

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
The Honorable Roger M. Young, Sr.
Circuit Court Judge

Circuit Court Case No. 2016-CP-10-03455

Court of Appeals Case No. 2020-001328
Unpublished Opinion No. 2025-UP-078 (filed March 12, 2025)

Appellate Case No. 2025-001495

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

v.

Winsor South, LLC and Jeffrey M. Thomas, individually, and on behalf of a class of construction defendants; Southeastern Recapitalization Group, LLC; WCM Construction, LLC; Jonathan J. Thomas; AC Heating and Air Conditioning Service, Inc.; ACME Doors, Inc.; Alpha Omega Construction Group, Inc.; Atlantic Construction Services, Inc.; Buck Lumber and Building Supply, Inc.; Builders FirstSource, Inc.; Builders FirstSource-Atlantic Group, LLC; Builders FirstSource - Florida a/k/a Builders FirstSource-Florida Design Center, LLC; Builders FirstSource-Southeast Group, LLC; Charlotte Flooring, Inc.; Dirla Tawl Painting, Inc.; East Coast Wall Systems, Inc.; Fogel Services, Inc.; G&S Home Remodeling, LLC; Guaranteed Framing, LLC; J. Mora Brick & Block Mason, LLC; Land/Site Services, Inc.; Landmark Construction Company, Inc.; Lutzen Construction, Inc; New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC; PJ Sanchez Masonry, LLC; Screens Plus, Inc.; Simons Construction Company, LLC; Stucco by Design, LLC; Fine Builders, LLC; Speedtruss, Inc.; AS Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating, and Air, Inc.; Ashley Steel, Inc.; Cahill Contracting, LLC; Cohen;s Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting and Construction a/k/a Sharon's Painting, LLC; Davis Tile; Timothy Mitchell; Electrical Design & Construction; Hurley Services, LLC; Charleston Exteriors LLC; Jorge Diaz aka Jorge Louis Paz; San Luis Construction, Inc. nka Roofing America Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Miguel Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez

Vazquez aka Alfonso Rodriguez, Sr.; Marcello Marques Palmeira d/b/a Palmeira Construction, Ernandes Riberio de Pinho, Cristiane Cleaning, LLC, and John Does 58-75,.....Defendants.

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

**RESPONDENT HURLEY SERVICES, LLC'S RETURN TO
BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC'S
PETITION FOR WRIT OF CERTIORARI**

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COUNTER-STATEMENT OF THE CASE

This is a case where a large material supplier and licensed general contractor, Petitioner Builders FirstSource – Southeast Group, LLC (“BFS”), asks our courts to enforce provisions in its master subcontractor agreement requiring its unlicensed subcontractors, including this Respondent, Hurley Services, LLC (“Hurley Services”), to indemnify BFS for the sums it has spent defending itself against its alleged negligence, without regard to BFS’s own negligence, its other subcontractor’s negligence, or clear and unequivocal contract terms providing for the same.

This litigation arises out of alleged construction defects at 656 Coleman, a twelve-building townhome community in Mount Pleasant, South Carolina. (R. p. 117). Petitioner Builders FirstSource – Southeast Group, LLC (“BFS”) is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. (R. p. 167, 229). BFS holds an unlimited commercial general contractor’s license with the South Carolina Department of Labor, Licensing, and Regulation (the “LLR”) (license no. 112969). (R. p. 229).

BFS supplied and installed windows and doors on the portion of the project developed by The Ryland Group, Inc. (i.e., nine of the twelve buildings that were constructed in 2013 and 2014). (R. p. 117, 120, 130, 229). BFS subcontracted out certain portions of its scope of work. (R. pp. 107-108, 186). Respondent Hurley Services, LLC (“Hurley Services”) served as one of BFS’s subcontractors. (R. p. 132). Hurley Services’ scope of work was limited to installing windows (i.e., labor-only); Hurley Services did not select, furnish, sell, or provide any windows, doors, or other building materials. (R. p. 418).

Hurley Services existed as a South Carolina limited liability company from 2012 until 2015. (R. p. 149). It did not hold any building or contractor licenses from the LLR; in other words, it was an unlicensed subcontractor during its brief existence. See (R. p. 423).

BFS required Hurley Services and its other subcontractors to enter its master subcontractor agreement, a form agreement. (R. pp. 196-207, 314-325, 418). Hurley Services performed its work on the project pursuant to a Master Subcontractor Agreement derivative of “Version – 5/17/06” of the form agreement. (R. pp. 196-207). So did BFS’s other subcontractor. (Pet. for Writ of Cert. p. 1; R. pp. 196, 314).

Plaintiffs initiated this suit on July 5, 2015. (R. pp. 20-34). Plaintiffs later added BFS and related entities as defendants. (R. pp. 35-57, R. pp. 58-84). BFS, in turn, asserted third-party claims against Hurley Services and its other subcontractor for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. See (R. pp. 85-114).

