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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Civil Action No. 2016-CP-10-03738
Appellate Case No. 2025-001224

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; Liollio 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.; Colleen 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,

of which Hurley Services, LLC is a… ……...….Respondent,

AND

Builders FirstSource-Southeast Group, LLC is the ……..... Petitioner.

RESPONDENT HURLEY SERVICES, LLC'S RETURN TO PETITION'S BRIEF

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March 18, 2026

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STATEMENT OF THE CASE

Plaintiffs, an association of homeowners and a horizontal property regime, filed suit in July of 2016, against the developer, Winston Carlyle Charleston National, LLC, and general contractor, Colin R. Campbell Construction, Inc., and Colin Campbell, individually, alleging construction deficiencies in the common elements of a multi-family project known as The Retreat at Charleston National Country Club (the "Project"). The complaint alleged causes of action for negligence, gross negligence, breaches of express and implied warranties, and breaches of the fiduciary duties of the developer.

Plaintiffs' First Amended Complaint added Builders FirstSource-Southeast Group, LLC ("BFS") as a defendant and brought claims for negligence, gross negligence, and breach of implied warranties against BFS. BFS is a large supplier of building materials that sold windows, doors, and other materials to the general contractor and/or developer and contracted to install these materials for the project. BFS holds an unlimited general contractor's license. (A. p. 879.) It hired Hurley Services, LLC ("Hurley"), as a labor-only subcontractor for the installation of windows, doors, and weather-resistant materials on four, two-story buildings at the Project. Hurley was paid $5,319.50 for its work. (A. p. 1037.)

Hurley's work at the Project was performed pursuant to a Master Subcontract Agreement, Version – 5/17/06 (hereinafter "MSA"), a form agreement drafted by BFS and signed May 14, 2012. (A. pp. 1501-12.) Hurley provided no materials or components in connection with its work. Plaintiffs' expert found deficiencies in the windows supplied by BFS for installation by Hurley. In its answer to the Amended Complaint, BFS asserted third-party claims against Hurley and other subcontractors alleging claims for contractual indemnity, equitable indemnity, breaches of express and implied warranties, negligence, and contract breaches.

In June of 2018, Plaintiffs filed a Second Amended Complaint naming BFS, Hurley, and others as direct defendants and reasserting their claims for construction deficiencies and defective materials. BFS answered Plaintiffs' Second Amended Complaint, in which it denied supplying building materials, and asserted crossclaims against Hurley substantially identical to the claims in its third-party complaint. In its crossclaims against Hurley, BFS repeatedly alleged that Hurley provided and warranted materials, had a duty of care in selecting materials, and was contractually obligated for procuring adequate materials in connection with its work. This is despite Hurley's status as a labor-only subcontractor.

In August of 2020, Hurley filed a motion for partial summary judgment regarding certain crossclaims alleged by BFS. (A. pp. 895-935.) Two months later, Hurley filed an amended motion for summary judgment as to all crossclaims asserted by BFS. (A. pp. 936-1075.) Hurley argued the motion in November of 2020. (A. p. 1386.) On July 7, 2021, the Honorable Jennifer B. McCoy, Circuit Court judge, signed and filed an order[1] granting partial summary judgment in favor of Hurley. (A. pp. 22-41.)

On February 12, 2025, the Court of Appeals affirmed all eight of the Circuit Court's Orders. BFS's Petition for Rehearing was denied on May 21, 2025, and the Court issued a substituted opinion correcting a scrivener's error. *Retreat at Charleston National Country Club Home Owners Association, Inc., v. Winston Carlyle Charleston National, LLC*, et al., 445 S.C. 566, 915 S.E.2d 736 (Ct. App. 2025). BFS filed its Petition for Writ of Certiorari on June 20, 2025, which was granted on December 16, 2025.

[1] The trial court also issued orders granting summary judgment in favor of seven other subcontractor defendants on BFS' crossclaims and from which BFS noticed appeals. The South Carolina Court of Appeals subsequently consolidated all appeals of BFS in this case.

STANDARD OF REVIEW

This Court utilizes the same standard of review as the trial court to review the grant of summary judgment. *Williams v. Jeffcoat*, 444 S.C. 224, 233, 906 S.E.2d 588, 593 (2024). In *Kitchen Planners*, this Court recently clarified "that the 'mere scintilla' standard does not apply under Rule 56(c)." *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). "Rather the proper standard is the 'genuine issue of material fact' standard set forth in the text of the Rule." *Id*.

To survive summary judgment, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Id*., 440 S.C. at 462, 892 S.E.2d at 301 (*quoting Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. *Manley v. Manley*, 291 S.C. 325, 329, 353 S.E.2d 312, 316 (Ct. App. 1987). 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 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). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Additionally, the interpretation of a statute is a question of law for the Court to review de novo." *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021).

