THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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's BRIEF

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1. When a contractor files a general third-party claim against its subcontractor seeking to recover in contractual indemnity for all damages for which it might be held liable, does such claim include those damages for which the subcontractor is either solely or concurrently responsible?
2. Should a contract provision imposing an obligation to indemnify – specifically as it relates to a contractor's claim for damages for which its subcontractor is either solely or concurrently responsible – be construed in accordance with precedent and with the laws governing contracts generally, or should it for the first time be subject to the heightened "clear and unequivocal" standard that would be applicable if the contractor were solely seeking indemnity for its *own* negligence?
3. Should the court restrict its inquiry to the provision of the contract directly at issue, that is, the indemnification provision set forth in the first paragraph of the indemnity section of the contract, rather than considering provisions under which no cause of action has been brought in this case, and should the inquiry into the meaning of the contract always give defined terms in the parties' contract the limited meaning ascribed to them in the contract?
4. Does the court's refusal to honor the severance language in this contract, and its consequent refusal to sever the offending language and thus save the contract, violate the Supreme Court's precedent?
5. Is a trial court's order that is on appeal, and thus on which judgment has not yet been finally entered, considered sufficiently "final" for collateral estoppel or res judicata purposes?
6. Did the court of appeals err in upholding summary judgment despite the existence of genuine issue of material fact as to Respondent's alleged negligence?

Statement of the Case

This litigation arises out of alleged deficiencies in construction of the Plaintiffs' residence, located at 1368 Penshell Place, Mount Pleasant, South Carolina. See A. pp. 68-69. The residence was constructed by general contractor Saussy Burbank, and was completed on or about May 13, 2013. See Id. By their First Amended Complaint, filed February 28, 2019, Plaintiffs Pavic alleged Builders FirstSource-Southeast Group, LLC ("BFS" or "Petitioner") was responsible for "defective/improper installation of windows and related flashing" during original construction. See A. p. 69. By their Second Amended Complaint, filed March 18, 2019, the Plaintiffs, Pavic, designated Hurley Services, LLC ("Hurley" or "Respondent subcontractor") as an additional defendant which, as a subcontractor to BFS, installed the windows and doors at the subject

residence. The Plaintiffs also reiterated prior allegations of "defective/improper installation of windows and related flashing". Accordingly, BFS filed cross-claims against Hurley, who performed the window installation work, and BFS filed third-party claims against MW Manufacturers, Inc., who manufactured the windows. Contrary to Hurley's and the lower courts' contention, BFS's claims against Hurley were and remain premised upon Hurley's alleged negligence in the installation of the windows. See A. pp. 91-97, 124-130, 251-257, 260.

On October 31, 2019, following some initial discovery, Plaintiffs entered a Stipulation 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." See A. p. 261. Likewise, the Stipulation provided that the Plaintiffs were not seeking recovery against any defendant or third-party defendant in connection with such claims. See A. pp. 261, 262. Based on Plaintiffs' Stipulation that they were not pursuing any window product defect claim, BFS entered into a separate Stipulation with the window manufacturer, MW Manufacturers, Inc., dismissing the manufacturer without prejudice from the litigation. See A. pp. 263-264. However, Plaintiffs claims against BFS and Hurley for alleged deficiencies in window installation remained pending. As such, BFS's cross-claims against Hurley for alleged deficiencies in window installation remained pending.

In discovery, the parties learned that Plaintiffs' forensic engineer Russell T. Mease, PE observed and documented purported deficiencies in the installation of the windows and related flashings at the Pavic residence. Specifically, Mr. Mease contended 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 A. 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);

(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 jamb, rendering the flashing ineffective; See A. pp. 355, 356 (line 23 page 186 through line 11 page 187 of February 21, 2020 deposition transcript of Russell T. Mease); and

(c) the head flashing of the windows had not been properly integrated (i.e. weather-lapped) with a building wrap above the windows. See A. pp. 357-358 (line 25 page 120 through line 12 page 121 of February 21, 2020 deposition transcript of Russell T. Mease).

Mr. Mease further opined that the deficiencies in the window installation flashing resulted in water intrusion and associated damages at or around the window locations. See A. p. 359 (lines 2-15, page 118). Mr. Mease also testified that the appropriate integration of window flashings and adjacent weather resistant barrier were addressed within the relevant building code and he did not think it is necessary for guidance around that. See A. p. 360 (lines 11-19, page 166).

Notwithstanding the evidence in the record regarding Hurley's negligent window installation work, on August 27, 2020, Hurley filed a motion for partial summary judgment against the cross-claims of BFS. See A. pp. 265-267. A hearing was held on the motion for partial summary judgment on October 1, 2020 before the Hon. Jennifer McCoy. See Transcript of Hearing, A. pp. 455-485. On January 11, 2021, Judge McCoy issued a Form 4 Order granting Hurley partial summary judgment and requesting that Hurley's counsel submit a proposed order. See A. p. 1. Hurley submitted a proposed order, and on January 22, 2021 Judge McCoy signed

the Order which the trial court filed on January 25, 2021. See A. pp. 4-15. BFS timely moved for reconsideration, but by a Form 4 Order dated February 16, 2021, the trial court denied BFS's motion. See A. pp. 16-18. BFS filed a Notice of Appeal on March 18, 2021.

On appeal, this case was considered by a panel of judges composed of Judges McDonald, Vinson, and Bromell Holmes. BFS's final briefs were submitted on July 28, 2021, and oral arguments were held on December 5, 2023. The court of appeals issued its order as an unpublished opinion on March 12, 2025, affirming the trial court's order. BFS filed a petition for rehearing on March 27, 2025. On June 25, 2025, the court of appeals denied the petition for rehearing, but issued a revised Opinion. BFS then filed its Petition for Writ of Certiorari on July 25, 2025, which was granted on December 16, 2025. This appeal follows.

STATEMENT OF FACTS

Certain parts of BFS's pleading and BFS's contract with Hurley are relevant to multiple arguments before the Court. For the Court's convenience, relevant portions of these documents are introduced here and then referenced throughout the Argument section.

Hurley has argued, and the lower courts have mistakenly held, that BFS's pleading seeks indemnification from Hurley for BFS's own negligence. Thus, we must first turn to the original text of the allegations BFS asserted against Hurley.

BFS's operative pleading alleging its indemnification cause of action provides:

> 108. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.
>
> 109. That this Defendant is informed and believes that Hurley Services, LLC is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Hurley Services, LLC provided materials and services, including the

installation of windows, doors, and/or other components, during original construction of the subject residence at 21368 Penshell Place, Mount Pleasant, South Carolina.

FOR A FIRST CAUSE OF ACTION AS TO HURLEY SERVICES, LLC

110. That each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein.

111. That the Plaintiffs, Dag Pavic and Stela Susac-Pavic, have sued Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), asserting damages allegedly caused, inter alia, by deficiencies in materials and/or installation of windows, doors, and related components during original construction of the subject structure.

112. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Second Amended Complaint.

113. That the CrossClaim Defendant, Hurley Services, LLC, (hereinafter sometimes ""CrossClaim Defendant") was responsible for provision of materials and services in connection with the installation of the aforesaid components of construction, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of relevant building codes. In the event that the Plaintiffs establish that the materials and/or services of the CrossClaim Defendant were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event the CrossClaim Defendant has failed properly to execute its duties, which failure has allegedly caused the Plaintiffs' damages.

114. That the subcontract between this Defendant and the CrossClaim Defendant provided for contractual indemnification in favor of Builders FirstSource.

115. That the CrossClaim Defendant served as a subcontractor to BFS in connection with its services at the subject structure. Regardless, therefore, of any specific contractual obligation to indemnify, there exists a special relationship between this Defendant, and the CrossClaim Defendant, sufficient to impose obligations to indemnity against the aforesaid CrossClaim Defendant, in favor of BFS.

116. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the CrossClaim Defendant, 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.

117. That BFS is entitled to full contractual and common law indemnification from the CrossClaim Defendant, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the CrossClaim Defendant, entitling BFS to recover from the

> Third-Party Defendant, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the CrossClaim Defendant any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

See A. pp. 124-126.

In addition to contesting BFS's pleading, Hurley argued and the lower courts held that the indemnity provisions are neither clear nor unequivocal. Thus, we must next review the parties' contract.

BFS entered into two written contractual agreements with Hurley. See A. pp. 486-511. Both of the contracts, including the defined terms, sections, and provisions therein, are nearly identical in form and substance. See Id. For example, both of the contracts begin with a "**SECTION 1. Introduction.**", which states, in relevant part, that the "Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") ...." See A. pp. 486, 498. The term Work, defined in SECTION 1 as the materials provided and/or services performed by the Subcontractor, is subsequently used throughout the contracts. See A. pp. 486-511. This defined term **"Work"** is critical to an appropriate reading of the contracts, because each Agreement, and all the contractual rights and obligations of the parties, is limited to the Subcontractor's Work.

The relevant indemnity provision in the contracts is as follows:

> **SECTION 5. INDEMNITY.**
> **TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LMIITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE**

INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISTE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACITIVITIES OF THE SUBCONTRACTOR, 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. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFCATION HEREUNDER.

See A. pp. 491, 503.

Here, where the underlying litigation arises out of alleged construction defects and resulting property damage claims, Hurley has agreed to indemnify BFS "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." See A. pp. 491, 503. Thus, contrary to Hurley's arguments, the indemnification provision is not only completely consistent with the relief sought by BFS, but also explicitly authorized by law.

Lastly, Hurley argued and the court of appeals correspondingly held that other contractual provisions in the contracts conflict with the relevant indemnity provision and/or violate South Carolina law.

Before setting forth the other contested provisions, BFS would emphasize, and will argue further below, that upon proper reading, i.e. when read in context and with appropriate consideration of defined terms, like "Work," the provisions do not stand for what Hurley argued and the court of appeals held. Equally importantly, the other provisions, specifically including provisions relating to warranty, bodily injury claims, and/or mechanic's liens, are (a) separate and distinct from the relevant indemnity provisions, (b) unrelated to the claims asserted here, and (c) not relied upon by BFS in the assertion of its claims against Hurley.

The other contested provisions of the contracts are as follows:

A) SECTION 3. Warranty.

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications of any home, building, or other structure. Notwithstanding the foregoing, this warranty will continue until such time as all express and implied warranties granted or deemed granted by Contractor and all other obligations of Contractor related to the Work are terminated or expired as a matter of Law. If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated. If Subcontractor fails to perform under this warranty, the party entitled to performance or Contractor will have the right to hire other persons to correct or replace the defective Work and hold Subcontractor liable for the costs thereof including costs, disbursements, and attorneys' fees incurred in the enforcement of this provision. This warranty is independent from all other obligations of Subcontractor under this Agreement, including, without limitation, all indemnification provisions, and will apply whether or not required by any other provision of this Agreement. Owner and any ultimate owner of any structure into which the Work is incorporated shall be intended non-incidental third party beneficiaries of this Agreement and shall have the power to enforce this Agreement. Subcontractor will maintain a published phone number or answering service during normal working hours.

See A. pp. 489-90, 501-502.

B) SECTION 5. INDEMNITY.

[Omitted – this first paragraph is set forth above as it is the indemnity provision upon which BFS relies in the assertion of its contractual indemnification claims.]

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS

INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, 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, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR' AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRCATOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT,

SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGES THAT IS (a) CAUSED BY OR RESULTING FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

See A. pp. 491-92, 503-505.

SECTION 8. Payment to Subcontractor.

a. **Payment by Owner is Condition Precedent.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

b. **Partial Payments.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

c. **Retainage.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

d. **Grounds for Withholding Parments.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

e. **Work Covered by Partial Payments.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

f. **Final Payment.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

g. **Release of Retainage.** [Omitted – not contested by Respondents or relied upon by the court of appeals].

h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment,

tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

i. **INDEMNIFICATION FOR LIENS. TO THE FULLEST EXTENT PERMITTED BY LAW, SUBCONTRACTOR HEREBY AGREES TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY MECHANICS' AND MATERIALMEN'S LIENS UPON THE PROJECT, ATTORNEYS' FEES AND EXPENSES, AMOUNTS PAID IN SETTLEMENT, AND AMOUNTS PAID TO DISCHARGE JUDGMENTS ARISING OUT OF THE SERVICES, LABOR, EQUIPMENT, OR MATERIALS FURNISHED BY SUBCONTRACTOR, OR ITS EMPLOYEES, SUPPLIERS, OR SUBCONTRACTORS. IF SUBCONTRACTOR FAILS TO DO SO, CONTRACTOR MAY DEDUCT FROM SUMS THEN OR THEREAFTER DUE TO SUBCONTRACTOR SUCH AMOUNTS AS CONTRACTOR DEEMS APPROPRIATE IN ITS SOLE DISCRETION TO INDEMNIFY THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM SUCH LIENS, CLAIMS, AND ENCUMBERANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR. SUBCONTRACTOR HEREBY WAIVES, RELEASES, AND FOREVER DISCHARGES THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM ALL COSTS, EXPENSES, CLAIMS, DEMANDS, DAMAGES, LOSSES, CAUSES OF ACTION, OR LIABILITIES THAT SUBCONTRACTOR MAY HAVE AGAINST THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES THAT ARISE DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBERANCES, OR DEMANDS.**

See A. pp. 494-496, 507-509[1].

Finally, and no less critical to an appropriate determination by this Court, the contracts include the following severability provision as follows:

[1] Section 8. Payment to Subcontractor is "Section 9" in Hurley's second contract with BFS.

> The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

See A. pp. 497, 510.

The foregoing are the many provisions that will be relevant to the Court's analysis of the questions presented in this case. For the reasons set forth herein and below, BFS requests that this honorable Court reverse the lower courts' errant holdings and remand BFS's contractual indemnification claims for liability or damage resulting from Hurley's negligence for trial.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the Trial Court under Rule 56(c), SCRCP, which is that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In reviewing a motion for summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). Any triable issues must go to the jury. Mulherin—Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct.App.2005).

On an appeal from an order granting summary judgment on a question of law, this Court reviews the ruling de novo. Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019)(citing Town of Summerville v. City of N. Charleston, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008)). "The appellate court will review all ambiguities, conclusions, and

inferences arising in and from the evidence in a light most favorable to the non-moving party below." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct.App.2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).

ARGUMENT

I. The court of appeals erred in holding that BFS's contractual indemnification claim sought recovery exclusively for BFS's own negligence and did not encompass a claim specifically for damages caused by the Respondent subcontractor's negligence.

The Opinion opens with the court of appeals' recognition that BFS's claims against Hurley are premised upon Hurley's alleged negligence in the installation of the windows. See Opinion, A. p. 550. The Opinion further recognizes that the Plaintiffs Pavic, by their stipulation, had specifically confirmed that they were not asserting or alleging any defect in the window products themselves. Id. Nonetheless, not two paragraphs later, the Opinion affirms summary judgment by erroneously reasoning that "because ... BFS sought 'indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation,' [t]he

circuit court did not err in finding 'the indemnity and duty to defend provisions of the [Agreement] violate South Carolina public policy and § 32-2-10.'" See Opinion, A. p. 551.