Plaintiffs subsequently asserted direct claims against Hurley Services and other third-party defendants. (R. pp. 115-146). Accordingly, BFS’s claims against Hurley Services and its other subcontractors are now cast as crossclaims. (R. pp. 186-192). BFS’s crossclaims seek recovery of the sums it “may pay in satisfaction” of Plaintiffs’ claim “plus costs for defense, inclusive of attorneys’ fees.” (R. p. 191).

While denying any and all liability, Hurley Services and BFS have both settled with Plaintiffs. (R. pp. 432-433). BFS did not pay Plaintiffs any sums for the alleged negligence of Hurley Services. (R. pp. 432, 447). Despite this fact, BFS maintained its crossclaims against Hurley Services. Accordingly, on January 22, 2020, Hurley Services filed a Motion for Summary Judgment with respect to BFS’s crossclaims for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. (R. pp. 194-207). In that Motion, Hurley

Services asserted that BFS's crossclaims fail because: (1) there is no genuine issue as to any material fact that BFS is seeking to be indemnified for its own negligence; (2) the contractual indemnity provisions of the master subcontractor agreement are neither clear nor unequivocal, are against public policy and the laws of South Carolina, including the Anti-Indemnity Statute, S.C. Code §32-2-10, and, therefore, fail as a matter of law and render the contract unenforceable; and (3) BFS should be estopped from asserting its crossclaims under the doctrine of collateral estoppel. (R. pp. 194-195).¹ Hurley Services also asserted that BFS's crossclaims for breach of express and implied warranties, breach of contract, and negligence were "merely disguised . . . claims for equitable indemnity" which fail under Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 634, 776 S.E.2d 434, 436 (Ct. App. 2015). (R. p. 194).

BFS did not file any memoranda, exhibits or affidavits in opposition to Hurley Services' Motion for Summary Judgment before it was heard by the circuit court.

The Honorable Roger M. Young, Sr. heard Hurley Services' motion on March 5, 2020.² (R. pp. 414-476). At the hearing, counsel for BFS stated that BFS was limiting the damages it sought on its contractual indemnity claim to the recovery of its attorneys' fees and costs incurred in defending this suit; according to counsel, BFS was no longer seeking to recover any amounts BFS paid Plaintiffs in settlement of their claims. (R. pp. 447-449). BFS did not argue against

¹ BFS asserted the same claims against its subcontractors, based on the same master subcontractor agreement, in the case of Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547 (now Appellate Case No. 2020-000415) (hereinafter referred to as the MI Windows case). (R. pp. 277-287). BFS's subcontractors moved for summary judgment in that case on similar grounds. The Honorable Clifton Newman analyzed the form agreement and found the indemnity provisions in the BFS master subcontractor agreement are "confusing at best and deceptive at worst", do not meet the "clear and unequivocal standard", and, therefore, fail as a matter of law. (R. pp. 277-287).

² The circuit court also heard argument from Charleston Exteriors, LLC based upon its Motion to Join in Hurley Services' motion for summary judgment. See (R. pp. 414-476).

summary judgment concerning its breach of express and implied warranties, breach of contract, and negligence causes of action; it conceded Stoneledge was good law. See generally (R. pp. 414-476).

Judge Young granted summary judgment to Hurley Services on April 29, 2020, finding that there was no genuine issue of material fact and Hurley Services was entitled to judgment as a matter of law on all of BFS's claims against it. (R. pp. 1-5). Judge Young found that BFS was collaterally estopped from re-litigating the same issues that were decided by the Honorable Clifton Newman in the MI Windows case, including the issue of enforceability of the master subcontractor agreement's indemnity provisions. (R. p. 3). Judge Young also found that the contractual indemnification provisions in the master subcontractor agreement are unenforceable as matter of law because they are neither clear nor unequivocal as required by Concord & Cumberland HPR v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) and are against the public policy and laws of South Carolina. (R. p. 3).

With respect to BFS's remaining causes of action, Judge Young found that BFS's claims for breach of express and implied warranties, breach of contract, and negligence causes of action failed as a matter of law. (R. p. 3).

BFS did not take issue with these latter aspects of Judge Young's Order,³ but filed a Motion for Reconsideration and/or Alteration/Amendment (the "Motion for Reconsideration") with respect to the grant of summary judgment on its contractual indemnity cause of action. (R. pp. 345-365). Hurley Services filed a Memorandum in Opposition to BFS's Motion for Reconsideration on May 26, 2020, arguing that BFS's purported limitation of its damages to

³ See (BFS App. Br. p. 9) ("Because the Stoneledge case is still considered good law by our courts, Appellant is not challenging the Trial Court's holding regarding Stoneledge."). Judge Young's granting of summary judgment as to these crossclaims is not an issue on appeal.

attorneys' fees and costs does not alter the analysis or outcome in this case as BFS is still seeking to recover damages occasioned as a result of its own negligence, whether sole or concurrent, pursuant to a contract that is unenforceable as a matter of law. (R. pp. 366-379). BFS filed a Reply and additional exhibits on June 4, 2020. (R. pp. 384-400). The circuit court denied BFS's Motion for Reconsideration via Form 4 Order filed on August 27, 2020.⁴ (R. pp. 6-8).

