and implied warranties, breach of contract, and negligence causes of action and has conceded that Stoneledge, 413 S.C. 630,776 S.E.2d 434, is dispositive of those claims. See **(Hr'g Tr. March 5, 2020, R. pp. 414-476)**; **(App. Br. p. 9)** ("Because the Stoneledge case is still considered good law by our courts, Appellant is not challenging the Trial Court's holding regarding Stoneledge."). Judge Young's granting of summary judgment as to these crossclaims is not an issue on appeal.

[6] The Form 4 Order denying Builders FirstSource-Southeast Group, LLC's Motion for Reconsideration is dated August 26, 2020, but was filed on August 27, 2020.

Builders FirstSource filed its Notice of Appeal of the Order granting summary judgment and the Form 4 Order denying its Motion for Reconsideration on September 24, 2020. **(Notice of Appeal dated Sept. 24, 2020)**.

STATEMENT OF FACTS

Builders FirstSource-Southeast Group, LLC is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. **(BFS Ans. to Third Am. Compl. ¶ 7, R. pp. 167); (Hurley Memo. in Support of its Mot. for Summ. J. dated March 3, 2020, Ex. 2, R. p. 229)**. It holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Department of Labor, Licensing, and Regulation ("SC LLR"), and Terry Rosamond ("Rosamond"), Builders FirstSource's Vice President of Installed Products and Services for the East Coast, serves as the "qualifying party" for such licensure in this state. **(Hurley Memo. in Support of its Mot. for Summ. J. dated March 3, 2020, Ex. 2, R. p. 229)**.

Hurley Services existed as a South Carolina limited liability company from 2012 until 2015. **(Hurley Ans. to Plfs. Third Am. Compl. ¶ 4, R. p. 149)**. It did not hold any building or contractor licenses from the SC LLR; in other words, it was an unlicensed subcontractor. See **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 8, R. pp. 273-276; Hr'g Tr. March 5, 2020, p. 10, ll. 8-9, R. p. 423)**. Hurley Services provided unlicensed subcontractor services on the Project to Builders FirstSource pursuant to a Master Subcontractor Agreement, "Version – 5/17/16," it entered with Builders FirstSource on May 14, 2012. **(Hurley Mot. for Summ. J., Ex. A, R. pp. 196-207)**.

I. The Parties' Work on the Project

Builders FirstSource supplied and installed windows and doors as a subcontractor of the Ryland Group for only the "Ryland Phase" buildings at the Project, which consists of nine (9) buildings that were constructed in 2013 and 2014. **(Third Am. Compl. ¶¶ 4, 24, 60, R. pp. 117, 120, 130)**. Builders FirstSource furnished the windows, related flashings, and caulk and provided superintendents to oversee such installation for the Ryland Phase buildings at the Project. **(R. pp. 209-210)**. Hurley Services' scope of work was limited to providing labor services related to the installation of windows. Plaintiffs' expert engineer Russell Mease, P.E., of RTM Engineering, LLC ("Mease") investigated the Project for construction deficiencies. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, R. p. 210)**. Mease prepared a 146-page report outlining his findings and was deposed on multiple occasions about his investigation of the Project. Discussing his report and his investigation, Mease testified that the windows and doors at Ryland Phase buildings of the Project were installed into the buildings' framing in accordance with "a protocol that's acceptable in the industry." **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 3, p. 121-122, ll. 24-1, R. pp. 231-232)**. His opinions concerning defects and damages surrounding window installations at the Ryland Phase buildings related to the work of other trades such as the brick mason and siding subcontractor as well as the lack of supervision by the general contractor. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 3, R. pp. 234-236); (Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 4, R. pp. 244-245)**.

Mease testified as to only one criticism with regard to the installation of the windows of the Ryland Phase buildings: he contended he did not see evidence of caulk underneath the nailing fin at the sills of the windows he examined, however, he could not say unequivocally that the caulk

was missing and admitted that he never removed a window from a rough opening in the Ryland Phase. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, R. pp. 249-253)**. Mease admitted that the omission of caulk from behind the sill nailing fin to allow for drainage of moisture was consistent with best practices that existed at the time of construction and his inspection. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, R. pp. 250-254)**. Mease claimed the lack of caulking underneath the nailing fins presented a concern about air filtration and cited a 2007 Florida test "cut sheet" from the window manufacturer that referenced caulk behind the perimeter of the nailing fin. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, R. pp. 248, 253)**. This criticism concerning caulking was not mentioned in Mease's 146-page report and no damage at the Project was attributable to this condition. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, R. pp. 246-253)**. Furthermore, Terry Rosamond, Builders FirstSource's 30(b)(6) witness, testified that best practices applicable at the time the Ryland Phase buildings were constructed called for the omission of caulk underneath a window's sill nailing fin so that any incidental moisture could exit or weep from the window assembly, and he noted window manufacturers' installation instructions have evolved over time to recognize this practice which promotes the drainage of water out of the wall. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 6, R. pp. 255-259)**. Rosamond further testified that Builders FirstSource instructed its subcontractors on the Project to not apply caulk at the sill fins. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 6, R. p. 257)**.

II. The Indemnity Provisions

The indemnification provisions that Builders FirstSource's assert support its contractual indemnity cross-claim are found in Sections 5 and 8 of its Master Subcontractor Agreement.

(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 196-207). Section 5 contains multiple indemnity clauses, which read as follow:

> 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 FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS 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 SUBCONTRACTORS, 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, SUCONTRACTOR'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 HEREUNDUER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUCONTRACTOR'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.

(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 201-202).

Another indemnity provision is contained in Section 8 of the Master Subcontractor Agreement, which states as follows:

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.

(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 206).

III. Prior Litigation concerning the Indemnity Provisions

Builders FirstSource has attempted, unsuccessfully, to enforce these indemnity provisions against its subcontractors, including Hurley Services, in several other cases in South Carolina.

In Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415 ("MI Windows"), Builders FirstSource sued its subcontractors on a construction project, which included Respondent Hurley Services, as well as MI Windows and Doors, Inc., seeking indemnification under the BFS master subcontractor agreement for any sums which it may owe to a general contractor and homeowners in another lawsuit as well as its attorney's fees, costs, and other expenses incurred in defending that other action. MI Windows. On December 6, 2019, the Honorable Clifton Newman granted summary judgment to the subcontractors on several grounds, including that the indemnity provisions in the BFS master subcontractor agreement are "confusing at best and deceptive at worst", do not meet the "clear and unequivocal standard", and, therefore, fail as a matter of law under Concord and Cumberland. **(Order dated December 6, 2019 in Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415).**

In asking Judge Newman to reconsider the court's grant of summary judgment in the MI Windows case, BFS admitted in its signed and filed motion papers that Judge Newman correctly found that the master subcontractor agreement does not comply with the clear and unequivocal standard imposed by South Carolina law in Concord and Cumberland:

> 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.

(Charleston Exteriors' Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. C, R. pp. 327-332). Judge Newman entered an Amended Order on February 3, 2020, but the court's grant of summary judgment as to BFS's claims for indemnity on grounds that BFS master subcontractor agreement is unenforceable as a matter of law was maintained in the Amended Order. **(Amended Order dated February 3, 2020 in Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415, R. pp. 9-19).**[7] Builders FirstSource filed a Notice of Intent to Appeal Judge Newman's Order in the MI Windows on March 5, 2020.[8] **(BFS Notice of Appeal, R. pp. 401-402).** At the hearing on Hurley Services' motion for summary judgment in this case, counsel for Builders FirstSource advised Judge Young that it had appealed Judge Newman's Amended Order. **(Hr'g Tr. March 5, 2020, p. 54, ll. 5-8, R. p. 467).**

In this case, Judge Young found that Builders FirstSource's cross-claims against Hurley are barred by collateral estoppel based upon Judge Newman's decision in the MI Windows case and Judge Young specifically adopted Judge Newman's above analysis as it relates to the

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[7] Judge Newman's Amended Order can also be found as Exhibit 9 to Hurley Services' Memo in Support of its Motion for Summary Judgment, dated March 3, 2020.

[8] The MI Windows appeal is pending as Appellate Case No. 2020-000415.

indemnity provisions at issue here. **(Order dated April 29, 2020, R. p. 3)**. Judge Young also ruled that the Master Subcontractor Agreement violates public policy and the laws of South Carolina. **(Order dated April 29, 2020, R. p. 3)**.

Since Judge Young's ruling in this case, the Honorable Jennifer B. McCoy has also held that BFS's Master Subcontractor Agreement is an adhesion contract; that BFS's Master Subcontractor Agreement contains multiple indemnity provisions, including multiple provisions in "Section 5. INDEMNITY" and another "buried in the fine print of "Section 3. Warranty;" that the indemnity provisions in BFS's master subcontractor agreement are unconscionable; that the indemnification provisions in Section 5 of BFS's master subcontractor agreement are ambiguous, conflict with each other and the provisions found in Section 3, do not meet the clear and unequivocable standard of Concord and Cumberland, and violate South Carolina public policy and S.C. Code § 40-11-270. See **(Order dated January 25, 2021 in Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, Appellate Case No. 2021-000290 ("Pavic") pp. 4-8)**. In Pavic, Judge McCoy ruled that both Judge Newman's Order in MI Windows and Judge Young's Order in this case are final orders that collaterally estop BFS from contesting the findings therein as BFS had a full and fair opportunity to litigate the issues in the MI Windows case and this action, and that the contract terms were "actually litigated, directly determined in the prior [actions], and the issues were essential to the [judgments] such that collateral estoppel should apply. **(Order dated January 25, 2021 in Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, Appellate Case No. 2021-000290 ("Pavic") pp. 9-10)**. Builders FirstSource has also appealed Judge McCoy's ruling in Pavic, along with the present appeal, the appeals of both the MI Windows case and Pavic are also pending

before this Court concerning many of the same issues.[9] See MI Windows, Appellate Case No. 2020-000415; Pavic, Appellate Case No. 2021-000290.

It is undisputed that Builders FirstSource's contractual indemnification provisions, which have already been determined to be unenforceable as a matter of law by the trial court in MI Windows, are the same indemnification provisions involved in this appeal, all of which are found in the BFS Master Subcontractor Agreement "Version – 5/17/06." **(App. Br. p. 12)** ("The contracts governing the indemnity claims in this case and the case before Judge Newman contain nearly identical indemnity provisions.").

STANDARD OF REVIEW

This Court applies the same standard applied by the circuit court when reviewing a grant of summary judgment. Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 211-212, 826 S.E.2d 285, 290 (2019). Rule 56(c), SCRCP, provides a circuit court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP. Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings,

[9] In addition to Pavic, since Judge Young's ruling in this case on April 29, 2020, Judge McCoy has also granted summary judgment against Builders FirstSource in another action in favor of numerous subcontractors, including Hurley Services, on grounds that the Builders FirstSource Master Subcontractor Agreement is legally unenforceable. See The Retreat at Charleston Nat'l Country Club Homeowners' Ass'n, Inc., et al. v. Winston Carlyle Charleston Nat'l, LLC et al., Civil Action No. 2016-CP-10-03783 (Form 4 Order entered on May 10, 2021, formal Order to follow, granting summary judgment against Builders FirstSource as to its contractual indemnity, breach of contract, negligence, and breach of express and implied warranties causes of action).

but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). On a motion for summary judgment, "the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009).

