RECEIVED

Oct 20 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the 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
Supreme Court Appellate Case No. 2025-001495
Opinion No. 2025-UP-078

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

v.

Winsor South, LLC and Jeffrey M. Thomas, individually, and on behalf of a class of construction defendants; Southeastern Recapitalization Group, LLC; WCM Construction, LLC; Jonathan J. Thomas; AC Heating and Air Conditioning Service, Inc.; ACME Doors, Inc.; Alpha Omega Construction Group, Inc.; Atlantic Construction Services, Inc.; Buck Lumber and Building Supply, Inc.; Builders FirstSource, Inc.; Builders FirstSource-Atlantic Group, LLC; Builders FirstSource - Florida a/k/a Builders FirstSource-Florida Design Center, LLC; Builders FirstSource-Southeast Group, LLC; Charlotte Flooring, Inc.; Dirla Tawl Painting, Inc.; East Coast Wall Systems, Inc.; Fogel Services, Inc.; G&S Home Remodeling, LLC; Guaranteed Framing, LLC; J. Mora Brick & Block Mason, LLC; Land/Site Services, Inc.; Landmark Construction Company, Inc.; Lutzen Construction, Inc; New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC; PJ Sanchez Masonry, LLC; Screens Plus, Inc.; Simons Construction Company, LLC; Stucco by Design, LLC; Fine Builders, LLC; Speedtruss, Inc.; AS Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating, and Air, Inc.; Ashley Steel, Inc.: Cahill Contracting, LLC; Cohen;s Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting and Construction a/k/a Sharon's Painting, LLC; Davis Tile; Timothy Mitchell; Electrical Design & Construction; Hurley Services, LLC; Charleston Exteriors LLC; Jorge Diaz aka Jorge Louis Paz; San Luis Construction, Inc. nka Roofing America Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vazquez aka Alfonso Rodriguez, Sr.; and John Does 55-75……...……... Defendants.

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

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

Stephen P. Hughes, Esquire
Bar No.: 002805
William H. Cox, III, Esquire
Bar No.: 101991
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
SPHughes@hghpa.com
WCox@hghpa.com
Attorneys for Petitioner Builders FirstSource-Southeast Group, LLC

REPLY

Petitioner Builders FirstSource-Southeast Group, LLC ("BFS") submits this Reply to support its Petition for Certiorari.

Hurley opens its Argument with the contention that "there are no considerations warranting certiorari in this case." Return p. 6. Yet, **Hurley *concedes* in the very next sentence that there are legitimate questions presented by the Petition,** but they "only arise if BFS's contract is enforceable." Id. (emphasis added). BFS respectfully disagrees.

Contrary to Hurley's opening argument, the Petition's questions address important issues that impact on the rights of all parties that utilize contracts in South Carolina. The underlying action concerns a dispute regarding construction of a residential housing project and the appeal concerns the rights of the parties to a construction services contract, however, the issues on appeal apply to all industries and all parties in South Carolina that deal with contracts. The questions in the Petition are set forth in neutral terms and the issues that this Court should address remain regardless of the validity of the BFS-Hurley contract. For these and the reasons set forth in the Petition and hereinbelow, the Court should grant certiorari.

I. BFS is seeking recovery of attorney's fees incurred defending against Plaintiffs' claims of damages resulting from Hurley's negligence.

Because the Petition fits squarely within the bounds of Rule 242 and this Court's authority, Hurley focuses its Return on attempting to convince the reader that the contract at issue and the claims asserted violate South Carolina law. Hurley argues that the Court need not reach the questions presented by BFS because it won't change the outcome for BFS and Hurley. However, as the Court will see, none of these contentions are true. 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.

a. BFS seeks indemnification for the negligence of Hurley.

In the Return's opening paragraph, Hurley argues that *BFS is seeking indemnification for BFS' own negligence*. See Return p. 1. However, as explained below, the record is clear that ***BFS' indemnification cause of action is limited to damage resulting only from the negligence of Hurley***.

At the summary judgment hearing, Hurley represented to the trial court that BFS' claims are:

> "**not predicated in any way saying, we're only seeking indemnification to the extent that the subcontractor Defendants were negligent or at fault**. We're seeking everything."

R. p. 420 (emphasis added).

Hurley argued that:

> "no matter what [BFS counsel] may say, Builders FirstSource is seeking, by virtue of its claims, to recover for their sole - - if not concurrent, if not the sole negligence in this case."

R. pp. 420-1.

Hurley is mistaken. To achieve Hurley's reading, one must focus exclusively on select language from the last paragraph and ignore all of the language in the preceding paragraphs which expressly limits the indemnification to damages resulting only from Hurley's negligence. BFS' allegations provide, when properly read in full context, that BFS is only seeking indemnification for the negligence of Hurley. See R. pp. 187-189.