The court of appeals' reasoning, and its conclusion, are flawed in several particulars. In the first instance, the court of appeals completely ignored the fact that BFS's contractual indemnity claim is premised only upon Hurley's negligence. See Opinion, A. p. 550; BFS's indemnification cause of action, A. pp. 124-126; and the only indemnity provision for third-party property damage claims resulting from subcontractors' acts or omissions, A. pp. 491, 503. Moreover, the court of appeals' conclusion conflicts with the fact that claims for defective window products were explicitly eliminated by Stipulation of Plaintiffs Pavic and by Stipulation of BFS. See Opinion, A. p. 550; also Stipulations entered by Plaintiffs and BFS, A. pp. 260-264. Contrary to the court of appeals' errant reasoning, no defective window claims were made by BFS against Hurley. See Id.

Moreover, the court's errant affirmation assumes, without any supporting evidence in the record, that the windows supplied by BFS were defective, and that the mere assertion of window defect claims in this or any litigation is equivalent to a dispositive determination of a product defect. Equally importantly, the assertion of window defect claims in this or any other separate litigation has no bearing upon BFS's claims against Hurley for damages resulting from Hurley's negligent acts or omissions in the installation of the windows.

The court of appeals was in error in its determination that BFS sought indemnity against damage resulting from window defects, when the uncontradicted evidence in the Record clearly established that no such claims had been asserted by the Plaintiffs against either BFS, Hurley, or against any other entity to the action. The court of appeals relied upon such erroneous determination in support of its equally erroneous determination that the assertion of claims by BFS,

and the contract provision upon which BFS relied, were violative of public policy and of the provisions of §32-2-10. Due to such error, and because the court of appeals overlooked the fact that BFS's claims are premised only upon the alleged negligence of Hurley in the installation of the windows, this Court must reverse and remand BFS's contractual indemnification cause of action for Hurley's negligence to trial.

As more fully detailed in sub arguments A and B, the lower courts' determinations concerning the indemnity sought by BFS were inconsistent not only with BFS's pleadings, but also contrary to BFS's redundant representations before both the trial court and the court of appeals. Additionally, and to the extent that the court determined that the BFS contractual indemnification claims did not encompass indemnity against liability or damage resulting from the negligence of its subcontractors, such a determination was inconsistent with precedent.

The court of appeals held that, because BFS sought indemnification for "any" sums for which it might be held liable, BFS was seeking indemnification for its own negligence, and thus its entire contractual indemnification claim was subject to dismissal. In so holding, the court of appeals overlooked that, even if "any" sums included those caused by the negligence of BFS, it also simultaneously included "any" sums caused by the derivative negligence of the subcontractors. Instead of dismissing the entire cause of action, the court of appeals should have allowed BFS to proceed on the portion of its contractual indemnification claim by which it seeks to recover from its subcontractors for the negligence of its subcontractors.

A. BFS pled a cause of action that, when read in context, seeks recovery only for liability or damage resulting from the negligence of the Respondent subcontractors.

As an initial matter, BFS maintains that its pleading only seeks indemnification for the negligence of Hurley. Specifically, BFS pled that if it were to be found liable to the Plaintiffs, that any such liability

would be the result of the wrongful acts, omissions, negligence, and/or representations of Hurley. See A. pp. 491, 503; See Paragraph 116, A. pp. 126. BFS then pled that it was entitled to full contractual and common law indemnification for any liability (i.e., any such liability resulting from the negligence of Hurley) which it is found to have to the Plaintiffs. See Paragraph 117, A. p.126.

Thus, a fair, impartial, and appropriate reading of the BFS pleading clearly establishes that BFS contends that any liability on its part is the result of the negligent acts or omissions of Hurley, and that BFS is seeking contractual indemnity only against liability occasioned by Hurley's negligence.

Despite acknowledging that BFS's pleading asserted claims against Hurley, premised upon Hurley's alleged negligence in the installation of the windows, the court of appeals, without any analysis of the pleadings, erroneously determined that BFS was seeking indemnification for its own negligence. See Opinion, A. pp. 550-554. To reach such a conclusion, the court of appeals must ignore the relevant allegations in BFS's pleading set forth in Paragraph 116. Importantly, the allegations in Paragraph 116 limit BFS's indemnification cause of action to damages resulting from Hurley's negligence. By the plain language in Paragraph 116, BFS's indemnification cause of action is limited "to the extent, if any, that BFS may be held liable to the Plaintiffs," and to the extent that such liability is "a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of the [Hurley]." A. p. 126. Thus, for BFS to proceed on its indemnification cause of action against Hurley, it must first, be found liable to the Plaintiffs, AND second, such liability must be a direct and proximate result of Hurley's negligence.

Hurley has not offered any rebuttal to the fact that the plain and unambiguous allegations of Paragraph 116 expressly limit BFS's indemnification cause of action to liability or damage resulting from Hurley's negligence.

Further, BFS's indemnification cause of action is pled with an alternative statement of recovery for indemnification provided by the common law. See Paragraph 115, A. pp. 125-126. Because BFS's common law indemnity claim is pled in the same cause of action, it is necessarily premised on the exact same allegations as its contractual indemnity claim. See A. pp. 124-126. Neither Hurley, nor the lower court, nor the court of appeals took issue with BFS's common law indemnity claim for *any* liability proceeding to trial. Moreover, neither the lower court nor the court of appeals provides any insight or explanation as to how BFS's common law indemnity claim for *any* liability may proceed to trial, but BFS's contractual indemnity claim for *any* liability may not. Such a result underscores the fact that court of appeals' selective analysis of BFS's pleading and subsequent determinations were improper and in error.

BFS sought recovery for "any" amount because the Respondent subcontractors agreed in their contracts to indemnify BFS for "any" liability and damage that is determined to have resulted from the Respondent subcontractors' negligence. See A. pp. 491, 503. Just as BFS's common law indemnification claim is allowed to proceed to trial, so too should BFS's contractual indemnification claim premised on the exact same allegations that limit its recovery to liability and damage that is found to have resulted from Hurley's negligence and not from BFS's own negligence. For these reasons, the Court must reverse and remand BFS's contractual indemnification claims to proceed to trial.

B. *Even if* BFS's pleadings could be construed to encompass recovery for BFS's own negligence, by seeking recovery for "any" amount, the pleadings would nonetheless also encompass claims for damages caused by the negligence of the Respondent subcontractors.

In seeking recovery of "any" amounts, BFS maintains it sought recovery only for liability or damage determined to result from Hurley's negligence. When BFS is seeking recovery for "any" sums, the use of the word "any" is meant in the sense of its definition – it is used to express a lack of restriction in the amount of recovery sought. Thus, "any" used in the context of BFS's

contractual and common law indemnity claims, which are limited to liability or damage resulting from Hurley's negligence, is intended to mean any sums attributable to the Hurley's negligence.

The court of appeals presumably determined (consistent with its determination in the other pending appeals) that when BFS seeks recovery for "any" sums, the use of the word "any" is meant to express a lack of restriction in the source of causation. The court of appeals must necessarily have determined that BFS's use of "any" provides that the particular recovery is unrestricted in that "any" amounts could be those amounts attributable to any source of negligence — whether by BFS or by BFS's subcontractor, or by the concurrent negligence of both parties. However, in order to reach such result, the court of appeals must ignore the limiting language of Paragraph 116.

Even assuming the Court adopts a broader interpretation of BFS's pleadings, it must acknowledge that "any" amounts, if it includes amounts resulting from BFS's negligence, must equally encompass amounts resulting from Hurley's negligence, whether sole or concurrent.

If the Court adopts a broader interpretation of BFS's pleadings, it must also recognize that parties routinely plead claims seeking damages they may ultimately be unable to recover. Importantly, this overly expansive pleading does not preclude parties' recovery of damages to which they are otherwise entitled. The propriety of such pleading was implicitly recognized by the court of appeals in its disposition of the Concord & Cumberland case.

