RECEIVED
Aug 04 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

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

Dag Pavic and Stela Susac-Pavic.....Plaintiffs,

v.

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

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

AND

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

v.

MW Manufacturers, Inc.,.....Third-Party Defendant.

FINAL BRIEF OF RESPONDENT

CLARKE, JOHNSON, PETERSON & McLEAN, P.A.

Finley B. Clarke
Post Office Box 1865
Florence, South Carolina 29503
(843) 669-2401
Attorney for Hurley Services, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

ADDITIONAL CASE CITATIONS

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in finding that the contractual indemnity provisions drafted by BFS violate S.C. Code Section 32-2-10 by requiring the subcontractors of BFS to indemnify it for its sole negligence, including its negligence in the selection and sale of products to third parties?

II. Did the Circuit Court err in applying the clear and unequivocable standard to the contractual indemnity provisions drafted by BFS where the pleadings of BFS seek indemnity for its sole or concurrent negligence?

III. Did the Circuit Court err in failing to make an express ruling on the severability of contractual indemnity provisions where the court found that these provisions are unconscionable and oppressive, violate S.C. Code Section 32-2-10, and fail to meet the clear and unequivocable standard?

IV. Did the Circuit Court err in finding that the Master Subcontract Agreement drafted by BFS is a contract of adhesion which is unconscionable and oppressive?

V. Did the Circuit Court err in applying the doctrine of collateral estoppel as a bar to the contractual indemnity claims of BFS?

VI. Did the Circuit Court err in granting Respondent's Motion for Partial Summary Judgment where none of the issues on appeal involve genuine issues of material fact?

STATEMENT OF THE CASE

Plaintiffs filed suit on February 14, 2019, against the general contractor, Saussy Burbank, and other defendants alleging construction defects in their two-story residence in Mount Pleasant, South Carolina. Plaintiffs purchased the residence from the builder for $649,900.00 in 2013. The Complaint was subsequently amended twice to name the correct defendants, including Builders FirstSource-Southeast Group, LLC ("BFS") and Hurley Services, LLC ("Hurley"). BFS sold windows and doors to Saussy Burbank and agreed to install them in Plaintiffs' residence. Hurley installed the windows and doors as a subcontractor to BFS, but Hurley provided no materials in connection with their installation. (R. p. 102) (R. p. 522).

Plaintiffs filed a Third Amended Complaint on April 2, 2019, alleging claims of negligence, breach of warranty, and breach of habitability. On April 19, 2019, BFS filed an amended answer to the Third Amended Complaint and reiterated its crossclaims against Hurley for equitable and contractual indemnity, negligence, breach of contract, and breach of warranty in connection with labor and materials. BFS also filed a Third-Party Complaint against the window manufacturer, MW Manufacturers, Inc. ("MW"), alleging claims for contractual and equitable indemnification, negligence, breach of express and implied warranties, contribution, and breach of contract in connection with the windows installed in the Pavic residence. (R. pp. 124-137.)

After service of process on Hurley, Hurley answered both the Third Amended Complaint and the crossclaims of BFS. Both answers contained standard construction defects defenses. On July 29, 2019, MW Manufacturers, Inc. filed an amended answer to

the Third-Party Complaint of BFS and asserted as a defense the class-action suit and settlement in Gulbankian v. MW Manufacturers, Inc., United States District Court, District of Massachusetts, Civil Action Numbers 10-10392-RWZ and 3:12-CV-30122-RWZ (D. Mass. 2014). (R. pp. 138-148) (R. pp. 149-157) (R. pp. 158-203).

On October 31, 2019, Plaintiffs and Appellant entered into a stipulation that Plaintiffs are not asserting claims for defective windows against any defendant in the litigation. On January 28, 2020, BFS filed a dismissal without prejudice of its Third-Party Complaint against MW Manufacturers, Inc. under a tolling agreement.

On August 5, 2020, Saussy Burbank filed an Amended Answer to Plaintiffs' Third Amended Complaint and crossclaims against BFS for negligence, contractual indemnification, and breach of express and implied warranties in connection with labor, materials, and products furnished by BFS in connection with the construction of Plaintiffs' residence. (R. pp. 215-223.) On August 26, 2020, BFS answered the crossclaims of Saussy Burbank and reiterated its crossclaims against Hurley. (R. pp. 251-257.) Hurley filed an answer to the BFS crossclaims on August 31, 2020.

