

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

S.C. SUPREME COURT

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.

APPENDIX VOLUME III

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VOLUME III
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EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

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In The Court of Appeals**

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v.

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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.

Appellate Case No. 2021-000290

Appeal From Charleston County
Jennifer B. McCoy, Circuit Court Judge

Unpublished Opinion No. 2025-UP-082
Heard December 5, 2023 – Filed March 12, 2025

AFFIRMED

Stephen P. Hughes and William Hewitt Cox, III, both of
Howell Gibson & Hughes, PA, of Beaufort, for
Appellant.

W. McElhaney White and Todd Russell Flippin, both of
Holcombe Bomar, PA, of Spartanburg, for Respondent.

PER CURIAM: This litigation arises from alleged construction defects in the Mount Pleasant home Dag Pavic and Stela Susac-Pavic (Plaintiffs) bought from general contractor Saussy Burbank. Plaintiffs amended their complaint to include a claim against Builders FirstSource-Southeast Group, LLC (BFS) and others for "defective/improper installation of windows and related flashing" during the home's original construction. BFS brought crossclaims against Hurley Services, LLC (Hurley), the labor-only subcontractor BFS hired pursuant to a master subcontract agreement (the Agreement) to install the doors and windows in the home. BFS's claims for breach of contract, breach of express and implied warranties, negligence, contractual indemnity, and equitable indemnity were premised upon Hurley's alleged negligence in the installation of the windows BFS provided. BFS also filed third-party claims against the window manufacturer.¹

Based on Plaintiffs' stipulation that they were not alleging any window manufacturing defect, BFS later executed a separate stipulation dismissing the window manufacturer without prejudice from the Pavic litigation. However, BFS's claims against Hurley remained. Hurley moved for partial summary judgment as to some of BFS's claims. After a hearing, the circuit court granted Hurley's motion.² The circuit court denied BFS's subsequent Rule 59(e), SCRCP, motion.

¹ The windows BFS provided for installation in this single family home were the subject of a class action against the window manufacturer. *See Gulbankian v. MW Mfrs., Inc.*, No. 10-10392-RWZ, 2014 WL 7384075 (D. Mass. 2014). This class action litigation was ultimately settled.

² BFS conceded that its warranty, breach of contract, and negligence claims were subject to dismissal as disguised indemnity claims pursuant to *Stoneledge at Lake*

BFS appealed, arguing the circuit court erred in: (1) misapplying section 32-2-10 of the South Carolina Code (2007) to the Agreement; (2) mischaracterizing the relief sought by BFS and thus mistakenly applying the clear and unequivocal standard articulated by *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) to the relevant contract language; (3) finding the Agreement was an adhesion contract; (4) failing to properly address severability; (5) applying collateral estoppel to bar BFS's indemnity claims; and (6) failing to find a genuine issue of material fact precluded partial summary judgment.

We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. The 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" 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 S.C. Code Ann. § 32-2-10 ("Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building . . . purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee . . . is against public policy and unenforceable."); *Builders FirstSource-Se. Grp., LLC v. Palmetto Trim & Renovation*, Op. No. 6099 (S.C. Ct. App. filed Feb. 12, 2025) (Howard Adv. Sh. No. 7 at 7, 31-32) (affirming circuit court's findings that contractual indemnity language in two versions of BFS's master subcontractor Agreement are unenforceable under § 32-2-10). 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.³ Such contract terms violate § 32-2-10. See

Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015).

³ Despite BFS's arguments to the contrary, the language in SECTION 3 of the Agreement stating "Subcontractor guarantees the Work against defects in design, workmanship, and materials" only makes sense if the words "design,

D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 46 (Ct. App. 2018) ("The indemnification agreement in this case purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10. Because the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.").

2. The circuit court properly applied the clear and unequivocal standard of *Concord & Cumberland* to the relevant language of the Agreement. See 424 S.C. at 646, 819 S.E.2d at 170 (rejecting general contractor's argument that general rules of contract should apply as opposed to the "clear and unequivocal" standard because the heightened standard applied whether the general contractor "sought indemnification for its sole or concurrent negligence"). Here, the relevant provisions of the Agreement are not sufficiently clear and unequivocal to require Hurley to indemnify BFS for BFS's own negligence. "[O]ur supreme court has generally held that a contract of indemnity may require a party to indemnify an indemnitee against its own negligence if the 'intention is expressed in clear and unequivocal terms.'" *D.R. Horton*, 422 S.C. at 152, 810 S.E.2d at 45 (quoting *Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003)). Because the challenged provisions of the Agreement are not sufficiently clear and unequivocal to require Hurley to indemnify BFS for BFS's negligence, the circuit court correctly granted partial summary judgment. See *Palmetto Trim & Renovation*, Op. No. 6099, at 24-31 (addressing contractual indemnity language in BFS's master subcontract Agreements and affirming circuit court's eight orders granting partial summary judgment to BFS's subcontractors).

3. The circuit court correctly characterized the Agreement as a contract of adhesion. See *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022), *cert. denied*, 143 S. Ct. 2581 (2023) (discussing adhesion contracts and emphasizing that "*adhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed*"); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27, 644 S.E.2d 663, 669 (2007) ("[U]nder general

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 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."

principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable.").

4. Because 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 Palmetto Trim & Renovation*, Op. No. 6099, at 31-33 (rejecting BFS's invitation to sever offending contract terms when the Agreement's indemnity provisions violated South Carolina law and public policy); *Concord & Cumberland*, 424 S.C. at 656, 819 S.E.2d at 175 (declining general contractor's invitation to rewrite indemnity clauses in subcontractor agreement); *Doe v. TCSC, LLC*, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020) (noting "[c]ourts have discretion . . . to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive").

5. The circuit court did not err in finding collateral estoppel bars the contractual indemnity claims in this case. The indemnity clauses in the Agreement are the same clauses from the same form agreement that BFS previously litigated in *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc.*, No. 2018-CP-08-2547 (Berkeley, S.C., Ct. Common Pleas, Dec. 6, 2019). *See, e.g., 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) (explaining that where the "illegality of the contract has been actually litigated and directly determined in the prior action and that issue was essential to the judgment," the application of offensive collateral estoppel is appropriate); *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) (noting collateral estoppel prevents a party from relitigating an issue that was litigated and "determined by a valid and final judgment" in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same). The fact that an appeal in *MI Windows & Doors* was pending at the time of the circuit court's orders here does not change the result—the prior, unreversed judgment has preclusive effect. As we held in *Palmetto Trim and Renovation*, the "prior findings have preclusive effect unless and until those dispositive findings are reversed." Op. No. 6099 at 34-35 (finding the circuit court properly applied collateral estoppel despite pending appeal in *MI Windows & Doors* and explaining rationale for deeming cases on appeal to be final judgments for collateral estoppel purposes); *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) (finding the finality of a court's judgment is not lost because an appeal is pending unless and until the applicable finding is reversed).

6. The circuit court properly rejected BFS's argument that the testimony of its expert witness, Russell T. Mease, PE, established a genuine issue of material fact precluding partial summary judgment. 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, provided instructions for and supervision of Hurley's installation, and inspected the installation. Thus, we find the circuit court properly granted Hurley's motion for partial summary judgment.⁴

AFFIRMED.

MCDONALD and VINSON, JJ., and BROMELL HOLMES, A.J., concur.

⁴ We further note 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. § 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.").

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AFFIRMED.

MCDONALD and VINSON, JJ., and BROMELL HOLMES, A.J., concur.

⁴ We further note 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. § 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.").

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of which Hurley Services, LLC is the Respondent.

AND

Builders FirstSource-Southeast Group, LLC, Appellant,

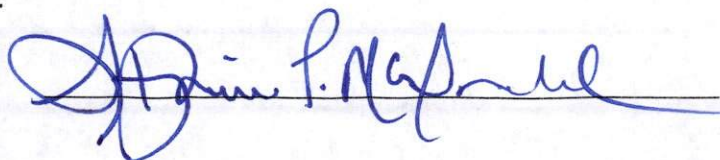
v.

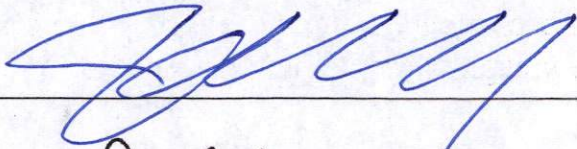
MW Manufacturers, Inc., Third Party Defendant.

Appellate Case No. 2021-000290

ORDER

Appellant has filed a petition for rehearing. After careful consideration, the Court denies the petition. However, the Court substitutes the attached revised opinion to correct a scrivener's error on page 6 of the opinion. No other changes were made to the previously-filed opinion.

 J.



Jan B. Brommell Holmes

A.J.

Columbia, South Carolina
Filed June 25, 2025

cc:
Stephen P. Hughes, Esquire
William Hewitt Cox, III, Esquire
W. McElhaney White, Esquire
Todd Russell Flippin, Esquire
The Honorable Jennifer B. McCoy

RECEIVED

Mar 27 2025

SC Court of Appeals

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PETITION FOR REHEARING

Stephen P. Hughes
William H. Cox, III
P.O. Box 40
Beaufort, South Carolina 29901
Attorneys for Appellant
Builders FirstSource-Southeast Group, LLC

Appellant Builders FirstSource-Southeast Group, LLC (hereinafter “BFS”) respectfully petitions this Court for rehearing.

The Court’s March 12, 2025 Opinion (hereinafter “Opinion”) correctly captures the nature of BFS’ claims: “***BFS’s claims for breach of contract, breach of express and implied warranties, negligence, contractual indemnity, and equitable indemnity were premised upon Hurley’s alleged negligence in the installation of the windows BFS provided.***” Opinion p. 1 (emphasis added). The Opinion, however, never once considers whether BFS can actually recover from Hurley for Hurley’s negligence; instead, the Opinion only considers whether BFS may recover for BFS’s negligence, which, by the Court’s own observation, is not the issue before the Court. Because the Opinion’s rationale and rulings focus on the wrong legal issues (and, at times, erroneous facts), and for other considerations more fully set hereinafter, BFS requests that the Court carefully reconsider and revise the Opinion to be consistent with the South Carolina law.

I. BFS is not seeking indemnity for its own negligence, and the contract provisions do not violate South Carolina public policy or statutory law.

As identified by the Court, BFS’s indemnity claims are premised upon Hurley’s negligence in installing the windows, *not* on BFS’s alleged own negligence. Such claims are explicitly permitted under South Carolina law, and the Court has not identified any reason why BFS should not be able to proceed with such a claim. This is especially true in this case because a material issue of fact exists as to whether Hurley was negligent, and this issue of fact should have precluded summary judgment.

a. BFS is seeking indemnity for liability for damages occasioned by Hurley, which is explicitly permitted under Section 32-2-10.

Despite the correct finding in the opening paragraph of the Opinion that BFS’s claim for indemnity is premised on Hurley’s negligent installation of the windows, only two paragraphs

later, in Section 1 of the Opinion, the Court erroneously states “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.’” This first affirmation by the Court is incorrect for multiple reasons. First, the Court completely ignores the fact that the Court has already correctly acknowledged that BFS’s contractual indemnity claims are premised only upon the alleged negligence of Hurley. Second, the Section 1 affirmation conflicts with the Court’s prior background recitation in the second paragraph of the Opinion that acknowledges that claims for defective windows were dismissed by Stipulations of Plaintiff Pavic and BFS. Moreover, the Court assumes, without any supporting evidence, that the windows supplied by BFS were defective, and that the mere assertion of window claims in unspecified class litigation, is equivalent to a dispositive determination of a product defect. Further, the assertion of window defect claims in this or in separate litigation has no bearing upon BFS’s claims against Hurley for damages resulting only from Hurley’s negligent acts or omissions in the installation of the windows.

The *correct and incorrect pattern* in the Opinion continues with subsequent language in Section 1 correctly noting that Section 32-2-10 allows BFS and Hurley to agree that “Hurley would indemnify BFS for damages caused by Hurley or Hurley's agents.” The scope of the indemnity agreement at issue does encompass such claims, but the Court did not acknowledge this. The Opinion incorrectly states that “the terms of the Agreement 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.” Again, as the Court has already correctly found in

the opening paragraphs of the Opinion, the parties dismissed any and all claims relating to purported deficiencies in the windows, and the only claims that remained pending related to the purported deficiencies in installation of the windows. The Court must revise the Opinion to be consistent with its finding that BFS's indemnity claim is premised only upon Hurley's negligence in installation of the windows, and that thus it is permissible under Section 32-2-10.

- b. The agreement uses "Work" as a defined term to limit Hurley's guarantee and warranty to only the work performed by Hurley, consistent with South Carolina law.

The Opinion argues in Footnote 3 that the relevant agreement violates Section 32-2-10 because in Section 3, Hurley must guarantee "the Work against defects in design, workmanship, and materials;" because Hurley did not provide materials, the Court asserts the Agreement attempts to make Hurley liable for more than its scope of work. However, the Court has overlooked that "Work" is a defined term in the agreement, and its definition is limited to the labor performed by or the materials provided by the subcontractor. **R. p. 492**. This limitation should mollify the Court, because it limits liability to the subcontractor's exact scope of work – nothing more. Thus, Hurley's *Work* may include "design, workmanship, and materials" **IF** Hurley agrees and contracts with BFS to supply and perform such Work. **IF** Hurley does not contract with BFS to supply materials or perform workmanship or design Work, then there is no obligation by Hurley to *guarantee* against such materials or services. The provision thus remains well within the scope of Section 32-2-10.

Because Section 1 of the Opinion confirms that the Court has overlooked the fact that BFS's claims are premised only upon the alleged negligence of Hurley's installation of the windows, and because Section 1 of the Opinion confirms that the Court has overlooked and/or misapprehended the plain language of the Agreement limiting the obligations of Hurley to only

Work performed by Hurley, the Court must revise the Opinion to be consistent with the Agreement of the parties and claims asserted by BFS in this litigation. Once the Opinion is revised to be consistent therewith, BFS submits that the Court should reverse the trial court's Order as BFS's claims and contract provisions do not violate South Carolina public policy or Section 32-2-10.

II. BFS is not seeking indemnity for its own negligence and therefore the relevant contract provision should not be subjected to the heightened clear and unequivocal standard.

Section 2 of the Opinion erroneously affirms the trial court's application of the clear and unequivocal standard from *Concord and Cumberland* because "the relevant provisions of the Agreement are not sufficiently clear and unequivocal to require Hurley to indemnify BFS for BFS's own negligence." As highlighted above, the opening paragraph of the Opinion correctly notes that the Court found that all of the claims set forth by BFS are premised only on Hurley's negligence in installing the windows. Because BFS is not seeking to require Hurley to indemnify BFS for BFS's own negligence, it was error for the trial court to apply the heightened clear and unequivocal standard. Instead, the trial court should have applied general rules of contract construction. Accordingly, the Court must revise Section 2 of the Opinion to be consistent with the claims asserted by BFS in this litigation and apply the correct standard from *Concord and Cumberland*. Once revised, BFS submits that the Court should reverse the trial court's Order and deny Hurley summary judgment as BFS's contractual indemnity claim and relevant indemnity provision are specifically authorized by and consistent with South Carolina law.

III. The Agreement does not have any provisions that violate South Carolina law or public policy; however, to the extent that the Court takes issue with certain language therein, the Court must honor the intent of the parties and sever accordingly.

Section 4 of the Opinion states, "[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.”

Section 4 of the Opinion does not identify the specific provisions that purportedly violate South Carolina law and public policy. Nevertheless, Section 1 of the Opinion discusses the circuit court finding “ ‘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.’ ” However, as explained above in Section I of the Petition, this portion of Section 1 of the Opinion is incorrect as BFS’s indemnity claim is premised only on Hurley’s negligence in installing the windows and the parties dismissed any and all claims for defective windows. Moreover, as explained in Section I of the Petition, the Court’s 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 *Section 1 Work* and *Section 3 Warranty*. Further, as noted in the Opinion’s opening paragraphs, the parties dismissed any and all claims for defective windows. The only claim remaining is relating to the purportedly improper installation of the windows. In *Pavic*, Hurley did not perform design Work, but it did supply fasteners and workmanship in installation of the windows and doors. Therefore, in *Pavic*, Hurley is only obligated to guarantee the fasteners – the materials Hurley supplied – and its workmanship – the installation of the windows and doors. Hurley is not obligated to guarantee any design Work in *Pavic*. None of the foregoing provisions violate South Carolina law or public policy.

Section 2 of the Opinion discusses the application of “the clear and unequivocal standard of *Concord & Cumberland* to the relevant language of the Agreement.” Section 2 of the Opinion continues, “the relevant provisions of the Agreement are not sufficiently clear and unequivocal to

require Hurley to indemnify BFS for BFS's own negligence." Section 2 of the Opinion reiterates this position, "[b]ecause the challenged provisions of the Agreement are not sufficiently clear and unequivocal to require Hurley to indemnify BFS for BFS's negligence, the circuit court correctly granted partial summary judgment." However, as noted above in Section II of the Petition, Section 2 of the Opinion is incorrect and must be revised as BFS is not seeking Hurley to indemnify BFS for BFS's own negligence. As the Court notes in the opening section of the Opinion, BFS claim for indemnity is premised only on Hurley's alleged negligence in installation of the windows.

Because Section 4 of the Opinion relies upon incorrect positions taken by the Court in Sections 1 and 2, the Court must revise the Opinion to reverse the trial court's grant of summary judgment.

Alternatively, to the extent that the Court intends to identify specific language in the Agreement it finds to be violative of South Carolina law or public policy, the Court must honor the intent of the parties and sever any offending language from the Agreement pursuant to Section 10(g). See R. p. 497 (**"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."**).

- IV. The Court, in determining that the Appellant's claims were barred by the doctrine of collateral estoppel, overlooks the fact that the specific issue before the trial court has not been previously resolved by any court judgment, and further overlooked that South Carolina law is silent regarding whether a decision on appeal is final for purposes of res judicata.**

The issue of whether a trial court decision on appeal is sufficiently "final" for purposes of collateral estoppel is an issue of first impression in South Carolina. There are no cases on point

other than the *MI Windows and Doors* case, which is still an active and ongoing appeal. Even the cases cited by the parties herein have reached different conclusions. Because the issue is one of novel impression in South Carolina, it was inappropriate for the matter to be resolved by summary judgment.

Moreover, this Court has overlooked that no court has yet answered the question of whether BFS can recover, under the relevant indemnity provision of the Agreement, for the negligence of Hurley, regardless of whether BFS can recover for its own negligence. All prior cases cited by the Court as its basis for collateral estoppel have involved the lower courts' consideration of BFS claims purportedly seeking indemnity against BFS negligence. No prior court has specifically addressed the issue – the specific claims as presented by BFS in this litigation.

The doctrine of collateral estoppel is ONLY available *when the same issues of fact or law* are actually litigated and determined by valid and final judgment. Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) (emphasis added).

The issue before the *Pavic* trial court was *whether BFS may recover indemnity for Hurley's negligence in installation of the windows*. See *Opinion*, p. 1. This issue has not been ruled upon by a single court to date, and thus, it is not subject to collateral estoppel. Therefore, this Court should answer the novel question, which is not precluded by collateral estoppel.

V. The Court acknowledges that a question of fact exists based off the evidence in the record.

A genuine issue of material fact exists regarding whether Hurley was negligent in its installation of windows. Specifically, the expert testimony in this matter creates an issue of fact that should have precluded summary judgment.

In this case, Saussy Burbank, LLC, as the general contractor, used its general contractor's license to pull the building permit to construct the *Pavic* residence. Saussy Burbank, as the general

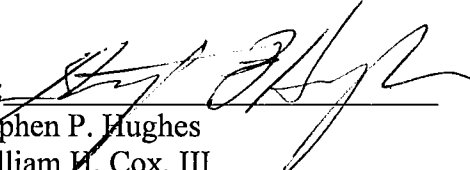
contractor, contracted with various parties to supply and install materials to construct the Pavic residence. Saussy Burbank contracted with BFS, a material supplier that provides limited installation services, to supply and install the windows and exterior doors at the Pavic residence. BFS contracted with Hurley to install the windows and exterior doors and corresponding flashings and materials at the Pavic residence. Per that agreement, BFS supplied the windows, exterior doors, self-adhered flashing, and caulk and Hurley supplied the fasteners and workmanship to install the materials. Hurley was responsible for installing the windows and doors pursuant to the manufacturer's installation instructions, which the manufacturer provides and adheres to each and every window and door product.

