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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

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

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

AND

Builders FirstSource-Southeast Group, LLC, ……...……...……Petitioner,
v.
MW Manufacturers, Inc.,……...……..Third-Party Defendant.

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

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March 19, 2026

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STATEMENT OF THE CASE

Plaintiffs filed suit on February 14, 2019, against the general contractor, Saussy Burbank, and other defendants alleging construction defects in their two-story residence in Mount Pleasant, South Carolina (the "Project"). Plaintiffs purchased the residence from the builder for $649,900.00 in 2013. The Complaint was subsequently amended twice to name the correct defendants, including Builders FirstSource-Southeast Group, LLC ("BFS") and Hurley Services, LLC ("Hurley"). (A. pp. 99-105.) BFS sold windows and doors to Saussy Burbank and agreed to install them in Plaintiffs' residence.

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. 283-94.) Hurley installed the windows and doors as a subcontractor to BFS, but Hurley provided no materials in connection with their installation. (A. pp. 328-29.) BFS paid Hurley $867.00 for installing the windows and doors. (A. p. 318.)

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

After service of process on Hurley, Hurley answered both the Third Amended Complaint and the crossclaims of BFS. Both answers contained standard construction defects defenses. On

July 29, 2019, MW Manufacturers, Inc. filed an amended answer to the Third-Party Complaint of BFS and asserted as a defense the class-action suit and settlement in *Gulbankian v. MW Manufacturers, Inc.*, C/A Nos. 1:10-cv-10392 and 3:12-cv-30122 (D. Mass. 2014). (A. pp. 138-48) (A. pp. 149-57) (A. pp. 158-203.)

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

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

On August 27, 2020, Hurley filed a motion for partial summary judgment as to all crossclaims of BFS excepting equitable indemnity. (A. pp. 265-77.) On September 17, 2020, Hurley filed an amended motion for partial summary judgment. (A. pp. 541-48.) Respondent's amended motion for partial summary judgment was argued in the Circuit Court on October 1, 2020. (A. p. 455.) On January 25, 2021, the Honorable Jennifer B. McCoy filed an Order granting partial summary judgment in favor of Hurley. (A. pp. 4-15.) BFS filed a motion for reconsideration which was denied on February 16, 2021. (A. pp. 16-18.) Appellant filed a Notice of Appeal on March 18, 2021.

Arguments for BFS's appeal were heard on December 5, 2023, by a three-judge panel of the Court of Appeals. The Court of Appeals affirmed the trial court's order in an unpublished opinion issued on March 12, 2025. BFS filed its Petition for Writ of Certiorari on July 25, 2025, which was granted on December 16, 2025.

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* does not apply in this case because BFS does not seek indemnity for losses caused by its own negligence. 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). 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 losses or damages 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 sole or concurrent negligence, BFS is necessarily pursuing recovery for damages caused by BFS's 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'S Concurrent Negligence.

By arguing that "general rules of contract construction," instead of the heightened "clear and unequivocal" standard of *Concord & Cumberland*, govern its claims indemnification for Hurley's sole or concurrent negligence, BFS neglects the specific 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. For the Pavic's residence, BFS was a turnkey contractor which provided both labor and material. (A. p. 976, line 1 – p. 981, line 15.) BFS sold windows and doors to the general contractor and subcontracted with Hurley for their installation in the single family residence. (A. pp. 943, 951-969.) There is no evidence that Hurley supplied materials in connection with its work at the project. (A. pp. 328-29.)

Although not the general contractor on this Project, BFS was the holder of an unlimited general contractor's license. As such, it 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 required Hurley to follow the directions of BFS. (A. pp. 905-906, 944.) BFS admitted responsibility for supervising the work performed by its subcontractors. Given that supervisory role, any negligence attributed to Hurley would necessarily involve BFS's concurrent negligence. Accordingly, BFS's effort to recover damages attributable to Hurley's concurrent negligence necessarily means that it seeks indemnification for BFS's 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).[1] "That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, … to a liability which is both joint and several, is a proposition recognized and approved in this state…." *Bridge v. Orange Crush Bottlers*, 164 S.C. 351, 162 S.E. 325, 328 (1932). "'[C]oncurring causes operate contemporaneously[2] 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 indemnitee, it errs by insisting that remedy it seeks should be discerned from its briefs and arguments. Instead, the true scope of the indemnification BFS seeks must be discerned from the terms it carved into the MSA, as written and as a whole. Moreover, BFS clouds the "issue" so

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[1] 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).