On August 27, 2020, Hurley filed a motion for partial summary judgment as to all crossclaims of BFS except for equitable indemnity. On September 17, 2020, Hurley filed an amended motion for partial summary judgment. (R. p. 1, app. pp. 1-4.)

The respondent's amended motion for partial summary judgment was argued in the Circuit Court on October 1, 2020. Both Appellant and Respondent submitted memoranda and exhibits in support of their respective positions. All issues raised in this appeal were argued in full by the parties without objection. (R. pp. 331-416) (R. p. 457, line 2 – p. 483,

line 25). On January 22, 2021, the Honorable Jennifer B. McCoy signed an Order granting partial summary judgment in favor of Hurley. The Order was filed January 25, 2021. BFS filed a motion for reconsideration which was denied on February 16, 2021. Appellant filed a Notice of Appeal on March 18, 2021.

STANDARD OF REVIEW

Summary Judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP. The purpose of Summary Judgment is to obviate delay where there is no material issue of fact involved. Hammond v. Scott, 268 S.C. 137, 232 S.E.2d 336 (1977). Summary Judgment is appropriate in those cases in which plain, palpable, and undisputed facts exist on which reasonable minds cannot differ. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993).

The party "opposing a properly supported motion for summary judgment ... may not rest on mere allegations or denials of his pleadings but must set forth or point to specific facts showing that there is a genuine issue of material fact." Bravis v. Dunbar, 316 S.C. 263, 264, 449 S.E.2d 495, 496 (Ct. App. 1994). However, it is not sufficient for a party to create an inference which is not reasonable or an issue of fact that is not genuine. Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990).

ARGUMENTS

I. The contractual indemnity provisions drafted by BFS violate S.C. Code §32-2-10 by requiring its subcontractors to indemnify it for its sole negligence, including its negligence in the selection and sale of products to third parties.

BFS is a large supplier of building materials. It is a merchant within the meaning of S.C. Code §36-2-104(1). It has or should have superior knowledge regarding the products it sells.

BFS sold windows to Saussy Burbank for installation in Plaintiffs' residence. (R. p. 216) (R. p. 531). These windows are the subject of a class-action suit and settlement. It is undisputed that Hurley furnished no materials.

Although Plaintiffs and BFS stipulated that Plaintiffs are claiming no damages from defective windows, this stipulation is not binding on non-signing parties. Moreover, class-action windows are installed in the residence, and there are moisture intrusion issues related to the windows. The national class-action suit against MW Manufacturers, Inc. alleges moisture intrusion problems and resulting damage and rot from the same windows which are installed in Plaintiffs' residence. BFS should have known that there were significant issues with these windows when it sold them. (R. pp. 138-148) (R. pp. 149-157) (R. pp. 158-203) (R. pp. 524-525).

The general contractor has asserted crossclaims against BFS which includes claims for defective materials. In its answer to these crossclaims, BFS has reasserted multiple claims against Hurley, which include claims for defective materials although it concedes in its brief on page 19 that Hurley furnished no materials. The crossclaims of BFS relate to the windows and doors it provided to Hurley for installation.

BFS drafted two Master Subcontract Agreements as is shown by its logo on the first page of the agreements. One is dated May 14, 2012, and the other, December 18, 2014.

The 2012 agreement is the operative agreement although the 2014 agreement is relevant on the issue of disparity in bargaining power. (R. pp. 486-497) (R. pp. 498-512).

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. PCS Nitrogen, Inc. v. Continental Cas. Co., 429 S.C. 30, 39, 837 S.E.2d 662, 666 (Ct. App. 2019) (reh'g denied). The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, "from the four corners of the instrument" alone. McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). Any uncertainty as to the meaning of any term should be resolved against the party who prepared the contract. Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 683 S.E.2d 814 (Ct. App. 2009). A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. Williams v. Gov't Emps Ins Co., 409 S.C. 586, 762 S.E.2d 705, 710 (2014).

The master contract was carefully drafted by BFS in a way which would obligate its subcontractors to warrant the design and suitability of products provided by BFS, and further, for subcontractors to indemnify and defend BFS and others from any property damage or personal injury resulting from those products. Referring to the 2012 Master Subcontract Agreement, one finds the following: (R. pp. 486-490.)

> "**SECTION 1. Introduction.**
>
> a. **Work.** '[T]his Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**") ....'

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on the Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

SECTION 3. Warranty.