The Opinion acknowledges in Section 6 that Plaintiff's expert witness, Russ Mease, testified that the windows were improperly installed (although the Opinion incorrectly identifies Mr. Mease as BFS's expert). However, the Opinion appears to hold that, despite such testimony that the windows were improperly installed, summary judgment was nonetheless appropriate because BFS "provided instructions for and supervision of Hurley's installation," and because BFS inspected the installation. The Opinion fails to consider that Hurley may have still negligently installed the windows in spite of proper instruction, supervision, and inspection by 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. For this reason, the Court must revise the Opinion to reverse the trial court's Order granting summary judgment on this basis.

CONCLUSION

Because the Court finally correctly acknowledged that BFS's claims are premised only on Hurley's negligence in installation of windows, and because all of the Opinion's subsequent affirmations and findings are premised on the incorrect notion that BFS is seeking to be indemnified for BFS's own negligence, the Court must revise the Opinion to reverse the trial court Order granting summary judgment as BFS's claims and Agreement comply with relevant South Carolina public policy and law, and there is a genuine issue of material fact as to Hurley's negligence which precludes summary judgment.

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March 27, 2025

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March 27, 2025

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Mar 27 2025
SC Court of Appeals

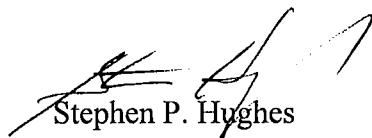
Re: Builders FirstSource - Southeast Group, LLC v. Hurley Services, LLC Pavic
Civil Action No.: 2021-000290
Our File No.: 12313.1 SPH

Dear Sir or Madam:

Please find enclosed herewith for filing an original and one copy of the *Petition for Rehearing*, together with the Certificate of Service, with regard to the above referenced matter. Also enclosed please find the applicable filing fee in the amount of \$50.00. I would appreciate your filing the Petition for Rehearing and returning a filed clocked copy to me via email at sphughes@hghpa.com, wcox@hghpa.com, and scombites@hghpa.com. If return of the clocked copy must be via U.S. Mail, please advise and I will provide a self-addressed, stamped envelope provided for same.

With kindest regards, I am
Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.


Stephen P. Hughes

SPH/sc
ENCLOSURES

The Supreme Court of South Carolina

The Retreat at Charleston National Country Club Home Owners Association, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime, Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollo Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveira; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado; Defendants,

Builders FirstSource-Southeast Group, LLC, Third-Party Plaintiff, Petitioner,

v.

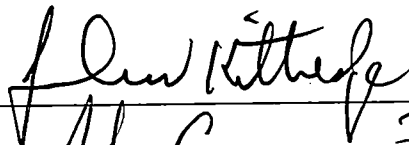
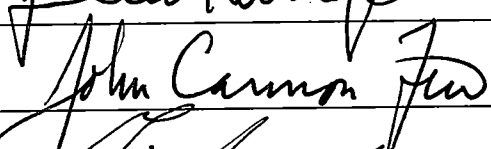
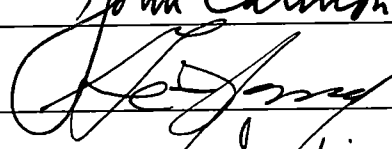
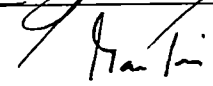
Pohlman Quality Contractors; Pohlman Quality
Exteriors; Palmetto Trim and Renovation; Edward Bruce
Witham; and East Coast Carpentry, Third-Party
Defendants,

Of which Palmetto Trim and Renovation; Hurley
Services, LLC; ECC Contracting, LLC; East Coast
Carpentry; AC Construction, Inc.; WS Contractors, LLC;
Pohlman Quality Exteriors, Inc.; and L&G Construction
Group, LLC are the Respondents.

Appellate Case No. 2025-001224

ORDER

Petitioner Builders FirstSource-Southeast Group, LLC has filed a motion to stay in (1) *Builders FirstSource-Southeast, LLC v. MI Windows* (Appellate Case No. 2025-001176); (2) *Builders FirstSource-Southeast, LLC v. Hurley Services, LLC* (Appellate Case No. 2025-001495); and (3) *Builders FirstSource-Southeast, LLC v. Hurley Services, LLC* (Appellate Case No. 2025-001496), pending this Court's decision in the instant matter of *Builders FirstSource-Southeast, LLC v. Palmetto Trim and Renovation* (Appellate Case No. 2025-001224). The motion to stay is denied.

	_____	C.J.
	_____	J.
	_____	J.
	_____	J.

Verdin, J., not participating

Columbia, South Carolina
September 10, 2025

cc:

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Stephen P. Hughes
William Hewitt Cox III
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Thomas Frank Dougall
Michal Kalwajtys
Payton Dwight Hoover
Edward Glenn Elliott
Jennifer Sue Ivey
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Jul 21 2025

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

S.C. SUPREME COURT

Appellate Case No. 2025-001224
Case No. 2016-CP-10-03783

Opinion No. 2025-6099

The Retreat at Charleston National Country Club Home Owners Association, Inc., and The
Retreat at Charleston National Country Club Horizontal Property Regime,
Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin
Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.;
Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee
Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston
Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co.,
LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollo
Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira
Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding;
Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma
Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos
d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin
Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and
Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC;
Givair De Caris; and Mario Salgado;
Defendants,

Builders FirstSource-Southeast Group, LLC, Petitioner

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation;
Edward Bruce Witham; and East Coast Carpentry, Third-Party Defendants,

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the Respondents.

MOTION TO STAY

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Attorneys for Petitioner Builders
FirstSource-Southeast Group, LLC

Petitioner, Builders FirstSource-Southeast Group, LLC, respectfully moves this Court for an Order to Stay the following separate, but related appeals:

1. Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC,
 - Supreme Court Appellate Case No. 2025-001176
 - Court of Appeals Case No. 2020-000415
 - Unpublished Opinion No. 2025-UP-072
 - Heard March 15, 2023
 - Filed February 26, 2025
 - Court of Appeals Judges McDonald, Thomas, and Hewitt
 - “BFS Damico Appeal”
2. Builders FirstSource-Southeast Group, LLC v. Hurley Services, LLC and Charleston Exteriors, LLC,
 - Court of Appeals Case No. 2020-001328
 - Unpublished Opinion No. 2025-UP-078
 - i. Heard December 5, 2023
 - ii. Filed March 12, 2025
 - iii. Withdrawn, Substituted, Refiled June 25, 2025
 - iv. Court of Appeals Judges McDonald, Vinson, and Bromell Holmes
 - “BFS Six Fifty Six Appeal”
3. Builders FirstSource-Southeast Group, LLC v. Hurley Services, LLC,
 - Court of Appeals Case No. 2021-000290
 - Unpublished Opinion No. 2025-UP-082
 - i. Heard December 5, 2023
 - ii. Filed March 12, 2025
 - iii. Withdrawn, Substituted, Refiled June 25, 2025
 - iv. Court of Appeals Judges McDonald, Vinson, and Bromell Holmes
 - “BFS Pavic Appeal”

The primary basis for the Stay is to promote and preserve judicial economy. The secondary basis for the Stay is to promote and preserve the issues on appeal.

All of the foregoing appeals, including this one (Appellate Case No. 2025-001224, “BFS Retreat Appeal,”) relate to Petitioner’s claims seeking contractual indemnification from its respective subcontractors for damages allegedly resulting from deficiencies in the work performed by the subcontractors at construction projects in South Carolina.

Petitioner's claims against the respective subcontractors in the separate appeals are based primarily on the same contract provisions that are at issue in this appeal. In fact, Petitioner's claims against Respondent ECC Contracting, LLC in this appeal are based on contractual indemnity provisions identical to those at issue in the BFS Damico Appeal. See Exhibit A, BFS-ECC Agreements in Records on Appeal for BFS Retreat Appeal and BFS Damico Appeal. Additionally, Petitioner's claims against Respondent Hurley Services, LLC in this appeal are based on contractual indemnity provisions identical to those at issue in the BFS Six Fifty Six Appeal and BFS Pavic Appeal. See Exhibit B, BFS-Hurley Agreements in Records on Appeal for BFS Retreat Appeal, BFS Six Fifty Six Appeal, and BFS Pavic Appeal.

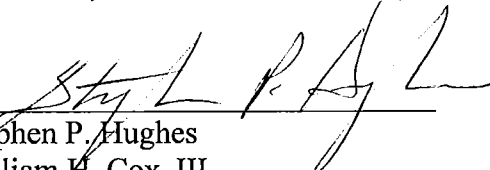
Further, Questions Presented by Petitioner in this BFS Retreat Appeal, while worded slightly differently, are substantively the same as the Questions Presented by Petitioner in the BFS Damico Appeal. See Exhibit C, BFS Petitions for Certiorari in BFS Retreat Appeal and BFS Damico Appeal. Moreover, the same will hold true for Petitioner's Petitions for Certiorari that are, absent any extension, due to be filed with this Court on July 25, 2025 for BFS Six Fifty Six Appeal and BFS Pavic Appeal.

Although the claims and contracts at issue in these separate appeals are substantively identical and most of the Questions Presented by Petitioner are or will be the same, consolidation of the appeals is not appropriate because there are multiple separate and distinct factual and legal issues that exist amongst the separate appeals that do not exist in this appeal. As such, Petitioner submits that consolidation of the appeals would distract from the Court's consideration of those primary issues common to each appeal, and also potentially cause the separate and distinct issues to be overlooked or confused by the Court of the parties.

Petitioner respectfully submits that a Stay of the separate appeals will promote judicial economy by allowing the Court and the parties to focus upon resolution of the significant issues common to each of the referenced appeals. The interests of both this Court and those of the parties are most effectively served by first resolving the issues in the BFS Retreat Appeal, which should resolve the issues common to each of the separate appeals. Additionally, a Stay of the separate appeals will preserve the separate and distinct issues on appeal while also promoting and preserving the primary issues on appeal that exist in all of the appeals.

Counsel for Respondents in BFS Damico Appeal, BFS Six Fifty Six Appeal, and BFS Pavic Appeal agree and consent to the Motion to Stay.

HOWELL, GIBSON & HUGHES, P.A.

By: 

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William H. Cox, III

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Attorneys for Petitioner Builders

FirstSource-Southeast Group, LLC

Beaufort, South Carolina

July 21, 2025

The Supreme Court of South Carolina

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, Petitioner,

v.

MW Manufacturers, Inc., Third Party Defendant.

Appellate Case No. 2025-001496

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file ten additional copies of the appendix and ten copies of their briefs in the manner provided by Rule 242(i), SCACR.

FOR THE COURT

BY Patricia A. Howard
CLERK

Columbia, South Carolina
December 16, 2025

cc:

Stephen P. Hughes

William H. Cox III

W. McElhaney White

Todd R. Flippin

The Honorable Jenny Abbott Kitchings

RECEIVED

Jul 25 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2021-000290
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.

PETITION FOR WRIT OF CERTIORARI

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Certification

Counsel for the Petitioner certifies that the petition for rehearing was made and finally ruled upon by the court of appeals on June 25, 2025.

Questions Presented

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

Builders FirstSource-Southeast Group, LLC (“Petitioner”) respectfully petitions this Court to grant a writ of certiorari to review the court of appeals’ revised Opinion dated June 25, 2025, which affirmed the trial court’s order granting partial summary judgment to Hurley Services, LLC (“Respondent”).

The underlying dispute arises from alleged defects in construction of a single-family residence, including alleged defects in the window installation work Respondent performed for Petitioner. Petitioner and Respondent’s agreement contains an indemnity provision that Petitioner contends covers claims for damages caused by Respondent’s negligent work. The trial court granted partial summary judgment to Respondent, finding that the indemnity provision was

unenforceable as contrary to public policy and statutory law, and further finding that the contractual indemnity claim was barred by collateral estoppel. The court of appeals affirmed, but its reasoning is internally inconsistent: while the revised Opinion correctly recognizes that Petitioner's claims are premised on Respondent's negligence in Respondent's installation of windows, it erroneously analyzed the contractual indemnity claim as if Petitioner were seeking recovery for damages resulting only from Petitioner's negligence. Because the court of appeals failed to analyze Petitioner's contractual indemnity claim for Respondent's negligence, this Court must grant certiorari to review and correct the lower court's mistake.

Dag and Susan Pavic Appeal

This litigation arises out of alleged deficiencies in construction of the Plaintiffs' residence, located at 1368 Penshell Place, Mount Pleasant, South Carolina. [R. pp. 68-69]. The residence was constructed by general contractor Saussy Burbank, and was completed on or about May 13, 2013. [Id]. By their First Amended Complaint, filed February 28, 2019, Plaintiffs Pavic alleged Petitioner was responsible for "defective/improper installation of windows and related flashing" during original construction. [R. p. 69]. By their Second Amended Complaint, filed March 18, 2019, the Plaintiffs, Pavic, designated Respondent as an additional defendant which, as a subcontractor to Petitioner, 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, Petitioner filed cross-claims against Respondent who actually performed the window installation work and Petitioner filed third-party claims against MW Manufacturers, Inc. who manufactured the windows. Contrary to Respondent's and the lower courts' contention, the Petitioner's claims against Respondent were and remain premised upon the Respondent's alleged negligence in the installation of the windows. See R. 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.” [R. 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. [R. pp. 261, 262]. Based on Plaintiffs’ Stipulation that they were not pursuing any window product defect claim, Petitioner entered into a separate Stipulation with the window manufacturer, MW Manufacturers, Inc., dismissing the manufacturer without prejudice from the litigation. [R. pp. 263-264]. However, Plaintiffs claims against Petitioner and Respondent for alleged deficiencies in window installation remained pending. As such, Petitioner’s cross-claims against Respondent 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 determined that

- (a) the flexible Fortiflash rough opening flashing at the windows had not been properly weather lapped outboard of the woven building wrap installed beneath the window sill; See R. pp. 352-354 (line 10 page 189 through line 11 page 190 and lines 6-19 page 195 of February 21, 2020 deposition transcript of Russell T. Mease);
- (b) the flexible Fortiflash material had not been installed to a sufficient depth within the window rough opening framing and the material did not appear to turn up the vertical leg of the jam, rendering the flashing ineffective; See R. pp. 355, 356 (line 23 page 186 through line 11 page 187 of February 21, 2020 deposition transcript of Russell T. Mease); 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 R. 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 R. 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 doesn't think it is necessary for guidance around that. [R. p. 360] (lines 11-19, page 166).

Notwithstanding the evidence in the record regarding Respondent's negligent window installation work, on August 27, 2020, Respondent filed a motion for partial summary judgment against the cross-claims of Petitioner. [R. pp. 265-267]. A hearing was held on the motion for partial summary judgment on October 1, 2020 before the Hon. Jennifer McCoy. [R. pp. 455-485]. On January 11, 2021, Judge McCoy issued a Form 4 Order granting Respondent partial summary judgment and requesting that Respondent's counsel submit a proposed order. [R. p. 1]. Respondent submitted a proposed order, and on January 22, 2021 Judge McCoy signed the Order which the trial court filed on January 25, 2021. [R. pp. 4-15]. Petitioner timely moved for reconsideration, but by a Form 4 Order dated February 16, 2021, the trial court denied Petitioner's motion. [R. pp. 16-18]. Petitioner 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. Petitioner'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. Petitioner 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. This petition for writ of certiorari follows.

Argument

I. Petitioner is not seeking indemnity for its own negligence, so the court of appeals erred by analyzing the contractual indemnity claim under such lens.

The revised Opinion opens with the court's recognition that Petitioner's claims against Respondent are premised upon Respondent's alleged negligence in the installation of the windows. See Opinion p. 1. The revised 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. Nonetheless, not two paragraphs later, the revised 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.'" The court's reasoning, and its conclusion, are flawed in several particulars. In the first instance, the court of appeals completely ignored the fact that Petitioner's contractual indemnity claim is premised only upon Respondent's negligence. See Opinion p. 1. Moreover, the court's conclusion conflicts with the fact that claims for defective window products were explicitly eliminated by Stipulation of Plaintiffs Pavic and by Stipulation of Petitioner. See R. pp. 260-264. Contrary to the court of appeals' errant reasoning, no defective window claims were made by Petitioner against Respondent. See R. p. 260; Opinion p. 1.

Moreover, the court's errant affirmation assumes without any supporting evidence in the record that the windows supplied by Petitioner 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 Petitioner's claims against Respondent for damages resulting only from Respondent's negligent acts or omissions in the installation of the windows.

The court of appeals was in error in its determination that Petitioner sought indemnity against damages 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 Petitioner or against any other entity to the action. The Court relied upon such erroneous determination in support of its equally erroneous determination that the assertion of such claims by Petitioner, and the contract provision upon which Petitioner relied, were violative of public policy and of the provisions of §32-2-10. Due to such error, and because the Court overlooked the fact that Petitioner's claims are premised only upon the alleged negligence of the Respondent in the installation of the windows, this Court must grant certiorari to correct the error to assure appropriate consideration of the Petitioner's claims.

II. The court of appeals failed to follow precedent when it erroneously applied the heightened "clear and unequivocal" standard to Petitioner's contractual indemnification claim seeking recovery of damages resulting from only Respondent's negligence.

A. In applying the heightened "clear and unequivocal" standard to Petitioner's claim seeking indemnity for Respondent's negligence, the court of appeals ran afoul of this Court's precedent.

Section 2 of the revised Opinion erroneously affirms the trial court's application of the "clear and unequivocal" standard from Concord & Cumberland because "the relevant provisions of the Agreement are not sufficiently clear and unequivocal to require Hurley to indemnify BFS for BFS's own negligence." As highlighted above, the opening paragraph of the revised Opinion correctly noted that no claims by the Plaintiffs had alleged defects in window products, and that Petitioner's claims are premised on Respondent's negligence in window installation. Because

Petitioner is not seeking to require Respondent to indemnify for Petitioner's own negligence, it was error for the court of appeals to affirm the trial court's application of the heightened "clear and unequivocal standard."

The revised Opinion is not consistent with South Carolina precedent which has 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 revised Opinion is also not consistent with South Carolina precedent which recognizes the basic rule that when a party seeks to be indemnified from its own negligent acts, 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. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). However, here, the court of appeals' opinion runs afoul of and directly contradicts these precedential cases, including Concord & Cumberland.

In Concord & Cumberland, Superior was a general contractor who hired Muhler as its subcontractor. When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to their contract. Superior claimed that the contractual provisions required Muhler to indemnify Superior, and that Superior's right to indemnity included not only damages occasioned by Muhler's negligence, but also liability for the

negligence of Superior itself. Id. at 645. Muhler countered that the contract did not require it to indemnify Superior for Superior's wrongdoing. 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. at 649. The court of appeals noted that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence (but notably not for Muhler's sole or concurrent negligence). Id.

Because the court 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 the language "*limited indemnification to damages resulting from the work Muhler performed.*" Concord & Cumberland at 645 (emphasis added). 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 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, not only did the Concord & Cumberland court recognize that Superior's claims for contractual indemnification 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, but the court then also separately analyzed the two types of claims: 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 – it then applied the analysis used with contracts generally (i.e., *not* the heightened standard), and under such analysis the court allowed Superior to recover for damages caused by its subcontractor (regardless of whether Muhler’s negligence was sole or concurrent).