Here, the material facts are undisputed. The lower court correctly granted judgment as a matter of law based upon the language of the indemnity clauses at issue.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL BECAUSE BUILDERS FIRSTSOURCE LITIGATED THE ENFORCEABILITY AND LEGALITY OF THE CONTRACTUAL INDEMNITY CLAUSES CONTAINED WITHIN ITS MASTER SUBCONTRACTOR AGREEMENT IN THE MI WINDOWS CASE, AND JUDGE NEWMAN'S AMENDED ORDER IN THAT CASE FINDING THOSE PROVISIONS ARE UNENFORCEABLE AS A MATTER OF LAW IS A BINDING FINAL JUDGMENT WITH PRECLUSIVE EFFECT UNLESS AND UNTIL IT IS REVERSED BY A HIGHER COURT.

The circuit court properly ruled that the doctrine of collateral estoppel barred Builders FirstSource's crossclaims in this case. **(Order dated April 29, 2020, R. p. 3)**. Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was litigated and "determined by a valid and final judgment" 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). Builders FirstSource was a party to the MI Windows case. Builders FirstSource concedes this point. **(App. Br. p. 15)**.

Where the "illegality of the contract has been actually litigated and directly determined in the prior action and that issue was essential to the judgment," the application of offensive collateral estoppel is appropriate. South Carolina Property Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.,

304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). The party invoking collateral estoppel need not have also been a party in the prior action;[10] the law only requires that the party *against* whom estoppel is applied have been a party to that action and had a full and fair opportunity to litigate the issue in the prior action. Id. ("Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action . . ."). In other words, parties can invoke collateral estoppel even in the absence of "mutuality." Id. Here, there is no dispute that Appellant is the party seeking to enforce the subject indemnity clauses from its Master Subcontractor Agreement and the party litigating the issue of enforceability in the MI Windows case, this case, and other cases.

The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 at n. 1, 315 S.E.2d 186, 189–90 at n. 1 (Ct. App. 1984).

Appellant asserts the application of collateral estoppel is improper in this case because: (1) it has appealed Judge Newman's order in the MI Windows case; and (2) the issues litigated in the case are different. **(App. Br. pp. 10-11)**. In asserting that Judge Newman's Amended Order in the MI Windows case is not a final judgment, Appellant claims "[c]ollateral estoppel requires that a *final*, prior judgment exists; however, a judgment, subject to reconsideration upon appeal, cannot be considered 'final' until the ultimate appellate court has made its determination." **(App. Br. p.**

[10] Hurley Services was one of four subcontractors who Appellant sued in the MI Windows case; however, Charleston Exteriors and ECC Contracting, LLC were the only parties who moved for summary judgment.

10) (emphasis and italics in original). Appellant's argument is conclusory, and notably, Appellant does not cite any case, statute, or court rule in support of this argument.

A judgment is final and remains final unless and until it has been overturned on appeal. See Rule 201 (a) SCACR (stating that "[a]ppeal may be taken, as provided by law, from any final judgment or appealable order."). Additionally, many courts have held that a judgment is final for purposes of collateral estoppel or res judicata unless and until it is overturned on appeal. See Lee v. Criterion Ins. Co., 659 F. Supp. 813, 819 (S.D. Ga. 1987) ("However, '[t]he established rule in the federal courts is that a final judgment retains all of its res judicata [or collateral estoppel] consequences pending decision of the appeal . . . .'" (internal citations omitted); In re Kramer, 543 B.R. 551, 554 (Bankr. E.D. Mich. 2015) ("[U]nder Michigan law, collateral estoppel applies to judgments even when they are pending on appeal or the time for appeals has not yet expired."); Hapgood v. City of Warren, 127 F.3d 490, 494 (6th Cir. 1997) ("It is worth noting that when the district court granted defendant summary judgment, plaintiff's case in Ohio state court was on appeal. The pendency of an appeal, however, does not prohibit application of claim preclusion. The prior state court judgment remains 'final' for preclusion purposes, unless or until overturned by the appellate court."); 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4433, p. 308 (". . . it is likewise held in federal courts that the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided."). The rationale behind this rule is that if cases on appeal were not final judgments, parties could re-file cases in trial court while the appeal is pending in order to try and achieve a different result, thus subjecting courts to inefficient duplicative litigation. See generally, Warwick Corp. v. Maryland Dep't of Transp., 573 F. Supp. 1011, 1014 (D. Md. 1983), aff'd sub nom, Warwick Corp. v. Maryland Dep't of Transportation, 735 F.2d 1359 (4th Cir. 1984) ("Such a consequence would also be laughable. If

a judgment was denied its res judicata effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation.").

Therefore, the fact that the appeal of the MI Windows case is pending in no way changes this result here; that judgment has preclusive effect. Judge Young did not trespass into the province of this Court or deprive this Court of its ultimate authority, as Appellant suggests, but rather, as discussed *supra*, promoted judicial economy, and put a stop to Appellant trying the issue among different trial courts. See generally, B&B Hardware, Inc. v. Hargis Industries, Inc., 575 U.S. 138, 140, 135 S.Ct. 1293, 1298-99 ("Sometimes two different tribunals are asked to decide the same issue. When that happens, the decision of the first tribunal usually must be followed by the second, at least if the issue is really the same. Allowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring.").

Furthermore, Appellant's argument that the issues in the MI Windows case and this case are different fails for two reasons. The indemnity clauses in the Master Subcontractor Agreement at issue in this case are the *same* clauses from the same form agreement that were at issue in the MI Windows case. Appellant has already litigated the issue of the enforceability of its indemnification provisions. It should not be permitted to now relitigate the same exact issue on the same exact form contract. In granting the subcontractor defendant's motions for summary judgment in the MI Windows case, Judge Newman specifically considered the provisions of the same indemnification clauses present here and found "the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither clear nor unequivocal." **(Amended**

Order dated February 3, 2020 in Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415, R. p. 16). Lastly, Judge Newman's determination of the unenforceability of the indemnification provisions in the MI Windows case was essential to the final order reached therein. **(Amended Order dated February 3, 2020 in Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415, R. p. 16).**

Because Judge Newman's Amended Order is a final judgment, and because the enforceability of the same indemnity provisions were at issue in this case and in the MI Windows case, the circuit court was correct in holding that collateral estoppel applies to this matter and should be affirmed in that regard.