ARGUMENTS

I. THE CLEAR AND UNEQUIVOCABLE STANDARD APPLIES TO THE INDEMNITY PROVISIONS DRAFTED BY BFS BECAUSE ITS PLEADINGS SEEK RECOVERY FROM HURLEY FOR BFS'S OWN NEGLIGENCE (SOLE OR CONCURRENT).

BFS argues that the elevated clear and unequivocable standard enunciated in *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC,* 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) does not apply in this case because BFS does not seek indemnity from Hurley for BFS' own negligence. BFS "has admitted on the record that the relevant indemnity provisions at issue here are not sufficiently clear and unequivocal to impose such an obligation upon" Hurley. Pet.'s Brief, p. 20. Instead, BFS asserts that it seeks indemnification only for loss or damage arising from Hurley's negligence, whether that negligence is sole or concurrent. This argument relies on a fundamental misunderstanding: by seeking indemnification for Hurley's concurrent negligence, BFS is necessarily pursuing recovery for damages caused by BFS' concurrent negligence. Absent clear and unequivocal indemnification terms in the Master Subcontractor Agreement, such recovery is prohibited.

A. Any Damage to Plaintiffs Caused by Hurley's Negligence Necessarily Resulted from BFS' Concurrent Negligence.

By arguing that "general rules of contract construction" govern its claims indemnification for Hurley's sole or concurrent negligence, BFS misunderstands the meaning of "concurrent negligence" in the context of claims for contractual indemnification by a general contractor against its labor-only subcontractor. Under this circumstance, a subcontractor's concurrent negligence is, and can only be, a tort combining with the general contractor's own concurrent negligence to proximately cause an indivisible injury to the plaintiff.

BFS is a division of one of the largest building supply corporations in the United States. At Retreat, BFS was a turnkey contractor which provided both labor and material. (A. p. 976, line

1 – p. 981, line 15.) BFS sold windows to the developer and/or general contractor and supplied those windows to Hurley, a BFS subcontractor, for installation in 4 of the 32 buildings in the Project. (A. pp. 943, 951-969.) It is undisputed that Hurley supplied no materials in connection with its work at the project.

BFS was the installation manager, and the holder of an unlimited general contractor's license. As such, it also had nondelegable statutory and common law duties to inspect and supervise the work of its subcontractors. S.C. Code § 40-11-270(E); *Fields v. J. Haynes Waters Builders*, 376 S.C. 545, 658 S.E.2d 80, 88 (2008); *Fountain v. Fred's, Inc*., 429 S.C. 533, 553, 839 S.E.2d 475, 486 (Ct. App. 2020). The Master Subcontractor Agreement also required Hurley to follow the directions of BFS. (A. pp. 905-906, 944.) BFS admitted responsibility for supervising the work performed by its subcontractors. (A. pp. 688–689). Given that supervisory role, any negligence attributed to Hurley would necessarily involve BFS' concurrent negligence. Accordingly, BFS' effort to recover damages attributable to Hurley's concurrent negligence necessarily means that it seeks indemnification for BFS' own negligence.

Concurrent negligence describes the situation where the proximate cause of a third-party's injury is the joint and concurrent negligence of the indemnitee and the indemnitor. *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 707 (Tex. 1987) (setting aside the clear and unequivocal test in favor of the express negligence standard).[2] "That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, … to a liability which is both joint and several, is a proposition recognized and approved in this

[2] The Court of Appeals cited *Ethyl Corp*. for the frustrating reality that the "drafters of indemnity provisions … write them in a way that can be read as indemnifying the indemnitee for its own negligence, 'yet be just ambiguous enough to conceal that intent from the indemnitor.'" *Concord*, 424 S.C. at 658, 819 S.E.2d at 176 (Ct. App. 2018) (*quoting Ethyl Corp*., 725 S.W.2d at 707–08).

state…." *Bridge v. Orange Crush Bottlers*, 164 S.C. 351, 162 S.E. 325, 328 (1932). "'[C]oncurring causes operate contemporaneously[3] to produce the injury, so that it would not have happened in the absence of either.'" *J.T. Baggerly v. CSX Transp., Inc*., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006) (*quoting Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972)); *see* 57A Am. Jur. 2d Negligence § 497 ("'Concurrent negligence' consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury.").

