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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
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 REPLY BRIEF OF APPELLANT

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Respondent's assertion that it is entitled to summary judgement is premised upon the following considerations:

(1) the Contract between Appellant and Respondent, purports to allow Appellant to recover on Appellant's negligence, in violation of South Carolina law. This assertion is premised upon the definition of the term "the Work" which, as erroneously interpreted by Respondent, makes Respondent responsible for materials selected and supplied by Appellant;

(2) the Appellant's pleadings, as erroneously interpreted by the Respondent, seek to recover for the Appellant's own negligence;

(3) that the trial court, in holding certain language of the contract to be unenforceable, made an implied ruling on the issue of severance;

(4) that the Respondent is entitled to judicial notice that it had no bargaining power, and that Contract between the parties is therefore oppressive;

(5) that final rulings exist on issues identical to the one before this Court, and thus collateral estoppel bars Appellant's claims.

Appellant submits the following reply brief in response to those specific arguments. However, Appellant does not concede any portion of Respondent's brief, regardless of whether or not discussed herein, and specifically incorporates the arguments submitted in its first brief.

I. **Respondent's liability for indemnification is appropriately limited to its own negligence because the term "Work" is clearly defined in the contract to encompass only the work or services that may have been provided or performed by the subcontractor.**

Respondent's arguments that the Contract between Respondent and Appellant violates South Carolina Code Section 32-2-10, Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), and public policy as to unconscionability, all rely on Respondent's incorrect definition of the term "Work." Respondent has attempted to redefine "Work" to include not only work or materials performed or supplied by the subcontractor but also any materials designed, selected, or provided by Appellant. However, the plain meaning of the term "Work" is clear from the face of the contract.

Section 1(a) of the Contract provides as follows:

> **a. Work**. This Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**").

R. p. 492 (emphasis in original). This is the *only* definition of "the Work" found in the Contract. Because this is a master subcontract agreement between the parties, it was drafted to cover the rights and relationships of the parties for any project for which Appellant hired Respondent. For the Project at issue in this case, the parties agree that Respondent did not provide the windows. Thus, the Work in this instance does *NOT* include windows, but only any materials and/or services that *WERE* provided or performed by Respondent.

Respondent, for the first time in this litigation, has pointed to Section 2(c) and claims that Section 2(c) further defines the term "Work." Because this argument was not before the Trial Court, Appellant does not believe that it is properly before this Court, but nonetheless will address Respondent's argument.

Section 2(c) provides[1]:

> **SECTION 2. Materials and Workmanship.** Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.
>
> . . .
>
> **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.

R. p. 487. Respondent's argument and analysis regarding this section is only one sentence long: "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." However, nowhere does the above language attempt any further definition of the term "Work." In fact, the only mention of "materials" at all is that the Subcontractor undertakes to *protect* the materials, regardless of who supplied them. This simply means that once Appellant

[1] Respondent quotes heavily from Section 2(c) and Section 3 of the Contract on pages 6 and 7 of its brief, underlining portions of texting but failing to note that such emphasis is Respondent's

provided Respondent with the windows for installation, and the windows were physically in Respondent's care, Respondent was responsible for protecting the windows from damage, injury, etc. This undertaking has no effect on the definition of the term "Work." Nonetheless, Respondent argues that this undertaking to protect materials within the subcontractor's care is unconscionable and violates S.C. Code Section 32-2-10 and Concord & Cumberland. However, all of those authorities speak to indemnification; none of them speak to the situation described in Section 2(c), which is protection of materials.

Respondent then turns to the "Section 3. Warranty" provision. The entirety of the Warranty provision can be found in the Record at pages 489-90, but the relevant provisions for this analysis are as follows:

> In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor ... and 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 years for all Work except, (b) ten (10) years for all Work consisting of any structural application of any home, building, or other structure... 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.

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addition and is not present in the original document. Appellant requests that the Court take notice of the fact that the original contract language contains no such emphasis.

