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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2025-001496
Case No. 2019-CP-10-00772

Opinion No. 2025-UP-082

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.

PETITIONER BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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REPLY

Petitioner Builders FirstSource-Southeast Group, LLC ("BFS") submits this Reply to support its Petition for Certiorari. Unsurprisingly, not once in the Return of Respondent Hurley Services, LLC ("Hurley") does Hurley address the evidence in the record that directly implicates its scope of work and should have precluded summary judgment. Instead of facing the facts, Hurley continues to deploy a smoke and mirrors routine throughout its Return. The undersigned prays that this Court will grant certiorari to review the record clearly and to correct the errors of law and unsupported factual findings entered by the lower courts.

I. BFS claims are contingent claims based on Plaintiffs' allegations of "defective/improper installation of windows and related flashing."

Hurley opens its Return noting that its "answers contained standard construction defects defenses" to Plaintiffs' Third Amended Complaint and BFS' Cross-claims. Return p. 1. BFS agrees. Indeed, the underlying litigation is by all measures a standard construction defect action. The underlying action involves claims by the plaintiffs homeowner (Pavic) against the general contractor builder (Saussy Burbank) and the subcontractor parties (including BFS and Hurley) that are allegedly responsible for causing the defects and damages. BFS submits that Hurley's "standard defenses" are in response to BFS' standard claims for indemnity. The rub if you will is that Hurley erroneously contends that BFS is seeking indemnity for BFS' own concurrent negligence. However, notwithstanding all the smoke and mirrors that Hurley puts forth in its Return, the claims between and/or among Plaintiffs, Saussy Burbank, BFS, and Hurley are based upon Plaintiffs' alleged claims for "defective/improper installation of windows and related flashing." See Plaintiffs First Amended Complaint, R. p. 69.

Before BFS could file an Answer and Third-Party Complaint, Plaintiffs filed a Second Amended Complaint against BFS and Hurley alleging they were responsible for

"defective/improper installation of windows and related flashing." Plaintiffs included the same exact allegations against BFS and Hurley in the Third Amended Complaint. See R. p. 102. Plaintiffs allege no other claims against BFS in terms of defective/improper installation of any other material components. See R. pp. 100-105. Accordingly, BFS filed cross-claims against Hurley who is the party that actually installed the windows and related flashing, and BFS filed third-party claims against MW Manufacturers, Inc. the party who manufactured the windows. See R. pp. 106-137.

After initial discovery, Plaintiffs entered a Stipulation confirming that they "are not asserting or alleging within the instant litigation against any defendant in this litigation (including but not limited to Builders FirstSource-Southeast Group, LLC), or against any third party defendant in this action, any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the windows installed at the subject residence, (identified herein as MW Series 800 Windows), and/or any component part of such windows, and/or in any MW installation instructions or requirements for those windows installed at the subject residence." R. p. 261. Because BFS claims are based on Plaintiffs' claims, BFS dismissed its claims against the window manufacturer. R. p. 263. However, notwithstanding the Stipulation, Plaintiffs' did not dismiss their claims against BFS for "defective/improper installation of windows and related flashing." Therefore, BFS did not dismiss its claims against Hurley as BFS claims against Hurley are based on Plaintiffs' claims against BFS.

Contrary to Hurley's continued errant assertions, BFS claims have always been, and remain, based upon Plaintiffs' alleged claims of "defective/improper installation of windows and related flashing." There is no dispute that but for Plaintiffs' claims, BFS would have no claims against Hurley for the underlying action. Hurley and the lower courts have known this from day

one. In fact, Hurley moved for summary judgment on such basis against BFS cross-claims asserting causes of action for breach of express and implied warranty, breach of contract, and negligence. See R. p. 265. The South Carolina Court of Appeals has considered the viability of causes of action where a defendant seeks recovery from a third-party for damages claimed by a plaintiff. The court has determined that, absent a claim for damages independent of damages claimed by the plaintiff, purported causes of action in negligence, breach of warranty and breach of contract are in fact disguised claims for equitable indemnity. See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 622, 776 S.E.2d 426, 430 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 637, 776 S.E.2d 434, 438 (Ct. App. 2015). In the absence of any further appellate consideration, these are controlling law. As such, BFS conceded the same and did not contest Hurley's motion on such basis. Here, the court of appeals acknowledged the same in its Revised Opinion. See Revised Opinion Footnote 2.