Paragraph 120 provides that the Plaintiffs assert damages allegedly caused by deficiencies in materials and/or installation of windows, doors, and related components. See Id. Paragraph 121 states "[t]hat BFS has denied the material allegations asserted against BFS." R. p. 187. Further, and very critical to BFS' point, paragraph 122 provides:

> **"In the event that the Plaintiffs establish that the materials and/or services of the CrossClaim Defendants were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event the CrossClaim Defendants have failed properly to execute their duties, which failure has allegedly caused the Plaintiffs' damages."**

R. p. 187 (emphasis added).

Paragraph 125 provides additional limiting language that Hurley claims does not exist. Paragraph 125 provides:

> "**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 Defendants**, 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. p. 188 (emphasis added).

Lastly, BFS notes that paragraph 126 expressly provides that BFS' "full contractual and common law indemnification" is **"for any negligence, as aforesaid, on the part of the CrossClaim Defendants…."** R. p. 188 (emphasis added).

Notwithstanding BFS' pleading plainly limiting BFS' indemnification cause of action to damage resulting only from Hurley's negligence, BFS explained as much on the record. See R. pp. 446-449. Moreover, BFS stipulated that it is not seeking indemnification from Hurley for any amount BFS paid to settle Plaintiffs' claims against BFS. See R. pp. 448-449. Further, BFS stipulated that BFS is only seeking recovery of attorneys' fees spent defending against Plaintiffs' claims relating to Hurley's negligence. See R. pp. 446-449. Hurley's trial counsel acknowledged and accepted BFS' stipulations. R. p. 467. Thus, the record is clear and contrary to Hurley's argument, BFS is not seeking indemnification for BFS' own negligence.

b. BFS continues to dispute and appeal the lower courts' rulings that the contract provisions violate South Carolina law.

Hurley's next major misrepresentations are set forth in its first argument section which is titled:

I. The Court of Appeals properly affirmed the circuit court's rulings that BFS' master subcontractor agreement violated the Anti-Indemnity Statute, S.C. Code Ann. Section 32-2-10, and the "clear and unequivocal" standard set in Concord and 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.**

Return p. 7 (emphasis added).

Hurley is mistaken again, as BFS continues to dispute, and has appealed, the lower courts' erroneous rulings that the parties' contract violated Section 32-2-10 and the "clear and unequivocal" standard discussed in Concord & Cumberland. The fourth argument in BFS' Final Brief on Appeal is titled, "**IV. The Language of the Contract does not Violate Concord and Cumberland.**" See BFS Final Brief p. 14. Therein, BFS explains how the relevant contract provision does not violate Concord & Cumberland and summary judgment and affirmation on such basis was not proper. See BFS Final Brief pp. 14-17.

The fifth argument in BFS' Final Brief on Appeal is titled, "**V. The Contract Provisions Violate Neither South Carolina Law nor Public Policy.**" See BFS Final Brief p. 17. Therein, BFS explained how the trial court did not identify what public policy or laws it was referring to and that neither did Judge Newman's Order upon which the trial court adopted in part. Nevertheless, based on arguments presented by Hurley, BFS proceeded to explain how the contract provisions do not violate S.C. Code Section 32-2-10. See BFS Final Brief pp. 18-20.

BFS also addressed these issues in its Final Reply Brief on Appeal. The third argument in BFS' Final Reply Brief is titled, "**III. The contractual provisions governing attorneys' fees are clear and unequivocal, satisfying Concord & Cumberland.**" See BFS Final Reply Brief p. 3. Therein, BFS specifically argued, "the provision at issue in this case meets the clear and

unequivocal standard outlined in Concord & Cumberland." BFS Final Reply Brief p. 4. Further BFS submitted that, "[t]his provision clearly and unequivocally imposes upon the subcontractor the duty to defend the contractor 'regardless of any ultimate liability or negligence of the contractor.' " Id. BFS continued with an extensive explanation regarding the trial court's errant ruling and Hurley's misplaced arguments on pages 4-7 of the BFS Final Reply Brief on Appeal.

The fourth argument in BFS' Reply Brief on Appeal is titled, "**IV. Claims for attorney's fees are not addressed by Section 32-2-10, and there is nothing within that statute or the general law or public policy of South Carolina, which bars the Appellant's claims for attorney's fees in this action.**" See BFS Final Reply Brief p. 7. Therein, BFS explained how the contract provisions do not violate Section 32-2-10. See BFS Final Reply Brief pp. 7-10.

Thus, contrary to Hurley's argument, *the lower courts' rulings regarding the parties' contract* are ripe for this Court's review.

c. BFS did not "admit" or "concede" that the contract provisions violate Section 32-2-10 or Concord & Cumberland.