II. THE CIRCUIT COURT CORRECTLY FOUND, BASED UPON THE UNDISPUTED FACTS, THAT THE INDEMNITY PROVISIONS IN BUILDERS FIRSTSOURCE'S MASTER SUBCONTRACTOR AGREEMENT ARE NOT CLEAR AND UNEQUIVOCAL, AS REQUIRED BY CONCORD AND CUMBERLAND, WHICH MAKES THOSE PROVISIONS UNENFORCEABLE AS A MATTER OF LAW.

Judge Young, and Judge Newman before him, properly determined that the Builders FirstSource Master Subcontractor Agreement failed to meet the legal requirements of South Carolina law. Contractual clauses requiring subcontractors to indemnify general contractors where the general contractor is concurrently negligent, as is the case here, are held to an exacting "clear and unequivocal" standard. See Concord and Cumberland, 424 S.C. 639, 819 S.E.2d 166 (requiring clauses whereby an indemnitee seeks to recover for its concurrent negligence to be "clear and unequivocal.") In Concord and Cumberland, the general contractor (Superior Construction) on a condominium project was sued by the condominium regime and unit owners for certain construction defects. Superior asserted cross claims against the window and door

installer (Muhler) that it subcontracted with on the project, seeking contractual and equitable indemnification. Id. at 168, 424 S.C. at 643. The subcontract and a separate agreement between Superior and Muhler included the following indemnity provisions:

> 12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that
>
> (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, to the extent caused or alleged to be caused in whole or in any 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, regardless of whether it is caused in part by a party indemnified hereunder.
>
> (b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this [a]rticle [12.1].
>
> * * *
>
> 11. In the event either Superior or Concord and Cumberland, LLC are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended [c]ontract [d]ocuments, or are defectively installed[,] Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable [attorney's] fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration, liability incurred by either or both as consequence including, but not limited to, costs and [attorney's] fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.

Id. at 168–69, 424 S.C. at 643–44. Superior settled with the plaintiffs for $775,000 and also claimed approximately $630,000 in attorney's fees and expenses related to its defense of the window and door claims, all of which is sought to recover from Muhler. Id. at 169, 424 S.C. at

644. On appeal, Superior asserted that general rules of contract interpretation, rather than the "clear and unequivocal" standard, should apply to its contractual indemnity claim against its subcontractor because it was seeking indemnification for its concurrent negligence and not its sole negligence. Id. at 170, 424 S.C. at 646. This Court disagreed, finding that "the clear and unequivocal standard . . . applies whether [the general contractor] sought indemnification for its sole or concurrent negligence." Id. As explained below, the circuit court properly applied that case here for several reasons and granted summary judgment to Hurley Services.

a. The circuit court correctly found there is no genuine issue of material fact and Hurley was entitled to summary judgment on Builders FirstSource's crossclaim for contractual indemnity.

Here, the circuit court correctly found that "[t]here exists no genuine issue as to any material fact and Hurley Services and Charleston Exteriors are entitled to judgment dismissing all cross-claims against it as a matter of law." **(Order dated April 29, 2020, R. p. 3)**. Builders FirstSource asserts that there is an issue of material fact as to Hurley's negligence, asserting that Concord and Cumberland does not apply. Builders FirstSource argues that "[t]he issue is material to the lower court's ruling because if Respondent *were* negligent, Appellant should have been allowed to pursue its contractual indemnity claim for attorneys' fees against Respondent for Respondent's negligence even without the presence of contractual language that satisfies the Concord & Cumberland [sic] 'clear and unequivocal' standard." **(App. Br. pp. 3-4)** (italics in original).

As explained herein, as a licensed contractor, Builders FirstSource is liable for all acts of its unlicensed subcontractors. See S.C. Code Ann. § 40-11-270(E). It is undisputed that Builders FirstSource was and is a licensed general contractor who was responsible for its subcontractors' work. Hurley Services operated as an unlicensed subcontractor. See **(Hurley Mem. in Supp. of**

Mot. for Summ. J. dated March 3, 2020, Ex. 8, R. pp. 273-276); (Hurley Memo. in Support of its Mot. for Summ. J. dated March 3, 2020, Ex. 2, R. p. 229).

Section 40-11-270(E) of the South Carolina Code of Laws provides: "Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's license group and license classification or subclassification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee." Put differently, under Section 40-11-270(E), the negligence of an unlicensed subcontractor is the negligence of the licensed general contractor. S.C. Code Ann. § 40-11-270. If Hurley were to be found to have been negligent, which negligence is denied, such would establish the concurrent negligence of Builders FirstSource as a matter of law. Based upon the respective licensing status of the parties and S.C. Code Ann. § 40-11-270(E), there can be no dispute that Builders FirstSource was at least concurrently negligent, if not solely negligent. Therefore, the circuit court properly determined the "clear and unequivocal" standard applied and that there was no genuine issue of material fact precluding summary judgment.

Furthermore, even if Builders FirstSource were not legally imputed with any alleged negligence of Hurley, the facts before the lower court were that there was no genuine issue of material fact that Hurley was not negligent. Builders FirstSource claims Hurley Services failed to "to install caulk on the inboard faces of the window nailing fins." **(App. Br. p. 3)**. However, Plaintiffs' expert's only criticism about the window installations at the Project was that, from his review of window installation photographs, he did not see the presence of caulk squeezed out from behind the sill fin of the windows. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, p. 596, ll. 15-22, R. pp. 249)**. Mease did not look for this condition during

destructive testing at the Project and it is 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. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, pp. 595-596, R. pp. 248-249)**. ("And, again, I have no evidence that there's any sealant behind these windows, and I believe that to be the case." Q: "Based on your review of the photographs?" A: "Correct.").