While BFS is correct that the fundamental issue is the extent of the indemnity sought by the Petitioner, it errs by insisting that remedy it seeks should be discerned from its briefs and arguments. Instead, the true scope of the indemnification BFS sought must be discerned from the terms it carved into the Later Contract, as written and as a whole. Moreover, BFS clouds the "issue" so identified by describing three scenarios under which BFS seeks recovery: for Hurley's negligence, for BFS' *sole* negligence, or for "both" types of negligence. (A. p. 1633.) Absent from BFS' scenarios is the single potential allocation possible between the contractor and labor-only subcontractor: the concurrent negligence of both BFS and Hurley. This matters because BFS is attempting to distinguish itself from the holding of *Concord*: that the clear and unequivocal

[3] This Court has recognized that two parties' negligence may be concurrent even if it does not occur contemporaneously. "We can conceive of no logical reason why acts of negligence committed by two or more persons at different times and places may not follow their separate ways and finally meet and concur in producing an event which causes injury which gives to the injured one a single cause of action predicated upon the joint liability of those who set in motion the train of acts of negligence which culminated in the injury." *Bridge*, 164 S.C. 351, 162 S.E. at 328. In *Bridge*, the Court examined whether a single cause of action against two defendants for a single injury was sustained by conduct by the two at different times and different places. The appealing defendant argued that concurrent negligence required the two defendants "acted contemporaneously; that is, 'co-operated' at the same time and place and together produced the injury." *Id*. This Court disagreed.

standard applies where the indemnitee seeks contractual indemnification for the losses caused by the concurrent negligence of the indemnitee and the indemnitor.

As a result of the Court of Appeals' opinion, BFS complains that it "is precluded from any recovery in contractual indemnity, even if the jury determines that the subcontractors have been solely or concurrently negligent in causing the damages at issue." (A. p. 1636, emphasis supplied.) However, a contractual indemnification term allowing the BFS to recover for a subcontractor's concurrent negligence is prohibited if the term does not meet the clear and unequivocal standard. For instance, in *Ethyl Corp*., the Texas "court of appeals found the … indemnity provision did not clearly and unequivocally require Daniel to indemnify Ethyl for Ethyl's own negligence or for the parties' concurrent negligence." *Ethyl Corp.*, 725 S.W.2d at 707 (emphasis supplied). Once again, BFS wants to ensure that it can recover from Hurley damages caused by the concurrent negligence of BFS and Hurley despite the MSA's failure to meet *Concord & Cumberland's* heightened standard.

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

The recovery BFS seeks is exclusively for losses caused by the alleged concurrent negligence of BFS and Hurley. This is evident on the basis of Plaintiffs' claims against the subcontractor defendants as repeated verbatim in the Court of Appeals' opinion. (A. p. 1550, quoting the Fourth amended complaint, ¶ 88 (a)-(i)). BFS' duties to Plaintiffs to supply materials for installation by Hurley, and to supervise, inspect, and approve Hurley's work, mean that any injury to Plaintiffs resulting from deficiencies by Hurley *per force* implicate the concurrent negligence of BFS. As it relates to Hurley's activities at the building site, any negligence by Hurley would require BFS' own, concurrent negligence to cause injury to Plaintiffs.

Petitioner's pleadings take as a premise that BFS has committed no negligence and has no liability. In this world constructed by Petitioner's pleading, where BFS has committed no negligence, the only possible way BFS could be liable is if the negligence was committed by Petitioner's subcontractor and not by BFS itself. Thus, in this world, and in context, Respondents, as the sole source of the negligence, would be liable to BFS for all damages, as plead in paragraphs 138 and 143, and Petitioner, in seeking indemnity, is seeking recovery only for Respondent's negligence and not for Petitioner's own negligence (because Petitioner's negligence is nonexistent). (A. pp. 441-42.) That Petitioner's worldview proves false does not change the plain meaning of Petitioner's cross claims against Hurley.

Petitioner's tutorial ignores the allegations against it contained in the complaint. It ignores the language of its own pleadings and subcontractor agreements which it drafted, and it also ignores undisputed facts which have been developed in this case.

Plaintiffs allege in paragraphs 9 and 10 of their Fourth Amended Complaint that BFS furnished materials at the Project. They also allege in paragraphs 88(a) and 88(d) that BFS is negligent and grossly negligent in "failing to properly supervise their work and the work of other trades…" and "in using and supplying defective materials." (A. pp. 346, 366.) In paragraphs 3, 4, and 26 of its Amended Answer to Plaintiff's Fourth Amended Complaint, BFS denies that it furnished any materials. (A. pp. 416, 420.) It asserts in its crossclaims against Hurley, that Hurley supplied the materials in connection with its work. BFS seeks indemnity "for any liability BFS is found to have to Plaintiffs or others in this action…" (A. p. 441.)

BFS complains that the Court of Appeals erred by finding that its plea for "indemnification for 'any' sums for which it might be held liable, BFS was seeking indemnification for its own negligence." Pet.'s Brief, at 15. Petitioner argues that "even if 'any' sums included those caused

by the negligence of BFS, it also simultaneously included 'any' sums caused by the derivative negligence of the subcontractors" like Hurley. *Id*. Accordingly, to BFS' logic, the word "any" does quite a bit of heavy lifting.

