

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

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

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Unpublished Opinion No. 2025-UP-078 (filed March 12, 2025)

Appellate Case No. 2025-001495

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

v.

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

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

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

BRIEF OF RESPONDENT HURLEY SERVICES, LLC

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STATEMENT OF THE ISSUES

Petitioner Builders FirstSource – Southeast Group, LLC (“BFS”), asks the court to revive its contractual indemnity claim against its subcontractors, including this Respondent, Hurley Services, LLC (“Hurley Services”). The issues relating to BFS’s indemnity cause of action against Hurley Services and the contract upon which it is premised are as follows:

- I. Whether the court of appeals properly subjected the indemnity provisions in BFS’s master subcontractor agreement to strict construction when BFS is seeking to recover damages, in the form of attorney’s fees and costs, occasioned by its sole or concurrent negligence?
- II. Whether the court of appeals correctly held the language of the subject indemnity provisions did not meet the “clear and unequivocal” standard and violates South Carolina public policy?
- III. Whether BFS can enforce the indemnity agreement and integrated duty to defend clauses?
- IV. Whether there is any genuine factual dispute as to BFS’s concurrent negligence?
- V. Whether a trial court is “final” for the purposes of collateral estoppel or res judicata?

STATEMENT OF THE CASE

The sole cause of action at issue in this appeal is BFS’s indemnity crossclaim against Hurley Services. This crossclaim arises out of construction defect claims a horizontal property regime and individual homeowners brought in 2015 against the developers, BFS, and other subcontractors responsible for the construction of the common elements and individual units at Six Fifty Six Coleman, a twelve-building townhome community in Mount Pleasant, South Carolina. (A. pp. 20-34, 115-146).

Six Fifty Six Coleman was developed by different developers at different phases. (A. pp. 117-120). Nine of the twelve townhome buildings were developed by The Ryland Group, Inc., between 2013 and 2014. (A. pp. 117, 120, 299, 301, 418). BFS supplied and installed windows and doors on the phase of the project developed by The Ryland Group, Inc., and, in the course of

doing so, BFS subcontracted out portions of its scope of work. (A. pp. 107-108, 128-135, 186-189).

BFS subcontracted window installation to Hurley Services. (A. pp. 107-114, 186). BFS required Hurley Services and its other subcontractors to enter its form, master subcontractor agreement. (A. pp. 188, 196-207). The form of BFS's master subcontractor agreement that Hurley Services entered into was "Version – 5/17/06." (Id.). That is the same form of the master agreement that BFS's other subcontractor on the project, Charleston Exteriors, LLC, entered into. (A. pp. 314-325).

After the plaintiffs added BFS as defendants to this suit, BFS brought third-party claims against Hurley Services and its other subcontractor for indemnity, breach of express and implied warranties, breach of contract, and negligence. See (A. pp. 85-114). Plaintiffs subsequently asserted direct claims against Hurley Services and other third-party defendants, and BFS's third-party claims were recast as crossclaims. (A. pp. 115-146, 186-193).

BFS's indemnity crossclaim is found in its operative pleading, its Answer to Plaintiffs' Third Amended Complaint and Crossclaims against Hurley Services and Charleston Exteriors, LLC. (A. pp. 164-193). The text of BFS's indemnity claim is as follows:

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

117. That this Defendant is informed and believes that Hurley Services, LLC, is a limited liability corporation organized under and existing pursuant to the laws of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Hurley Services, LLC provided materials and services, including the installation of windows, doors, and/or other components, during original construction of the subject structures within the Six Fifty Six Coleman townhome complex.

118. That this Defendant is informed and believes that Charleston Exteriors, LLC, is a limited liability corporation organized under and existing pursuant to the laws

of the State of South Carolina, which corporation was, at all times relevant hereto, conducting business in Charleston County, South Carolina; this Defendant is further informed and believes that Charleston Exteriors, LLC provided materials and services, including the installation of windows, doors, and/or other components, during original construction of the subject structures within the Six Fifty Six Coleman townhome complex.

