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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

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No. 2025-001495
Opinion No. 2025-UP-078

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

v.

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

Of which Builders FirstSource-Southeast Group, LLC is the Appellant and Hurley Services, LLC and Charleston Exteriors, LLC are the Respondents.

PETITIONER'S BRIEF

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Questions Presented on Certiorari

2. Is the Agreement's duty to defend provision subjected to the heightened clear and unequivocal standard that indemnity for liability provisions are required to meet and if so, does the Agreement's language meet the heightened standard?

3. 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?

4. Does the court's refusal to view the evidence in the light most favorable to the non-moving party violate the rule of civil procedure and the Supreme Court's precedent regarding summary judgment?

Statement of the Case

This litigation arises out of alleged construction defects at Six Fifty Six Coleman Boulevard, a townhome community in Mount Pleasant, SC. See A. pp. 20-34. Petitioner Builders FirstSource – Southeast Group, LLC (hereinafter "BFS" or "Petitioner") supplied windows and doors for the nine buildings constructed in 2013 and 2014 known as the "Ryland" phase. BFS's subcontractors, Respondent Hurley Services, LLC ("Hurley" or "Respondent") and Charleston Exteriors, LLC, installed the windows and doors at the Six Fifty Six project. Hurley and Charleston Exteriors performed their installation services pursuant to subcontract agreements entered into with BFS in 2012. See A. pp. 196-207, 314-325. Each subcontract agreement contains provisions that call for the subcontractor to defend and indemnify BFS from and against any and all claims resulting from property damage alleged to have arisen out of the subcontractor's performance of its Work. See A. pp. 201-202, 319-320. After being served with Plaintiff's complaint, BFS filed third-party claims, and subsequently cross-claims, against Hurley and Charleston Exteriors asserting causes of action for indemnification, breach of express warranties, breach of implied warranties, negligence, and breach of contract. See A. pp. 107-114, 186-193.

In discovery, as it relates to Plaintiff's alleged window installation defects, the parties learned from Plaintiff's expert witness that, notwithstanding the installation criteria imposed by the window manufacturer, he did not see any evidence, and therefore did not believe, that the window installer installed sealant caulk inboard of *any* of the window's four (4) perimeter nailing fins (flanges). See A. pp. 488-492.

BFS's SCRCP Rule 30(b)(6) designee testified that BFS believed that the windows were installed at Six Fifty Six with sealant caulk installed behind the windows' nailing fins and that its subcontractors were instructed to install the windows with sealant caulk behind the window nailing fins. See A. p. 505, ll. 2-9; 507, ll. 8-10; 509, ll. 22-25, 510, ll. 1-19. Charleston Exteriors' SCRCP Rule 30(b)(6) designee confirmed in deposition testimony that BFS instructed the subcontractor to install sealant caulk behind the windows' nailing fins and that an entire tube of caulk was used by the subcontractor to install the windows. See A. p. 513, ll. 15-22; p. 514, ll. 15-18.

Thus, a genuine issue of material fact existed as to whether or not the sealant caulk was installed by the window installers. As such, the parties proceeded to trial, however, in advance of the trial, BFS, Hurley, and Charleston Exteriors each reached individual settlements with the Plaintiff's resolving Plaintiff's claims against each party individually. However, in light of the evidence obtained during discovery, BFS's claims against its subcontractors for defense costs – specifically for attorney's fees and costs incurred in defending against the Plaintiff's claims of negligent window installation – survived the settlement. Hurley moved for summary judgment against BFS's claims on January 22, 2020. See A. pp. 194-207. Charleston Exteriors filed a motion to join in Hurley's motion for summary judgment on February 21, 2020. See A. p. 208. After hearing oral arguments on the motion, the trial court issued an order granting the motion for summary judgment on April 29, 2020. See A. pp. 1-5. BFS filed a timely motion for

reconsideration, and all parties submitted additional briefs. The trial court denied the motion for reconsideration without a hearing by a Form 4 Order filed on August 27, 2020. See A. pp. 6-8. BFS timely filed a Notice of Appeal.

On appeal, this case was considered by a panel of judges composed of Judges McDonald, Vinson and Bromell. BFS's final briefs were submitted on September 10, 2021, and oral arguments were held on December 5, 2023. On March 12, 2025, the court of appeals issued its decision affirming the trial court's order as an un-published opinion. BFS filed a petition for rehearing on March 27, 2025. On June 25, 2025, the court of appeals issued a substituted opinion denying the petition for rehearing. BFS filed a petition for certiorari, which was granted by this Court in an Order dated December 16, 2025. This brief follows.

STATEMENT OF FACTS

Certain parts of BFS's pleading and the parties' contracts are relevant to multiple arguments before the Court. For the Court's convenience, relevant portions of these documents and excerpts from deposition testimony offered by the parties' witnesses are introduced here and then referenced throughout the Argument section.