That Hurley furnished no materials except for those given to it by BFS for installation has been known to BFS since the inception of this lawsuit. Nevertheless, BFS has asserted a third-party complaint and multiple crossclaims against Hurley alleging that Hurley provided and warranted materials, that Hurley had a duty of care in selecting materials, and that Hurley was contractually obligated for procuring adequate materials and services in connection with its work. Paragraphs 126, 140, 141, 149, and 153 from BFS' most recent crossclaim are as follows:

> 126. That [BFS] … is further **informed and believes that Hurley Services, LLC provided materials and services** in connection with framing, including, but not limited to the installation of windows, doors, and/or other components, during original construction of the subject structures ….
>
> 140. That [Hurley] **made express warranties that materials, services, and/or workmanship**, provided in conjunction with their services at the subject structures, would be as required by and in accordance with the contract documents, applicable building codes, and industry standards.
>
> 141. That the respective sub-contract agreements … include provisions, by which [Hurley] **expressly undertook to provide materials and services in accordance with the contract documents**.
>
> 149. That [Hurley] **owed a duty of due care in providing services and materials** in connection with construction and/or repair of the subject structures.
>
> 153. That [Hurley was] **contractually responsible for provision of adequate materials and services** in connection with [its] respective undertakings regarding construction of the subject structures.
>
> (A. pp. 436-45.) (emphasis supplied).

It is obvious that BFS is trying to transfer to Hurley the risk associated with potential defective products which it selected and sold for the Project and which is supplied to its

subcontractors for installation. BFS denies in its pleadings that it provided materials, and it alleges in substance that any deficiencies in materials are the responsibility of Hurley. This is despite BFS' recognition that Plaintiffs' forensic expert opined that the windows at the Project have inadequate design pressure ratings requiring complete replacement of those windows. Pet.'s Brief, p. 2.

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

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

Of the two different versions of BFS's Master Subcontractor Agreement, Hurley was a party to the later version (following the Court of Appeals' verbiage, the "Later Contract"). (A. pp. 1501-12.) The relevant portions of the Later Contract are quoted in full in the Court of Appeals' Opinion. (A. pp. 1537-48.)

BFS makes much of the definition of "Work" in the MSA for the apparent purpose of narrowing the scope of indemnity permitted under the agreement. Pet.'s Brief, pp. 26-27. Whatever the purpose, BFS' argument is betrayed by the language in the first paragraph of Section 5, which BFS cites as the sole, operative indemnity provision in the Later Contracts. *Id*., pp. 7-8. In Section 5, BFS seeks indemnification for "any and all" losses **"… 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…."** *Id*., p. 8. In bold face, all caps font, the MSA demands indemnification for Hurley's actions without regard to the limitations derived from the definition

of Work in Section 1(a). Accordingly, the indemnification term BFS cites as pivotal nullifies any narrowing effect the phrase Work might suggest.

Buried in the fine print of **SECTION 3 Warranty** of the Subcontractor Agreement are disguised indemnity provisions in favor of BFS relating to materials selected and sold by BFS. That section reads as follows:

> **SECTION 3. Warranty.**
>
> [I]n addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor **guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor** and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) **ten (10) years for all Work consisting of any structural applications** … If demand is made upon Subcontractor to perform under this warranty, **Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, materials**, and workmanship described in this Section, including, without limitation, property damage to the homes or properties into which the Work is incorporated, **property damage** to the personal property of the ultimate owners … **and personal injury damages to persons residing at or visiting the properties** into which the Work is incorporated .... (emphasis added) (R. pp. 901-902.)

The language in **SECTION 3 Warranty** that "subcontractor guarantees the work against defects in design… and materials" only makes sense if the word "design" refers to manufactured materials provided by BFS. Hurley had no responsibility for the design of the project or any of its components. Hurley's work was limited to installation of Tyvek house wrap, windows, and doors in a handful of buildings at the Project.

In addition, **SECTION 3** requires Hurley to give a guarantee and indemnity for ten years on any "structural applications." The only structural applications are the windows and doors which BFS selected and sold and gave to Hurley for installation. Plaintiffs' expert witness opined that the design pressure ratings on the windows do not meet applicable codes. This provision requires Hurley indemnify BFS for its sole negligence in selecting and selling the applicable windows. **SECTION 3** also exposes Hurley to liability and indemnity claims arising from property damage and personal injury relating to defects of design and materials.

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

> "**SECTION 1. Introduction.**
>
> a. **Work.** '[T]his Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**") from time to time for Contractor on any project (the "**Project**") …."