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

120. That the Plaintiffs, Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually and on behalf of others similarly situated have sued Builders FirstSource-Southeast Group, LLC (hereinafter sometimes "BFS"), asserting damages allegedly caused, inter alia, by deficiencies in materials and/or installation of windows, doors, and related components, during original construction of the subject structures.

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

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

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

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

125. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the CrossClaim Defendants, which have damaged BFS, as BFS has been subjected to liability and

has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

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

(A. pp. 186-189).

While denying any and all liability, Hurley Services and BFS have both settled with Plaintiffs. (A. pp. 432-433). BFS did not pay Plaintiffs any sums for the alleged negligence of Hurley Services. (A. pp. 432, 447).

BFS maintained its crossclaims against Hurley Services following its settlement with Plaintiffs. Accordingly, on January 22, 2020, Hurley Services filed a motion for summary judgment with respect to BFS's crossclaims. (A. pp. 194-207). In that motion, Hurley Services asserted that BFS's crossclaims fail because: (1) there is no genuine issue as to any material fact that BFS is seeking to be indemnified for its own negligence; (2) the contractual indemnity provisions of the master subcontractor agreement are neither clear nor unequivocal, are against public policy and the laws of South Carolina, including the Anti-Indemnity Statute, S.C. Code §32-2-10, and, therefore, fail as a matter of law and render the contract unenforceable; and (3) BFS should be estopped from asserting its crossclaims under the doctrine of collateral estoppel.¹ (A.

¹ BFS asserted the same claims against its subcontractors, based on the same master subcontractor agreement, in the case of Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al., Civil Action No. 2018-CP-08-02547 (now Appellate Case No. 2025-001496). (A. pp. 277-287). The Honorable Clifton Newman analyzed the subject indemnity agreement and found it to be unenforceable.

pp. 194-195). Hurley Services also asserted that BFS's crossclaims for breach of express and implied warranties, breach of contract, and negligence were "merely disguised . . . claims for equitable indemnity" which fail under Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Grp., 413 S.C. 630, 634, 776 S.E.2d 434, 436 (Ct. App. 2015). (A. pp. 194-195).

BFS did not file any memoranda, exhibits or affidavits in opposition to Hurley Services' motion for summary judgment before it was heard by the circuit court. See generally (Cir. Ct. Docket).

The Honorable Roger M. Young, Sr. heard Hurley Services' motion on March 5, 2020.² (A. pp. 414-476). At the hearing, BFS's counsel stated that BFS was limiting the damages it sought on its contractual indemnity claim to the recovery of its attorneys' fees and costs incurred in defending this suit; according to counsel, BFS was no longer seeking to recover any amounts BFS paid Plaintiffs in settlement of Plaintiffs' claims against it. (A. pp. 447-449).³ BFS did not argue against summary judgment concerning its breach of express and implied warranties, breach of contract, and negligence causes of action; its counsel conceded Stoneledge was good law. See generally (A. pp. 414-476).

Judge Young granted summary judgment to Hurley Services on April 29, 2020, finding that there was no genuine issue of material fact and Hurley Services was entitled to judgment as a matter of law on all of BFS's claims against it. (A. pp. 1-5). Judge Young found that BFS was collaterally estopped from re-litigating the same issues that were decided by the Honorable Clifton

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

³ BFS has not amended its pleading to limit the scope of its claim or limit the elements of damages it seeks. See generally (Docket).

Newman in the MI Windows case, including the issue of enforceability of the master subcontractor agreement's indemnity provisions. (A. p. 3). Judge Young also found that the contractual indemnification provisions in the master subcontractor agreement were unenforceable as matter of law because they are neither clear nor unequivocal as required by Concord and Cumberland HPR v. Concord and Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) and are against the public policy and laws of South Carolina. (A. p. 3). With respect to BFS's remaining causes of action, Judge Young found that BFS's claims for breach of express and implied warranties, breach of contract, and negligence causes of action failed as a matter of law. (A. p. 3).