For Hurley to continue to argue that BFS claims are based on anything other than Hurley's defective installation of the windows and related flashing is disingenuous.

II. Evidence in the record implicates Hurley's Work and supports BFS' claims for indemnity.

Hurley's Return continues to ignore the fact that there is relevant and admissible evidence in the record that directly implicates its scope of Work.

Plaintiffs' forensic engineer Russell T. Mease, PE observed, documented, and testified that the windows Hurley installed were installed defectively and are causing water intrusion and resulting damages to material components around the windows. See R. p. 359 (lines 2-15 page 118). Moreover, Mr. Mease offered that

(a) the flexible Fortiflash rough opening flashing at the windows had not been properly weather lapped outboard of the woven building wrap installed beneath the window sill; See R. pp. 352-354 (line 10 page 189 through line 11 page 190 and lines 6-19 page 195 of February 21, 2020 deposition transcript of Russell T. Mease); and
(b) the flexible Fortiflash material had not been installed to a sufficient depth within the window rough opening framing and the material did not appear to turn up the vertical leg of the jam, rendering the flashing ineffective; See R. pp. 355, 356 (line 23 page 186 through line 11 page 187 of February 21, 2020 deposition transcript of Russell T. Mease).

Critical to BFS' contention that it was only Hurley's negligent acts or omissions that caused Plaintiffs' damages is the fact that **Mr. Mease testified that the appropriate integration of window flashings and adjacent weather resistant barrier was addressed within the relevant building code and he didn't think it was necessary for guidance around that**. [R. p. 360] (lines 11-19, page 166)(emphasis added).

Hurley's Return does not refute, much less even address, the testimony of Mr. Mease. BFS submits that this evidence alone creates a genuine issue of material fact and should have precluded summary judgment. Further, Mr. Mease's observations and testimonial evidence underscore the errors of the lower courts in not following the basic principles of Rule 56. It was inappropriate for the lower courts to find that the windows were defective without any supporting basis and to weigh the evidence of Mr. Mease against BFS, the non-moving party.

III. BFS has a claim for contractual indemnity for the negligence of Hurley that is consistent with both its pleading and with its contracts.

Hurley has argued, and the lower courts have mistakenly held, that BFS's pleading seeks indemnification from Hurley only for BFS's own negligence, and nearly every subsequent holding flows from that premise: the heightened standard of Concord & Cumberland; consideration of Section 32-2-10; the unconscionability of the Agreement; and the issue of collateral estoppel all rely on the lower courts' errant decision that BFS is seeking to recover in indemnity for BFS's own negligence. BFS is not seeking to recover for damages that may have been caused by its

negligence, but only those damages caused by Hurley's negligence. BFS' pleading and the Agreement are consistent with this position.

A. The BFS pleading seeks recovery only for the negligence of Hurley.

BFS' allegations provide, when properly read in full context, that BFS is only seeking indemnification for the negligence of Hurley. An excerpt from BFS's relevant pleading for contractual indemnification follows:

> 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 [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.

[R. pp. 253] (emphasis added).

BFS contends that it has committed no negligence and therefore has no liability for damages resulting from its scope of work. Thus, BFS' pleading makes clear that BFS, in seeking indemnity, is seeking recovery only for Hurley's negligence and not for BFS own negligence. Whether the facts later bear out BFS's worldview that BFS was not negligent does not affect the fact that BFS's pleading sought recovery from Hurley based on the contention that BFS was not negligent, and thus any recovery would be limited to only damages caused by Hurley's negligence.