However, BFS reliance on the narrow definition of Work cannot rescue the MSA from clear and unequivocal standard that proves fatal to its indemnification claims. **SECTION 2** of the Master Subcontractor Agreement expands the definition of work as follows:

> **SECTION 2. Materials and Workmanship.**
>
> Subcontractor agrees to commence Work on the Projects upon request by Contractor. **Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work**.
>
> c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, **protect all of its labor, materials (regardless of who supplied such**

> **materials)**, supplies, tools, and equipment … against any damage, injury, destruction, theft, or loss." (R. p. 899.) (emphasis supplied)

BFS argues that **SECTION 2 (c)** merely describes the duties of a bailee. (A. p. 1910.) However, the bailment argument and the interpretation BFS now places on Sections 1, 2, and 3 do not explain why BFS asserted crossclaims for materials against Hurley when Hurley furnished no materials. It is obvious from its pleadings that BFS has interpreted Sections 1, 2, and 3 to mean that the **Work** includes materials supplied by BFS so that it can assert indemnification claims against its subcontractors for the materials it selects and sells for use at the project. Parties are bound by their pleadings and are precluded from advancing arguments contrary to those assertions. *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015).

Additional evidence of the interpretation BFS places on these contract provisions which it drafted is found in **SECTION 8(i)**, which BFS argues applies only to indemnification of BFS by its subcontractors in connection with mechanic's and materialmen's liens. (A. pp. 1884-84.) It provides, in pertinent part, for indemnification of BFS for "[A]ttorney's fees and expenses, amounts paid in settlement, and amounts paid to discharge judgments arising out of the services, labor, equipment, or materials furnished by subcontractor, or its employees, **suppliers**, or subcontractors …". *Id*. (emphasis supplied). BFS is, however, the supplier of materials for Hurley to install at the Project. If BFS were to file a mechanic's lien, and if it suffered an adverse judgment for costs and attorney's fees under S.C. Code § 29-5-10, *et seq.,* as a result of supplying and selling defective products, it could seek indemnification for these attorney's fees and costs from its subcontractors, even though BFS would be 100% at fault. **SECTION 8(i)** is in conflict with **SECTION 5**, paragraph 1, where indemnity for costs and attorney's fees are only triggered upon the negligence (sole or concurrent) of the subcontractor. (A. pp. 903, 908.)

In asserting its contractual indemnity claims against Hurley, BFS relies primarily upon **SECTION 5 Indemnity**, paragraph 1. The Court of Appeals correctly applied the standard in *Concord & Cumberland*, 424 S.C. at 645, 819 S.E.2d at 170, in holding that BFS could not recover against Hurley for its own negligence under the language of that paragraph. As noted above, the limitations that might apply given the definition of Work in Section 1(a) are mooted by Section 5's broad indemnification to include "subcontractor's performance of the work or other activities …."

BFS contends, however, that dicta in *Concord & Cumberland* regarding the liability of the subcontractor Muller permits BFS to recover from Hurley to the extent of its own negligence. *Concord & Cumberland*, 424 S.C. at 652-653, 819 S.E.2d at 173-174. However, the facts in that case are distinguishable from those in this case. Here, there are multiple conflicting, deceptive, unconscionable, and oppressive indemnity provisions which were not considered by the court in *Concord & Cumberland* but would have affected the decision of the court.

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

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

SECTION 5, paragraphs 1 and 2 are also in conflict. Paragraph 1 deals with both personal injury and property damage claims whereas paragraph 2 only deals with personal injury claims. Paragraph 1 only allows indemnification based upon the negligence of the subcontractor. Paragraph 2 allows indemnification even if BFS is solely negligent. Even though this is not a personal injury action, paragraph 2 is relevant because it demonstrates how BFS has intentionally drafted the Master Subcontractor Agreement in a conflicting, confusing and deceptive manner in furtherance of its own purposes. These paragraphs drafted by BFS should be read together and strictly construed against BFS.

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

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

II. THE INDEMNITY TERMS DRAFTED BY BFS VIOLATE S.C. CODE ANN. § 32-2-10 BY REQUIRING HURLEY TO INDEMNIFY BFS FOR LOSSES ARISING FROM ITS SOLE NEGLIGENCE.

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

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

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

On appeal, BFS cited *D.R. Horton v. Builders FirstSource – SE Grp., LLC*, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018) as authority for the proposition that the language of **SECTION 5**, paragraph 1, does not violate S.C. Code Ann. § 32-2-10. (A. pp. 1900-01.) However, the holding in that case is not quite what BFS cites it for.[4] The court held that D.R. Horton could not obtain indemnification from its subcontractor, BFS, for D.R. Horton's own negligence.