The court of appeals in this case, under factual circumstances nearly identical to those presented in Concord & Cumberland, has nonetheless reached a diametrically opposed result. Rather than apply the heightened “clear and unequivocal” standard only to the portion of claims allegedly seeking recovery for Petitioner’s own negligence, the court applied the heightened standard to *every* contractual indemnity claim – including Petitioner’s claim to recover for the negligence of its subcontractors. Applying the heightened standard, the court then determined that Petitioner’s contractual indemnity claims failed as a matter of law, because the contractual provisions were not sufficiently clear and unequivocal to pass the heightened test. Such a broad application of the “clear and unequivocal” standard is contrary to established law, including the court’s own precedent. However, here, Petitioner’s contractual indemnity claim does not involve indemnity for its own negligence, so the court should have applied ordinary contract principles, not a heightened standard. By misapplying this standard, the court of appeals effectively imposed a burden on Petitioner that South Carolina law does not require under these facts. Moreover, the revised Opinion effectively rejects established and recognized precedent regarding indemnity claims such as Fed. Pac. Elec., Campbell, Ashley II, and Laurens Emergency Med. Specialists. Remarkably, nowhere did the court of appeals in this case attempt to distinguish its holding from that in Concord & Cumberland, and nowhere did the court criticize its previous analysis, its holding, or its results. By failing to do so, the revised Opinion disregards additional precedent regarding changing precedent. See Coleman v. Page's Est., 202 S.C. 486, 25 S.E.2d 559, 560

(1943)(A decision which is to overrule all former precedents and to establish a principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside.)

Unless the Supreme Court weighs in, the result is that the legal landscape will be filled with instability, unpredictability, and confusion regarding how to proceed in a situation where appellate courts are divided over whether or not a party may recover from its subcontractor in contractual indemnity for that subcontractor's negligence.

- B. The Supreme Court should take this case because the consequence of allowing the ruling of the court of appeals to stand will upend the entire construction industry in ways the court never intended.

The revised Opinion creates new and unprecedented law governing contractual relations between parties. Specifically, it unsettles established South Carolina law regarding the allocation of risk between contractors and their subcontractors, and it upends the recognized contractual requirements for indemnity provisions. In ignoring and abandoning precedential cases, such as Laurens, Ashley II, and Concord & Cumberland, the court of appeal's revised Opinion has effectively created new and harmful law that will cause turbulence to the relationships of parties far beyond this case; virtually every contract currently in effect in the industry is now subject to challenge and left potentially without support.¹

The contractual indemnity provision to which the court of appeals applied the heightened clear and unequivocal standard in this case are virtually identical to those provisions reviewed by

¹ See **South Carolina Ruling Has Major Implications on Indemnity Provisions and Collateral Estoppel**
<https://www.jdsupra.com/legalnews/south-carolina-ruling-has-major-9011993/>

the court of appeals in Concord & Cumberland, where the court found such provisions to be adequate to support the contractor's claim for indemnity against liability caused by the negligence of its subcontractor – these provisions were not subjected to the clear and unequivocal standard. Moreover, these provisions are based on provisions promulgated by the AIA. This means they are standard terms, and they are present in nearly *every single contract* used in the industry. Never before had a court required these provisions to withstand the heightened clear and unequivocal analysis in order for one party to recover from a second party for that second party's negligence; instead courts analyzed them under the rules governing contracts generally, and under that level of scrutiny, the indemnification provisions were found acceptable. Thus, year after year, they were incorporated into contracts and year after year, serve as the basis for a contractual indemnification claim.

Now, for the first time, the holding of the court of appeals will require that a party's entire contract must meet the clear and unequivocal standard in order for that party to recover in contractual indemnity *at all*. The court of appeals looked at this standard AIA indemnification language and, by this opinion, has already held that this language fails to meet the heightened standard. [Opinion p. 3]. While the revised Opinion stands, no contractor who used AIA language will be able to recover from any negligent subcontractor for that subcontractor's negligence. Contractors will be left to bear the financial burdens of the mistakes of others, and subcontractors who performed negligently will face no consequences. To emphasize the magnitude of the situation, Petitioner points out that the contract at issue to this litigation contains a version of this AIA language that dates back to 2012, which means that thirteen (13) years of construction work is implicated in this upheaval. See R. pp. 486-497.

Petitioner does not believe that the court of appeals intended to create new law or to upend an entire industry. It thus asks that the Supreme Court take this case to clarify (1) that Petitioner has preserved a claim for contractual indemnity for the negligence of Respondent; and (2) that this portion of the claim for contractual indemnity is subject only to the general rules of construction for contracts generally, and not to the heightened “clear and unequivocal” standard.

III. The manner in which the court of appeals indefensibly parsed the parties’ contract violated the long-established rules of contract interpretation memorialized in the precedential opinions of this Supreme Court.

The revised Opinion in Section 1 incorrectly states that “the terms of the Agreement 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.” The court of appeals argues in Footnote 3 that the relevant agreement violates 32-2-10 because in Section 3 of the Agreement, Respondent must guarantee “the Work against defects in design, workmanship, and materials;” and because Respondent did not provide the windows, the Agreement attempts to make Respondent liable for more than its scope of work. Again, the record is clear and even the court confirmed in the opening paragraphs of the revised Opinion that the parties dismissed any and all claims relating to purported deficiencies in the windows and the only remaining claims were for purported deficiencies in window installation. Moreover, the court has overlooked that “Work” is a defined term in the Agreement and its definition is limited to *materials provided or services performed by Respondent*. [R. p. 486].

"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)). "A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause." Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014) (quoting McGill, 381 S.C. at 185, 672 S.E.2d at 574). When a contract is unambiguous, a court must construe its provisions according to the terms the parties used and as understood in their plain and ordinary meaning. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

Despite the explicit prohibition against creating an ambiguity by pointing out a single sentence or clause, the court of appeals has done exactly that. It points to the unrelated 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 Petitioner, rather than the subcontractor, performed. 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*. [R. p. 486]. The opinion evidences that the court of appeals failed to give credit to the defined term "Work" as required under the contracts. The court of appeals' failure to do so directly contradicts this Court's precedent on honoring terms used by the parties in the contract. See Schulmeyer, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (explaining courts must interpret a contract "according to the terms the parties used"). When read with the proper definition, as the parties intended, the Warranty section no longer can be interpreted to require something illicit, and thus, the Warranty section can no longer be the basis of *any* the court's holdings listed above.

In addition to failing to acknowledge defined terms in the contract, the lower court and court of appeals reviewed terms and provisions of the contract which have absolutely no relevance whatsoever to the claims pending before the court. For example, the court focused on the warranty provisions of the contract despite the fact that there is no *warranty* claim before the court².

The court of appeals in picking and choosing select language from non-relevant provisions to create conflicting terms, directly contradicts this Court's precedent that a court may not review isolated portions of a contract or single sentences or clauses to create ambiguities. See McGill, 381 S.C. at 185, 672 S.E.2d at 574; Farr v. Duke Power Co., 265 S.C. 356, 218 S.E.2d 431 (1975); Williams v. Gov't Emps. Ins. Co. (GEICO), 409 S.C. 586, 595, 762 S.E.2d 705, 710 (2014). Because the court of appeal's opinion conflicts with this Court's precedent on basic rules of contract interpretation, this Court should grant certiorari.

Here, Respondent contracted with Petitioner to perform services which included and were limited to installation of windows and doors. Stated differently, Respondent did not contract to provide windows. Accordingly, there is no obligation by Respondent to guarantee against the window products themselves, nor against the design of the windows. The only guarantee Respondent made in the Pavic case relates to the workmanship Respondent performed in the installation of the windows. Therefore, the warranty provision and contractual indemnity claim remain well within the bounds of South Carolina public policy and statutory law.

Because Section 1 of the revised Opinion confirms that the court overlooked and/or misapprehended the plain language of the Agreement limiting the obligations of Respondent to only Work performed by Respondent, the relevant contract provisions do not violate South

² While Petitioner pled breach of warranty causes of action, Petitioner 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.

Carolina public policy or Section 32-2-10 and the Court must grant certiorari to correct the errors of the lower courts.

IV. The failure of the court of appeals to sever any problematic language in the contract conflicts with this Court's precedent regarding severance provisions and severability of contracts.

Section 4 of the revised Opinion states, “[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.” Section 4 of the revised 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. Nevertheless, Section 1 of the revised Opinion discusses the circuit court finding “ ‘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.’ ” However, as explained above in Section I of the Petition, this portion of Section 1 of the revised Opinion is incorrect as Petitioner’s indemnity claim is premised only on Respondent’s negligence in installing the windows and the parties dismissed any and all claims for defective window products. Moreover, as explained in Section I of the Petition, the court’s 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. As noted above, none of the foregoing provisions violate South Carolina law or public policy. Section 2 of the revised Opinion discusses the application of “the clear and unequivocal standard of Concord & Cumberland to the relevant language of the Agreement.” Section 2 of the revised Opinion

continues, “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 noted above in Section II of the Petition, Section 2 of the revised Opinion is incorrect as Petitioner is not seeking to have Respondent indemnify Petitioner for Petitioner’s own negligence. As the court notes in the opening section of the revised Opinion, Petitioner’s claim for indemnity is premised only on Respondent’s alleged negligence in installation of the windows. Because Section 4 of the revised Opinion relies upon incorrect positions taken by the court in Sections 1 and 2 of the revised Opinion, the Court must grant certiorari to reverse the revised Opinion’s affirmation of the trial court’s grant of partial summary judgment.

Contrary to the finding of the court of appeals, the contract, when the terms and provisions are given their proper, reasonable, and plain meaning, is not replete with illegal or unconscionable terms. As such there is no basis to support the court’s failure to sever, when the provisions in fact comply with relevant law. Petitioner is not asking any court to re-write the contracts; however, to the extent necessary, it is asking the Court to honor the intent of the parties and sever any provision that violates South Carolina law.

“Whether an illegal provision in an otherwise valid contract may be separated from the contract is a matter of intent of the parties” The Beach Company v. Twillman, Ltd., 351 S.C. 56, 64, 56 S.E.2d 63, 867 (Ct. App. 2002). 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 unenforceable language. Jane Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880-81 (Ct. App. 2020). Equally importantly, 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. Am. Nat. Bank of Winter Haven, Fla., v. Caldwell, 166 S.C. 194, 164 S.E. 613, 615 (1932).

The Agreement, at issue here, contains separate distinct sections relating to separate matters, including, respectively, *Section 1 Introduction*, *Section 2 Materials and Workmanship*, *Section 3 Warranty*, *Section 4 Insurance*, *Section 5 Indemnity*, *Section 6 Independent Subcontractor Status and Warranty to be Lawfully Entitled to Work in the United States of America*, *Section 7 Default and Damages*, *Section 8 Payment to Subcontractor*, and *Section 9 Miscellaneous*. [R. pp. 486-497]. Moreover, each section includes separately numbered sub-sections and or separate paragraphs and some of the sub-sections or separate paragraphs include separately numbered provisions or clauses. For example, Section 5 Indemnity, the section that provides for Petitioner's contractual indemnity claim, in addition to its first paragraph upon which Petitioner relies in support of its indemnity claim, is further characterized by three other separate paragraphs, each addressing separate and distinct circumstances under which an obligation to indemnify may arise between the parties. [R. pp. 491-492]. Each of the separate sections of the Agreement, and the distinct sub-sections or 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 contract also includes a severability provision that explicitly states

"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."

[R. p. 497].

In light of the format of the Agreement and the severability provision, there can be no dispute that the parties intended for any unenforceable language to be severed and the remainder of the contract be left intact and in effect. Moreover, the revised Opinion declining to honor the severance provision defies reason as certainly, no party to the contract intended that the contract be rendered wholly unenforceable, as all parties to the contract relied upon the contract for business purposes and their livelihood.

The revised Opinion directly contradicts this Court's precedent which acknowledges that for 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, 595-96, 910 S.E.2d 474, 477-78 (2024)(citing Pigot's Case, 77 ER 1177, 1179 (1614); United States v. Bradley, 35 U.S. 343 (1836)). Moreover, our courts perform severance even where the parties may not have intended such action to take place. Id.

Accordingly, this Court must grant certiorari to review and correct the errors of the court of appeals.

V. Whether a trial court's order on appeal is "final" for purposes of collateral estoppel or res judicata is a novel issue in South Carolina and a split issue in the Fourth Circuit; the South Carolina Supreme Court should hear this case to resolve the uncertainty and clarify the state of the law in South Carolina.

The issue of whether a trial court decision on appeal is sufficiently "final" for purposes of collateral estoppel is an issue of first impression in South Carolina. There are no cases on point. Even the cases cited by the parties herein have reached different conclusions, and the issue is split amongst states in the Fourth Circuit. *Compare* Arkansas Best Freight Sys., Inc. v. H.H. Moore, Jr. Trucking Co., 244 Va. 304, 307, 421 S.E.2d 197, 198 (1992) ("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.”) to Warwick Corp. v. Maryland Dep't of Transp., 573 F. Supp. 1011, 1014 (D. Md. 1983) ("Such a consequence would also be laughable. If a judgment was denied its *res judicata* effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation.")

The revised 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 Agreement was actually litigated and directly determined in a prior action (BFS v MI Windows) and the legality of the Agreement issue was essential to the judgment. The revised 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. Petitioner 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 Id. at 213. Consistent with what Petitioner 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. Camreta v. Greene, 563 U.S. 692, 709, 131 S. Ct. 2020, 2033, 179 L. Ed. 2d 1118 (2011).

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, Petitioner argued to the lower court that it was inappropriate to consider such judgment for purposes of collateral estoppel. Id. (“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.”).

Moreover, the court of appeals overlooked that no trial court has yet answered the question of whether Petitioner can recover, under the relevant indemnity provision of the respective contract, for the negligence of Respondent, regardless of whether Petitioner 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 Petitioner's claims purportedly seeking indemnity against Petitioner's negligence. No prior court has specifically addressed the issue – the specific claim Petitioner contends that it is seeking in litigation – of whether Petitioner may recover indemnity for Respondent's negligence in the window installation work performed by Respondent.

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. 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 Petitioner may recover under the relevant indemnity provision for Respondent's negligence* (whether sole or concurrent). This issue has not been ruled upon by a single court to date, and thus, it is not subject to collateral estoppel.

Because the issue is one of novel impression in South Carolina, because the judgment is pending appellate review, and because the issue in this matter has not been ruled upon by a single court to date, the Court should grant certiorari to provide clarity on finality and correct the lower court's application of collateral estoppel.

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

The revised Opinion confirms in Section 6 that the record includes testimony from Plaintiff's forensic engineer Russ Mease that the windows were improperly installed. O. p. 5. The revised Opinion does not hold that the engineer's testimony is not relevant or not admissible evidence. Instead, the revised Opinion points to other facts not at issue, and to facts that are absolutely disputed between the parties, and appears to weigh the court's facts to affirm the trial court's grant of partial summary judgment. Such action by the court of appeals is in disregard of the rules of civil procedure promulgated by this Court which provide that the evidence, when viewed in the light most favorable to Petitioner, creates a genuine issue of material fact precluding

summary judgment. See Rule 56, S.C.R.C.P. 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). Because the court of appeals has ignored the relevant admissible testimony of the Plaintiff's expert witness, the Court should grant certiorari to reverse the revised Opinion as there is clearly evidence to support Petitioner's claims and certainly a question of material fact to preclude summary judgment.

Further, the revised Opinion confirms that the court of appeals incorrectly concluded that Petitioner's instructions or inspections absolve Respondent of its independent duty to install the windows properly. To support this incorrect argument, the court of appeals included a footnote in the revised Opinion that states "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 violation of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.")). First, the court of appeals includes this footnote without any explanation and more importantly without any evidence in the record to support Respondent's assertion that the lower court and now court of appeals wholesale adopted. Moreover, the fact that Petitioner holds an unlimited general contractors license and Respondent does not, has no bearing on the fact that Respondent failed to install the windows as required by the building code and manufacturer installation instructions. Equally importantly, Petitioner too was an unlicensed contractor as it too was working under the license of the general contractor as no license by Petitioner was used for construction of the project.

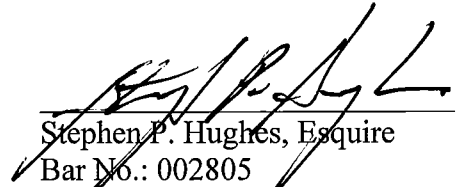
Further, as South Carolina courts have previously noted, the pertinent licensing statutes are intended to protect the public interest. See S.C.Code Ann. § 40–1–10(A)–(B) (2011); Teseniar v. Pro. Plastering & Stucco, Inc., 407 S.C. 83, 97, 754 S.E.2d 267, 274 (Ct. App. 2014). The purpose of protecting the public interest by denying enforceability of contracts does not exist when dealing with claims between contractors. Teseniar at 407 S.C. 97 (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, at the Pavic project, neither Petitioner nor Respondent was required to have a license under the applicable statutory chapter, and, thus, section 40–11–370(C) does not preclude Petitioner from bringing claims against Respondent, and the court of appeals’ footnote citation to Section 40-11-270(E) is misplaced and in error.

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

Conclusion

Because the revised Opinion of the court of appeals contradicts its own finding – that Petitioner’s claims are premised solely on Respondent’s negligence but then analyzes the claims as if they seek indemnity for Petitioner’s sole negligence – warrants the Supreme Court granting review. Moreover, the revised Opinion misapprehends statutory law, misapplies controlling precedent, dismisses genuine issues of material fact, and fails to honor settled contract principles.

As such, the Supreme Court should grant certiorari in this case and provide guidance to the courts, the parties, and the industry on the correct analysis of contract provisions and contractual indemnification claims.



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July 25, 2025

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2016-CP-10-03738
Appellate Case No. 2025-001496

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, ...Petitioner,
v.

MW Manufacturers, Inc.,.....Third-Party Defendant.

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

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By: *s/ Todd Russell Flippin*

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Spartanburg, South Carolina
September 24, 2025

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STATEMENT OF THE CASE

Plaintiffs filed suit on February 14, 2019, against the general contractor, Saussy Burbank, and other defendants alleging construction defects in their two-story residence in Mount Pleasant, South Carolina. Plaintiffs purchased the residence from the builder for \$649,900.00 in 2013. The Complaint was subsequently amended twice to name the correct defendants, including Builders FirstSource-Southeast Group, LLC ("BFS") and Hurley Services, LLC ("Hurley"). BFS sold windows and doors to Saussy Burbank and agreed to install them in Plaintiffs' residence. Hurley installed the windows and doors as a subcontractor to BFS, but Hurley provided no materials in connection with their installation. (R. pp. 102 & 522).

Plaintiffs filed a Third Amended Complaint on April 2, 2019, alleging claims of negligence, breach of warranty, and breach of habitability. (R. pp. 99-105). On April 19, 2019, BFS filed an amended answer to the Third Amended Complaint and reiterated its crossclaims against Hurley for equitable and contractual indemnity, negligence, breach of contract, and breach of warranty in connection with labor and materials. BFS also filed a Third-Party Complaint against the window manufacturer, MW Manufacturers, Inc., alleging claims for contractual and equitable indemnification, negligence, breach of express and implied warranties, contribution, and breach of contract in connection with the windows installed in the Pavic residence. (R. pp. 124-37).

After service of process on Hurley, Hurley answered both the Third Amended Complaint and the crossclaims of BFS. Both answers contained standard construction defects defenses. On July 29, 2019, MW Manufacturers, Inc. filed an amended answer to the Third-Party Complaint of BFS and asserted as a defense the class-action suit and settlement in *Gulbankian v. MW Manufacturers, Inc.*, C/A Nos. 1:10-cv-10392 and 3:12-cv-30122 (D. Mass. 2014). (R. pp. 138-48) (R. pp. 149-57) (R. pp. 158-203).

On October 31, 2019, Plaintiffs entered into a stipulation that they are not asserting claims for defective windows against any defendant in the litigation. (R. pp. 259-62). On January 28, 2020, BFS filed a dismissal without prejudice of its Third-Party Complaint against MW Manufacturers, Inc. under a tolling agreement. (R. pp. 263-64).