BFS filed its Notice of Appeal of the order granting summary judgment and the Form 4 order denying its motion for reconsideration on September 24, 2020. (Notice of Appeal dated Sept. 24, 2020). On March 12, 2025, the Court of Appeals affirmed the circuit court's orders. BFS's Petition for Rehearing was denied on June 25, 2025. The Court of Appeals issued a revised opinion to correct a scrivener's error in the final paragraph of page 3 the same day.⁵

BFS moved to stay this case and others pending the disposition of its Petition for a Writ of Certiorari in Builders FirstSource-Southeast Group, LLC v. WS Contractors, LLC, et al., Civil Action No. 2016-CP-10-03783, Appellate Case No. 2025-001224, on July 21, 2025. While that motion was pending, BFS filed a Petition for Writ of a Certiorari in this case on July 25, 2025. BFS's motion to stay was denied on September 10, 2025. A copy of the Order was served on counsel September 25, 2025.

STANDARD OF REVIEW

This Court only reviews final decisions of the Court of Appeals "where there are special and important reasons" to do so. Rule 242(b), SCACR. Factors bearing on this Court's

⁴ The Form 4 Order denying BFS's Motion for Reconsideration is dated August 26, 2020, but was filed on August 27, 2020.

⁵ BFS repeatedly references the "revised Opinion" in its Petition, suggesting significant differences between the original and substituted opinion. There are no substantive revisions between the two opinions.

consideration of whether it should exercise its discretionary authority to issue a writ of certiorari are: (1) whether there are novel questions of law; (2) whether there is a dissent in the decision of the Court of Appeals; (3) where the Court of Appeals' decision is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; or (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR.

ARGUMENT

There are no considerations warranting certiorari in this case, much less are there special and important reasons for this Court to take up review of this case. BFS reaches to present questions it contends are novel (they are not), but the simple fact of the matter is: these questions only arise if BFS's contract is enforceable.

The central question in this appeal is whether BFS's master subcontractor agreement, or more narrowly, the indemnity section within, is enforceable as a matter of law. It is not. In fact, it is *undisputed* that the agreement at issue in this case (and others) is violative of the Anti-Indemnity Statute and fails to satisfy the Concord & Cumberland "clear and unequivocal" standard. Contracts requiring a subcontractor to indemnify and hold a general contractor or other promisee harmless for damages arising out of the promisee's sole or concurrent negligence must meet the Concord & Cumberland standard. This contract does not and BFS admits that fact. Further, there is no question that this is a situation where if there is any negligence on the part of Hurley Services (which is strictly denied), BFS is necessarily concurrently negligent. BFS, the upstream contractor, is responsible for directing, supervising, and inspecting its downstream subcontractor's work. There is no scenario where Hurley Services, as a matter of law, is negligent and BFS is not. This principle is only strengthened by the fact that BFS is a licensed general contractor and Hurley Services is an

unlicensed subcontractor. BFS bears concurrent, if not sole responsibility for issues with the windows that Hurley Services installed.

This Court should deny BFS's Petition because the fundamental issue in this case is not disputed and not one of the questions presented in the Petition. Because this elemental issue is dispositive and unappealed, even if this Court were to take up review of the questions BFS presents and answer each in BFS's favor, Hurley Services would still prevail. It would be a wasteful and useless exercise to address the merits of BFS's Petition where it would not change the result.

For this reason and those set out below, this Court should deny BFS's Petition for a Writ of Certiorari.

I. The Court of Appeals properly affirmed the circuit court's rulings that BFS's master subcontractor agreement violated the Anti-Indemnity Statute, S.C. Code Ann. §32-2-10, and the "clear and unequivocal" standard set in Concord & Cumberland and was therefore unenforceable as a whole. BFS does not dispute that its agreement fails to meet these standards. Certiorari should be denied because this issue is dispositive and unappealed.

BFS's master subcontract agreement has been examined by a number of circuit court judges and is now the subject of four appellate decisions, all in favor of the subcontractors similarly situated to Hurley Services.⁶ In each case, the court has found that BFS's agreement violates the Anti-Indemnity Statute, S.C. Code §32-2-10, because it requires BFS's subcontractors to indemnify BFS for its sole negligence. The reviewing courts have further found that contract does

⁶ This case presents one of the appellate decisions. The MI Windows case, cited supra, is the second case. The third case is Pavic et al. v. Carolina Cottage Homes et al., lower court case no. 2019-CP-10-00772 (Charleston County), Court of Appeals case no. 2021-000290, Supreme Court case no. 2025-001496 (the "Pavic case"). The fourth case is Retreat at Charleston National Country Club Homeowners Association et al. v. Winston Carlyle Charleston National, LLC et al., lower court case no. 2016-CP-10-03783 (Charleston County), Court of Appeals case no. 2021-001050, and Supreme Court case no. 2025- (the "Retreat case").