[4] There is dicta in the case which opines that a portion of the indemnity agreement obligating BFS to indemnify D.R. Horton for its own negligence did not violate public policy. *D.R. Horton*, 422 S.C. 144, 810 S.E.2d at 45. The opinion of the court was based upon an unusual and deficient

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

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

The Master Subcontractor Agreements drawn by BFS are sophisticated documents. Each word was drafted with much thought and care in an effort to transfer all risk from BFS to its subcontractors. It is hard to imagine language that would more blatantly violate South Carolina law. Once the at-issue agreement is determined to violate § 32-2-10, the plain language of the statute provides that the "agreement … is unenforceable." There is no provision whereby an indemnity agreement that runs afoul of the statute can be saved. The Court of Appeals correctly read the deceptive language and conflicting provisions together and properly concluded that they collectively violated S.C. Code Ann. § 32-2-10.

III. THE MASTER SUBCONTRACTOR AGREEMENT DRAFTED BY BFS IS A CONTRACT OF ADHESION, WHICH IS UNCONSCIONABLE AND OPPRESSIVE.

The Court of Appeals correctly determined that the "warranty, guaranty, and indemnity provisions of the Later Contracts violate § 32-2-10, are ambiguous, conflict with each other, and

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arbitration award which made no findings of fact or conclusions of law. There is no evidence in that case that the arbitrator or the court considered conflicting, deceptive, and oppressive indemnity provisions which are similar to those present in the BFS Master Subcontractor Agreement.

do not meet the clear and unequivocal standard articulated in *Concord & Cumberland*." (A. p. 1560). In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-side contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004); *Doe,* 430 S.C. at 612, 846 S.E.2d at 879.

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process. *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 644 S.E.2d 663, 669 (2007). Among the factors considered by the court in determining whether a contract was tainted by an absence of meaningful choice are the nature of the injuries suffered by the claimant; whether the claimant is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged language; and, the conspicuity of the clause. *Simpson*, 644 S.E.2d at 669; *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874, 879 (Ct. App. 2020).

Hurley was a local subcontractor in the Charleston area which installed products for BFS. BFS is the regional division of Builders FirstSource as appears from its name on the contract. The parent of BFS is one of the largest building supply companies in the United States. Respondent requests that this Court take judicial cognizance of the fact that the Master Subcontractor Agreement of BFS is so one-sided, that a subcontractor executing the agreement, more than likely lacks any meaningful bargaining power. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016) (Kittredge & Pleicones, JJ, dissenting) *quoting Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-736 (1989) (taking judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as

against the seller). The fact that Hurley was paid only $5,319.50 for installing Tyvek house wrap, windows, and exterior doors on four, two-story, multi-family buildings reflects a lack of bargaining power. (A. pp. 951-969.)

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

The deceptive nature of the definitional, warranty, guaranty, and indemnity provisions contained in Sections 1, 2, 3, 5 and 8 of the MSA have been discussed in detail elsewhere in this brief. To be fair, the language BFS claims as the only relevant indemnification term in the MSA is set forth in all-caps, bold type font in **SECTION 5, INDEMNITY**.[5]

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

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

In addition, although Hurley provided no material in connection with the installation of windows, doors, and Tyvek, the fine print language of **SECTION 3 Warranty** obligates Hurley

[5] The disguised indemnity provisions of Section 3, however, are buried in fine print under the title of "Warranty."

for "defects in design, workmanship and materials" and "structural applications" which obviously relates to manufactured products selected and sold by BFS. Hurley was not involved in the design of any of the manufactured materials or any portion of the project. These provisions expose Hurley to liability for property damage and personal injury claims arising from deficient materials selected and sold by BFS.

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

BFS continues to insist that under **SECTION 1 (a)**, "**Work**" is defined as including only Hurley-supplied materials, though Hurley was a labor only subcontractor. However, BFS overlooks **SECTION 2 (c)** of the agreement it drafted expanding the definition of "**Work**" to include materials supplied by BFS. In addition, in its Initial Brief, BFS has offered no explanation whatsoever for why it has filed multiple crossclaims against Hurley relating to materials. It is abundantly clear that BFS interprets its contract language to include materials it provides to Hurley for installation as being within the definition of "**Work**".

It is equally clear that the Master Subcontractor Agreement drafted by BFS is an adhesion contract which is drawn to the fullest extent possible in favor of BFS. BFS has expansive rights and remedies under the agreement it drafted. In contrast, most of the rights and remedies of Hurley are limited or waived. Most paragraphs of the agreement create obligations and liabilities for Hurley or a waiver or limitation of Hurley's rights. The agreement drafted by BFS attempts to transfer all risks associated with the project to its subcontractors, including risks associated with the products and components furnished by BFS. The best evidence of this is the fact that BFS has

filed multiple crossclaims against Hurley alleging product deficiencies when BFS alone supplied materials for construction at the project.