On August 5, 2020, Saussy Burbank filed an Amended Answer to Plaintiffs' Third Amended Complaint and crossclaims against BFS for negligence, contractual indemnification, and breach of express and implied warranties in connection with labor, materials, and products furnished by BFS in connection with the construction of Plaintiffs' residence. (R. pp. 205-223). On August 26, 2020, BFS answered the crossclaims of Saussy Burbank and reiterated its crossclaims against Hurley. (R. pp. 224-58). Hurley filed an answer to the BFS crossclaims on August 31, 2020.

On August 27, 2020, Hurley filed a motion for partial summary judgment as to all crossclaims of BFS except for equitable indemnity. (R. pp. 265-77). On September 17, 2020, Hurley filed an amended motion for partial summary judgment. (R. pp. 278-330). Respondent's amended motion for partial summary judgment was argued in the Circuit Court on October 1, 2020. On January 25, 2021, the Honorable Jennifer B. McCoy filed an Order granting partial summary judgment in favor of Hurley. (R. pp. 4-15). BFS filed a motion for reconsideration which was denied on February 16, 2021. (R. pp. 16-18). Appellant filed a Notice of Appeal on March 18, 2021.

Arguments for BFS' appeal were heard on December 5, 2023, by a three-judge panel of the Court of Appeals. The Court of Appeals affirmed the trial court's order in an unpublished opinion issued on March 12, 2025. BFS filed its Petition for Writ of Certiorari on July 25, 2025.

STANDARD OF REVIEW

This Court only reviews final decisions of the Court of Appeals “where there are special and important reasons” to do so. Rule 242(b), SCACR. Factors bearing on this Court’s consideration of whether it should exercise its discretionary authority to issue a writ of certiorari are: (1) whether there are novel questions of law; (2) whether there is a dissent in the decision of the Court of Appeals; (3) where the Court of Appeals’ decision is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; or (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR.

ARGUMENTS

I. The Court of Appeals Correctly Applied the Clear and Unequivocal Standard to the Contractual Indemnity Provisions Drafted by BFS Where its Pleadings Seek Indemnification for its Own Negligence.

Petitioner argues that the elevated clear and unequivocal standard enunciated in *Concord & Cumberland* does not apply in this case because it does not seek indemnity for its own negligence. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). BHG asserts that it is only seeking indemnification for loss or damage arising from Hurley’s negligence, whether that negligence is sole or concurrent. However, the Court of Appeals correctly applied the *Concord & Cumberland* standard and BFS’ arguments to the contrary rely on a fundamental misunderstanding: by seeking indemnification for Hurley’s concurrent negligence, BFS is necessarily pursuing recovery for its own negligence. Absent clear and unequivocal indemnification terms in the Master Subcontractor Agreement, such recovery is prohibited.

BFS asserts that under *Concord & Cumberland*, the heightened “clear and unequivocal” standard does not apply to the contract terms giving BFS the right to recover from a subcontractor for that subcontractor's own negligence, whether sole or concurrent. (Petition, pp. 8-9.) BFS’ argument belies a fundamental misunderstanding of the meaning of “concurrent negligence” in the context of claims for contractual indemnification. Under this circumstance, a subcontractor’s concurrent negligence is, and can only be, a tort combining with the contractor’s own concurrent negligence to proximately cause an indivisible injury to the plaintiff. Accordingly, BFS’ admission that it is seeking to recover damages attributable to Hurley’s concurrent negligence necessarily means that it seeks indemnification for BFS’ own concurrent negligence. As the court concluded in *Concord & Cumberland*, “the clear and unequivocal standard because the standard applies when an indemnitee seeks indemnification for its own concurrent negligence.” *Concord & Cumberland*, 424 S.C. at 649, 819 S.E.2d at 172.

Concurrent negligence describes the situation where the proximate cause of a third-party’s injury is the joint and concurrent negligence of the indemnitee and the indemnitor. *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707 (Tex. 1987) (setting aside the clear and unequivocal test in favor of the express negligence standard). “That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, ... to a liability which is both joint and several, is a proposition recognized and approved in this state....” *Bridge v. Orange Crush Bottlers*, 164 S.C. 351, 162 S.E. 325, 328 (1932). “[C]oncurring causes operate contemporaneously¹ to produce the injury, so that it would not have happened in

¹ This Court has recognized that two parties’ negligence may be concurrent even if it does not occur contemporaneously. “We can conceive of no logical reason why acts of negligence committed by two or more persons at different times and places may not follow their separate ways and finally meet and concur in producing an event which causes injury which gives to the injured one a single cause of action predicated upon the joint liability of those who set in motion the train

the absence of either.”” *J.T. Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (quoting *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972)); see 57A Am. Jur. 2d Negligence § 497 (“‘Concurrent negligence’ consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury.”).

The fundamental issue is the extent of the indemnity sought by Petitioner. The scope of that indemnity should not be limited to that described in Petitioner’s briefs and arguments. Instead, the true scope of the indemnification BFS sought must be discerned from the terms it carved into the MSA, as written and as a whole. Moreover, BFS obscures the issue by describing three scenarios under which BFS seeks recovery: for Hurley’s negligence, for BFS’ *sole* negligence, or for Hurley’s concurrent negligence (omitting to identify the concurrent tortfeasor). This matters because BFS is attempting to distinguish its broad indemnification terms from the central holding of *Concord & Cumberland*: that the clear and unequivocal standard applies where the indemnitee seeks contractual indemnification for the losses caused by the concurrent negligence of the indemnitee and the indemnitor. That is precisely the indemnification BFS seeks through its MSA.

BFS complains that it the Court of Appeals applied the heightened standard not only to BFS’ attempt to recover for its own negligence, but to “every contractual indemnity claim.” (Petition, p. 9). This is not the fault of reviewing courts. The plain language of the Master Subcontractor Agreement that insists on Hurley indemnifying BFS not only for Hurley’s sole

of acts of negligence which culminated in the injury.” *Bridge*, 164 S.C. 351, 162 S.E. at 328. In *Bridge*, the court examined whether a single cause of action against two defendants for a single injury was sustained by alleged conduct by the two at different times and different places. The appealing defendant argued that concurrent negligence required the two defendants “acted contemporaneously; that is, ‘co-operated’ at the same time and place and together produced the injury.” *Id.* This Court disagreed.

negligence, but also for the concurrent negligence attributable to both BFS and Hurley. It is beyond argument that a contractual indemnification term allowing the BFS to recover for Hurley's concurrent negligence (when that negligence is concurrent with BFS and not some other tortfeasor) is prohibited if the term does not meet the clear and unequivocal standard. For instance, in *Ethyl Corp.*, the Texas "court of appeals found the ... indemnity provision did not clearly and unequivocally require Daniel to indemnify Ethyl for Ethyl's own negligence or for the parties' concurrent negligence." *Ethyl Corp.*, 725 S.W.2d at 707 (emphasis supplied). Once again, BFS wants to ensure that it can recover from Hurley damages caused by the concurrent negligence of BFS and Hurley despite the Master Subcontractor Agreement's failure to meet *Concord & Cumberland's* heightened standard.

A. Plaintiffs' Stipulation with the Window Manufacturer Neither Alters Nor Cures the Unlawful Indemnification Terms in the Master Subcontractor Agreement.

Petitioner argues that affirming the circuit court's summary judgment order was error because the decision conflicts with the fact that "claims for defective window products were explicitly eliminated by Stipulation of Plaintiffs." (Petition, p. 5). The Stipulation between BFS and Plaintiffs, and the window manufacturer's subsequent dismissal, are simply not relevant to the issues before the Court of Appeals, which was whether the Master Subcontractor Agreement unlawfully imposed on Hurley an obligation to indemnify BFS for BFS' own negligence. Because it does not limit scope of indemnification the Master Subcontractor Agreement imposes on Hurley, Plaintiffs' Stipulation cannot cure these unlawful terms. As elaborated on below, the exhaustive indemnification terms in the Master Subcontractor Agreement require place Hurley on the hook for any and all damages attributable to any materials, including windows, installed by Hurley – whether those damages were caused by the defective product or by negligent installation.

As discussed by the Court of Appeals, Section 3 of the Master Subcontractor Agreement requires Hurley to indemnify BFS for the defective windows² sourced and supplied by BFS. As explained in its opinion, the phrase ““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 materials.” (Opinion, p. 3, fn. 3).

Firstly, the Stipulation binds only Plaintiffs and does not limit the claims BFS asserts against any other party or third-party defendant. Although it limits Plaintiffs’ claims against BFS, the terms of the Stipulation include no representations or promises by BFS.

That the plaintiffs, Dag Pavic and Stela Susac-Pavic 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 litigation, any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the windows installed at the subject residence, (identified herein as MW Series 800 Windows), and/or any component part of such windows, and/or in any MW installation instructions or requirements for those windows installed at the subject residence...

(R. p. 261). BFS is not bound by the Stipulation to refrain from seeking indemnification from Hurley for claims for damages relating to the installation of windows at Plaintiffs’ residence.

Moreover, the subsequent dismissal of the window manufacturer from the lawsuit was without prejudice to Plaintiffs’ ability to pursue claims in the future based on defects or deficiencies in the development, design, manufacture, production, sale and/or distribution of the windows. (R.

² Note that the Plaintiffs Stipulation is silent as to the doors, which were provided by BFS and installed by Hurley on the project. The Master Subcontractor Agreement requires Hurley to indemnify BFS for damages resulting from “defects in design, workmanship, and materials” for the doors despite Hurley’s limited scope of work. (R. pp. 489-90).

p. 261). Accordingly, BFS' contractual indemnification terms against Hurley are a contingent liability that could spring to life³ should this Court grant BFS' petition.

B. Petitioner's Pleadings Demonstrate that Its Claims for Indemnification Against Hurley Include Recovery for Losses Caused by BFS' Negligence.

The recovery BFS seeks is exclusively for losses caused by the alleged concurrent negligence of BFS and Hurley. This is evident on the basis of Petitioner's third-party claims in its Amended Answer to Crossclaims and Restated Claims against Hurley. (R. pp. 252-53). BFS' own duties to Plaintiffs to supply materials for installation by Hurley, and to supervise, inspect, and approve Hurley's work, mean that any injury to Plaintiff resulting from deficiencies related to Hurley's scope of work *per force* implicate the concurrent negligence of BFS. Because BFS was required to supervise and approve all of Hurley's activities at the building site, any negligence by Hurley would require BFS' own, concurrent negligence to cause injury to Plaintiffs.

Petitioner's pleadings take as a premise that Petitioner has committed no negligence and has no liability. In the world described in BFS' pleadings, BFS has committed no negligence, and could only be liable for the negligence of its subcontractor, Hurley. Thus, according to BFS' version of the story, Hurley would be liable to indemnify BFS for every expense, damage, or loss BFS suffered. Accordingly, BFS' pleadings assume that it did not, and could not, breach any duty owed to Plaintiffs. (R. pp. 252-53).

However, Petitioner's pleadings ignore the allegations against it contained in Defendant Saussy Burbank's Answer to Plaintiffs' Third Amended Complaint and Crossclaims and the undisputed facts that have been developed in this case. Defendant Saussy Burbank's alleges that

³ The order on appeal only granted Hurley partial summary judgment and dismissed BFS' causes of action for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity. (R. pp. 4-15). BFS' claim for equitable indemnity against Hurley remains.

BFS “provided labor and materials to the Project including, but not limited to, supply and installation of windows and doors and related components.” (R. p. 216). It is alleged that BFS was “negligent, grossly negligent, careless, and/or reckless and will have breached their duties of care in failing to provide labor, materials, products and services free from defects and otherwise in conformity with” applicable standards. (R. p. 219). BFS answered and asserted third-party claims against Hurley. (R. pp. 224-58).

That Hurley furnished no materials except for those given to it by BFS for installation has been known to BFS since the inception of this lawsuit. Nevertheless, BFS has asserted a third-party complaint and multiple crossclaims against Hurley alleging that Hurley provided and warranted materials, that Hurley had a duty of care in selecting materials, and that Hurley was contractually obligated for procuring adequate materials and services in connection with its work. (R. pp. 251-57). BFS pleadings clearly assert that Hurley is liable to BFS for any damages Plaintiffs attribute to BFS.

162. 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.
164. That ... **Hurley Services, LLC, ... 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 [Hurley Services, LLC] were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event [Hurley Services, LLC] has failed properly to execute its duties, which failure has allegedly caused the Plaintiffs’ damages.
167. **That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or**

representations of [Hurley Services, LLC], which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

168. That BFS is entitled to full contractual and common law indemnification from [Hurley Services, LLC], **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 [Hurley Services, LLC], 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 [Hurley Services, LLC] any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

(R. pp. 252-53).

It is obvious that BFS is trying to transfer to Hurley the risk associated with potential defective products which it selected and sold for use at the project. BFS alleges in substance that any deficiencies in materials are the responsibility of Hurley. Despite BFS' pleading to the contrary, BFS was responsible for Hurley's work on the project and the Master Subcontractor Agreement required Hurley to follow the directions of BFS. (R. pp. 486-87).

These unfounded claims of BFS against Hurley are not the result pleading errors, but represent a course of conduct which BFS has also employed in other cases. BFS relies upon the unconscionable and oppressive language hidden in the fine print of the Master Subcontractor Agreements to obtain indemnity for its sole or concurrent negligence.

C. BFS's Master Subcontractor Agreement Repeatedly Asserts BFS' Rights for Indemnification Against Hurley for Losses Caused by BFS' Own Negligence.

Hurley signed BFS' Master Subcontractor Agreement⁴ on May 14, 2012. (R. pp. 486-97). Buried in the fine print of **Section 3 Warranty** of the Master Subcontractor Agreement are

⁴ The Court of Appeals recently examined two versions of BFS' Master Subcontractor Agreement in *Builders FirstSource-Se. Grp., LLC v. Palmetto Trim & Renovation*, Op. No. 6099 (S.C. Ct. App. filed Feb. 12, 2025). The contract at issue in this appeal is one of the "Later

disguised indemnity provisions in favor of BFS relating to materials selected and sold by BFS.

That section reads as follows:

SECTION 3. Warranty.

[I]n 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** ... 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, materials, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners ... and personal injury damages to persons residing at or visiting the properties** into which the Work is incorporated

(R. pp. 489-90) (emphasis added).

The language in Section 3 Warranty that “subcontractor guarantees the work against defects in design... and materials” only makes sense if the word “design” refers to manufactured materials provided by BFS. Hurley had no responsibility for the design of the project or any of its components. Hurley’s work was limited to installation of windows, and doors on the residence.

In addition, Section 3 requires Hurley to give a guarantee and indemnity for ten years on any “structural applications.” (R. p. 489). The only structural applications are the windows and

Contracts” as described by the Court of Appeals. BHG has petitioned for writ of certiorari to review that decision.

doors which BFS selected and provided to Hurley for installation. This provision requires Hurley indemnify BFS for its sole negligence in selecting and selling the applicable windows. Section 3 also exposes Hurley to liability and indemnity claims arising from property damage and personal injury relating to defects of design and materials.

BFS argued on appeal that the warranty and indemnity provisions under Section 3 do not apply because under Section 1 of the Agreement, the “Work” is defined as materials and/or services provided by Hurley. Section 1 reads as follows:

SECTION 1. Introduction.

- a. **Work.** “[T]his Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the “**Work**”) from time to time for Contractor on any project (the “**Project**”) ...

However, Section 2 of the Master Subcontractor Agreement expands the definition of work as follows:

SECTION 2. Materials and Workmanship.

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

- c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, **protect all of its labor, materials (regardless of who supplied such materials),** supplies, tools, and equipment ... against any damage, injury, destruction, theft, or loss.”

(R. p. 487) (emphasis supplied).

BFS argues that the Court of Appeals erroneously “reviewed terms and provisions of the contract which have absolutely no relevance to the claims pending before the court” (Petition, p.

14). The interpretation BFS now places on Sections 1, 2, and 3 does not explain why BFS asserted crossclaims for materials against Hurley when Hurley furnished no materials. It is obvious from its pleadings that BFS has interpreted Sections 1, 2, and 3 to mean that the Work includes materials supplied by BFS so that it can assert indemnification claims against its subcontractors for the materials it selects and sells for use at the project. Parties are bound by their pleadings and are precluded from advancing arguments contrary to those assertions. *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015).

Additional evidence of the interpretation BFS places on these contract provisions is found in Section 8(i), which provides, in pertinent part, for indemnification of BFS for “[a]ttorney’s 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” (R. p. 496) (emphasis supplied). BFS is, however, the supplier of materials for Hurley to install at the project. If BFS were to file a mechanic’s lien, and if it suffered an adverse judgment for costs and attorney’s fees under S.C. Code Ann. § 29-5-10, *et seq.* as a result of supplying and selling defective products, it could seek indemnification for these attorney’s fees and costs from its subcontractors, even though BFS would be 100% at fault. Section 8(i) is in conflict with Section 5, paragraph 1, where indemnity for costs and attorney’s fees are only triggered upon the negligence of the subcontractor. (R. pp. 491, 496).

In asserting its contractual indemnity claims against Hurley, BFS relies primarily upon Section 5 Indemnity, paragraph 1. (R. p. 491). The Court of Appeals correctly applied the standard in *Concord & Cumberland*, 424 S.C. at 645, 819 S.E.2d at 170, in holding that BFS could not recover against Hurley for its own negligence under the language of that paragraph.

BFS contends, however, that dicta in *Concord & Cumberland* regarding the liability of the subcontractor Muller permits BFS to recover from Hurley to the extent of its own negligence. *Concord & Cumberland*, 424 S.C. at 652-653, 819 S.E.2d at 173-174. As argued above, that case requires courts apply the elevated clear and unequivocal standard when an indemnitee seeks indemnification for its own concurrent negligence. Moreover, the facts in *Concord & Cumberland* are distinguishable from those currently before the Court. Here, there are multiple conflicting, deceptive, unconscionable, and oppressive indemnity provisions which were not before the court in *Concord & Cumberland* but would necessarily have altered the outcome in that case.

Although BFS selects Section 5 Indemnity, paragraph 1, as the controlling paragraph for indemnification of BFS, a contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. *Williams v. Gov't Emps. Ins. Co.*, 409 S.C. 586, 762 S.E.2d 705, 710 (2014). The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, "from the four corners of the instrument" alone. *McPherson v. J.E. Serrine & Co.*, 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945).

Section 5, paragraph 1 clearly conflicts with the language of Sections 1, 2, 3, and 8(i) which provide for indemnification of BFS for its sole negligence in selecting and selling building supplies. It is undisputed that Hurley furnished no materials to the project except those given to it by BFS.

Section 5, paragraphs 1 and 2 are also in conflict. Paragraph 1 deals with both personal injury and property damage claims whereas paragraph 2 only deals with personal injury claims. Paragraph 1 only allows indemnification based upon the negligence of the subcontractor. Paragraph 2 allows indemnification even if BFS is solely negligent. Even though this is not a

personal injury action, paragraph 2 is relevant because it demonstrates how BFS has intentionally drafted the Master Subcontractor Agreement in a conflicting, confusing and deceptive manner in furtherance of its own purposes. These paragraphs drafted by BFS should be read together and strictly construed against BFS. Because the Court of Appeals applied the correct level of scrutiny to these terms, this Petition should be denied.

Section 5, paragraph 3, is a disguised indemnity provision for defense costs in favor of BFS even if BFS is solely at fault. (R. p. 492). It conflicts with Section 5, paragraph 1, where attorneys' fees and costs are payable only upon the fault of the subcontractor. BFS has argued that attorneys' fees do not fall within the scope of an indemnity clause because they are not paid by the first party to the second party for loss or damage the second party incurs to the third party. However, BFS elected to include this paragraph in the bold print Section 5 Indemnity section of the contract. Paragraph 3 is in effect an indemnity provision for attorney's fees and defense costs. There is nothing in South Carolina law that separates a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of contractual indemnification.