In each of these cases, the circuit court granted summary judgment to BFS's subcontractors and the Court of Appeals affirmed the decision.

not express BFS's intentions for its subcontractors to indemnify BFS against its concurrent negligence in clear or unequivocal terms, as required by Concord & Cumberland. Based on these findings, the courts have found the master subcontractor agreement to be legally unenforceable. This issue is dispositive and it is unappealed here.

BFS's Petition should be denied on this ground alone.

A. There is no dispute that the contractual indemnity provision of BFS's master subcontractor agreement violates applicable law.

BFS has expressly conceded its master agreement does not meet the Concord & Cumberland standard in at least one other case and has tacitly done so here by limiting the damages it seeks on its contractual indemnity claim to attorney's fees and costs. BFS's silence on these issues in its Petition for Rehearing and Petition for a Writ of Certiorari is just further acknowledgement that its agreement is wrought with troublesome language.

BFS's expressly admitted in the MI Windows case that to the extent BFS seeks indemnity from its subcontractors for BFS's concurrent negligence, the contract does not meet the standard set in Concord & Cumberland because it does not clearly and unequivocally set out BFS's intent for its subcontractors to indemnify it for its concurrent negligence. In BFS's Motion to Reconsider filed on December 16, 2019 in the MI Windows case, BFS admitted:

[T]he parties to the instant action have agreed that the *Concord and Cumberland* ruling governs the Plaintiff's claims for contractual indemnity in this matter. Appropriate allocation of the *Concord and Cumberland* standards, to the contractual provisions at issue in the instant proceeding, clearly authorizes pursuit of contractual indemnity caused by the **Defendant's own negligence** (as opposed to damages occasioned by the sole or concurrent negligence of the Plaintiff), and, equally clearly, precludes summary judgement in favor of the Defendants.

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

(R. p. 328) (emphasis in original).⁷ Unlike this case, BFS affirmatively sued its subcontractors in MI Windows in an effort to obtain indemnification from them. (R. p. 327 at caption). Accordingly, BFS was saying that because its master subcontractor agreement did not meet the Concord & Cumberland test, it could not maintain indemnification claims where it was solely or concurrently negligent with its subcontractor. Or, in other words, it could only maintain a contractual indemnity claim where its subcontractor was solely negligent.

BFS is bound by its admission in the MI Windows case. See Youn v. Martin, 254 S.C. 50, 58, 173 S.E.2d 361, 365 (1970) (holding that a party is bound by an admission contained in a court filing prepared and signed by his attorney and that an admission in one action may be received in evidence in another action involving a different party).⁸

This is significant as it relates to this case because BFS is necessarily seeking to be indemnified by Hurley Services for its concurrent negligence.

i. BFS is seeking indemnification for its concurrent negligence, at the least, as a matter of law.

BFS is necessarily concurrently negligent. BFS was responsible for directing, supervising, and inspecting Hurley Services and its other subcontractors work at 656 Coleman. BFS's qualified licensee, Terry Rosamond, testified as the 30(b)(6) designee of BFS in this case. (R. p. 500). Mr. Rosamond confirmed that BFS representatives would have provided the window installer subcontractors instructions on how to install the subject windows, specifically as to whether to apply sealant behind the nailing fin on all sides. (R. pp. 509-510). The 30(b)(6) representative of

⁷ As further addressed infra, the master subcontractor agreement at issue in MI Windows is the same as at issue in this case.

⁸ While it does not matter, it is worth note that Hurley Services was a party to the MI Windows case. See (R. p. 327).

BFS's other subcontractor, Charleston Exteriors, LLC, testified that an employee or representative of BFS named "Rooster" was on the 656 Coleman job site every day and inspected every job that Mr. Taylor had ever performed for BFS. (R. pp. 513-515). Mr. Taylor was very clear that Rooster inspected every sequential step of the window installation. (Id.).

Setting aside BFS and Hurley Services' respective contractor licensure status with the LLR, the relationship between BFS, on one hand, and Hurley Services and Charleston Exteriors, LLC, on the other is that of principal and agent. Where one acting as an agent for another, within the scope of his agency, is negligent, both the principal and the agent are joint tortfeasors. Little v. Robert G. Lassiter & Co., 156 S.C. 286, 153 S.E. 128, 128 (1930).