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

Examples of the oppressive and unconscionable nature of the Later Contracts are as follows:

1. Section 1(a): Limitation of Hurley's remedies in the event of a change order which increases costs.

2. Sections 1(a) & 2(c): Deceptive language defining the term "Work".

3. Section 2(c): Hurley assumes risk of loss to the Work.

4. Section 2(d)(2)(C): Requiring Hurley indemnify BFS in connection with environmental regulations.

5. Section 2(d)(4): Providing liquidated damages against Hurley for delay at $200 per hour for a minimum of 10-hour day until Project can be resumed.

6. Section 3: Fine-print requiring Hurley indemnify BFS for BFS' products and negligence.

7. Section 3: Unfavorable warranty, guaranty, and indemnity provisions relating to products selected and sold by BFS.

8. Section 4: Waiver of subrogation rights and release of all claims in favor of BFS.

9. Section 5: Indemnification and defense of BFS for its own negligence.

10. Section 5: Modifying the term "Work" to include "other activities of the subcontractor."

11. Sections 6 & 7(b)(2): Misleading provisions regarding BFS's right to direct and control work.

12. Section 7(a): Numerous events of default by subcontractor without any corresponding events of default on the part of BFS.

13. Section 7(b)(1): Waiver of claims and damages for delay in favor of BFS.

14. Section 7(b)(2): Liability of Hurley to BFS upon termination for all costs and damages plus a 25% surcharge.

15. Section 7(c): Fine-print indemnity, defense, and hold harmless provisions in favor of BFS.

16. Section 8(a): No obligation of BFS to pay Hurley until BFS receives payment from owner. If owner does not pay BFS, BFS does not pay and Hurley assumes risk of non-payment.

17. Section 8(f): Unreasonable conditions for obtaining final payment, including furnishing "as-built drawings."

18. Section 8(i): Indemnification of BFS for liens and judgments including judgments arising from materials supplied by BFS.

19. Section 8(i): Waiver of rights against BFS.

20. Section 9(e): Hurley waives the right to file a lien for its work.

21. Section 9(f): buried, fine-print severability clause.

This Court is well aware that sophistication is another form of bargaining power. *See Smith,* 417 S.C. 49, 790 S.E.2d 4. The high degree of sophistication of BFS is obvious in the language of the Later Contracts. BFS has taken advantage of any asymmetry in sophistication to include provisions that are either concealed in fine print or that its subcontractors are unlikely to fully appreciate. A subcontractor such as Hurley who installs windows in two-story multi-family buildings for $13 - $15 each typically does not have a corporate lawyer standing by to review its installation contracts. (A. pp. 951-969.)

The oppressive, one-sided, and unconscionable terms of the Later Contracts are exemplified by the draconian release of any and all claims by Hurley hidden in the fine print of Section 10(f):

> **f. Release.** Subcontractor hereby waives, releases, and forever discharges the Contractor, the Owner, and all of their officers, directors, agents, and employees from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities that Subcontractor may have against the Contractor, the Owner, and all of their officers, directors, agents, and employees. Specifically, Subcontractor agrees that Subcontractor shall not file, or cause to be filed, any demand, claim, suit or cause of action against Contractor and all of its officers, directors, agents, and employees hereunder.
>
> (A. p. 922.)

It is simply inconceivable that a party who understood the implications of the language of these agreements would sign them absent a meaningful choice on the part of the subcontractor. The combination of Hurley's absence of a meaningful choice, deceptive language, disparity in bargaining power and one-sided provisions in the adhesion contract drafted by BFS renders the warranty and indemnification provisions in **SECTION 3 Warranty** and the indemnity and duty to defend paragraphs in **SECTION 5 Indemnity** unconscionable and unenforceable. South Carolina courts will not enforce a contract which is violative of public policy or statutory law. *Carolina Care Plan, Inc.*, 361 S.C. 544, 606 S.E.2d 752; *D.R. Horton, Inc.*, 422 S.C. 144, 810 S.E.2d 41.

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

On appeal, Petitioner made four arguments regarding the ruling of the lower court relating to the severability clause in the Master Subcontractor Agreement. The first is that the court failed

to make a ruling on the severability issue. (A. p. 1858.) This assertion ignores numbered paragraph 14 on page 19 of the court's order:

> 14. That the Master Subcontractor Agreement contains so many provisions that are deceptive and unconscionable, fail to meet the clear and unequivocable standard, violate S.C. Code Ann. §32-2-10, and are against public policy, **that it would be impossible to sever and/or reform them** without rewriting the Master Subcontractor Agreement, which this Court is not obligated to do.
> (A. p. 40, emphasis added.)

BFS discussed in detail the magnitude of these conflicting and unconscionable provisions which precludes severance of the offending provisions as a realistic option for the lower court. Second, Petitioner argued that the court stated that it lacked authority to sever provisions of the contract. (A. p. 1860.) Nowhere in the order does the court make such a statement. Rather, the court stated that it had no obligation or authority to rewrite the contractual indemnity provisions of BFS citing *Poynter Invest., Inc. v. Cent. Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15, 18 (2010); *Lewis v. Premium Inv. Corp*., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002). (A. p. 38.)