B. The contract provisions applicable to this case provide for recovery in indemnity only in the ultimate event of Hurley's negligence.

Hurley also argues that the contract provisions do not support BFS's position that it is attempting to recover for the negligence of Hurley. However, in the case currently before the Court, the contract provides a right to indemnification that is limited to the extent that Hurley is found to have been negligent. This is the exact indemnification that BFS is seeking.

The relevant indemnification language in the contract provides in relevant part, that BFS may seek indemnification for claims arising out of property damage:

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

[R. p. 491].

This paragraph expressly permits BFS to recover from Hurley for the negligent acts or omissions of Hurley in cases, such as the one before this Court, involving Plaintiffs' property damage claims. Even Hurley appears to agree that the first paragraph is the relevant indemnity provision upon which BFS relies for its contractual indemnity claim. See Return p. 13. The first paragraph is the only paragraph within Section 5 Indemnity of the contracts which specifically provides for indemnification against property damage claims caused by the negligent act or omission of Hurley, and it is completely consistent with the limited relief BFS seeks from Hurley in this case.

Nevertheless, Hurley contends that other non-relevant provisions of the contract violate the law and/or conflict with the terms of paragraph one. See Return pp. 14-15. However, as noted by Hurley, the second paragraph of Section 5 Indemnity governs the relationship between the parties in cases arising out of bodily injury claims of the subcontractor, its agents, employees, and/or subcontractors. See Id. Even Hurley must agree that there are no bodily injury claims in this litigation. Thus, the second paragraph of Section 5 Indemnity is not relevant and should not be before the Court. Nonetheless, Hurley has taken issue with this paragraph because, in cases involving bodily injury to the subcontractor, its agents, employees, and/or subcontractors, the paragraph allows BFS, "*to the fullest extent permitted by law*," to seek indemnification "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." [R. pp. 491-2](emphasis added). Thus, the

provisions of the second paragraph, by their specific terms, allow recovery in indemnity only as authorized by law, and, correspondingly, would not impose any indemnity obligation contrary to South Carolina law. More importantly, BFS does not seek any recovery pursuant to this paragraph, and thus, it is not at odds with BFS's cause of action for contractual indemnity based on alleged property damage arising from defective installation of the windows and related flashing performed by Hurley.

Next, Hurley argues that "[u]nder Section 5, paragraph 3, Hurley's duty to defend arises out of a suit against BFS, without regard to whether BFS is solely at fault for the claims alleged." Return p. 17. However, the third paragraph of Section 5 Indemnity governs the subcontractor's duty to defend an indemnified party against an indemnified claim. [R. p. 492]. The contractual right to tender defense of an indemnified claim made against an indemnified party under the first paragraph or the second paragraph or to bring a claim for defense expenses incurred against such an indemnified claim – even a right that is not contingent on a finding of fault[1] – does not change the fact that BFS has valid contractual indemnity claims for any judgment(s) that may ultimately be entered against it arising out of the negligent work of Hurley, and that these claims are supported by (and not, as Hurley argues, inconsistent with) the respective contract terms and provisions.

These non-relevant indemnity provisions cited by Hurley have no bearing on the relief requested in this case, and even if they did, they are properly limited in scope to the materials supplied by or the services rendered by Hurley.

IV. <u>Concord & Cumberland</u> prohibits a contractor from recovering for its own negligence (whether sole or concurrent) but does not prohibit a contractor from recovering for the negligence of its subcontractors (whether sole or concurrent).

[1] This obligation does not run afoul of Section 32-2-10 – see Petition for Certiorari.