BFS devotes considerable amount of its Petition rehashing the testimony of Plaintiff's expert engineer, Russell Mease, PE, with respect to the sealing of the windows BFS supplied and its subcontractors allegedly installed. See (Pet. for Writ of Cert. pp. 12-14). BFS focuses on Mr. Mease's opinion that sealant had not been placed behind the nailing fin of the windows, contrary to BFS's installation protocol. (Id. at p. 13).⁹ These facts, which are disputed, are neither here nor there, because under general agency principles, a principal is held responsible for the tort of its agent, even where the agent's alleged wrongful act was done in violation of the principal's wish and direction. Sams v. Arthur, 135 S.C. 123, 133 S.E. 205, 207 (1926).

It only bolsters these agency principles that this particular agency relationship was between a licensed general contractor and an unlicensed subcontractor. BFS harps on the words "general

⁹ BFS states in its Petition for a Writ of Certiorari that "Respondents failed to install required caulk behind the window jamb fins and window head finds as instructed by Petitioner and as required by the building code and manufacturer instructions." (Pet. for Writ of Cert. at p. 14). That is not accurate. BFS's 30(b)(6) representative testified that BFS's installation protocol differed from the manufacturer's installation instructions (and that the code requires contractors to follow the manufacturer's instructions). (R. pp. 509-511).

contractor” in trying to avoid application of S.C. Code §40-11-270(E) as it relates to the parties’ respective liability as a matter of law. See (Pet. for Writ of Cert. at p. 14). Section 40-11-270(E) is applicable to “Licensees,” not just general contractors who are serving as the general contractor on a specific project. S.C. Code §40-11-270(E) (“(E) Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee’s licensure group and license classification or subclassification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.”). A general contractor could subcontract out the mechanical scope of work to a licensed mechanical contractor who, in turn, subcontracts portions of the mechanical work to an unlicensed subcontractor. Pursuant to S.C. Code §40-11-270(E) and S.C. Code §40-11-20(14) (defining a mechanical contractor as a type of “Licensee”), the mechanical contractor would: (1) be responsible for providing supervision; and (2) be fully responsible for any code violations, including those that are solely attributable to the subcontractor’s work.

BFS was responsible for and did, in fact, direct, supervise, and inspect Hurley Services and its other subcontractors’ installation work. The Circuit Court and Court of Appeals properly applied existing statutory and case law to the facts of this case. There is no situation in which BFS is not at least concurrently negligent with its subcontractors.

B. The finding that the master subcontractor agreement is not enforceable is dispositive.

Just as BFS has admitted its master subcontractor agreement does not meet the Concord & Cumberland heightened standard, BFS has also acknowledged that there is language within its master subcontractor agreement that runs afoul of S.C. Code §32-2-10. (R. pp. 453-454). In this light, it is not surprising that BFS, in its Petition for Rehearing and Petition for Writ of Certiorari, does not

challenge that its agreement has indemnity language that is neither clear nor unequivocal and that purports to have its subcontractors indemnify it against its sole negligence in violation of S.C. Code §32-2-10. BFS has conceded these issues,¹⁰ they are not novel, there is not a circuit court or appellate judge who has interpreted the agreement's language differently or found severance appropriate, and there are no constitutional or federal questions involved. There is no basis for certiorari.

This issue is dispositive. “An illegal contract is unenforceable.” Mason v. Mason, 412 S.C. 28, 56, 770 S.E.2d 405, 420 (Ct. App. 2015). “The court ‘will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy.’” Id. at 56-57 (quoting Ward v. W. Oil Co., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010)). The circuit court's decision in this case and in others, as affirmed in each instance by the Court of Appeals, to deem the contract unenforceable is well within the courts' discretion and supported by a well-developed body of case law.

There is no need, nor is there any requirement, for this Court to address nuanced questions relating to excerpted portions of the indemnity section of the agreement that has been deemed unenforceable. A court does not need to address remaining issues when the resolution of a prior issue is dispositive. See generally Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 85, 856 S.E.2d 550, 559 (2021); Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010); Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

¹⁰ Issues not raised in a petition for rehearing or a petition for writ of certiorari are not preserved for review. See Clarke v. Fine Housing, Inc., 438 S.C. 174, 183 at n. 3, 882 S.E.2d 763, 767 (2023) (“This argument was not in Clarke's petition for rehearing to the court of appeals or his petition for a writ of certiorari; therefore, it is unpreserved.”); McCray v. State, 317 S.C. 557, 559 at n. 1, 455 S.E.2d 686, 687 (1995) (“The other issue presented by petitioner in his brief is not preserved for review because it was not raised in his petition for a writ of certiorari.”).

II. Certiorari is not appropriate under Rule 242, SCACR. BFS's master subcontractor agreement is unenforceable under South Carolina law and the illegal and offensive provisions cannot be severed out of the contract because they pervade the contract; severance would amount to a judicial rewriting of the agreement.

BFS must have an enforceable contract to get to the nuanced questions it presents to this Court. The only way for BFS to maintain rights to enforce any contractual language relating to reimbursement of attorney's fees and costs is for a Court to sever the illegal provisions from the agreement. The question of severability is not novel (nor is it presented as such), is not in conflict with other opinions, and does not present any other considerations warranting further review. This Court should deny BFS's Petition for Certiorari on this further basis.