Petitioner's third argument was that the lower court was obligated to sever "problematic language" because of the existence of a severability clause in the contract of adhesion drafted by BFS. To the contrary, our courts have refused to sever oppressive contractual provisions when the sheer magnitude of unconscionability as is reflected in the BFS Master Subcontractor Agreement permeates the entire contract. *Simpson*, 373 S.C. at 644 S.E.2d at 673-674.

In support of its position, BFS cited *One Belle Hall Property Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). (A. pp. 1890-91.) That case is distinguishable both on the facts and the law. It involved a determination of the unconscionability of an arbitration agreement embedded in a warranty contract which contained

oppressive terms. It also involved the application of the *Prima Paint* doctrine which holds that an arbitration clause is separate from a contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). There is no requirement in this case that each unconscionable, conflicting, and oppressive provision of the contract be interpreted separately from the contract as a whole.

In its final argument, Petitioner cited *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020), for the proposition that the presence of a severability clause in the agreement is strong evidence of the intent of the parties to sever unenforceable language. (A. p. 1897.) *Doe* is distinguishable because it also involved the validity of an arbitration provision and the application of the *Prima Paint* doctrine. The court also emphasized the strong South Carolina and federal policies favoring arbitration and that arbitration agreements are presumed valid. *Doe,* 430 S.C. at 607, 846 S.E.2d at 876. In addition, the decision in *Doe* did not discuss whether the severability clause in the agreement was conspicuous. However, in this case, the severability clause upon which Petitioner places so much reliance is buried in fine print in **SECTION 9 Miscellaneous (f) Other** on page 12 of the contract.

> **SECTION 9. Miscellaneous.**
>
> **f. Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable

> attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. **The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof**. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.
> (A. p. 1506, emphasis added)

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

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

In its petition, BFS argues that in South Carolina whether a trial court order that is the subject of a pending appeal is sufficiently "final" for purposes of collateral estoppel is an issue of first impression.[6] In hopes of suggesting a conflict among this State's courts, BFS cites opinions from Maryland and Virginia. Even if this Court has not previously decided the issue, there are no "special and important reasons" to do so now. Rule 242(b), SCACR. Moreover, the trial court's application of collateral estoppel was cumulative to its holding, on the record then before it, that the Master Subcontractor Agreement failed to meet *Concord's* clear and unequivocal standard and violated the Anti-Indemnification Statute, among other things. (A. pp. 22-41.)

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[6] On appeal, BFS argued that these orders involved different issues of fact or law insofar as the issues decided in those cases were whether BFS could recover from its subcontractor for its own negligence whereas the issue in this case is whether Petitioner may recover from Hurley for Hurley's sole negligence. (A. pp. 1837-40.) However, BFS did not preserve this argument for appeal. In its opposition to Hurley's summary judgment motion, BFS argued only that the orders of were not final and did not raise the issue of the commonality of fact or law. (A. pp. 1095-1097.)

In its order granting summary judgment in favor of Hurley on the collateral estoppel issue, the lower court took judicial notice of two Circuit Court orders which have interpreted the contractual indemnity language found in **SECTION 5**, paragraph 1, of the Master Subcontractor Agreement. *See* Order of the Honorable Roger M. Young, Sr. in *Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC*, C/A No. 2016-CP-10-3455, and Amended Order of the Honorable Clifton Newman in *Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc.,* et al., C/A No. 2018-CP-08-2547. (A. pp. 146-156.) (A. pp. 157-161.)

The Court of Appeals affirmed the trial court finding that issue preclusion doctrine bars BFS from attempting to challenge effect of the orders. "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." (A. pp. 1557-58.) The Court of Appeals' conclusion on this issue is supported by well-settled law that the pendency of an appeal has no effect on the finality of a trial court's judgment, and poses no barrier to applying collateral estoppel. *See Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183, 189 (1941) (finding the finality of a court's judgment is not lost because appeal is pending). The contractual indemnity terms drafted by BFS were extensively litigated and directly addressed in the prior orders, and collateral estoppel should apply. *First Union Nat'l Bank v. Hitman, Inc.*, 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991) (finding that a final judgment is one that finally determines the rights of the parties). Moreover, Rule 201(a), SCACR provides that an "appeal may be taken, as provided by law, from any final judgment or appealable order." The fact that BFS appealed from the orders in *MI Windows & Doors*, *Pavic*, and *Six Fifty-Six Owners' Association* speaks to their finality.

CONCLUSION

The Court of Appeals' opinion is fully supported by the record and controlling legal authorities. Therefore, for all the reasons stated above, in addition to those set out in the Returns of Hurley's co-Respondents, the Petitioner's appeal should be dismissed**.**