In Concord & Cumberland, the general contractor pled one paragraph of allegations for its contractual indemnity claim:

"104. Superior is entitled by contractual provisions, to the fullest extent permitted by law, full indemnity from the Subcontractors and Suppliers, to include the assumption of Superior's defense, as a result of the allegations and claims made by the Plaintiff, if substantiated."

Notably, the general contractor **did not** limit its contractual indemnity claims against the subcontractors whatsoever. Moreover, the general contractor, by its motion for partial summary

judgment, *explicitly* sought recovery in indemnity against liability for damages caused by *both* the negligence of its subcontractor, and the negligence of the general contractor itself. Thus, despite the expansive indemnification cause of action as pled by the general contractor, and despite overt representations by the general contractor that it was seeking indemnity for damages resulting from its own negligence, the court of appeals in Concord & Cumberland affirmed the trial court's decision that *"limited indemnification to damages resulting from the work Muhler performed."* Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 645, 819 S.E.2d 166, 169–70 (Ct. App. 2018) (emphasis added).

Here, even if BFS fails on its "alleged plea to recover for its own negligence," the alternative plea for damages related to the negligence of Hurley should remain fully intact. Therefore, at trial, notwithstanding any potential finding of negligence on the part of BFS, BFS nevertheless is entitled to recover for such damages which a jury may find to have resulted from the negligence of Hurley.

To the extent that the court of appeals determined that the BFS indemnification cause of action did not encompass claims seeking contractual indemnity for damages resulting from Hurley's negligence, (whether sole or concurrent), such determination is inconsistent with the rules for pleadings outlined in the South Carolina Rules of Civil Procedure and contradicts the court of appeals' decision in Concord & Cumberland. As such, this Court should reverse and remand BFS's contractual indemnification claims for liability and/or damage resulting from Hurley's negligence to proceed to trial.

II. An indemnification provision, which limits indemnification to damages resulting from negligence of the subcontractor/indemnitor, relied upon in support of an indemnification claim should be construed under general rules of contract construction rather than under the heightened "clear and unequivocal" standard.

BFS recognizes that, under common law, the assertion of a claim for contractual indemnity seeking recovery against liability for damages caused by the negligence of BFS itself would require that the relevant indemnity provision be subjected to the heightened "clear and unequivocal" standard. BFS also recognizes and has admitted on the record that the relevant indemnity provision at issue here is not sufficiently clear and unequivocal to impose such an obligation upon Hurley. However, BFS is not seeking this type of indemnity from Hurley in the instant litigation, and the application of the clear and unequivocal standard is thus inappropriate and inconsistent with precedent.

As demonstrated hereinabove, BFS has pled a cause of action in contractual indemnity, seeking recovery for liability and/or damage caused by the negligence of Hurley. Under the circumstances, the relevant contractual provisions authorizing such indemnity should have been analyzed in accordance with the general rules of contract construction. Such claims should, moreover, have withstood summary judgment, as there have been no findings of fact pertaining to Plaintiffs' claims and purported damages. The court of appeals was in error in failing to recognize the existence of such valid indemnity claims, and in its failure to apply the appropriate standard in analyzing the relevant contractual provisions relied upon in support of such claims.

Assuming the court of appeals appreciated that BFS had in fact pled an indemnification cause of action for the Respondent subcontractors' negligence, it nonetheless erred by applying the heightened "clear and unequivocal" standard to <u>both</u> BFS's contractual indemnification claim for Hurley's negligence and BFS's alleged contractual indemnification claim for its own negligence. The court of appeals held that such claims failed as a matter of law because the indemnity provisions were not sufficiently "clear and unequivocal." See Opinion, A. p. 552. Prior

to the court of appeals' Opinion, such application of the heightened "clear and unequivocal" standard, had never been made by a South Carolina court.

Our courts have historically recognized that contractual indemnity provisions are to be construed in accordance with rules of construction of contracts generally. See Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989); Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). The exception to this basic rule arises **only** when a party seeks to be indemnified from its own negligent acts, and in such instance, the heightened "clear and unequivocal terms" standard will be applied to the indemnity provision. See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 490, 763 S.E.2d 19, 20 (2014); Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003).

In Concord & Cumberland, the court of appeals acknowledged and attempted to clarify those circumstances under which the respective standards are to be applied. However, here, the court of appeals' opinion runs afoul of and directly contradicts these precedential cases.

In Concord & Cumberland, Superior was a general contractor who hired Muhler as its subcontractor. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643, 819 S.E.2d 166, 168 (Ct. App. 2018). When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to the parties' contract. See Id. at 645, 169. Superior claimed that the contractual provisions required Muhler to indemnify Superior, and that Superior's right to indemnity was not lessened by any concurrent negligence of or causation by Superior. Id. Muhler countered that the relevant contract provisions did not require it to indemnify Superior for Superior's "own wrong-doing." Id. The trial court found, and the court of appeals agreed, that in order for Superior to prevail on a claim seeking indemnity *for its own negligence* (as opposed to indemnity for the negligence of its subcontractor), it was required to

show that the contract language granting that right was set forth in clear and unequivocal terms. Id. Further, the court of appeals found that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence. Id. at 646, 170. Notably, the court of appeals in Concord & Cumberland did not hold that the heightened standard applied to Superior's claim seeking indemnification for Muhler's sole or concurrent negligence. Id. Because the court of appeals found that the language in Superior's contract did not meet the heightened standard, it held that the contract did not require Muhler to indemnify Superior for Superior's own negligence and instead affirmed the trial court's decision that *"limited indemnification to damages resulting from the work Muhler performed."* Id. at 645 (emphasis added), 657. Thus, despite overt representations by the general contractor that it was seeking indemnity for damages resulting from both its own negligence and the negligence of its subcontractor, the court of appeals in Concord & Cumberland nonetheless allowed the general contractor to recover from its subcontractor for damages resulting from the work of the subcontractor.

To arrive at this conclusion, the Concord & Cumberland Court recognized that Superior's contractual indemnification claim encompassed both a claim to be indemnified for its own negligence as well as a claim to be indemnified for the negligence of the subcontractors. Further, the court recognized that the two types of claims are subject to two different standards of review. To the claim for indemnification for Superior's own negligence, the court applied the heightened clear and unequivocal standard and found that the contract could not meet that heightened standard; however, for the second type of claim — Superior's claim to recover for its subcontractor's negligence (whether sole or concurrent) — the Court recognized that the contract provision allowing for such indemnification would be construed "in accordance with the rules for the construction of contracts generally." Concord &

Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170 (Ct. App. 2018)(quoting Campbell v. Beacon Mfg. Co., 313 S.C. at 453, 438 S.E.2d at 272).

Here, the trial court erred by precluding BFS from proceeding to trial on its claims seeking contractual indemnity from Hurley's negligence. IF BFS were found to be liable for Plaintiffs' damages, the jury would then determine if the liability resulted from BFS's negligence, the negligence of Hurley, or both. IF the jury determined that Plaintiffs' damages resulted from both BFS's negligence and the negligence of Hurley, BFS should have been allowed to proceed on its contractual indemnification claim for such damages as are found to result from Hurley's negligence. Such a result is not novel in South Carolina. See e.g. Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993)(where indemnitor security company was required to indemnify indemnitee warehouse lessee for any liability it may have to warehouse owners for fire set by security company employee even if lessee was negligent and thus contributed to its own damage since security company agreed to indemnify the lessee for damages arising "in whole or in part" from acts of its employees, and it remained undisputed that damage arose "in part" from employee's act of setting fire.); S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 135 S.E.2d 613 (1964) (affirming judgment for full recovery of contractual indemnity for damages arising from defective construction based on contract requiring indemnity for "any and all claims for damages to persons and/or property arising out of or in any way connected with the performance of any work covered by this contract").