The contract provisions that BFS seeks to enforce are all contained within Section 5 of the BFS master subcontractor agreement. See (Pet. for Writ of Cert. at p. 6). BFS asks that it be allowed to cherry-pick out certain language within Section 5 from the remaining language so that BFS can recover its attorney's fees and costs spent defending against its own negligence. BFS asserts in its appellate brief and implicitly in its Petition for Rehearing and Petition for Writ of Certiorari that the illegal provisions are "irrelevant" and that they should be disregarded. (App. Br. p. 13). BFS ignores that the analysis of the enforceability of the master subcontractor agreement must necessarily involve looking at the indemnity provisions and the contract as a whole. See McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571, 574 (S.C. 2009) ("A contract is read as a whole document..."). "Replacing some [illegal] language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term" to which Hurley Services did not agree. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 175 (S.C. App. 2018) (declining appellant's invitation to rewrite the indemnity provisions of its contracts and replace language violative of South Carolina law). Further, what BFS refers to as Paragraph 3 of Section 5, has to be chopped, sliced, and revised within itself to

craft the reading BFS would like. Additional illegal terms are found within Section 8 of the master subcontractor agreement. All of these indemnity provisions which disregard the negligence of BFS violate South Carolina law and are unenforceable.

The South Carolina Supreme Court cautioned in Simpson v. MSA of Myrtle Beach, Inc., “if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.” 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007) (internal citations omitted). It is not the function of the court to rewrite contracts for parties. Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010); Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002); ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011).

The circuit court reached the correct decision in finding that the master subcontractor agreement contains numerous terms that violate the Anti-Indemnity Statute, S.C. Code §32-2-10, applicable case law (Concord & Cumberland), and public policy, and that those provisions cannot be severed from the agreement because it would amount to a rewriting of the contract. South Carolina courts do not “blue pencil” agreements and rewrite a contract’s terms to make it comply with the law, as BFS would have it (and as is necessary for BFS to obtain any relief). See Poynter, 387 S.C. at 588, 694 S.E.2d at 18 (recognizing that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy).

There is nothing about the severability issue that warrants certiorari under Rule 242(b), SCACR. BFS’s Petition for a Writ of Certiorari should be denied on this additional basis.

III. There is no other basis to grant certiorari under Rule 242, SCACR.

None of the questions presented in BFS's Petition for a Writ of Certiorari are novel, uncertain, or otherwise supporting of further review. Section 32-2-10 by its plain language applies to claims for "damages," which encompasses BFS's request for an award of damages measured by the amount of attorney's fees and costs it expends defending this case. The duty to defend language in BFS's master subcontractor agreement is part and parcel of the indemnity section and subject to Concord & Cumberland's "clear and unequivocal" standard. Lastly, the question of whether an appealed order is "final" for the purposes of offensive collateral estoppel is not an uncertain or novel issue. This issue was decided, as BFS is aware, in the Retreat case. Retreat at Charleston Nat'l Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC, 445 S.C. 566, 595-96, 915 S.E.2d 736, 751-52 (Ct. App. 2025). There is no basis to grant BFS's Petition for a Writ of Certiorari.

A. BFS pared-down request for damages limited to the amount of its attorney's fees and costs pursuant to its contractual indemnity claim is still a claim for "damages" subject to the Anti-Indemnity Statute, S.C. Code §32-2-10.

BFS has conceded all of its crossclaims against Hurley Services except for its contractual indemnity claim. (R. pp. 1-5, 345-365, App. Br.). Despite the fact that it is proceeding solely on a contractual indemnity claim, and that the contract upon which this claim is based calls for Hurley Services to pay BFS's attorney's fees and costs regardless of any ultimate liability or negligence of BFS, BFS asserts that the Anti-Indemnity Statute, S.C. Code Ann. §32-2-10, has no application because, according to an announcement made by its counsel during a motion hearing,¹¹ BFS has

¹¹ BFS has not conformed its pleadings to limit the relief or damages it now seeks.

scaled-back the damages it seeks on its contractual indemnity claim to its attorney's fees and costs (i.e., reimbursement thereof). (R. p. 202).

This argument is nonsensical and easily defeated by a plain reading of the Anti-Indemnity Statute, S.C. Code Ann. §32-2-10. Title 32 of the South Carolina Code governs Contracts and Agents. The Legislature, in Chapter 2, has defined "hold harmless clauses in certain construction contracts" to be against public policy in the State of South Carolina. S.C. Code §32-2-10. The Code section reads as follows:

Title 32 - CONTRACTS AND AGENTS

CHAPTER 2

Contracts Against Public Policy

SECTION 32-2-10. Hold harmless clauses in certain construction contracts.

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

HISTORY: 1980 Act No. 466.