Hurley argues that BFS cannot recover in contractual indemnity for the concurrent negligence of Hurley unless the language of the contract satisfies the heightened "clear and unequivocal" standard. Return p. 6. An analysis of concurrent versus sole negligence was never done before either the trial court or the court of appeals, and thus is arguably inappropriate here. Moreover, at this stage BFS's pleading controls BFS's claims and the pleading alleges that any damages will be the result of the negligence of Hurley[2]; nevertheless, BFS would be able to recover for the negligence of Hurley, whether sole or concurrent. Concord & Cumberland explicitly found only that the heightened clear and unequivocal standard "applies whether [a contractor], i.e. the indemnitee, sought indemnification for its own sole or concurrent negligence." Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct. App. 2018). Despite Hurley's representation, the South Carolina Court of Appeals did not go so far as the Texas Court in Ethyl Corp., and it *did not* subject recovery for losses arising from the concurrent negligence of the subcontractor to the heightened clear and unequivocal standard – in fact, Concord & Cumberland affirmed a trial court order that allowed recovery for the concurrent negligence of the subcontractor despite the language of the contract's failure to meet the clear and unequivocal standard. Concord & Cumberland, 424 S.C. at 645. The Concord & Cumberland courts limited indemnification to the subcontractor's negligence, whether sole or concurrent. Id. This is the same relief BFS seeks in this case.

Perhaps most troubling is Hurley's argument that by seeking indemnification for Hurley's concurrent negligence, BFS is necessarily pursuing recovery for its own negligence. Return p. 4.

[2] Hurley's arguments that BFS is inherently subject to negligence as a matter of law vis-à-vis its relationship with Hurley as contractor-subcontractor is flawed. It is entirely possible for Hurley to be solely negligent notwithstanding any duty of BFS to supervise its subcontractors. For example, Hurley could fraudulently misrepresent its Work, including the manner in which it installed the flashing materials during installation of the windows.

Hurley notably provides no citation following this statement, nor any logical syllogism that would compel this conclusion. As BFS can best understand it, Hurley mistakenly conflates the relationship of joint tortfeasors with the relationship between a third-party or cross-claim plaintiff and a third-party or cross-claim defendant. BFS here seeks recovery not from a joint tortfeasor, but from Hurley who, due to the nature of the special relationship with BFS, "may be liable to him for all **or part** of the plaintiff's claim against him." S.C. R. Civ. P. 14 (emphasis added) (see also Rule 13(g) for similar language pertaining to cross-claim defendants). The Rules of Civil Procedure considered that a derivative defendant might be concurrently negligent with a third-party plaintiff, and the Rules allow a third-party plaintiff to recover for derivative, concurrent negligence by providing for partial recovery without any type of heightened burden.

V. Hurley's Smoke and Mirrors Act.

In an effort to direct the Court's attention away from the actual issues and evidence in the record which supports BFS' indemnity claim, Hurley deploys a smoke and mirrors act pushing misleading and non-relevant information in its Return. Examples include but are not limited to the following topics.

a. Hurley's scope of work.

Hurley's asserts on page 1 of its Return that it provided *no materials* in connection with construction of Plaintiff Pavic's residence. However, this assertion is in error and without any supporting basis. While Hurley cites to R. p. 102 which is page 3 from Plaintiff Pavic's complaint, the Court will see that there is no allegation supporting Hurley's *no material* argument. Hurley also cites to R. p. 522 which is Page 7 from BFS' Answer to Hurley's initial Interrogatories. Therein, BFS presumes Hurley is intending to cite to BFS' Answer to Hurley Interrogatory 8

seeking information pertaining to the scope of work performed by Hurley at the Pavic residence. However, in responding thereto, BFS noted

> "**Discovery is still ongoing**. However, upon information and belief, Hurley Services, LLC subcontracted with Builders FirstSource-Southeast Group, LLC to provide labor for installation of the windows, doors, and limited framing at the Plaintiffs' residence during original construction."