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

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

FOR A FIRST CAUSE AS TO HURLEY SERVICES, LLC AND CHARLESTON EXTERIORS, LLC

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

120. That the Plaintiffs, Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually and on behalf of others similarly situated 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 structures.

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

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

123. That the respective subcontracts between this Defendant and the CrossClaim Defendants, provide for contractual indemnification in favor of BFS.

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

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

126. That BFS is entitled to full contractual and common law indemnification from the CrossClaim Defendants, 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 Defendants, entitling BFS to recover from the Third-Party Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the CrossClaim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

See A. pp. 187-189.

At the summary judgment hearing, and throughout the appeal, Hurley contended that BFS's indemnification cause of action sought indemnity for BFS's own negligence. However, to achieve Hurley's reading of BFS's pleading, one must focus exclusively on select language from only the last paragraph and ignore all of the language in the preceding paragraphs which expressly limit BFS's indemnification cause of action to damages resulting only from Hurley's negligence. Specifically, paragraph 122 of BFS's indemnification cause of action, provides:

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

A. p. 187 (emphasis added).

Paragraph 125 provides:

> **"That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the [subcontractors], 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."**

A. p. 188 (emphasis added).

BFS also points out that paragraph 126 provides that BFS's alleged entitlement for "full contractual and common law indemnification" is **"for any negligence, as aforesaid, on the part of the [subcontractors]...."** A. p. 188 (emphasis added).

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

BFS entered into a written contractual agreement with Hurley dated May 14, 2012. See A. pp. 196-207. BFS entered into a similar agreement with Charleston Exteriors dated October 17, 2012. See A. pp. 314-325.

Both contracts are of the same format and include virtually the same terms and provisions. The contracts begins with a "**SECTION 1. Introduction.**", which states, in relevant part, that the "Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") ...." See A. pp. 196, 314. The term Work, defined in SECTION 1 as the materials provided and/or services performed by the Subcontractor, is subsequently used throughout the contracts. See A. pp. 196-207, 314-325. This defined term **"Work"** is critical to an appropriate reading of the contracts, because each Agreement, and all the contractual rights and obligations of the parties, is limited to the Subcontractor's Work.

The relevant indemnity provision in the contracts is as follows:

> **SECTION 5. INDEMNITY.**
> **TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LMIITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISTE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACITIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN**

PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFCATION HEREUNDER.

See A. pp. 201, 319 (emphasis in original).

The contracts also include a separate provision regarding defense rights which is set forth as follows:

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

See A. pp. 202, 320 (emphasis in original).

Also, at issue on appeal is whether or not there is a genuine issue of material fact that precludes summary judgment as it relates to whether or not Hurley and Charleston Exteriors installed required sealant caulk, on the inboard sides of the window nailing fins, in their window installation work. Therefore, we must next review the deposition testimony offered by the parties' witnesses on the subject.

Plaintiffs' expert witness, Mr. Russell Mease, P.E., testified that he saw no evidence of the sealant caulk behind the nailing fins of the windows installed at the Six Fifty Six project. See A.

pp. 488-492. He testified further that if sealant caulk is installed behind the window's nailing fin, you always see it in the nail holes and quite often behind the perimeter as it is squeezed out behind the fin. See A. p. 489, ll. 1-4. Mr. Mease agreed that generally, the windows' jamb and head nailing fins were covered by peel-and-seal tape, but that the sills of the windows were not. See A. pp. 489, ll. 23-25, 490, ll. 1-11. In response to the question of whether he could "definitively opine that there's a complete absence of caulk behind the nailing fins of the windows installed on the Ryland buildings," Mr. Mease testified that he "was able to see the window corners at the jamb-sill intersection," an "area where [he] would typically see sealant exposed," and that he had no evidence of it. See A. pp. 491, ll. 23-25, 492, ll. 1-6. He reiterated and testified that he had no evidence of sealant installed behind the windows and he believed that to be the case. See A. p. 492, ll. 7-9. Mr. Mease further testified that his opinion was based on review of photographs, his on-site observations, and his general experience in investigating windows. See A. p. 492, ll. 10-13. He testified that based on his experience, that when sealant is used, it is visible because it gets all over everything and that he did not see one stitch of sealant on anything. See A. p. 492, ll. 17-22. Mr. Mease explained "it's sticky, messy stuff that gets on almost everything." See A. p. 492, ll. 24-25. For these reasons, Mr. Mease reiterated and testified that he did not believe that any sealant was installed on the backs of the window's fins. See A. p. 492, ll. 22-24.

BFS's SCRCP Rule 30(b)(6) designee, Mr. Terry Rosamond, testified that BFS believed that the windows were installed at Six Fifty Six with sealant caulk behind the two (2) jambs and one (1) head nailing fins and with use of Fortifiber flashing installed beneath the sill nailing fin. See A. p. 505, ll. 2-9. Mr. Rosamond reiterated that BFS expected the windows to be installed with "a 3/8 bead of caulk around three sides of the window, the sides, the top and the head." A. p. 507, ll. 8-10. He testified that installation of the sealant caulk must be applied to the window

before you install the window. See A. pp. 507, l. 25, 508, ll. 1-3. Further, Mr. Rosamond testified that he felt certain that the installer was instructed how to install the windows. See A. pp. 509, ll. 22-25, 510, ll. 1-19.