All of these conflicting paragraphs were drafted by BFS, and any uncertainty as to the meaning of the terms should be resolved against BFS. *Springs & Davenport, Inc. v. AAG, Inc.*, 385 S.C. 320, 683 S.E.2d 814, 817 (Ct. App. 2009). The court below correctly concluded that the conflicting, ambiguous, and deceptive language drafted by BFS fails to meet the clear and convincing standard for contractual indemnity.

II. The Contractual Indemnity Provisions Drafted by BFS Violate S.C. Code Ann. § 32-2-10 by Requiring Hurley to Indemnify BFS for Losses Arising from its Sole Negligence.

South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10, provides, in pertinent part, that:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, ... purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately **caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable ...** (emphasis added).

An analysis of the pleadings and the Master Subcontractor Agreements drafted by BFS, as well as the undisputed facts of the case, demonstrate that BFS is seeking indemnification for its own negligence, whether sole or concurrent, in violation of S.C. Code Ann. § 32-2-10. Actions speak louder than words. BFS has asserted numerous crossclaims against Hurley seeking indemnity for materials when it is undisputed that Hurley provided no materials. All materials were furnished by BFS including windows, which are alleged by Plaintiffs to be defective. Hurley had no role in the selection and sale of these products, and despite its denial, BFS is seeking indemnity for its own negligence under the terms of the Master Subcontractor Agreement it drafted.

On appeal, BFS cited *D.R. Horton v. Builders FirstSource – SE Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) as authority for the proposition that the language of Section 5, paragraph 1, does not violate S.C. Code Ann. § 32-2-10. (Final Brief of Appl. p. 9). However, the

holding in that case is not quite what BFS cites it for.⁵ The court held that D.R. Horton could not obtain indemnification from its subcontractor, BFS, for D.R. Horton's own negligence.

Under Section 5, paragraph 3, Hurley's duty to defend arises out of a suit against BFS, without regard to whether BFS is solely at fault for claims alleged. Thus, because the Master Subcontractor Agreement purports to indemnify BFS for the indemnitee's sole negligence, it is an illegal contract under § 32-2-10 and "[a]n illegal contract is unenforceable." *D.R. Horton, Inc*, 422 S.C. at 152.

The conflicting, confusing, oppressive, and deceptive language of the Master Subcontractor Agreement drafted by BFS has been discussed elsewhere in this brief. These provisions should be strictly construed against BFS. *Springs & Davenport, Inc.*, 683 S.E.2d at 817, and they clearly show that BFS is seeking indemnification for its own negligence.

The Master Subcontractor Agreements drawn by BFS are sophisticated documents. Each word was drafted with much thought and care in an effort to transfer all risk from BFS to its subcontractors. To economize its efforts at transferring risk, BFS created a one-size-fits-all agreement that all subcontractors were obligated to sign or forego access to BFS's considerable market share. Counsel for BFS argued that the Master Subcontractor Agreement was "designed to encompass those circumstances where the Sub does in fact provide some materials." (R. p. 476). That agreement imposed the same indemnification and warranty terms on labor-only subs and material providers alike.

⁵ There is dicta in the case which opines that a portion of the indemnity agreement obligating BFS to indemnify D.R. Horton for D.R. Horton's own negligence did not violate public policy. *D.R. Horton*, 422 S.C. 144, 810 S.E.2d at 45. The opinion of the court was based upon an unusual and deficient arbitration award which made no findings of fact or conclusions of law. There is no evidence in that case that the arbitrator or the court considered conflicting, deceptive, and oppressive indemnity provisions which are similar to those present in BFS' Master Subcontractor Agreement.

It is hard to imagine language that would more blatantly violate South Carolina law. Once the at-issue agreement is determined to violate § 32-2-10, the plain language of the statute provides that the “agreement ... is unenforceable.” There is no provision whereby an indemnity agreement that runs afoul of the statute can be saved. The Court of Appeals correctly read the deceptive language and conflicting provisions together and properly concluded that they collectively violated § 32-2-10. The Master Subcontractor Agreement “obligate[s] 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.” (Opinion, p. 3).

III. The Master Subcontractor Agreement Drafted by BFS is a Contract of Adhesion, Which is Unconscionable and Oppressive.

The Court of Appeals correctly relied on *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27, 644 S.E.2d 663, 669 (2007) to conclude that this “standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable” was a contract of adhesion. (Opinion, p. 4). In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-side contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004); *Doe*, 430 S.C. at 612, 846 S.E.2d at 879.

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process. *Simpson*, 644 S.E.2d at 669. Among the factors considered by the court in determining whether a contract was tainted by an absence of meaningful choice are the nature of the injuries suffered by plaintiff; whether the plaintiff is a substantial

business concern; the relative disparity in the party's bargaining power; the party's relative sophistication; whether there is an element of surprise in the inclusion of the challenged language; and the conspicuousness of the clause. *Simpson*, 644 S.E.2d at 669; *Doe v. TCSC, LLC*, 430 S.C. 602, 606, 846 S.E.2d 874, 879 (Ct. App. 2020).

Hurley was a local subcontractor in the Charleston area which installed products for BFS. BFS is the regional division of Builders FirstSource as appears from its name on the contract. The parent of BFS is one of the largest building supply companies in the United States. The fact that Hurley was paid only \$867.00 for installing windows and doors on the single-family residence reflects its lack of bargaining power. (R. p. 524).

The contract provisions are also deceptive. Contract provisions result in unfair surprise when the real meaning of the terms are intentionally obscured by one of the parties. The master contract was carefully drafted by BFS in a way which would obligate its subcontractors to warrant the design and suitability of products provided by BFS, and further, for subcontractors to indemnify and defend BFS and others from any property damage or personal injury resulting from those products.

The deceptive nature of the definitional, warranty, guaranty, and indemnity provisions contained in Sections 1, 2, 3, 5 and 8 of the agreement have been discussed in detail elsewhere in this brief. It should be noted, however, that the disguised indemnity provisions in Section 3 Warranty were buried in fine print unlike the bold type found in Section 5 Indemnity.

In finding contract provisions unconscionable in *Simpson*, the court observed, in pertinent part, as follows:

“[W]hile certain phrases within other provisions of additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) ... We cannot, under the circumstances, ignore the

inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law ...”

Simpson, 644 S.E.2d at 670.

In addition, although Hurley provided no material in connection with the installation of windows, doors, and Tyvek, the fine print language of Section 3 Warranty obligates Hurley for “defects in design, workmanship and materials” and “structural applications” which obviously relates to manufactured products selected and sold by BFS. Hurley was not involved in the design of any of the manufactured materials or any portion of the project. These provisions expose Hurley to liability for property damage and personal injury claims arising from deficient materials selected and sold by BFS.

Thus, it is clear that a disparity in bargaining power and the intentional use of deceptive language buried in the fine print of the agreement deprives Hurley of a meaningful choice in the execution of the agreement. It is equally clear that the Master Subcontractor Agreement drafted by BFS is an adhesion contract which is drawn to the fullest extent possible in favor of BFS. BFS has expansive rights and remedies under the agreement it drafted. In contrast, most of the rights and remedies of Hurley are limited or waived. Most paragraphs of the agreement create obligations and liabilities for Hurley or a waiver or limitation of Hurley’s rights. For instance, Section 8(i) Hurley waives, releases, and forever discharges ... [BFS] ... from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities” that Hurley may have against BFS. (R. p. 496).

The agreement drafted by BFS attempts to transfer all risks associated with the project to its subcontractors, including risks associated with the products and components furnished by BFS.

The best evidence of this is the fact that BFS has filed multiple crossclaims against Hurley alleging product deficiencies when BFS alone supplied materials for construction at the project.

Under general principles of state law, an adhesion contract is a standard form contract offered on a “take it or leave it basis” with terms that are non-negotiable. *Munoz v. Greentree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Although adhesion contracts are not per se unconscionable, the cumulative effect of these oppressive and one-sided provisions can cross a line which makes the contract unconscionable. *Simpson*, 644 S.E.2d at 674.

Examples of the oppressive and unconscionable nature of BFS’ Master Subcontractor Agreement are as follows:

1. In Section 1(a), limitation of Hurley’s remedies in the event of a change order which increases costs.
2. In Sections 1(a) and 2(c), deceptive language defining the “work”.
3. In Section 2(c), Hurley assumes risk of loss to the work.
4. In Section 2(d)(2)(C), indemnity of BFS in connection with environmental regulations.
5. In Section 2(d)(4), liquidated damages against Hurley for delay at \$200 per hour for a minimum of 10-hour day until project can be resumed.
6. In Section 3, fine print indemnity of BFS for its own products and negligence.
7. In Section 3, unfavorable warranty, guaranty, and indemnity provisions relating to products selected and sold by BFS.
8. In Section 4, waiver of subrogation rights and release of all claims in favor of BFS.
9. In Section 5, indemnification and defense of BFS for its own negligence.
10. In Sections 6 and 7(b)(2), misleading provisions regarding BFS’s right to direct and control work.
11. In Section 7(a), numerous events of default by subcontractor without any corresponding events of default on the part of BFS.

12. In Section 7(b)(1), waiver of claims and damages for delay in favor of BFS.
13. In Section 7(b)(2), liability of Hurley to BFS upon termination for all costs and damages of BFS plus 25% of all costs and damages of BFS.
14. In Section 7(c), fine print indemnity, defense, and hold harmless provisions in favor of BFS.
15. In Section 8(a), no obligation of BFS to pay Hurley until BFS receives payment from owner. If owner does not pay BFS, BFS does not pay and Hurley assumes risk of non-payment.
16. In Section 8(f), unreasonable conditions for obtaining final payment, including furnishing “as-built drawings” in Section 8(f)(3).
17. In Section 8(i), indemnification of BFS for liens and judgments including judgments arising from materials supplied by BFS.
18. In Section 8(i), waiver of rights against BFS.
19. In Section 9(e), Hurley waives the right to file a lien for its work.
20. In Section 9(f), buried fine print severability clause.
21. In Section 10(f), waiver of right to file any demand, claim, suit or cause of action against BHG.

(R. pp. 486-97).

This Court is well aware that sophistication is another form of bargaining power. *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). The high degree of sophistication of BFS is obvious in the language of the aforementioned contract terms. BFS has taken advantage of any asymmetry in sophistication to include provisions that are either concealed in fine print or that its subcontractors are unlikely to fully appreciate.

It is simply inconceivable that a party who understood the implications of the language of these agreements would sign them unless there were a total absence of a meaningful choice on the part of the subcontractor. The combination of an absence of a meaningful choice on the part of

Hurley, deceptive language, disparity in bargaining power and one-sided provisions in the adhesion contract drafted by BFS renders the warranty/indemnification provisions in **Section 3 Warranty** and the indemnity/duty to defend paragraphs in **Section 5 Indemnity** unconscionable and unenforceable. South Carolina courts will not enforce a contract which is violative of public policy or statutory law. *Carolina Care Plan, Inc.*, 361 S.C. 544, 606 S.E.2d 752; *D.R. Horton, Inc.*, 422 S.C. 144, 810 S.E.2d 41.

IV. The Court of Appeals Correctly Ruled That There Are So Many Unenforceable Clauses Throughout the Master Subcontractor Agreement that They Cannot Be Effectively Severed.

Petitioner argues that the court below erred in failing to enforce the severability clause in the Master Subcontractor Agreement because it failed to appreciate the stipulation regarding the defective windows. (Petition, p. 15). The Court of Appeals was correct in concluding that the “Agreement’s indemnity provisions are replete with terms that violate South Carolina law and public policy, these terms cannot be appropriately severed.” Opinion, p. 5).

BFS argues that the Master Subcontractor Agreement “contains separate distinct sections relating to separate matters” under “separately numbered subsections and or separate paragraphs.” (Petition, p. 17). It is undisputable that BFS’ Agreement includes dozens of paragraphs designed to shift all risk to the subcontractor in every conceivable scenario.

Petitioner argues that the lower court was obligated to sever unlawful terms because of the existence of a severability clause in the contract of adhesion BFS drafted. (Petition, pp. 17-18). To the contrary, our courts have refused to sever oppressive contractual provisions when the sheer magnitude of unconscionability as is reflected in the BFS Master Subcontractor Agreement permeates the entire contract. *Simpson*, 373 S.C. at 644 S.E.2d at 673-674; *Smith*, 403 S.C. at 16, 742 S.E.2d at 41. BFS relies on *Doe v. TCSC, LLC*, 430 S.C. at 615, 846 S.E.2d at 880-81, for the

proposition that the presence of a severability clause in the agreement is strong evidence of the intent of the parties to sever unenforceable language. However, the court in *Doe* did not discuss whether the severability clause in the agreement was conspicuous. Here, the severability clause upon which BFS places so much reliance is buried in fine print on page 12 of the contract.

SECTION 9. Miscellaneous.

f. Other. This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. **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.

(R. p. 497) (emphasis added).

Our courts have refused to enforce contractual provisions inconspicuously buried in the fine print which were drafted by the superior party and which function to contract away impair the legal rights of the less sophisticated party. *See Simpson*, 644 S.E.2d at 670; *see also Doe*, 846 S.E.2d at 879.

V. The Contractual Indemnity Claims of BFS are Barred by the Doctrine of Collateral Estoppel.

In its petition, BFS argues that in South Carolina whether a trial court order that is the subject of a pending appeal is sufficiently "final" for purposes of collateral estoppel is an issue of first impression.⁶ In hopes of suggesting a conflict among this State's courts, BFS cites opinions from Maryland and Virginia. Even if this Court has not previously decided the issue, there are no "special and important reasons" to do so now. Rule 242(b), SCACR. Moreover, the trial court's application of collateral estoppel was cumulative to its holding, on the record then before it, that the Master Subcontractor Agreement failed to meet *Concord's* clear and unequivocal standard and violated the Anti-Indemnification Statute, among other things. (R. pp. 4-15). Thus, granting BFS' petition on this issue would not alter the effect of the Court of Appeals' final opinion.

In its order granting summary judgment in favor of Hurley on the collateral estoppel issue, the lower court took judicial notice of two Circuit Court orders which have interpreted the contractual indemnity language found in Section 5, paragraph 1, of the Master Subcontractor Agreement. *See* Order of the Honorable Roger M. Young, Sr. in *Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC*, C/A No. 2016-CP-10-3455, and Amended Order of the Honorable Clifton Newman in *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al.*, C/A No. 2018-CP-08-2547. (R. pp. 19-29 & 30-34).

⁶ On appeal, BFS argued that these orders involved different issues of fact or law insofar as the issues decided in those cases were whether BFS could recover from its subcontractor for its own negligence whereas the issue in this case is whether Petitioner may recover from Hurley for Hurley's sole negligence. (Final Brief of Appl. pp. 21-22). However, BFS did not preserve this argument for appeal. In its opposition to Hurley's summary judgment motion, BFS argued only that the orders of were not final and did not raise the issue of the commonality of fact or law. (R. pp. 341-42).

The Court of Appeals affirmed the trial court finding that issue preclusion doctrine bars BFS from attempting to challenge effect of the orders. “As we held in *Palmetto Trim and Renovation*, the ‘prior findings have preclusive effect unless and until those dispositive findings are reversed.’” Op. No. 6099, at 34-35 (finding the circuit court properly applied collateral estoppel despite pending appeal in *MI Windows & Doors* and explaining rationale for deeming cases on appeal to be final judgments for collateral estoppel purposes). (Opinion, p. 3). The Court of Appeals’ conclusion on this issue is supported by well-settled law that the pendency of an appeal has no effect on the finality of a trial court’s judgment and poses no barrier to applying collateral estoppel. *See Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) (finding the finality of a court’s judgment is not lost because appeal is pending). The contractual indemnity terms drafted by BFS were extensively litigated and directly addressed in the prior orders, and collateral estoppel should apply. *First Union Nat’l Bank v. Hitman, Inc.*, 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991) (finding that a final judgment is one that finally determines the rights of the parties). Moreover, Rule 201(a), SCACR provides that an “appeal may be taken, as provided by law, from any final judgment or appealable order.” As the Court of Appeals concluded that despite a pending appeal, an “unreversed judgment has preclusive effect.” (Opinion, p. 5). The fact that BFS appealed from the orders in *MI Windows & Doors* and *Six Fifty-Six Owners’ Association* speaks to their finality.

CONCLUSION

The Court of Appeals’ opinion is fully supported by the Record on Appeal and controlling legal authorities. Therefore, for all the reasons stated above, this Petition for a Writ of Certiorari should be denied.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Oct 07 2025

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

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REPLY

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

I. BFS claims are contingent claims based on Plaintiffs’ allegations of “defective/improper installation of windows and related flashing.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

167. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of [Hurley], which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

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

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

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

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

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

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

[R. p. 491].

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

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

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

Next, Hurley argues that "[u]nder Section 5, paragraph 3, Hurley's duty to defend arises out of a suit against BFS, without regard to whether BFS is solely at fault for the claims alleged." Return p. 17. However, the third paragraph of Section 5 Indemnity governs the subcontractor's duty to defend an indemnified party against an indemnified claim. [R. p. 492]. The contractual right to tender defense of an indemnified claim made against an indemnified party under the first paragraph or the second paragraph or to bring a claim for defense expenses incurred against such an indemnified claim – even a right that is not contingent on a finding of fault¹ – does not change the fact that BFS has valid contractual indemnity claims for any judgment(s) that may ultimately be entered against it arising out of the negligent work of Hurley, and that these claims are supported by (and not, as Hurley argues, inconsistent with) the respective contract terms and provisions.

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

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

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

Hurley argues that BFS cannot recover in contractual indemnity for the concurrent negligence of Hurley unless the language of the contract satisfies the heightened “clear and unequivocal” standard. Return p. 6. An analysis of concurrent versus sole negligence was never done before either the trial court or the court of appeals, and thus is arguably inappropriate here. Moreover, at this stage BFS’s pleading controls BFS’s claims and the pleading alleges that any damages will be the result of the negligence of Hurley²; nevertheless, BFS would be able to recover for the negligence of Hurley, whether sole or concurrent. Concord & Cumberland explicitly found only that the heightened clear and unequivocal standard “applies whether [a contractor], i.e. the indemnitee, sought indemnification for its own sole or concurrent negligence.” Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct. App. 2018). Despite Hurley’s representation, the South Carolina Court of Appeals did not go so far as the Texas Court in Ethyl Corp., and it *did not* subject recovery for losses arising from the concurrent negligence of the subcontractor to the heightened clear and unequivocal standard – in fact, Concord & Cumberland affirmed a trial court order that allowed recovery for the concurrent negligence of the subcontractor despite the language of the contract’s failure to meet the clear and unequivocal standard. Concord & Cumberland, 424 S.C. at 645. The Concord & Cumberland courts limited indemnification to the subcontractor’s negligence, whether sole or concurrent. Id. This is the same relief BFS seeks in this case.

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

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

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

V. Hurley’s Smoke and Mirrors Act.

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

a. Hurley’s scope of work.

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

seeking information pertaining to the scope of work performed by Hurley at the Pavic residence.

However, in responding thereto, BFS noted

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

R. p. 522. (emphasis added).

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

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

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

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

b. Plaintiffs stipulated no window claims.

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

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

c. There are no door claims.

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

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

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

e. This case does not involve mechanics liens.

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

f. Hurley's kitchen sink.

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

1. Section 1. a. Work.

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

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

R. p. 486.

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

2. 2(c) Protection of Work

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

Under 2(c), Hurley agrees to “protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss.” R. p. 487. If, as in Pavic, Hurley agrees to perform the service of installation of windows, once Hurley takes possession of or begins to install the windows, it is responsible for protecting the windows from damage until they are installed in a good and workmanlike manner. For Hurley to contend that it somehow is not responsible for insuring that the windows are free from damage during its installation flies in the face of reason. Regardless, the windows themselves are not at issue in this litigation, so this is another example of the smoke and mirrors act of Hurley.

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

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

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

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

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

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

4. Section 3 Warranty

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

5. Severability provision

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

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

CONCLUSION

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

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

RECEIVED

Jul 28 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2019-CP-10-00772
Appellate Case No. 2021-000290

Dag Pavic and Stela Susac-Pavic.....Plaintiffs,
v.