Moreover, as detailed more thoroughly in Argument III, contrary to the court of appeals' determination, the contract provisions at issue limit Hurley's obligation to indemnify BFS for damages resulting from the negligent acts or omissions of Hurley. Such provisions should have been construed in accordance with rules for construction of contracts generally, and not under the heightened clear and unequivocal standard.

III. The Court should restrict its inquiry to the relevant indemnity provisions, not other provisions for which no cause of action or claims have been asserted, and rules of contract construction require the Court to honor defined terms in the contracts.

Here, where the underlying litigation arises out of alleged construction defects and resulting property damage claims of the Plaintiffs, Hurley agreed to indemnify BFS "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." See the first paragraph of Section 5, A. pp. 491, 503. These are the provisions relevant to the underlying claims of the Plaintiffs, and it is pursuant to these provisions that BFS seeks recovery. There was no reason for the lower courts to look beyond these provisions in analyzing the recovery sought and due in this case.

In an attempt to avoid any liability – even liability for damages for which they may be found to be ultimately and justly responsible – Hurley argued that other contract provisions, unrelated to the litigation pending before the court, are ambiguous, conflict with the relevant indemnity provisions, and/or are outright illegal. However, as explained in detail below: to achieve Hurley's result, one must read select language from the unrelated provisions out of context, in isolation, and without deference to defined terms in the contracts. Further, Hurley argued, with the fantasy contract provisions in mind, that there is a disparity in bargaining power between the parties, that the contracts are of adhesion, and that the contracts are therefore unconscionable. Lastly, Hurley argued that the court should not honor the severability provisions in the contracts and instead find the contracts unenforceable. Notwithstanding BFS's efforts to dissuade the lower courts of Hurley's unsupported contentions, the trial court wholesale adopted Hurley's arguments, and the court of appeals errantly affirmed the same. As explained herein, Hurley's arguments are without merit, and the court of appeals erred by ignoring the basic rules of contract construction.

Thus, this Court must reverse the court of appeals' Opinion and remand BFS's contractual indemnification claim for Hurley's negligence to trial.

A. The general rules of contract construction require the Court to honor the defined terms of the contracts.

BFS, in contesting Hurley's assertions, would initially direct the Court's attention to the definition of the term "Work," which is set forth in Section 1(a) at the very beginning of the contracts. See A. pp. 486, 498. As defined in Section 1(a), the term "Work" is limited to **services performed and/or the materials provided by the subcontractor**. Id. (emphasis added). The term "Work" is used throughout the parties' contracts. See A. pp. 486-511.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). Moreover, courts must interpret a contract "according to the terms the parties used." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

Here, there is no evidence that the lower court even considered the impact of the definition of "Work," or gave deference to that definition in their determinations of the issues. Any mention of the term "Work" in the trial court orders was, rather, the direct result of the trial court's wholesale adoption of orders drafted by Hurley's counsel.

The court of appeals never once acknowledged that "Work" is a contractually defined term or that by definition the Work is limited to the materials provided and/or services performed by the subcontractor. The Opinion's findings evidence that the court of appeals conducted no analysis of the term "Work," and, more tellingly, failed to utilize the definition of Work in determining the validity of the various indemnity provisions with which it took issue. Such analysis contradicts

the cardinal rules of contract construction. See Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012); McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009); Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

The "Work" limitation allows for a harmonious reading of the contract, is consistent with South Carolina law and the intention of the parties. Because the court of appeals failed to honor the defined term "Work" in its analysis, the Court must reverse and remand BFS's contractual indemnification claim to proceed to trial.

B. The other provisions are unrelated to BFS's indemnification for property damage claims and should not be considered by the Court. Nevertheless, the other provisions are not illegal, ambiguous, or conflict with the relevant indemnity provisions.

In addition to failing to acknowledge defined terms in the contract, the lower court and court of appeals reviewed provisions of the contract which have absolutely no relevance whatsoever to the claims pending before the court. For example, the court of appeals focused on the warranty provisions of the contracts despite the fact that there is no *warranty* claim before the court[2]. Further, the court of appeals analyzed indemnity provisions exclusively relating to bodily injury claims by the subcontractors. None of these types of claims has been brought before the lower court, and BFS submits that review of such unrelated provisions was in itself error.

Nevertheless, the court of appeals further erred by analyzing select language from the non-relevant provisions and by ignoring limiting language in the non-relevant provisions to create ambiguities and conflicting provisions. Such analysis directly contradicts this Court's instructions that a court may not review isolated portions of a contract or single sentences or clauses to create

[2] While BFS pled breach of warranty causes of action, BFS conceded during oral arguments at the trial court that Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630 (Ct. App. 2015) is valid law and renders the warranty claims as disguised indemnity claims and thus it did not appeal the trial court's ruling granting summary judgment on such basis.

ambiguities. See Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014); Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975).

1. **SECTION 3 Warranty does not call for the Respondent subcontractors to indemnify BFS for materials supplied by BFS.**

The court of appeals takes issue with the SECTION 3 Warranty provision of the contract, where the subcontractor agrees to provide a warranty for the Work the subcontractor performed on the project. The court of appeals found this provision unconscionable because, by the court's interpretation, the provision purports to require the subcontractor to warrant work that BFS, rather than Hurley, performed.

Specifically, regarding Section 3 Warranty, the Opinion states that:

> While the statute allowed BFS and Hurley to agree Hurley would indemnify BFS for damages caused by Hurley or Hurley's agents, the terms of the Agreement here seek to obligate Hurley not only to warrant the design and suitability of the defective materials BFS provided for installation but also to indemnify and defend BFS from property damage or personal injury resulting from the moisture intrusion issues related to the faulty windows.

See Opinion, A. p. 551.

The court of appeals reaches this conclusion by adopting Hurley's position that:

> The language in Section 3 of the Later Contracts stating "Subcontractor guarantees **the Work** against defects in design, workmanship, and materials" only makes sense if the words "design, workmanship, and materials" refer to the windows and doors provided by BFS because Hurley had no responsibility for the design of Plaintiffs' residence or its components—including the materials. Further, although BFS provided the structural components to Hurley, the Agreement appears to require Hurley to provide a ten-year warranty on "structural applications."

See Opinion pp. 551-552, n. 3 (emphasis added).

But this erroneous interpretation was reached only because the court read this provision in isolation AND the court ignored and did not address the fact that "Work" is a defined term, limited,

by *the explicit provisions of the contract*, to the *materials provided and/or services performed by the subcontractor*. See A. pp. 486, 498.

Here, BFS contracted with Hurley to perform services which included installation of windows, doors, and other related components[3]. Stated differently, BFS did not contract with Hurley to provide the windows or doors. Accordingly, there is no obligation by Hurley to guarantee against the window or door products or against the design thereof. The only guarantee Hurley made relates to the workmanship Hurley performed in the installation of the windows or doors. Correspondingly, any obligation to indemnify under Section 3 Warranty is also limited to claims and damages resulting from the Hurley's **Work – ie, the materials supplied and/or services performed by Hurley itself**. Therefore, the warranty provision and contractual indemnity claim remain well within the bounds of South Carolina public policy and statutory law.

More importantly at this juncture, however, is the fact that the court of appeals overlooked the rightful, legitimate, and licit interpretation of the contracts. When such a licit interpretation exists, courts are compelled to adopt it. See Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 416–17, 756 S.E.2d 148, 153 (2014)(quoting that "[b]ecause it must be assumed that the parties intended to form a binding contract, the court should favor an interpretation that saves the contract instead of voiding it," and further, that "an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous"). **"Work"** is a defined term used throughout the contracts, including in Section 3 Warranty. Because **Work** is a defined term, this Court must honor a reading of the contract that limits warranty of **Work** to materials supplied and/or services performed by the subcontractors.

[3] Hurley was responsible for providing appropriate fasteners for use in the implementation of its services, and for compliance with relevant manufacturer installation instructions in installation of the windows and doors.

