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.

---

# FINAL REPLY BRIEF OF APPELLANT

---

Stephen P. Hughes, Esquire
Bar No.: 002805
Mary Bass Lohr, Esquire
Bar No.: 16927
Catherine L. Floeder, Esquire
Bar No: 103741
William H. Cox, III, Esquire
Bar No.: 101991
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
(843) 522-2429
SPHughes@hghpa.com
MLohr@hghpa.com
WCox@hghpa.com
CFloeder@hghpa.com

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### STATUTES AND RULES

## REPLY

In response to the arguments outlined in the Brief of Respondent, Appellant submits this Reply Brief. Appellant hereby incorporates by reference all arguments made in its opening Brief, and concedes none of Respondent's arguments, regardless of whether or not said arguments are addressed specifically herein.

### I. The issue before Judge Young in this case is distinct from the issue ruled on by Judge Newman, and thus collateral estoppel does not apply.

Respondent argues that collateral estoppel precludes Appellant's claims in this case because the same issue has been previously ruled on by Judge Newman in Builders FirstSource – Southeast Group, LLC v. M.I. Windows & Doors. Specifically, Respondent argues that because the language of the indemnification provision is the same in both cases, collateral estoppel applies. This oversimplification of collateral estoppel ignores the requirement that the specific issue litigated must be the same in both cases in order for collateral estoppel to apply. See Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). The "issue" is not, as Respondent vaguely puts it, the enforceability of the indemnity provision. The issue before Judge Newman, as he saw it, was whether the language of Paragraphs One and Two of the indemnity provision allowed BFS to recover in indemnity for its own negligence. The issue in this case is whether the contract language in Paragraph Three (or alternatively, as explained hereafter, Paragraph One) of the indemnity provision allows BFS to recover its attorneys' fees.

Contrary to Respondent's representation, Judge Newman did not rule that the indemnity clause was entirely unenforceable. Rather, he ruled that in the specific context of the case before him,

> 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 … neither clear or unequivocal.

**(R. p. 16 (emphasis added).)** Thus, Judge Newman considered the specific issue of whether the indemnity provision is sufficiently clear and unequivocal to allow BFS to recover for its own negligence, and he ruled that it was not.

In this case, Appellant is not seeking indemnity against liability for damages resulting from its own negligence. Rather, Appellant is seeking to recover the damages occasioned by Respondent's failure to comply with its contractual obligation to defend Appellant. The relevant contract language, which is found in Paragraph Three of the indemnity provision, was never even considered by Judge Newman. This issue has not been addressed by any court to date, and thus is not subject to collateral estoppel.

## II. Genuine issues of material fact exist, and it was error for the Court to usurp the role of the factfinder and determine otherwise.

Respondent argues that the Court correctly determined that no issue of material fact existed regarding the negligence of the parties because Appellant, as a licensed contractor, would be liable as a matter of law for any negligence of Respondent. However, where liability arises as a matter of law, and not of fault, the party who may be liable as a matter of law is nonetheless entitled to seek

attorneys' fees from the at-fault party. See Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992); S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 89, 135 S.E.2d 613, 617 (1964).

The alleged concurrent negligence of Appellant is irrelevant because under Section Five, Paragraph Three of the Indemnity Provision, Respondent is required to defend Appellant regardless of the potential negligence of Appellant. However, should the Court, as discussed below, determine that Paragraph Three should be severed or struck entirely, Appellant will pursue its claims under Section Five, Paragraph One. In this latter scenario, the relevant negligence of Respondent and Appellant is of the utmost importance, because Appellant's attorneys' fees would be limited to the costs resulting from the negligence of Respondent.

Evidence exists, in the form of the testimony of Plaintiff's expert Mr. Mease, which was outlined for this Court in Appellant's Opening Brief, that Respondent was negligent. Under South Carolina law, "the negligence of a party is a question of fact for the jury." Brown v. Smalls, 325 S.C. 547, 558, 481 S.E.2d 444, 450 (Ct. App. 1997). Thus, the Trial Court should not have evaluated Mr. Mease's testimony and determined that no issue of fact existed as to the negligence of Respondent.

## III. The contractual provisions governing attorneys' fees are clear and unequivocal, satisfying Concord & Cumberland.

Respondent argues that the Subcontract violates Concord & Cumberland and thus Appellant may not recover its attorneys' fees. Respondent did not, however, directly address how the specific provision governing attorneys' fees, that

is, Section Five, Paragraph Three, fares when analyzed through Concord & Cumberland's clear and unequivocal standard.