Hurley next argues that *BFS admitted in the MI Windows case that its contract does not meet the "clear and unequivocal" standard and that BFS admitted it cannot pursue claims against the subcontractors for BFS's concurrent negligence*. Return p. 8. However, as the Court will see, these are further misrepresentations by Hurley.

Yes, in BFS v MI Windows, BFS acknowledged that the trial court was correct that the lone indemnification provision at issue in that case - Section Five, Paragraph One - did not meet the heightened "clear and unequivocal" standard. See R. p. 328. However, Hurley conveniently leaves out the fact that in the very next sentence, BFS submitted that "pursuant to *Concord and Cumberland,* [BFS] still has valid indemnification claims for [its subcontractors'] negligence." R. p. 329. Further, BFS v MI Windows was dealing with the lone indemnification provision set forth

in Section Five, Paragraph One. Here, in Six Fifty Six, BFS is seeking recovery of attorney's fees from Hurley under the duty to defend provision set forth in Section Five, Paragraph Three. The duty to defend provision in paragraph three of Section Five was never discussed by the parties or Judge Newman in BFS v MI Windows. Moreover, BFS contends, in a manner completely consistent with its prior positions, that the "duty to defend" provision meets the "clear and unequivocal" standard discussed in Concord & Cumberland.

Hurley next cites to R. pp. 453-454 and argues that BFS acknowledged that there is language in the agreement that runs afoul of S.C. Code 32-2-10. Return p. 11. However, again, Hurley is not providing the complete picture.

During oral arguments, BFS' counsel noted that there is a "separate indemnification provision, which requires that **to the extent permitted by law** – **to the extent permitted by law**, the subcontractor defend and indemnify against all liability occasioned by personal injury or death, regardless of the negligence of the indemnitee." R. p. 453 (emphasis in original). BFS' counsel also noted that the provision is not relevant here and is not a basis for any claim that BFS has asserted in this action. See R. p. 453. BFS' counsel re-emphasized that while the provision could be construed to be contrary to Section 32-2-10, it is limited "to the extent permitted by state law." R. p. 453. BFS tripled-down on the point that by its very terms, the provision is "sub servant to South Carolina law." R. p. 454.

Alternatively, BFS also noted that to the extent that the trial court deemed the language to be problematic, the contract has a specific severability provision. R. p. 454. BFS explained to the trial court that "severability is a question of the intent of the parties" and that the contract has a severability provision calling for the court to sever any portion or section of the contract that is contrary to law. R. p. 455.

Further, in its Final Brief, BFS specifically stated:

> "While Appellant does not concede that such provisions contain any problematic language, nonetheless, to the extent that the Trial Court took issue with these irrelevant paragraphs, it should have simply severed them and left the provision regarding attorneys' fees intact."

See BFS Final Brief, p. 13.

Thus, contrary to Hurley's mistaken representations: BFS is not seeking indemnification for its own negligence; BFS has appealed the lower courts' erroneous findings; and BFS has never "admitted" or "conceded" that any of the contract provisions violate South Carolina law.

II. BFS liability to other parties does not necessarily dispose of BFS claims against Hurley for damages resulting from Hurley's negligence.

Hurley also argues that even if the Court grants certiorari and answers the questions to BFS favor, that it will not matter and Hurley will still prevail. Return p. 7. Hurley contends that BFS holds a commercial general contractor license and even though BFS did not serve as the general contractor for the Six Fifty Six project, BFS is nevertheless responsible for any of its unlicensed subcontractors' work under S.C. Code Section 40-11-270(E). Hurley also argues that under general agency principles, BFS as the principal is responsible for the tort of its agent, Hurley, even where Hurley's wrongful act was done in violation of BFS' direction per Sams v. Arthur, 135 S.C. 123, 133 S.E. 205, 207 (1926).

However, what Hurley fails to appreciate is that while BFS may be liable to an owner or general contractor for the negligent acts or omissions of its unlicensed or licensed subcontractors under a licensing statute or under agency principles, this Court has nevertheless held consistently that BFS has the right to pursue contractual indemnification claims against the subcontractor for any damages resulting from the subcontractor's negligent acts or omissions. See Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992); S.C. Elec. & Gas

Co. v. Utilities Const. Co., 244 S.C. 79, 89, 135 S.E.2d 613, 617 (1964). This Court must grant certiorari to correct the lower courts' errors and allow BFS to proceed on such claims.