Carolina Cottage Homes, LLC d/b/a Saussy Burbank; SB Holding, LLC d/b/a
Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services,
LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services, LLC; Simons
Contractors, LLC and Cohen's Drywall Company, Inc.,.....Defendants,

of which Hurley Services, LLC is the Respondent

AND

Builders FirstSource-Southeast Group, LLC, ...Appellant,
v.

MW Manufacturers, Inc.,.....Third Party Defendant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court erroneously apply South Carolina Code Section 32-2-10 to the parties' contract?
- II. Did the Trial Court mischaracterize the relief sought by Appellant and thus mistakenly apply the clear and unequivocal standard articulated by Concord and Cumberland to the relevant contractual language?
- III. Did the Trial Court err in failing to address the severability provision of the contract?
- IV. Did the Trial Court err in finding, despite a complete lack of evidence, that the parties' contract was one of adhesion?
- V. Did the Trial Court erroneously determine that the doctrine of collateral estoppel bars Appellant's claims for indemnity in the present case?
- VI. Did the Trial Court inappropriately grant summary judgment to Respondents despite the presence of genuine issues of material fact?

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, which was completed in 2013. By their First Amended Complaint, filed February 28, 2019, Plaintiffs alleged against Appellant "defective/improper installation of windows and related flashing" during original construction. **R. p. 69.** Appellant then filed crossclaims against its subcontractor, Hurley Services, LLC, which was responsible for the window installation. The BFS crossclaims, alleging breach of contract, breach of implied and express warranties, negligence, contractual indemnity, and equitable indemnity, were premised upon Respondent's alleged negligence in the installation of the windows. **R. pp. 91-97.** Appellant later also filed third-party claims against the window manufacturer, MW Manufacturers Inc. **R. pp. 130-136.**

On October 31, 2019, Plaintiffs and Appellant entered into a stipulation by which the Plaintiffs agreed 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 litigation, any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the windows installed at the subject residence, (identified herein as MW Series 800 Windows), and/or any component part of such windows, and/or in any MW installation instructions or requirements for those windows installed at the subject residence" **R. p. 261.** Likewise, the stipulation provided that the Plaintiffs were not seeking

recovery against any defendant or third party defendant in connection with such claims.

Based on Plaintiffs' stipulation that they were not alleging any window manufacturing defect, Appellant entered into a separate stipulation with the window manufacturer, MW Manufacturers, Inc., dismissing the manufacturer without prejudice from the litigation. **R. p. 263.** However, Appellant's crossclaims against Respondent remained.

On August 27, 2020, Respondent Hurley Services filed a motion for summary judgment against the crossclaims of Appellant. A hearing was held on the motion for summary judgment on October 1, 2020 before the Hon. Jennifer McCoy. On January 11, 2021, Judge McCoy issued a Form 4 Order granting partial summary judgment and requesting that counsel submit a proposed order. Concerned by the procedural complications of two separate orders, counsel for Appellant submitted correspondence to the Court requesting confirmation "that the Court will issue a subsequent Order comprehensively setting forth the findings of fact and conclusions of law, [. . .] that the issuance of the subsequent Order will serve as the Court's final dispositive Order, and that the date of the dispositive Order will serve as the date for commencement of any post-judgment procedures for the parties." **R. pp. 513-14.** The Court confirmed all of the above. **R. p. 515.** Respondents submitted a proposed order, and on January 22, 2021 Judge McCoy adopted it wholesale (filed January 25, 2021). Appellant timely moved for reconsideration, but by a Form 4 Order dated February 16,

2021, the Court denied Appellant's motion. Appellant filed a Notice of Appeal on March 18, 2021.

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), SCRPC, 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, "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).

ARGUMENTS

Essential to understanding the issues on appeal is an understanding of the underlying contract that is the source of the claims at issue in this litigation; thus, in accordance with Appellate Rule 208(b)(1)(E), Appellant provides for the Court's benefit this separate statement of facts surrounding the Contract.

Respondent has been a subcontractor of Appellant for some time. The Master Subcontract Agreement ("Contract") that is the subject of this litigation was entered into on May 14, 2012. **R. p. 486.** Upon its expiration, desirous to maintain their working relationship, the parties entered into a substantially similar contract dated December 18, 2014. **R. p. 498.**

There are two sections of this Contract that Respondents now contest. The first is "Section 3. Warranty." In Section 3, the subcontractor warrants and guarantees "the Work," which is a defined term found in Section 1(a) of the Contract. **R. p. 489.** As defined, the "Work" encompasses only the materials that

the subcontractor agrees to provide and/or the services that the subcontractor agrees to perform. **R. p. 486.** Thus, in Section 3, the subcontractor warrants and guarantees only the materials that the subcontractor provides and/or the services that the subcontractor performs. The Warranty provision also provides that the subcontractor will indemnify Appellant for all nonconforming “Work” – which, again, is a defined term, indicating that the indemnification obligation on a demand made pursuant to the Warranty Provision encompasses only the materials and/or services provided by or rendered by the subcontractor.

The second section that Respondent now challenges is “Section 5. Indemnity” Section Five is comprised of four paragraphs, but only three are discussed herein. The first paragraph governs indemnification in cases including those arising out of property damage, such as the underlying action. The second paragraph governs indemnification in cases arising out of bodily injury to the subcontractor (Hurley), its agents, employees, or subcontractors. The third paragraph governs the subcontractor’s separate duty to defend. Each is addressed here in turn.

Paragraph One provides, in relevant part, that Appellant may seek indemnification for losses arising out of, among other things, property damage:

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

R. p. 491. This paragraph expressly permits Appellant to recover from Respondent Subcontractor for the negligent acts or omissions of said

subcontractor in cases, such as the one before this Court, arising out of property damage. It bears emphasis that this paragraph is the only paragraph within Section 5 of the Master Subcontract Agreement which specifically provides for indemnification against loss resulting from property damage caused by the neglect or omission of the indemnitor.

Paragraph Two governs the relationship between the parties in cases arising out of claims of bodily injury to the subcontractor, its agents, employees, and/or subcontractors. This case does not arise out of bodily injury, and thus this paragraph is irrelevant and not currently before the Court. Nonetheless, Respondents have taken issue with this paragraph because, in cases involving bodily injury to the subcontractor, its agents, employees, and/or subcontractors, the contract allows Appellant to seek indemnification for losses to the fullest extent allowed by law, "REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES." **R. p. 491**. While, for reasons discussed below, this language may potentially be problematic if this were a case arising out of bodily injury, it does not affect Appellant's right to pursue indemnification pursuant to Paragraph One in a case arising out of property damage.

Paragraph Three of the Indemnity Section governs the subcontractor's duty to defend. Paragraph Three provides that:

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.

R. p. 492. Appellant believes that Paragraph Three needs no further explanation, as the terms are abundantly clear and speak for themselves.

There is one final provision in the Contract that neither Respondents nor the Trial Court chose to address (despite Appellant's multiple requests), but that is essential to the outcome of this case: the severability provision. The parties agreed that:

[t]he 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.

R. p. 497. Thus, the Contract requires that, in the event that any one provision should be found invalid, that provision should be severed and the remaining provisions and rights of the parties should be left intact.

Having provided the Court with this summary of the contractual provisions relevant to this case, Appellant now turns to its legal arguments.

I. The Trial Court Erroneously Applied South Carolina Code Section 32-2-10 to the Parties' Contract.

The Trial Court held that "the indemnity and duty to defend provisions of the master subcontractor agreement violate South Carolina public policy and §32-2-10 S.C. Code." **R. p. 14.** The Trial Court additionally concluded that the contract's Warranty provision violates Section 32-2-10 because it "allows BFS to seek indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation." **R. p. 9.** However, the Trial

Court's Order contains neither an analysis of Section 32-2-10 nor any explanation of how these contractual provisions allegedly violate the statute.

S.C. Code Ann. § 32-2-10 provides:

Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.

(Emphasis added). Section 32-2-10, by its specific language, states simply that an agreement to indemnify a party against liability for damages arising out of that party's sole negligence is against public policy, and thus unenforceable. None of the applicable sections of the contract violates this statute.

A. The Indemnity Provision of the Contract is Specifically Authorized by Section 32-2-10.

The Trial Court first criticized the indemnity provision as running afoul of South Carolina Code Section 32-2-10. However, the indemnity provision of Section 5 Paragraph One, relied upon by Appellant in support of its claims in the underlying action, does not require Respondent to indemnify Appellant against liability for damages arising out of Appellant's sole negligence. Rather, by limiting indemnification only to damages "TO THE EXTENT CAUSED IN WHOLE OR IN

PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACOR,” Section Five, Paragraph One requires Respondent to indemnify Appellant against liability or damages for *Respondent’s* negligence (whether sole or concurrent). This arrangement is the exact type of agreement authorized by the second half of the statute, underlined above. Section 32-2-10 specifically authorizes agreements whereby the promisor shall indemnify or hold harmless the promisee against liability for damages resulting from the negligence, in whole or in part, of the promisor. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, (422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018)). The indemnity provision of Section 5 Paragraph One is, therefore, specifically authorized by Section 32-2-10 because by that provision Respondent undertook to indemnify Appellant for Respondent’s own negligence (as opposed to Appellant’s own negligence). Furthermore, a contractual provision authorized by statute cannot logically be against public policy Id. Thus, the indemnity provision does not violate Section 32-2-10 or public policy, and provides no basis for an award of summary judgment in favor of Respondent.

B. The Duty to Defend Provision of the Contract is Neither Addressed nor Prohibited by Section 32-2-10.

The Court’s Order also finds that Paragraph Three of the Indemnity Provision violates South Carolina Code Section 32-2-10 because Appellant may seek reimbursement of attorney’s fees regardless of any ultimate liability or negligence of Appellant. However, this statute addresses general damages and not recovery of attorneys’ fees; thus, the statute does not apply to this portion of the Contract.

The very terms of the statute limit its application to agreements for indemnification against liability for damages. When approaching statutory interpretation, courts must assume that the legislature was aware of the common law, “and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.” Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Additionally, when, as here, a statute is “in derogation of the common law,” it must be strictly construed. Id.

Section 32-2-10 specifically states that it governs agreements for indemnity against liability for damages. As noted by this Court in Concord & Cumberland, our courts “have consistently defined indemnity as ‘that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party.’” Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646-47, 819 S.E.2d 166 (Ct. App. 2018). Attorneys’ fees do not fall within the scope of indemnity because they are not paid by a first party to “a second party for loss or damage the second party incurs to a third party.” Rather, they are consequential damages of an indemnity claim. Because Section 32-2-10 must be strictly construed, and because it uses the term “indemnify,” a term that “has a well-recognized meaning in the law,” it must be read only to apply to agreements governing indemnification; its meaning may not be expanded by the Court to include agreements governing attorneys’ fees.

While Section 32-2-10 addresses agreements governing the duty to indemnify, the statute is silent as to agreements imposing a duty to defend. The duty to defend and the duty to indemnify are two separate and distinct contractual obligations. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). “Although these duties are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the judgment, the duty to defend exists regardless of the [indemnitor’s] ultimate liability to the [indemnatee].” Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977).

Finally, even if the Court *were* to determine for some reason that the contractual provision regarding attorneys’ fees violated Section 32-2-10, the Court should sever the offending provision, as discussed below; then, Appellant’s claim for attorneys’ fees would instead be fully encompassed by Paragraph One of the Indemnity Provision. Paragraph One provides that Respondents would indemnify Appellant for all losses, “including, but not limited to . . . attorney’s fees” arising out of claims for property damage, but “ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OF THE SUBCONTRACTOR” Because recovery under Paragraph One is limited to attorneys’ fees incurred in defending against the negligence of the subcontractor, it is not covered by the alleged prohibition of Section 32-2-10; in fact, it is specifically authorized by the statute, because the statute says that it does not affect or void “a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee . . . against liability for damages resulting from the

negligence, in whole or in part, of the promisor” As noted above, Paragraph One of the Indemnity Provision is the exact type of agreement authorized by the statute.

C. The Warranty Provision of the Contract does not Violate Section 32-2-10.

Finally, the Trial Court held that the contract’s Warranty provision violates Section 32-2-10 because it “allows BFS to seek indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation.” **R. p. 9.**

The Trial Court has grossly mischaracterized the Contract’s Warranty provision. The Trial Court quoted excerpts from the Warranty provision, which are reproduced below; the Appellant, however, has added back some of the original contractual language, (which Appellant has underlined), that the Trial Court excluded:

Section 3. Warranty.

... subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... 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 ...

R. p. 8. As previously noted, “the Work,” which is used throughout this section, is a defined term limited to the materials provided by and/or services rendered by the subcontractor. Because the entire section relates to “the Work” of the

subcontractor, it is impossible to reach the Trial Court's conclusion that the Contract forces the subcontractor to warrant materials provided by Appellant. Due to the definition of "the Work," any recovery based on a breach of the warranty provision would be limited to defects in the materials provided by or the services rendered by the subcontractor; in this case, because the Respondent subcontractor did not provide materials but only labor as the window installer, recovery based on a breach of warranty is limited to the labor rendered by the Respondent.

To the extent that Section 32-2-10 may apply to a warranty provision, agreements such as this one, where the recovery is limited to the negligence of the indemnitor, is explicitly authorized by the statute. Thus, the warranty provision does not violate Section 32-2-10 nor public policy.

II. The Trial Court Mistakenly Applied the Clear and Unequivocal Standard Articulated by Concord and Cumberland to the Relevant Contractual Language.

It bears emphasis that typically, courts will construe an indemnification contract "in accordance with the rules for construction, and of contracts generally." Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) (Campbell v. Beacon Mfg Co., 333 S.C. 451, at 453, 438 S.E.2d 271, at 272).

The Trial Court held that "the indemnity and duty to defend provisions of the master subcontractor agreement are neither clear nor unequivocal [*sic*], and fail as a matter of law." **R. p. 14.** Nowhere in its Order does the Court explain why the provisions would need to be "clear and unequivocal," which is a

heightened standard of contractual interpretation. The Trial Court gave only slightly more context earlier in the Order when it explained that the paragraphs in the Indemnity provision “do not meet the elevated clear and unequivocal [*sic*] standard found in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).” Concord & Cumberland stands for the proposition that if a general contractor is seeking to be indemnified by a subcontractor for the general contractor’s own negligence, the contractual language imposing such an obligation must be clear and unequivocal. See id. Because Appellant is not seeking indemnification for its own negligence, the heightened standard of “clear and unequivocal” should not have been applied to its contract.

In Concord & Cumberland, the Court of Appeals considered indemnification provisions which were virtually identical to those at issue in the instant litigation. In that case, the general contractor, Superior Construction, sought indemnification from its window installation subcontractor, Muhler, against damages arising from both (a) the negligence of the subcontractor, and (b) the concurrent negligence of Superior (the general contractor) itself. The Circuit Court found that the indemnification provisions of the Subcontract Agreement were not sufficiently “clear and unequivocal” as to require Muhler to indemnify Superior for Superior’s own negligence. However, the Circuit Court specifically determined that those indemnity provisions did in fact obligate the subcontractor, Muhler, to indemnify the general contractor, Superior, against claims and damages caused by the negligent acts or omissions of Muhler. The Court of

Appeals affirmed the determination of the Circuit Court, noting repeatedly within its opinion, that, although the indemnification provision of the relevant subcontract agreement was not sufficiently clear and unequivocal to require indemnification against the general contractor's own negligence, such indemnification provision nonetheless obligated the subcontractor to indemnify the general contractor against loss or damage caused by the negligent acts or omissions of the subcontractor.

At the crux of Concord & Cumberland was the fact that the general contractor was trying to recover from its subcontractor for the general contractor's own negligence. That is not the case here. Appellant is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from Respondent's negligence. When, as here, a contractor does not seek indemnity for its own negligence, the clear and unequivocal standard simply does not apply, and the indemnity provision is not subject to that heightened standard.

III. The Trial Court Erred in Failing to Address the Severability Provision of the Contract, Which Requires that Offending Provisions be Severed and Legitimate Provisions be Left Intact.

The Trial Court's Order does not address the Contract's severability provision. If it had, the Trial Court would have been compelled to sever any offending provisions of the Contract, leaving the rest of the Contract intact and precluding summary judgment. Although in its motion for reconsideration Appellant specifically requested that the Court address this provision, the Court failed to do so. **R. pp. 436-38.**

Appellant does not concede that any provisions of the Contract contain problematic language; nonetheless, to the extent that the Trial Court took issue with any specific language, it should have simply severed such language and left the remainder of the Contract intact. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

"Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002). The severability provision of the Contract here demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

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.

R. p. 497. This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the Contract may be invalid, the Trial Court should have honored the intent of the parties and severed any offending provision, leaving the remaining provisions intact.

The Trial Court took issue, for various reasons, with Section Five (Indemnity), Paragraphs Two (Bodily Injury) and Three (Duty to Defend); as well

as with Section Three (Warranty). While Appellant maintains that all of these provisions are valid, the Court could have severed all of them, and Appellant would still be entitled to pursue its claim for contractual indemnity under Section Five Paragraph One (Property Damage), which was never criticized by the Court. Thus, it was an error for the Trial Court to grant summary judgment.

IV. The Parties' Contract was Neither a Contract of Adhesion nor Unconscionable.

The Trial Court vaguely held that “the indemnity and duty to defend provisions of the master subcontractor agreement are unconscionable, ambiguous, unintelligible, conflicting, oppressive, and are unenforceable.” **R. p. 14.** The Order also states, without any explanation, that “[t]he master subcontractor agreement between BFS and Hurley is a contract of adhesion.” **R. p. 7.**

A contract is considered one of adhesion if it “is a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007). While the Master Subcontract Agreement does appear to be a from contract, *Respondent has offered no evidence that the contract was either (1) offered on a take-it-or-leave-it basis, nor that (2) its terms were not negotiable.* On summary judgment, a trial court looking to make a finding on whether a contract was one of adhesion *must* make the finding based on evidence in the record, and not solely on the averments of counsel in their pleadings. See S.C. R. Civ. P. 56. As the record is devoid of any such evidence, the Trial Court’s finding was impermissible.

Even if the Trial Court's determination was correct, it would not end the analysis because "[a]dhesion contracts . . . are not per se unconscionable." Simpson, 373 S.C. at 27. "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id. at 24–25.

The Court held that the Contract was unconscionable because it permits "BFS to seek indemnity and a defense from labor-only subcontractors such as Hurley for materials selected and sold by BFS to third parties." **R. p. 11.** The Court's conclusion is nonsensical and, to the best of Appellant's understanding, can be reached only by a misconstruction of the Contract's Warranty provision. In the Warranty section, all warranties, all guarantees, and all indemnification undertakings are limited to the materials provided by or the services rendered by the subcontractor. **R. p. 489** – see also definition of "the Work," at **R. p. 486.** Because Respondent did not provide materials, the provisions of this section regarding warranties and indemnification against defects in design and materials simply do not apply. Thus, it is impossible to conclude that Respondent is guaranteeing or providing indemnification for "materials selected and sold by BFS to third parties." Instead, in this situation, because Respondent provided labor, it has instead warrantied – and agreed to provide indemnification for claims against – its workmanship. This is not oppressive nor unconscionable, as our courts have consistently upheld contracts wherein a party agrees to indemnify a

second party for the first party's own negligence. See Concord & Cumberland, 424 S.C. 639; One Belle Hall, 418 S.C. 51.

Additionally, the Trial Court should have asked whether the terms of the Contract were "so oppressive that no reasonable person would make them and no fair and honest person would accept them." The evidence here shows that Respondent was so contented with the terms of the contract that it accepted them not only once in 2012, but chose to renew the same terms again in 2014. **R. pp. 486, 498.** Respondent cannot cry foul on terms it repeatedly agreed to because it has now become inconvenient for Respondent to be bound by them.

