

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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 Oliveira
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.

APPENDIX VOLUME III

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VOLUME III
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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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
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Horizon Shutters International, LLC; PJ Sanchez
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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 is the Respondent.

Appellate Case No. 2020-001328

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Unpublished Opinion No. 2025-UP-078
Heard December 5, 2023 – Filed March 12, 2025
Withdrawn, Substituted, and Refiled June 25, 2025

AFFIRMED

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

Ian Wesley Freeman, of Ian Freeman Law, LLC, and Jennifer Sue Ivey and John Phillips Linton, Jr., both of Walker Gressette & Linton, LLC, all of Charleston, for Respondent.

PER CURIAM: This litigation arises from alleged construction defects at Six Fifty Six Coleman Boulevard, a twelve-building townhome community in Mount Pleasant (the Project). Builders FirstSource-Southeast Group, LLC (BFS) supplied windows and doors for nine of the Project's buildings; Hurley Services, LLC (Hurley) and Charleston Exteriors, LLC installed the windows and doors pursuant to their subcontractor agreements with BFS. Each master subcontractor agreement (the Agreement) contains provisions requiring the subcontractor to defend and indemnify BFS from all suits resulting from property damage alleged to have arisen from the subcontractor's work.

After the Six Fifty Six Owners Association and property owners (Plaintiffs) brought suit against BFS, BFS filed third-party claims (and later, crossclaims) against Hurley and Charleston Exteriors for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. BFS seeks recovery for any sums it "may pay in satisfaction" of Plaintiffs' claims "plus costs for defense, inclusive of attorneys' fees." Although the parties settled with the Plaintiffs, BFS's claims against these subcontractors survived the settlement.

Hurley moved for summary judgment, and Charleston Exteriors joined in the motion. Following a hearing, the circuit court granted summary judgment. The circuit court denied BFS's subsequent Rule 59(e), SCRCF, motion.

BFS appealed, arguing the circuit court erred in: (1) granting summary judgment despite the presence of genuine issues of material fact; (2) finding BFS's indemnity claims are barred by the doctrine of collateral estoppel; (3) mischaracterizing the language of the Agreement as confusing and unenforceable; (4) finding the relevant contractual indemnity language did not meet the clear and unequivocal standard of *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018); and (5) deeming the contractual language violative of the laws and public policy of South Carolina.¹

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

1. The circuit court properly rejected BFS's argument that the testimony of Plaintiffs' expert, Russell T. Mease, PE, established genuine issues of material fact

¹ BFS conceded that *Stoneledge at Lake Keowee Owners' Association, Inc. v. Builders FirstSource-Southeast Group*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015) was dispositive of its breach of warranty, breach of contract, and negligence claims. Only the contractual indemnity claim remains for our consideration.

regarding BFS's claim that Hurley negligently failed to install caulk on the inboard faces of the window nailing fins. Mease's only criticism regarding Hurley's window installation was that "there is no evidence at all of sealant behind the nailing fin." However, Mease did not look for this condition during destructive testing, and it is not featured in his report; only in hindsight did he consider exposed caulk during a review of photographs before the third day of his deposition. While Mease admitted the caulk would have been applied behind and obscured by each window's nail fins, he stated he was looking for signs that caulk may have squeezed out from behind the sill fin upon installation. But the windows Mease and other experts inspected had peel-and-seal flashing tape that completely covered the jamb fins along either side of each window as well as the head fin at the top of each window. More significantly, BFS had instructed its subcontractors *not to apply caulk* at these sill fin locations as a best practice so that incidental water could weep from the window and wall assembly.

In its appellate brief, BFS admits the substitution of flashing tape behind the sill flange in lieu of caulk was its standard practice, confirming BFS's sole—or, at best, concurrent—negligence as the basis for the window claims. And, Charleston Exteriors' corporate designee testified BFS "inspects everything from . . . taping the windows, butterflying the corners, to caulking the windows." Thus, we agree with the circuit court's finding that there exists no genuine issue of material fact precluding summary judgment.²

2. 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.*, 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)

² 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.").

(stating 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 had preclusive effect. As we held in *Builders FirstSource-Southeast Group, LLC v. Palmetto Trim & Renovation*, the "prior findings have preclusive effect unless and until those dispositive findings are reversed." Op. No. 6099 (S.C. Ct. App. filed Feb. 12, 2025) (Howard Adv. Sh. No. 7 at 7, 34-35) (finding 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).

3. The circuit court did not mischaracterize the language of the Agreement as confusing and unenforceable or err in finding the relevant contractual indemnity language failed to meet the clear and unequivocal standard. In *Concord & Cumberland*, this court 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." 424 S.C. at 646, 819 S.E.2d at 170. 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. "[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, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018) (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 the subcontractors to indemnify BFS for BFS's own negligence, the circuit court correctly granted summary judgment. See *Palmetto Trim & Renovation*, Op. No. 6099, at 24-31 (addressing the indemnity language in BFS's master subcontract Agreements and affirming circuit court's eight orders granting partial summary judgment to BFS's subcontractors).

4. The circuit court correctly deemed the language of the Agreement upon which BFS seeks contractual indemnity to be violative of South Carolina law and public policy. See S.C. Code Ann. § 32-2-10 (Supp. 2024) ("Notwithstanding any other

provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building [or] 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 . . . is against public policy and unenforceable."); *D.R. Horton*, 422 S.C. at 152, 810 S.E.2d at 46 ("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."); *Palmetto Trim & Renovation*, Op. No. 6099 at 31-32 (affirming the circuit court's findings that contractual indemnity language in two versions of BFS's Agreement are unenforceable under section 32-2-10).

AFFIRMED.

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

The South Carolina Court of Appeals

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

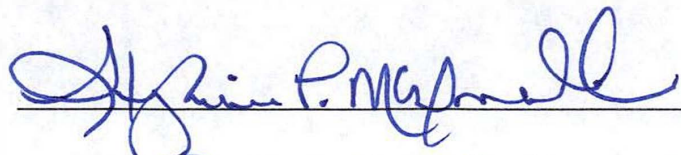
Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vazquez aka Alfonso Rodriguez, Sr.; and John Does 55-75, Defendants,

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

Appellate Case No. 2020-001328

ORDER

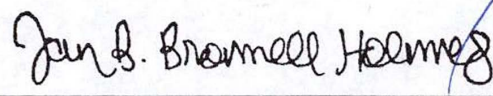
Appellant has filed a petition for rehearing. After careful consideration, the Court denies the petition. However, the Court substitutes the attached revised opinion to correct a scrivener's error in the final paragraph of page 3. No other changes were made to the previously-filed opinion.



J.



J.



A.J.

Columbia, South Carolina

Filed June 25, 2025

cc:

Stephen P. Hughes, Esquire

William Hewitt Cox, III, Esquire

Ian Wesley Freeman, Esquire
Jennifer Sue Ivey, Esquire
John Phillips Linton, Jr., Esquire
The Honorable Roger M. Young, Sr.

Mar 27 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No. 2020-001328

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

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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.

PETITION FOR REHEARING

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

The March 12, 2025 Opinion (herein after “Opinion”) (a) misrepresents and ignores nearly all of the relevant testimony from Plaintiff’s expert witness and BFS and Charleston Exteriors fact witnesses that creates a genuine issue of material fact which should preclude summary judgment; (b) erroneously affirms collateral estoppel without the issues in this matter being litigated and determined by a valid and final judgment; (c) confirms that the Court failed to review the record on appeal and adopted the rationale of other courts pertaining to issues not before the trial court or presently before this Court on appeal.

BFS requests that the Court carefully reconsider and revise the Opinion to be consistent with issues before this Court and the relevant law.

I. The Opinion misrepresents nearly all of the relevant testimony that creates a genuine issue of material fact necessary to preclude summary judgment.

The Opinion states that “[t]he circuit court properly rejected BFS’ argument that the testimony of its expert, Russell T. Mease, PE, established genuine issues of material fact regarding BFS’ claim that Hurley negligently failed to install caulk on the inboard faces of the window nailing fins.” The Opinion is incorrect, as Russell T. Mease, PE is the expert witness hired by Plaintiffs Six Fifty Six Owners Association, Inc. and Robert John Nutley, not BFS.

Next, the Opinion appears to dismiss the merits of Mr. Mease’s investigation and determination that the required caulk was not installed behind the windows’ nailing fins. More importantly, the Opinion confirms that the Court has ignored multiple sections of relevant testimony offered by Mr. Mease to support his opinion. Specifically, the Court ignored that Mr. Mease testified that he reviewed “*every window fin exposed during [his] and the defense’s investigation.*” R. p. 350, ll. 22-24 (emphasis added). The Court also ignored that Mr. Mease

further testified that “[i]f sealant is placed behind the nailing fin, you *always* see it in the nail holes, and quite often behind the perimeter as it is squeezed out behind the fin. And there was no evidence of that in any of the windows that were *exposed*.” R. p. 350, ll. 1-6 (emphasis added). The Opinion, without any supporting basis, incorrectly finds that “the windows Mease and other experts inspected had peel-and-seal flashing tape that completely covered the jamb fins along either side of each window as well as the head fin at the top of each window.” However, in order to reach this conclusion, the Court must ignore the fact that Mr. Mease testified that he reviewed EXPOSED nailing fins. Exposed nailing fins, means that there is no material or component covering the nailing fin, i.e. there is no peel-and-seal flashing covering the nailing fin, and therefore one can see whether the required caulk was installed by evidence of the caulk extruding out at the nail holes of the exposed nailing fin or from extruding out from the sides of the exposed nailing fins.

Further, the Opinion acknowledges that BFS instructed the subcontractors not to install caulk at the SILL FIN locations so that water could weep from the window and wall assembly. (emphasis added). However, the Opinion incorrectly finds that BFS’ substitution of flashing tape behind the sill flange in lieu of caulk confirms BFS’ sole – or, at best, concurrent – negligence as the basis for the window claims. The Opinion cites to a select portion of testimony offered by Charleston Exteriors corporate designee, presumably for the unwritten proposition of the Court that BFS’ supervision is the sole – or, at best, concurrent – cause of the omitted caulk. This section of the Opinion continues to confirm that the Court ignored that Mease testified that there was no evidence of caulk at ANY of the nailing fins, not only the sill (or “bottom”) nailing fins. Moreover, this section of the Opinion confirms that the Court ignored Charleston Exteriors corporate designee testimony 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.” R. p. 353, ll. 16-18. And that this installation protocol is what BFS instructed and expected Charleston Exteriors to perform in the window installation. R. p. 353, ll. 17-21.

The standard of review requires this Court 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). As detailed above, the Court has clearly failed to apply the appropriate standard of review as evidenced by the findings and decisions set forth in its Opinion.

Because the Court has misconstrued¹ and failed to consider the relevant testimony of the expert and fact witnesses in affirming the lower court’s ruling that there exists no genuine issue of material fact to preclude summary judgment, the Opinion must be revised to reverse the order of the trial court.

II. The Opinion erroneously applies collateral estoppel where the claim and provision at issue were not litigated, much less discussed or contemplated by the prior court.

This Opinion confirms that the author of the Court’s recent Opinions continues to ignore the plain language in the pleadings of BFS and even the plain language of the Orders on appeal.

Here, the Opinion incorrectly finds that “[t]he 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.*, 2018-CP-08-2547 (Berkeley, S.C., Ct.

¹ The Opinion in Footnote 2 states that BFS holds an unlimited commercial general contractor’s license and is responsible by statute for the work of its unlicensed subcontractors and cites to S.C. Code Ann. Section 40-11-270(E). This argument by Respondents and subsequent adoption by the Court flies in the face of reason. The fact that BFS holds an unlimited commercial general contractor’s license is immaterial to the *Six Fifty Six* litigation as BFS was not the general contractor and did not use its general contractor’s license or any other licenses that it holds for construction of the *Six Fifty Six* project.

Common Pleas, Dec. 6, 2019).” Further, the Opinion incorrectly states that “[t]he 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 had preclusive effect.”

In *Six Fifty Six*, BFS is seeking recovery of attorney’s fees pursuant to paragraph three of Section 5 of the contracts and if necessary, alternatively, attorney’s fees resulting from only the subcontractors’ negligence pursuant to paragraph one of Section 5 of the contracts. The claims for attorney’s fees and the provisions set forth in paragraph 3 of Section 5 of the contracts 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 the prior action did not discuss, much less litigate, nor did Judge Newman consider, much less rule upon, the issues before Judge Young in *Six Fifty Six*. 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*. 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.

Further, 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.

Because the Opinion confirms that the Court has failed adequately to review the record on appeal in *Six Fifty Six* and erroneously misapplied the doctrine of collateral estoppel to ban BFS's claims, the Court must revise the Opinion to reverse the trial court order granting summary judgment on the collateral estoppel basis.

III. The Opinion re-confirms that the appellate court has misapprehended the plain language in pleadings, contract provisions, and relevant statutory and case law.

In Section 3 of the Opinion, this Court opines that the provisions of the contract at issue are not sufficiently clear and unequivocal to require the subcontractors to indemnify BFS for BFS's own negligence. The Opinion mischaracterizes the relief sought in this matter as indemnity; in fact, in this case, BFS seeks only its attorneys' fees. Therefore, the Court's instruction on indemnity is irrelevant and the Opinion should be modified to instead focus on the contractual provisions relating to attorneys' fees.

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, 424 S.C. at 646-47. Attorneys' fees fall outside that definition. BFS seeks recovery of its attorneys' fees by one of two means: full recovery as provided by the clear and unequivocal language of the third paragraph of Section 5 of its contract; or, alternatively, if the Court does not grant it under said paragraph, then BFS seeks recovery of its attorneys' fees in proportion to the degree of negligence to which its subcontractors are found liable.

a. BFS' entitlement to complete recovery of its attorneys' fees

The primary claim that BFS is seeking to pursue against the subcontractors in *Six Fifty Six* is for all of the attorney's fees incurred in defending against the Plaintiff's claims, and the contractual language supporting this claim has never been held to fail to meet the clear and

unequivocal standard (even assuming such a standard applies to attorneys' fees). BFS is seeking reimbursement of the attorney's fees pursuant to the provision in the third paragraph of Section 5. It is not clear from the Opinion whether the Court specifically considered the language of this paragraph; however, it provides that the duty to defend 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. 548 (emphasis added). Notably, the *Concord and Cumberland* case did not explicitly address whether the "clear and unequivocal" standard applied to claims for attorneys' fees. To the extent that this Court determines that the "clear and unequivocal" standard applies, BFS submits that the contractual provision is clear in imposing an obligation to defend regardless of the 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 to absolve [BFS] of the consequences of its own concurrent negligence." 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, the third paragraph of Section 5 meets the heightened "clear and unequivocal" standard, and summary judgment is not proper.

b. BFS' alternative claim for pro-rated attorney's fees

BFS' alternative basis for recovery of its attorney's fees proposed imposing liability on its subcontractor for said fees in proportion to the negligence the subcontractor is ultimately found culpable for. This theory of recovery limits damages to those incurred by the subcontractors' own negligence. While disallowing this recovery, the Opinion fails to identify or even discuss the

contract provisions or language at issue. Thus, BFS will try to explain based on speculation from the Court's case law citations.

The Court cites to the recent *Palmetto Trim* opinion for support that the language of the contracts is neither clear nor unequivocal. The contracts at issue here, in *Six Fifty Six*, are similar form agreements that were at issue in *MI Windows* and *Palmetto Trim* matters; however, the relevant issues are different. The contracts include a section 5 *Indemnity* which sets forth four (4) separate paragraphs of contract provisions that pertain to separate and distinct facts and circumstances. As previously explained, in *MI Windows* and *Palmetto Trim* matters, the trial courts, and now the Court of Appeals, have ignored the plain limiting language in BFS' pleadings and subsequent Rule 11 certifications by BFS counsel that BFS was seeking indemnification for damages only resulting from the subcontractors' negligence. *MI Windows* and *Palmetto Trim* matters involve property damage claims of owners allegedly resulting from negligent acts or omissions in construction of the respective properties. Accordingly, there is ONLY one indemnity provision that obligates the subcontractors to indemnify BFS for property damages resulting from the negligent acts or omissions of the subcontractors in the Work performed by the subcontractors for BFS. That one indemnity provision is set forth in the first paragraph of Section 5 Indemnity. Consistent with the ruling issued by the Court of Appeals in *Concord and Cumberland*, BFS has previously acknowledged that the indemnity provision in the first paragraph of Section 5 Indemnity does not meet the clear and unequivocal standard required to impose the obligation that the subcontractors indemnify BFS for BFS' own negligence, whether sole or concurrent. However, as the Court in *Concord and Cumberland* found and held, and the Court in *Palmetto Trim* even alluded to, there is nothing confusing, illegal, or unenforceable about the indemnity provision based on the AIA standard indemnification provision that limits the obligation to

indemnify for damages resulting from the subcontractors' negligence. Such a provision is an industry standard provision and complies with statutory law.

In this case, *Six Fifty Six*, BFS is only seeking to be indemnified by the subcontractors for attorney's fees resulting from the subcontractors' negligence as an *alternative claim*. The Opinion confirms that the Court has failed to appreciate the finding and holding in *Concord and Cumberland* that limited indemnification to damages resulting from the subcontractors' negligence. For this reason, the Court must revise the Opinion to reverse the trial court's Order to deny summary judgment and accurately reflect the correct application of the law.

IV. The Court relied on irrelevant cases to hold that the relief requested here violates public policy and laws of South Carolina.

The Opinion goes beyond Concord and Cumberland and finds that the language of the contract also violates "public policy and the laws of South Carolina." The Court did not identify to what public policy, or to what laws, it was referring. Additionally, Judge Newman's Order does not address public policy or any other law besides the common law articulated by the Concord and Cumberland case (discussed above). The Opinion affirms the trial court's ruling without any analysis, but merely provided a string of citations. BFS will now address those citations.

Section 32-2-10 prohibits contracts that indemnify the indemnitee "for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee" In this case, the "damages arising out of . . . property damage" are those damages for which BFS would have been responsible to the Plaintiff. There are no bodily injury damages in *Six Fifty Six*. However, BFS is not seeking damages as contemplated by Section 32-2-10. Instead, BFS is seeking reimbursement of attorney's fees incurred in defending Plaintiff's claims, about which Section 32-2-10 is silent. 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. Attorney’s 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).

The Court also cites to two other opinions as evidence for why the language at issue here violates Section 32-2-10. First, the Court cites to *D.R. Horton v. Builders FirstSource*. That case, as evidenced by the parenthetical the court used, explicitly considered whether BFS could be forced to indemnify D.R. Horton for D.R. Horton’s own negligence. As already articulated, at issue here is not indemnity but recovery for attorney’s fees. Second, the Court cites to the recent

Palmetto Trim Opinion, an opinion which is subject to continuing challenge and has not yet been resolved by any final judgment.

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 above; then, Appellant's claim for attorney's 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 caused by 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" To the extent that claims for attorney's fees might properly be characterized as claims in contractual indemnity, Paragraph One of the Indemnity Provision is the exact type of agreement exempted by the statute.

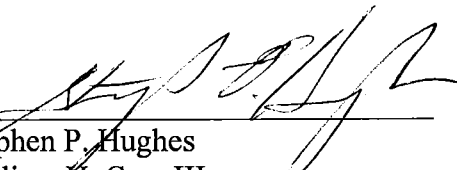
The obligations imposed on the subcontractors here, to defend the interests of Builders FirstSource, are clearly and unequivocally set forth within the relevant Master Subcontract Agreements. These obligations do not violate § 32-2-10 or any public policy of the State of South Carolina, and the Court should not have granted summary judgment against these claims.

CONCLUSION

Because the March 12, 2025 Opinion (a) misrepresents and ignores nearly all of the relevant testimony from Plaintiff's expert witness and BFS and Charleston Exteriors fact witnesses

that creates a genuine issue of material fact which should preclude summary judgment; (b) erroneously affirms collateral estoppel without the issues in this matter being litigated and determined by a prior valid and final judgment; (c) confirms that the Court failed to review the record on appeal and adopted the rationale of other courts pertaining to issues not before the trial court or presently before this Court on appeal, the Court should revise its Opinion to reverse the Order of the trial court to allow BFS's claims for attorney's fees to proceed to trial.

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Beaufort, South Carolina

March 27, 2025

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March 27, 2025

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Mar 27 2025

SC Court of Appeals

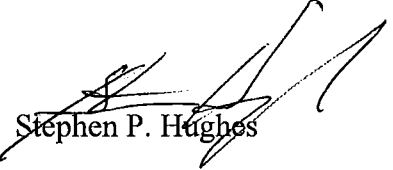
Re: Builders FirstSource - Southeast Group, LLC v. Hurley Services, LLC
and Charleston Exteriors, LLC
Civil Action No.: 2020-001328
Our File No.: 11925.1 SPH

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.

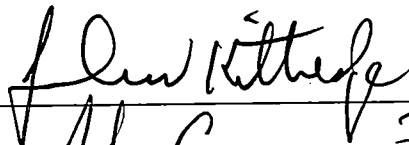
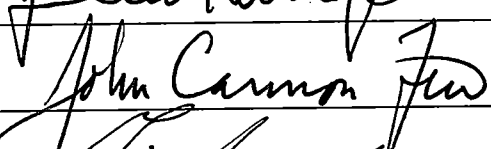
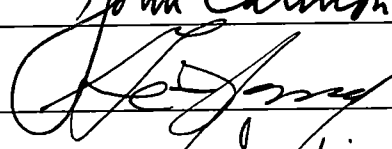
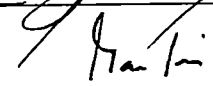
Pohlman Quality Contractors; Pohlman Quality
Exteriors; Palmetto Trim and Renovation; Edward Bruce
Witham; and East Coast Carpentry, Third-Party
Defendants,

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:

Kevin W. Mims
William Chase McNair
John Barnwell Fishburne, Jr.
Stephen P. Hughes
William Hewitt Cox III
James H. Elliott, Jr.
Francis Heyward Grimball
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Payton Dwight Hoover
Edward Glenn Elliott
Jennifer Sue Ivey
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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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.