Concord & Cumberland addressed whether or not a general contractor could recover in indemnity from its subcontractor for the general contractor's own negligence. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). The Court held that in order for the general contractor to recover indemnity against liability for damages occasioned by its own negligence, there must be a clear and unequivocal contractual provision outlining that obligation. The Court never discussed the recovery of attorneys' fees, and thus, it is unclear whether a provision imposing attorneys' fees is subject to the same heightened standard of "clear and unequivocal." Even if it were, however, the provision at issue in this case meets the clear and unequivocal standard outlined in Concord & Cumberland.

The provision governing attorneys' fees provides, in relevant part:

> 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.

**(R. p. 548.)** This provision clearly and unequivocally imposes upon the subcontractor the duty to defend the contractor "regardless of any ultimate liability or negligence of the contractor." In its brief, Respondent did not contest the clarity and sufficiency of this provision.

Instead of analyzing whether this provision clearly and unequivocally imposed the defense obligation on the subcontractor, Respondent argues that

taken together with the other paragraphs of Section 5, the Indemnity provision, as a whole fails to be generally clear and unequivocal.

As demonstrated hereinafter, the other paragraphs of the Indemnity provision govern indemnification obligations in situations that are not before this Court, and thus are irrelevant to this litigation. Nonetheless, taken together, these provisions do not obfuscate the clear and unequivocal duty imposed by Paragraph Three to defend "regardless of any ultimate liability or negligence of the contractor."

Section Five of the contract is titled "Indemnity," and it is made up of four paragraphs. While Respondent quibbles that these paragraphs are not independently numbered, they are nonetheless very obviously separated and easy to identify. Each paragraph deals with a specific circumstance or set of circumstances under which different indemnity obligations apply.

Paragraph One provides that in a case arising out of property damage (among other things) the subcontractor will indemnify the contractor to the extent the damage was caused in whole or in part by any negligent act or omission of the subcontractor. **(R. p. 547.)**

Paragraph Two provides that in a case arising out of the bodily injury of the subcontractor or any of its agents, the subcontractor shall, to the fullest extent permitted by law, indemnify the contractor for damages regardless of whether the damage was caused in whole or in part by the contractor. **(R. pp. 547-548.)**

Paragraph Three provides that the duty to defend is separate from the duty to indemnify and exists regardless of any ultimate liability or negligence of the contractor. **(R. p. 548.)**

Paragraph Four provides that the indemnification obligations do not require the subcontractor to indemnify a registered architect or licensed engineer. **(R. p. 548.)**

These four paragraphs do not alter the clarity with which Paragraph Three requires that the subcontractor undertake the defense of the contractor "regardless of any ultimate liability or negligence of the contractor." Thus, Paragraph Three imposes the obligation to defend, regardless of the negligence of the Contractor, in a manner that satisfies the Concord & Cumberland heightened standard.

Notably, to the extent the Court finds that Paragraph Three is not clear and unequivocal, or in the event that Paragraph Three is struck or severed from the Contract, Appellant's claims for attorneys' fees will be encompassed by Paragraph One, which limits Appellant's ability to recover to expenses caused by the negligence of the subcontractor. Because recovery is limited to the negligence of the subcontractor, and does not provide for recovery for the contractor's own negligence, Paragraph One is not analyzed under the heightened standard provided by Concord & Cumberland.

Finally, Respondent argues that Appellant has previously admitted "in the MI Windows case that the Master Subcontractor Agreement's indemnity clauses fail to meet the 'clear and unequivocal' standard." Brief of Respondent, p. 24. This is not true. Had Respondent read more carefully, Respondent would have discovered that when Appellant said that "the indemnity language *at issue* does not meet the elevated standard of being clear and unequivocal," that was in the context of a discussion of Section Five, Paragraph One, and Section Five,

Paragraph Two, which are the *only* two indemnity provisions discussed by Judge Newman's December 6, 2019 order (to which Appellant was then responding).[1] Judge Newman's order *never* discussed Section Five, Paragraph Three, which is the paragraph that Appellant now contends, in a manner that is completely consistent with its prior positions, meets the "clear and unequivocal" standard articulated by Concord & Cumberland.