BFS did not take issue with these latter aspects of Judge Young's Order,⁴ but filed a motion for reconsideration and/or alteration/amendment with respect to the grant of summary judgment on its contractual indemnity cause of action. (A. pp. 345-365). Hurley Services filed a memorandum in opposition to BFS's motion for reconsideration, arguing that BFS's purported limitation of its damages to attorneys' fees and costs does not alter the analysis or outcome in this case as BFS is still seeking to recover damages occasioned as a result of its own negligence, whether sole or concurrent, pursuant to a contract that is unenforceable as a matter of law. (A. pp. 366-379). BFS filed a reply and additional exhibits on June 4, 2020. (A. pp. 384-400). The circuit court denied BFS's motion for reconsideration via Form 4 Order filed on August 27, 2020. (A. pp. 6-8).

BFS timely filed its notice of appeal of the order granting summary judgment and the Form 4 order denying its motion for reconsideration on September 29, 2020. (A. p. 401). The parties submitted their briefs in 2021 and Judges Mc

⁴ See (A. p. 684) ("Because the Stoneledge case is still considered good law by our courts, Appellant is not challenging the Trial Court's holding regarding Stoneledge."). Judge Young's granting of summary judgment as to these crossclaims is not an issue on appeal.

Donald, Vinson, and Bromwell heard the appeal on December 5, 2023. The court of appeals issued an unpublished opinion affirming the circuit court's orders on March 12, 2025. (Opinion No. 2025-UP-078). BFS petitioned for rehearing on March 27, 2025. (A. pp. 579-591). The court of appeals denied BFS's petition for rehearing on June 25, 2025, and issued a revised opinion to correct a scrivener's error in the final paragraph of page three of the opinion the same day. (Opinion No. 2025-UP-078).

BFS moved to stay this case and others pending the disposition of its petition for a writ of certiorari in Builders FirstSource-Southeast Group, LLC v. WS Contractors, LLC, et al., Civil Action No. 2016-CP-10-03783, Appellate Case No. 2025-001224 (commonly referred to as The Retreat case), on July 21, 2025. (A. pp. 596-600). While that motion was pending, BFS filed a petition for writ of a certiorari in this case on July 25, 2025. (A. pp. 604-623). Hurley Services opposed BFS's petition. (A. pp. 626-652). BFS's motion to stay was denied on September 10, 2025. (A. pp. 593-585). This Court granted certiorari on December 16, 2025, as to three of the four questions BFS presented for review.

STATEMENT OF FACTS

BFS supplied and installed windows and doors as a subcontractor of The Ryland Group, Inc., for the "Ryland Phase" of the townhome development project.⁵ BFS furnished the windows, doors, related flashings and caulk, and provided superintendents to oversee the installation of these building materials. (Pet. Br. at pp. 14-15).

⁵ The Ryland Phase consisted of nine of twelve buildings constructed between 2013 and 2014. (A. pp. 117, 120, 299, 301, 418).

Hurley Services' scope of work was limited to installing windows (i.e., labor-only); Hurley Services did not select, furnish, sell, or provide any windows or other building materials. (Id.; see also A. p. 418).

Hurley Services existed as a South Carolina limited liability company from 2012 until 2015. (A. p. 149). It did not hold any building or contractor licenses from the LLR; in other words, it was an unlicensed subcontractor during its brief life. See (A. p. 273-276, 423). BFS, on the other hand, is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. (A. p. 167, 229). At all times pertinent hereto, BFS held an unlimited commercial general contractor's license with the South Carolina Department of Labor, Licensing, and Regulation (the "LLR") (License No. 112969), with Terry Rosamond ("Rosamond"), BFS's Vice President of Installed Products and Services for the East Coast, serving as the "qualifying party" for its licensure in this State. (A. p. 229).

BFS had Hurley Services enter into its master subcontractor agreement in 2012. (A. pp. 196-207). The version of BFS's agreement at the time was "Version – 5/17/06." (A. p. 196). The indemnification provisions that BFS asserts support its contractual indemnity crossclaim are found in Sections 5 and 8 of its Master Subcontractor Agreement. (A. pp. 196-207). Section 5 contains multiple indemnity clauses, which reads as follows:

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY

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

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE 'INDEMNITEES') FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTORS, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS. THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

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

(A. pp. 201-202) (emphasis in original).

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

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

(A. p. 206) (emphasis in original).