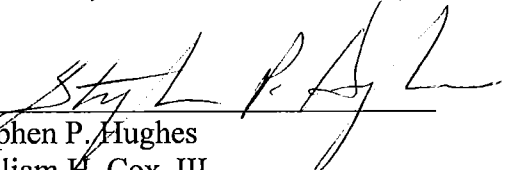
Further, Questions Presented by Petitioner in this BFS Retreat Appeal, while worded slightly differently, are substantively the same as the Questions Presented by Petitioner in the BFS Damico Appeal. See Exhibit C, BFS Petitions for Certiorari in BFS Retreat Appeal and BFS Damico Appeal. Moreover, the 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: 

Stephen P. Hughes

William H. Cox, III

PO Box 40

Beaufort, SC 29901-0040

(843) 522-2400

Attorneys for Petitioner Builders

FirstSource-Southeast Group, LLC

Beaufort, South Carolina

July 21, 2025

The Supreme Court of South Carolina

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

v.

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

Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vazquez aka Alfonso Rodriguez, Sr.; and John Does 55-75, Defendants,

Of which Builders FirstSource-Southeast Group, LLC is the Petitioner,

and Hurley Services, LLC is the Respondent.

Appellate Case No. 2025-001495

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted as to Petitioner's Questions 2, 3, and 4, and denied as to Petitioner's Question 1. 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
Ian W. Freeman

Jennifer S. Ivey
Charleston Exteriors, LLC
John P. Linton
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
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No. 2020-001328

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.

PETITION FOR 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. Does S.C. Code Section 32-2-10 by its specific provisions apply only to agreements in indemnification, and does its silence regarding attorneys' fees reflect both legislative intent and a common law imperative that attorneys' fees do not fall within the scope of Section 32-2-10?
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. [R. pp. 20-34]. Appellant Builders FirstSource – Southeast Group, LLC supplied windows and doors for the nine buildings constructed in 2013 and 2014 known as the "Ryland" phase, and Appellant's subcontractors, Respondents Hurley Services, LLC and Charleston Exteriors, LLC installed the windows and doors. Respondents Hurley Services and Charleston Exteriors performed their installation services pursuant to subcontract agreements entered into with Appellant in 2012. [R. pp. 196, 314]. Each Subcontract Agreement is derivative of the Master Subcontract Agreement Version 5/17/06, and each contains a provision that requires the subcontractor to defend and indemnify Appellant from

all suits resulting from property damage alleged to have arisen out of the subcontractor's performance of its work. [R. pp. 196, 314]. After being served with Plaintiffs' complaint, BFS filed third-party claims and subsequently cross-claims against Hurley Services and Charleston Exteriors for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. [R. pp. 85-114].

In discovery, the parties learned from Plaintiff's forensic engineer, Mr. Russell Mease, P.E., that notwithstanding the installation criteria imposed by the window manufacturer, no caulk had been installed inboard of any of the four perimeter nailing fins (flanges) of the windows at the Ryland buildings. [R. pp. 488, 489]. Mr. Mease explained that he determined the caulk was omitted because he saw no evidence at all of sealant behind the exposed nailing fins. Id. Further, Mr. Mease explained that he would expect to see it at the window corners and there was no evidence of the sealant at the jamb-sill intersection. [R. p. 491]. Petitioner's 30(b)(6) designee, Mr. Terry Rosamond, testified that Respondents were instructed to install the windows with sealant behind the jams and window head nailing flanges and to use Fortifiber FortiFlash self adhered flexible flashing at the sill nailing flange. R. p. 505. Mr. Rosamond reiterated that the Respondents were instructed to "apply a 3/8 bead of caulk around three sides of the window, the sides, the top and the head. And sometimes they require you to do a skip caulk on the bottom. That's -- a lot of times that's required by the builder which way they want it done." [R. p. 506]. Equally importantly, Edward Taylor, the 30(b)(6) designee for Respondent Charleston Exteriors, confirmed that the Petitioner's subcontractors were advised of these installation practices. [R. p. 513]. Mr. Taylor walked through Petitioner's window installation instructions in detail which confirmed installation of caulk inboard of the three nailing fins. [R. p. 514]. All of this evidence, taken together, establishes the following: (1) Petitioner's window installation instructions, which were to be

followed by Respondents, included the application of caulk inboard of the three nailing fins of the window at the jamb and head; but, (2) the Plaintiffs' retained forensic engineer determined that such caulking had been omitted, not only inboard of the bottom sill fin, but also inboard of the three remaining perimeter fins of the windows. This evidence creates a question of material fact as to the alleged negligence of the parties and should have precluded summary judgment. Under the circumstances, the trial court's determination and court of appeal's affirmation of an absence of any genuine issue of material fact is not supported by the record, and is contrary to the specific evidence presented.

In the underlying suit, Appellant, Hurley Services, and Charleston Exteriors have each reached individual settlements with the Plaintiffs resolving Plaintiffs' claims against each party for their own respective liabilities. However, Appellant's third-party claims against its subcontractors for defense costs – specifically for attorneys' fees and costs incurred in defending itself against the Plaintiffs' claims of negligence for window installation – survived the settlement. Respondent Hurley Services moved for summary judgment against Appellant's claims on January 22, 2020. [R. pp. 194-207]. Charleston Exteriors joined in said motion on February 21, 2020. [R. p. 208]. After hearing oral argument on the motion, the Trial Court issued an order granting the motion for summary judgment on April 29, 2020. [R. p. 1]. Appellant 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 on August 27, 2020. [R. p. 6]. This appeal followed.

On appeal, this case was considered by a panel of judges composed of Judges McDonald, Vinson and Bromell. Petitioner's final briefs were submitted on September 10, 2021, and oral arguments were held on December 5, 2023. The court of appeals issued its order as an un-

published 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 issued a substituted opinion denying the petition for rehearing. Appellant Builders FirstSource-Southeast Group, LLC (hereinafter "Petitioner") respectfully petitions this Court for certiorari.

ARGUMENT

I. Whether S.C. Code Section 32-2-10 prohibits a party's ability to recover attorney's fees is a novel issue in South Carolina, and the Supreme Court should hear this case to clarify that under strict statutory construction, Section 32-2-10, which is in derogation of common law and expressly applies only to indemnification, does not apply to attorneys' fees, which are a separate form of recovery.

Section 32-2-10 governs agreements for indemnity against liability for damages; it is silent regarding attorneys' fees, and no South Carolina Court has yet addressed the question of whether the statute was intended to apply expansively to attorneys' fees or whether it was intended, as written, to apply only to indemnification for damages.

Section 32-2-10 prohibits contracts that indemnify the indemnitee "for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee" In this case, the "damages arising out of . . . property damage" are those damages for which Petitioner would have been responsible to the Plaintiff. There are no bodily injury damages in Six Fifty Six. However, Petitioner is not seeking damages as contemplated by Section 32-2-10. Instead, Petitioner is seeking reimbursement of attorney's fees incurred in defending against Plaintiff's claims for damages allegedly resulting from deficiencies in work performed by Respondents.

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 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 Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646-47 (Ct. App. 2018), reh'g denied (Oct. 18, 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 imposes restrictions unknown at common law, it must be strictly construed. 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 [indemnitee].” 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; then, Petitioner's claim for attorneys' fees would instead be fully encompassed by Paragraph One of the Indemnity Provision. Paragraph One provides that Respondents would indemnify Petitioner 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 caused by 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" Paragraph One of Section 5 INDEMNITY is the exact type of agreement exempted by the statute.

For all of the foregoing reasons, this Court should grant certiorari to review the Record on Appeal which will confirm that Paragraph Three of Section 5 INDEMNITY is neither addressed nor prohibited by Section 32-2-10 and in the alternative Paragraph One of Section 5 INDEMNITY is expressly authorized by Section 32-2-10.

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.

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 attorney's fees for Respondents' negligence in the window installation work performed by Respondents.

Additionally, the revised Opinion erroneously applies collateral estoppel where the claim and provision at issue were not litigated, much less discussed or contemplated by the prior court. 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. Here, in Six Fifty Six, BFS is seeking recovery of attorney's fees pursuant to paragraph three of Section 5 INDEMNITY of the Agreements and if necessary, alternatively, attorney's fees resulting from only Respondents' negligence pursuant to paragraph one of Section 5 INDEMNITY of the Agreements. The claims for attorney's fees and the provisions set forth in paragraph 3 of Section 5 of the Agreements were not at issue in the prior BFS v MI Windows litigation. Contrary to the court of appeals' mistaken belief, the parties in BFS v MI Windows did not litigate, much less discuss, nor did Judge Newman consider, much less rule upon, the issue before Judge Young in Six Fifty Six - Petitioner seeking recovery of

attorney's fees pursuant to paragraph three of Section 5 INDEMNITY of the Agreements. 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. Because the revised Opinion confirms that the court of appeals failed to review the record on appeal in Six Fifty Six, the Court must grant certiorari to correct the lower courts actions with respect to collateral estoppel.

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 attorneys fees under the relevant provisions of the parties contract*. 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, because the issue in this matter has not been ruled upon by a single court to date, and because the claim and provisions at issue were not before Judge Newman in BFS v MI Windows, the Court should grant certiorari to provide clarity on *finality* and correct the lower court's errant application of collateral estoppel.

III. The Agreement's duty to defend provision is not required to meet the heightened clear and unequivocal standard, however, if it is, the language meets the same and provides that Respondent must defend Petitioner in clear and unequivocal terms.

The primary claim that Petitioner is seeking to pursue against the Respondents in Six Fifty Six is for all of the attorney's fees incurred in defending against the Plaintiff's claims for defective installation work performed by the Respondents. Petitioner is seeking reimbursement of the attorney's fees pursuant to the provision in the third paragraph of Section 5 INDEMNITY. The

specific language of the Agreements provide that the duty to defend is “...independent and separate from the duty to indemnify, *and the duty to defend exist regardless of any ultimate liability or negligence of the contractor . . .*” R. p. 548 (emphasis added). Notably, the Concord & Cumberland case did not explicitly address whether the “clear and unequivocal” standard applied to claims for attorneys’ fees. To the extent that this Court determines that the “clear and unequivocal” standard applies, Petitioner submits that the contractual provision is clear in imposing an obligation to defend regardless of any potential concurrent-negligence of Petitioner. By imposing the duty to defend “regardless of any ultimate liability or negligence of the contractor,” the provision “clearly shows the parties’ intent to absolve [Petitioner] of the consequences of its own concurrent negligence.” 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.”).

The Court should grant certiorari because the issue is of novel impression as to whether a defense provision is subjected to the heightened clear and unequivocal standard.

IV. The revised 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 revised Opinion evidences the court of appeals’ disregard for Rule 56 (c) and this Court’s precedent regarding the summary judgment standard. Specifically, the court of appeals revised 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’ revised 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 record that may establish the negligence of Respondent and serve as basis for Petitioner's window claims.

In the revised 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. Q. p. 2. While the revised Opinion sets forth what appears to be the court of appeals' criticisms regarding Mr. Mease's testimony, investigation, and findings, importantly, the court of appeals did not find the testimony or findings of Mr. Mease to be not relevant, or inadmissible. 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. The court's acknowledgment suggests corresponding concurrent negligence on the part of the Respondent. The respective negligence of Petitioner and Respondent is, notwithstanding the ruling of the lower courts, a matter of fact subject to jury determination. Thus, it was an error for the court of appeals to affirm the trial court's grant of summary judgment, as the revised Opinion confirms that there is a genuine issue of material fact pertaining to Respondent's installation of the windows, and that the court of appeals failed to consider the testimony and findings of Mr. Mease in the light most favorable to Petitioner, the non-moving party.

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

The revised Opinion confirms that the court of appeals ignored pertinent evidence in the record. Specifically, the court of appeals ignored that Mr. Mease testified that he reviewed "every

window fin exposed during [his] and the defense's investigation." R. p. 350, ll. 22-24 (emphasis added). The revised Opinion also confirms that the court of appeals ignored that Mr. Mease further testified that "[i]f sealant is placed behind the nailing fin, you always see it in the nail holes, and quite often behind the perimeter as it is squeezed out behind the fin. And there was no evidence of that in any of the windows that were *exposed*." R. p. 350, ll. 1-6 (emphasis added). Moreover, the revised Opinion confirms that the court of appeals ignored Charleston Exteriors corporate designee testimony 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." R. p. 353, ll. 16-18. And that this installation protocol is what BFS instructed and expected Charleston Exteriors to perform in the window installation. R. p. 353, ll. 17-21. Further, the revised Opinion ignores that Mr. Mease testified that he has "no evidence of [caulk]" installed behind the nailing fins of the windows. R. pp. 251, ll 23-25, 252, ll1-2. Mr. Mease also testified that he "was able to see the window corners at the jamb-sill intersection" which is "another area where [he] would typically see sealant exposed from behind the fin." R. p. 252, ll 2-6. Moreover, Mr. Mease testified that when [sealant] is used, it "is typically visible because it gets all over everything." R. p. 252, ll 16-19. Mr. Mease explained, "the fact that I looked through all of my pictures and didn't see one stitch of sealant on anything leads me to believe clearly that there hasn't been any installed on the backs of the fins. It's stick, messy stuff that gets on almost everything." R. p. 252, ll 20-25.

The standard of review requires this Court 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 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 Petitioner's claims and certainly a 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.

The revised Opinion includes a footnote 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 the argument advanced by Respondents. Moreover, the fact that Petitioner holds an unlimited general contractors license and Respondents do not, has no bearing on the fact that Respondents failed to install required caulk behind the window jamb fins and window head fins as instructed by Petitioner and 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

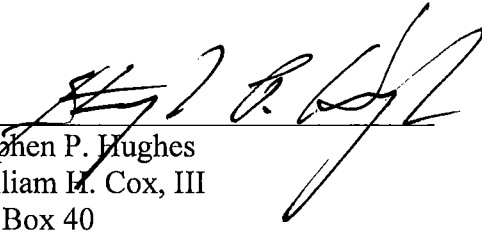
from being imposed upon by persons not qualified to render a professional service. The reason for the rule denying enforceability [of contracts] does not exist when persons engaged in the same business or profession are dealing at arm[']s length with each other. In the case before us, appellant was in 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 Six Fifty Six, neither Petitioner nor Respondents were required to have a license under the applicable statutory chapter, and, thus, section 40–11–270(E) does not preclude Petitioner from bringing claims against Respondents and the court of appeals’ footnote citation is misplaced and in error.

This Court must grant certiorari to correct the court of appeals revised Opinion which, notwithstanding the presence of relevant, admissible evidence of Respondent’s negligence in the record, errantly affirms the lower court’s “finding that there exists no genuine issue of material fact precluding summary judgment.”

CONCLUSION

Because the June 25, 2025 revised Opinion of the court of appeals contradicts the summary judgment rule promulgated by this Court and flies in the face of precedent, 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 contractual claims.

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July 25, 2025

Jul 25 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No. 2020-001328

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;

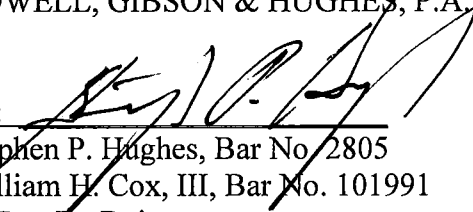
Miguel Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vazquez aka Alfonso Rodriguez, Sr.; and John Does 55-75, Defendants,

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

PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the *Petition for Writ of Certiorari*, upon all counsel of record by email on the 25th day of July, 2025. Hard Copy and filing fee are attached and sent via US Postal Service to the Supreme Court of South Carolina.

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Oct 03 2025

S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
The Honorable Roger M. Young, Sr.
Circuit Court Judge

Circuit Court Case No. 2016-CP-10-03455

Court of Appeals Case No. 2020-001328
Unpublished Opinion No. 2025-UP-078 (filed March 12, 2025)

Appellate Case No. 2025-001495

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; Miguel Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez

Vazquez aka Alfonso Rodriguez, Sr.; Marcello Marques Palmeira d/b/a Palmeira Construction, Ernandes Riberio de Pinho, Cristiane Cleaning, LLC, and John Does 58-75,.....Defendants.

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

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

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COUNTER-STATEMENT OF THE CASE

This is a case where a large material supplier and licensed general contractor, Petitioner Builders FirstSource – Southeast Group, LLC (“BFS”), asks our courts to enforce provisions in its master subcontractor agreement requiring its unlicensed subcontractors, including this Respondent, Hurley Services, LLC (“Hurley Services”), to indemnify BFS for the sums it has spent defending itself against its alleged negligence, without regard to BFS’s own negligence, its other subcontractor’s negligence, or clear and unequivocal contract terms providing for the same.

This litigation arises out of alleged construction defects at 656 Coleman, a twelve-building townhome community in Mount Pleasant, South Carolina. (R. p. 117). Petitioner Builders FirstSource – Southeast Group, LLC (“BFS”) is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. (R. p. 167, 229). BFS holds an unlimited commercial general contractor’s license with the South Carolina Department of Labor, Licensing, and Regulation (the “LLR”) (license no. 112969). (R. p. 229).

BFS supplied and installed windows and doors on the portion of the project developed by The Ryland Group, Inc. (i.e., nine of the twelve buildings that were constructed in 2013 and 2014). (R. p. 117, 120, 130, 229). BFS subcontracted out certain portions of its scope of work. (R. pp. 107-108, 186). Respondent Hurley Services, LLC (“Hurley Services”) served as one of BFS’s subcontractors. (R. p. 132). Hurley Services’ scope of work was limited to installing windows (i.e., labor-only); Hurley Services did not select, furnish, sell, or provide any windows, doors, or other building materials. (R. p. 418).

Hurley Services existed as a South Carolina limited liability company from 2012 until 2015. (R. p. 149). It did not hold any building or contractor licenses from the LLR; in other words, it was an unlicensed subcontractor during its brief existence. See (R. p. 423).

BFS required Hurley Services and its other subcontractors to enter its master subcontractor agreement, a form agreement. (R. pp. 196-207, 314-325, 418). Hurley Services performed its work on the project pursuant to a Master Subcontractor Agreement derivative of “Version – 5/17/06” of the form agreement. (R. pp. 196-207). So did BFS’s other subcontractor. (Pet. for Writ of Cert. p. 1; R. pp. 196, 314).

Plaintiffs initiated this suit on July 5, 2015. (R. pp. 20-34). Plaintiffs later added BFS and related entities as defendants. (R. pp. 35-57, R. pp. 58-84). BFS, in turn, asserted third-party claims against Hurley Services and its other subcontractor for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. See (R. pp. 85-114).

Plaintiffs subsequently asserted direct claims against Hurley Services and other third-party defendants. (R. pp. 115-146). Accordingly, BFS’s claims against Hurley Services and its other subcontractors are now cast as crossclaims. (R. pp. 186-192). BFS’s crossclaims seek recovery of the sums it “may pay in satisfaction” of Plaintiffs’ claim “plus costs for defense, inclusive of attorneys’ fees.” (R. p. 191).

While denying any and all liability, Hurley Services and BFS have both settled with Plaintiffs. (R. pp. 432-433). BFS did not pay Plaintiffs any sums for the alleged negligence of Hurley Services. (R. pp. 432, 447). Despite this fact, BFS maintained its crossclaims against Hurley Services. Accordingly, on January 22, 2020, Hurley Services filed a Motion for Summary Judgment with respect to BFS’s crossclaims for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. (R. pp. 194-207). In that Motion, Hurley

Services asserted that BFS's crossclaims fail because: (1) there is no genuine issue as to any material fact that BFS is seeking to be indemnified for its own negligence; (2) the contractual indemnity provisions of the master subcontractor agreement are neither clear nor unequivocal, are against public policy and the laws of South Carolina, including the Anti-Indemnity Statute, S.C. Code §32-2-10, and, therefore, fail as a matter of law and render the contract unenforceable; and (3) BFS should be estopped from asserting its crossclaims under the doctrine of collateral estoppel. (R. pp. 194-195).¹ Hurley Services also asserted that BFS's crossclaims for breach of express and implied warranties, breach of contract, and negligence were "merely disguised . . . claims for equitable indemnity" which fail under Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 634, 776 S.E.2d 434, 436 (Ct. App. 2015). (R. p. 194).

BFS did not file any memoranda, exhibits or affidavits in opposition to Hurley Services' Motion for Summary Judgment before it was heard by the circuit court.

The Honorable Roger M. Young, Sr. heard Hurley Services' motion on March 5, 2020.² (R. pp. 414-476). At the hearing, counsel for BFS stated that BFS was limiting the damages it sought on its contractual indemnity claim to the recovery of its attorneys' fees and costs incurred in defending this suit; according to counsel, BFS was no longer seeking to recover any amounts BFS paid Plaintiffs in settlement of their claims. (R. pp. 447-449). BFS did not argue against

¹ BFS asserted the same claims against its subcontractors, based on the same master subcontractor agreement, in the case of Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547 (now Appellate Case No. 2020-000415) (hereinafter referred to as the MI Windows case). (R. pp. 277-287). BFS's subcontractors moved for summary judgment in that case on similar grounds. The Honorable Clifton Newman analyzed the form agreement and found the indemnity provisions in the BFS master subcontractor agreement are "confusing at best and deceptive at worst", do not meet the "clear and unequivocal standard", and, therefore, fail as a matter of law. (R. pp. 277-287).