As noted herein and above, the warranty provisions of Section 3, when properly construed, comply with the laws of South Carolina.

Again, the warranty provisions of Section 3 of the contract are neither relevant to nor relied upon by BFS in the assertion of its indemnity claims against Hurley. To the extent the Court chooses to consider the provision, however, it must apply the definition of the term "Work" agreed to by the parties; once properly interpreting "Work," the Court will see that the interpretation of the court of appeals was in error.

2. The indemnity provisions of the contract are not ambiguous, do not conflict with each other, and are not illegal.

The court of appeals here has overlooked that the first paragraph of SECTION 5, the only indemnity provision for which BFS relies insofar as relevant to the BFS claims in this matter, applies only to losses arising out of third-party property damage claims, while the second paragraph applies only to bodily injury sustained by the subcontractor, its employees, agents, or representatives.

Here, there are no claims for, or any allegations, of, bodily injury damage sustained by the subcontractors. Instead, the claims in this matter are for property damages allegedly sustained by the Pavics and which they allege resulted from both BFS' and Hurley's negligence. As such, the first paragraph in SECTION 5 is the only indemnity provision relied upon by BFS in the assertion of its claims in this litigation because it is the only indemnity provision that relates to Plaintiffs' claims for property damage.

Moreover, the separate indemnity obligation imposed upon Hurley by the first paragraph of SECTION 5 provides that BFS may seek indemnification against Hurley for property damage claims **BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY**

NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR. A. pp. 491, 503 (emphasis in original). The first paragraph indemnity provision is expressly authorized by and consistent with S.C. Code Section 32-2-10.

The second paragraph of Section 5 deals only with potential obligations to indemnify for bodily injury losses sustained by the Subcontractor or the Subcontractor's employees, agents, or subcontractors. A. pp. 491, 503. Thus, the factual circumstances, which the second paragraph of SECTION 5 addresses, are not at issue here. Moreover, BFS has not cited the second paragraph as being in support of its claims, as it is irrelevant to the assertion of these claims, and should not have been considered by the court of appeals.

To claim that these two separate and distinct indemnity provisions cannot be reconciled, is simply incorrect; they address different factual scenarios, are set forth in separate paragraphs, and do not contradict each other.

Hurley and the court of appeals also take issue with the third paragraph of SECTION 5. The third paragraph provides the contractual right to tender defense of an indemnified claim or to bring a claim for defense expenses incurred against such an indemnified claim. The third paragraph also provides that the duty to defend is independent and separate from the duty to indemnify.

BFS submits that there is nothing illegal about any of these provisions as they are all limited "to the fullest extent permitted by law." Moreover, the provisions of the second, third, and fourth paragraphs of SECTION 5, do not change the fact that BFS has valid contractual indemnity claims for the judgment(s) that may ultimately be entered against it arising out of the negligent work of Hurley, and that this claim is supported by (and not, as Hurley argues, inconsistent with) the relevant contract terms and provisions.

Nevertheless, as more thoroughly detailed in following argument, the other unrelated provisions of the contracts, to the extent they may be found to be inconsistent with law, can be severed without impacting on the independent indemnity obligations as set forth in the first paragraph of SECTION 5 of the contract.

IV. Any potentially offending provisions are easily severable.

Contrary, to the finding of the court of appeals, the contract, when its terms and provisions are given their proper, reasonable, and plain meaning, is neither a) replete with illegal or unconscionable terms, nor b) violative of South Carolina law and public policy. To the extent however, that this Court may determine that any contract provision is not consistent with South Carolina law, such provision should have been severed.

Section 4 of the Opinion states that, "[b]ecause the Agreement's indemnity provisions are replete with terms that violate South Carolina law and public policy, these terms cannot be appropriately severed; thus the circuit court did not err in declining to address the severability provision of the Agreement." See Opinion, A. p. 553. Section 4 of the Opinion does not identify the specific provisions that purportedly violate South Carolina law and public policy, nor does it identify the specific South Carolina law or public policy at issue. See Id. Nevertheless, Section 1 of the revised Opinion discusses the circuit court finding that " 'the indemnity and duty to defend provisions of the [Agreement] violate South Carolina public policy and Section 32-2-10' because, through these provisions, BFS sought 'indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation.' " See A. p. 551.

The court's determination is, however, not only premised upon an improper construction of the contracts terms, but is also inconsistent with the relevant evidence. By specific stipulation, Plaintiffs were neither alleging, nor seeking recovery for, any defect or deficiency in the window

products. BFS's indemnity claim is thus premised only on Hurley's negligence in installing the windows and not on any unasserted claim of window product defect.

Similarly, and as also detailed hereinabove, the court of appeals' issue with the guarantee language in the Agreement is eliminated by a proper understanding of the pending claims and a proper reading of the plain and unambiguous language of the Agreement's Section 1 Work and Section 3 Warranty. None of the foregoing provisions violate South Carolina law or public policy.

Section 2 of the Opinion, in addressing the clear and unequivocal standard of Concord & Cumberland, states that, "the relevant provisions of the Agreement are not sufficiently clear and unequivocal to require Hurley to indemnify BFS for BFS's own negligence." However, as detailed more thoroughly above, BFS is not seeking indemnity from Hurley against BFS's own negligence. As the court of appeals itself recognized in the opening section of the Opinion, BFS's claim for indemnity is premised only on Hurley's alleged negligence in installation of the windows.

As explained above, the majority of the court of appeals' concerns regarding offending provisions should be eliminated once the Court appropriately considers that *Work,* a defined term used throughout the contract, necessarily limits the terms and provisions of the contracts specifically to the materials provided or services performed by the Hurley.

Moreover, the purportedly problematic provision - the second paragraph of Section 5 – includes language imposing an obligation to indemnify only "to the fullest extent permitted by law." See A. pp. 491, 503. Thus, when properly read, all of the contract provisions comply with relevant law and thus, there is no need to sever. However, to the extent necessary, BFS urges the Court to honor the intent of the parties and, consistent with precedent, sever any provision that it deems to violate South Carolina law.

The court of appeal's Opinion directly contradicts this Court's precedent which acknowledges that "[f]or centuries, the law has stricken illegal parts from contracts and upheld the legal parts, as long as the central purpose of the parties' agreement did not depend upon the illegal part." Huskins v. Mungo Homes, LLC, 444 S.C. 592, 595, 910 S.E.2d 474, 476 (2024)(quoting Pigot's Case, 77 ER 1177, 1179 (1614)("if some of the covenants ... are against law, and some good and lawful ... [then] the covenants or conditions which are against law are void *ab initio*, and the others stand good."). This Court noted that such view was transported to America in United States v. Bradley, 35 U.S. 343 (1836). See Id.

Historically, "this Court generally would encourage severability of an unconscionable provision" as opposed to throwing out the entire clause, section or contract. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 35, n.9, 644 S.E.2d 663, 674 (2007). This is especially true when a contract (1) contains a severability clause, and (2) contains only one unenforceable or invalid provision. See Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002) (explaining that "[w]hether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties.); Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020) (determining that parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable); Simpson, 373 S.C. at 35, n.9 (citing the following cases for the proposition that courts have severed isolated unenforceable language in contracts: Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir.2006) (severing a provision in an arbitration clause that prohibited the award of treble damages); Safranek v. Copart, Inc., 379 F.Supp.2d 927 (D.Ill.2005) (severing a provision in an arbitration clause that violated Title VII by requiring each party to bear its own attorney's fees and costs); Ex parte Celtic Life Ins. Co., 834 So.2d 766 (Ala.2002) (severing

a provision in an arbitration clause that was void as a violation of public policy by prohibiting the award of punitive damages); Healthcomp Evaluation Servs. Corp. v. O'Donnell, 817 So. 2d 1095 (Fla. Dist. Ct. App. 2002) (severing a provision in an arbitration clause that violated state law by not permitting the parties to appeal or review an arbitration award)); see also D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018)(severing indemnity provision "to the extent" it was against public policy); Concord & Cumberland, 424 S.C. at 639 (allowing partial recovery under the valid portion of an indemnity provision that otherwise did not completely comport with South Carolina law).