(bold emphasis in original, underline emphasis added). Section 5 of the BFS master subcontractor agreement, as applied to the 656 Coleman project, undoubtedly involves a promise or agreement in connection with the construction of a building. The subcontractor is purporting to indemnify

BFS against liability for damages arising out of property damage proximately caused by or resulting from the subcontractor's negligence.

BFS attempts to escape the statute through its definition of the term "indemnity." (Pet. for Writ of Cert. at p. 5). The statute does not use the term "indemnity," it uses the phrase "to indemnify" or, in other words, the active verb "indemnify." S.C. Code Ann. §32-2-10. To "indemnify" means to make good; to compensate; to make reimbursement to one of a loss already incurred by him. Black's Law Dictionary, Rev. 4th Ed. ("Indemnify").

Contrary to BFS's creative definition exercise, premised on a word not found in the statute, South Carolina law is very clear that an indemnitee can recover, in indemnity, more than just the amount that the indemnitee pays or is liable to a third-party. In Addy v. Bolton, this Court stated that where the wrongful act of the indemnitor has involved the indemnitee in litigation or places him in such relation with others such that it makes it necessary for the indemnitee to incur expense to protect his interest, the indemnitee may recover damages in the form of legal expenses on an indemnification theory. 257 S.C. 28, 33, 183 S.E.2d 708, 709-10 (1971). This Court reaffirmed this principle more recently in McCoy v. Greenwave Enterprises, Inc., quoting Addy v. Bolton:

In cases of either contractual or equitable indemnification, "reasonable attorney['s] fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses."

408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014); see also Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 625, 776 S.E.2d 426, 431 (Ct. App. 2015) ("The right of indemnity allows the indemnity plaintiff to recover the necessary expenses it incurred defending itself against the third party's claim.").

In seeking to enforce the Section 5 "INDEMNITY" provisions of its master subcontractor agreement against Hurley Services, through a contractual indemnity claim, to recover its attorney's

fees and costs expended in defending against this suit, BFS is seeking to be indemnified for its damages, albeit a limited measure of such damages. Because the subject indemnification language purports to require Hurley Services to indemnify BFS even where BFS is solely negligent, the provision violates the Anti-Indemnity Statute, S.C. Code Ann. §32-2-10. There is no novel question of law as it relates to the Anti-Indemnity Statute because the lower courts properly refused to sever the offensive language out of the agreement. Section 5 is unenforceable. This is dispositive of this case.

B. The so-called “duty to defend provision” is part of the indemnity provision of the master subcontractor agreement and subject to the heightened “clear and unequivocal” standard set in Concord & Cumberland.

BFS’s Petition for a Writ of Certiorari would lead one to believe that there are independent duty to defend and indemnity provisions and separately enumerated provisions or sections within said sections of BFS’s master subcontractor agreement. That is not the case. The conflicting and confusing indemnity and duty to defend provisions are all jumbled together within one long strand of text in Section 5 of the BFS master subcontractor agreement. For the reasons set out above, Section 5, is unenforceable, and it is inappropriate to sever out certain provisions of Section 5, particularly the last paragraph which BFS refers to as the duty to defend provision, which violates S.C. Code §32-2-10. Further, BFS’s request for reimbursement of its attorney’s fees and costs is a claim for indemnity triggering application of South Carolina law governing indemnity.

Beyond these issues, 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 in a manner that would exempt defense costs from the Anti-Indemnity or Concord & Cumberland’s “clear and unequivocal” standard. The two cases BFS cites to, City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009)

and Sloan Constr. v. Centr. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977) address the relationship between an insurer’s duty to defend and its duty to indemnify and are inapposite to the relationship between the parties here; Hurley Services is not an insurer.

C. There is no conflict in South Carolina appellate courts as to whether a trial court’s order, subject to appeal, is “final” for the purposes of collateral estoppel.

The Court of Appeals’ opinion in this case was unpublished. However, a month prior to BFS filing its Petition for a Writ of Certiorari in this case, the Court of Appeals published a decision in Retreat at Charleston Nat’l Country Club Home Owners Ass’n, Inc. v. Winston Carlyle Charleston Nat’l, LLC, 445 S.C. 566, 595-96, 915 S.E.2d 736, 751-52 (Ct. App. 2025), one of the related cases involving BFS’s master subcontractor agreement and the issues that present in this appeal, including the collateral estoppel question. BFS omits this opinion in its 4-page discussion of collateral estoppel in its Petition for a Writ of Certiorari. (Pet. for Writ of Cert. at pp. 6-10). BFS even goes so far as to represent that “[t]here are no cases on point” on the “issue of whether a trial court decision on appeal is sufficiently ‘final’ for purposes of collateral estoppel.” (Id. at p. 6). The Retreat case speaks directly on this issue:

III. Collateral Estoppel

BFS next argues the circuit court erred in finding the doctrine of collateral estoppel bars its indemnity claims because the prior judgments are both inapposite and not final because they have been appealed. We disagree.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was “‘actually litigated and determined by a valid and final judgment’” in a previous action, “regardless of whether the claims in the first and subsequent suits are the same.” *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) (quoting *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008)). Where the “illegality of the contract has been actually litigated and directly determined in the prior action and that issue was essential to the judgment,” the application of offensive collateral estoppel is appropriate. *S.C. Prop. & Cas. Ins. Guar. Ass’n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). The party invoking collateral estoppel need not have also been a party in

the prior action; the law requires only that the party against whom estoppel is applied have been a party with a full and fair opportunity to litigate the issue. *Id.* (“Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action”).