"[I]n addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications ... If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, materials, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners ... and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated ...."

In SECTION 2(c), BFS drafted the contract language to read that "work" includes materials supplied by others, which in this case are windows and doors supplied by BFS.

Although in its brief, Appellant describes the contract interpretation of the lower court as "nonsensical", the language in SECTION 3 Warranty "subcontractor guarantees the work against defects in design ... and materials" only makes sense if the word "design" refers to manufactured materials provided by BFS. Hurley has no responsibility for the design of the residence or any of its components. In addition, BFS, not Hurley, provides structural components. Yet Hurley is required to give a 10-year warranty on "structural applications." (R. p. 489.)

The fine print indemnity language found in SECTION 3 Warranty is jumbled with warranty and guaranty provisions under which Hurley warrants, guarantees, and agrees to indemnify BFS for its sole negligence in selecting and selling materials and building components for installation in Plaintiffs' residence. The warranty and guaranty provisions are merely disguised indemnity provisions, and they, along with the indemnity provisions, clearly violate S.C. Code §32-2-10.

BFS uses the language in Sections 1, 2, and 3 in combination with the indemnity and duty to defend provision found in the first three paragraphs of SECTION 5 Indemnity, to obtain indemnity for its sole negligence. (R. pp. 490-491.) For example, the second paragraph of SECTION 5 Indemnity calls for the subcontractors to "indemnify, defend, and hold harmless" BFS "... regardless of whether such claim, damage, loss, or expense is caused or is alleged to be caused in whole or in part, by the negligence of any of the indemnitees." This provision also violates S.C. Code §32-2-10.

In addition, SECTION 5 Indemnity, paragraph 3, deals with a duty to defend. BFS elected to include this paragraph in the bold print indemnity section of the subcontract.

Paragraph 3 is in effect an indemnity provision for defense costs. There is nothing in South Carolina law that separates a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement. Moreover, S.C. Code §32-2-10 speaks solely of "damages" while limiting the ability of the indemnitor to indemnify the indemnitee. Attorneys' fees and defense costs are nothing more than continuing consequential damages.

SECTION 5 Indemnity, paragraph 3, provides, in pertinent part, for the subcontractor to pay attorneys' fees of BFS "regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees." BFS has relied upon these provisions in asserting crossclaims against Hurley for defense costs and attorneys' fees in violation of S.C. Code §32-2-10.

The definitions, warranty, guaranty, and indemnity provisions of Sections 1, 2, 3, and 5 violate S.C. Code §32-2-10 because they require Hurley to indemnify BFS for its sole negligence. These provisions are illegal, void, and unenforceable. *See* D.R. Horton, Inc. v. Builders FirstSource S.E. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 46 (Ct. App. 2018).

II. THE CIRCUIT COURT PROPERLY APPLIED THE CLEAR AND UNEQUIVOCABLE STANDARD TO THE CONTRACTUAL INDEMNITY PROVISIONS DRAFTED BY BFS WHERE ITS PLEADINGS SEEK INDEMNITY FOR ITS SOLE OR CONCURRENT NEGLIGENCE.

BFS argues that the elevated clear and unequivocable standard enunciated in Concord & Cumberland does not apply in this case because it is not seeking indemnity for its sole or concurrent negligence. It asserts that it is only seeking indemnification for loss

or damage arising from Hurley's negligence. The pleadings of BFS do not support its argument.

BFS supplied windows and doors to Hurley. Hurley provided no materials for their installation. The windows provided by BFS are the subject of a class-action suit and settlement. The general contractor has crossclaimed against BFS for defects in materials. BFS has attempted to transfer this risk to Hurley and has asserted claims against Hurley in connection with materials which were installed at the Pavic residence. BFS is obviously seeking contractual indemnity for the defective windows which it selected and sold.

The pleadings also seek recovery for "any sums which BFS may be held liable to Plaintiffs or others, or which Builders FirstSource Southeast Group, LLC may pay in satisfaction of such claims." This would include indemnity for any judgment in favor of the general contractor who purchased the defective windows from BFS. The indemnity provisions contained in SECTION 8i provide indemnification of BFS for "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 ..." (R. p. 496.) BFS is a supplier.

The pleadings also seek a recovery of attorneys' fees and costs from Hurley. Under SECTION 5 Indemnity, paragraph 3, BFS is seeking to recover attorneys' fees which, according to the language of the agreement, are payable even if BFS is 100% at fault in causing the loss, injury and damages.