R. p. 522. (emphasis added).

Equally importantly, in response to Hurley's Interrogatory 19 seeking information as to materials supplied by BFS and materials supplied by Hurley, BFS did not provide any substantive response and noted that "discovery was ongoing." BFS was without much information sought by Hurley initially, so BFS was compelled to respond to many of Hurley's interrogatories with the representation that "discovery was ongoing" and that it was without relevant responsive information at that time. See BFS Answer to the following Hurley Interrogatories:

5. witness statements or summary thereof, R. pp. 519-520,
7. nature and extent of construction defects caused by Hurley, R. pp. 521-522,
8. detail scope of work performed by Hurley, R. p. 522,
10. names and addresses of [persons] charged with field supervision or site inspection responsibility for work performed by Hurley, R. p. 522,
11. names and addresses of [persons] who inspected and/or approved work performed by Hurley, R. p. 523,
14. documents that constitute the project plans and specifications for work performed by Hurley, R. p. 523,
17. dates and amounts of payments made to Hurley, R. p. 524,
18. statements to Hurley regarding Hurley work, R. p. 524.

Similarly, BFS noted that it would rely on the testimony of its witnesses for details regarding work performed by Hurley. See BFS Answer to Hurley Interrogatories 1, 5, and 12, R. pp. 518-520, 523. BFS fact witnesses will testify that all BFS' subcontractors, including Hurley, supply their own fasteners if they perform Work that includes any installation of lumber, house-wrap, windows, exterior or interior doors, interior or exterior trim, exterior or interior siding, etc. Regardless,

whether Hurley *supplied materials* is not relevant as the only claims pending pertain to alleged deficiencies in Hurley's installation of the windows and related flashing.

b. Plaintiffs stipulated no window claims.

Hurley acknowledges at page 2 of its Return that "Plaintiffs entered a stipulation that they are not asserting claims for defective windows against any defendant in the litigation." Nevertheless, Hurley continues to argue that BFS is seeking indemnity for BFS' own negligence in supplying defective windows. Hurley argues that the Stipulation only binds Plaintiffs and does not limit BFS claims. Return p. 7. However, as explained above, BFS claims are premised entirely on Plaintiffs' claims.

Next, Hurley argues that "BFS is not bound by the Stipulation to refrain from seeking indemnification from Hurley for claims for damages relating to the installation of the windows at Plaintiffs' residence." BFS agrees and notes that this is the entire basis of BFS' claims against Hurley as explained above. Hurley continues on page 8 that "BFS' contractual indemnification terms against Hurley are a contingent liability that could spring to life should this Court grant BFS' petition." Yes, BFS' indemnification claims as pled, pursuant to the terms of the contract, are and will always be contingent claims. And yes, this Court should grant certiorari to review the record and correct the errors of the lower courts which included errant factual findings pertaining to the windows which are not at issue in the underlying action as stipulated to by Plaintiffs.

c. There are no door claims.

Hurley in Footnote 2 on page 7 of its Return argues that "the Plaintiffs Stipulation is silent as to the doors, which were provided by BFS and installed by Hurley on this project." BFS agrees and notes that Plaintiff did not assert any claims against any party for defective supply or installation of the doors. See R. pp. 100-105.

d. "Work" is a defined term used throughout the contracts and is limited to "materials provided or services performed" by Hurley.

Hurley argues that "BFS is trying to transfer to Hurley the risk associated with potential defective products which BFS selected and sold for use at the project." Return p. 10. Hurley argues that BFS pleading "alleges in substance that any deficiencies in materials are the responsibility of Hurley." Id. However, Hurley is ignoring the fact that the first provision of the contracts defines "Work" as *the materials which [Hurley] agrees to provide and/or the services which [Hurley] agrees to perform*. R. p. 486. BFS pleadings do nothing more than seek to hold Hurley responsible for any and all damages resulting from Hurley's Work. Here, Hurley did not supply windows, so Hurley's Work does not include the supply of windows, and BFS claims are not seeking damages from Hurley for defects in the supply of windows.

e. This case does not involve mechanics liens.