BFS attempted, unsuccessfully, to enforce these indemnity provisions against its subcontractors, including Hurley Services, in several other cases in South Carolina. In *Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al.*, Civil Action No. 2018-CP-08-02547, Appellate Case No. 2025-001176 (“MI Windows”), BFS sued its subcontractors on a construction project, which included Hurley Services as well as MI Windows and Doors, Inc., seeking indemnification under “Version – 5/17/06” of its master subcontractor agreement⁶ for any sums which it may owe to a general contractor and homeowners in another lawsuit as well as its attorney’s fees, costs, and other expenses incurred in defending that other action. Judge Newman granted summary judgment to the subcontractors on several grounds, including a finding that the contractual indemnity language is both confusing and contradictory at times and, therefore, fails as a matter of law under Concord and Cumberland Horizontal Prop. Regime v. Concord and Cumberland, LLC, 424 S.C. 639, 819 S.E. 2d 166 (Ct. App. 2018). (A. pp. 277-287).

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

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

(A. p. 328).

⁶ It is undisputed that Builders FirstSource’s contractual indemnification provisions, which have already been determined to be unenforceable as a matter of law by the trial court in *MI Windows*, are substantially the same, if not identical to those involved in this appeal, all of which are found in the BFS Master Subcontractor Agreement “Version – 5/17/06.” (A. p. 687).

In this case, Judge Young found that BFS’s crossclaims against Hurley are barred by collateral estoppel based upon Judge Newman’s decision in the MI Windows case. (A. p. 3). Judge Young specifically adopted Judge Newman’s analysis as it relates to the indemnity provisions at issue in the case. (Id.). In conducting his own analysis, Judge Young ruled that BFS’s master subcontractor agreement violates public policy and the laws of South Carolina. (Id.). Since then, BFS’s master subcontractor agreement has been further evaluated in two additional cases which serve to make up the four cases involving the BFS master subcontractor agreement before this Court.⁷

STANDARD OF REVIEW

This Court utilizes the same standard of review as the trial court in reviewing the grant of summary judgment. Williams v. Jeffcoat, 444 S.C. 224, 233, 906 S.E.2d 588, 593 (2024); Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 211-212, 826 S.E.2d 285, 290 (2019). Rule 56(c) of the South Carolina Rules of Civil Procedure provides a circuit court shall grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” Rule 56, SCRPC.⁸ Once the

⁷ Judge Jennifer B. McCoy has also evaluated BFS’s master subcontractor agreement in two cases that are now before this Court: (1) Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, Appellate Case No. 2025-001496; and (2) The Retreat at Charleston Nat’l Country Club Homeowners’ Ass’n, Inc., et al. v. Winston Carlyle Charleston Nat’l, LLC et al., Civil Action No. 2016-CP-10-03783, Appellate Case No. 2025-001224. Like Judge Newman and Judge Young, Judge McCoy found BFS’s master subcontractor agreement to be unenforceable, and the court of appeals affirmed each of her rulings.

⁸ In Kitchen Planners, this Court 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.

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).

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.” Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 462, 892 S.E.2d 297, 301 (2023) (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). 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).

ARGUMENT

This Court should affirm the court of appeals’ opinion because the indemnity section within BFS’s master subcontractor agreement, which incorporates the duty to defend and attorney’s fees recovery clauses, is not enforceable.

I. The court of appeals applied the proper standard of review to BFS’s master subcontractor agreement because BFS is seeking to recover damages, in the form of attorney’s fees and costs, occasioned by its sole or concurrent negligence, thereby invoking the “clear and unequivocal” standard.

The court of appeals correctly applied the heightened “clear and unequivocal” standard to the indemnity language in BFS’s master subcontractor agreement because BFS was (and is) seeking to be indemnified against losses it caused, in whole or in part.