[2] 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.

identified by describing three scenarios under which BFS seeks recovery: for Hurley's negligence, for BFS's *sole* negligence, or for "both" types of negligence. (A. p. 1633.) Absent from BFS's 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 distance itself from the holding of *Concord*: that the clear and unequivocal standard applies where the indemnitee seeks contractual indemnification for the losses caused by the concurrent negligence of the indemnitee and the indemnitor.

Regarding its pleadings seeking "any sums" in indemnity, BFS complains that the Court of Appeals failed to "acknowledge that 'any' amounts, if it includes amounts resulting from BFS's negligence, must equally encompass amounts resulting from Hurley's negligence, whether sole or concurrent." Pet.'s Brief, p. 18. This is not the fault of reviewing courts. The plain language of the Master Subcontractor Agreement insists on Hurley indemnifying BFS not only for Hurley's sole negligence,[3] but also for the concurrent negligence attributable to both BFS and Hurley. It is beyond argument that a contractual indemnification term allowing the BFS to recover for Hurley's concurrent negligence (when that negligence is concurrent with BFS and not some other tortfeasor) is prohibited if the term does not meet the clear and unequivocal standard. For instance, in *Ethyl Corp*., the Texas "court of appeals found the … indemnity provision did not clearly and unequivocally require Daniel to indemnify Ethyl for Ethyl's own negligence or for the parties' concurrent negligence." *Ethyl Corp.*, 725 S.W.2d at 707 (emphasis supplied). Once again, BFS wants to ensure that it can recover from Hurley damages caused by the concurrent negligence of

[3] Theoretically, Hurley could be required to indemnify BFS for losses caused by the concurrent negligence of Hurley and a person or entity other than BFS without triggering the *Concord's* heightened standard. However, there is no evidence in this action regarding other subcontractor involved in Hurley's scope of work.

BFS and Hurley despite the Master Subcontractor Agreement's failure to meet *Concord & Cumberland's* heightened standard.

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

BFS argues that affirming the circuit court's summary judgment order was error because the decision conflicts with the fact that "claims for defective window products were explicitly eliminated by Stipulation of Plaintiffs." Pet.'s Brief, pp. 13-16. The Stipulation between BFS and Plaintiffs, and the window manufacturer's subsequent dismissal, are simply not relevant[4] to the issues before the trial court, which was whether the Master Subcontractor Agreement unlawfully imposed on Hurley an obligation to indemnify BFS for BFS's own negligence.

Because it does not limit scope of indemnification the Master Subcontractor Agreement imposes on Hurley, Plaintiffs' Stipulation cannot cure these unlawful terms. As elaborated on below, the exhaustive indemnification terms in the Master Subcontractor Agreement place Hurley on the hook for any and all damages attributable to any materials, including windows, installed by Hurley – whether those damages were caused by the defective product or by negligent installation.

As discussed by the Court of Appeals, Section 3 of the Master Subcontractor Agreement requires Hurley to indemnify BFS for the defective windows[5] sourced and supplied by BFS. As explained in its opinion, the phrase "'Subcontractor guarantees the Work against defects in design,

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[4] As discussed in Section VI below, the trial court dismissed BFS'S negligence claim against Hurley as a matter of law under the authority of *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group*, 413 S.C. 630, 638, 776 S.E. 2d 434, 439 (Ct. App. 2015). BFS conceded that point in its response to Hurley's motion for partial summary judgment and did not challenge the trial court's holding in its Rule 59(e) motion.

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

workmanship, and materials' only makes sense if the words 'design workmanship, and materials' refer to the windows and doors provided by BFS because Hurley had no responsibility for the design of Plaintiffs' residence or its components—including materials." (A. pp. 557-58.)