Hurley argues that "[i]f BFS were to file a mechanic's lien, and if it suffered an adverse judgment for costs and attorney's fees under S.C. Code Ann Section 29-5-10, et seq, as a result of supplying and selling defective products, it could seek indemnification even though BFS would be 100% at fault." Return p. 13. This case has nothing to do with mechanics liens or payments between the parties. Moreover, a proper reading of Section 8(i) requires reading of Section 8(h). Therein, Hurley is required to pay for "all charges **owed by it** for labor, services, materials, equipment, tools, and supplies" used by Hurley to implement its Work. R. p. 495 (emphasis added). Provision 8(i), requires in turn that Hurley will indemnify BFS if Hurley fails to make its required payments under 8(h). R. p. 496. Further, such duty to indemnify under Section 8 only arises when Hurley fails to satisfy its own obligations owed to third-parties. Thus, these provisions support, rather than contradict, BFS' position that it seeks recovery only for its subcontractors' negligence no matter what the situation entails.

f. Hurley's kitchen sink.

Hurley sets forth a list of terms and provisions which it contends, **without any citation or explanation**, are "oppressive and unconscionable." Return pp. 21-22. As explained here and above, when properly read, not one of the terms or provisions that Hurley points to is unconscionable or violative of South Carolina law. BFS will address the first couple to provide examples of how Hurley's smoke and mirror act is patently incorrect.

1. Section 1. a. Work.

Hurley argues that 1(a) limits Hurley's remedies in the event of a change order and is "oppressive and unconscionable." Return p. 21. **Section 1. Introduction a. Work** provides

> "This Agreement contains the basic terms and conditions under which [Hurley] agrees to provide materials and/or to perform services (the "**Work**") from time to time for [BFS] on any project (the "**Project**"). TIME IS OF THE ESSENCE. It will apply to and govern all Work requested by [BFS] from [Hurley] at any time following the date of this Agreement, unless other terms and conditions are specifically agreed to in writing by [BFS] with respect to particular items of Work or until this Agreement is terminated as hereinafter provided. In accordance with the terms and conditions contained in this Agreement, [Hurley] will perform and finish in a good and workmanlike manner, and will furnish all required materials, labor, equipment, supplies and tools for, the Work described from time to time for [BFS] on any Project. Projects may or may not be owned or controlled by [BFS] customer (the "**Owner**"). The Work will be performed in accordance with plans, specifications, drawings and schedules for the Work, and any supplemental terms and conditions to this Agreement, all of which are, or will be, on file at the office of [BFS] (the "**Contract Documents**") and incorporated into the Agreement by reference as if fully set forth. [BFS] will have the right at any time to supplement the plans and specifications for the Work with additional or replacement drawings and schedules or other documents and upon so doing such drawings and schedules will immediately become part of the Contract Documents. The Contract Documents, including any time schedules, may be amended and/or supplemented from time to time by giving [Hurley] written notice thereof. [Hurley]'s only remedy in the event an amendment or supplement to the Contract Documents materially increases the cost or difficulty of performance by [Hurley] is to terminate this Agreement by written notice to [BFS] within 24 hours after [BFS] delivers such amendment or supplement to [Hurley].

R. p. 486.

Hurley fails to explain how a) the provision that provides that any changes to the parties Agreement must be set forth in writing is unconscionable. Hurley also fails to explain how the provision that provides Hurley full and complete autonomy to accept and to terminate any agreement to provide materials or to perform services is unconscionable.

2. 2(c) Protection of Work

Hurley argues the definition of "Work" is deceptive and expanded under 2(c). The Court can easily see above that "Work" is plainly defined to the materials Hurley provides and/or services Hurley performs. See R. p. 486. Nothing more. Nothing less.