Respondent alleges that three provisions of the warranty section have the effect of making Respondent liable for Appellant's negligence. First, Respondent highlights the language that provides that "Subcontractor guarantees the Work against defects in design, workmanship, and materials."[2] Respondent alleges, without explaining, that the only possible interpretation of this sentence is that it requires the subcontractor to guarantee materials provided by BFS against defects in design. In doing so, however, Respondent has substituted "the Work" with "materials provided by BFS." Because "the Work" is a defined term that specifically excludes materials provided by BFS and only includes materials and/or services provided or performed by the subcontractor, Respondent's reading of the sentence is impossible.

Substituting "the Work" instead with its true definition, the sentence reads that "Subcontractor guarantees the materials and/or services provided or performed by the Subcontractor against defects in design, workmanship, and materials." The sentence now makes sense. If a subcontractor provided materials, the Subcontractor guarantees them against defects in design, workmanship, and materials. If the Subcontractor performed services, "design" may be inapplicable in that specific situation, but the Subcontractor still guarantees its workmanship (and any materials that it does provide in tandem with its services). In this instance, the parties have agreed that Respondent did not provide the windows; thus, Respondent is not guaranteeing the windows

[2] When discussing this contract language on page 7 of its brief, Respondent incorrectly quotes from the contract that "Subcontractor guarantees the work against defects in design ... and materials." However, the contract uses the defined term "Work," with a capital "W." The defined

against defects in design, workmanship, and materials. Because this warranty language does not require Respondent to assume liability for the design of the windows provided by Appellant, it does not violate Section 32-2-10, Concord & Cumberland, or public policy.

The second warranty provision that Respondent challenges provides that "This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three years for all Work except, (b) ten (10) years for all Work consisting of any structural application of any home, building, or other structure..." Respondent challenges the fact that although BFS provided the product, Respondent guarantees "all Work consisting of any structural application." Again, the definition of "Work" matters here. This contractual language provides that Respondent is guaranteeing the materials and/or services provided or performed by Respondent consisting of any structural application. Respondent did not provide the windows, so it is not guaranteeing the windows, but only the services and/or materials that Respondent *did* perform or provide.

The third provision at issue is what Respondent has termed the hidden indemnity language, whereby: "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." Again, understanding that "Work" relates *only* to materials and/or services provided or performed by the Subcontractor, this

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term leaves no doubt that the section applies only to materials and/or services provided or performed by the Subcontractor.

provision only requires Subcontractor to correct its own work (or, as the case may be, any materials that Subcontractor may have provided) and to indemnify other parties for costs incurred relating to the demand that Subcontractor correct its own work. A contractual provision whereby a subcontractor must indemnify the contractor for damages resulting from the subcontractor's negligence is specifically authorized by Section 32-2-10 and is consistent with both Concord & Cumberland and with public policy.

II. The Record supports the proposition that Appellant is only seeking indemnification for damages caused as the result of the negligence of Respondent.

Appellant has repeatedly represented to the trial court and to Respondent that Appellant is only seeking indemnification from Respondent for damages caused by Respondent's negligence. **R. p. 469, line 21 – p. 470, line 1; R. p. 472, lines 19-25; R. pp. 338-40; R. p. 434-36.** Despite Respondent's contention otherwise, this representation is completely consistent with Appellant's pleadings.

This entire case turns on whether Appellant is seeking to be indemnified for Appellant's own negligence or only for the negligence, whether sole or concurrent, of its subcontractor. Respondent argues that Appellant's pleadings seek indemnification from Respondent regardless of the ultimate negligence of Appellant, and nearly every subsequent argument flows from that premise: the heightened standard of Concord & Cumberland, the language of 32-2-10, the unconscionability of the agreement, and the issue of collateral estoppel *all only matter if Appellant is seeking to recover in indemnity for, or regardless of, Appellant's own negligence.* As Appellant has reiterated countless times,

Appellant is not seeking to recover in indemnity for damages that may have been occasioned by its negligence, but only those occasioned by the negligence of its subcontractor – and the pleadings support this position.