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

> That the plaintiffs, Dag Pavic and Stela Susac-Pavic are not asserting or alleging within the instant litigation against any defendant in this litigation (including but not limited to Builders FirstSource-Southeast Group, LLC), or against any third party defendant in this litigation, any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the windows installed at the subject residence, (identified herein as MW Series 800 Windows), and/or any component part of such windows, and/or in any MW installation instructions or requirements for those windows installed at the subject residence…

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

Moreover, the subsequent dismissal of the window manufacturer from the lawsuit was without prejudice to Plaintiffs' ability to pursue claims in the future based on defects or deficiencies in the development, design, manufacture, production, sale and/or distribution of the windows. (A. p. 261.) Accordingly, BFS's contractual indemnification terms against Hurley are a contingent liability that could spring to life[6] should this Court grant BFS's petition.

C. BFS'S Pleadings Demonstrate that Its Claims Against Hurley Include Indemnification for Losses Caused by BFS'S 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 BFS's third-party claims in its

[6] The circuit court order granted Hurley only partial summary judgment and dismissed BFS's causes of action for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity. (A. pp. 4-15). BFS's claim for equitable indemnity against Hurley remains.

Amended Answer to Crossclaims and Restated Claims against Hurley. (A. pp. 252-53). BFS's own duties to Plaintiffs to supply materials for installation by Hurley, and to supervise, inspect, and approve Hurley's work, mean that any injury to Plaintiff resulting from deficiencies related to Hurley's scope of work *per force* implicate the concurrent negligence of BFS. Because BFS was required to supervise and approve all of Hurley's activities at the building site, any negligence by Hurley would require BFS's 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. Accordingly, BFS's pleadings assume that it did not, and could not, breach any duty owed to Plaintiffs. (A. pp. 252-53.) In this world constructed by Petitioner's pleadings, 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 167 and 184, 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. 251-56.)[7] 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 agreement it drafted, and it also ignores undisputed facts which have been developed in this case.

[7] Petitioner cites from its amended answer to Plaintiffs' third amended complaint, filed April 19, 2019. (A. pp. 106-37.) Hurley cites to the operative crossclaims against it, which are found in BFS'Ss answer to Defendant Saussy Burbank's answer to Plaintiff's third amended complaint, dated August 26, 2020. (A. pp. 224-58.)

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

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, p. 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's 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. (A. pp. 251-57.) BFS pleadings clearly assert that Hurley is liable to BFS for any damages Plaintiffs attribute to BFS.

> 162. That the Plaintiffs, Dag Pavic and Stela Susac-Pavic have sued Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), asserting damages allegedly caused, inter alia, by **deficiencies in materials and/or installation of windows, doors, and related components**, during original construction of the subject structure.
>
> 164. That … **Hurley Services, LLC, … was responsible for provision of materials and services in connection with the installation of the**

aforesaid components of construction, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of relevant building codes. In the event that the Plaintiffs establish that the materials and/or services of [Hurley] were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event [Hurley] has failed properly to execute its duties, which failure has allegedly caused the Plaintiffs' damages.

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

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

(A. pp. 252-53.)

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

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

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

Of the two different versions[8] of BFS's Master Subcontractor Agreement, Hurley was a party[9] to the later version (following the Court of Appeal's verbiage, the "Later Contracts"). (A. pp. 283-94.) 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. 25-26. Whatever the purpose, BFS's 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. 6-7. 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 Master Subcontractor Agreement are disguised indemnity provisions in favor of BFS relating to materials selected and sold by BFS. That section reads as follows:

---

[8] The Court of Appeals recently examined two versions of BFS's Master Subcontractor Agreement in *Builders FirstSource-Se. Grp., LLC v. Palmetto Trim & Renovation*, Op. No. 6099 (S.C. Ct. App. filed Feb. 12, 2025). The contract at issue in this appeal is one of the "Later Contracts" as described by the Court of Appeals. This Court granted BFS's petition for writ of certiorari to review that decision.

[9] Hurley also executed on December 18, 2014, an agreement substantially identical to the Later Contract. (A. pp. 295-308.) The 2014 agreement is included in the record for the purpose of demonstrating Hurley's lack of bargaining power with BFS.