III. The court of appeals' Opinion conflicts with precedent regarding the summary judgment standard.

Hurley's Return does not dispute that the respective negligence of the parties is, notwithstanding the ruling of the lower courts, a matter of fact subject to jury determination. Instead, just like the court of appeals' Opinion, Hurley's Return dismisses the testimony implicating its work as not important. However, this Court's precedent requires that the evidence, and all the inferences that can be reasonably drawn from the evidence, must be viewed in the light most favorable to the nonmoving party. See Med. Univ. of S.C. v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004) (citing Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003)). Hurley's Return effectively confirms that the court of appeals' Opinion conflicts with the foregoing precedent. Thus, this Court must grant certiorari accordingly.

IV. There are no illegal provisions in the contract.

Hurley argues that the relevant indemnity provisions are "conflicting and confusing" and "all jumbled together within one long strand of text in Section 5." Return p. 18. Hurley is mistaken again as Section 5 of the contract contains four (4) separate and distinct paragraphs. See R. pp. 547-548.

The first paragraph of Section 5 sets forth the relevant indemnification provision for this case. It 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. 547.

This first 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. The first paragraph is the only paragraph within Section 5 Indemnity of the contract 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.

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 R. p. 547. 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. Moreover, the indemnity provision contained in the second paragraph of Section 5 is expressly limited "*to the fullest extent permitted by law."* R. p. 547. Thus, the indemnity provision of the second paragraph, by its specific terms, allows recovery only as authorized by law, and, correspondingly, would not impose any indemnity obligation contrary to South Carolina law. BFS does not seek any recovery pursuant to this provision, 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.

The third paragraph of Section 5 Indemnity provides details regarding defense of an indemnified claim. R. p. 548. 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.

The fourth paragraph of Section 5 provides that defense and indemnification obligations do not extend to design professionals and do not include liability for damages that is caused by defects in plans, designs, or specifications prepared by design professionals. See R. p. 548.

Hurley argues that additional illegal terms are found within Section 8 of the contract. Return p. 14. Hurley provides no explanation for this argument, but from Hurley's contention in other cases, BFS notes that 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. 551 (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. 552. 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.

Thus, contrary to Hurley's arguments, as the Court will see, when properly read, all the provisions in the contract are limited to Hurley's scope and do not violate South Carolina law.

V. S.C. Code Section 32-2-10 speaks to "liability for damages."

Hurley next argues that Section 32-2-10 governs agreements to "indemnify," and that BFS' novel question of law based on the term "indemnity" is misplaced. However, while Hurley is

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

correct that the statute uses the term, or verb, "indemnify," Hurley fails to appreciate that the statute does not include the words "attorney's fees." Moreover, Hurley's Return confirms that no South Carolina Court has yet addressed the novel question of whether the statute was intended to apply expansively to attorneys' fees or whether it was intended, as written, to apply only to liabilities for damages arising out of property damage.

In this case, the "liability for damages arising out of . . . property damage" would be those damages for which BFS would have been responsible to the Plaintiffs. However, as explained above, no judgment was entered against BFS and BFS is not seeking recovery for the payment it made to settle Plaintiffs' property damage claims. Further, Section 32-2-10 expressly states that it does not affect agreements to indemnify "against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees." The trial court improperly granted summary judgment when there had been no finding regarding the parties' alleged negligence. Therefore, BFS seeking reimbursement of attorney's fees incurred in defending against Plaintiffs' claims for damages allegedly resulting from deficiencies in work performed by Hurley is not violative of Section 32-2-10.

VI. Whether a trial court's order on appeal is "final" for purposes of collateral estoppel remains a novel issue in South Carolina.

Hurley's Return confirms that whether a trial court's order on appeal is "final" for collateral estoppel remains a novel issue in South Carolina. Hurley cites to 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) as being dispositive on the issue. However, BFS has filed a Petition for Certiorari in the Retreat appeal, so that case is not complete of all steps and is not procedurally definite. Thus, issue of whether a trial court decision on appeal is sufficiently "final" for purposes of collateral estoppel remains an issue of first impression in South Carolina.

This Court officially adopted the general rules as set forth in the Restatement (Second) of Judgments in S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc. See 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). The Restatement commentary provides that, "a judgment will ordinarily be considered final in respect to a claim" if "it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular kind of adjudication." Restatement (Second) of Judgments § 13 Requirement of Finality (1982). Further, the Restatement commentary notes that "the test of finality" is "whether the conclusion in question is procedurally definite." Id.

Here, the trial court invoked collateral estoppel using a judgment which is not final because it has been and remains subject to pending appellate review.

CONCLUSION

The Record shows that BFS seeks recovery only for attorney's fees caused by Hurley's negligence, not for BFS's own negligence. Section 32-2-10 does not bar such recovery. Collateral estoppel cannot apply to issues never litigated or still on appeal. There are no illegal provisions, however, severance of any problematic language honors the intent of the parties and leaves valid provisions intact and an enforceable contract. **Accordingly, BFS's Petition for Certiorari should be granted, and the lower courts' orders should be reversed.**