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

V. Because the Specific Issue Here has not been Addressed by a Court Before, the Doctrine of Collateral Estoppel does not Bar Appellant's Claims for Indemnity in the Present Case.

The Trial Court's Order finds that the Appellant's claims are barred by collateral estoppel because identical issues have already been ruled upon in Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al., Civil Action No. 2018-CP-08-2547 and Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455.

The doctrine of collateral estoppel is available when issues of fact or law are actually litigated and determined by valid and final judgment. Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994).

It is thus only when a valid and final judgement on the merits has been reached that the doctrine of collateral estoppel will have any application. Even in those instances where a valid and final judgement has been reached, the doctrine will preclude relitigation only of issues that were in fact actually litigated and determined. Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 495–96, 450 S.E.2d 616, 619 (Ct. App. 1994). Neither criterion is satisfied here, and the doctrine of collateral estoppel is simply not available to preclude litigation of the issues before this Court.

Each of the orders cited by the Respondent is currently pending, for additional consideration, before the South Carolina Court of Appeals. **R. p.p. 35, 51.** Absent an authoritative resolution before our appellate courts, the Appellant will not have been afforded a full and fair opportunity to litigate those issues addressed within the respective orders, and no final judgement will have been rendered.

Equally importantly, and of equal relevance here, each of the orders, as issued by Judges Newman and Young, respectively, is based upon the Court's stated finding that the Appellant, in each action, sought indemnity against liability for damages arising out of the Appellant's own negligence.

Both Judges Young and Newman further determined that the indemnity provisions of the relevant subcontract agreements were not sufficiently clear and unequivocal to impose such an indemnity obligation, and awarded summary judgement on that basis.

The Trial Court's Order notes that other courts "have found that the indemnification provisions fail to meet the clear and unequivocal [sic] standard." **R. p. 12.** In fact, what the other courts actually found was as follows:

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question as to BFS seeking indemnification for its own negligent acts or omissions. BFS has failed to demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence.

See Amended Order of Judge Newman filed February 3, 2020 in Builders FirstSource – Southeast Group, LLC v. MI Windows and Doors et al., Civil Action No. 2018-CP-08-02547, (emphasis added), **R. p. 19**, which order was also adopted by Judge Young in Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455, **R. p. 30**. As evidenced by the language of the order, Judge Newman only ruled on the issue of whether BFS could recover for its own negligence, finding that:

- (a) BFS was seeking to be indemnified for its own negligence, and
- (b) the relevant contract provision was not sufficiently clear and unequivocal to require the subcontractor to indemnify BFS for BFS's own negligence.

The Trial Court's Order does not make any finding regarding Appellant's ability to recover in indemnity for its own negligence, because that is not the issue in this case. Instead, the issue before this Court is whether Appellant can recover for the negligence of its subcontractor, which is a separate issue from the one ruled upon by Judge Newman (and consequently, by Judge Young). This issue has not

yet been “actually litigated” within the context of collateral estoppel. Here, because Appellant is not seeking to be indemnified against Appellant’s own negligence, but only against liability for damages caused by the negligence of its subcontractor, neither Judge Newman’s Order nor Judge Young’s Order can, as a matter of law, operate to estop Appellant from seeking indemnification for Respondent’s negligence in this action.

The Trial Court’s holding regarding collateral estoppel is also problematic because it mischaracterizes the prior rulings as having found that the indemnity provisions generally fail to “meet the requirements of South Carolina law.” As discussed above, the holding of Judge Newman was limited to the issue of whether BFS could recover for its own negligence. That Court did not determine that the provisions fail to meet the requirements of South Carolina law. Additionally, no court has ever considered the provisions in light of Section 32-2-10 or any case law other than Concord & Cumberland. Judge Newman did not determine that the indemnity provision violated South Carolina law, but only that, in light of Concord & Cumberland, the indemnity provision was not sufficient to require the subcontractor to indemnify Appellant for its own negligence. When, as here, Appellant is seeking indemnity only for its subcontractor’s negligence (whether sole or concurrent), no court has ever held that the indemnity provision is insufficient grounds for recovery, and thus, it is impossible for collateral estoppel to apply to the situation before this Court.

VI. Given the Validity of the Contract, Genuine Issues of Material Fact Preclude Summary Judgment.

The Trial Court held that:

Although BFS contends that there are material issues of fact because of alleged installation deficiencies on the part of Hurley, those alleged deficiencies have no bearing on whether the language of the contract is against public policy, violates §32-2-10 S.C. Code, is unconscionable, and fails to meet the clear and unequivocal *[sic]* standard.

R. p. 13. Because Appellant has now established that the language of the Contract is not against public policy, does not violate Section 32-2-10, is not unconscionable, and is not subject to the “clear and unequivocal” standard, Appellant now turns to the issues of fact that preclude summary judgment.

Summary judgment is proper if “...there is no genuine issue as to any material fact”, and the moving party is “entitled to judgment as a matter of law.” Rule 56(c) SCRPC. As demonstrated hereinafter, the testimony offered on behalf of the plaintiffs by their retained expert, Russell T. Mease, PE, is sufficient to establish a genuine issue of material fact, precluding summary judgment in favor of Respondent.

The windows and associated flashings at the Plaintiffs’ residence were installed by Respondent, pursuant to obligations undertaken by Respondent under the Master Subcontractor Agreement executed with Appellant.

Plaintiffs’ expert, Mr. Mease testified that he identified deficiencies in the installation of the windows at the Plaintiffs’ residence. Specifically, Mr. Mease determined 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; **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; **R. p. 449, line 23 – p. 450, line 11;**

(c) the head flashing of the windows had not been properly integrated (weather lapped) with a building wrap above the windows. **R. p 451, line 25 – p. 452, line 12.**

Mr. Mease further contended that the aforesaid failures constituted violations of Section 703.8, of the International Residential Code, 2006 Edition. He further opined that the aforesaid purported deficiencies in window flashing installations, coupled with the omission of a proper sealant joint around window perimeters, had resulted in water intrusion and associated damages at or around window locations. **R. p. 453, lines 2-15.**

Mr. Mease also 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. **R. p. 454, lines 11-19.**

As noted above, 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 Respondent, to Appellant. Thus, the evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to Appellant, clearly suggest negligent acts or omissions by Hurley in its installations of the windows and related flashings, causing the water intrusion and associated damages at the subject residence. At

the very least, the testimony of Mr. Mease establishes a scintilla of evidence adequate to preclude summary judgment in favor of Respondent.

CONCLUSION

Because (1) the Contract between Appellant and Respondent does not violate South Carolina law nor public policy, is not unconscionable, and contains a severability clause that allows valid contractual provisions to remain in force even after invalid provisions are severed; (2) the issues before the Court have not been previously ruled on and are not subject to collateral estoppel; and (3) issues of fact preclude summary judgment, Appellant respectfully requests that this Court REVERSE the decision of the Trial Court.

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July 28, 2021

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Jul 28 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2019-CP-10-00772
Appellate Case No. 2021-000290

Dag Pavic and Stela Susac-Pavic.....Plaintiffs,

v.

Carolina Cottage Homes, LLC d/b/a Saussy Burbank; SB Holding, LLC d/b/a
Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services,
LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services, LLC; Simons
Contractors, LLC and Cohen's Drywall Company, Inc.,.....Defendants,

of which Hurley Services, LLC is the Respondent

AND

Builders FirstSource-Southeast Group, LLC, ...Appellant,

v.

MW Manufacturers, Inc.,.....Third Party Defendant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

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

- (1) the Contract between Appellant and Respondent, purports to allow Appellant to recover on Appellant's negligence, in violation of South Carolina law. This assertion is premised upon the definition of the term "the Work" which, as erroneously interpreted by Respondent, makes Respondent responsible for materials selected and supplied by Appellant;
- (2) the Appellant's pleadings, as erroneously interpreted by the Respondent, seek to recover for the Appellant's own negligence;
- (3) that the trial court, in holding certain language of the contract to be unenforceable, made an implied ruling on the issue of severance;
- (4) that the Respondent is entitled to judicial notice that it had no bargaining power, and that Contract between the parties is therefore oppressive;
- (5) that final rulings exist on issues identical to the one before this Court, and thus collateral estoppel bars Appellant's claims.

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

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

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

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

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

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

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

Section 2(c) provides¹:

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

...

c. Protection of Work. Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

R. p. 487. Respondent’s argument and analysis regarding this section is only one sentence long: “In SECTION 2(c), BFS drafted the contract language to read that ‘work’ includes materials supplied by others, which in this case are windows and doors supplied by BFS.” However, nowhere does the above language attempt any further definition of the term “Work.” In fact, the only mention of “materials” at all is that the Subcontractor undertakes to *protect* the materials, regardless of who supplied them. This simply means that once Appellant

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

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

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

In addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor ... and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three years for all Work except, (b) ten (10) years for all Work consisting of any structural application of any home, building, or other structure... If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and Indemnify Contractor and any other party for any costs incurred by any party relating to such demand.

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

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

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

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

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

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

The third provision at issue is what Respondent has termed the hidden indemnity language, whereby: “If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor’s sole option, any defective or nonconforming Work and Indemnify Contractor and any other party for any costs incurred by any party relating to such demand.” Again, understanding that “Work” relates only to materials and/or services provided or performed by the Subcontractor, this

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

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

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

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

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

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

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

163. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Third Amended Complaint.

...

167. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the CrossClaim Defendant [Hurley], which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

168. That BFS is entitled to full contractual and common law indemnification from the CrossClaim Defendant, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the CrossClaim Defendant, entitling BFS to recover from the [CrossClaim]³ Defendant, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the CrossClaim Defendant any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

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

163. BFS denies liability.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This is not at all analogous the situation before the trial court in this case. A finding that the contract language is unenforceable does not necessitate a finding that it is not severable; the language can be both unenforceable and severable. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016) (holding that "the circuit court erred in finding the arbitration agreement was not separable from other allegedly unconscionable provisions"); D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) (voiding indemnification language only to the extent that it violated Section 32-2-10 and leaving enforceable indemnity language intact).

South Carolina law provides that “[c]ourts have discretion ... to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive.” Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020). “Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). The presence of a severability clause should be treated as strong evidence of the parties’ intent to sever unenforceable language. See Doe, 430 S.C. at 615, 846 S.E.2d at 880-81 (determining that parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable). The Contract at issue here contains a severability clause. Thus, the trial court should have honored the parties’ intent and should have severed the offending language (if any).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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July 28, 2021

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Aug 04 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2019-CP-10-00772
Appellate Case No. 2021-000290

Dag Pavic and Stela Susac-Pavic.....Plaintiffs,
v.

Carolina Cottage Homes, LLC d/b/a Saussy Burbank; SB Holding, LLC d/b/a Saussy
Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders
FirstSource-Southeast Group, LLC; Hurley Services, LLC; Simons Contractors, LLC and
Cohen's Drywall Company, Inc., ...Defendants,

of which Hurley Services, LLC is the Respondent

AND

Builders FirstSource-Southeast Group, LLC, ...Appellant,
v.

MW Manufacturers, Inc.,.....Third-Party Defendant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err in finding that the contractual indemnity provisions drafted by BFS violate S.C. Code Section 32-2-10 by requiring the subcontractors of BFS to indemnify it for its sole negligence, including its negligence in the selection and sale of products to third parties?
- II. Did the Circuit Court err in applying the clear and unequivocal standard to the contractual indemnity provisions drafted by BFS where the pleadings of BFS seek indemnity for its sole or concurrent negligence?
- III. Did the Circuit Court err in failing to make an express ruling on the severability of contractual indemnity provisions where the court found that these provisions are unconscionable and oppressive, violate S.C. Code Section 32-2-10, and fail to meet the clear and unequivocal standard?
- IV. Did the Circuit Court err in finding that the Master Subcontract Agreement drafted by BFS is a contract of adhesion which is unconscionable and oppressive?
- V. Did the Circuit Court err in applying the doctrine of collateral estoppel as a bar to the contractual indemnity claims of BFS?
- VI. Did the Circuit Court err in granting Respondent's Motion for Partial Summary Judgment where none of the issues on appeal involve genuine issues of material fact?

STATEMENT OF THE CASE

Plaintiffs filed suit on February 14, 2019, against the general contractor, Saussy Burbank, and other defendants alleging construction defects in their two-story residence in Mount Pleasant, South Carolina. Plaintiffs purchased the residence from the builder for \$649,900.00 in 2013. The Complaint was subsequently amended twice to name the correct defendants, including Builders FirstSource-Southeast Group, LLC (“BFS”) and Hurley Services, LLC (“Hurley”). BFS sold windows and doors to Saussy Burbank and agreed to install them in Plaintiffs’ residence. Hurley installed the windows and doors as a subcontractor to BFS, but Hurley provided no materials in connection with their installation. (R. p. 102) (R. p. 522).

Plaintiffs filed a Third Amended Complaint on April 2, 2019, alleging claims of negligence, breach of warranty, and breach of habitability. On April 19, 2019, BFS filed an amended answer to the Third Amended Complaint and reiterated its crossclaims against Hurley for equitable and contractual indemnity, negligence, breach of contract, and breach of warranty in connection with labor and materials. BFS also filed a Third-Party Complaint against the window manufacturer, MW Manufacturers, Inc. (“MW”), alleging claims for contractual and equitable indemnification, negligence, breach of express and implied warranties, contribution, and breach of contract in connection with the windows installed in the Pavic residence. (R. pp. 124-137.)

After service of process on Hurley, Hurley answered both the Third Amended Complaint and the crossclaims of BFS. Both answers contained standard construction defects defenses. On July 29, 2019, MW Manufacturers, Inc. filed an amended answer to

the Third-Party Complaint of BFS and asserted as a defense the class-action suit and settlement in Gulbankian v. MW Manufacturers, Inc., United States District Court, District of Massachusetts, Civil Action Numbers 10-10392-RWZ and 3:12-CV-30122-RWZ (D. Mass. 2014). (R. pp. 138-148) (R. pp. 149-157) (R. pp. 158-203).

On October 31, 2019, Plaintiffs and Appellant entered into a stipulation that Plaintiffs are not asserting claims for defective windows against any defendant in the litigation. On January 28, 2020, BFS filed a dismissal without prejudice of its Third-Party Complaint against MW Manufacturers, Inc. under a tolling agreement.

On August 5, 2020, Saussy Burbank filed an Amended Answer to Plaintiffs' Third Amended Complaint and crossclaims against BFS for negligence, contractual indemnification, and breach of express and implied warranties in connection with labor, materials, and products furnished by BFS in connection with the construction of Plaintiffs' residence. (R. pp. 215-223.) On August 26, 2020, BFS answered the crossclaims of Saussy Burbank and reiterated its crossclaims against Hurley. (R. pp. 251-257.) Hurley filed an answer to the BFS crossclaims on August 31, 2020.

On August 27, 2020, Hurley filed a motion for partial summary judgment as to all crossclaims of BFS except for equitable indemnity. On September 17, 2020, Hurley filed an amended motion for partial summary judgment. (R. p. 1, app. pp. 1-4.)

The respondent's amended motion for partial summary judgment was argued in the Circuit Court on October 1, 2020. Both Appellant and Respondent submitted memoranda and exhibits in support of their respective positions. All issues raised in this appeal were argued in full by the parties without objection. (R. pp. 331-416) (R. p. 457, line 2 – p. 483,

line 25). On January 22, 2021, the Honorable Jennifer B. McCoy signed an Order granting partial summary judgment in favor of Hurley. The Order was filed January 25, 2021. BFS filed a motion for reconsideration which was denied on February 16, 2021. Appellant filed a Notice of Appeal on March 18, 2021.

STANDARD OF REVIEW

Summary Judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP. The purpose of Summary Judgment is to obviate delay where there is no material issue of fact involved. Hammond v. Scott, 268 S.C. 137, 232 S.E.2d 336 (1977). Summary Judgment is appropriate in those cases in which plain, palpable, and undisputed facts exist on which reasonable minds cannot differ. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993).

The party “opposing a properly supported motion for summary judgment ... may not rest on mere allegations or denials of his pleadings but must set forth or point to specific facts showing that there is a genuine issue of material fact.” Bravis v. Dunbar, 316 S.C. 263, 264, 449 S.E.2d 495, 496 (Ct. App. 1994). However, it is not sufficient for a party to create an inference which is not reasonable or an issue of fact that is not genuine. Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990).

ARGUMENTS

- I. The contractual indemnity provisions drafted by BFS violate S.C. Code §32-2-10 by requiring its subcontractors to indemnify it for its sole negligence, including its negligence in the selection and sale of products to third parties.**

BFS is a large supplier of building materials. It is a merchant within the meaning of S.C. Code §36-2-104(1). It has or should have superior knowledge regarding the products it sells.

BFS sold windows to Saussy Burbank for installation in Plaintiffs' residence. (R. p. 216) (R. p. 531). These windows are the subject of a class-action suit and settlement. It is undisputed that Hurley furnished no materials.

Although Plaintiffs and BFS stipulated that Plaintiffs are claiming no damages from defective windows, this stipulation is not binding on non-signing parties. Moreover, class-action windows are installed in the residence, and there are moisture intrusion issues related to the windows. The national class-action suit against MW Manufacturers, Inc. alleges moisture intrusion problems and resulting damage and rot from the same windows which are installed in Plaintiffs' residence. BFS should have known that there were significant issues with these windows when it sold them. (R. pp. 138-148) (R. pp. 149-157) (R. pp. 158-203) (R. pp. 524-525).

The general contractor has asserted crossclaims against BFS which includes claims for defective materials. In its answer to these crossclaims, BFS has reasserted multiple claims against Hurley, which include claims for defective materials although it concedes in its brief on page 19 that Hurley furnished no materials. The crossclaims of BFS relate to the windows and doors it provided to Hurley for installation.

BFS drafted two Master Subcontract Agreements as is shown by its logo on the first page of the agreements. One is dated May 14, 2012, and the other, December 18, 2014.

The 2012 agreement is the operative agreement although the 2014 agreement is relevant on the issue of disparity in bargaining power. (R. pp. 486-497) (R. pp. 498-512).

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. PCS Nitrogen, Inc. v. Continental Cas. Co., 429 S.C. 30, 39, 837 S.E.2d 662, 666 (Ct. App. 2019) (reh'g denied). The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, "from the four corners of the instrument" alone. McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). Any uncertainty as to the meaning of any term should be resolved against the party who prepared the contract. Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 683 S.E.2d 814 (Ct. App. 2009). A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. Williams v. Gov't Emps Ins Co., 409 S.C. 586, 762 S.E.2d 705, 710 (2014).

The master contract was carefully drafted by BFS in a way which would obligate its subcontractors to warrant the design and suitability of products provided by BFS, and further, for subcontractors to indemnify and defend BFS and others from any property damage or personal injury resulting from those products. Referring to the 2012 Master Subcontract Agreement, one finds the following: (R. pp. 486-490.)

"SECTION 1. Introduction.

- a. **Work.** '[T]his Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**")'

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on the Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

- c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

SECTION 3. Warranty.

“[I]n 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 ... 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, materials, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, property damage to the personal property of the ultimate owners ... and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated”

In SECTION 2(c), BFS drafted the contract language to read that “work” includes materials supplied by others, which in this case are windows and doors supplied by BFS.

Although in its brief, Appellant describes the contract interpretation of the lower court as “nonsensical”, the language in SECTION 3 Warranty “subcontractor guarantees the work against defects in design ... and materials” only makes sense if the word “design” refers to manufactured materials provided by BFS. Hurley has no responsibility for the design of the residence or any of its components. In addition, BFS, not Hurley, provides structural components. Yet Hurley is required to give a 10-year warranty on “structural applications.” (R. p. 489.)

The fine print indemnity language found in SECTION 3 Warranty is jumbled with warranty and guaranty provisions under which Hurley warrants, guarantees, and agrees to indemnify BFS for its sole negligence in selecting and selling materials and building components for installation in Plaintiffs’ residence. The warranty and guaranty provisions are merely disguised indemnity provisions, and they, along with the indemnity provisions, clearly violate S.C. Code §32-2-10.