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 ....
>
> (A. pp. 489-90, emphasis added.)

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

In addition, Section 3 requires Hurley to give a guarantee and indemnity for ten years on any "structural applications." (A. p. 489). The only structural applications are the windows and doors which BFS selected and provided to Hurley for installation. This provision requires Hurley indemnify BFS for its sole negligence in selecting and selling the applicable windows. Section 3 also exposes Hurley to liability and indemnity claims arising from property damage and personal injury relating to defects of design and materials.

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

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

BFS reliance on the narrow definition of Work fails as the indemnification terms of Section 5 expand Hurley's obligation beyond "Work" to encompass "OTHER ACTIVITIES OF THE SUBCONTRACTOR." (A. p. 491.) Moreover, 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."
>
> (A. p. 487) (emphasis supplied).

BFS argues that the Court of Appeals erroneously "reviewed terms and provisions of the contract which have absolutely no relevance to the claims pending before the court" Pet.'s Brief, p. 14.) The interpretation BFS now places on Sections 1, 2, and 3 does not explain why BFS asserted crossclaims for materials against Hurley when Hurley furnished no materials. It is

obvious from its pleadings that BFS has interpreted Sections 1, 2, and 3 to mean that the Work includes materials supplied by BFS so that it can assert indemnification claims against its subcontractors for the materials it selects and sells for use at the project. Parties are bound by their pleadings and are precluded from advancing arguments contrary to those assertions. *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015).

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

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

BFS contends, however, that dicta in *Concord & Cumberland* regarding the liability of the subcontractor Muller permits BFS to recover from Hurley to the extent of its own negligence. *Concord & Cumberland*, 424 S.C. at 652-653, 819 S.E.2d at 173-174. As argued above, that case

requires courts apply the elevated clear and unequivocable standard when an indemnitee seeks indemnification for its own concurrent negligence. Moreover, the facts in *Concord & Cumberland* are distinguishable from those currently before the Court. Here, there are multiple conflicting, deceptive, unconscionable, and oppressive indemnity provisions which were not before the court in *Concord & Cumberland* but would necessarily have altered the outcome in that case.

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

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

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

strictly construed against BFS. Because the Court of Appeals applied the correct level of scrutiny to these terms, this Petition should be denied.

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

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

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

On appeal, BFS cited *D.A. 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. p. 672.) However, the holding in that case is not quite what BFS cites it for.[10] The court held that D.A. Horton could not obtain indemnification from its subcontractor, BFS, for D.A. Horton's own negligence.

Under Section 5, paragraph 3, Hurley's duty to defend arises out of a suit against BFS, without regard to whether BFS is solely at fault for claims alleged. Thus, because the Master Subcontractor Agreement purports to indemnify BFS for the indemnitee's sole negligence, it is an

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

illegal contract under § 32-2-10 and "[a]n illegal contract is unenforceable." *D.A. Horton, Inc*, 422 S.C. at 152.

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

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

It is hard to imagine language that would more blatantly violate South Carolina law. Once the at-issue agreement is determined to violate § 32-2-10, the plain language of the statute provides that the "agreement … is unenforceable." There is no provision whereby an indemnity agreement that runs afoul of the statute can be saved. The Court of Appeals correctly read the deceptive language and conflicting provisions together and properly concluded that they collectively violated § 32-2-10. The Master Subcontractor Agreement "obligate[s] Hurley not only to warrant the design and suitability of the defective materials BFS provided for installation but also to indemnify and defend BFS from property damage or personal injury resulting from the moisture intrusion issues related to the faulty windows." (A. p. 551.)

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

The Court of Appeals correctly concluded that BFS's Master Subcontractor Agreement is a contract of adhesion. (A. p. 552.) BFS has not challenged this holding in its brief to this Court. "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (citation omitted). "Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal." *Id*. Accordingly, this Court should affirm the holding of the trial court that because is unconscionable and oppressive the MSA, it is unenforceable.

The Court of Appeals correctly relied on *Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. 14, 26-27, 644 S.E.2d 663, 669 (2007) to conclude that a "standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable" was a contract of adhesion. (A. p. 552.) 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 $867.00 for installing windows and doors on the single-family residence reflects its lack of bargaining power. (A. p. 318).