² The circuit court also heard argument from Charleston Exteriors, LLC based upon its Motion to Join in Hurley Services' motion for summary judgment. See (R. pp. 414-476).

summary judgment concerning its breach of express and implied warranties, breach of contract, and negligence causes of action; it conceded Stoneledge was good law. See generally (R. pp. 414-476).

Judge Young granted summary judgment to Hurley Services on April 29, 2020, finding that there was no genuine issue of material fact and Hurley Services was entitled to judgment as a matter of law on all of BFS's claims against it. (R. pp. 1-5). Judge Young found that BFS was collaterally estopped from re-litigating the same issues that were decided by the Honorable Clifton Newman in the MI Windows case, including the issue of enforceability of the master subcontractor agreement's indemnity provisions. (R. p. 3). Judge Young also found that the contractual indemnification provisions in the master subcontractor agreement are unenforceable as matter of law because they are neither clear nor unequivocal as required by Concord & Cumberland HPR v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) and are against the public policy and laws of South Carolina. (R. p. 3).

With respect to BFS's remaining causes of action, Judge Young found that BFS's claims for breach of express and implied warranties, breach of contract, and negligence causes of action failed as a matter of law. (R. p. 3).

BFS did not take issue with these latter aspects of Judge Young's Order,³ but filed a Motion for Reconsideration and/or Alteration/Amendment (the "Motion for Reconsideration") with respect to the grant of summary judgment on its contractual indemnity cause of action. (R. pp. 345-365). Hurley Services filed a Memorandum in Opposition to BFS's Motion for Reconsideration on May 26, 2020, arguing that BFS's purported limitation of its damages to

³ See (BFS App. Br. p. 9) ("Because the Stoneledge case is still considered good law by our courts, Appellant is not challenging the Trial Court's holding regarding Stoneledge."). Judge Young's granting of summary judgment as to these crossclaims is not an issue on appeal.

attorneys' fees and costs does not alter the analysis or outcome in this case as BFS is still seeking to recover damages occasioned as a result of its own negligence, whether sole or concurrent, pursuant to a contract that is unenforceable as a matter of law. (R. pp. 366-379). BFS filed a Reply and additional exhibits on June 4, 2020. (R. pp. 384-400). The circuit court denied BFS's Motion for Reconsideration via Form 4 Order filed on August 27, 2020.⁴ (R. pp. 6-8).

BFS filed its Notice of Appeal of the order granting summary judgment and the Form 4 order denying its motion for reconsideration on September 24, 2020. (Notice of Appeal dated Sept. 24, 2020). On March 12, 2025, the Court of Appeals affirmed the circuit court's orders. BFS's Petition for Rehearing was denied on June 25, 2025. The Court of Appeals issued a revised opinion to correct a scrivener's error in the final paragraph of page 3 the same day.⁵

BFS moved to stay this case and others pending the disposition of its Petition for a Writ of Certiorari in Builders FirstSource-Southeast Group, LLC v. WS Contractors, LLC, et al., Civil Action No. 2016-CP-10-03783, Appellate Case No. 2025-001224, on July 21, 2025. While that motion was pending, BFS filed a Petition for Writ of a Certiorari in this case on July 25, 2025. BFS's motion to stay was denied on September 10, 2025. A copy of the Order was served on counsel September 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

⁴ The Form 4 Order denying BFS's Motion for Reconsideration is dated August 26, 2020, but was filed on August 27, 2020.

⁵ BFS repeatedly references the "revised Opinion" in its Petition, suggesting significant differences between the original and substituted opinion. There are no substantive revisions between the two opinions.

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.

ARGUMENT

There are no considerations warranting certiorari in this case, much less are there special and important reasons for this Court to take up review of this case. BFS reaches to present questions it contends are novel (they are not), but the simple fact of the matter is: these questions only arise if BFS's contract is enforceable.

The central question in this appeal is whether BFS's master subcontractor agreement, or more narrowly, the indemnity section within, is enforceable as a matter of law. It is not. In fact, it is undisputed that the agreement at issue in this case (and others) is violative of the Anti-Indemnity Statute and fails to satisfy the Concord & Cumberland "clear and unequivocal" standard. Contracts requiring a subcontractor to indemnify and hold a general contractor or other promisee harmless for damages arising out of the promisee's sole or concurrent negligence must meet the Concord & Cumberland standard. This contract does not and BFS admits that fact. Further, there is no question that this is a situation where if there is any negligence on the part of Hurley Services (which is strictly denied), BFS is necessarily concurrently negligent. BFS, the upstream contractor, is responsible for directing, supervising, and inspecting its downstream subcontractor's work. There is no scenario where Hurley Services, as a matter of law, is negligent and BFS is not. This principle is only strengthened by the fact that BFS is a licensed general contractor and Hurley Services is an

unlicensed subcontractor. BFS bears concurrent, if not sole responsibility for issues with the windows that Hurley Services installed.

This Court should deny BFS's Petition because the fundamental issue in this case is not disputed and not one of the questions presented in the Petition. Because this elemental issue is dispositive and unappealed, even if this Court were to take up review of the questions BFS presents and answer each in BFS's favor, Hurley Services would still prevail. It would be a wasteful and useless exercise to address the merits of BFS's Petition where it would not change the result.

For this reason and those set out below, this Court should deny BFS's Petition for a Writ of Certiorari.

I. The Court of Appeals properly affirmed the circuit court's rulings that BFS's master subcontractor agreement violated the Anti-Indemnity Statute, S.C. Code Ann. §32-2-10, and the "clear and unequivocal" standard set in Concord & Cumberland and was therefore unenforceable as a whole. BFS does not dispute that its agreement fails to meet these standards. Certiorari should be denied because this issue is dispositive and unappealed.

BFS's master subcontract agreement has been examined by a number of circuit court judges and is now the subject of four appellate decisions, all in favor of the subcontractors similarly situated to Hurley Services.⁶ In each case, the court has found that BFS's agreement violates the Anti-Indemnity Statute, S.C. Code §32-2-10, because it requires BFS's subcontractors to indemnify BFS for its sole negligence. The reviewing courts have further found that contract does

⁶ This case presents one of the appellate decisions. The MI Windows case, cited supra, is the second case. The third case is Pavic et al. v. Carolina Cottage Homes et al., lower court case no. 2019-CP-10-00772 (Charleston County), Court of Appeals case no. 2021-000290, Supreme Court case no. 2025-001496 (the "Pavic case"). The fourth case is Retreat at Charleston National Country Club Homeowners Association et al. v. Winston Carlyle Charleston National, LLC et al., lower court case no. 2016-CP-10-03783 (Charleston County), Court of Appeals case no. 2021-001050, and Supreme Court case no. 2025- (the "Retreat case").

In each of these cases, the circuit court granted summary judgment to BFS's subcontractors and the Court of Appeals affirmed the decision.

not express BFS's intentions for its subcontractors to indemnify BFS against its concurrent negligence in clear or unequivocal terms, as required by Concord & Cumberland. Based on these findings, the courts have found the master subcontractor agreement to be legally unenforceable. This issue is dispositive and it is unappealed here.

BFS's Petition should be denied on this ground alone.

A. There is no dispute that the contractual indemnity provision of BFS's master subcontractor agreement violates applicable law.

BFS has expressly conceded its master agreement does not meet the Concord & Cumberland standard in at least one other case and has tacitly done so here by limiting the damages it seeks on its contractual indemnity claim to attorney's fees and costs. BFS's silence on these issues in its Petition for Rehearing and Petition for a Writ of Certiorari is just further acknowledgement that its agreement is wrought with troublesome language.

BFS's expressly admitted in the MI Windows case that to the extent BFS seeks indemnity from its subcontractors for BFS's concurrent negligence, the contract does not meet the standard set in Concord & Cumberland because it does not clearly and unequivocally set out BFS's intent for its subcontractors to indemnify it for its concurrent negligence. In BFS's Motion to Reconsider filed on December 16, 2019 in the MI Windows case, BFS admitted:

[T]he parties to the instant action have agreed that the *Concord and Cumberland* ruling governs the Plaintiff's claims for contractual indemnity in this matter. Appropriate allocation of the *Concord and Cumberland* standards, to the contractual provisions at issue in the instant proceeding, clearly authorizes pursuit of contractual indemnity caused by the **Defendant's own negligence** (as opposed to damages occasioned by the sole or concurrent negligence of the Plaintiff), and, equally clearly, precludes summary judgement in favor of the Defendants.

This Court's December 6, 2019 Order correctly finds that the indemnity language at issue does not meet the elevated standard of being clear and unequivocal and thus the Plaintiff cannot maintain indemnification claims for Plaintiff's negligence.

(R. p. 328) (emphasis in original).⁷ Unlike this case, BFS affirmatively sued its subcontractors in MI Windows in an effort to obtain indemnification from them. (R. p. 327 at caption). Accordingly, BFS was saying that because its master subcontractor agreement did not meet the Concord & Cumberland test, it could not maintain indemnification claims where it was solely or concurrently negligent with its subcontractor. Or, in other words, it could only maintain a contractual indemnity claim where its subcontractor was solely negligent.

BFS is bound by its admission in the MI Windows case. See Youn v. Martin, 254 S.C. 50, 58, 173 S.E.2d 361, 365 (1970) (holding that a party is bound by an admission contained in a court filing prepared and signed by his attorney and that an admission in one action may be received in evidence in another action involving a different party).⁸

This is significant as it relates to this case because BFS is necessarily seeking to be indemnified by Hurley Services for its concurrent negligence.

i. BFS is seeking indemnification for its concurrent negligence, at the least, as a matter of law.

BFS is necessarily concurrently negligent. BFS was responsible for directing, supervising, and inspecting Hurley Services and its other subcontractors work at 656 Coleman. BFS's qualified licensee, Terry Rosamond, testified as the 30(b)(6) designee of BFS in this case. (R. p. 500). Mr. Rosamond confirmed that BFS representatives would have provided the window installer subcontractors instructions on how to install the subject windows, specifically as to whether to apply sealant behind the nailing fin on all sides. (R. pp. 509-510). The 30(b)(6) representative of

⁷ As further addressed infra, the master subcontractor agreement at issue in MI Windows is the same as at issue in this case.

⁸ While it does not matter, it is worth note that Hurley Services was a party to the MI Windows case. See (R. p. 327).

BFS's other subcontractor, Charleston Exteriors, LLC, testified that an employee or representative of BFS named "Rooster" was on the 656 Coleman job site every day and inspected every job that Mr. Taylor had ever performed for BFS. (R. pp. 513-515). Mr. Taylor was very clear that Rooster inspected every sequential step of the window installation. (Id.).

Setting aside BFS and Hurley Services' respective contractor licensure status with the LLR, the relationship between BFS, on one hand, and Hurley Services and Charleston Exteriors, LLC, on the other is that of principal and agent. Where one acting as an agent for another, within the scope of his agency, is negligent, both the principal and the agent are joint tortfeasors. Little v. Robert G. Lassiter & Co., 156 S.C. 286, 153 S.E. 128, 128 (1930).

BFS devotes considerable amount of its Petition rehashing the testimony of Plaintiff's expert engineer, Russell Mease, PE, with respect to the sealing of the windows BFS supplied and its subcontractors allegedly installed. See (Pet. for Writ of Cert. pp. 12-14). BFS focuses on Mr. Mease's opinion that sealant had not been placed behind the nailing fin of the windows, contrary to BFS's installation protocol. (Id. at p. 13).⁹ These facts, which are disputed, are neither here nor there, because under general agency principles, a principal is held responsible for the tort of its agent, even where the agent's alleged wrongful act was done in violation of the principal's wish and direction. Sams v. Arthur, 135 S.C. 123, 133 S.E. 205, 207 (1926).

It only bolsters these agency principles that this particular agency relationship was between a licensed general contractor and an unlicensed subcontractor. BFS harps on the words "general

⁹ BFS states in its Petition for a Writ of Certiorari that "Respondents failed to install required caulk behind the window jamb fins and window head finds as instructed by Petitioner and as required by the building code and manufacturer instructions." (Pet. for Writ of Cert. at p. 14). That is not accurate. BFS's 30(b)(6) representative testified that BFS's installation protocol differed from the manufacturer's installation instructions (and that the code requires contractors to follow the manufacturer's instructions). (R. pp. 509-511).

contractor” in trying to avoid application of S.C. Code §40-11-270(E) as it relates to the parties’ respective liability as a matter of law. See (Pet. for Writ of Cert. at p. 14). Section 40-11-270(E) is applicable to “Licensees,” not just general contractors who are serving as the general contractor on a specific project. S.C. Code §40-11-270(E) (“(E) Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee’s licensure group and license classification or subclassification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.”). A general contractor could subcontract out the mechanical scope of work to a licensed mechanical contractor who, in turn, subcontracts portions of the mechanical work to an unlicensed subcontractor. Pursuant to S.C. Code §40-11-270(E) and S.C. Code §40-11-20(14) (defining a mechanical contractor as a type of “Licensee”), the mechanical contractor would: (1) be responsible for providing supervision; and (2) be fully responsible for any code violations, including those that are solely attributable to the subcontractor’s work.

BFS was responsible for and did, in fact, direct, supervise, and inspect Hurley Services and its other subcontractors’ installation work. The Circuit Court and Court of Appeals properly applied existing statutory and case law to the facts of this case. There is no situation in which BFS is not at least concurrently negligent with its subcontractors.

B. The finding that the master subcontractor agreement is not enforceable is dispositive.

Just as BFS has admitted its master subcontractor agreement does not meet the Concord & Cumberland heightened standard, BFS has also acknowledged that there is language within its master subcontractor agreement that runs afoul of S.C. Code §32-2-10. (R. pp. 453-454). In this light, it is not surprising that BFS, in its Petition for Rehearing and Petition for Writ of Certiorari, does not

challenge that its agreement has indemnity language that is neither clear nor unequivocal and that purports to have its subcontractors indemnify it against its sole negligence in violation of S.C. Code §32-2-10. BFS has conceded these issues,¹⁰ they are not novel, there is not a circuit court or appellate judge who has interpreted the agreement's language differently or found severance appropriate, and there are no constitutional or federal questions involved. There is no basis for certiorari.

This issue is dispositive. “An illegal contract is unenforceable.” Mason v. Mason, 412 S.C. 28, 56, 770 S.E.2d 405, 420 (Ct. App. 2015). “The court ‘will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy.’” Id. at 56-57 (quoting Ward v. W. Oil Co., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010)). The circuit court's decision in this case and in others, as affirmed in each instance by the Court of Appeals, to deem the contract unenforceable is well within the courts' discretion and supported by a well-developed body of case law.

There is no need, nor is there any requirement, for this Court to address nuanced questions relating to excerpted portions of the indemnity section of the agreement that has been deemed unenforceable. A court does not need to address remaining issues when the resolution of a prior issue is dispositive. See generally Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 85, 856 S.E.2d 550, 559 (2021); Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010); Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

¹⁰ Issues not raised in a petition for rehearing or a petition for writ of certiorari are not preserved for review. See Clarke v. Fine Housing, Inc., 438 S.C. 174, 183 at n. 3, 882 S.E.2d 763, 767 (2023) (“This argument was not in Clarke's petition for rehearing to the court of appeals or his petition for a writ of certiorari; therefore, it is unpreserved.”); McCray v. State, 317 S.C. 557, 559 at n. 1, 455 S.E.2d 686, 687 (1995) (“The other issue presented by petitioner in his brief is not preserved for review because it was not raised in his petition for a writ of certiorari.”).

II. Certiorari is not appropriate under Rule 242, SCACR. BFS's master subcontractor agreement is unenforceable under South Carolina law and the illegal and offensive provisions cannot be severed out of the contract because they pervade the contract; severance would amount to a judicial rewriting of the agreement.

BFS must have an enforceable contract to get to the nuanced questions it presents to this Court. The only way for BFS to maintain rights to enforce any contractual language relating to reimbursement of attorney's fees and costs is for a Court to sever the illegal provisions from the agreement. The question of severability is not novel (nor is it presented as such), is not in conflict with other opinions, and does not present any other considerations warranting further review. This Court should deny BFS's Petition for Certiorari on this further basis.

The contract provisions that BFS seeks to enforce are all contained within Section 5 of the BFS master subcontractor agreement. See (Pet. for Writ of Cert. at p. 6). BFS asks that it be allowed to cherry-pick out certain language within Section 5 from the remaining language so that BFS can recover its attorney's fees and costs spent defending against its own negligence. BFS asserts in its appellate brief and implicitly in its Petition for Rehearing and Petition for Writ of Certiorari that the illegal provisions are "irrelevant" and that they should be disregarded. (App. Br. p. 13). BFS ignores that the analysis of the enforceability of the master subcontractor agreement must necessarily involve looking at the indemnity provisions and the contract as a whole. See McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571, 574 (S.C. 2009) ("A contract is read as a whole document..."). "Replacing some [illegal] language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term" to which Hurley Services did not agree. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 175 (S.C. App. 2018) (declining appellant's invitation to rewrite the indemnity provisions of its contracts and replace language violative of South Carolina law). Further, what BFS refers to as Paragraph 3 of Section 5, has to be chopped, sliced, and revised within itself to

craft the reading BFS would like. Additional illegal terms are found within Section 8 of the master subcontractor agreement. All of these indemnity provisions which disregard the negligence of BFS violate South Carolina law and are unenforceable.

The South Carolina Supreme Court cautioned in Simpson v. MSA of Myrtle Beach, Inc., “if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.” 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007) (internal citations omitted). It is not the function of the court to rewrite contracts for parties. Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010); Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002); ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011).

The circuit court reached the correct decision in finding that the master subcontractor agreement contains numerous terms that violate the Anti-Indemnity Statute, S.C. Code §32-2-10, applicable case law (Concord & Cumberland), and public policy, and that those provisions cannot be severed from the agreement because it would amount to a rewriting of the contract. South Carolina courts do not “blue pencil” agreements and rewrite a contract’s terms to make it comply with the law, as BFS would have it (and as is necessary for BFS to obtain any relief). See Poynter, 387 S.C. at 588, 694 S.E.2d at 18 (recognizing that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy).

There is nothing about the severability issue that warrants certiorari under Rule 242(b), SCACR. BFS’s Petition for a Writ of Certiorari should be denied on this additional basis.

III. There is no other basis to grant certiorari under Rule 242, SCACR.

None of the questions presented in BFS's Petition for a Writ of Certiorari are novel, uncertain, or otherwise supporting of further review. Section 32-2-10 by its plain language applies to claims for "damages," which encompasses BFS's request for an award of damages measured by the amount of attorney's fees and costs it expends defending this case. The duty to defend language in BFS's master subcontractor agreement is part and parcel of the indemnity section and subject to Concord & Cumberland's "clear and unequivocal" standard. Lastly, the question of whether an appealed order is "final" for the purposes of offensive collateral estoppel is not an uncertain or novel issue. This issue was decided, as BFS is aware, in the Retreat case. Retreat at Charleston Nat'l Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC, 445 S.C. 566, 595-96, 915 S.E.2d 736, 751-52 (Ct. App. 2025). There is no basis to grant BFS's Petition for a Writ of Certiorari.

A. BFS pared-down request for damages limited to the amount of its attorney's fees and costs pursuant to its contractual indemnity claim is still a claim for "damages" subject to the Anti-Indemnity Statute, S.C. Code §32-2-10.

BFS has conceded all of its crossclaims against Hurley Services except for its contractual indemnity claim. (R. pp. 1-5, 345-365, App. Br.). Despite the fact that it is proceeding solely on a contractual indemnity claim, and that the contract upon which this claim is based calls for Hurley Services to pay BFS's attorney's fees and costs regardless of any ultimate liability or negligence of BFS, BFS asserts that the Anti-Indemnity Statute, S.C. Code Ann. §32-2-10, has no application because, according to an announcement made by its counsel during a motion hearing,¹¹ BFS has

¹¹ BFS has not conformed its pleadings to limit the relief or damages it now seeks.

scaled-back the damages it seeks on its contractual indemnity claim to its attorney's fees and costs (i.e., reimbursement thereof). (R. p. 202).

This argument is nonsensical and easily defeated by a plain reading of the Anti-Indemnity Statute, S.C. Code Ann. §32-2-10. Title 32 of the South Carolina Code governs Contracts and Agents. The Legislature, in Chapter 2, has defined "hold harmless clauses in certain construction contracts" to be against public policy in the State of South Carolina. S.C. Code §32-2-10. The Code section reads as follows:

Title 32 - CONTRACTS AND AGENTS

CHAPTER 2

Contracts Against Public Policy

SECTION 32-2-10. Hold harmless clauses in certain construction contracts.

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. The provisions of this section shall not affect any insurance contract or workers' compensation agreements; nor shall it apply to any electric utility, electric cooperative, common carriers by rail and their corporate affiliates or the South Carolina Public Service Authority.

HISTORY: 1980 Act No. 466.

(bold emphasis in original, underline emphasis added). Section 5 of the BFS master subcontractor agreement, as applied to the 656 Coleman project, undoubtably involves a promise or agreement in connection with the construction of a building. The subcontractor is purporting to indemnify

BFS against liability for damages arising out of property damage proximately caused by or resulting from the subcontractor's negligence.

BFS attempts to escape the statute through its definition of the term "indemnity." (Pet. for Writ of Cert. at p. 5). The statute does not use the term "indemnity," it uses the phrase "to indemnify" or, in other words, the active verb "indemnify." S.C. Code Ann. §32-2-10. To "indemnify" means to make good; to compensate; to make reimbursement to one of a loss already incurred by him. Black's Law Dictionary, Rev. 4th Ed. ("Indemnify").