Charleston Exteriors' SCRCP Rule 30(b)(6) designee, Edward Taylor, confirmed in deposition testimony that BFS instructed Charleston Exteriors how BFS expected the windows to be installed at Six Fifty Six. See A. p. 513, ll. 15-22. As it relates to sealant caulk being installed on the windows' nail flange, Mr. Taylor testified that "you've got to caulk" and "[Charleston Exteriors] used a whole tube of caulk on the nail flange, three – the two sides and the top." See A. p. 514, ll. 15-18.

The aforesaid evidence, suggesting deficiencies in the installation of windows by the BFS subcontractors, gives rise to a genuine issue of material fact, which should have precluded summary judgment.

The court of appeals also found deficiencies in the contractual provisions relied upon by BFS. Where, however, as here, the litigation involved alleged property damage from purported defects in the subcontractor's window installation work, the subcontractor has agreed to indemnify BFS "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." See A. pp. 201, 319. Thus, contrary to Hurley's arguments, the indemnification provision is not only completely consistent with the relief sought by BFS, but also explicitly authorized by law.

Nevertheless, Hurley argued and the court of appeals correspondingly held that other contractual provisions in the contracts conflict with the relevant provisions and/or violate South Carolina law. Before setting forth the other contested provisions, BFS would emphasize, and will argue further below, that upon proper reading, i.e. when read in context and with appropriate

consideration of defined terms, like "Work," the provisions do not stand for what Hurley argued and the court of appeals held. Equally importantly, the other provisions, specifically including provisions relating to bodily injury claims, and/or mechanic's liens, are (a) separate and distinct from the relevant provisions, (b) unrelated to the claims asserted here, and (c) not relied upon by BFS in the assertion of its claims against Hurley.

The other contested provisions of the contracts are as follows:

> **SECTION 5. INDEMNITY.**
> [First paragraph is omitted – this first paragraph is set forth above as it is the indemnity provision upon which BFS relies in the assertion of its contractual indemnification claims against the subcontractors.]
>
> **NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR' AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE**

LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

[Third paragraph is omitted – the third paragraph is set forth above as it is a provision relating to defense expenses incurred by BFS.]

THE DEFENSE AND INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT ARE NOT INTENDED TO AND SHALL NOT REQUIRE THE SUBCONTRACTOR OR OTHERS TO INDEMNIFY OR HOLD HARMLESS A REGISTERED ARCHITECT, LICENSED ENGINEER, OR AN AGENT, SERVANT, OR EMPLOYEE OF A REGISTERED ARCHITECT OR LICENSED ENGINEER FROM LIABILITY FOR DAMAGES THAT IS (a) CAUSED BY OR RESULTING FROM: (1) DEFECTS IN PLANS, DESIGNS, OR SPECIFICATIONS PREPARED, APPROVED, OR USED BY THE ARCHITECT OR ENGINEER; OR (2) THE NEGLIGENCE OF THE ARCHITECT OR ENGINEER IN THE RENDITION OR CONDUCT OF PROFESSIONAL DUTIES CALLED FOR OR ARISING OUT OF THE CONSTRUCTION CONTRACT AND THE PLANS, DESIGNS, OR SPECIFICATIONS THAT ARE A PART OF THE CONSTRUCTION CONTRACT; AND (b) ARISES FROM PERSONAL INJURY OR DEATH, PROPERTY INJURY, OR ANY OTHER EXPENSE THAT ARISES FROM PERSONAL INJURY, DEATH OR PROPERTY INJURY.

See A. pp. 201-202, 319-320.

SECTION 8. Payment to Subcontractor.

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

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

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

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

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

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

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

h. **Subcontractor's Agreement to Pay.** Subcontractor will promptly pay when due all charges owed by it for labor, services, materials, equipment, tools, and supplies furnished under this Agreement and will keep the Work and Project free from any mechanics' and materialmen's liens. Subcontractor shall not acquire any materials, supplies, or equipment subject to any security interest or conditional sale or other agreement where any interest is retained by or granted to a seller, supplier, or lender. If Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion. Contractor shall be entitled to and Subcontractor shall provide acceptable security insuring against claims by Subcontractor's creditors.

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

DIRECTLY OR INDIRECTLY FROM CURING ANY SUCH LIENS, CLAIMS, ENCUMBERANCES, OR DEMANDS.

See A. pp. 204-206, 322-324.

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

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

See A. pp. 207, 325.

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

STANDARD OF REVIEW

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

On an appeal from an order granting summary judgment on a question of law, this Court reviews the ruling de novo. Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019)(citing Town of Summerville v. City of N. Charleston, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008)). "The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct.App.2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).