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

The deceptive nature of the definitional, warranty, guaranty, and indemnity provisions contained in Sections 1, 2, 3, 5 and 8 of the agreement have been discussed in detail elsewhere in

this brief. It should be noted, however, that the disguised indemnity provisions in Section 3 Warranty were buried in fine print unlike the bold type found in Section 5 Indemnity.

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

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

In addition, although Hurley provided no material in connection with the installation of windows, doors, and Tyvek, the fine print language of Section 3 Warranty obligates Hurley for "defects in design, workmanship and materials" and "structural applications" which obviously relates to manufactured products selected and sold by BFS. (A. p. 489.) Hurley was not involved in the design of any of the manufactured materials or any portion of the project. These provisions expose Hurley to liability for property damage and personal injury claims arising from deficient materials selected and sold by BFS.

Thus, it is clear that a disparity in bargaining power and the intentional use of deceptive language buried in the fine print of the agreement deprives Hurley of a meaningful choice in the execution of the agreement. It is equally clear that the Master Subcontractor Agreement drafted by BFS is an adhesion contract which is drawn to the fullest extent possible in favor of BFS. BFS has expansive rights and remedies under the agreement it drafted. In contrast, most of the rights and remedies of Hurley are limited or waived. Most paragraphs of the agreement create obligations and liabilities for Hurley or a waiver or limitation of Hurley's rights. For instance, Section 8(i)

Hurley waives, releases, and forever discharges … [BFS] … from all costs, expenses, claims, demands, damages, losses, causes of action, or liabilities" that Hurley may have against BFS. (A. p. 496). Hurley is left with essentially no remedy against BFS under this agreement.

The agreement drafted by BFS attempts to transfer all risks associated with the project to its subcontractors, including risks associated with the products and components furnished by BFS. The best evidence of this is the fact that BFS has filed multiple crossclaims against Hurley alleging product deficiencies when BFS alone supplied materials for construction at the project.

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

Examples of the oppressive and unconscionable nature of BFS's Master Subcontractor Agreement 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's 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.

(A. pp. 486-97.)

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 aforementioned contract terms. BFS has taken advantage of any asymmetry in

sophistication to include provisions that are either concealed in fine print or that its subcontractors are unlikely to fully appreciate.

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) of the agreement it signed with BFS in 2014:

> **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. 510.)

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

IV. THE COURT OF APPEALS CORRECTLY RULED THAT THERE ARE SO MANY UNENFORCEABLE CLAUSES THROUGHOUT THE MASTER SUBCONTRACTOR AGREEMENT THAT THEY CANNOT BE EFFECTIVELY SEVERED.

Petitioner argues that the court below erred in failing to enforce the severability clause in the Master Subcontractor Agreement because it failed to appreciate the stipulation regarding the defective windows. Pet.'s Brief, p. 15. The Court of Appeals was correct in concluding that the "Agreement's indemnity provisions are replete with terms that violate South Carolina law and public policy, these terms cannot be appropriately severed." (A. p. 559.)

BFS argues that the Master Subcontractor Agreement "contains separate distinct sections relating to separate matters" under "separately numbered subsections and or separate paragraphs." Pet.'s Brief, p. 17. It is undisputable that BFS's Agreement includes dozens of paragraphs designed to shift all risk to the subcontractor in every conceivable scenario.

Petitioner argues that the lower court was obligated to sever unlawful terms because of the existence of a severability clause in the contract of adhesion BFS drafted. Pet.'s Brief, pp. 17-18. To the contrary, our courts have refused to sever oppressive contractual provisions when the sheer magnitude of unconscionability as is reflected in the BFS Master Subcontractor Agreement permeates the entire contract. *Simpson*, 373 S.C. at 644 S.E.2d at 673-674; *Smith*, 403 S.C. at 16, 742 S.E.2d at 41. BFS relies on *Doe*, 430 S.C. at 615, 846 S.E.2d at 880-81, for the proposition that the presence of a severability clause in the agreement is strong evidence of the intent of the parties to sever unenforceable language. However, the court in *Doe* did not discuss whether the severability clause in the agreement was conspicuous. Here, the severability clause upon which BFS places so much reliance is buried in fine print on page 12 of the contract.