Contrary to BFS's creative definition exercise, premised on a word not found in the statute, South Carolina law is very clear that an indemnitee can recover, in indemnity, more than just the amount that the indemnitee pays or is liable to a third-party. In Addy v. Bolton, this Court stated that where the wrongful act of the indemnitor has involved the indemnitee in litigation or places him in such relation with others such that it makes it necessary for the indemnitee to incur expense to protect his interest, the indemnitee may recover damages in the form of legal expenses on an indemnification theory. 257 S.C. 28, 33, 183 S.E.2d 708, 709-10 (1971). This Court reaffirmed this principle more recently in McCoy v. Greenwave Enterprises, Inc., quoting Addy v. Bolton:

In cases of either contractual or equitable indemnification, "reasonable attorney[']s fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses."

408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014); see also Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 625, 776 S.E.2d 426, 431 (Ct. App. 2015) ("The right of indemnity allows the indemnity plaintiff to recover the necessary expenses it incurred defending itself against the third party's claim.").

In seeking to enforce the Section 5 "INDEMNITY" provisions of its master subcontractor agreement against Hurley Services, through a contractual indemnity claim, to recover its attorney's

fees and costs expended in defending against this suit, BFS is seeking to be indemnified for its damages, albeit a limited measure of such damages. Because the subject indemnification language purports to require Hurley Services to indemnify BFS even where BFS is solely negligent, the provision violates the Anti-Indemnity Statute, S.C. Code Ann. §32-2-10. There is no novel question of law as it relates to the Anti-Indemnity Statute because the lower courts properly refused to sever the offensive language out of the agreement. Section 5 is unenforceable. This is dispositive of this case.

B. The so-called “duty to defend provision” is part of the indemnity provision of the master subcontractor agreement and subject to the heightened “clear and unequivocal” standard set in Concord & Cumberland.

BFS’s Petition for a Writ of Certiorari would lead one to believe that there are independent duty to defend and indemnity provisions and separately enumerated provisions or sections within said sections of BFS’s master subcontractor agreement. That is not the case. The conflicting and confusing indemnity and duty to defend provisions are all jumbled together within one long strand of text in Section 5 of the BFS master subcontractor agreement. For the reasons set out above, Section 5, is unenforceable, and it is inappropriate to sever out certain provisions of Section 5, particularly the last paragraph which BFS refers to as the duty to defend provision, which violates S.C. Code §32-2-10. Further, BFS’s request for reimbursement of its attorney’s fees and costs is a claim for indemnity triggering application of South Carolina law governing indemnity.

Beyond these issues, 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 in a manner that would exempt defense costs from the Anti-Indemnity or Concord & Cumberland’s “clear and unequivocal” standard. The two cases BFS cites to, City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009)

and Sloan Constr. v. Centr. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977) address the relationship between an insurer's duty to defend and its duty to indemnify and are inapposite to the relationship between the parties here; Hurley Services is not an insurer.

C. There is no conflict in South Carolina appellate courts as to whether a trial court's order, subject to appeal, is "final" for the purposes of collateral estoppel.

The Court of Appeals' opinion in this case was unpublished. However, a month prior to BFS filing its Petition for a Writ of Certiorari in this case, the Court of Appeals published a decision in Retreat at Charleston Nat'l Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC, 445 S.C. 566, 595-96, 915 S.E.2d 736, 751-52 (Ct. App. 2025), one of the related cases involving BFS's master subcontractor agreement and the issues that present in this appeal, including the collateral estoppel question. BFS omits this opinion in its 4-page discussion of collateral estoppel in its Petition for a Writ of Certiorari. (Pet. for Writ of Cert. at pp. 6-10). BFS even goes so far as to represent that "[t]here are no cases on point" on the "issue of whether a trial court decision on appeal is sufficiently 'final' for purposes of collateral estoppel." (Id. at p. 6). The Retreat case speaks directly on this issue:

III. Collateral Estoppel

BFS next argues the circuit court erred in finding the doctrine of collateral estoppel bars its indemnity claims because the prior judgments are both inapposite and not final because they have been appealed. We disagree.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was "actually litigated and determined by a valid and final judgment" in a previous action, "regardless of whether the claims in the first and subsequent suits are the same." *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) (quoting *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008)). 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. *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). The party invoking collateral estoppel need not have also been a party in

the prior action; the law requires only that the party against whom estoppel is applied have been a party with a full and fair opportunity to litigate the issue. *Id.* (“Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action”).

There is no dispute that BFS is the party seeking to enforce the indemnity clauses of the Later Contracts (which are identical to those previously litigated). It further cannot be disputed that BFS was the party litigating the issue of enforceability in other construction defect cases before the circuit court. The circuit court had previously addressed the Later Contracts’ indemnity language in *MI Windows & Doors*, *Dag Pavic and Stela Susas-Pavic*, and *Six Fifty-Six Owners’ Association*, et al. Although BFS had appealed these orders, the circuit court did not err in finding the same terms had been actually litigated and directly determined in a prior action. A judgment is final and remains final unless and until it has been overturned on appeal. See *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189, 61 S.Ct. 513, 85 L.Ed. 725 (1941) (finding finality of a court’s judgment is not lost because appeal is pending unless and until reversed).

The rationale behind this rule is that if cases on appeal were not viewed as final judgments for collateral estoppel purposes, parties could simply refile in trial court while an appeal is pending and hope for a different result, thus subjecting courts (and parties) to inefficient duplicative litigation. *See generally 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.”), *aff’d Warwick Corp. v. Maryland Dep’t of Transp.*, 735 F.2d 1359 (4th Cir. 1984). That appeals were pending at the time of the circuit court’s rulings in these eight cases in no way changes the result: the prior findings have preclusive effect unless and until those dispositive findings are reversed. The indemnity clauses in the Later Contracts are the same clauses from the same agreement at issue in *MI Windows & Doors*, *Pavic*, and *Six Fifty-Six Owners’ Association*. Because BFS had previously litigated the enforceability of its contractual indemnity provisions, the circuit court properly applied collateral estoppel.

455 S.C. at 595-96, 915 S.E.2d at 751-52 (italics emphasis in original, underline emphasis added).

Rule 201(a) of the South Carolina Appellate Court Rules also supports the finality of an appealed order or judgment. See Rule 201 (a) SCACR (stating that “[a]ppeal may be taken, as provided by law, from any final judgment or appealable order.”). The status of the prior orders as a final judgment is what makes the orders appealable in the first instance.

Judge Newman, in MI Windows, was analyzing the same form of the master subcontractor agreement that is at issue in this case, particularly Section 5. Judge Newman, like Judge Young, determined that the agreement violated the Anti-Indemnity Statute, §32-2-10, public policy, and Concord & Cumerland’s “clear and unequivocal” standard and therefore was unenforceable. The selective provisions that BFS seeks to hold onto in this case is part of Section 5 and as explained *supra*, only present if Section 5 is enforceable.

Judge Young did not trespass into the province of the court of appeals of its ultimate authority, as BFS suggests, but rather, promoted judicial economy, and put a stop to BFS trying the issue among different trial courts. See generally, B&B Hardware, Inc. v. Hargis Industries, Inc., 575 U.S. 138, 140, 135 S.Ct. 1293, 1298-99 (2021) (“Sometimes two different tribunals are asked to decide the same issue. When that happens, the decision of the first tribunal usually must be followed by the second, at least if the issue is really the same. Allowing the same issue to be decided more than once wastes litigants’ resources and adjudicators’ time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring.”).

Moreover, as the Court of Appeals decision and the underlying record shows, both the circuit court and the Court of Appeals conducted their own independent analysis of BFS’s master subcontractor agreement. It only added to their conclusion that prior orders from other circuit court judges had reached the same result.

Conclusion

As analyzed above, there is no novel issue of law warranting this Court to exercise its discretion and power to further review the case. Further, there was no dissent at the Court of Appeals—the decision was unanimous. The decision of the Court of Appeals does not conflict

with any prior decision of this Court—the Court of Appeals decision keeps with Court of Appeals decisions, including Concord & Cumberland and the Retreat. There are no constitutional issues involved in this appeal, nor are there any federal questions involved that conflicts with any decision of the United States Supreme Court.

While the decision to grant certiorari is discretionary and the reasons stated in the rule are not a controlling list of prerequisites to granting a petition, there is simply no reason certiorari is appropriate here. Therefore, for all the reasons stated above, in addition to those set out in the co-Respondent’s Returns, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully Submitted,

WALKER GRESSETTE & LINTON, LLC

s/ Jennifer S. Ivey

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Attorneys for Respondent Hurley Services, LLC

October 3, 2025
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Oct 03 2025

S.C. SUPREME COURT

Appeal from Charleston County
Court of Common Pleas
The Honorable Roger M. Young, Sr.
Circuit Court Judge

Circuit Court Case No. 2016-CP-10-03455

Court of Appeals Case No. 2020-001328
Unpublished Opinion No. 2025-UP-078 (filed March 12, 2025)

Appellate Case No. 2025-001495

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; Miguel Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez

Vazquez aka Alfonso Rodriguez, Sr.; Marcello Marques Palmeira d/b/a Palmeira Construction, Ernandes Riberio de Pinho, Cristiane Cleaning, LLC, and John Does 58-75,.....Defendants.

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

PROOF OF SERVICE

The undersigned hereby certifies that on this 3rd.day of October, 2025, a copy of **RESPONDENT HURLEY SERVICES, LLC’S RETURN TO BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC’S PETITION FOR WRIT OF CERTIORARI** was served on counsel of record, by Electronic Mail, addressed to the following:

Stephen P. Hughes, Esq.
William Hewitt Cox, III, Esq.
sphughes@hghpa.com
wcox@hghpa.com

Attorneys for Petitioner

/s/ Jennifer S. Ivey

Jennifer S. Ivey
Attorney

October 3, 2025
Charleston, South Carolina

RECEIVED

Oct 20 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Sr., Circuit Court Judge

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

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others similarly situated,..... Plaintiffs,

v.

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

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

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

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REPLY

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

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

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

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

Because the Petition fits squarely within the bounds of Rule 242 and this Court’s authority, Hurley focuses its Return on attempting to convince the reader that the contract at issue and the claims asserted violate South Carolina law. Hurley argues that the Court need not reach the questions presented by BFS because it won’t change the outcome for BFS and Hurley. However, as the Court will see, none of these contentions are true. The undersigned prays that this Court will grant certiorari to review the record clearly and to correct the errors of law and unsupported factual findings entered by the lower courts.

a. BFS seeks indemnification for the negligence of Hurley.

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

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

“not predicated in any way saying, we’re only seeking indemnification to the extent that the subcontractor Defendants were negligent or at fault. We’re seeking everything.”

R. p. 420 (emphasis added).

Hurley argued that:

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

R. pp. 420-1.

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

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

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

R. p. 187 (emphasis added).

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

Paragraph 125 provides:

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

R. p. 188 (emphasis added).

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

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

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

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

- I. The Court of Appeals properly affirmed the circuit court's rulings that BFS' master subcontractor agreement violated the Anti-Indemnity Statute, S.C. Code Ann. Section 32-2-10, and the "clear and unequivocal" standard set in Concord and Cumberland and was therefore unenforceable as a whole. **BFS does not dispute that its agreement fails to meet these standards. Certiorari should be denied because this issue is dispositive and unappealed.**

Return p. 7 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

Further, in its Final Brief, BFS specifically stated:

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

See BFS Final Brief, p. 13.

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

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

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

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

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

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

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

IV. There are no illegal provisions in the contract.

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

The first paragraph of Section 5 sets forth the relevant indemnification provision for this case. It provides in relevant part, that BFS may seek indemnification for claims arising out of property damage:

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

R. p. 547.

This first paragraph expressly permits BFS to recover from Hurley for the negligent acts or omissions of Hurley in cases, such as the one before this Court, involving Plaintiffs' property damage claims. The first paragraph is the only paragraph within Section 5 Indemnity of the contract which specifically provides for indemnification against property damage claims caused by the negligent act or omission of Hurley, and it is completely consistent with the limited relief BFS seeks from Hurley in this case.

The second paragraph of Section 5 Indemnity governs the relationship between the parties *in cases arising out of bodily injury claims of the subcontractor, its agents, employees, and/or subcontractors*. See R. p. 547. There are no bodily injury claims in this litigation. Thus, the second paragraph of Section 5 Indemnity is not relevant and should not be before the Court. Moreover, the indemnity provision contained in the second paragraph of Section 5 is expressly limited "*to the fullest extent permitted by law.*" R. p. 547. Thus, the indemnity provision of the second paragraph, by its specific terms, allows recovery only as authorized by law, and, correspondingly, would not impose any indemnity obligation contrary to South Carolina law. BFS does not seek any recovery pursuant to this provision, and thus, it is not at odds with BFS's cause of action for contractual indemnity based on alleged property damage arising from defective installation of the windows and related flashing performed by Hurley.

The third paragraph of Section 5 Indemnity provides details regarding defense of an indemnified claim. R. p. 548. The contractual right to tender defense of an indemnified claim made against an indemnified party under the first paragraph or the second paragraph or to bring a claim for defense expenses incurred against such an indemnified claim – even a right that is not

contingent on a finding of 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.

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

Hurley argues that additional illegal terms are found within Section 8 of the contract. Return p. 14. Hurley provides no explanation for this argument, but from Hurley’s contention in other cases, BFS notes that a proper reading of Section 8(i) requires reading of Section 8(h). Therein, Hurley is required to pay for “all charges **owed by it** for labor, services, materials, equipment, tools, and supplies” used by Hurley to implement its Work. R. p. 551 (emphasis added). Provision 8(i) requires in turn that Hurley will indemnify BFS if Hurley fails to make its required payments under 8(h). R. p. 552. Further, such duty to indemnify under Section 8 only arises when Hurley fails to satisfy its own obligations owed to third-parties. Thus, these provisions support, rather than contradict, BFS’ position that it seeks recovery only for its subcontractors’ negligence no matter what the situation entails.

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

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

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

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

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

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

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

Hurley’s Return confirms that whether a trial court’s order on appeal is “final” for collateral estoppel remains a novel issue in South Carolina. Hurley cites to Retreat at Charleston Nat’l Country Club Home Owners Ass’n, Inc. v. Winston Carlyle Charleston Nat’l, LLC, 445 S.C. 566, 595-96, 915 S.E.2d 736, 751-52 (Ct. App. 2025) as being dispositive on the issue. However, BFS has filed a Petition for Certiorari in the Retreat appeal, so that case is not complete of all steps and is not procedurally definite. Thus, issue of whether a trial court decision on appeal is sufficiently “final” for purposes of collateral estoppel remains an issue of first impression in South Carolina.

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

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

CONCLUSION

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

RECEIVED

Oct 20 2025

CERTIFICATE OF SERVICE

S.C. SUPREME COURT

The undersigned counsel hereby certifies that he has served the foregoing Petitioner's Reply to Respondent Hurley Services' Return to Petition for Writ of Certiorari upon all counsel of record by last known email address on this 20th day of October 2025.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No. 2020-001328

RECEIVED

Sep 10 2021

SC Court of Appeals

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court inappropriately grant summary judgment to Respondents despite the presence of genuine issues of material fact?
- II. Did the Trial Court erroneously determine that the doctrine of collateral estoppel bars Appellant's claims for indemnity in the present case?
- III. In adopting the Order of Judge Newman, did the Trial Court mischaracterize the language of the parties' contract as confusing and therefore unenforceable?
- IV. Did the Trial Court err in holding that the relevant contractual language did not meet the clear and unequivocal standard articulated by Concord and Cumberland?
- V. Did the Trial Court incorrectly hold that the contractual language violates the laws and public policy of South Carolina?

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. Appellant Builders FirstSource – Southeast Group, LLC supplied windows and doors for the nine buildings constructed in 2013 and 2014 known as the “Ryland” phase, and Appellant’s subcontractors, Respondents Hurley Services, LLC and Charleston Exteriors, LLC installed the windows and doors. Respondents Hurley Services and Charleston Exteriors performed their installation services pursuant to subcontract agreements entered into with Appellant in 2012. Each Subcontract Agreement is derivative of the Master Subcontract Agreement Version 5/17/06, and each contains a provision that requires the subcontractor to defend and indemnify Appellant from all suits resulting from property damage alleged to have arisen out of the subcontractor’s performance of its work. After being served with Plaintiffs’ complaint, BFS filed third-party claims and subsequently cross-claims against Hurley Services and Charleston Exteriors for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence.

In the underlying suit, Appellant, Hurley Services, and Charleston Exteriors have each reached individual settlements with the Plaintiffs resolving Plaintiffs’ claims against each party for their own respective liabilities. However, Appellant’s third-party claims against its subcontractors for defense costs – specifically for attorneys’ fees and costs incurred in defending itself against the Plaintiffs’ claims of negligence – survived the settlement. Respondent Hurley Services moved for summary judgment against Appellant’s claims on January 22, 2020. Charleston

Exteriors joined in said motion on February 21, 2020. After hearing oral argument on the motion, the Trial Court issued an order granting the motion for summary judgment on April 29, 2020. Appellant 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 on August 27, 2020. This appeal followed.

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

I. The Trial Court Erred in Granting Summary Judgment to Respondents Despite the Presence of Genuine Issues of Material Fact.

The presence of a genuine issue of material fact precludes the Trial Court from granting summary judgment. Here, the genuine issue of material fact is whether Respondent, as a subcontractor for Appellant, negligently performed its work on the Ryland project. The issue is genuine because evidence has been presented supporting the contention that Respondent negligently failed to install caulk on the inboard faces of the window nailing fins. The issue is material to the lower court's ruling because if Respondent *were* negligent, Appellant should have been allowed to pursue its contractual indemnity claim for attorneys' fees against

Respondent for Respondent's negligence even without the presence of contractual language that satisfies the Concord & Cumberland "clear and unequivocal" standard (discussed in greater detail below).

The Plaintiffs' claims, as asserted against Appellant and Respondent, are premised upon alleged deficiencies in installation of windows during original construction of the nine Ryland buildings. In support of those allegations, the Plaintiffs offered testimony of their primary forensic expert, professional engineer Russell T. Mease. Mr. Mease determined that the window installations were defective based upon his finding that they failed to include the application of caulk inboard of any of the four perimeter nailing fins¹ of the windows – which would be contrary to the requirements imposed by the window manufacturer. At the Trial Court level, Respondent represented, incorrectly, that the only deficiency in installation identified by the plaintiffs' expert, Mr. Mease, was the omission of caulk inboard of only the sill nailing fin (rather than all four fins). Respondent has argued further that any failure to install caulk inboard of the sill nailing fin was a result of specific instructions from Builders FirstSource, effectively precluding any Builders FirstSource recovery in indemnity.

Contrary to the representations of the subcontractors, however, Mr. Mease in fact testified that, notwithstanding the installation criteria imposed by the window manufacturer, no caulk had been installed inboard of any of the four perimeter

¹ The following terms will be used throughout this section to describe the four different nailing fins that border the window: the "sill," which runs along the bottom; the "jamb," which runs along each side; and the "head," which runs along the top.

nailing fins (flanges) of the windows at the Ryland buildings. The testimony of Mr.

Mease, in addressing window installation issues, included the following:

Q. As I understand it, your criticism relative to window installation on the Ryland side of the project relates to a document that was produced to us last night, this MI window -- I believe you referred to it as a cut sheet -- that's been marked as Exhibit 100.

A. Yes.

Q. And concerning that sheet, there's a reference there that says, Caulk under mounting fin entire perimeter before fastening. And that detail and statement on the Exhibit 100 is the basis of your opinion that there's something wrong with the installation of the windows as to the MI windows?

A. Yes.

(R. p. 488, lines 3–17.) Mr. Mease continued and explained how he was able to determine the absence of the required sealant under the nailing fins:

Q. What's your basis for determining that there is not caulk installed under the perimeter fin?

A. Well, last night I went through my pictures and looked at every window fin that was exposed during our investigation and the defense's investigation, and there's no evidence at all of sealant behind the nailing fin. If sealant is placed behind the nailing fin, you always see it in the nail holes, and quite often behind the perimeter as it is squeezed out behind the fin. And there was no evidence of that in any of the windows that were exposed.

(R. p. 488, line 18-p. 489, line 6.) Mr. Mease confirmed his opinion in subsequent testimony as follows:

Q. Can you definitively opine that there's a complete absence of caulk behind the nailing fins of the windows installed on the Ryland buildings?

A. I have no evidence of it. I was able to see the window corners at the jamb-sill intersection. That's another area where I would typically see sealant exposed from behind the fin. And, again, I have no

evidence that there's any sealant behind these windows, and I believe that to be the case.

(R. p. 491, line 23–p. 492, line 9.)

Moreover, although it is undisputed that the Builders FirstSource installation practices included the substitution of Fortiflash at the sill in lieu of caulking inboard of the sill nailing fin (flanges), it is equally undisputed that the Builders FirstSource installation practices included the application of caulk inboard of the remaining window perimeter nailing fins (flanges) (at jambs and head); that is to say, while Appellant's practice was to use a different material under the lower, sill nailing fin, it was nonetheless Appellant's practice to caulk the remaining three nailing fins bordering the window (and thus, if Respondent deviated from this practice, then Respondent, rather than Appellant, was negligent).

The Builders FirstSource window installation practices were specifically addressed within the testimony of Terry Rosamond, the Builders FirstSource 30(b)(6) designee, as follows:

Q. How were the windows installed at 656?

A. How were they installed? To my understanding, the windows were put in level, plumb and square with sealant behind three -- well, first there's a sill pan created with Fortifiber flashing in the bottom sill and up approximately 6 inches each side. The window is installed with sealant behind the three flanges, two jambs and a head. Then it's put in with fasteners, and I think there's a fastener in every nail slot, best I understand. Then you tape your jamb tape on each side of the jambs. Then you take your head flashing and then pull your house wrap down over the head flashing for the tape.