ARGUMENT

I. The Agreement's duty to defend provision is not required to meet the heightened clear and unequivocal standard; however, even if it is, the language meets the same and provides that Hurley must defend BFS in clear and unequivocal terms.

Plaintiff sued BFS for alleged deficiencies in and damages resulting from the window installation work performed by BFS's subcontractors. Importantly, Plaintiff's claims in *Six Fifty Six* did not relate to any defect in the window product supplied by BFS; instead, Plaintiff's claims

related only to purported defects in the way the windows were installed. BFS supplied the windows and subcontracted with Hurley and Charleston Exteriors to perform the actual window installation work. Every single aspect of window installation was, in fact, performed solely by the subcontractor. Thus, here, where BFS was sued because of the subcontractors' allegedly negligent window installation work, BFS was compelled to expend attorneys' fees to defend itself from Plaintiff's claims, regardless of whether or not Plaintiff ultimately prevailed on the claims. For this reason, and pursuant to its contract, BFS seeks recovery for its attorneys' fees and defense expenses incurred in defending against Plaintiff's claims for purported deficiencies in the window installation work performed by Charleston Exteriors and Hurley.

BFS's indemnification cause of action is seeking recovery of damages allegedly resulting solely from the negligence of its subcontractors, and not as a result of any negligence by BFS itself. Therefore, the contractual provision on which its claims are based, (set forth in the first paragraph of SECTION 5), is not subject to the heightened "clear and unequivocal" standard. Historically, our courts have recognized that contractual indemnity provisions are to be construed in accordance with rules for construction of contracts generally. See Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989); Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). The exception to this basic rule arises **only** when a party seeks to be indemnified from its own negligent acts, and in such instance, the heightened "clear and unequivocal terms" standard will be applied to the indemnity provision. See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 490, 763 S.E.2d 19, 20 (2014); Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003).

The court of appeals, in Section 3 of its Opinion, made a series of erroneous implicit and explicit conclusions: first, it concluded that BFS was seeking to recover damages that resulted

from its own negligence; second, it concluded that Concord & Cumberland stands for the proposition that general rules of contract construction cannot apply to the situation before the Court; and third, it agreed with the circuit court that the contract language was confusing and unenforceable. All of these conclusions are either incorrect or irrelevant to the actual issue before the Court.

Even assuming, however, an ultimate determination that the Plaintiff's damages arose from the concurrent negligence of both BFS and Hurley Services, BFS contends that any contractual provision, (set forth in the third paragraph of SECTION 5) imposing, upon the subcontractor, the obligation to defend against the concurrent negligence of its contractor, is subject to the ordinary rules of contract construction, and not to the heightened "clear and unequivocal" standard. Nevertheless, to the extent that this court may determine that such a heightened standard is relevant here, BFS contends that the relevant contractual provision, as set forth in the third paragraph of SECTION 5, is clear in imposing an obligation to defend regardless of any potential concurrent negligence of BFS.

A. BFS is not seeking contractual indemnification for its own negligence (whether sole or concurrent), but only for damages BFS incurred as a result of the alleged negligence of the subcontractors.

The Opinion implicitly determines, without explanation or analysis, that BFS is seeking indemnity for its own negligence, writing: "Here, the relevant provisions of the Agreement are not sufficiently clear and unequivocal to require Respondents to indemnify BFS for BFS's own negligence—whether sole or concurrent." A. p. 574. The Opinion never even considers whether BFS can recover damages, including attorney's fees, for its *subcontractor's* negligence—whether sole or concurrent.

What the Record actually shows is that, contrary to the court of appeals' determination, BFS's indemnification cause of action seeks recovery **only** for damages found to have resulted from its subcontractor's negligence. BFS pleaded a cause of action seeking recovery of damages that were "the direct and proximate result ... of the negligence ... of the [subcontractors]." See A. p. 187 ("122...In the event that the Plaintiffs establish that the materials and/or services of the [subcontractors] were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event the [subcontractors] have failed properly to execute their duties, which failure has allegedly caused the Plaintiffs' damages."); A. p.188 ("125. 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 the direct and proximate result of the wrongful acts, omissions, negligence and/or representations of the [subcontractors], 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."). (emphasis supplied)

As argued repeatedly before the trial court and the court of appeals, BFS has contended that the Plaintiff's allegations of deficiencies in window installations, (as purportedly supported by Plaintiff's expert's testimony) arose solely from the negligent acts or omissions of its subcontractor. Under the circumstances, BFS further represented that it was seeking recovery only of defense costs relating to the actions of its subcontractors. See A. pp. 447-448.

The court of appeals thus analyzed the wrong type of claim: it analyzed BFS's cause of action as if it were that of a contractor seeking indemnification for its own negligence; it should have analyzed it as a cause of action by which BFS seeks recovery for damages resulting for the negligence of its subcontractor(s). This error affected the entirety of the court of appeals' analysis; because BFS is not seeking indemnification for its own negligence, the heightened clear and

unequivocal standard, (even if appliable to defense costs), should not be applied to the contractual provisions, (set forth in the first and third paragraphs of SECTION 5) upon which BFS relies in the assertion of its indemnification claim for the subcontractor's negligence. 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).