> **SECTION 9. Miscellaneous.**
>
> **f. Other.** This Agreement embodies the entire agreement between the parties and supersedes all prior agreements and

> understandings. This Agreement may be amended or supplemented only by an instrument in writing executed by the party against whom enforcement is sought. No delay or failure by Contractor to exercise any right or remedy hereunder, and no partial or single exercise of such right or remedy, will constitute a waiver of that or any other right or remedy. The duties and obligations imposed by this Agreement and rights and remedies available hereunder shall be in addition to and not a limitation of duties, obligations, rights, and remedies otherwise imposed or available by Law. The prevailing party to any dispute shall have a right to collect its reasonable attorney's fees and expenses. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflicts of law provisions thereof. **The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof**. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.
>
> (A. p. 497) (emphasis added).

Our courts have refused to enforce contractual provisions inconspicuously buried in the fine print which were drafted by the superior party and which function to contract away 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 DOCTRINE OF COLLATERAL ESTOPPEL BARS BFS'S CONTRACTUAL INDEMNIFICATION CLAIMS.

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.[11] In hopes of suggesting a conflict among this State's courts, BFS cites opinions

[11] 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. 684-85.) However, BFS did not preserve this argument for

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), SCACA. 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. 4-15). Thus, granting BFS's petition on this issue would not alter the effect of the Court of Appeals' final opinion.

In its order granting summary judgment in favor of Hurley on the collateral estoppel issue, the lower court took judicial notice of two Circuit Court orders which have interpreted the contractual indemnity language found in Section 5, paragraph 1, of the Master Subcontractor Agreement. *See* Order of the Honorable Roger M. Young, SA. 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. 19-29 & 30-34).

The Court of Appeals affirmed the trial court finding that issue preclusion doctrine bars BFS from attempting to challenge effect of the orders. "As we held in *Palmetto Trim and Renovation*, the 'prior findings have preclusive effect unless and until those dispositive findings are reversed.'" (A. p. 558, finding the circuit court properly applied collateral estoppel despite pending appeal in *MI Windows & Doors* and explaining rationale for deeming cases on appeal to be final judgments for collateral estoppel purposes.) 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*

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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. 341-42).

Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189 (1941) (finding the finality of a court's judgment is not lost because appeal is pending). The contractual indemnity terms drafted by BFS were extensively litigated and directly addressed in the prior orders, and collateral estoppel should apply. *First Union Nat'l Bank v. Hitman, Inc.*, 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991) (finding that a final judgment is one that finally determines the rights of the parties). Moreover, Rule 201(a), SCACR provides that an "appeal may be taken, as provided by law, from any final judgment or appealable order." As the Court of Appeals concluded that despite a pending appeal, an "unreversed judgment has preclusive effect." (A. p. 559.) That BFS appealed from the orders in *MI Windows & Doors* and *Six Fifty-Six Owners' Association* speaks to their finality.

VI. BFS DID NOT PRESERVE FOR APPEAL ITS ARGUMENT THAT ALLEGED ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT ON ITS NEGLIGENCE CLAIMS.

On appeal, BFS argues that expert witness testimony that the windows at the Project were improperly installed created an issue of material fact precluding summary judgment in Hurley's favor. Pet.'s Brief, pp. 38-44. BFS did not, however, preserve this issue for appeal. In its response to Hurley's summary judgment motion, BFS conceded that its crossclaim for negligence (in addition to its claims for express and implied warranties and breach of contract) were subject to dismissal under *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-SE Group,* 413 S.C. 630, 638, 776 S.E. 2d 434, 439 (Ct. App. 2015). (A. pp. 6-7.) Accordingly, the trial court relied upon BFS concession in dismissing the negligence claim.