In asserting its contractual indemnity claims against Hurley, BFS also relies upon SECTION 5 Indemnity, paragraph 1. The South Carolina Court of Appeals issued a

decision in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 64, 819 S.E.2d 166, 170 (Ct. App. 2018), that specifically recognized that this contract language fails as a matter of law because it does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own liability. The Court refused to allow a general contractor to obtain indemnity for its concurrent negligence.

Dicta in Concord & Cumberland at 424 S.C. 652, 653, 819 S.E.2d 173, 174 regarding the liability of the subcontractor Muller is inapplicable to the facts of this case. Here, there are multiple conflicting indemnity provisions and BFS is also seeking indemnity for its own negligence in selecting and selling defective windows.

A review of the indemnity provisions drafted by BFS is helpful. The indemnity provision buried in the fine print of SECTION 3 Warranty does not require any finding of fault on the part of Hurley. It also does not exclude any fault of BFS. The indemnity provision simply arises upon the demand of BFS.

> "**SECTION 3. Warranty.**
>
> ... subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship ... including, without limitation, property damage to the homes or properties into which the Work is incorporated ..."

In addition, the indemnity provisions in SECTION 5 Indemnity do not expressly exclude the sole or concurrent negligence of BFS, but to the contrary, the last two paragraphs of SECTION 5 INDEMNITY expressly provide for indemnification for the sole negligence of BFS. Relevant language from each paragraph is as follows: (R. pp. 491-493.)

> "ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE."

The next paragraph suggests a duty to indemnify BFS:

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

The following paragraph provides that:

> "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 Court should not ignore the language of the contract and the pleadings drafted by BFS based upon the unsupported assertion that BFS is only seeking indemnity for the sole or concurrent negligence of Hurley. These indemnification provisions are unclear and conflict with each other and do not meet the elevated clear and unequivocable standard required by Concord & Cumberland. As a result, the indemnification provisions of the Master Subcontract Agreement are unenforceable.

III. THE CIRCUIT COURT WAS NOT REQUIRED TO MAKE AN EXPRESS RULING ON THE SEVERABILITY OF CONTRACTUAL INDEMNITY PROVISIONS WHERE THE COURT FOUND THAT THESE PROVISIONS ARE UNCONSCIONABLE AND OPPRESSIVE, VIOLATE S.C. CODE §32-2-10, AND FAIL TO MEET THE CLEAR AND UNEQUIVOCABLE STANDARD.

BFS argues that the Circuit Court committed a reversible error when it failed to make an express ruling on the severability of contractual indemnity provisions. It further argues that the Court would have been compelled to sever any offending provisions of the contract, leaving the rest of the contract intact.

An express ruling on these provisions was unnecessary because the Court found that the indemnity provisions are unconscionable and oppressive, violate S.C. Code §32-2-10, and fail to meet the clear and unequivocable standard enunciated in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). By making these findings, the Court ruled by implication that these contractual indemnity provisions can not be severed. *See* Wannamaker v. Wannamaker, 305 S.C. 36, 40, 406 S.E.2d 180, 183 (Ct. App. 1990) (holding by implication that there was no transmutation of a husband's stocks).

The fine print indemnity provisions in SECTION 3 Warranty are unconscionable and violate S.C. Code §32-2-10. The provision contained in SECTION 5 Indemnity, paragraph 1, fails to meet the Concord & Cumberland standard. The provisions found in SECTION 5 Indemnity, paragraphs 2 and 3, clearly violate S.C. Code §32-2-10 and are also unconscionable. All of these provisions are oppressive and unconscionable, void, and unenforceable in the context of an oppressive adhesion contract drafted by BFS.

There are so many objectionable clauses that run throughout the agreement that it is not possible to sever or reform them. *See* Smith v. D.R. Horton, Inc., 403 S.C. 10, 16, 742 S.E.2d 37, 41 (Ct. App. 2013O) aff'd 417 S.C. 42, 790 S.E.2d 1 (2016) (Kittredge & Pleicones, JJ, dissenting). The Court has no obligation or authority to rewrite the contractual indemnity provisions of BFS. Poynter Inves., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 83, 694 S.E.2d 15, 17 (S.C. 2010); Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

If an express ruling were required by the trial court on the issue of severability, the failure to make one was a harmless error within the meaning of Rule 61 SCRCP.