B. The court of appeals improperly applied the reasoning of Concord & Cumberland.

The court of appeals stated that "[i]n Concord & Cumberland, this court [of appeals] rejected the 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.'" Opinion, A. p. 574. While this may be an accurate description of the case, it is incomplete: the Concord & Cumberland court held that when a contractor seeks indemnification for its own negligence, whether sole or concurrent, the court must analyze the contractual language by which the contractor seeks such indemnification under the heightened "clear and unequivocal" standard; however, the Concord & Cumberland court **did not** apply the "clear and unequivocal" standard to the portion of the contractor's claim by which the contractor sought recovery for damages resulting from the negligence of the subcontractor. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) (affirming the district court's award of damages to the contractor to the extent they were based on the negligence of the subcontractor *even though* the contractual provision on which the contractor relied for that relief *did not* meet the heightened clear and unequivocal standard).

The type of claim before this Court is the same type of claim to which the Concord & Cumberland Court *did not* apply the heightened "clear and unequivocal" standard. The trial court and court of appeals were thus wrong to apply such a heightened standard in this case.

Moreover, based on the language of the pleadings and the contract, even if the court of appeals believed that a claim for BFS's own negligence had been asserted, it should still have considered whether a claim for the recovery for the negligence of the subcontractors had also been asserted. In fact, the court of appeals appears to have recognized such possibility when it stated that BFS installation procedures confirmed "BFS's sole-or, at best, concurrent-negligence...." See A. p. 573.

Even if BFS cannot recover under the first paragraph of SECTION 5, for its own negligence, BFS can still recover in contractual indemnity for damages, including defense costs, it incurred as a result of the negligence of its subcontractors. Such a result is not novel in South Carolina. See e.g. Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993)(where indemnitor security company was required to indemnify indemnitee warehouse lessee for any liability it may have to warehouse owners for fire set by security company employee even if lessee was negligent and thus contributed to its own damage since security company agreed to indemnify the lessee for damages arising "in whole or in part" from acts of its employees, and it remained undisputed that damage arose "in part" from employee's act of setting fire.); S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 135 S.E.2d 613 (1964) (affirming judgment for full recovery of contractual indemnity for damages arising from defective construction based on contract requiring indemnity for "any and all claims for damages to persons and/or property arising out of or in any way connected with the performance of any work covered by this contract").

C. The provisions of the contract are sufficiently clear to provide for the type of relief requested.

The court of appeals held that the contractual provisions at issue were not sufficiently clear and unequivocal to allow BFS to recover for its own negligence. As discussed above, however, this is an improper standard by which to evaluate whether the contract allows BFS to recover for the negligence of its subcontractors. Instead, the standard that governs is that which is used generally in contract interpretation.

Moreover, as more thoroughly demonstrated hereinafter, even assuming the clear and unequivocal standard might be applicable to any potential claims for defense costs arising out of any concurrent negligence of BFS itself, the relevant contractual provision, as set forth in the third paragraph of SECTION 5, satisfies such heightened standard.

To recover its attorneys' fees, BFS looks to its contracts with its subcontractors. As part of their contract, Hurley and Charleston Exteriors agreed, in the first paragraph of SECTION 5, to defend and indemnify BFS against any and all third-party property damage claims, "**BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR.**" See A. pp. 201, 319 (emphasis in original).

The first paragraph of SECTION 5 clearly obligates the subcontractors to defend and indemnify BFS against property damage claims (such as the one in this case) to the extent that the allegations against BFS were, as here, caused "**in whole or in part**" by the negligence of the subcontractor. This paragraph does not provide for BFS to recover for its own negligence. There is nothing confusing, illegal, or unenforceable about this provision, which is based on the AIA standard indemnification provision that limits the obligation to defend and indemnify for damages resulting from the subcontractors' negligence. Such a provision is an industry standard provision and complies with South Carolina law. Thus, pursuant to this provision, BFS should be able to

pursue a claim against its subcontractors for attorney's fees resulting from the subcontractor's negligence.[1]

However, as pointed out by the subcontractors, this provision in the first paragraph of SECTION 5 is not the only one by which BFS may establish its right to recover attorney's fees from its subcontractors. Hurley and Charleston Exteriors also agreed, under the separate provisions set forth in the third paragraph of SECTION 5, that they would defend BFS against an indemnified claim regardless of any ultimate liability or negligence of BFS. See A. pp. 202, 320 **(THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRCATOR.)**(emphasis in original).