(R. p. 505, lines 1–15.) Mr. Rosamond continued as follows:

Q. So you set your window in. Walk me through it, really basic. What's next after you set the window? Or did I skip a step? You show

up, the rough opening is there, and it may or may not have been cut. If it's not cut, then the window installer cut it. Then what?

A. Like I said, you create what we call a sill pan in the bottom using the FortiFlash flashing. Normally cut it 12 inches longer than the opening so it can wrap 6 inches up each jamb side. And then on the corners, we normally would put like a butterfly patch on those corners, to seal any of those corners so there's no water penetration. Next step would be to install your window. You'd apply a 3/8 bead of caulk around three sides of the window, the sides, the top and the head. And sometimes they require you to do a skip caulk on the bottom. That's -- a lot of times that's required by the builder which way they want it done.

(R. p. 506, line 18–p. 507, line 13.)

Equally importantly, Edward Taylor, the 30(b)(6) designee for Charleston Exteriors, confirmed that the Builders FirstSource subcontractors were advised of these Builders FirstSource installation practices, offering testimony as follows:

Q. And he didn't give you any field instructions before you started the work?

A. Not anything further than what we were already instructed on, how they expect the windows to be installed. There's nothing to add to that. But he inspects everything from the time -- taping the windows, butterflying the corners, to caulking the windows.

(R. p. 513, lines 17–24.) Mr. Taylor walked through the Builders FirstSource window installation instructions in detail which confirmed installation of caulk inboard of the three nailing fins:

Q. Okay. And then what's the next step?

A. Next step is to install the window itself. You've got to caulk. We used a whole tube of caulk on the nail flange, three -- the two sides and the top. Put your shims in the bottom at the sill, set your window, plumb, level, nail your corners. Once you nail off your corners, you nail off the rest of the window, and you have to stop.

(R. p. 514, lines 14 – 22.)

The above evidence, taken together, establishes the following: (1) Appellant's installation criteria, which were to be followed Respondent, included the application of caulk inboard of the three nailing fins of the window at the jamb and head; but, (2) the plaintiffs' retained expert, Russell Mease, determined that such caulking had been omitted, not only inboard of the bottom sill fin, but also inboard of the three remaining perimeter fins of the windows. Such a failure, if proven, would be attributable to the negligence of the installation subcontractors.

It is for losses resulting from such subcontractors' negligence that Appellant is currently seeking to recover attorneys' fees, which appellant incurred as a consequence of the Respondents' breach of its contractual obligations to defend and indemnify. Under the circumstances, the Trial Court's determination of an absence of any genuine issue of material fact is not supported by the record, and is contrary to the specific evidence presented. At the very least, the aforesaid testimony establishes a scintilla of evidence sufficient to present a genuine issue of material fact as to whether Respondent was negligent, such as to entitle Appellant to pursue the recovery that it seeks. Such an issue of material fact should have precluded an award of summary judgment in favor of Respondent.

II. The Doctrine of Collateral Estoppel does not Bar Appellant's Claims for Attorneys' Fees in the Present Case.

The Trial Court held that it was collaterally estopped from considering Appellant's claims for attorneys' fees by the Order of the Hon. Clifton Newman filed February 3, 2020 in the case of Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al, Case No. 2018-CP-08-2547. **(See R. pp. 9-19.)** Addressing the Order, the holding goes on to state that "[s]pecifically, the Court

references and adopts the court's analysis in Paragraphs B and C therein." (R. p. 3.)

The case of Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al involved a claim of Builders FirstSource against a subcontractor for indemnification for damages. The order referenced by Judge Young is currently the subject of a separate appeal (See Appellate Case No. 2020-000415).

Paragraph B of Judge Newman's Order, which was adopted by the Trial Court, grants summary judgment on the claims of Builders FirstSource that were considered disguised indemnity claims under Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015). Because the Stoneledge case is still considered good law by our courts, Appellant is not challenging the Trial Court's holding regarding Stoneledge.

Paragraph C of the Order, which was also adopted by the Trial Court, addresses the Builders FirstSource claim for contractual indemnity. The holding of Paragraph C reads:

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal ***when seeking to be indemnified for its own negligence***, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear [sic] or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

(R. p. 16 (emphasis added).) Judge Newman believed that BFS was seeking to be indemnified for its own negligence, and thus granted summary judgment.

The Trial Court's determination that it was estopped from allowing Appellant to proceed on its claims by Paragraph C of Judge Newman's Order is without merit. 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). The doctrine of collateral estoppel applies only "once a **final judgment** on the merits has been reached in a prior claim." Carrigg v. Cannon, 347 S.C. 75, 79, 552 S.E.2d 767, 770 (Ct. App. 2001) (emphasis added). "Even where all the elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it." Id.

Judge Newman's Order cannot collaterally estop the Trial Court in this case from allowing Appellant's claims to proceed for two reasons. First, Judge Newman's Order is currently on appeal. (**R. p. 401.**) Collateral estoppel requires that a final, prior judgment exists; however, a judgment, subject to reconsideration upon appeal, cannot be considered "final" until the ultimate appellate court has made its determination. The reasoning of the Trial Court to the contrary would potentially endow the lower courts with authority not contemplated by the judicial system, and, correspondingly, deprive the appellate courts of the authority reserved to those bodies.

The second reason that collateral estoppel is inapplicable to this case is that “the issue . . . actually litigated in the prior case” is different than the issue before the Trial Court in this case. Judge Newman’s order specifically holds that:

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.

(R. p. 16 (emphasis added).) In the case before this Court, BFS is not seeking indemnification for its own negligent acts or omissions, but rather is seeking attorney’s fees pursuant to the clear provisions of its subcontract agreements. Paragraph C of Judge Newman’s Order never even considered the contractual language governing attorneys’ fees. Thus, the issues are not the same, collateral estoppel has not been triggered, and Judge Newman’s order is not relevant to the analysis required by this case.

III. **Judge Newman’s Analysis, Adopted by the Trial Court, Misunderstood and Misrepresented the Parties’ Contract Language.**

In adopting Paragraph C of Judge Newman’s Order, the Trial Court purportedly adopted Judge Newman’s position therein that the contract entered into by Respondent and Appellant is confusing and thus precludes recovery. Respondent has likewise argued that the entire indemnity section – in fact, the entire contract – should be voided because the indemnity section contains provisions that are “confusing,” “unclear,” “contradictory,” and “downright deceptive.” (R. p. 430, lines 9-10.)

The contracts governing the indemnity claims in this case and in the case before Judge Newman contain nearly identical indemnity provisions. In his order, Judge Newman quoted two different paragraphs of the Contract's indemnity provision, misunderstanding that these two provisions apply to completely separate scenarios, and he reasoned that these provisions somehow contradict each other in a way that renders Appellant's indemnity claims void.

The indemnity provision of the Contract between Appellant and Respondent contains four Paragraphs. Judge Newman's order pulls quotes from two different paragraphs of the indemnity provision. The first section highlighted in the order accurately quotes 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. 547.) This paragraph expressly permits Appellant to recover from Respondent Subcontractor for the negligent acts or omissions of said subcontractor, and is consistent with the Court of Appeal's holding in Concord and Cumberland, which is further discussed below.

Judge Newman's Order then goes on to quote language from a different paragraph of the Indemnity Provision:

REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN [SIC] PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.

(R. p. 15.) However, this selection has been taken out of context, and, when read in context, clearly applies only “to the fullest extent permitted by law” and only to losses:

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.

(R. p. 547 (emphasis added).) Both the case before Judge Newman and the case before the Trial Court involve claims for property damage, not bodily injury. Thus, the second paragraph in the order cited by Judge Newman is irrelevant to this case and should not have factored into its decision. There is no confusion that the indemnity provision relating to property damage limits recoverable indemnity to the negligence of the subcontractor.

None of the paragraphs cited by Judge Newman govern the separate duty to defend, and thus none of the contractual provisions discussed in his Order were actually relevant to the issue before the Trial Court. Despite the fact that the Trial Court was advised that Appellant was seeking attorneys’ fees, and that attorneys’ fees were governed by a specific paragraph in the Indemnity Section of the Contract, the Trial Court, in adopting Judge Newman’s Order, instead chose to focus on and take issue with irrelevant contractual provisions. While Appellant does not concede that such provisions contain any problematic language, nonetheless, to the extent that the Trial Court took issue with these irrelevant paragraphs, it should have simply severed them and left the provision regarding

attorneys' fees intact. See Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002) (explaining that "[w]hether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties"). The severability provision of the Contract 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. 553.) 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.

IV. The Language of the Contract does not Violate Concord and Cumberland.

The Trial Court's final holding reads that:

Builders First Source-Southeast Group, LLC's cross-claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law. See Concord and Cumberland HPR v. Concord and Cumberland, LLC, 2018 WL 3748616 (S.C. Ct. App. 2018).

(R. p. 3.) The Trial Court provided no analysis to support this conclusion; however, Appellant will attempt to address the perceived issues.

A. Concord and Cumberland

An understanding of the 2018 Court of Appeals decision in Concord and Cumberland is essential to the issues before this Court. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). In that case, 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. The contract provided, in relevant part, that:

To the fullest extent permitted by law, **the Subcontractor shall indemnify and hold harmless** the Owner, the Architect, **the Contractor** (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, **arising out of or resulting from the performance of the Subcontractor's Work provided that**

- (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, **to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor** or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, **regardless of whether it is caused in part by a party indemnified hereunder.**

Id. at 643-44 (emphasis added). Superior claimed that these provisions required Muhler to indemnify Superior and that Superior's right to indemnity was not lessened by Superior's concurrent negligence. 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*, it would need to show that the contract language granting that right met the heightened standard of being clear and unequivocal. 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. Id. Because the Court found that the language 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 "limited indemnification to damages resulting from the work Muhler performed." Id. at 645.

B. The contractual language governing payment of attorneys' fees meets the heightened "clear and unequivocal" standard articulated by Concord and Cumberland.

Respondent has argued, and the Trial Court appears to have held, that the Builders FirstSource claims for attorneys' fees are based upon provisions that violate Concord and Cumberland.

Notably, the Concord and Cumberland case did not explicitly address whether the "clear and unequivocal" standard applied to indemnification claims for attorneys' fees as well as to indemnification claims for liability owed to a third party. Thus, the instant action is distinguishable from Concord and Cumberland in that Builders FirstSource is not seeking indemnity for payments made in satisfaction of the plaintiffs' claims, to the extent that such claims may arise out of the negligent acts and omissions of Builders FirstSource itself. Builders FirstSource is seeking

only recovery of attorney's fees and costs, expended in defending against the plaintiffs' claims, arising out of the performance of the subcontractors' work.

Even if the Court were to apply the "clear and unequivocal" standard to contractual language governing attorneys' fees, the contractual provisions at issue here meet that heightened burden. The language of the contract provides that the duty to defend is "...independent and separate from the duty to indemnify, **and the duty to defend exist regardless of any ultimate liability or negligence of the contractor**" (R. p. 548 (emphasis added).) The contractual provision is thus clear in imposing an obligation to defend regardless of the negligence of Builders FirstSource.

"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." Concord & Cumberland, 424 S.C. at 657. By imposing the duty to defend "regardless of any ultimate liability or negligence of the contractor," the Contract "clearly shows the parties' intent to absolve [Appellant] of the consequences of its own concurrent negligence." Thus, this language meets the heightened "clear and unequivocal" standard, and summary judgment was not proper.

V. The Contract Provisions Violate Neither South Carolina Law nor Public Policy.

The Trial Court's holding goes beyond Concord and Cumberland and finds that the language of the contract also violates "public policy and the laws of South

Carolina.” The Trial Court did not identify to what public policy, or to what laws, it was referring. Additionally, Judge Newman’s Order does not address public policy or any other laws besides the common law articulated by the Concord and Cumberland case (discussed above).

One of the arguments that has been advanced below by Respondent is that the Contract violates South Carolina Code § 32-2-10. However, this statute addresses general damages and not recovery of attorneys’ fees. Specifically, Section 32-2-10 prohibits contracts that indemnify the indemnitee “for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee” In this case, the “damages arising out of . . . property damage” are those damages for which Appellant would have been responsible to the Plaintiff.

Furthermore, the very terms of the statute limit its application to agreements to indemnify 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 governs agreements for indemnity. 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, 424 S.C. at 646–47. 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 above; 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 caused by 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” Paragraph One of the Indemnity Provision is the exact type of agreement exempted by the statute.

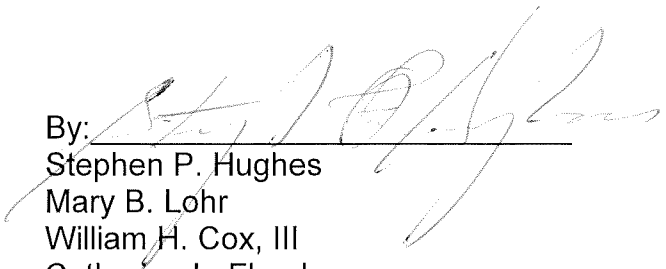
The obligations imposed on the subcontractors here, to defend the interests of Builders FirstSource, are clearly and unequivocally set forth within the relevant Master Subcontract Agreements. These obligations do not violate § 32-2-10 or any public policy of the State of South Carolina, and the Court should not have granted summary judgment against these claims.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse the decision of the Trial Court and allow Appellant to proceed on its indemnification claims for attorneys’ fees against Respondent.

[Signature page follows]

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September 10, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No. 2020-001328

RECEIVED

Sep 10 2021

SC Court of Appeals

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.

FINAL REPLY BRIEF OF APPELLANT

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REPLY

In response to the arguments outlined in the Brief of Respondent, Appellant submits this Reply Brief. Appellant hereby incorporates by reference all arguments made in its opening Brief, and concedes none of Respondent's arguments, regardless of whether or not said arguments are addressed specifically herein.

I. The issue before Judge Young in this case is distinct from the issue ruled on by Judge Newman, and thus collateral estoppel does not apply.

Respondent argues that collateral estoppel precludes Appellant's claims in this case because the same issue has been previously ruled on by Judge Newman in Builders FirstSource – Southeast Group, LLC v. M.I. Windows & Doors. Specifically, Respondent argues that because the language of the indemnification provision is the same in both cases, collateral estoppel applies. This oversimplification of collateral estoppel ignores the requirement that the specific issue litigated must be the same in both cases in order for collateral estoppel to apply. See Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). The "issue" is not, as Respondent vaguely puts it, the enforceability of the indemnity provision. The issue before Judge Newman, as he saw it, was whether the language of Paragraphs One and Two of the indemnity provision allowed BFS to recover in indemnity for its own negligence. The issue in this case is whether the contract language in Paragraph Three (or alternatively, as explained hereafter, Paragraph One) of the indemnity provision allows BFS to recover its attorneys' fees.

Contrary to Respondent's representation, Judge Newman did not rule that the indemnity clause was entirely unenforceable. Rather, he ruled that in the specific context of the case before him,

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal **when seeking to be indemnified for its own negligence**, the Court rules that the specific language from the Master Subcontractor Agreement is ... neither clear or unequivocal.

(R. p. 16 (emphasis added).) Thus, Judge Newman considered the specific issue of whether the indemnity provision is sufficiently clear and unequivocal to allow BFS to recover for its own negligence, and he ruled that it was not.

In this case, Appellant is not seeking indemnity against liability for damages resulting from its own negligence. Rather, Appellant is seeking to recover the damages occasioned by Respondent's failure to comply with its contractual obligation to defend Appellant. The relevant contract language, which is found in Paragraph Three of the indemnity provision, was never even considered by Judge Newman. This issue has not been addressed by any court to date, and thus is not subject to collateral estoppel.

II. Genuine issues of material fact exist, and it was error for the Court to usurp the role of the factfinder and determine otherwise.

Respondent argues that the Court correctly determined that no issue of material fact existed regarding the negligence of the parties because Appellant, as a licensed contractor, would be liable as a matter of law for any negligence of Respondent. However, where liability arises as a matter of law, and not of fault, the party who may be liable as a matter of law is nonetheless entitled to seek

attorneys' fees from the at-fault party. See Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992); S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 89, 135 S.E.2d 613, 617 (1964).

The alleged concurrent negligence of Appellant is irrelevant because under Section Five, Paragraph Three of the Indemnity Provision, Respondent is required to defend Appellant regardless of the potential negligence of Appellant. However, should the Court, as discussed below, determine that Paragraph Three should be severed or struck entirely, Appellant will pursue its claims under Section Five, Paragraph One. In this latter scenario, the relevant negligence of Respondent and Appellant is of the utmost importance, because Appellant's attorneys' fees would be limited to the costs resulting from the negligence of Respondent.

Evidence exists, in the form of the testimony of Plaintiff's expert Mr. Mease, which was outlined for this Court in Appellant's Opening Brief, that Respondent was negligent. Under South Carolina law, "the negligence of a party is a question of fact for the jury." Brown v. Smalls, 325 S.C. 547, 558, 481 S.E.2d 444, 450 (Ct. App. 1997). Thus, the Trial Court should not have evaluated Mr. Mease's testimony and determined that no issue of fact existed as to the negligence of Respondent.

III. The contractual provisions governing attorneys' fees are clear and unequivocal, satisfying Concord & Cumberland.

Respondent argues that the Subcontract violates Concord & Cumberland and thus Appellant may not recover its attorneys' fees. Respondent did not, however, directly address how the specific provision governing attorneys' fees, that

is, Section Five, Paragraph Three, fares when analyzed through Concord & Cumberland's clear and unequivocal standard.

Concord & Cumberland addressed whether or not a general contractor could recover in indemnity from its subcontractor for the general contractor's own negligence. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). The Court held that in order for the general contractor to recover indemnity against liability for damages occasioned by its own negligence, there must be a clear and unequivocal contractual provision outlining that obligation. The Court never discussed the recovery of attorneys' fees, and thus, it is unclear whether a provision imposing attorneys' fees is subject to the same heightened standard of "clear and unequivocal." Even if it were, however, the provision at issue in this case meets the clear and unequivocal standard outlined in Concord & Cumberland.

The provision governing attorneys' fees provides, in relevant part:

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. 548.) This provision clearly and unequivocally imposes upon the subcontractor the duty to defend the contractor "regardless of any ultimate liability or negligence of the contractor." In its brief, Respondent did not contest the clarity and sufficiency of this provision.

Instead of analyzing whether this provision clearly and unequivocally imposed the defense obligation on the subcontractor, Respondent argues that

taken together with the other paragraphs of Section 5, the Indemnity provision, as a whole fails to be generally clear and unequivocal.

As demonstrated hereinafter, the other paragraphs of the Indemnity provision govern indemnification obligations in situations that are not before this Court, and thus are irrelevant to this litigation. Nonetheless, taken together, these provisions do not obfuscate the clear and unequivocal duty imposed by Paragraph Three to defend “regardless of any ultimate liability or negligence of the contractor.”

Section Five of the contract is titled “Indemnity,” and it is made up of four paragraphs. While Respondent quibbles that these paragraphs are not independently numbered, they are nonetheless very obviously separated and easy to identify. Each paragraph deals with a specific circumstance or set of circumstances under which different indemnity obligations apply.

Paragraph One provides that in a case arising out of property damage (among other things) the subcontractor will indemnify the contractor to the extent the damage was caused in whole or in part by any negligent act or omission of the subcontractor. **(R. p. 547.)**

Paragraph Two provides that in a case arising out of the bodily injury of the subcontractor or any of its agents, the subcontractor shall, to the fullest extent permitted by law, indemnify the contractor for damages regardless of whether the damage was caused in whole or in part by the contractor. **(R. pp. 547-548.)**

Paragraph Three provides that the duty to defend is separate from the duty to indemnify and exists regardless of any ultimate liability or negligence of the contractor. **(R. p. 548.)**

Paragraph Four provides that the indemnification obligations do not require the subcontractor to indemnify a registered architect or licensed engineer. **(R. p. 548.)**

These four paragraphs do not alter the clarity with which Paragraph Three requires that the subcontractor undertake the defense of the contractor “regardless of any ultimate liability or negligence of the contractor.” Thus, Paragraph Three imposes the obligation to defend, regardless of the negligence of the Contractor, in a manner that satisfies the Concord & Cumberland heightened standard.

Notably, to the extent the Court finds that Paragraph Three is not clear and unequivocal, or in the event that Paragraph Three is struck or severed from the Contract, Appellant’s claims for attorneys’ fees will be encompassed by Paragraph One, which limits Appellant’s ability to recover to expenses caused by the negligence of the subcontractor. Because recovery is limited to the negligence of the subcontractor, and does not provide for recovery for the contractor’s own negligence, Paragraph One is not analyzed under the heightened standard provided by Concord & Cumberland.

Finally, Respondent argues that Appellant has previously admitted “in the MI Windows case that the Master Subcontractor Agreement’s indemnity clauses fail to meet the ‘clear and unequivocal’ standard.” Brief of Respondent, p. 24. This is not true. Had Respondent read more carefully, Respondent would have discovered that when Appellant said that “the indemnity language *at issue* does not meet the elevated standard of being clear and unequivocal,” that was in the context of a discussion of Section Five, Paragraph One, and Section Five,

Paragraph Two, which are the *only* two indemnity provisions discussed by Judge Newman's December 6, 2019 order (to which Appellant was then responding).¹ Judge Newman's order *never* discussed Section Five, Paragraph Three, which is the paragraph that Appellant now contends, in a manner that is completely consistent with its prior positions, meets the "clear and unequivocal" standard articulated by Concord & Cumberland.

Because the provision regarding attorneys' fees satisfies the heightened standard imposed by Concord & Cumberland, the Trial Court was incorrect to grant summary judgment on that basis.

IV. Claims for attorney's fees are not addressed by Section 32-2-10, and there is nothing within that statute or the general law or public policy of South Carolina, which bars the Appellant's claims for attorney's fees in this action.