IV. THE MASTER SUBCONTRACT AGREEMENT DRAFTED BY BFS IS A CONTRACT OF ADHESION WHICH IS UNCONSCIONABLE AND OPPRESSIVE.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-side contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (2007) (citation omitted). Among the factors considered by the court in determining whether a contract was tainted by an absence of meaningful choice are the relative disparity in the bargaining power of the party; whether there is an

element of surprise in the inclusion of the challenged language; and the conspicuousness of the language or clause. Simpson, 644 S.E.2d at 669.

Hurley was a local subcontractor in the Charleston area which installed products for BFS. BFS is the regional division of Builders FirstSource as appears from its name on the contract. Respondent requests that this Court take judicial cognizance of the fact that BFS is a large supplier of building materials and that its Master Subcontract Agreement is so one-sided, that a subcontractor executing the agreement, more than likely lacks any meaningful bargaining power. *Cf.* Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016) (Kittredge & Pleicones, JJ, dissenting) quoting Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730, 735-736 (1989) (taking judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller). The fact that Hurley was paid only $867.00 for installing all of the windows and exterior doors in this residence reflects a lack of bargaining power. (R. p. 524.)

The contract provisions are also deceptive. Contract provisions result in unfair surprise when the real meaning of the terms are intentionally obscured by one of the parties. The master contract was carefully drafted by BFS in a way which would obligate its subcontractors to warrant the design and suitability of products provided by BFS, and further, for subcontractors to indemnify and defend BFS and others from any property damage or personal injury resulting from those products.

The deceptive nature of the definitional, warranty, guaranty, and indemnity provisions contained in Sections 1, 2, and 3 of the agreement have been discussed in detail

elsewhere in this brief. It should be noted, however, that the indemnity provision in SECTION 3 Warranty was buried in fine print. (R. p. 489.)

In finding contract provisions unconscionable in Simpson, the court observed, in pertinent part, as follows:

> "[W]hile certain phrases within other provisions of additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) ... We cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law ...."
> Simpson, 644 S.E.2d at 670.

In addition, although Hurley provided no materials in connection with the installation of the windows and doors, there is a provision under SECTION 3 Warranty which requires Hurley to give a ten-year warranty on "structural applications." This warranty exceeds the eight-year time limit in the applicable statute of repose found in S.C. Code §15-3-640 and may jeopardize a significant defense otherwise available to Hurley.

Thus, it is clear that a disparity in bargaining power and the intentional use of deceptive language buried in the fine print of the agreement deprives Hurley of a meaningful choice in the execution of the agreement.

It is equally clear that the Master Subcontract Agreement drafted by BFS is an adhesion contract which is drawn to the fullest extent possible in favor of BFS. BFS has expansive rights and remedies under the agreement it drafted. In contrast, most of the rights and remedies of Hurley are limited or waived. Most paragraphs of the agreement create obligations and liabilities for Hurley or a waiver or limitation of Hurley's rights.

The agreement drafted by BFS attempts to transfer all risks associated with the project to its subcontractors, including risks associated with the products and components furnished by BFS. The best evidence of this is the fact that BFS has filed multiple crossclaims against Hurley alleging product deficiencies when BFS concedes on page 19 of its brief that Hurley did not provide any materials whatsoever in connection with the construction of the Pavic residence.

Under general principles of state law, an adhesion contract is a standard form contract offered on a "take it or leave it basis" with terms that are non-negotiable. Munoz v. Greentree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001). Although adhesion contracts are not per se unconscionable, the cumulative effect of these oppressive and one-sided provisions can cross a line which makes the contract unconscionable. Simpson, 644 S.E.2d at 674.

Examples of the oppressive and unconscionable nature of the 2012 Master Subcontract Agreement are as follows:

1. In Section 1(a), limitation of Hurley's remedies in the event of a change order which increases costs.

2. In Sections 1(a) and 2(c), deceptive language defining the "work."

3. In Section 2(c), Hurley assumes risk of loss to the work.

4. In Section 2(d)(2)(C), indemnity of BFS in connection with environmental regulations.

5. In Section 2(d)(4), liquidated damages against Hurley for delay at $200 per hour for a minimum of 10 hour day until project can be resumed.