An excerpt of Appellant's relevant pleading for contractual indemnification follows. Respondent focuses only on paragraph 168; however, that paragraph must be read in the context of the surrounding allegations establishing the cause of action for contractual indemnity.

> 163. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Third Amended Complaint.
> ...
> 167. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the CrossClaim Defendant [Hurley], which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.
>
> 168. That BFS is entitled to full contractual and common law indemnification from the CrossClaim Defendant, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the CrossClaim Defendant, entitling BFS to recover from the [CrossClaim][3] Defendant, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the CrossClaim Defendant any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

R. p. 252-53 (emphasis added). Broken down in simpler language, the paragraphs say the following:

> 163. BFS denies liability.

[3] The original text reads Third-Party Defendant, but as BFS had no claims against third-party defendants at the time of this pleading, that designation is merely a typographical error.

167. If BFS is found to be liable to the Plaintiff, it is *only* because Hurley did something wrong.

168. Thus, if BFS is liable to the Plaintiffs, Hurley is derivatively and contractually liable to BFS.

Appellant's pleading takes as a premise that Appellant has committed no negligence and has no liability. In this world constructed by Appellant's pleading, where Appellant has committed no negligence, the only possible way Appellant could be liable is if the negligence was committed by Appellant's subcontractor and not by Appellant itself. Thus, in this world, and in context, Respondent, as the sole source of the negligence, would be liable to Appellant for all damages, as plead in paragraph 168, and Appellant, in seeking indemnity, is seeking recovery only for Respondent's negligence and not for Appellant's own negligence (because Appellant's negligence is nonexistent). Whether the facts later bear out Appellant's worldview does not affect the analysis of what Appellant's pleadings seek.

Because Appellant's pleadings and consistent representations have been that it is seeking indemnification only for Respondents' negligence, the trial court should not have applied the elevated standard of "clear and unequivocal" articulated by Concord & Cumberland; it should not have analyzed Appellant's contractual claim in the context of Section 32-2-10; it should not have considered irrelevant sections of the Contract and found them unconscionable; and it should not have found that the issue here – whether Appellant may seek indemnity for Respondent's negligence – has been ruled on by other courts and thus Appellant was collaterally estopped from seeking indemnity. Rather, the trial court should

have allowed Appellant to pursue its contractual indemnification claim against Respondent for Respondent's negligence.

III. The relevant contractual indemnity language is found in Section Five Paragraph One, and to the extent any other provision of the contract is invalid, the Court must honor the intent of the parties and sever it.

Appellant is seeking indemnification for property damages caused as a result of Respondent's negligence. This is not a warranty claim, and it is not a personal injury claim. Therefore, the *only* contractual language relevant to Appellant's claim is Section Five, Paragraph One, which provides for recovery for property damage, among other things, "BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR." **R. p. 491.** This language is completely consistent with Concord & Cumberland, Section 32-2-10, and public policy. No other paragraph provides for recovery in indemnity for property damage. Respondent quotes from paragraphs governing warranty claims and personal injury claims, but those provisions are not relevant to the contractual indemnity claims in this case, and are not properly before this Court.

Appellant is also seeking attorneys' fees. Attorneys' fees are governed by the language regarding the duty to defend in Section Five, Paragraph Three. While the duty to defend does exist "REGARDLESS OF ANY ULTIMATE LIABILTY OR NEGLIGENCE OF THE CONTRACTOR," Appellant has previously articulated arguments as to why this language, which is clear and unequivocal, passes the heightened test of Concord & Cumberland, and why this language, which provides for a recovery completely distinct from indemnity, is not

encompassed by Section 32-2-10. Those arguments are incorporated herein by reference.