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 sill fin upon installation. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, p. 596, ll. 1-6, R. p. 249)**. Mease further admitted that neither he nor the defense experts removed any window from a rough opening in the Ryland Phase of the Project. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, p. 596, ll. 7-14, R. p. 249)**. (Q: "Did you—as to the Ryland buildings, did you actually remove any window from a rough opening?" A: "No." Q: "With regard to the Ryland buildings, did the defense remove any window from a rough opening?" A: "I don't believe so."). Significantly, windows that were inspected by Mease and the experts had peel-and-seal flashing tape that completely covered the jamb fins along either side of the window and the head fin at the top of the window. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, pp. 596-597, R. p. 249-250)**. Accordingly, with the jamb and head fins covered by tape, such were not visible onsite or in the photos Mease reviewed. Neither Mease nor any other expert removed a window. 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, Builders FirstSource 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. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 6, R. pp. 255-259)**. Builders FirstSource brief admits the substitution of flashing tape behind the sill flange in lieu of caulk was Builders FirstSource's standard practice and, thus, confirms Builders FirstSource's concurrent if not sole negligence was the basis of Plaintiffs' claims. **(App. Br. p. 6).**[11] Charleston Exteriors' corporate designee testified that Builders FirstSource's superintendent "inspects everything from the time – taping the windows, butterflying the corners, to caulking the windows." **(BFS Mot. for Reconsideration, p. 9, R. p. 353)**.

There is no issue of material fact that Builders FirstSource is seeking to recover its attorneys' fees and costs incurred as a result of its sole or concurrent negligence. The circuit court correctly found that no genuine issue of material fact exists as to this issue and should be affirmed for this additional reason. Concord and Cumberland and the "clear and unequivocal" standard apply.

b. The circuit court correctly found that the language of the indemnity provisions fails to meet the Concord and Cumberland clear and unequivocal standard that applies in this case, and such language is thus unenforceable as a matter of law.

Having correctly determined that Concord and Cumberland applies, the circuit court correctly held based upon the undisputed facts and language of the provisions at issue that Builders FirstSource's Master Subcontractor Agreement does not satisfy the clear and unequivocal standard. **(Order dated April 29, 2020, R. p. 3)** ("Builders FirstSource['s] . . . cross-claims for

[11] BFS's Motion to Reconsider before the circuit court also admitted "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 Mot. for Reconsideration, p. 7, R. p. 351)**.

contractual indemnity are based on contractual provisions that are neither clear nor unequivocal . . ."). Critically, it is important to note that Builders FirstSource has admitted in the MI Windows case that the Master Subcontractor Agreement's indemnity clauses fail to meet the "clear and unequivocal" standard set forth by this Court in Concord and Cumberland.[12] However, Builders FirstSource takes a different position in this case, arguing that the Master Subcontractor Agreement's language meets the "clear and unequivocal standard." **(App. Br. pp. 16-17)**. A review of the Master Subcontractor Agreement's numerous indemnification clauses reveals that they are not "clear and unequivocal."

The Master Subcontractor Agreement contemplates indemnification of all attorney's fees incurred in the defense of Builders FirstSource as well as all amounts paid in settlement or to satisfy demands – each without any regard to the fault of the subcontractor or any reference to the negligence of Builders FirstSource; in other areas the Master Subcontractor Agreement refers to indemnification in favor of Builders FirstSource regardless of the sole or concurrent negligence of Appellant; and yet other provisions qualify indemnification to the extent the loss is caused in whole or part by the negligence of Hurley Services or other subcontractors. See **(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 201-202)**. These terms, as viewed against each

[12] In its Motion to Reconsider filed on December 16, 2019 in the MI Windows case, Builders FirstSource admitted: "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." **(BFS Mot. for Reconsideration, p. 2, R. p. 328)**. 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 (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.

other, are "confusing at best and deceptive at worst." **(Order dated April 29, 2020, R. p. 3)**. Therefore, the circuit court should be affirmed.

c. Builders FirstSource's limitation of its claim to attorneys' fees and costs is nonetheless a claim for "damages" under South Carolina law, and the South Carolina Anti-Indemnity Statute and Concord and Cumberland's clear and unequivocal standard therefore still apply.

As explained above, the circuit court correctly held that the "clear and unequivocal" standard applies. **(Order dated April 29, 2020, R. p. 3)**. Builders FirstSource argues that Concord and Cumberland "did not explicitly address whether the 'clear and unequivocal' standard applied to indemnification of attorneys' fees as well as to indemnification claims for liability owed to a third party." **(App. Br. p. 16)**. Nothing in Concord and Cumberland states that the Court's holding does not apply to indemnification clauses addressing payment of attorneys' fees and costs. As stated in that case, "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." Concord and Cumberland, 424 S.C. at 647, 819 S.E.2d at 170-71 (citing cases). The fact that Builders FirstSource limited its claim to a recovery of attorneys' fees does nothing to change the terms of its Master Subcontractor Agreement or the outcome of this case. Builders FirstSource attempts to save its claim by contending that the Anti-Indemnity Statute, S.C. Code § 32-2-10, (discussed in depth below), and Concord and Cumberland do not apply to its indemnity claims because attorney's fees are not considered damages. **(App. Br. p. 24)**; see also **(App. Br. p. 16)**. By limiting its claim to attorneys' fees, Appellants assert that they have distinguished the request in this case from that in the MI Windows case. **(App. Br. p. 24)**. Appellant ignores that under South Carolina law, attorneys' fees are damages, and the entirety of the indemnity provisions are unenforceable as a matter of law.