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–80 (2004); *e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to

and ruled upon by the trial judge to be preserved for appellate review."); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

Moreover, in its motion for reconsideration of the trial court's order granting Hurley partial summary judgment, BFS did not argue that issues of material fact precluded summary judgment. (A. pp. 433-45.) This omission from BFS's Rule 59(e) motion is entirely consistent with its concession that the negligence claim was barred under *Stoneledge*. To the extent BFS now contests the application of *Stoneledge* to bar its negligence claim in this action, BFS did not preserve[12] that argument.

BFS resurrected its negligence claim only on appeal and in a manner that confuses the record. In fact, the trial court did not grant summary judgment on BFS's negligence claim while ignoring material evidence that should have been viewed in the light most favorable to BFS as the nonmoving party. Instead, the court cited BFS's "oral arguments and memorandum of law" conceding that its crossclaims against Hurley for negligence was merely a "disguised claims for equitable indemnity … subject to dismissal pursuant to *Stoneledge*." (A. p. 6.) In addition to relying on BFS's concessions, the trial court clearly articulated why the evidence BFS cited in support of its negligence claim against Hurley was not material to the questions raised by Hurley's Rule 56 motion. Regarding BFS's reference to evidence of alleged installation deficiencies by Hurley, the trial court addressed materiality by stating that the "alleged deficiencies have no bearing on whether the language of the contract is against public policy, violates §32-2-10, is unconscionable, and fails to meet the clear and unequivocable standard." (A. p. 13.)

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[12] Even if an issue of material fact effected Hurley's entitlement to summary judgment on BFS's negligence cause of action, "South Carolina appellate courts do not recognize the 'plain error rule,' under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party. *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002).

In its unpublished opinion, the Court of Appeals correctly found that the trial court "properly rejected BFS's argument that the testimony of expert witness Russell T. Mease, PE established a genuine issue of material fact precluding partial summary judgment." (A. 560.) This is entirely consistent with the trial court's holding that *Stoneledge* barred BFS's negligence claim and BFS's concession of that issue. Although the opinion goes on to describe facts[13] that did not influence the trial court's holding on BFS'S negligence claim, these references are mere surplusage. *Id*. Despite failing to contest the trial court's holding in its Rule 59(e) motion, BFS latched on to the Court of Appeals' extraneous citations to the expert witnesses' report in hopes of advancing its previously waived argument. Notwithstanding its unequivocal concession, BFS erroneously faulted the "lower courts" for departing from "the basic principles of Rule 56" and finding that "the windows were defective without any supporting basis and to weigh the evidence of [the expert witness] against BFS, the non-moving party." (A. p. 646.) At no point in its appeal has BFS challenged the fact that its negligence claim was, as a matter of law, subject to dismissal under *Stoneledge*.

Despite BFS's persistent efforts to reanimate its waived claims for negligence against Hurley, evidence of the subcontractor's performance under the MSA are not relevant to the issues on appeal. As succinctly put by the trial court, these "alleged deficiencies have no bearing on whether the language of the contract is against public policy, violates §32-2-10, is unconscionable, and fails to meet the clear and unequivocable standard." (A. p. 13.) Hurley did not seek, and the trial court did not grant, summary judgment in Hurley's favor on BFS's equitable indemnification

[13] In particular, the opinion notes BFS's roles as holder of an unlimited commercial general contractor's license, supplier of the "defective windows," and supervisor and inspector of Hurley's installation of the windows. (A. p. 560.)

claims. (A. p. 14.) This remaining claim exposes BFS's cluttered arguments around the meaning and scope of the word "any." Pet.'s Brief, pp.16-17.

BFS complains that "neither the lower court nor the court of appeals provides any insight or explanation as to how BFS's common law (equitable) indemnity claim for *any* liability may proceed to trial, but BFS 's contractual indemnity claim for *any* liability may not." *Id*., p. 17. The answer is simple. BFS's entitlement to equitable indemnity is not an issue on appeal. On remand, BFS is free to argue that the alleged deficiencies cited in its brief require indemnification from Hurley.

CONCLUSION

The trial court's order granting Hurley Services, LLC's motion for partial summary judgment is without error. With the inconsequential exception noted above, the Court of Appeals' opinion is fully supported by the record and controlling legal authorities. Therefore, Petitioner's appeal should be dismissed**.**