The contracts at issue here contain separate distinct sections, relating to separate and distinct circumstances under which an obligation to indemnify may arise. See A. pp. 486-511. Each of these separate sections, and the distinct paragraphs within the respective sections, relate to separate rights and or responsibilities, and are all subject to severance, if needed, without compromising the goals of the contracting parties.

Moreover, the contracts also include severability provisions that explicitly state:

> "The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law."

See A. pp. 497, 510.

This Court has long since held that the primary purpose in the construction of contracts is to discover the intention of the parties, which, when discovered, will be given effect regardless of technical forms of expression. See Am. Nat. Bank of Winter Haven, Fla., v. Caldwell, 166 S.C. 194, 164 S.E. 613, 615 (1932). "Whether an illegal provision in an otherwise valid contract may be separated from the contract is a matter of intent of the parties." Beach Company v. Twillman,

Ltd., 351 S.C. 56, 64, 56 S.E.2d 63, 867 (Ct. App. 2002). Equally importantly, the presence of a severability clause, such as the clause incorporated within each of the contracts at issue here, should be treated as strong evidence of the parties' intent to sever any unenforceable language. See Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880-81 (Ct. App. 2020).

In light of the format of the contracts and the severability provisions, there can be no dispute that the parties intended that any unenforceable provision be severed and that the remainder of the contract be left intact and in effect. Moreover, the court of appeals' Opinion declining to honor the severance provision defies reason as certainly no party to the contract intended that the contract (which was renewed in toto and without revision by Hurley after several years) be rendered wholly unenforceable, as all parties to the contract relied upon the contract for business purposes and their livelihood. Accordingly, this Court must reverse and sever any illegal provision from the contracts per the parties' intent and severance provisions of the contacts.

V. A trial court's order on appeal is not "final" for purposes of collateral estoppel or res judicata in South Carolina.

In holding that the parties were collaterally estopped from litigating the issue that forms the basis for this appeal, the court of appeals' Opinion overlooked the fact that no trial court has yet answered the specific question before this Court: of whether BFS can recover, under the relevant indemnity provisions of the respective contracts, for the negligence of Hurley, regardless of whether BFS can recover indemnity for its own negligence. All prior cases cited as the basis for the lower court's collateral estoppel have involved the lower courts' consideration of BFS's claims purportedly seeking indemnity against BFS's own negligence.

The doctrine of collateral estoppel is only available *when the same issues of fact or law* are actually litigated and directly determined by valid and final judgment. See Carman v. South

Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) (emphasis added). The issue before the trial court in this case was *whether BFS may recover under the relevant indemnity provision for Hurley's negligence* (whether sole or concurrent). This specific issue has neither been litigated or directly determined by a single court to date, and thus, it is not subject to collateral estoppel.

The court of appeals' Opinion erred in finding that a judgment on appeal is final for collateral estoppel purposes. The Opinion cites to 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) for the point that the application of offensive collateral estoppel is appropriate because the legality of the contract was actually litigated and directly determined in a prior action and the issue was essential to the judgment. The Opinion also cites to Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) for the point that collateral estoppel prevents a party from relitigating an issue that was litigated and "determined by a valid and **FINAL** judgment" in a previous action. Emphasis added. BFS has repeatedly argued to the lower courts that the lower court's judgment on appeal is not *final* for res judicata or collateral estoppel purposes.

In S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., this Court officially adopted the general rules as set forth in the Restatement (Second) of Judgments. See 304 S.C. at 213. Consistent with what BFS has argued, the Restatement provides:

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

Restatement (Second) of Judgments § 13 (1982).

The Restatement's commentary on *finality* provides, "[i]t has often been suggested that finality for appellate review is the same as finality for purposes of res judicata, but that has probably never been quite true." Restatement (Second) of Judgments § 13 Requirement of Finality (1982). The Restatement commentary continues 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." Id. Further, the Restatement commentary notes that "the test of finality" is "whether the conclusion in question is procedurally definite." Id.

The Restatement's definition of *finality* and test thereof are consistent with the approach taken by the United States Supreme Court, which has noted that a decision of a lower court is not binding precedent in either a different or the same lower court or even on the same judge in a different case. See Camreta v. Greene, 563 U.S. 692, 709, 131 S. Ct. 2020, 2033, 179 L. Ed. 2d 1118 (2011).

Within the geographic bounds of the Fourth Circuit, the Virginia Supreme Court has held that "[a] judgment, to be relied upon for the application of the doctrine of res judicata, must be final, and a judgment which is being appealed is not final for res judicata purposes." Arkansas Best Freight Sys., Inc. v. H.H. Moore, Jr. Trucking Co., 244 Va. 304, 307, 421 S.E.2d 197, 198 (1992) (internal citations omitted).

Corpus Juris Secundum advises that "the pendency of an appeal from a judgment is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded." 50 C.J.S. Judgments § 940.

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. Here, consistent with the Restatement, BFS argued to the lower courts that it was inappropriate to consider such judgment for purposes of collateral estoppel. Restatement (Second) of Judgments § 13 Requirement of Finality (1982) ("The pendency of a motion for new trial or to set aside a judgment, or of an appeal from a judgment, is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded.").

Because the orders relied upon by the trial court did not litigate the specific issue pending before the trial court, and because the judgments relied upon by the trial court are pending appellate review, the Court should reverse and provide clarity, consistent with this Court's prior adoption of the Restatement Second of Judgments, that an order subject to appeal is not final for application of collateral estoppel, and thus remand BFS's contractual indemnification cause of action to trial.

VI. A genuine issue of material fact exists regarding Hurley's negligence.

In Section 6 of the Opinion, the court of appeals' disposed of BFS's claims, based upon its own determination, premised on its review of contradictory and disputed evidence, that that there is no genuine issue of material fact sufficient to preclude summary judgment. See Opinion, A. p. 560.

The court of appeals' affirmation of the trial court's award of summary judgment is not only contrary to the requirements of Rule 56 SCRCP, but also in violation of the standards for determination of a motion for summary judgment. Specifically, the court ignored that a grant of summary judgment is authorized only when there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law. See Rule 56, SCRCP. Further, in analyzing a motion for summary judgment, the standard of review requires the courts to consider **all the evidence and all inferences must be viewed in the light most favorable to the nonmoving party**. See Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005) (emphasis added).

The court of appeals' acknowledged explicitly that Plaintiffs' expert witness testified that the windows were improperly installed. See Opinion, A. p. 560. Nevertheless, the court of appeals determined that because BFS provided the installation instructions, supervised, and inspected Hurley's installation of the windows, that the circuit court properly granted Hurley's motion for partial summary judgment. See Id. With this determination, the court of appeals included a footnote further noting that "BFS holds an unlimited commercial general contractor's license and is responsible-by statute-for the work of its unlicensed subcontractors. *See* S.C. Code Ann. Section 40-11-270(E) (Supp. 2024) ("The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee."). The court of appeals' determination is in error for the following reasons.

a. The Pavic windows are not defective.

The court's errant reasoning for affirming the trial court's grant of summary judgment includes reference to "defective windows." See Opinion, A. p. 560 "Although Mease did testify that the defective windows were installed improperly, it is undisputed that BFS sold Saussy Burbank the windows (which BFS only later learned were defective) for Hurley to install...." As explained in the Fact section above, any and all claims for defective window products were explicitly eliminated by Stipulation of Plaintiffs Pavic and by Stipulation of BFS. See Stipulations

entered by Plaintiffs and BFS, A. pp. 260-264. Further, the court of appeals previously acknowledged as much in the opening section of its Opinion. See A. p. 550. Contrary to the court's reasoning, there are no pending "defective window" claims and more importantly there has been no determination by any jury that the windows at the Pavic residence are "defective." Thus, the court's "defective window basis" for affirming the trial court's grant of summary judgment is unfounded and without any supporting evidence in the record.

b. Evidence in the record indicates that Hurley failed to install the windows per the building code requirements and that Hurley should independently know how to properly install the windows.