Respondent argues that Section 32-2-10, which governs contracts in which a party seeks indemnity for "liability for damages" caused by its own negligence, nonetheless applies to Appellant's distinct claims for attorneys' fees because attorneys' fees are the same as damages in the context of indemnification. Brief of Respondent, p. 26.

There are multiple elements of damage in an indemnity claim. First, there are the damages that result from the first party being held liable to a second party for the damages caused by a third party; that is, the amount of the award,

¹ The December 6, 2019 Order was later superseded by Judge Newman's Amended Order dated February 3, 2020. However, the Court's language analyzing the Contract in the context of Concord & Cumberland is the exact same in both orders, and that language may be found in the Record at (R. pp. 14-16).

settlement, or other expense paid to satisfy or avoid a judgment. When, however, the party has suffered additional damage by the refusal of the negligent party to defend that party, a second type of damage, that is, attorneys' fees, are also recoverable. See Town of Winnsboro, 307 S.C. at 130 (articulating that in indemnity a party may recover "[1] the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence as well as [2] attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence"). The first type of damage arises out of property damage resulting from the work of the subcontractor. The second type of damage arises as a result of the subcontractor's failure to perform on its defense obligation.

Section 32-2-10 provides that "a promise or agreement ... purporting to indemnify the promise ... 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."

By its specific terms, Section 32-2-10 is speaking exclusively of the first type of "liability for damages," that is, the damages that a first party pays to a second party for the loss or damage caused by a third party. The statute speaks of damages arising out of property damage – these would be damages caused by the original negligence of the subcontractor, for which judgment or settlement the contractor may be liable. Attorneys' fees arise not out of property damage, but out of a party's failure to defend. Equally telling, Section 32-2-10 speaks of indemnity against liability for damages. 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, 424 S.C. at 646-47. As discussed in Appellant’s opening brief, when a statute is in derogation of the common law, as Section 32-2-10 is, the statute must be strictly construed. Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Attorneys’ fees simply 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, attorneys’ fees are recoverable in addition to – and separately from – the indemnity damages. See Town of Winnsboro, 307 S.C. at 130

Section 32-2-10 does not state that it applies to attorneys’ fees; absent such an explicit designation, the general rule is that the damages discussed therein do not include attorneys’ fees. See Rimer v. State Farm Mut. Auto. Ins. Co., 248 S.C. 18, 27, 148 S.E.2d 742, 746 (1996) (providing that damages **do not** “include the expense of employing counsel, except when so provided by contract or statute”). Therefore, Section 32-2-10 is not applicable to Appellant’s claims for attorneys’ fees.

Respondent argues that the Subcontract Agreement redefines damages to include attorneys’ fees because it provides that the subcontractor will indemnify Appellant:

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 LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY’S FEES**

Brief of Respondent, p. 27 (bolded emphasis added by Respondent, not present in original; see also **(R. p. 547.)**). Respondent reads the clause “including, but not limited to, . . . attorney’s fees” as modifying “damages.” This is not a natural reading of the sentence. The phrase “including, but not limited to, . . . attorney’s fees” clearly modifies the phrase directly preceding it, which is “expenses of any kind whatsoever” both because of the nature of sentence construction and because it is clear that arbitration/court costs and attorney’s fees are both “expenses.” Read in that way, “expenses of any kind whatsoever, including, but not limited to, . . . attorney’s fees,” makes sense. However, cherry picking random words from earlier in the sentence leads to unintelligibility. Using Respondent’s logic, one could just as easily argue that “including, but not limited to, . . . attorney’s fees” modifies the phrase “causes of action;” however, the ridiculousness of this sentence is made even clearer when read in complete context. The sentence would read that the subcontractor would indemnify Appellant from and against any “causes of action” “including, but not limited to arbitration or court costs and attorney’s fees.” Court costs and attorney’s fees are not causes of action. They are expenses. Thus, Respondent’s proposed contortion of the paragraph to redefine “damages” is futile.

Because Section 32-2-10 does not address attorneys’ fees, it does not bar Appellant’s claims. However, even if the Court were to expand the reach of Section 32-2-10 to include attorneys’ fees, Appellant would nonetheless be able to recover. If the Court decided that Section Five, Paragraph Three (which provides for attorneys’ fees regardless of the negligence of Appellant) did not comply with

Section 32-2-10, the Court should sever the offending provision; then, Appellant's claim for attorneys' fees would instead be fully encompassed by Paragraph One of Section Five. Paragraph One provides that Respondents would indemnify Appellant for all expenses, "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, Paragraph One is specifically authorized by the statute, because the statute says that it does not affect or void a contract where the first party shall indemnify the second party against liability for damages resulting from the negligence of the first party; this is exactly the effect of Paragraph One.

V. South Carolina Courts have articulated that offending language in a contract may be severed, and to the extent that the Court finds certain language unenforceable in this indemnity provision, it is compelled to sever it.

Respondent argues that "the Master Subcontract Agreement fails as a whole" and accuses Appellant of trying to "cherry pick" enforceable provisions of its contract. Brief of Respondent, p. 33. To be clear, Appellant is not "cherry picking" anything. Appellant maintains that the entire contract is valid, and to the extent that the *Court* decides otherwise, the *Court*, and not Appellant, is tasked with identifying and severing provisions that the Court deems unenforceable.

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 contains a severability clause, and the trial court was wrong to ignore it. 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) ((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).

Finally, when faced with indemnification language similar to the language at issue here, South Carolina Courts have allowed recovery in indemnity based on permissible provisions of the agreement, while refusing to allow sought-after recovery that would violate South Carolina law. Concord & Cumberland, 424 S.C. at 645 (refusing to allow contractor to recover in contractual indemnity for its own negligence because contract did not meet “clear and unequivocal” standard, but

nonetheless allowing contractor to recover in contractual indemnity for its subcontractor's negligence under that same contract). See also D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) (disagreeing with trial court that entire indemnity provision was against public policy; rather, only the specific language that violated Section 32-2-10 was invalid).

Respondent contends that “[e]liminating the illegal provisions in . . . the Master Subcontractor Agreement would amount to a rewriting of the agreement, not severing a word, clause, phrase, or line.” Brief of Respondent, p. 36. Respondent’s conclusion does not follow. The simplest fix, should the Court determine that severance was necessary, would be for the Court to sever, in Section Five, Paragraph Three, the phrase “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.” Alternatively, the Court could strike the entirety of Paragraph Three, at which point Appellant’s claims for attorneys’ fees would be entirely encompassed by Section Five, Paragraph One. Likewise, if the Court thought it necessary to address Paragraph Two, the Court could strike from Paragraph Two the language providing that the indemnification obligation existed regardless of the negligence of the contractor; alternatively, the Court could strike Paragraph Two entirely – it would not affect Appellant’s ability to claim attorneys’ fees.

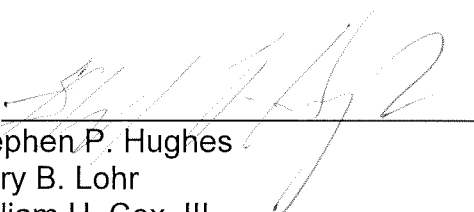
This is not a re-writing or blue-penciling of the contract, because the Court is not required to write or replace any provisions – instead it is simply honoring the

stated intent of both Appellant and Respondent and severing the invalid provisions. The valid provisions stand on their own even without the severed language.

CONCLUSION

Because Respondent has not effectively shown that the claims of Appellant are barred by collateral estoppel, Concord & Cumberland, or Section 32-2-10, and because even if certain provisions were barred by South Carolina law, those provisions can be effectively severed, Appellant incorporates herein its arguments submitted in its opening brief and requests that this Court REVERSE the Trial Court's decision.

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September ____, 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

Roger M. Young, Sr., Circuit Court Judge
Civil Action No. 2016-CP-10-03455

Appellate Case No. 2020-001328

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
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LLC; Davis Tile; Timothy Mitchell; Electrical Design & Construction; Hurley Services, LLC;
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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; Miguel 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
is the Respondent.

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the circuit court correctly found Appellant's claim was barred by the doctrine of collateral estoppel when Appellant previously litigated the enforceability of its identical indemnity provisions to the circuit court, and the circuit court found those provisions to be unenforceable as a matter of law, and that decision has not been overturned.
- II. Whether the circuit court correctly held that based on the undisputed facts, the indemnity provisions at issue are unenforceable as a matter of law when they require a subcontractor to indemnify its general contractor for the general contractor's sole or concurrent negligence but the indemnity provisions are neither clear nor unequivocal as required by this Court's decision in Concord and Cumberland HPR v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).
- III. Whether the circuit court correctly held that Appellant's indemnity provisions violate South Carolina law and public policy when they require a subcontractor to indemnify its general contractor against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the general contractor and are overly broad and confusing, and select portions of the indemnity provisions cannot be severed from the agreement.

STATEMENT OF THE CASE

This litigation arises out of alleged construction defects at Six Fifty-Six Coleman Boulevard, a twelve-building townhome community in Mount Pleasant, South Carolina ("the Project"). (**Third Am. Compl. ¶ 4, R. p. 117**). Appellant Builders FirstSource-Southeast Group, LLC is a licensed general contractor who provided building supplies and turn-key contracting services on the portion of the Project developed by The Ryland Group, Inc.¹ (**Third Am. Compl. ¶ 60, R. p. 130**); (**Hurley Memo. in Support of its Mot. for Summ. J. dated March 3, 2020, Ex. 2, R. p. 229**). Respondents Hurley Services, LLC ("Hurley Services" or "Hurley") and Charleston Exteriors, LLC ("Charleston Exteriors") served as subcontractors to Builders

¹ Plaintiffs filed a separate suit against The Ryland Group, Inc., in a case styled as Six Fifty Six Owners Association Inc. et al. v. The Ryland Group, Inc. et al., in the Charleston County Court of Common Pleas, Civil Action No.: 2016-CP-10-03456.

FirstSource-Southeast Group, LLC. (**Third Am. Compl.** ¶¶ 68-69, **R. p. 132**). Hurley Services' scope of work was limited to providing labor services related to the installation of windows. Hurley Services performed its work on the Project pursuant to a master subcontractor agreement with Builders FirstSource-Southeast Group, LLC (the "Master Subcontractor Agreement"). See (**Hurley Mot. for Summ. J., Ex. A, R. pp. 196-207**). The Master Subcontractor Agreement entered into between Hurley and Builders FirstSource is a Builders FirstSource form contract bearing "Version – 5/17/06." (**Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 196-207**).

Plaintiffs initiated this suit on July 5, 2015. (**Compl., R. pp. 20-34**). Plaintiffs added claims against the Builders FirstSource entities.² (**First Am. Compl., R. pp. 35-57**); (**Second Am. Compl., R. pp. 58-84**). Builders FirstSource then asserted third-party claims against Hurley Services, Charleston Exteriors, and DVS, Inc., its subcontractors on the Project, for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. See (**BFS Ans. to Second Am. Compl. ¶¶ 117-145, R. pp. 85-114**).

Plaintiffs subsequently asserted direct claims against Hurley Services and other third-party defendants. (**Third Am. Compl., R. pp. 115-146**). Accordingly, Builders FirstSource's claims against its subcontractors, including Hurley Services, are now cast as crossclaims. (**BFS Ans. to Third Am. Compl. ¶¶ 116-143, R. pp. 186-192**). Builders FirstSource's crossclaims seek

² Builders FirstSource, Inc., Builders FirstSource-Atlantic Group, LLC, Builders FirstSource-Florida a/k/a Builders FirstSource-Florida Design Center, LLC, and Builders FirstSource-Southeast Group, LLC are parties-defendants to this suit. They have appeared collectively through the same counsel and answered in the same pleadings, but Builders FirstSource-Southeast Group, LLC is the party with whom Respondents entered Master Subcontractor Agreements and who brings claims against them here. Builders FirstSource-Southeast Group, LLC will be referred to hereinafter as "Builders FirstSource" or "BFS."

recovery of the sums it “may pay in satisfaction” of Plaintiffs’ claim “plus costs for defense, inclusive of attorneys’ fees.” (**BFS Ans. to Third Am. Compl.** ¶¶ 139, R. p. 191).

While denying any and all liability, Hurley Services and Builders FirstSource have both settled with Plaintiffs. (**Hr’g Tr. March 5, 2020, p. 19, ll. 1-2, p. 20, ll. 3-18, R. pp. 432-433**); (**App. Br. p. 1**). Builders FirstSource did not pay Plaintiffs any sums for the alleged negligence of Hurley Services. (**Hr’g Tr. March 5, 2020, p. 19, ll. 3-7, p. 34, ll. 1-13, R. pp. 432, 447**).

On January 22, 2020, Hurley Services filed a Motion for Summary Judgment (the “Motion”) with respect to the only claims that remained against it - Builders FirstSource cross-claims for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. (**Hurley Mot. for Summ. J. dated January 22, 2020, R. pp. 194-207**). In that Motion, Hurley Services asserted that Builders FirstSource’s cross-claims fail because: (1) there is no genuine issue as to any material fact; (2) the contractual provisions of the Master Subcontractor Agreement (upon which Builders FirstSource’s contractual indemnity claim rests) are neither clear nor unequivocal, are against public policy and the laws of South Carolina and, therefore, fail as a matter of law; and (3) Builders FirstSource should be estopped from asserting its cross-claims under the doctrine of collateral estoppel. (**Hurley Mot. for Summ. J. dated January 22, 2020, R. pp. 194-195**).³

Appellant Builders FirstSource did not file any memoranda, exhibits or affidavits in opposition to the Motion before it was heard. Hurley Services filed a memorandum in support of

³ Hurley Services also asserted that Builders FirstSource’s cross-claims for breach of express and implied warranties, breach of contract, and negligence were “merely disguised . . . claims for equitable indemnity” which fail under Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 634, 776 S.E.2d 434, 436 (Ct. App. 2015). (**Hurley Mot. for Summ. J. dated January 22, 2020, R. p. 194**). However, that issue is not before this Court.

its Motion on March 3, 2020. (**Hurley Mem. in Support of Mot. for Summ. J. dated March 3, 2020, R. pp. 209-223**).

The Honorable Roger M. Young, Sr. heard Hurley Services' Motion on March 5, 2020.⁴ (**Hr'g Tr. March 5, 2020, R. pp. 414-476**). At the hearing, counsel for Builders FirstSource stated that Builders FirstSource was limiting its indemnity claim to the recovery of its attorneys' fees and costs incurred in defending this suit, but it was no longer seeking to recover any amounts Builders FirstSource paid Plaintiffs in settlement of their claims. (**Hr'g Tr. March 5, 2020, p. 34, ll. 14-22, R. p. 447**).

Judge Young granted summary judgment in favor of Hurley Services on April 29, 2020, finding that there was no genuine issue of material fact and Hurley Services was entitled to judgement as a matter of law on all of Builders FirstSource's claims against it. (**Order dated April 29, 2020, R. pp. 1-5**). Judge Young found that Builders FirstSource was collaterally estopped from re-litigating the exact same issues, which were decided by the Honorable Clifton Newman in the case of Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415, including the issue of enforceability of the BFS Master Subcontractor Agreement's indemnity provisions. (**Order dated April 29, 2020, R. p. 3**) (citing to Judge Newman's Order entered on February 3, 2020). Judge Young also found that the contractual indemnification provisions in the Master Subcontractor Agreement are unenforceable as matter of law because they are neither clear nor unequivocal as required by Concord and Cumberland HPR v. Concord & Cumberland, LLC, 424

⁴ The circuit court also heard argument from Respondent Charleston Exteriors based upon its Motion to Join in Hurley Services' Motion for Summary Judgment. See (Hr'g Tr. March 5, 2020, R. pp. 414-476).

S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) and are against the public policy and laws of South Carolina. **(Order dated April 29, 2020, R. p. 3).**⁵

Builders FirstSource filed a Motion for Reconsideration and/or Alteration/Amendment (the “Motion for Reconsideration”). **(Mot. for Recons. and/or Alteration/Amendment dated May 11, 2020, R. pp. 345-365).** Hurley Services filed a Memorandum in Opposition to Builders FirstSource’s Motion for Reconsideration on May 26, 2020, arguing that Builders FirstSource’s purported limitation of its damages to attorneys’ fees and costs, does not alter the analysis or outcome in this case as Builders FirstSource is still seeking to recover damages as a result of its own negligence. **(Mem. in Opp. to Mot. for Recons. and/or Alteration/Amendment dated May 26, 2020, R. pp. 366-379).** Builders FirstSource filed a reply and additional exhibits on June 4, 2020. **(BFS Reply to Hurley Services, LLC and Charleston Exteriors, LLC’s Mem. in Opp. to Mot. for Recons. and/or Alteration/Amendment dated June 4, 2020, R. pp. 384-400).** The circuit court denied Builders FirstSource’s Motion for Reconsideration via Form 4 Order filed on August 27, 2020.⁶ **(Form 4 Order dated August 26, 2020, R. pp. 6-8).**

⁵ Judge Young also found that Builders FirstSource’s claims for breach of express and implied warranties, breach of contract, and negligence causes of action failed as a matter of law. **(Order dated April 29, 2020, R. p. 3).** Builders FirstSource did not argue against summary judgment concerning its breach of express and implied warranties, breach of contract, and negligence causes of action and has conceded that Stoneledge, 413 S.C. 630, 776 S.E.2d 434, is dispositive of those claims. See (Hr’g Tr. March 5, 2020, R. pp. 414-476); (App. Br. p. 9) (“Because the Stoneledge case is still considered good law by our courts, Appellant is not challenging the Trial Court’s holding regarding Stoneledge.”). Judge Young’s granting of summary judgment as to these crossclaims is not an issue on appeal.

⁶ The Form 4 Order denying Builders FirstSource-Southeast Group, LLC’s Motion for Reconsideration is dated August 26, 2020, but was filed on August 27, 2020.

Builders FirstSource filed its Notice of Appeal of the Order granting summary judgment and the Form 4 Order denying its Motion for Reconsideration on September 24, 2020. **(Notice of Appeal dated Sept. 24, 2020).**

STATEMENT OF FACTS

Builders FirstSource-Southeast Group, LLC is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. **(BFS Ans. to Third Am. Compl. ¶ 7, R. pp. 167); (Hurley Memo. in Support of its Mot. for Summ. J. dated March 3, 2020, Ex. 2, R. p. 229).** It holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Department of Labor, Licensing, and Regulation ("SC LLR"), and Terry Rosamond ("Rosamond"), Builders FirstSource's Vice President of Installed Products and Services for the East Coast, serves as the "qualifying party" for such licensure in this state. **(Hurley Memo. in Support of its Mot. for Summ. J. dated March 3, 2020, Ex. 2, R. p. 229).**

Hurley Services existed as a South Carolina limited liability company from 2012 until 2015. **(Hurley Ans. to Plfs. Third Am. Compl. ¶ 4, R. p. 149).** It did not hold any building or contractor licenses from the SC LLR; in other words, it was an unlicensed subcontractor. See **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 8, R. pp. 273-276; Hr'g Tr. March 5, 2020, p. 10, ll. 8-9, R. p. 423).** Hurley Services provided unlicensed subcontractor services on the Project to Builders FirstSource pursuant to a Master Subcontractor Agreement, "Version – 5/17/16," it entered with Builders FirstSource on May 14, 2012. **(Hurley Mot. for Summ. J., Ex. A, R. pp. 196-207).**

I. The Parties' Work on the Project

Builders FirstSource supplied and installed windows and doors as a subcontractor of the Ryland Group for only the “Ryland Phase” buildings at the Project, which consists of nine (9) buildings that were constructed in 2013 and 2014. (**Third Am. Compl. ¶¶ 4, 24, 60, R. pp. 117, 120, 130**). Builders FirstSource furnished the windows, related flashings, and caulk and provided superintendents to oversee such installation for the Ryland Phase buildings at the Project. (**R. pp. 209-210**). Hurley Services’ scope of work was limited to providing labor services related to the installation of windows. Plaintiffs’ expert engineer Russell Mease, P.E., of RTM Engineering, LLC (“Mease”) investigated the Project for construction deficiencies. (**Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, R. p. 210**). Mease prepared a 146-page report outlining his findings and was deposed on multiple occasions about his investigation of the Project. Discussing his report and his investigation, Mease testified that the windows and doors at Ryland Phase buildings of the Project were installed into the buildings’ framing in accordance with “a protocol that’s acceptable in the industry.” (**Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 3, p. 121-122, ll. 24-1, R. pp. 231-232**). His opinions concerning defects and damages surrounding window installations at the Ryland Phase buildings related to the work of other trades such as the brick mason and siding subcontractor as well as the lack of supervision by the general contractor. (**Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 3, R. pp. 234-236**); (**Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 4, R. pp. 244-245**).

Mease testified as to only one criticism with regard to the installation of the windows of the Ryland Phase buildings: he contended he did not see evidence of caulk underneath the nailing fin at the sills of the windows he examined, however, he could not say unequivocally that the caulk

was missing and admitted that he never removed a window from a rough opening in the Ryland Phase. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, R. pp. 249-253)**. Mease admitted that the omission of caulk from behind the sill nailing fin to allow for drainage of moisture was consistent with best practices that existed at the time of construction and his inspection. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, R. pp. 250-254)**. Mease claimed the lack of caulking underneath the nailing fins presented a concern about air filtration and cited a 2007 Florida test “cut sheet” from the window manufacturer that referenced caulk behind the perimeter of the nailing fin. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, R. pp. 248, 253)**. This criticism concerning caulking was not mentioned in Mease’s 146-page report and no damage at the Project was attributable to this condition. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, R. pp. 246-253)**. Furthermore, Terry Rosamond, Builders FirstSource’s 30(b)(6) witness, testified that best practices applicable at the time the Ryland Phase buildings were constructed called for the omission of caulk underneath a window’s sill nailing fin so that any incidental moisture could exit or weep from the window assembly, and he noted window manufacturers’ installation instructions have evolved over time to recognize this practice which promotes the drainage of water out of the wall. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 6, R. pp. 255-259)**. Rosamond further testified that Builders FirstSource instructed its subcontractors on the Project to not apply caulk at the sill fins. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 6, R. p. 257)**.