Because the provision regarding attorneys' fees satisfies the heightened standard imposed by Concord & Cumberland, the Trial Court was incorrect to grant summary judgment on that basis.

## IV. Claims for attorney's fees are not addressed by Section 32-2-10, and there is nothing within that statute or the general law or public policy of South Carolina, which bars the Appellant's claims for attorney's fees in this action.

Respondent argues that Section 32-2-10, which governs contracts in which a party seeks indemnity for "liability for damages" caused by its own negligence, nonetheless applies to Appellant's distinct claims for attorneys' fees because attorneys' fees are the same as damages in the context of indemnification. Brief of Respondent, p. 26.

There are multiple elements of damage in an indemnity claim. First, there are the damages that result from the first party being held liable to a second party for the damages caused by a third party; that is, the amount of the award,

[1] The December 6, 2019 Order was later superseded by Judge Newman's Amended Order dated February 3, 2020. However, the Court's language analyzing the Contract in the context of Concord & Cumberland is the exact same in both orders, and that language may be found in the Record at **(R. pp. 14-16)**.

settlement, or other expense paid to satisfy or avoid a judgment. When, however, the party has suffered additional damage by the refusal of the negligent party to defend that party, a second type of damage, that is, attorneys' fees, are also recoverable. See Town of Winnsboro, 307 S.C. at 130 (articulating that in indemnity a party may recover "[1] the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as [2] attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence"). The first type of damage arises out of property damage resulting from the work of the subcontractor. The second type of damage arises as a result of the subcontractor's failure to perform on its defense obligation.

Section 32-2-10 provides that "a promise or agreement ... purporting to indemnify the promise ... against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee ... is against public policy and unenforceable."

By its specific terms, Section 32-2-10 is speaking exclusively of the first type of "liability for damages," that is, the damages that a first party pays to a second party for the loss or damage caused by a third party. The statute speaks of damages arising out of property damage – these would be damages caused by the original negligence of the subcontractor, for which judgment or settlement the contractor may be liable. Attorneys' fees arise not out of property damage, but out of a party's failure to defend. Equally telling, Section 32-2-10 speaks of indemnity against liability for damages. Our courts "have consistently defined indemnity as 'that form of compensation in which a first party is liable to pay a second party for

loss or damage the second party incurs to a third party.'" Concord & Cumberland, 424 S.C. at 646-47. As discussed in Appellant's opening brief, when a statute is in derogation of the common law, as Section 32-2-10 is, the statute must be strictly construed. Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Attorneys' fees simply do not fall within the scope of indemnity because they are not paid by a first party to "a second party for loss or damage the second party incurs to a third party." Rather, attorneys' fees are recoverable in addition to – and separately from – the indemnity damages. See Town of Winnsboro, 307 S.C. at 130

Section 32-2-10 does not state that it applies to attorneys' fees; absent such an explicit designation, the general rule is that the damages discussed therein do not include attorneys' fees. See Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1996) (providing that damages **do not** "include the expense of employing counsel, except when so provided by contract or statute"). Therefore, Section 32-2-10 is not applicable to Appellant's claims for attorneys' fees.

Respondent argues that the Subcontract Agreement redefines damages to include attorneys' fees because it provides that the subcontractor will indemnify Appellant:

> 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** . . . .

Brief of Respondent, p. 27 (bolded emphasis added by Respondent, not present in original; see also **(R. p. 547.)**. Respondent reads the clause "including, but not limited to, . . . attorney's fees" as modifying "damages." This is not a natural reading of the sentence. The phrase "including, but not limited to, . . . attorney's fees" clearly modifies the phrase directly preceding it, which is "expenses of any kind whatsoever" both because of the nature of sentence construction and because it is clear that arbitration/court costs and attorney's fees are both "expenses." Read in that way, "expenses of any kind whatsoever, including, but not limited to, . . . attorney's fees," makes sense. However, cherry picking random words from earlier in the sentence leads to unintelligibility. Using Respondent's logic, one could just as easily argue that "including, but not limited to, . . . attorney's fees" modifies the phrase "causes of action;" however, the ridiculousness of this sentence is made even clearer when read in complete context. The sentence would read that the subcontractor would indemnify Appellant from and against any "causes of action" "including, but not limited to arbitration or court costs and attorney's fees." Court costs and attorney's fees are not causes of action. They are expenses. Thus, Respondent's proposed contortion of the paragraph to redefine "damages" is futile.