It is not proper to read this paragraph in isolation as the subcontractors suggest. The third paragraph must be read in conjunction with the "duty to defend" as addressed in the relevant and operative indemnity provision in SECTION 5. Here, where the litigation involves third-party property damage claims asserted by the Plaintiffs, the relevant indemnity provision is set forth in the first paragraph of SECTION 5. Thus, the subcontractor's "duty to defend" is limited to "the extent caused in whole or in part by the negligence of the subcontractor." What the third paragraph

[1] BFS acknowledges that it may be the case that a jury determination may be required, in Paragraph 1 of Section 1, in order to determine the proportion of the BFS attorneys' fees allocable each subcontractor. Such a result, however, is the contractual right of BFS, and one for which the parties properly bargained.

then says is that this duty to defend is separate from the duty to indemnify-that is, a situation may arise where a subcontractor has a duty to defend BFS, even though the subcontractor may not ultimately have a duty to indemnify BFS, and that the defense obligation of the subcontractor arises upon presentation of a claim by the indemnified party. Further, the provision states that the duty to defend BFS, against claims that have been made against BFS concerning the Work of the subcontractor, exists regardless of whether BFS is found to be negligent or not.

Such a provision makes logical sense. When a Plaintiff files and serves BFS with a lawsuit alleging that the windows were improperly installed by BFS's subcontractor(s), BFS is required to begin to expend attorney's fees and other expenses in its defense against claims relating to the subcontractor(s)' Work. BFS would not be in this position if there were not an alleged problem with the Work the subcontractors performed. It may be the case that a jury finds that the Work of the subcontractors was not performed negligently and that the plaintiff is not entitled to any recovery. In this event, BFS would not have any claim for indemnity because it was not forced to pay any judgment to plaintiff arising out of the subcontractor's Work. However, BFS still had to expend attorneys' fees in defending its and the subcontractor(s)' "innocence," and thus those attorney's fees are recoverable from the subcontractor under the third paragraph of SECTION 5.

Further, it may be the case that BFS could be found to be concurrently negligent with the subcontractor; in that situation, the first paragraph of SECTION 5 nonetheless provides that BFS is entitled to recover attorney's fees, to "the extent caused in whole or in part by the negligence of the subcontractor," for the concurrent negligence of its subcontractor. Because the "duty to defend" is always limited to "the extent caused in whole or in part by the negligence of the subcontractor," this provision should not be analyzed under the heightened "clear and unequivocal" standard.

By contrast, however, the third paragraph of SECTION 5 provides BFS a right to a defense regardless of any negligence or ultimate liability of BFS. BFS submits that this contractual provision is clear and unequivocal in imposing the obligation to defend regardless of any concurrent negligence of BFS. By imposing the duty to defend "regardless of any ultimate liability or negligence of the contractor," the provision "clearly shows the parties' intent" that the subcontractor must defend BFS against an indemnified claim regardless of any potential concurrent negligence of BFS. See Concord & Cumberland, 424 S.C. at 657 ("Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in an indemnity clause that clearly shows the parties' intent to absolve the indemnitee of the consequences of its own concurrent negligence."). Thus, should the Court determine that the heightened standard applies here, the third paragraph of SECTION 5 sets forth the duty to defend (even in the event of the concurrent negligence of BFS and Hurley Services), in "clear and unequivocal" terms, and summary judgment, on that possible issue, was thus improper.

In this case, *Six Fifty Six*, BFS has contended that damages for alleged deficiencies in window installation arose solely from the acts or omissions of its subcontractor, and that it thus seeks recovery of defense costs only as those costs relate to the subcontractor's negligence. See A. pp. 187-189, 447-448. To such claims for defense costs, the court of appeals improperly applied the heightened standard articulated in Concord & Cumberland.

Moreover, BFS contends that the application of the heightened "clear and unequivocal standard," to claims for attorney's fees arising from the concurrent negligence of the indemnitee (BFS), was inappropriate, when such contractual provision should have been evaluated in accordance with the general rules for construction of contracts.

Finally, to the extent that this court should deem that the clear and unequivocal standard is applicable to claims for defense costs relating to the concurrent negligence of the indemnitee, the contractual provisions imposing such an obligation upon Hurley (as set forth in the third paragraph of SECTION 5), were sufficient to satisfy the heightened standard.

II. 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.

In holding that the parties were collaterally estopped from litigating the issue that forms the basis for this appeal, the court of appeals' Opinion overlooked the fact that no trial court has yet answered the question of whether BFS can recover, under the relevant indemnity provisions of the respective contract, for the negligence of Hurley, regardless of whether BFS can recover indemnity for its own negligence. All prior cases cited as the basis for the lower court's collateral estoppel have involved the lower courts' consideration of BFS's claims purportedly seeking indemnity against BFS's own negligence. No prior court has specifically addressed the issue – the specific claim BFS contends that it is seeking in this litigation – of whether BFS may recover indemnity for Hurley's negligence in the window and exterior door installation work performed by Hurley.