II. The Indemnity Provisions

The indemnification provisions that Builders FirstSource’s assert support its contractual indemnity cross-claim are found in Sections 5 and 8 of its Master Subcontractor Agreement.

(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 196-207). Section 5 contains

multiple indemnity clauses, which read as follow:

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 LIMITED 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 ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

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 SUBCONTRACTORS, 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'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES. THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS 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.

(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 201-202).

Another indemnity provision is contained in Section 8 of the Master Subcontractor Agreement, which states as follows:

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 ENCUMBRANCES. CONTRACTOR MAY, IN ITS SOLE DISCRETION, CURE ANY LIENS OR SATISFY ANY DEMANDS, AND RECOVER ITS COSTS RELATED DIRECTLY OR INDIRECTLY THERETO FROM SUBCONTRACTOR.

(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 206).

III. Prior Litigation concerning the Indemnity Provisions

Builders FirstSource has attempted, unsuccessfully, to enforce these indemnity provisions against its subcontractors, including Hurley Services, in several other cases in South Carolina.

In Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415 (“MI Windows”), Builders FirstSource sued its subcontractors on a construction project, which included Respondent Hurley Services, as well as MI Windows and Doors, Inc., seeking indemnification under the BFS master subcontractor agreement for any sums which it may owe to a general contractor and homeowners in another lawsuit as well as its attorney’s fees, costs, and other expenses incurred in defending that other action. MI Windows. On December 6, 2019, the Honorable Clifton Newman granted summary judgment to the subcontractors on several grounds, including that the indemnity provisions in the BFS master subcontractor agreement are “confusing at best and deceptive at worst”, do not meet the “clear and unequivocal standard”, and, therefore, fail as a matter of law under Concord and Cumberland. (Order dated December 6, 2019 in Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415).

In asking Judge Newman to reconsider the court's grant of summary judgment in the MI Windows case, BFS admitted in its signed and filed motion papers that Judge Newman correctly found that the master subcontractor agreement does not comply with the clear and unequivocal standard imposed by South Carolina law in Concord and Cumberland:

This Court's December 6, 2019 Order correctly finds that the indemnity language at issue does not meet the elevated standard of being clear and unequivocal and thus the Plaintiff cannot maintain indemnification claims for Plaintiff's negligence.

(Charleston Exteriors' Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. C, R. pp. 327-332). Judge Newman entered an Amended Order on February 3, 2020, but the court's grant of summary judgment as to BFS's claims for indemnity on grounds that BFS master subcontractor agreement is unenforceable as a matter of law was maintained in the Amended Order. **(Amended Order dated February 3, 2020 in Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415, R. pp. 9-19).**⁷ Builders FirstSource filed a Notice of Intent to Appeal Judge Newman's Order in the MI Windows on March 5, 2020.⁸ **(BFS Notice of Appeal, R. pp. 401-402).** At the hearing on Hurley Services' motion for summary judgment in this case, counsel for Builders FirstSource advised Judge Young that it had appealed Judge Newman's Amended Order. **(Hr'g Tr. March 5, 2020, p. 54, ll. 5-8, R. p. 467).**

In this case, Judge Young found that Builders FirstSource's cross-claims against Hurley are barred by collateral estoppel based upon Judge Newman's decision in the MI Windows case and Judge Young specifically adopted Judge Newman's above analysis as it relates to the

⁷ Judge Newman's Amended Order can also be found as Exhibit 9 to Hurley Services' Memo in Support of its Motion for Summary Judgment, dated March 3, 2020.

⁸ The MI Windows appeal is pending as Appellate Case No. 2020-000415.

indemnity provisions at issue here. **(Order dated April 29, 2020, R. p. 3).** Judge Young also ruled that the Master Subcontractor Agreement violates public policy and the laws of South Carolina. **(Order dated April 29, 2020, R. p. 3).**

Since Judge Young's ruling in this case, the Honorable Jennifer B. McCoy has also held that BFS's Master Subcontractor Agreement is an adhesion contract; that BFS's Master Subcontractor Agreement contains multiple indemnity provisions, including multiple provisions in "Section 5. INDEMNITY" and another "buried in the fine print of "Section 3. Warranty;" that the indemnity provisions in BFS's master subcontractor agreement are unconscionable; that the indemnification provisions in Section 5 of BFS's master subcontractor agreement are ambiguous, conflict with each other and the provisions found in Section 3, do not meet the clear and unequivocal standard of Concord and Cumberland, and violate South Carolina public policy and S.C. Code § 40-11-270. See (Order dated January 25, 2021 in **Pavic v. Carolina Cottage Homes, LLC, et al.**, Civil Action No. 2019-CP-10-00772, Appellate Case No. 2021-000290 ("Pavic") pp. 4-8). In Pavic, Judge McCoy ruled that both Judge Newman's Order in MI Windows and Judge Young's Order in this case are final orders that collaterally estop BFS from contesting the findings therein as BFS had a full and fair opportunity to litigate the issues in the MI Windows case and this action, and that the contract terms were "actually litigated, directly determined in the prior [actions], and the issues were essential to the [judgments] such that collateral estoppel should apply. **(Order dated January 25, 2021 in Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, Appellate Case No. 2021-000290 ("Pavic") pp. 9-10).** Builders FirstSource has also appealed Judge McCoy's ruling in Pavic, along with the present appeal, the appeals of both the MI Windows case and Pavic are also pending

before this Court concerning many of the same issues.⁹ See MI Windows, Appellate Case No. 2020-000415; Pavic, Appellate Case No. 2021-000290.

It is undisputed that Builders FirstSource's contractual indemnification provisions, which have already been determined to be unenforceable as a matter of law by the trial court in MI Windows, are the same indemnification provisions involved in this appeal, all of which are found in the BFS Master Subcontractor Agreement "Version – 5/17/06." (**App. Br. p. 12**) ("The contracts governing the indemnity claims in this case and the case before Judge Newman contain nearly identical indemnity provisions.").

STANDARD OF REVIEW

This Court applies the same standard applied by the circuit court when reviewing a grant of summary judgment. Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 211-212, 826 S.E.2d 285, 290 (2019). Rule 56(c), SCRCP, provides a circuit court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP. Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings,

⁹ In addition to Pavic, since Judge Young's ruling in this case on April 29, 2020, Judge McCoy has also granted summary judgment against Builders FirstSource in another action in favor of numerous subcontractors, including Hurley Services, on grounds that the Builders FirstSource Master Subcontractor Agreement is legally unenforceable. See The Retreat at Charleston Nat'l Country Club Homeowners' Ass'n, Inc., et al. v. Winston Carlyle Charleston Nat'l, LLC et al., Civil Action No. 2016-CP-10-03783 (Form 4 Order entered on May 10, 2021, formal Order to follow, granting summary judgment against Builders FirstSource as to its contractual indemnity, breach of contract, negligence, and breach of express and implied warranties causes of action).

but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). On a motion for summary judgment, “the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009).

Here, the material facts are undisputed. The lower court correctly granted judgment as a matter of law based upon the language of the indemnity clauses at issue.

ARGUMENT

- I. THE CIRCUIT COURT PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL BECAUSE BUILDERS FIRSTSOURCE LITIGATED THE ENFORCEABILITY AND LEGALITY OF THE CONTRACTUAL INDEMNITY CLAUSES CONTAINED WITHIN ITS MASTER SUBCONTRACTOR AGREEMENT IN THE MI WINDOWS CASE, AND JUDGE NEWMAN’S AMENDED ORDER IN THAT CASE FINDING THOSE PROVISIONS ARE UNENFORCEABLE AS A MATTER OF LAW IS A BINDING FINAL JUDGMENT WITH PRECLUSIVE EFFECT UNLESS AND UNTIL IT IS REVERSED BY A HIGHER COURT.

The circuit court properly ruled that the doctrine of collateral estoppel barred Builders FirstSource’s crossclaims in this case. (**Order dated April 29, 2020, R. p. 3**). Collateral estoppel, also known as issue preclusion, 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. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). Builders FirstSource was a party to the MI Windows case. Builders FirstSource concedes this point. (**App. Br. p. 15**).

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. 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). The party invoking collateral estoppel need not have also been a party in the prior action;¹⁰ 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. Id. (“Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action . . .”). In other words, parties can invoke collateral estoppel even in the absence of “mutuality.” Id. Here, there is no dispute that Appellant is the party seeking to enforce the subject indemnity clauses from its Master Subcontractor Agreement and the party litigating the issue of enforceability in the MI Windows case, this case, and other cases.

The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 at n. 1, 315 S.E.2d 186, 189–90 at n. 1 (Ct. App. 1984).

Appellant asserts the application of collateral estoppel is improper in this case because: (1) it has appealed Judge Newman’s order in the MI Windows case; and (2) the issues litigated in the case are different. (**App. Br. pp. 10-11**). In asserting that Judge Newman’s Amended Order in the MI Windows case is not a final judgment, Appellant claims “[c]ollateral estoppel requires that a final, prior judgment exists; however, a judgment, subject to reconsideration upon appeal, cannot be considered ‘final’ until the ultimate appellate court has made its determination.” (**App. Br. p.**

¹⁰ Hurley Services was one of four subcontractors who Appellant sued in the MI Windows case; however, Charleston Exteriors and ECC Contracting, LLC were the only parties who moved for summary judgment.

10) (emphasis and italics in original). Appellant’s argument is conclusory, and notably, Appellant does not cite any case, statute, or court rule in support of this argument.

A judgment is final and remains final unless and until it has been overturned on appeal. See Rule 201 (a) SCACR (stating that “[a]ppeal may be taken, as provided by law, from any final judgment or appealable order.”). Additionally, many courts have held that a judgment is final for purposes of collateral estoppel or res judicata unless and until it is overturned on appeal. See Lee v. Criterion Ins. Co., 659 F. Supp. 813, 819 (S.D. Ga. 1987) (“However, ‘[t]he established rule in the federal courts is that a final judgment retains all of its res judicata [or collateral estoppel] consequences pending decision of the appeal’” (internal citations omitted)); In re Kramer, 543 B.R. 551, 554 (Bankr. E.D. Mich. 2015) (“[U]nder Michigan law, collateral estoppel applies to judgments even when they are pending on appeal or the time for appeals has not yet expired.”); Hapgood v. City of Warren, 127 F.3d 490, 494 (6th Cir. 1997) (“It is worth noting that when the district court granted defendant summary judgment, plaintiff’s case in Ohio state court was on appeal. The pendency of an appeal, however, does not prohibit application of claim preclusion. The prior state court judgment remains ‘final’ for preclusion purposes, unless or until overturned by the appellate court.”); 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4433, p. 308 (“ . . . it is likewise held in federal courts that the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided.”). The rationale behind this rule is that if cases on appeal were not final judgments, parties could re-file cases in trial court while the appeal is pending in order to try and achieve a different result, thus subjecting courts to inefficient duplicative litigation. See generally, Warwick Corp. v. Maryland Dep’t of Transp., 573 F. Supp. 1011, 1014 (D. Md. 1983), aff’d sub nom, Warwick Corp. v. Maryland Dep’t of Transportation, 735 F.2d 1359 (4th Cir. 1984) (“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.”).

Therefore, the fact that the appeal of the MI Windows case is pending in no way changes this result here; that judgment has preclusive effect. Judge Young did not trespass into the province of this Court or deprive this Court of its ultimate authority, as Appellant suggests, but rather, as discussed *supra*, promoted judicial economy, and put a stop to Appellant trying the issue among different trial courts. See generally, B&B Hardware, Inc. v. Hargis Industries, Inc., 575 U.S. 138, 140, 135 S.Ct. 1293, 1298-99 (“Sometimes two different tribunals are asked to decide the same issue. When that happens, the decision of the first tribunal usually must be followed by the second, at least if the issue is really the same. Allowing the same issue to be decided more than once wastes litigants’ resources and adjudicators’ time, and it encourages parties who lose before one tribunal to shop around for another. The doctrine of collateral estoppel or issue preclusion is designed to prevent this from occurring.”).

Furthermore, Appellant’s argument that the issues in the MI Windows case and this case are different fails for two reasons. The indemnity clauses in the Master Subcontractor Agreement at issue in this case are the *same* clauses from the same form agreement that were at issue in the MI Windows case. Appellant has already litigated the issue of the enforceability of its indemnification provisions. It should not be permitted to now relitigate the same exact issue on the same exact form contract. In granting the subcontractor defendant’s motions for summary judgment in the MI Windows case, Judge Newman specifically considered the provisions of the same indemnification clauses present here and found “the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither clear nor unequivocal.” (**Amended**

Order dated February 3, 2020 in Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415, R. p. 16). Lastly, Judge Newman’s determination of the unenforceability of the indemnification provisions in the MI Windows case was essential to the final order reached therein. (Amended Order dated February 3, 2020 in Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547, Appellate Case No. 2020-000415, R. p. 16).

Because Judge Newman’s Amended Order is a final judgment, and because the enforceability of the same indemnity provisions were at issue in this case and in the MI Windows case, the circuit court was correct in holding that collateral estoppel applies to this matter and should be affirmed in that regard.

II. THE CIRCUIT COURT CORRECTLY FOUND, BASED UPON THE UNDISPUTED FACTS, THAT THE INDEMNITY PROVISIONS IN BUILDERS FIRSTSOURCE’S MASTER SUBCONTRACTOR AGREEMENT ARE NOT CLEAR AND UNEQUIVOCAL, AS REQUIRED BY CONCORD AND CUMBERLAND, WHICH MAKES THOSE PROVISIONS UNENFORCEABLE AS A MATTER OF LAW.

Judge Young, and Judge Newman before him, properly determined that the Builders FirstSource Master Subcontractor Agreement failed to meet the legal requirements of South Carolina law. Contractual clauses requiring subcontractors to indemnify general contractors where the general contractor is concurrently negligent, as is the case here, are held to an exacting “clear and unequivocal” standard. See Concord and Cumberland, 424 S.C. 639, 819 S.E.2d 166 (requiring clauses whereby an indemnitee seeks to recover for its concurrent negligence to be “clear and unequivocal.”) In Concord and Cumberland, the general contractor (Superior Construction) on a condominium project was sued by the condominium regime and unit owners for certain construction defects. Superior asserted cross claims against the window and door

installer (Muhler) that it subcontracted with on the project, seeking contractual and equitable indemnification. Id. at 168, 424 S.C. at 643. The subcontract and a separate agreement between Superior and Muhler included the following indemnity provisions:

12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, the Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that

(a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.

(b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this [a]rticle [12.1].

* * *

11. In the event either Superior or Concord and Cumberland, LLC are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended [c]ontract [d]ocuments, or are defectively installed[,] Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable [attorney's] fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration, liability incurred by either or both as consequence including, but not limited to, costs and [attorney's] fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.

Id. at 168–69, 424 S.C. at 643–44. Superior settled with the plaintiffs for \$775,000 and also claimed approximately \$630,000 in attorney's fees and expenses related to its defense of the window and door claims, all of which is sought to recover from Muhler. Id. at 169, 424 S.C. at

644. On appeal, Superior asserted that general rules of contract interpretation, rather than the “clear and unequivocal” standard, should apply to its contractual indemnity claim against its subcontractor because it was seeking indemnification for its concurrent negligence and not its sole negligence. Id. at 170, 424 S.C. at 646. This Court disagreed, finding that “the clear and unequivocal standard . . . applies whether [the general contractor] sought indemnification for its sole or concurrent negligence.” Id. As explained below, the circuit court properly applied that case here for several reasons and granted summary judgment to Hurley Services.

- a. The circuit court correctly found there is no genuine issue of material fact and Hurley was entitled to summary judgment on Builders FirstSource’s crossclaim for contractual indemnity.

Here, the circuit court correctly found that “[t]here exists no genuine issue as to any material fact and Hurley Services and Charleston Exteriors are entitled to judgment dismissing all cross-claims against it as a matter of law.” (**Order dated April 29, 2020, R. p. 3**). Builders FirstSource asserts that there is an issue of material fact as to Hurley’s negligence, asserting that Concord and Cumberland does not apply. Builders FirstSource argues that “[t]he issue is material to the lower court’s ruling because if Respondent *were* negligent, Appellant should have been allowed to pursue its contractual indemnity claim for attorneys’ fees against Respondent for Respondent’s negligence even without the presence of contractual language that satisfies the Concord & Cumberland [sic] ‘clear and unequivocal’ standard.” (**App. Br. pp. 3-4**) (italics in original).

As explained herein, as a licensed contractor, Builders FirstSource is liable for all acts of its unlicensed subcontractors. See S.C. Code Ann. § 40-11-270(E). It is undisputed that Builders FirstSource was and is a licensed general contractor who was responsible for its subcontractors’ work. Hurley Services operated as an unlicensed subcontractor. See (**Hurley Mem. in Supp. of**

Mot. for Summ. J. dated March 3, 2020, Ex. 8, R. pp. 273-276); (Hurley Memo. in Support of its Mot. for Summ. J. dated March 3, 2020, Ex. 2, R. p. 229).

Section 40-11-270(E) of the South Carolina Code of Laws provides: “Licensees 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. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.” Put differently, under Section 40-11-270(E), the negligence of an unlicensed subcontractor is the negligence of the licensed general contractor. S.C. Code Ann. § 40-11-270. If Hurley were to be found to have been negligent, which negligence is denied, such would establish the concurrent negligence of Builders FirstSource as a matter of law. Based upon the respective licensing status of the parties and S.C. Code Ann. § 40-11-270(E), there can be no dispute that Builders FirstSource was at least concurrently negligent, if not solely negligent. Therefore, the circuit court properly determined the “clear and unequivocal” standard applied and that there was no genuine issue of material fact precluding summary judgment.

Furthermore, even if Builders FirstSource were not legally imputed with any alleged negligence of Hurley, the facts before the lower court were that there was no genuine issue of material fact that Hurley was not negligent. Builders FirstSource claims Hurley Services failed to “to install caulk on the inboard faces of the window nailing fins.” (**App. Br. p. 3**). However, Plaintiffs’ expert’s only criticism about the window installations at the Project was that, from his review of window installation photographs, he did not see the presence of caulk squeezed out from behind the sill fin of the windows. (**Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, p. 596, ll. 15-22, R. pp. 249**). Mease did not look for this condition during

destructive testing at the Project and it is not featured in his 146-page report; only in hindsight did he look for exposed caulk during a review of photographs before his third day of deposition. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, pp. 595-596, R. pp. 248-249).** (“And, again, I have no evidence that there’s any sealant behind these windows, and I believe that to be the case.” Q: “Based on your review of the photographs?” A: “Correct.”).

Mease admitted, however, that the caulk would have been applied behind and obscured by each window’s nailing fin, but he was looking for signs where it may have squeezed out from behind the sill fin upon installation. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, p. 596, ll. 1-6, R. p. 249).** Mease further admitted that neither he nor the defense experts removed any window from a rough opening in the Ryland Phase of the Project. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, p. 596, ll. 7-14, R. p. 249).** (Q: “Did you—as to the Ryland buildings, did you actually remove any window from a rough opening?” A: “No.” Q: “With regard to the Ryland buildings, did the defense remove any window from a rough opening?” A: “I don’t believe so.”). Significantly, windows that were inspected by Mease and the experts had peel-and-seal flashing tape that completely covered the jamb fins along either side of the window and the head fin at the top of the window. **(Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 5, pp. 596-597, R. p. 249-250).** Accordingly, with the jamb and head fins covered by tape, such were not visible onsite or in the photos Mease reviewed. Neither Mease nor any other expert removed a window. Without doing so, Mease never exposed the areas to confirm whether caulk was present at the jambs and heads. The only opinion with any foundation, however weak it may have been, that Mease gave at deposition was that he did not see caulk squeezed out from behind a window’s *sill fin* or extrude through a *sill fin* nail hole.

Significantly, Builders FirstSource instructed its subcontractors not to apply caulk at these *sill fin* locations as a best practice so that any incidental water could weep out of the window and wall assembly. (**Hurley Mem. in Supp. of Mot. for Summ. J. dated March 3, 2020, Ex. 6, R. pp. 255-259**). Builders FirstSource brief admits the substitution of flashing tape behind the sill flange in lieu of caulk was Builders FirstSource’s standard practice and, thus, confirms Builders FirstSource’s concurrent if not sole negligence was the basis of Plaintiffs’ claims. (**App. Br. p. 6**).¹¹ Charleston Exteriors’ corporate designee testified that Builders FirstSource’s superintendent “inspects everything from the time – taping the windows, butterflying the corners, to caulking the windows.” (**BFS Mot. for Reconsideration, p. 9, R. p. 353**).

There is no issue of material fact that Builders FirstSource is seeking to recover its attorneys’ fees and costs incurred as a result of its sole or concurrent negligence. The circuit court correctly found that no genuine issue of material fact exists as to this issue and should be affirmed for this additional reason. Concord and Cumberland and the “clear and unequivocal” standard apply.

- b. The circuit court correctly found that the language of the indemnity provisions fails to meet the Concord and Cumberland clear and unequivocal standard that applies in this case, and such language is thus unenforceable as a matter of law.