Under South Carolina law, recoverable "general damages" may include attorneys' fees when so provided by contract or statute. See Rimer v. State Farm, 248 S.C. 18, 27 148 S.E.2d 742, 747 (1966) ("Nor do recoverable damages include the expense of employing counsel, except when so provided by contract or statute). Here, the Master Subcontractor Agreement provides for recovery of attorneys' fees as damages. See, e.g., **(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 201-202)**. Section 5 of the Master Subcontractor Agreement, for instance, states:

> TO THE FULLEST EXTENT PERMITTED BY LAW, THE **SUBCONTRACTOR SHALL INDEMNIFY, DEFENDANT 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 . . . .**

(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 201-202) (emphasis added).

Builders FirstSource's pleadings also reflect that it seeks to recover attorneys' fees as general damages. Builders FirstSource's cross-claims allege that it is "entitled to full contractual and common law indemnification from [Respondents], for any liability [Builders FirstSource] is found to have to the Plaintiffs or to others in this action, and [Builders FirstSource] is also entitled to damages for any negligence, as aforesaid, on the part of [Respondents], entitling [Builders FirstSource] to recover from [Respondents], its attorneys' fees, costs, and other expenses incurred in defending this action . . . ." **(BFS Ans. to Plfs. Third Am. Compl., ¶ 126, R. p. 188)** (emphasis added). Builders FirstSource's self-imposed limitation of its claims to its attorneys' fees and costs does nothing to change the fact that its cross-claims remain ones for damages, and attorneys' fees are simply an element thereof. Moreover, BFS's stated limitation to the recovery of attorney's fees does not save its fatally flawed contract. Rather, it sounds its death knell as the illegality of the contract's provisions is highlighted by the defense cost indemnity terms. Damages for attorney's fees are to be assessed against

subcontractors regardless of Builders First Source's ultimate liability for the entire matter in violation of S.C. Code Ann. § 32-2-10.

Even if the recovery of attorneys' fees as damages was not contemplated within the Master Subcontractor Agreement, South Carolina courts have recognized many other circumstances where attorneys' fees can be considered damages. See Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) ("Where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages."); see also Fountain v. Fred's, Inc., 429 S.C. 533, 556–57, 839 S.E.2d 475, 488 (Ct. App. 2020), reh'g denied (Mar. 30, 2020), cert. granted (May 28, 2021) ("In an equitable indemnification action, attorney's fees and costs proximately resulting from the at-fault party's breach of contract or negligence are treated as the legal consequences of the at-fault party's original wrongful act and may be recovered as damages."); McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 360, 759 S.E.2d 136, 138 (2014) ("The facts of this case clearly demonstrate that the attorney's fees and costs incurred by Appellants in defending the McCoys' lawsuit were the natural and probable consequences of Miles's breach of the purchase agreement.") (citing Addy).

Furthermore, under Builders FirstSource's flawed analysis, a South Carolina court could award attorney's fees to an indemnitee in the event of its sole negligence. Section 32-2-10 does not contain any such exception that allows the Statute to be violated where the indemnitee only seeks to recover attorneys' fees, nor does Concord and Cumberland even discuss attorneys' fees. Indeed, the fallacy of Builders FirstSource's argument is borne out by considering such an absurd result.

Therefore, the circuit court correctly found that the indemnity provisions violate South Carolina law and should be affirmed.

III. THE MASTER SUBCONTRACTOR AGREEMENT'S INDEMNITY PROVISIONS ARE REPLETE WITH TERMS THAT VIOLATE SOUTH CAROLINA LAW AND PUBLIC POLICY, AND THOSE TERMS CANNOT BE SEVERED FROM THE MASTER SUBCONTRACT AGREEMENT, MAKING THE INDEMNITY PROVISIONS OF THE MASTER SUBCONTRACTOR AGREEMENT UNENFORCEABLE AS A WHOLE.

a. The Master Subcontractor Agreement contains numerous terms that violate the South Carolina Anti-Indemnity Statute, as well as South Carolina public policy.

As several aspects of the Master Subcontractor Agreement require Builders FirstSource's subcontractors to indemnify it from its sole or own negligence, which squarely violates South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10, and public policy. Indeed, Builders FirstSource admits that some of the indemnification provisions in its form contact are unenforceable as a matter of South Carolina law. See **(Hr'g Tr. March 5, 2020, p. 40, ll. 1-17, R. p. 453)**. These unlawful provisions further demonstrate that the Master Subcontractor Agreement fails to meet the "clear and unequivocal" standard as discussed above, and the circuit court Order granting summary judgment should be upheld. These illegal provisions also provide an independent ground for this Court to affirm the Order granting summary judgment dismissing Builders FirstSource's cross-claims for indemnity as a matter of law.[13]

[13] While Judge Young's Order was proper in all respects and should be upheld, this Court is also free to consider independent sustaining grounds for affirming the grant of summary judgment against Appellant which were raised below by Respondents, including, BFS's violation of S.C. Code Ann. § 32-2-10. See I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723-24 (2000) ("Under the present rules, a respondent – the 'winner' in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.")

Among other things, the Master Subcontractor Agreement requires subcontractors to indemnify Builders FirstSource's for claims of death or personal injury, regardless of Builders FirstSource's negligence. See **(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 201)** ("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 SUBCONTRACTORS, 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") (original in capitals, but some emphasis added).[14] Builders FirstSource has admitted this provision violates South Carolina law. **(Hr'g Tr. March 5, 2020, p. 40, ll. 11-17, R. p. 453)** (counsel for Builders FirstSource indicating that the form contract is used in many states, and while it may work in other states, it does not here).