6. In Section 3, fine print indemnity of BFS for its own products and negligence.

7. In Section 3, unfavorable warranty, guaranty, and indemnity provisions relating to products selected and sold by BFS.

8. In Section 4, waiver of subrogation rights and release of all claims in favor of BFS.

9. In Section 5, indemnification and defense of BFS for its own negligence.

10. In Sections 6 and 7(b)(2), misleading provisions regarding BFS's right to direct and control work.

11. In Section 7(a), numerous events of default by subcontractor without any corresponding events of default on the part of BFS.

12. In Section 7(b)(1), waiver of claims and damages for delay in favor of BFS.

13. In Section 7(b)(2), liability of Hurley to BFS upon termination for all costs and damages of BFS plus 25% of all costs and damages of BFS.

14. In Section 7(c), fine print indemnity, defense, and hold harmless provisions in favor of BFS.

15. In Section 8(a), no obligation of BFS to pay Hurley until BFS receives payment from owner. If owner does not pay BFS, BFS does not pay and Hurley assumes risk of non-payment.

16. In Section 8(f), unreasonable conditions for obtaining final payment, including furnishing "as-built drawings" in Section 8(f)(3).

17. In Section 8(i), indemnification of BFS for liens and judgments including judgments arising from materials supplied by BFS.

18. In Section 8(i), waiver of rights against BFS.

19. In Section 9(e), Hurley waives the right to file a lien for its work.

This Court is well aware that sophistication is another form of bargaining power. *See* Smith v. Horton at 417 S.C. 49, 790 S.E.2d 4. The high degree of sophistication of BFS is obvious in the language of the aforementioned provisions of the 2012 contract. BFS

has taken advantage of any asymmetry in sophistication to include provisions that are either concealed in fine print or that its subcontractors are unlikely to fully appreciate.

The 2014 agreement executed by Hurley is even more oppressive than the 2012 version because of the addition in fine print of Section 10 (f):

> "**f. Release.** Subcontractor hereby waives, releases, and forever discharges the Contractor, the Owner, and all of their officers, directors, agents, and employees from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities that Subcontractor may have against the Contractor, the Owner, and all of their officers, directors, agents, and employees. Specifically, Subcontractor agrees that Subcontractor shall not file, or cause to be filed, any demand, claim, suit or cause of action against Contractor and all of its officers, directors, agents, and employees hereunder."
> (R. p. 510.)

It is simply inconceivable that a party who understood the implications of the language of these agreements would sign them unless there were a total absence of a meaningful choice on the part of the subcontractor. The combination of an absence of a meaningful choice on the part of Hurley, deceptive language, disparity in bargaining power, and one-sided provisions in the adhesion contract drafted by BFS renders the warranty/indemnification provisions in Section 3 and the indemnity/duty to defend paragraphs in Section 5 unconscionable and unenforceable. South Carolina courts will not enforce a contract which is violative of public policy or statutory law. Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004); D.R. Horton, Inc. v. Builders FirstSource-SE Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).

V. THE CONTRACTUAL INDEMNITY CLAIMS OF BFS ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL

The Circuit Court took judicial notice of two Circuit Court orders which have interpreted BFS's contractual indemnity language. See order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six Owners' Associations, Inc. v. Windsor South, LLC, 2016-CP-10-3455 and the amended order of the Honorable Clifton Newman filed February 3, 2020 in the Court of Common Pleas for Berkeley County in the case of Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al. as Civil Action No. 2018-CP-08-2547. (R. pp. 30-34) (R. pp. 19-29).

Significantly, the Honorable Clifton Newman found the same version of the BFS Master Agreement which is in issue in this case to be unenforceable as a matter of law because the indemnification clauses are not clear and unequivocable and they violate South Carolina Rules of Contract Constitution.

The Honorable Roger Young also ruled that Judge Newman's amended Order constitutes a prior final judgment that determined that the contractual indemnity provisions in BFS's master agreement was unenforceable as a matter of law. BFS has appealed both orders.

To invoke collateral estoppel, a party need not have also been a party to the prior action; 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.

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).

BFS argues that the issues in this case and in the prior cases are not the same. It contends that these orders of Judge Newman and Judge Young are distinguishable because the issue in those cases was whether the indemnity language was sufficiently clear and unequivocable to permit BFS to recover for its own negligence. It asserts that in this case, it is only seeking a recovery for the negligence of its subcontractor which is a separate issue.