Having correctly determined that Concord and Cumberland applies, the circuit court correctly held based upon the undisputed facts and language of the provisions at issue that Builders FirstSource’s Master Subcontractor Agreement does not satisfy the clear and unequivocal standard. (**Order dated April 29, 2020, R. p. 3**) (“Builders FirstSource[’s] . . . cross-claims for

¹¹ BFS’s Motion to Reconsider before the circuit court also admitted “it is undisputed that the Builders FirstSource installation practices included the substitution of Fortiflash at the sill in lieu of caulking inboard of the sill nailing fin (flanges)....” (**BFS Mot. for Reconsideration, p. 7, R. p. 351**).

contractual indemnity are based on contractual provisions that are neither clear nor unequivocal . . .”). Critically, it is important to note that Builders FirstSource has admitted in the MI Windows case that the Master Subcontractor Agreement’s indemnity clauses fail to meet the “clear and unequivocal” standard set forth by this Court in Concord and Cumberland.¹² However, Builders FirstSource takes a different position in this case, arguing that the Master Subcontractor Agreement’s language meets the “clear and unequivocal standard.” (**App. Br. pp. 16-17**). A review of the Master Subcontractor Agreement’s numerous indemnification clauses reveals that they are not “clear and unequivocal.”

The Master Subcontractor Agreement contemplates indemnification of all attorney’s fees incurred in the defense of Builders FirstSource as well as all amounts paid in settlement or to satisfy demands – each without any regard to the fault of the subcontractor or any reference to the negligence of Builders FirstSource; in other areas the Master Subcontractor Agreement refers to indemnification in favor of Builders FirstSource regardless of the sole or concurrent negligence of Appellant; and yet other provisions qualify indemnification to the extent the loss is caused in whole or part by the negligence of Hurley Services or other subcontractors. See (Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 201-202). These terms, as viewed against each

¹² In its Motion to Reconsider filed on December 16, 2019 in the MI Windows case, Builders FirstSource admitted: “This Court’s December 6, 2019 Order correctly finds that the indemnity language at issue does not meet the elevated standard of being clear and unequivocal and thus the Plaintiff cannot maintain indemnification claims for Plaintiff’s negligence.” (**BFS Mot. for Reconsideration, p. 2, R. p. 328**). Under South Carolina law, a party is bound by an admission contained in a court filing prepared and signed by his attorney. See Youn v. Martin, 254 S.C. 50, 58 (1970) (finding that judicial admissions by counsel for a party apply to matters of law, as well as factual issues, and where such a mixed question is admitted by a party’s attorney the conclusion of law has been waived). An admission in one action may be received in evidence in another action involving a different party. Id.

other, are “confusing at best and deceptive at worst.” (Order dated April 29, 2020, R. p. 3).

Therefore, the circuit court should be affirmed.

- c. Builders FirstSource’s limitation of its claim to attorneys’ fees and costs is nonetheless a claim for “damages” under South Carolina law, and the South Carolina Anti-Indemnity Statute and Concord and Cumberland’s clear and unequivocal standard therefore still apply.

As explained above, the circuit court correctly held that the “clear and unequivocal” standard applies. (Order dated April 29, 2020, R. p. 3). Builders FirstSource argues that Concord and Cumberland “did not explicitly address whether the ‘clear and unequivocal’ standard applied to indemnification of attorneys’ fees as well as to indemnification claims for liability owed to a third party.” (App. Br. p. 16). Nothing in Concord and Cumberland states that the Court’s holding does not apply to indemnification clauses addressing payment of attorneys’ fees and costs. As stated in that case, “when an indemnity clause purports ‘to relieve an indemnitee from the consequences of its own negligence,’ our case law requires strict construction of the clause.” Concord and Cumberland, 424 S.C. at 647, 819 S.E.2d at 170-71 (citing cases). The fact that Builders FirstSource limited its claim to a recovery of attorneys’ fees does nothing to change the terms of its Master Subcontractor Agreement or the outcome of this case. Builders FirstSource attempts to save its claim by contending that the Anti-Indemnity Statute, S.C. Code § 32-2-10, (discussed in depth below), and Concord and Cumberland do not apply to its indemnity claims because attorney’s fees are not considered damages. (App. Br. p. 24); see also (App. Br. p. 16). By limiting its claim to attorneys’ fees, Appellants assert that they have distinguished the request in this case from that in the MI Windows case. (App. Br. p. 24). Appellant ignores that under South Carolina law, attorneys’ fees are damages, and the entirety of the indemnity provisions are unenforceable as a matter of law.

Under South Carolina law, recoverable “general damages” may include attorneys’ fees when so provided by contract or statute. See Rimer v. State Farm, 248 S.C. 18, 27 148 S.E.2d 742, 747 (1966) (“Nor do recoverable damages include the expense of employing counsel, except when so provided by contract or statute). Here, the Master Subcontractor Agreement provides for recovery of attorneys’ fees as damages. See, e.g., (Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 201-202). Section 5 of the Master Subcontractor Agreement, for instance, states:

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFENDANT 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 LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY’S FEES

(Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. pp. 201-202) (emphasis added).

Builders FirstSource’s pleadings also reflect that it seeks to recover attorneys’ fees as general damages. Builders FirstSource’s cross-claims allege that it is “entitled to full contractual and common law indemnification from [Respondents], for any liability [Builders FirstSource] is found to have to the Plaintiffs or to others in this action, and [Builders FirstSource] is also entitled to damages for any negligence, as aforesaid, on the part of [Respondents], entitling [Builders FirstSource] to recover from [Respondents], its attorneys’ fees, costs, and other expenses incurred in defending this action”

(BFS Ans. to Plfs. Third Am. Compl., ¶ 126, R. p. 188) (emphasis added). Builders FirstSource’s self-imposed limitation of its claims to its attorneys’ fees and costs does nothing to change the fact that its cross-claims remain ones for damages, and attorneys’ fees are simply an element thereof. Moreover, BFS’s stated limitation to the recovery of attorney’s fees does not save its fatally flawed contract. Rather, it sounds its death knell as the illegality of the contract’s provisions is highlighted by the defense cost indemnity terms. Damages for attorney’s fees are to be assessed against

subcontractors regardless of Builders First Source's ultimate liability for the entire matter in violation of S.C. Code Ann. § 32-2-10.

Even if the recovery of attorneys' fees as damages was not contemplated within the Master Subcontractor Agreement, South Carolina courts have recognized many other circumstances where attorneys' fees can be considered damages. See Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 709 (1971) ("Where the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expense to protect his interest, such costs and expenses, including attorneys' fees, should be treated as the legal consequences of the original wrongful act and may be recovered as damages."); see also Fountain v. Fred's, Inc., 429 S.C. 533, 556–57, 839 S.E.2d 475, 488 (Ct. App. 2020), reh'g denied (Mar. 30, 2020), cert. granted (May 28, 2021) ("In an equitable indemnification action, attorney's fees and costs proximately resulting from the at-fault party's breach of contract or negligence are treated as the legal consequences of the at-fault party's original wrongful act and may be recovered as damages."); McCoy v. Greenwave Enterprises, Inc., 408 S.C. 355, 360, 759 S.E.2d 136, 138 (2014) ("The facts of this case clearly demonstrate that the attorney's fees and costs incurred by Appellants in defending the McCoy's lawsuit were the natural and probable consequences of Miles's breach of the purchase agreement.") (citing Addy).

Furthermore, under Builders FirstSource's flawed analysis, a South Carolina court could award attorney's fees to an indemnitee in the event of its sole negligence. Section 32-2-10 does not contain any such exception that allows the Statute to be violated where the indemnitee only seeks to recover attorneys' fees, nor does Concord and Cumberland even discuss attorneys' fees. Indeed, the fallacy of Builders FirstSource's argument is borne out by considering such an absurd result.

Therefore, the circuit court correctly found that the indemnity provisions violate South Carolina law and should be affirmed.

III. THE MASTER SUBCONTRACTOR AGREEMENT'S INDEMNITY PROVISIONS ARE REplete WITH TERMS THAT VIOLATE SOUTH CAROLINA LAW AND PUBLIC POLICY, AND THOSE TERMS CANNOT BE SEVERED FROM THE MASTER SUBCONTRACT AGREEMENT, MAKING THE INDEMNITY PROVISIONS OF THE MASTER SUBCONTRACTOR AGREEMENT UNENFORCEABLE AS A WHOLE.

- a. The Master Subcontractor Agreement contains numerous terms that violate the South Carolina Anti-Indemnity Statute, as well as South Carolina public policy.

As several aspects of the Master Subcontractor Agreement require Builders FirstSource's subcontractors to indemnify it from its sole or own negligence, which squarely violates South Carolina's Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10, and public policy. Indeed, Builders FirstSource admits that some of the indemnification provisions in its form contract are unenforceable as a matter of South Carolina law. See (Hr'g Tr. March 5, 2020, p. 40, ll. 1-17, R. p. 453). These unlawful provisions further demonstrate that the Master Subcontractor Agreement fails to meet the "clear and unequivocal" standard as discussed above, and the circuit court Order granting summary judgment should be upheld. These illegal provisions also provide an independent ground for this Court to affirm the Order granting summary judgment dismissing Builders FirstSource's cross-claims for indemnity as a matter of law.¹³

¹³ While Judge Young's Order was proper in all respects and should be upheld, this Court is also free to consider independent sustaining grounds for affirming the grant of summary judgment against Appellant which were raised below by Respondents, including, BFS's violation of S.C. Code Ann. § 32-2-10. See I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723-24 (2000) ("Under the present rules, a respondent – the 'winner' in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.")

Among other things, the Master Subcontractor Agreement requires subcontractors to indemnify Builders FirstSource's for claims of death or personal injury, regardless of Builders FirstSource's negligence. See (Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 201) ("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 SUBCONTRACTORS, 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") (original in capitals, but some emphasis added).¹⁴ Builders FirstSource has admitted this provision violates South Carolina law. (Hr'g Tr. March 5, 2020, p. 40, ll. 11-17, R. p. 453) (counsel for Builders FirstSource indicating that the form contract is used in many states, and while it may work in other states, it does not here).

Likewise, the Master Subcontractor Agreement requires subcontractors to defend Builders FirstSource in the case of Builders FirstSource's sole negligence. See (Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 202) ("THE DUTY TO DEFEND EXISTS

¹⁴ Builders FirstSource is identified as the "Contractor" in the Master Subcontractor Agreement.

REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES”) (original in all capitals, no emphasis added); see also (**Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 206**).

Because these indemnity provisions require the subcontractors to indemnify Builders FirstSource against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of Builders FirstSource, these provisions are unenforceable under S.C. Code Ann. § 32-2-10, which provides as follows:

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.

(Emphasis and double emphasis added); see also D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). There is no disputing that the above-quoted provisions do not comply with this language. The circuit court should be affirmed for this additional reason.

In addition to violating Section 32-2-10, it is important to note that Judge Young also found that the indemnity provisions violate public policy. (**Order dated April 29, 2020, R. p. 3**) (“Builders FirstSource [‘s] . . . cross claims for contractual indemnity are based on contractual provisions that . . . are against public policy and violate the laws of South Carolina . . .”).

Public policy disfavors indemnity provisions that are “overly broad.” See Keith v. River Consulting, Inc., 365 S.C. 500, 618 S.E.2d 302 (Ct. App. 2005) (“indemnity clause, though wide

in scope, was not so overly broad as to render the clause void as against public policy.”). Anti-indemnity agreements violate public policy and anti-indemnity statutes were enacted to combat broad indemnity agreements that contractors obtained from their subcontractors, which lead to construction sites rife with injuries. See McMunn v. Hertz Equip. Rental Corp., 791 F.2d 88, 92 (7th Cir. 1986) (Judge Richard Posner interpreting the similar Indiana anti-indemnity statute) (“We can get some help from Fort Wayne Cablevision v. Indiana & Michigan Electric Co., 443 N.E.2d 863 (Ind.App.1983), where the Indiana Court of Appeals explained that the purpose of the statute is to increase safety at construction sites. Before it was passed general contractors would negotiate with their subcontractors for a promise to indemnify the general contractor if he was sued for a personal injury to a worker employed by a subcontractor at the construction site. The legislature believed that this type of agreement resulted in more accidents on the job. This is possible, certainly. If the general contractor can shift the financial burden of liability he may have less incentive to take measures to make the construction site safe.”)

Furthermore, the Anti-Indemnity statute explicitly states that indemnity provisions “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 promise . . . [are] against public policy” S.C. Code Ann. § 32-2-10.

The indemnification provisions here are overly broad and violate public policy. The Master Subcontractor Agreement’s numerous indemnification clauses are not clear and unequivocal. The smorgasbord of indemnification reflects that, in terms of indemnity, Builders FirstSource took a “throw everything in the kitchen sink” approach to drafting the contract, presumably under the theory that if one clause fails another may stand. On one hand, Builders

FirstSource Master Subcontractor Agreement contemplates indemnification of all attorneys' fees incurred in the defense of the BFS as well as all amounts paid in settlement or to satisfy demands – each without any regard to the fault of the subcontractor or any reference to the negligence of Builders FirstSource; in other areas the Master Subcontractor Agreement refers to indemnification in favor of Builders FirstSource regardless of the sole or concurrent negligence of Builders FirstSource; and yet other provisions qualify indemnification to the extent the loss is caused in whole or part by the negligence of subcontractors. The terms are confusing at best, contradictory at times, and misleading, and appear to indemnify Builders FirstSource for just about anything. Such terms are overly broad and violative of public policy.

The circuit court (and Judge Newman) were correct in finding that the indemnity provisions of Master Subcontractor Agreement are illegal and against public policy and therefore unenforceable and the circuit court's ruling should be affirmed on this ground alone.

- b. The Court cannot sever the unenforceable and illegal indemnity provisions of the Master Subcontractor Agreement; the Master Subcontractor Agreement must be considered as a whole, and because it contains legally unenforceable provisions, the Master Subcontractor Agreement fails as a whole.

Builders FirstSource appears to concede that some of the provisions of the Master Subcontract Agreement could violate South Carolina Law and public policy, but Appellant urges the Court to ignore this and further invites the Court to “sever the offending provision[s].” (**App. Br. p. 19**). As such, Builders FirstSource is not arguing that all of the that the indemnification provisions comport with the Anti-Indemnity Statute, but rather that BFS should be permitted to cherry pick non-offending provisions, have the court and reform its claims to save its ability to recovery its attorneys' fees and costs incurred in defending against its own negligence in this suit. (**App. Br. pp. 12-13**).

Builders FirstSource further asserts that the illegal provisions are “irrelevant,” and Judge Young erred in considering those provisions. (**App. Br. p. 13**). Builders FirstSource ignores that the analysis of the enforceability of the Master Subcontractor Agreement must necessarily involve looking at the indemnity provisions and the contract as a whole. See McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571, 574 (S.C. 2009) (“A contract is read as a whole document....”). “Replacing some [illegal] language but leaving other language in place would amount to rewriting the indemnity clauses into a contractual term” to which Hurley Services did not agree. See Concord and Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 175 (S.C. App. 2018) (declining appellant’s invitation to rewrite the indemnity provisions of its contracts and replace language violative of South Carolina law). As a general rule, “courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866 (Ct. App. 2002) (quoting Berkebile v. Outen, 311 S.C. 50, 53, n. 2, 426 S.E.2d 760, 762 n. 2 (1993)). It is not the function of the court to rewrite contracts for parties. Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010); Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002); ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011).

Because the indemnity provisions violate South Carolina law in many respects, Builders FirstSource’s request that the Court rewrite the indemnity provisions must be rejected. (**App. Br. pp. 13-14**). Specifically, Builders FirstSource states that “to the extent that the Trial Court took issue with [the indemnity provisions], it should have simply severed them and left the provision regarding attorneys’ fees intact.” (**App. Br. pp. 13-14**). But Builders FirstSource’s attorney’s fees provisions are unlawful and purport to impose liability for damages in the form of attorney’s fees

and costs of defense from Respondents without regard to Builders FirstSource's liability or negligence. (App. Br. pp. 16-17). Such attorney's fees provisions violative of S.C. Code Ann. § 32-2-10. Builders FirstSource fails to identify clear and distinct terms that could be severed. The indemnity and duty to defend clauses are interdependent of each other.

The indemnification for attorneys' fees provision is contained within Section 5, which, as discussed before, contains indemnity provisions. Section 5 does not identify separately enumerated subparagraphs. Significantly, the defense costs clause provides in pertinent part: "... **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.**" (Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 202) (Emphasis and double emphasis added). Accordingly, by its terms, even if Builders FirstSource was solely liable for causing the loss that gave rise to the claim for defense, the Master Subcontractor Agreement purports to place entire the duty to defend and responsibility to indemnify for the costs to defend upon Builders FirstSource's subcontractor. Ultimately, Builders FirstSource could be solely liable for the entire loss, but the Master Subcontractor Agreement provides for the indemnification from the subcontractor in favor of Builders FirstSource for defense costs regardless of Builders FirstSource's negligence and proven liability. Section 5 of the Master Subcontractor Agreement provides that the defense costs obligation ends once its finally proven in court that the claims against Builders FirstSource are barred by the applicable statute of limitations, but contains no exception to the extent the claims are the result of the negligence or sole negligence of Builders FirstSource. Although the end of Section 5 provides an exception for defense and indemnity for claims arising from design defects and the professional negligence of architects and engineers, it does not provide any exception relative to the fault of Builders FirstSource in whole or

part. Section 8.i. of the Master Subcontractor Agreement also provides for indemnification of attorneys' fees and expenses and amounts paid in settlement without regard to the fault of BFS. See (Hurley Mot. for Summ. J. dated January 22, 2020, Ex. A, R. p. 206). All of these indemnity provisions which disregard the negligence of Builders FirstSource violate South Carolina law and are unenforceable. That Builders FirstSource has now limited its claim to attorney's fees and costs is again fatal to its case. There is simply no reasonable way to sever these illegal provisions from the contract and this Court should decline Builders FirstSource's invitation to do so.

The South Carolina Supreme Court cautioned in Simpson v. MSA of Myrtle Beach, Inc., "if illegality pervades the . . . agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007) (internal citations omitted).

Eliminating the illegal provisions in Sections 5 and 8 of the Master Subcontractor Agreement would amount to a rewriting of the agreement, not severing a word, clause, phrase, or line. South Carolina courts do not "blue pencil" agreements and rewrite a contract's terms to make it comply with the law, as Builders FirstSource would have it. See Poynter, 387 S.C. at 588, 694 S.E.2d at 18 (recognizing that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy).

The sole case Builders FirstSource cites in support of its argument for severability is Beach Co., 351 S.C. 56, 566 S.E.2d 863. Beach Co. is inapposite. There, a landlord brought suit against tenant for breach of lease agreement, and the landlord countersued for breach of contract. 351 S.C. 56, 566 S.E.2d 863. The contract at issue contained provisions that waived the tenant's right to a jury trial and to assert compulsory counterclaims. Id. at 64, 866. This Court held that "A severable

contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be.” Id. at 64, 867. This Court ultimately held that the tenant’s rights to a jury trial and to assert counterclaims were separate and distinct rights, and it severed the waiver of compulsory of counterclaims. Id. at 65, 867.

Here, unlike Beach Co., the indemnification provisions of Builders FirstSource’s Master Subcontractor Agreement are intertwined and dependent upon one another, and, thus, are not susceptible of division. Builders FirstSource’s right to be indemnified for attorneys’ fees and costs is part and parcel of its right to recover damages under the subcontract. Builders FirstSource should not be allowed to jumble multiple “confusing at best and deceptive at worst” indemnity provisions within the indemnification section of the Master Subcontractor Agreement, and then selectively choose terms to be severed when confronted with their illegality. (**Order dated April 29, 2020, R. p. 3**). The subject subcontract’s interdependent indemnification provisions are wholly unenforceable, and the illegal terms should not be severed by this Court.

This Court’s decision in Simpson is on point. In Simpson, the South Carolina Supreme Court found an arbitration agreement with unconscionable terms wholly unenforceable, despite the presence of a separate contractual severability clause, due to the “cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause.” 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007). The contractual severability provision did not result in an exception to the general rule of unenforceability of illegal contracts, especially where the contract is one-sided, oppressive, or a contract of adhesion. Id.

Builders FirstSource should not and cannot, as a matter of law, be saved from its own illegal contract, by a rewriting of its terms, especially rewriting by a court. Poynter, 387 S.C. at

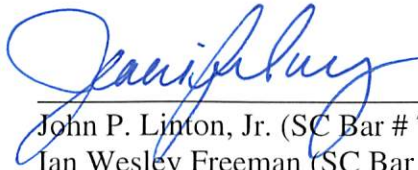
588, 694 S.E.2d at 18; Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002), ERIE Ins. Co., 393 S.C. at 460, 713 S.E.2d at 321. For this reason, the circuit court should be affirmed.

CONCLUSION

For the reasons stated above, the circuit court's Order Granting Defendants Hurley Services, LLC Motion for Summary Judgment Against the Claims of Builders FirstSource-Southeast Group, LLC and the Form 4 Order Denying Builders FirstSource-Southeast Group, LLC's Motion for Reconsideration and/or Alteration/Amendment should be **AFFIRMED**.

Respectfully Submitted,

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October 19, 2021
Charleston, South Carolina

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Oct 19 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
Civil Action No. 2016-CP-10-03455

Appellate Case No. 2020-001328

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

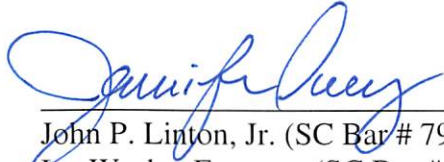
v.

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; Miguel Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez
Vazquez aka Alfonso Rodriguez, Sr.; Marcello Marques Palmeira d/b/a Palmeira Construction,
Ernandes Riberio de Pinho, Cristiane Cleaning, LLC, and John Does 58-75, ... Defendants,

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

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent Hurley Services, LLC's final brief complies with Rule 211(b), SCACR.



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