Because Section 32-2-10 does not address attorneys' fees, it does not bar Appellant's claims. However, even if the Court were to expand the reach of Section 32-2-10 to include attorneys' fees, Appellant would nonetheless be able to recover. If the Court decided that Section Five, Paragraph Three (which provides for attorneys' fees regardless of the negligence of Appellant) did not comply with

Section 32-2-10, the Court should sever the offending provision; then, Appellant's claim for attorneys' fees would instead be fully encompassed by Paragraph One of Section Five. Paragraph One provides that Respondents would indemnify Appellant for all expenses, "including, but not limited to . . . attorney's fees" arising out of claims for property damage, but "ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OF THE SUBCONTRACTOR . . . ." Because recovery under Paragraph One is limited to attorneys' fees incurred in defending against the negligence of the subcontractor, it is not covered by the alleged prohibition of Section 32-2-10. In fact, Paragraph One is specifically authorized by the statute, because the statute says that it does not affect or void a contract where the first party shall indemnify the second party against liability for damages resulting from the negligence of the first party; this is exactly the effect of Paragraph One.

## V. South Carolina Courts have articulated that offending language in a contract may be severed, and to the extent that the Court finds certain language unenforceable in this indemnity provision, it is compelled to sever it.

Respondent argues that "the Master Subcontract Agreement fails as a whole" and accuses Appellant of trying to "cherry pick" enforceable provisions of its contract. Brief of Respondent, p. 33. To be clear, Appellant is not "cherry picking" anything. Appellant maintains that the entire contract is valid, and to the extent that the *Court* decides otherwise, the *Court*, and not Appellant, is tasked with identifying and severing provisions that the Court deems unenforceable.

South Carolina law provides that "[c]ourts have discretion ... to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive." Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020). "Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). The presence of a severability clause should be treated as strong evidence of the parties' intent to sever unenforceable language. See Doe, 430 S.C. at 615, 846 S.E.2d at 880-81 (determining that parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable). The contract at issue contains a severability clause, and the trial court was wrong to ignore it. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

Finally, when faced with indemnification language similar to the language at issue here, South Carolina Courts have allowed recovery in indemnity based on permissible provisions of the agreement, while refusing to allow sought-after recovery that would violate South Carolina law. Concord & Cumberland, 424 S.C. at 645 (refusing to allow contractor to recover in contractual indemnity for its own negligence because contract did not meet "clear and unequivocal" standard, but

nonetheless allowing contractor to recover in contractual indemnity for its subcontractor's negligence under that same contract). See also D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) (disagreeing with trial court that entire indemnity provision was against public policy; rather, only the specific language that violated Section 32-2-10 was invalid).

Respondent contends that "[e]liminating the illegal provisions in . . . the Master Subcontractor Agreement would amount to a rewriting of the agreement, not severing a word, clause, phrase, or line." Brief of Respondent, p. 36. Respondent's conclusion does not follow. The simplest fix, should the Court determine that severance was necessary, would be for the Court to sever, in Section Five, Paragraph Three, the phrase "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." Alternatively, the Court could strike the entirety of Paragraph Three, at which point Appellant's claims for attorneys' fees would be entirely encompassed by Section Five, Paragraph One. Likewise, if the Court thought it necessary to address Paragraph Two, the Court could strike from Paragraph Two the language providing that the indemnification obligation existed regardless of the negligence of the contractor; alternatively, the Court could strike Paragraph Two entirely – it would not affect Appellant's ability to claim attorneys' fees.

This is not a re-writing or blue-penciling of the contract, because the Court is not required to write or replace any provisions – instead it is simply honoring the

stated intent of both Appellant and Respondent and severing the invalid provisions. The valid provisions stand on their own even without the severed language.

## CONCLUSION

Because Respondent has not effectively shown that the claims of Appellant are barred by collateral estoppel, Concord & Cumberland, or Section 32-2-10, and because even if certain provisions were barred by South Carolina law, those provisions can be effectively severed, Appellant incorporates herein its arguments submitted in its opening brief and requests that this Court REVERSE the Trial Court's decision.

HOWELL, GIBSON & HUGHES, P.A.

By: _____

Stephen P. Hughes
Mary B. Lohr
William H. Cox, III
Catherine L. Floeder
PO Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Builders FirstSource - Southeast Group, LLC

Beaufort, South Carolina

September ___, 2021