BFS is clearly asserting claims for its own negligence in this case which have been addressed in other sections of this brief. However, it is worth noting that BFS concedes on page 19 of its brief that Hurley provided no materials in the construction of the Pavic residence. Yet, BFS has filed multiple crossclaims against Hurley alleging material deficiencies in Hurley's work. These allegations can only refer to the windows provided by BFS to Hurley for installation. These windows are the subject of a class-action suit and settlement. These windows were selected and sold by BFS at a time when BFS knew or should have known that there were significant issues with the windows.

In its brief, BFS does not take issue with the fact that the same contractual indemnity provisions in this case were considered by the courts in issuing their orders. However, it takes the position that BFS will not have had a full and fair opportunity to litigate the issues decided by Judges Newman and Young until the resolution of any appeals and entry of final judgment. In other words, BFS is contending that these orders are not final judgments for purposes of the application of the doctrine of collateral estoppel.

The appeals from these orders do not undermind their status as final judgments; the law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's judgment, and thus, will not be a barrier to applying collateral estoppel. *See* Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189, 61 S.Ct. 513, 515, 85 L.Ed. 725 (1941). (Finding finality of a court's judgment is not lost because appeal is pending until and unless reversed.)

The contractual indemnity terms drafted by BFS have been litigated and directly determined in prior actions, and collateral estoppel should apply. A final judgment is one that finally determines the rights of the parties. First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), aff'd 308 S.C. 421, 418 S.E.2d 545 (1992). Moreover, Rule 201(a) SCACR provides that an: "appeal may be taken, as provided by law, from any final judgment or appealable order." BFS could not have appealed these orders unless they were final orders.

VI. PARTIAL SUMMARY JUDGMENT WAS PROPERLY GRANTED WHERE NONE OF THE ISSUES ON APPEAL INVOLVE GENUINE ISSUES OF MATERIAL FACT.

In its brief, the only issues of fact which are raised by Appellant relate to alleged deficiencies in the installation of the windows provided by BFS. These issues will be resolved in connection with the equitable indemnity claim of BFS which is pending in the lower court.

Other than installation issues, Appellant fails to identify any issues on appeal which should not be decided as a matter of law. The relationship of the parties is not in dispute. The language of relevant pleadings are not in dispute. The fact that Hurley furnished no

materials is not in dispute. The fact that BFS filed multiple crossclaims against Hurley in connection with materials is not in dispute. The fact that BFS alone supplied materials is not in dispute. The fact that windows supplied by BFS are subject to a class-action suit and settlement is not in dispute. The language of the contract is not in dispute. Indeed, in its memorandum in opposition to Hurley's motion for partial summary judgment, BFS states: "The BFS Master Subcontract Agreement is not ambiguous, does not contain conflicting provisions, and is not unconscionable." (R. p. 344.)

The application of S.C. Code §32-2-10 is a matter of law. Whether the clear and unequivocable standard applies, and if so, whether it bars the claims of BFS is a matter of law. Whether the relationship of the parties, the language of the contract, and the conduct of Appellant combine to render the contract unconscionable and unenforceable is a matter of law. Whether the lower court correctly ruled by implication that contractual indemnity provisions cannot be severed, and if not, whether the failure to issue an express ruling was harmless error, is a matter of law for the court. Whether the lower court properly applied the doctrine of collateral estoppel is a matter of law.

The Circuit Court properly granted partial summary judgment in favor of Hurley. BFS is not without a remedy as its equitable indemnity claim remains in the lower court and all factual issues will be resolved when that claim is decided.

CONCLUSION

There are no genuine issues of material fact that relate to the issues on appeal. All legal issues were correctly decided in the order of the lower court which should be affirmed in full.

CLARKE, JOHNSON, PETERSON & McLEAN, P.A.

By: Finley B Clarke
Finley B. Clarke
Post Office Box 1865
Florence, South Carolina 29503
(843) 669-2401
Attorney for Hurley Services, LLC

August 4, 2021

RECEIVED
Aug 04 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

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

Dag Pavic and Stela Susac-Pavic.....Plaintiffs,

v.

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

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

AND

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

v.

MW Manufacturers, Inc.,.....Third-Party Defendant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b).

SIGNATURE PAGE FOLLOWS

CLARKE, JOHNSON, PETERSON & McLEAN, P.A.

By: Finley B Clarke
Finley B. Clarke
Post Office Box 1865
Florence, South Carolina 29503
(843) 669-2401
Attorney for Hurley Services, LLC

Florence, South Carolina

August 4, 2021