Here, in *Six Fifty Six*, BFS is seeking recovery of attorney's fees pursuant to the third paragraph of Section 5 of the contract and if necessary, alternatively, attorney's fees resulting from only the subcontractors' negligence pursuant to the first paragraph of Section 5 of the contract. The claims for attorney's fees and the provisions set forth in the third paragraph of Section 5 of the contract were not at issue in the prior *BFS v MI Windows* litigation or the subsequent *BFS v. Palmetto Trim & Renovation* litigation. Contrary to the Opinion, the parties in *BFS v MI Windows* did not discuss, much less litigate, nor did Judge Newman consider, much less rule upon, the issues

before Judge Young in *Six Fifty Six*. The doctrine of collateral estoppel is only available *when the same issues of fact or law* are actually litigated and directly determined by valid and final judgment. See Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) (emphasis added). Further, collateral estoppel requires that: (1) the issue in the current case was actually litigated in the prior action; (2) the issue was directly determined in the prior action; and (3) the issue was necessary to support the prior judgment. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Not one of the three elements necessary for collateral estoppel is present in *Six Fifty Six*. The issue before the trial court in *Six Fifty Six* was *whether BFS may recover under the duty to defend provision or alternatively the relevant indemnity provision for Hurley'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. As such, Judge Newman's Order from *BFS v MI Windows* cannot serve as the basis for Judge Young to invoke collateral estoppel and grant summary judgment, nor can it serve as the basis for the court of appeals to affirm Judge Young's Order.

In addition to failing to appreciate that the issue before the lower court has not been litigated, the court of appeals' Opinion erred in finding that a judgment on appeal is *final* for collateral estoppel purposes. The Opinion cites to S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) for the point that the application of offensive collateral estoppel is appropriate because the legality of the contract was actually litigated and directly determined in a prior action and the issue was essential to the judgment. The Opinion also cites to Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) for the point that collateral estoppel prevents a party from relitigating an issue that was litigated and "determined by a valid and **FINAL** judgment" in a previous action. Emphasis added. BFS has

repeatedly argued to the lower courts that the lower court's judgment on appeal is not *final* for res judicata or collateral estoppel purposes.

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

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

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

The Restatement's commentary on *finality* provides, "[i]t has often been suggested that finality for appellate review is the same as finality for purposes of res judicata, but that has probably never been quite true." Restatement (Second) of Judgments § 13 Requirement of Finality (1982). The Restatement commentary continues that, "a judgment will ordinarily be considered final in respect to a claim" if "it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular kind of adjudication." Id. Further, the Restatement commentary notes that "the test of finality" is "whether the conclusion in question is procedurally definite." Id.

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

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

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

Here, the trial court invoked collateral estoppel using a judgment which is not final because it has been and remains subject to pending appellate review. Here, consistent with the Restatement, BFS argued to the lower courts that it was inappropriate to consider such judgment for purposes of collateral estoppel. Restatement (Second) of Judgments § 13 Requirement of Finality (1982) ("The pendency of a motion for new trial or to set aside a judgment, or of an appeal from a judgment, is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded.").

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

III. The Opinion conflicts with the rule of civil procedure promulgated by this Court, as well as this Court's precedent regarding the summary judgment standard.

In affirming summary judgment despite the presence of a question of material fact, the Opinion evidences the court of appeals' disregard for Rule 56 (c) and for this Court's precedent regarding the summary judgment standard. Specifically, the court of appeals' Opinion rejects the Rule 56(c) requirement that judgment shall only be rendered if there is no genuine issue as to any material fact. Moreover, the court of appeals' Opinion disregards this Court's precedent that the evidence, and all the inferences that can be reasonably drawn from the evidence, must be viewed in the light most favorable to the nonmoving party. Med. Univ. of S.C. v. Arnaud, 360 S.C. 615, 619, 602 S.E.2d 747, 749 (2004) (citing Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003)).

a. The court confirms that there is evidence in the record that may establish the negligence of Hurley and serve as the basis for BFS's window claims.

In the Opinion, the court of appeals concedes that Plaintiff's expert witness, Russell T. Mease, PE, testified that he found no evidence at all that the required caulk was installed behind the windows' nailing fins. See A. p. 573. While the Opinion sets forth what appears to be the court of appeals' criticisms regarding Mr. Mease's testimony, investigation, and findings, the court of appeals, importantly, did not find the testimony or findings of Mr. Mease to be not relevant, or inadmissible. See Id. More importantly, the court of appeals also specifically acknowledged that the omission of caulk is evidence of the possible "concurrent" negligence of BFS in the installation of the windows at the project. See A. p. 573. Such acknowledgment necessarily suggests corresponding concurrent negligence on the part of Hurley. The respective negligence of BFS and Hurley is, notwithstanding the ruling of the lower courts, a matter of fact subject to jury determination.

The Opinion does not hold that the engineer's testimony is not relevant or not admissible evidence. Instead, the 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, viewed in the light most favorable to BFS, creates a genuine issue of material fact, summary judgment is inappropriate. See Rule 56, S.C.R.C.P. The standard of review requires that the courts consider **ALL** the evidence, **AND** that 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 reverse the Opinion, as there is clearly evidence to support BFS's claims, and certainly a genuine question of material fact to preclude summary judgment.

b. The court of appeals ignored relevant, admissible evidence in the record that creates a question of material fact to preclude summary judgment.