Under 2(c), Hurley agrees to "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." R. p. 487. If, as in Pavic, Hurley agrees to perform the service of installation of windows, once Hurley takes possession of or begins to install the windows, it is responsible for protecting the windows from damage until they are installed in a good and workmanlike manner. For Hurley to contend that it somehow is not responsible for insuring that the windows are free from damage during its installation flies in the face of reason. Regardless, the windows themselves are not at issue in this litigation, so this is another example of the smoke and mirrors act of Hurley.

3. 2(d)(2)(C) OSHA and EPA indemnity provision

Hurley submits without any explanation that the Section 2(d)(2)(C) indemnification provision in connection with environmental regulations is oppressive and unconscionable. Return p. 21. Hurley also contends that 2(d)(4) is also oppressive and unconscionable. Id.

Section 2(d)(2)(C) provides:

> (C) TO THE FULLEST EXTENT PERMITTED BY LAW, [HURLEY] WILL INDEMNIFY, DEFEND, AND HOLD HARMLESS [BFS], THE

> OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL CLAIMS, DAMAGES, LIABILITIES, AND CAUSES OF ACTION THAT ARISE FROM THE FAILURE OF [HURLEY] TO COMPLY WITH THE REGULATIONS.

R. p. 488. Section 2(d)(4) provides that if Hurley fails to comply with OSHA and EPA requirements AND after verbal or written notice from BFS, that BFS may correct the violation and deduct the cost from Hurley. See R. p. 489. How is a provision 1) limited to the fullest extent permitted by law and 2) limited to Hurley's failure to comply with Occupational Safety and Health Administration and Environmental Protection Agency regulations oppressive and unconscionable?

4. Section 3 Warranty

Hurley argues that Section 3 sets forth "unfavorable warranty, guaranty, and indemnity provisions relating to products selected and sold by BFS." Return p. 21. Section 3 Warranty provides that Hurley will warrant and guarantee the Work will conform to any specifications provided by BFS and comply with all Law (See R. p. 488 "all local, state, and Federal laws, codes, rules, and regulations bearing on the Work") and Hurley guarantees the Work against defects in design, workmanship, and materials. See R. p. 489. As noted above "Work" is a defined term limited to the materials Hurley provides and/or services Hurley performs. See R. p. 486. All of Hurley's rights and obligations are limited to the Work it agrees to perform. Section 3 is no exception and there is not one term or provision in Section 3, or anywhere in the contract, that provides that Hurley must warrant and guarantee any other party's Work.

5. Severability provision

Hurley argues that the severability provision is "buried fine print." Return p. 22. As the Court will see, each page to the contract is initialed by Hurley and by BFS. See R pp. 486-497. The initial means that each party has read the terms and provisions set forth on the respective page to which their initials are attached. The severability provision is the last provision in the contract

and has an initial by Hurley right next to it. The assertion that the severability provision is buried fine print is, like all of the arguments before it, pure conjecture and without any evidentiary support.

CONCLUSION

Because the revised Opinion of the court of appeals contradicts its own finding – that BFS's claims are premised solely on Hurley's negligence but then analyzes the claims as if they seek indemnity for BFS's sole negligence – it warrants the Supreme Court granting review. Moreover, the revised Opinion misapprehends statutory law, misapplies controlling precedent, dismisses genuine issues of material fact, and fails to honor settled contract principles. As such, the Supreme Court should grant certiorari in this case and provide guidance to the courts, the parties, and the industry on the correct analysis of contract provisions and contractual indemnification claims.

In addition, certiorari should be granted in this case to correct the injustice imposed by the lower courts in this case: namely, that if Hurley is found to have been negligent in the work it performed for BFS, and if, as a result of that negligence, BFS is subject to a monetary loss, and furthermore, if BFS had a contract with Hurley providing for indemnification in such scenario, then justice compels this Court to grant certiorari to allow BFS to proceed on its contractual indemnification claim against Hurley for damages incurred as a result of Hurley's negligence.