BFS uses the language in Sections 1, 2, and 3 in combination with the indemnity and duty to defend provision found in the first three paragraphs of SECTION 5 Indemnity, to obtain indemnity for its sole negligence. (R. pp. 490-491.) For example, the second paragraph of SECTION 5 Indemnity calls for the subcontractors to “indemnify, defend, and hold harmless” BFS “... 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.” This provision also violates S.C. Code §32-2-10.

In addition, SECTION 5 Indemnity, paragraph 3, deals with a duty to defend. BFS elected to include this paragraph in the bold print indemnity section of the subcontract.

Paragraph 3 is in effect an indemnity provision for defense costs. There is nothing in South Carolina law that separates a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement. Moreover, S.C. Code §32-2-10 speaks solely of "damages" while limiting the ability of the indemnitor to indemnify the indemnitee. Attorneys' fees and defense costs are nothing more than continuing consequential damages.

SECTION 5 Indemnity, paragraph 3, provides, in pertinent part, for the subcontractor to pay attorneys' fees of BFS "regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees." BFS has relied upon these provisions in asserting crossclaims against Hurley for defense costs and attorneys' fees in violation of S.C. Code §32-2-10.

The definitions, warranty, guaranty, and indemnity provisions of Sections 1, 2, 3, and 5 violate S.C. Code §32-2-10 because they require Hurley to indemnify BFS for its sole negligence. These provisions are illegal, void, and unenforceable. *See D.R. Horton, Inc. v. Builders FirstSource S.E. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 46 (Ct. App. 2018).

II. THE CIRCUIT COURT PROPERLY APPLIED THE CLEAR AND UNEQUIVOCABLE STANDARD TO THE CONTRACTUAL INDEMNITY PROVISIONS DRAFTED BY BFS WHERE ITS PLEADINGS SEEK INDEMNITY FOR ITS SOLE OR CONCURRENT NEGLIGENCE.

BFS argues that the elevated clear and unequivocal standard enunciated in Concord & Cumberland does not apply in this case because it is not seeking indemnity for its sole or concurrent negligence. It asserts that it is only seeking indemnification for loss

or damage arising from Hurley's negligence. The pleadings of BFS do not support its argument.

BFS supplied windows and doors to Hurley. Hurley provided no materials for their installation. The windows provided by BFS are the subject of a class-action suit and settlement. The general contractor has crossclaimed against BFS for defects in materials. BFS has attempted to transfer this risk to Hurley and has asserted claims against Hurley in connection with materials which were installed at the Pavic residence. BFS is obviously seeking contractual indemnity for the defective windows which it selected and sold.

The pleadings also seek recovery for "any sums which BFS may be held liable to Plaintiffs or others, or which Builders FirstSource Southeast Group, LLC may pay in satisfaction of such claims." This would include indemnity for any judgment in favor of the general contractor who purchased the defective windows from BFS. The indemnity provisions contained in SECTION 8i provide indemnification of BFS for "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 ..." (R. p. 496.) BFS is a supplier.

The pleadings also seek a recovery of attorneys' fees and costs from Hurley. Under SECTION 5 Indemnity, paragraph 3, BFS is seeking to recover attorneys' fees which, according to the language of the agreement, are payable even if BFS is 100% at fault in causing the loss, injury and damages.

In asserting its contractual indemnity claims against Hurley, BFS also relies upon SECTION 5 Indemnity, paragraph 1. The South Carolina Court of Appeals issued a

decision in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 64, 819 S.E.2d 166, 170 (Ct. App. 2018), that specifically recognized that this contract language fails as a matter of law because it does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own liability. The Court refused to allow a general contractor to obtain indemnity for its concurrent negligence.

Dicta in Concord & Cumberland at 424 S.C. 652, 653, 819 S.E.2d 173, 174 regarding the liability of the subcontractor Muller is inapplicable to the facts of this case. Here, there are multiple conflicting indemnity provisions and BFS is also seeking indemnity for its own negligence in selecting and selling defective windows.

A review of the indemnity provisions drafted by BFS is helpful. The indemnity provision buried in the fine print of SECTION 3 Warranty does not require any finding of fault on the part of Hurley. It also does not exclude any fault of BFS. The indemnity provision simply arises upon the demand of BFS.

“SECTION 3. Warranty.

... subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... 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 ... including, without limitation, property damage to the homes or properties into which the Work is incorporated ...”

In addition, the indemnity provisions in SECTION 5 Indemnity do not expressly exclude the sole or concurrent negligence of BFS, but to the contrary, the last two paragraphs of SECTION 5 INDEMNITY expressly provide for indemnification for the sole negligence of BFS. Relevant language from each paragraph is as follows: (R. pp. 491-493.)

“ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.”

The next paragraph suggests a duty to indemnify BFS:

“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.”

The following paragraph provides that:

“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 Court should not ignore the language of the contract and the pleadings drafted by BFS based upon the unsupported assertion that BFS is only seeking indemnity for the sole or concurrent negligence of Hurley. These indemnification provisions are unclear and conflict with each other and do not meet the elevated clear and unequivocal standard required by Concord & Cumberland. As a result, the indemnification provisions of the Master Subcontract Agreement are unenforceable.

III. THE CIRCUIT COURT WAS NOT REQUIRED TO MAKE AN EXPRESS RULING ON THE SEVERABILITY OF CONTRACTUAL INDEMNITY PROVISIONS WHERE THE COURT FOUND THAT THESE PROVISIONS ARE UNCONSCIONABLE AND OPPRESSIVE, VIOLATE S.C. CODE §32-2-10, AND FAIL TO MEET THE CLEAR AND UNEQUIVOCABLE STANDARD.

BFS argues that the Circuit Court committed a reversible error when it failed to make an express ruling on the severability of contractual indemnity provisions. It further argues that the Court would have been compelled to sever any offending provisions of the contract, leaving the rest of the contract intact.

An express ruling on these provisions was unnecessary because the Court found that the indemnity provisions are unconscionable and oppressive, violate S.C. Code §32-2-10, and fail to meet the clear and unequivocal standard enunciated in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). By making these findings, the Court ruled by implication that these contractual indemnity provisions can not be severed. See Wannamaker v. Wannamaker, 305 S.C. 36, 40, 406 S.E.2d 180, 183 (Ct. App. 1990) (holding by implication that there was no transmutation of a husband's stocks).

The fine print indemnity provisions in SECTION 3 Warranty are unconscionable and violate S.C. Code §32-2-10. The provision contained in SECTION 5 Indemnity, paragraph 1, fails to meet the Concord & Cumberland standard. The provisions found in SECTION 5 Indemnity, paragraphs 2 and 3, clearly violate S.C. Code §32-2-10 and are also unconscionable. All of these provisions are oppressive and unconscionable, void, and unenforceable in the context of an oppressive adhesion contract drafted by BFS.

There are so many objectionable clauses that run throughout the agreement that it is not possible to sever or reform them. *See Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 16, 742 S.E.2d 37, 41 (Ct. App. 2013O) *aff'd* 417 S.C. 42, 790 S.E.2d 1 (2016) (Kittredge & Pleicones, JJ, dissenting). The Court has no obligation or authority to rewrite the contractual indemnity provisions of BFS. *Poynter Inves., Inc. v. Cent. Builders of Piedmont, Inc.*, 387 S.C. 83, 694 S.E.2d 15, 17 (S.C. 2010); *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

If an express ruling were required by the trial court on the issue of severability, the failure to make one was a harmless error within the meaning of Rule 61 SCRPC.

IV. THE MASTER SUBCONTRACT AGREEMENT DRAFTED BY BFS IS A CONTRACT OF ADHESION WHICH IS UNCONSCIONABLE AND OPPRESSIVE.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-side contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663, 669 (2007) (citation omitted). Among the factors considered by the court in determining whether a contract was tainted by an absence of meaningful choice are the relative disparity in the bargaining power of the party; whether there is an

element of surprise in the inclusion of the challenged language; and the conspicuousness of the language or clause. Simpson, 644 S.E.2d at 669.

Hurley was a local subcontractor in the Charleston area which installed products for BFS. BFS is the regional division of Builders FirstSource as appears from its name on the contract. Respondent requests that this Court take judicial cognizance of the fact that BFS is a large supplier of building materials and that its Master Subcontract Agreement is so one-sided, that a subcontractor executing the agreement, more than likely lacks any meaningful bargaining power. *Cf. Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016) (Kittredge & Pleicones, JJ, dissenting) quoting Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 384 S.E.2d 730, 735-736 (1989) (taking judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller). The fact that Hurley was paid only \$867.00 for installing all of the windows and exterior doors in this residence reflects a lack of bargaining power. (R. p. 524.)

The contract provisions are also deceptive. Contract provisions result in unfair surprise when the real meaning of the terms are intentionally obscured by one of the parties. The master contract was carefully drafted by BFS in a way which would obligate its subcontractors to warrant the design and suitability of products provided by BFS, and further, for subcontractors to indemnify and defend BFS and others from any property damage or personal injury resulting from those products.

The deceptive nature of the definitional, warranty, guaranty, and indemnity provisions contained in Sections 1, 2, and 3 of the agreement have been discussed in detail

elsewhere in this brief. It should be noted, however, that the indemnity provision in SECTION 3 Warranty was buried in fine print. (R. p. 489.)

In finding contract provisions unconscionable in Simpson, the court observed, in pertinent part, as follows:

“[W]hile certain phrases within other provisions of additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) ... We cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law”
Simpson, 644 S.E.2d at 670.

In addition, although Hurley provided no materials in connection with the installation of the windows and doors, there is a provision under SECTION 3 Warranty which requires Hurley to give a ten-year warranty on “structural applications.” This warranty exceeds the eight-year time limit in the applicable statute of repose found in S.C. Code §15-3-640 and may jeopardize a significant defense otherwise available to Hurley.

Thus, it is clear that a disparity in bargaining power and the intentional use of deceptive language buried in the fine print of the agreement deprives Hurley of a meaningful choice in the execution of the agreement.

It is equally clear that the Master Subcontract Agreement drafted by BFS is an adhesion contract which is drawn to the fullest extent possible in favor of BFS. BFS has expansive rights and remedies under the agreement it drafted. In contrast, most of the rights and remedies of Hurley are limited or waived. Most paragraphs of the agreement create obligations and liabilities for Hurley or a waiver or limitation of Hurley’s rights.

The agreement drafted by BFS attempts to transfer all risks associated with the project to its subcontractors, including risks associated with the products and components furnished by BFS. The best evidence of this is the fact that BFS has filed multiple crossclaims against Hurley alleging product deficiencies when BFS concedes on page 19 of its brief that Hurley did not provide any materials whatsoever in connection with the construction of the Pavic residence.

Under general principles of state law, an adhesion contract is a standard form contract offered on a “take it or leave it basis” with terms that are non-negotiable. Munoz v. Greentree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001). Although adhesion contracts are not per se unconscionable, the cumulative effect of these oppressive and one-sided provisions can cross a line which makes the contract unconscionable. Simpson, 644 S.E.2d at 674.

Examples of the oppressive and unconscionable nature of the 2012 Master Subcontract Agreement are as follows:

1. In Section 1(a), limitation of Hurley’s remedies in the event of a change order which increases costs.
2. In Sections 1(a) and 2(c), deceptive language defining the “work.”
3. In Section 2(c), Hurley assumes risk of loss to the work.
4. In Section 2(d)(2)(C), indemnity of BFS in connection with environmental regulations.
5. In Section 2(d)(4), liquidated damages against Hurley for delay at \$200 per hour for a minimum of 10 hour day until project can be resumed.
6. In Section 3, fine print indemnity of BFS for its own products and negligence.

7. In Section 3, unfavorable warranty, guaranty, and indemnity provisions relating to products selected and sold by BFS.
8. In Section 4, waiver of subrogation rights and release of all claims in favor of BFS.
9. In Section 5, indemnification and defense of BFS for its own negligence.
10. In Sections 6 and 7(b)(2), misleading provisions regarding BFS's right to direct and control work.
11. In Section 7(a), numerous events of default by subcontractor without any corresponding events of default on the part of BFS.
12. In Section 7(b)(1), waiver of claims and damages for delay in favor of BFS.
13. In Section 7(b)(2), liability of Hurley to BFS upon termination for all costs and damages of BFS plus 25% of all costs and damages of BFS.
14. In Section 7(c), fine print indemnity, defense, and hold harmless provisions in favor of BFS.
15. In Section 8(a), no obligation of BFS to pay Hurley until BFS receives payment from owner. If owner does not pay BFS, BFS does not pay and Hurley assumes risk of non-payment.
16. In Section 8(f), unreasonable conditions for obtaining final payment, including furnishing "as-built drawings" in Section 8(f)(3).
17. In Section 8(i), indemnification of BFS for liens and judgments including judgments arising from materials supplied by BFS.
18. In Section 8(i), waiver of rights against BFS.
19. In Section 9(e), Hurley waives the right to file a lien for its work.

This Court is well aware that sophistication is another form of bargaining power. *See Smith v. Horton* at 417 S.C. 49, 790 S.E.2d 4. The high degree of sophistication of BFS is obvious in the language of the aforementioned provisions of the 2012 contract. BFS

has taken advantage of any asymmetry in sophistication to include provisions that are either concealed in fine print or that its subcontractors are unlikely to fully appreciate.

The 2014 agreement executed by Hurley is even more oppressive than the 2012 version because of the addition in fine print of Section 10 (f):

“f. Release. 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. Specifically, Subcontractor agrees that Subcontractor shall not file, or cause to be filed, any demand, claim, suit or cause of action against Contractor and all of its officers, directors, agents, and employees hereunder.”
(R. p. 510.)

It is simply inconceivable that a party who understood the implications of the language of these agreements would sign them unless there were a total absence of a meaningful choice on the part of the subcontractor. The combination of an absence of a meaningful choice on the part of Hurley, deceptive language, disparity in bargaining power, and one-sided provisions in the adhesion contract drafted by BFS renders the warranty/indemnification provisions in Section 3 and the indemnity/duty to defend paragraphs in Section 5 unconscionable and unenforceable. South Carolina courts will not enforce a contract which is violative of public policy or statutory law. Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004); D.R. Horton, Inc. v. Builders FirstSource-SE Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).

V. THE CONTRACTUAL INDEMNITY CLAIMS OF BFS ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL

The Circuit Court took judicial notice of two Circuit Court orders which have interpreted BFS's contractual indemnity language. See order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six Owners' Associations, Inc. v. Windsor South, LLC, 2016-CP-10-3455 and the amended order of the Honorable Clifton Newman filed February 3, 2020 in the Court of Common Pleas for Berkeley County in the case of Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al. as Civil Action No. 2018-CP-08-2547. (R. pp. 30-34) (R. pp. 19-29).

Significantly, the Honorable Clifton Newman found the same version of the BFS Master Agreement which is in issue in this case to be unenforceable as a matter of law because the indemnification clauses are not clear and unequivocal and they violate South Carolina Rules of Contract Constitution.

The Honorable Roger Young also ruled that Judge Newman's amended Order constitutes a prior final judgment that determined that the contractual indemnity provisions in BFS's master agreement was unenforceable as a matter of law. BFS has appealed both orders.

To invoke collateral estoppel, a party need not have also been a party to the prior action; the law only requires that the party against whom estoppel is applied have been a party to that action and had a full and fair opportunity to litigate the issue in the prior action.

South Carolina Property & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991).

BFS argues that the issues in this case and in the prior cases are not the same. It contends that these orders of Judge Newman and Judge Young are distinguishable because the issue in those cases was whether the indemnity language was sufficiently clear and unequivocal to permit BFS to recover for its own negligence. It asserts that in this case, it is only seeking a recovery for the negligence of its subcontractor which is a separate issue.

BFS is clearly asserting claims for its own negligence in this case which have been addressed in other sections of this brief. However, it is worth noting that BFS concedes on page 19 of its brief that Hurley provided no materials in the construction of the Pavic residence. Yet, BFS has filed multiple crossclaims against Hurley alleging material deficiencies in Hurley's work. These allegations can only refer to the windows provided by BFS to Hurley for installation. These windows are the subject of a class-action suit and settlement. These windows were selected and sold by BFS at a time when BFS knew or should have known that there were significant issues with the windows.

In its brief, BFS does not take issue with the fact that the same contractual indemnity provisions in this case were considered by the courts in issuing their orders. However, it takes the position that BFS will not have had a full and fair opportunity to litigate the issues decided by Judges Newman and Young until the resolution of any appeals and entry of final judgment. In other words, BFS is contending that these orders are not final judgments for purposes of the application of the doctrine of collateral estoppel.

The appeals from these orders do not undermine their status as final judgments; the law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's judgment, and thus, will not be a barrier to applying collateral estoppel. *See Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189, 61 S.Ct. 513, 515, 85 L.Ed. 725 (1941). (Finding finality of a court's judgment is not lost because appeal is pending until and unless reversed.)

The contractual indemnity terms drafted by BFS have been litigated and directly determined in prior actions, and collateral estoppel should apply. A final judgment is one that finally determines the rights of the parties. *First Union Nat'l Bank v. Hitman, Inc.*, 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), *aff'd* 308 S.C. 421, 418 S.E.2d 545 (1992). Moreover, Rule 201(a) SCACR provides that an: "appeal may be taken, as provided by law, from any final judgment or appealable order." BFS could not have appealed these orders unless they were final orders.

VI. PARTIAL SUMMARY JUDGMENT WAS PROPERLY GRANTED WHERE NONE OF THE ISSUES ON APPEAL INVOLVE GENUINE ISSUES OF MATERIAL FACT.

In its brief, the only issues of fact which are raised by Appellant relate to alleged deficiencies in the installation of the windows provided by BFS. These issues will be resolved in connection with the equitable indemnity claim of BFS which is pending in the lower court.

Other than installation issues, Appellant fails to identify any issues on appeal which should not be decided as a matter of law. The relationship of the parties is not in dispute. The language of relevant pleadings are not in dispute. The fact that Hurley furnished no

materials is not in dispute. The fact that BFS filed multiple crossclaims against Hurley in connection with materials is not in dispute. The fact that BFS alone supplied materials is not in dispute. The fact that windows supplied by BFS are subject to a class-action suit and settlement is not in dispute. The language of the contract is not in dispute. Indeed, in its memorandum in opposition to Hurley's motion for partial summary judgment, BFS states: "The BFS Master Subcontract Agreement is not ambiguous, does not contain conflicting provisions, and is not unconscionable." (R. p. 344.)

The application of S.C. Code §32-2-10 is a matter of law. Whether the clear and unequivocal standard applies, and if so, whether it bars the claims of BFS is a matter of law. Whether the relationship of the parties, the language of the contract, and the conduct of Appellant combine to render the contract unconscionable and unenforceable is a matter of law. Whether the lower court correctly ruled by implication that contractual indemnity provisions cannot be severed, and if not, whether the failure to issue an express ruling was harmless error, is a matter of law for the court. Whether the lower court properly applied the doctrine of collateral estoppel is a matter of law.

The Circuit Court properly granted partial summary judgment in favor of Hurley. BFS is not without a remedy as its equitable indemnity claim remains in the lower court and all factual issues will be resolved when that claim is decided.

CONCLUSION

There are no genuine issues of material fact that relate to the issues on appeal. All legal issues were correctly decided in the order of the lower court which should be affirmed in full.

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August 4, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2019-CP-10-00772
Appellate Case No. 2021-000290

Dag Pavic and Stela Susac-Pavic.....Plaintiffs,
v.

Carolina Cottage Homes, LLC d/b/a Saussy Burbank; SB Holding, LLC d/b/a Saussy
Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders
FirstSource-Southeast Group, LLC; Hurley Services, LLC; Simons Contractors, LLC and
Cohen's Drywall Company, Inc., ...Defendants,

of which Hurley Services, LLC is the Respondent

AND

Builders FirstSource-Southeast Group, LLC, ...Appellant,
v.

MW Manufacturers, Inc., ...Third-Party Defendant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b).

SIGNATURE PAGE FOLLOWS

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