Nonetheless, to the extent that the trial court found that any of the language governing warranties, personal injury, or attorneys' fees was legally problematic, the trial court was *required* to honor the intent of the parties and sever the offending language. However, the trial court never addressed severability. Respondent argues that simply by holding that certain contract provisions were unenforceable, "the Court ruled by implication that these contractual indemnity provisions cannot be severed." See Brief of Respondent, p. 13. Respondent's conclusion does not logically follow. The Court's holding that the provisions are unenforceable has no bearing on the separate question of whether they are severable.

Attempting to support its position, Respondent cites to Wannamaker v. Wannamaker, 305 S.C. 36, 406 S.E.2d 180 (Ct. App. 1991). Appellant is at a loss as to the relevant application of Wannamaker to the facts at issue. In Wannamaker, a husband and wife were contesting the division of various marital and non-marital property in the wake of their divorce. Id. at 37. The wife argued that husband's stocks were transmuted into marital property. Id. The stocks were held in a separate account in the husband's name only, and were either gifted to him or purchased with nonmarital assets. Id. at 38-39. Although husband sometimes used money from the account for marital purposes, no records showed that he ever used marital property to purchase assets held in the accounts. Id. at 38-40. Thus, the Court of Appeals concurred with both the trial

judge's finding "that the husband's stocks . . . are his separate property and the implied ruling that there was no transmutation." Id. at 40. This is the only instance of the word "imply" or "implied" in the entire case.

Wannamaker does not support Respondent's position not only because it has nothing to do with severability but also because it sheds no new light on the principle of implied rulings. In Wannamaker, the logic of the trial court's conclusion was as follows:

- EITHER the property is husband's separate property OR it has been transmuted into marital property. It cannot simultaneously be both.
- The property is husband's separate property.
- Therefore, by implication, it cannot have been transmuted into marital property.

This is not at all analogous the situation before the trial court in this case. A finding that the contract language is unenforceable does not necessitate a finding that it is not severable; the language can be both unenforceable and severable. 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) (holding that "the circuit court erred in finding the arbitration agreement was not separable from other allegedly unconscionable provisions"); D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) (voiding indemnification language only to the extent that it violated Section 32-2-10 and leaving enforceable indemnity language intact).

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 here contains a severability clause. Thus, the trial court should have honored the parties' intent and should have severed the offending language (if any).

Finally, Respondent argues that the failure to address severability is harmless error under Rule 61 of the South Carolina Rules of Civil Procedure. That rule provides that an error is harmless unless it "is inconsistent with substantial justice" or affects "the substantial rights of the parties." The Court's duty in interpreting this Contract was to honor the rights of the parties, and its failure to do so is inconsistent with substantial justice and affected the contractual rights of Appellant. Had the trial court considered the severability provision, it would have been compelled to sever any offending language and deny summary

judgment. Therefore, the trial court's failure in this instance is not harmless error and its holding must be reversed.

IV. Respondent was a sophisticated party to the Agreement and has produced no evidence that the Agreement is unconscionable.

Respondent argues that the Contract is a contract of adhesion that is unconscionable and oppressive. A contract is considered one of adhesion if it "is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007). Respondent has offered no evidence that the contract was either (1) offered on a take-it-or-leave-it basis, nor that (2) its terms were not negotiable. Instead, Respondent requests that the Court take "judicial cognizance" of the fact that the "Master Subcontract Agreement is so one-sided, that a subcontractor executing the agreement, more than likely lacks any meaningful bargaining power." See Brief of Respondent, p. 14. It cites to Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016), for support; however, while Smith took judicial notice of the uneven bargaining power between an individual buyer and a corporate seller in the context of arbitration language in the contract for the sale of a residence, there is no authority for extending the same judicial notice in the context of two companies bargaining for mutually beneficial terms.

There is no evidence that Hurley is an unsophisticated company. Respondent argues that Hurley's receipt of $867 on this Project somehow speaks to its bargaining power; in fact, as represented to the trial court at oral arguments, Hurley has collected over three-quarters of a million dollars from

Builders FirstSource as a result of the contract that it now seeks to evade. **R. p. 474, lines 21-23.** Respondent's work was always voluntary, and Respondent voluntarily entered into both the contract at issue and subsequent contracts – to its clear financial benefit.