Aside from the fact that the windows installed at the Pavic residence have not been determined to be "defective," and that Plaintiffs by their Stipulation have agreed that they are not defective, the court further erred by determining, without any explanation or citation to the evidence in the record, that Hurley was not negligent in its installation of the windows. The court of appeals appears to contend that because BFS provided installation instructions, supervised, and inspected Hurley's work, that Hurley was not negligent in the work it performed. However, what the court failed to appreciate is the actual testimony offered by Plaintiffs' expert witness that supports BFS's claims against Hurley.

Plaintiffs' expert, Mr. Mease testified in part 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. p. 446, line 10 — p. 447, line 11; R. p. 448, lines 6 - 19);

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 jamb, rendering the flashing ineffective (See R. p. 449, line 23 — p. 450, line 11); and

In addition to the particular defects and deficiencies in Hurley's window installation work, Mr. Mease testified that appropriate integration of window flashings and adjacent weather-resistant barrier were addressed within the relevant building code, and that **such procedures should have been known to the window installation subcontractor**. See R. p. 454, lines 11-19 (emphasis added). Equally importantly, the court of appeals did not determine that Mr. Mease's testimony was not relevant or not admissible.

Here, Plaintiffs have alleged that the windows were installed improperly and that the Plaintiffs have sustained or will sustain damages resulting from the improper window installation. Plaintiffs have imputed fault associated with the improper window installation, by Hurley, to BFS. Moreover, Plaintiffs' expert witness testified that Hurley, as the window installation subcontractor, should know the requirements of the building code for proper window installation, and that he observed that Hurley failed to comply with the relevant installation requirements. Thus, the evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to BFS, clearly suggests negligent acts or omissions by Hurley which are separate and distinct from any purported negligence on the part of BFS.

As the non-moving party on a summary judgment motion, BFS was entitled to have the inference of liability resolved in its favor, which would have precluded summary judgment. Thus, the improperly installed window testimony by Mr. Mease is relevant evidence that creates a genuine issue of material fact and should preclude summary judgment for Hurley.

Because the court of appeals has ignored the relevant admissible testimony of the Plaintiff's expert witness, the Court should reverse the Opinion as there is clearly evidence to support BFS's claims and certainly a question of material fact to preclude summary judgment.

c. 40-11-270(E) has no bearing on BFS's claims against Hurley.

Lastly, contrary to Hurley's arguments, and the court of appeals' adoption thereof, S.C. Code Ann. Section 40-11-270(E) has no bearing on BFS's claims against Hurley for Hurley's negligent acts or omissions.

A contractor is defined as a "general" or "mechanical" contractor and is regulated under Chapter 11 of Section 40 of the S.C. Code. Teseniar v. Pro. Plastering & Stucco, Inc., 407 S.C. 83, 96, 754 S.E.2d 267, 274 (Ct. App. 2014) (citing S.C. Code Ann. § 40–11–20(4) (2011)). A general contractor is an entity that performs or supervises or offers to perform or supervise general construction. Id. (citing S.C. Code Ann § 40–11–20(9). A subcontractor is an entity who contracts to perform construction services for a prime contractor, which is one who contracts directly with an owner to perform general or mechanical construction, or another subcontractor. Teseniar 407 S.C. at 97 (citing § 40–11–20(17), (22)).

In this litigation, Saussy Burbank served as the general contractor for construction of the Pavic residence. See Opinion, A. p. 556. Plaintiffs purchased their residence from the general contractor Saussy Burbank. See Id. Contrary to the court of appeals' determination in Section 6, there is no evidence in the record to establish that the other parties were performing work at the Pavic project under any license other than Saussy Burbank's general contractor license. BFS was a subcontractor to Saussy Burbank and performed work on the Pavic project under Saussy Burbank's general contractor license. Correspondingly, Hurley as a subcontractor to BFS also performed work on the Pavic project under Saussy Burbank's general contractor license. Thus, it is immaterial whether BFS separately holds an unlimited general contractor's license, as BFS and Hurley were performing work on the Pavic residence as subcontractors under Saussy Burbank's license.

Moreover, as the licensee, Saussy Burbank may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's license group and license classification or subclassification; provided, the licensee provides supervision. See Teseniar 407 S.C. at 97 citing S.C. Code Section 40-11-270(C). Here, no party is contending that supervision was not provided. It also bears emphasis that even assuming (despite the absence of any supporting evidence) that BFS were operating as a general contractor in original construction of the subject residence, that nothing, within either Chapter 11, or within the common law of this state, that would preclude its assertion of claims in indemnity against a negligent subcontractor.

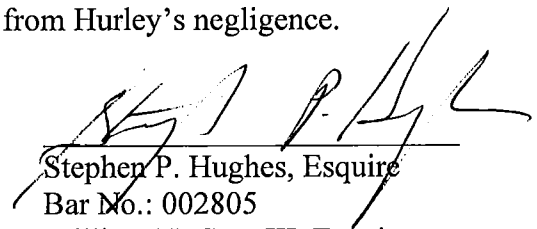
Lastly, the fact that subsection E of Section 270 provides that the licensee, Saussy Burbank, is fully responsible for any violation of this chapter, Chapter 11, resulting from the actions of unlicensed subcontractors performing work for the license has no bearing on BFS's claims against Hurley. The fact that BFS holds an unlimited general contractors license, (which was not used by BFS on the Pavic project) and that Hurley is an unlicensed subcontractor, has no bearing on whether Hurley is liable to BFS for Hurley's failure to install the windows as required by the building code and manufacturer installation instructions. See Teseniar v. Pro. Plastering & Stucco, Inc., 407 S.C. 83, 97, 754 S.E.2d 267, 274 (Ct. App. 2014)(quoting Kennoy v. Graves, 300 S.W.2d 568 (Ky.App.1957) ("The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. The reason for the rule denying enforceability [of contracts] does not exist when persons engaged in the same business or profession are dealing at arm['s] length with each other. In the case before us, appellant was in a position to know, and did know, the qualifications of appellee. No reliance was placed upon the existence of a license, as presumptively would be the case if appellee was dealing with the general public."). Accordingly, here, at the Pavic project, where BFS are Hurley were

operating under Saussy Burbank's license, neither Section 40–11–270 nor Section 40-11-370 precludes BFS from bringing claims against Hurley for damage resulting from Hurley's negligent acts or omissions. To the extent that the court of appeals' footnote citation to Section 40-11-270(E) suggests otherwise, it is in error.

For these reasons, the Court must reverse the court of appeals' Opinion and remand BFS's claims for trial as the question of whether Hurley was negligent should be decided by a jury, not by the court of appeals.

Conclusion

In conclusion, it was error for the court of appeals to ignore BFS's contractual indemnification claim for damages resulting from Hurley's negligence; it was error for the court of appeals to apply the heightened "clear and unequivocal" standard to the various contracts at issue because BFS is not seeking indemnity for its own negligence; it was error for the court of appeals not to give proper evaluation to the defined terms and provisions of the contracts; it was error for the court of appeals to analyze provisions that were separate and distinct and conclude that they were ambiguous, confusing, and failed to meet the clear and unequivocal standard; it was error for the court of appeals to decline to sever the few purportedly offensive provisions; it was error for the court of appeals to conclude that the parties were collaterally estopped from litigating the issue of contractual indemnity for damages resulting from Hurley's negligence.



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