Likewise, the Master Subcontractor Agreement requires subcontractors to defend Builders FirstSource in the case of Builders FirstSource's sole negligence. See **(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 202)** ("THE DUTY TO DEFEND EXISTS

[14] Builders FirstSource is identified as the "Contractor" in the Master Subcontractor Agreement.

REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES") (original in all capitals, no emphasis added); see also **(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 206)**.

Because these indemnity provisions require the subcontractors to indemnify Builders FirstSource against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of Builders FirstSource, these provisions are unenforceable under S.C. Code Ann. § 32-2-10, which provides as follows:

> **Notwithstanding any other provision of law, a promise or agreement in connection with the** design, planning, **construction**, alteration, repair or maintenance **of a building**, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, **purporting to indemnify the promisee**, its independent contractors, agents, employees, **or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee**, its independent contractors, agents, employees, or indemnitees **is against public policy and unenforceable.**

(Emphasis and double emphasis added); see also D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). There is no disputing that the above-quoted provisions do not comply with this language. The circuit court should be affirmed for this additional reason.

In addition to violating Section 32-2-10, it is important to note that Judge Young also found that the indemnity provisions violate public policy. **(Order dated April 29, 2020, R. p. 3)** ("Builders FirstSource ['s] . . . cross claims for contractual indemnity are based on contractual provisions that . . . are against public policy and violate the laws of South Carolina . . . .").

Public policy disfavors indemnity provisions that are "overly broad." See Keith v. River Consulting, Inc., 365 S.C. 500, 618 S.E.2d 302 (Ct. App. 2005) ("indemnity clause, though wide

in scope, was not so overly broad as to render the clause void as against public policy."). Anti-indemnity agreements violate public policy and anti-indemnity statutes were enacted to combat broad indemnity agreements that contractors obtained from their subcontractors, which lead to construction sites rife with injuries. See McMunn v. Hertz Equip. Rental Corp., 791 F.2d 88, 92 (7th Cir. 1986) (Judge Richard Posner interpreting the similar Indiana anti-indemnity statute) ("We can get some help from Fort Wayne Cablevision v. Indiana & Michigan Electric Co., 443 N.E.2d 863 (Ind.App.1983), where the Indiana Court of Appeals explained that the purpose of the statute is to increase safety at construction sites. Before it was passed general contractors would negotiate with their subcontractors for a promise to indemnify the general contractor if he was sued for a personal injury to a worker employed by a subcontractor at the construction site. The legislature believed that this type of agreement resulted in more accidents on the job. This is possible, certainly. If the general contractor can shift the financial burden of liability he may have less incentive to take measures to make the construction site safe.")

Furthermore, the Anti-Indemnity statute explicitly states that indemnity provisions "purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promise . . . [are] against public policy . . . ." S.C. Code Ann. § 32-2-10.

The indemnification provisions here are overly broad and violate public policy. The Master Subcontractor Agreement's numerous indemnification clauses are not clear and unequivocal. The smorgasbord of indemnification reflects that, in terms of indemnity, Builders FirstSource took a "throw everything in the kitchen sink" approach to drafting the contract, presumably under the theory that if one clause fails another may stand. On one hand, Builders

FirstSource Master Subcontractor Agreement contemplates indemnification of all attorneys' fees incurred in the defense of the BFS as well as all amounts paid in settlement or to satisfy demands – each without any regard to the fault of the subcontractor or any reference to the negligence of Builders FirstSource; in other areas the Master Subcontractor Agreement refers to indemnification in favor of Builders FirstSource regardless of the sole or concurrent negligence of Builders FirstSource; and yet other provisions qualify indemnification to the extent the loss is caused in whole or part by the negligence of subcontractors. The terms are confusing at best, contradictory at times, and misleading, and appear to indemnify Builders FirstSource for just about anything. Such terms are overly broad and violative of public policy.

The circuit court (and Judge Newman) were correct in finding that the indemnity provisions of Master Subcontractor Agreement are illegal and against public policy and therefore unenforceable and the circuit court's ruling should be affirmed on this ground alone.

b. The Court cannot sever the unenforceable and illegal indemnity provisions of the Master Subcontractor Agreement; the Master Subcontractor Agreement must be considered as a whole, and because it contains legally unenforceable provisions, the Master Subcontractor Agreement fails as a whole.

Builders FirstSource appears to concede that some of the provisions of the Master Subcontract Agreement could violate South Carolina Law and public policy, but Appellant urges the Court to ignore this and further invites the Court to "sever the offending provision[s]." **(App. Br. p. 19)**. As such, Builders FirstSource is not arguing that all of the that the indemnification provisions comport with the Anti-Indemnity Statute, but rather that BFS should be permitted to cherry pick non-offending provisions, have the court and reform its claims to save its ability to recovery its attorneys' fees and costs incurred in defending against its own negligence in this suit. **(App. Br. pp. 12-13)**.

Builders FirstSource further asserts that the illegal provisions are "irrelevant," and Judge Young erred in considering those provisions. **(App. Br. p. 13)**. Builders FirstSource ignores that the analysis of the enforceability of the Master Subcontractor Agreement must necessarily involve looking at the indemnity provisions and the contract as a whole. See McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571, 574 (S.C. 2009) ("A contract is read as a whole document...."). "Replacing some [illegal] language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term" to which Hurley Services did not agree. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 175 (S.C. App. 2018) (declining appellant's invitation to rewrite the indemnity provisions of its contracts and replace language violative of South Carolina law). As a general rule, "courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) (quoting Berkebile v. Outen, 311 S.C. 50, 53, n. 2, 426 S.E.2d 760, 762 n. 2 (1993)). It is not the function of the court to rewrite contracts for parties. Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010); Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002); ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011).