Respondent has, for the first time here on appeal, compiled a laundry list of contractual terms to which it now objects. Appellant does not believe that it would be a helpful or efficient use of the Court's time for Appellant to attempt to refute or explain every allegation (although Appellant is prepared to do so at the Court's request). Many are twisted or taken out of context. Some of the complained-about provisions actually benefit Respondent. In entering into the Agreement, both Respondent and Appellant contracted for many rights – some of which inure to the benefit of one, some to the other. Respondent, for example, has the right to be paid for its work, the right to work in OSHA-compliant conditions, the right to withdraw from the contract, the right to renegotiate the contract, etc. The fact that Appellant also has some rights under the Contract does not make it oppressive or unenforceable.

Respondent again argues that the Contract is oppressive because of terms found in the warranty provision that allegedly permit Appellant to seek indemnity from Hurley for materials selected and sold by Appellant. As argued in great detail above, all warrantees, all guarantees, and all indemnification undertakings are limited to the materials provided by or the services rendered by the subcontractor. **R. p. 489**; see also definition of "the Work," **R. p. 486**. Thus,

it is impossible to conclude that Respondent is guaranteeing or providing indemnification for "materials selected and sold by BFS to third parties."

Finally, to the extent that the Contract may contain terms that the Court finds unconscionable, the unconscionable terms should be severed and the remainder of the contract should be left in place.

V. Because the specific issue here is whether Appellant can recover for Respondent's negligence, as opposed to its own, the doctrine of collateral estoppel does not bar Appellant's claims for indemnity in the present case.

Respondent argues that Appellant is collaterally estopped from proceeding with its contractual indemnification claim because (1) the courts in Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al., Civil Action No. 2018-CP-08-2547 and Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455 have considered and ruled on the identical issue before the trial court, and (2) those courts' rulings, although on appeal, are final.

The doctrine of collateral estoppel is available when the same issues of fact or law are actually litigated and determined by valid and final judgment. Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994). Collateral estoppel is unavailable here because (1) the issues considered in prior cases are not the same issues before this Court, and (2) even if they were, the prior orders are not final because they are currently on appeal.

Here, Respondent does not contest that the issue considered by prior courts was whether or not Appellant could recover for its *own* negligence.

Instead, Respondent simply reasserts that the same issue is before this Court and Appellant is again seeking to recover for its own negligence. This brief has already recounted in great detail above why all of the evidence and pleadings show that Appellant is NOT seeking to recover for its own negligence, but only for the negligence of Respondent, and those arguments are hereby incorporated into this section.

Respondent also argues that Appellant is bound by the doctrine of collateral estoppel because it has had its full and final opportunity to litigate this issue despite the fact that the issue is on appeal. Respondent cites to Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 61 S. Ct. 513, 85 L. Ed. 725 (1941), for the proposition that an order on appeal is nonetheless "final" for purposes of collateral estoppel. However, Huron Holding did not address collateral estoppel, and to the extent to which it addresses treatment of issues on appeal, the Court of Appeals notes that "the [Circuit] court's final judgment was not rendered, nor execution issued, until the [prior] judgment had been affirmed [on appeal]." Id. at 188. Thus, the trial court in Huron Holding did *not* render its judgment on an issue that was pending on appeal, as here, but rather waited until the underlying issue had been affirmed on appeal. Id. The trial court here should have done similarly and refused to apply principles of collateral estoppel to an issue on appeal.

CONCLUSION

In addition to all arguments previously submitted in Appellant's first brief, Appellant submits that because the Contract does not provide for recovery for

Appellant's own negligence under these facts (nor is Appellant seeking such recovery); because a severability provision leaves the relevant indemnity provisions of the Contract intact; because the issues before the Court are not subject to collateral estoppel; and because the Contract is not oppressive nor unconscionable, this Court should REVERSE the decision of the Trial Court.

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