The Opinion confirms that the court of appeals ignored pertinent evidence in the record.

Notable examples of evidence which appears to have been ignored or overlooked by the court of appeals include the following:

(a) the testimony of Charleston Exteriors' corporate designee, who specifically testified that "[y]ou've got to caulk. We used a whole tube of caulk in the nail flange, three - - the two sides and the top." See A. p. 514, ll. 15-18.

(b) testimony from Plaintiffs' expert witness Mr. Mease:

(i) that he found no evidence of sealant installed behind the windows and he believed that to be the case. See A. p. 492, ll. 7-9.

(ii) that he reviewed "*every window fin exposed during [his] and the defense's investigation, and there's no evidence at all of sealant behind the nailing fin.*" A. p. 488, ll. 22-25 (emphasis added).

(iii) that he "was able to see the window corners at the jamb-sill intersection", an "area where [he] would typically see sealant exposed", and that he saw no evidence of it. See A. pp. 491, ll. 23-25, 492, ll. 1-6.

(iv) that his opinion was based from review of photographs, his on-site observations, and his general experience in investigating windows. See A. p. 492, ll. 10-13.

(v) that based on his experience, when sealant is used, it is visible because it gets all over everything and that he did not see one stitch of sealant on anything. See A. p. 492, ll. 17-22.

(vi) caulking was described by Mr. Mease as "it's sticky, messy stuff that gets on almost everything." See A. p. 492, ll. 24-25.

(c) Premised upon the foregoing observations, Mr. Mease reiterated and testified that he did not believe that any sealant was installed on the backs of the window's fins. See A. p. 492, ll. 22-24.

The foregoing testimony constitutes evidence of negligence in window installation as implemented by the subcontractors, and was clearly contrary to the Court's award of summary judgment.

The standard of review requires this Court to consider ALL the *evidence,* AND further requires that 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 misconstrued and/or failed to consider the relevant admissible testimony of the Plaintiff's expert witness and a fact witness, the Court should grant certiorari to reverse the revised Opinion, as there is clearly evidence to support BFS's claims and certainly a genuine question of material fact to preclude summary judgment.

c. The court of appeals misconstrued and inappropriately applied the provisions of S.C Code Ann. §40-11-270 (F) in support of its erroneous adoption of the Respondent's arguments.

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

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

In this litigation, Windsor South, LLC and Jeffrey M. Thomas served as the initial general contractors for construction of the Six Fifty Six project. See A. p. 22. WCM Construction, LLC

and Jonathan J. Thomas served as the second general contractors for construction of the Six Fifty Six project. See A. p. 62. BFS was a subcontractor on the Six Fifty Six project. See A. pp. 63-64. Hurley was a subcontractor to BFS for the Six Fifty Six project. See A. 572. Contrary to the court of appeals' determination, there is no evidence in the record to establish that the parties were performing work at the Six Fifty Six project under a license of BFS.

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

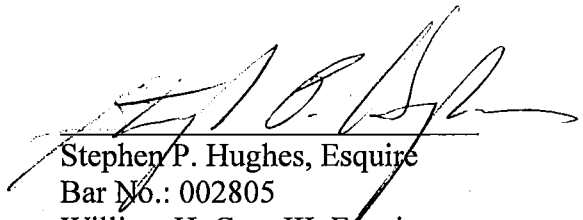
Lastly, the fact that subsection E of Section 270 provides that the licensee is fully responsible for any violation of this chapter, Chapter 11, resulting from the actions of unlicensed subcontractors performing work for the licensee, has no bearing on BFS's claims against Hurley. The fact that BFS holds an unlimited general contractor's license, that was not used by BFS on the Six Fifty Six project, and that Hurley is an unlicensed subcontractor, has no bearing on whether Hurley is liable to BFS for Hurley's failure to install the windows as required by the building code and manufacturer installation instructions. See Teseniar v. Pro. Plastering & Stucco, Inc., 407 S.C. 83, 97, 754 S.E.2d 267, 274 (Ct. App. 2014)(quoting Kennoy v. Graves, 300 S.W.2d 568 (Ky.App.1957) ("The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. The reason for the

rule denying enforceability [of contracts] does not exist when persons engaged in the same business or profession are dealing at arm['s] length with each other. In the case before us, appellant was in a position to know, and did know, the qualifications of appellee. No reliance was placed upon the existence of a license, as presumptively would be the case if appellee was dealing with the general public."). Accordingly, here, at the Six Fifty Six project, where BFS and Hurley were operating under the general contractor's license, neither Section 40–11–270 nor Section 40-11-370 precludes BFS from bringing claims against Hurley for damage resulting from Hurley's negligent acts or omissions. To the extent that the court of appeals' footnote citation to Section 40-11-270(E) suggests otherwise, it is in error.

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

Conclusion

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



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