Because the indemnity provisions violate South Carolina law in many respects, Builders FirstSource's request that the Court rewrite the indemnity provisions must be rejected. **(App. Br. pp. 13-14)**. Specifically, Builders FirstSource states that "to the extent that the Trial Court took issue with [the indemnity provisions], it should have simply severed them and left the provision regarding attorneys' fees intact." **(App. Br. pp. 13-14)**. But Builders FirstSource's attorney's fees provisions are unlawful and purport to impose liability for damages in the form of attorney's fees

and costs of defense from Respondents *without regard to Builders FirstSource's liability or negligence*. **(App. Br. pp. 16-17)**. Such attorney's fees provisions violative of S.C. Code Ann. § 32-2-10. Builders FirstSource fails to identify clear and distinct terms that could be severed. The indemnity and duty to defend clauses are interdependent of each other.

The indemnification for attorneys' fees provision is contained within Section 5, which, as discussed before, contains indemnity provisions. Section 5 does not identify separately enumerated subparagraphs. 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." (Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 202)** (Emphasis and double emphasis added). Accordingly, by its terms, even if Builders FirstSource was solely liable for causing the loss that gave rise to the claim for defense, the Master Subcontractor Agreement purports to place entire the duty to defend and responsibility to indemnify for the costs to defend upon Builders FirstSource's subcontractor. Ultimately, Builders FirstSource could be solely liable for the entire loss, but the Master Subcontractor Agreement provides for the indemnification from the subcontractor in favor of Builders FirstSource for defense costs regardless of Builders FirstSource's negligence and proven liability. Section 5 of the Master Subcontractor Agreement provides that the defense costs obligation ends once its finally proven in court that the claims against Builders FirstSource 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 Builders FirstSource. 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 Builders FirstSource in whole or

part. Section 8.i. of the Master Subcontractor Agreement also provides for indemnification of attorneys' fees and expenses and amounts paid in settlement without regard to the fault of BFS. See **(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 206).** All of these indemnity provisions which disregard the negligence of Builders FirstSource violate South Carolina law and are unenforceable. That Builders FirstSource has now limited its claim to attorney's fees and costs is again fatal to its case. There is simply no reasonable way to sever these illegal provisions from the contract and this Court should decline Builders FirstSource's invitation to do so.

The South Carolina Supreme Court cautioned in Simpson v. MSA of Myrtle Beach, Inc., "if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007) (internal citations omitted).

Eliminating the illegal provisions in Sections 5 and 8 of the Master Subcontractor Agreement would amount to a rewriting of the agreement, not severing a word, clause, phrase, or line. South Carolina courts do not "blue pencil" agreements and rewrite a contract's terms to make it comply with the law, as Builders FirstSource would have it. See Poynter, 387 S.C. at 588, 694 S.E.2d at 18 (recognizing that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy).

The sole case Builders FirstSource cites in support of its argument for severability is Beach Co., 351 S.C. 56, 566 S.E.2d 863. Beach Co. is inapposite. There, a landlord brought suit against tenant for breach of lease agreement, and the landlord countersued for breach of contract. 351 S.C. 56, 566 S.E.2d 863. The contract at issue contained provisions that waived the tenant's right to a jury trial and to assert compulsory counterclaims. Id. at 64, 866. This Court held that "A severable

contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be." Id. at 64, 867. This Court ultimately held that the tenant's rights to a jury trial and to assert counterclaims were separate and distinct rights, and it severed the waiver of compulsory of counterclaims. Id. at 65, 867.

Here, unlike Beach Co., the indemnification provisions of Builders FirstSource's Master Subcontractor Agreement are intertwined and dependent upon one another, and, thus, are not susceptible of division. Builders FirstSource's right to be indemnified for attorneys' fees and costs is part and parcel of its right to recover damages under the subcontract. Builders FirstSource should not be allowed to jumble multiple "confusing at best and deceptive at worst" indemnity provisions within the indemnification section of the Master Subcontractor Agreement, and then selectively choose terms to be severed when confronted with their illegality. **(Order dated April 29, 2020, R. p. 3)**. The subject subcontract's interdependent indemnification provisions are wholly unenforceable, and the illegal terms should not be severed by this Court.

This Court's decision in Simpson is on point. In Simpson, the South Carolina Supreme Court found an arbitration agreement with unconscionable terms wholly unenforceable, despite the presence of a separate contractual severability clause, due to the "cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause." 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007). The contractual severability provision did not result in an exception to the general rule of unenforceability of illegal contracts, especially where the contract is one-sided, oppressive, or a contract of adhesion. Id.

Builders FirstSource should not and cannot, as a matter of law, be saved from its own illegal contract, by a rewriting of its terms, especially rewriting by a court. Poynter, 387 S.C. at

588, 694 S.E.2d at 18; Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002), ERIE Ins. Co., 393 S.C. at 460, 713 S.E.2d at 321. For this reason, the circuit court should be affirmed.

CONCLUSION

For the reasons stated above, the circuit court's Order Granting Defendants Hurley Services, LLC Motion for Summary Judgment Against the Claims of Builders FirstSource-Southeast Group, LLC and the Form 4 Order Denying Builders FirstSource-Southeast Group, LLC's Motion for Reconsideration and/or Alteration/Amendment should be **AFFIRMED**.

Respectfully Submitted,

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October 19, 2021
Charleston, South Carolina

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SC Court of Appeals

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
Civil Action 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; Miguel Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vazquez aka Alfonso Rodriguez, Sr.; Marcello Marques Palmeira d/b/a Palmeira Construction, Ernandes Riberio de Pinho, Cristiane Cleaning, LLC, and John Does 58-75, ... Defendants,

Of which Builders FirstSource-Southeast Group, LLC is the Appellant and Hurley Services, LLC is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent Hurley Services, LLC's final brief complies with Rule 211(b), SCACR.

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