There is no dispute that BFS is the party seeking to enforce the indemnity clauses of the Later Contracts (which are identical to those previously litigated). It further cannot be disputed that BFS was the party litigating the issue of enforceability in other construction defect cases before the circuit court. The circuit court had previously addressed the Later Contracts’ indemnity language in *MI Windows & Doors, Dag Pavic and Stela Susas-Pavic, and Six Fifty-Six Owners’ Association, et al.* Although BFS had appealed these orders, the circuit court did not err in finding the same terms had been actually litigated and directly determined in a prior action. A judgment is final and remains final unless and until it has been overturned on appeal. See *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189, 61 S.Ct. 513, 85 L.Ed. 725 (1941) (finding finality of a court's judgment is not lost because appeal is pending unless and until reversed).

The rationale behind this rule is that if cases on appeal were not viewed as final judgments for collateral estoppel purposes, parties could simply refile in trial court while an appeal is pending and hope for a different result, thus subjecting courts (and parties) to inefficient duplicative litigation. See generally *Warwick Corp. v. Maryland Dep't of Transp.*, 573 F. Supp. 1011, 1014 (D. Md. 1983) (“Such a consequence would also be laughable. If a judgment was denied its *res judicata* effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation.”), *aff'd Warwick Corp. v. Maryland Dep't of Transp.*, 735 F.2d 1359 (4th Cir. 1984). That appeals were pending at the time of the circuit court's rulings in these eight cases in no way changes the result: the prior findings have preclusive effect unless and until those dispositive findings are reversed. The indemnity clauses in the Later Contracts are the same clauses from the same agreement at issue in *MI Windows & Doors, Pavic, and Six Fifty-Six Owners’ Association*. Because BFS had previously litigated the enforceability of its contractual indemnity provisions, the circuit court properly applied collateral estoppel.

455 S.C. at 595-96, 915 S.E.2d at 751-52 (italics emphasis in original, underline emphasis added).

Rule 201(a) of the South Carolina Appellate Court Rules also supports the finality of an appealed order or judgment. See Rule 201 (a) SCACR (stating that “[a]ppel may be taken, as provided by law, from any final judgment or appealable order.”). The status of the prior orders as a final judgment is what makes the orders appealable in the first instance.

Judge Newman, in MI Windows, was analyzing the same form of the master subcontractor agreement that is at issue in this case, particularly Section 5. Judge Newman, like Judge Young, determined that the agreement violated the Anti-Indemnity Statute, §32-2-10, public policy, and Concord & Cumerland's "clear and unequivocal" standard and therefore was unenforceable. The selective provisions that BFS seeks to hold onto in this case is part of Section 5 and as explained supra, only present if Section 5 is enforceable.

Judge Young did not trespass into the province of the court of appeals of its ultimate authority, as BFS suggests, but rather, promoted judicial economy, and put a stop to BFS trying the issue among different trial courts. See generally, B&B Hardware, Inc. v. Hargis Industries, Inc., 575 U.S. 138, 140, 135 S.Ct. 1293, 1298-99 (2021) ("Sometimes two different tribunals are asked to decide the same issue. When that happens, the decision of the first tribunal usually must be followed by the second, at least if the issue is really the same. Allowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring.").

Moreover, as the Court of Appeals decision and the underlying record shows, both the circuit court and the Court of Appeals conducted their own independent analysis of BFS's master subcontractor agreement. It only added to their conclusion that prior orders from other circuit court judges had reached the same result.

Conclusion

As analyzed above, there is no novel issue of law warranting this Court to exercise its discretion and power to further review the case. Further, there was no dissent at the Court of Appeals—the decision was unanimous. The decision of the Court of Appeals does not conflict

with any prior decision of this Court—the Court of Appeals decision keeps with Court of Appeals decisions, including Concord & Cumberland and the Retreat. There are no constitutional issues involved in this appeal, nor are there any federal questions involved that conflicts with any decision of the United States Supreme Court.

While the decision to grant certiorari is discretionary and the reasons stated in the rule are not a controlling list of prerequisites to granting a petition, there is simply no reason certiorari is appropriate here. Therefore, for all the reasons stated above, in addition to those set out in the co-Respondent’s Returns, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully Submitted,

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