It is well-settled that contracts requiring a subcontractor or other indemnitor to indemnify and hold a general contractor or other indemnitee harmless for damages arising out of the general

contractor or indemnitee’s sole or concurrent negligence are not subject to ordinary rules of contract construction or interpretation, but rather strict interpretation. See Federal Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 27, 378 S.E.2d 56, 58 (Ct. App. 1989); Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 409 S.C. 490, 501, 762 S.E.2d 696, 702 (2014); Concord and Cumberland Horizontal Property Regime v. Concord and Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166 (Ct. App. 2018). Our courts follow the general rule that an indemnification agreement will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in “clear and unequivocal” terms. Id.⁹ This rule is motivated, in part, by the fact that it is unusual for an indemnitor to indemnify the indemnitee for losses resulting from the indemnitee’s own negligence, and, in the specific context of the residential homebuilding industry, it serves as a deterrent to future negligence. Federal Pac. Elec., 298 S.C. at 27, 378 at 58; Ashley II, 409 S.C. at 490-91, 763 S.E.2d at 21 (holding that barring indemnification when the indemnitee is at fault serves the goal of deterring future negligent conduct on part of the indemnitee because the indemnitee will know its indemnification agreement pushing liability to its downstream contractor will not save it from liability if it fails to act with due care).

As an initial matter, the court of appeals applied the correct standard of review in this case because BFS’s own pleadings, statements on the record, and appellate filings completely negate the contention upon which BFS first argument is premised; i.e., that “BFS is not seeking contractual indemnification for its own negligence (whether sole or concurrent) but only for

⁹ The Legislature has further expressed its disdain for unusual and overreaching contractual indemnity agreements through the South Carolina Anti-Indemnity Statute, S.C. Code. § 32-2-10.

damages BFS incurred as a result of the alleged negligence of the subcontractors.” (Pet. Br. at p. 16, § I.A. argument header, deemphasized); see also (Pet. Br. at pp. 17-18).

BFS is seeking to be indemnified for its attorney’s fees without regard to its own negligence.

A. BFS seeks full indemnification from its subcontractors, without regard to its own negligence, in its pleading.

BFS’s harsh criticism of the court of appeals’ reading and analysis of its indemnity cause of action is misplaced.¹⁰ The court of appeals read BFS’s cause of action exactly as it is stated.

BFS, in Paragraph 126 of BFS’s Answer to Plaintiffs’ Third Amended Complaint and Crossclaims, no doubt, seeks “full” indemnification in BFS’s favor, covering “any liability” and “any sums” BFS is found to have or owe Plaintiffs or others for “any negligence,” plus all of “its attorney’s fees, costs, and other expenses incurred in defending this action.” (A. p. 189). The text of Paragraph 126 is:

126. That BFS is entitled to full contractual and common law indemnification from the CrossClaim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for

¹⁰ BFS asserts:

What the Record actually shows is that, contrary to the court of appeals' determination, BFS's indemnification cause of action seeks recovery **only** for damages found to have resulted from its subcontractor's negligence. . . . The court of appeals thus analyzed the wrong type of claim: it analyzed BFS's cause of action as if it were that of a contractor seeking indemnification for its own negligence; it should have analyzed it as a cause of action by which BFS seeks recovery for damages resulting for the negligence of its subcontractor(s). This error affected the entirety of the court of appeals' analysis; because BFS is not seeking indemnification for its own negligence, the heightened clear and unequivocal standard, (even if applicable to defense costs), should not be applied to the contractual provisions, (set forth in the first and third paragraphs of SECTION 5) upon which BFS relies in the assertion of its indemnification claim for the subcontractor's negligence.

(Pet. Br. at pp. 17-18) (emphasis in original).

any negligence, as aforesaid, on the part of the CrossClaim Defendants, entitling BFS to recover from the Third-Party Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the CrossClaim. Defendants any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

(A. pp. 186-189) (emphasis and double emphasis added).

Importantly, this claim does not limit indemnification to damages caused solely by BFS's subcontractor, nor does it exclude liability or damages arising from BFS's own conduct. It says Hurley Services and Charleston Exteriors, LLC must fully indemnify BFS, for any liability, all damages, and any sums, on account of any negligence.

BFS's counsel previously confirmed this is exactly how far it intended its indemnity claim to reach in the circuit court hearing. Judge Young's first question to BFS's counsel was to educate him on what BFS was seeking to be indemnified for. (A. p. 446, ll. 12-16). BFS's counsel, Mr. Hughes, responded: "Our initial claims were for recovery of all damages paid to the Plaintiff." (A. p. 446, ll. 20-21). Mr. Hughes added: "Our contention also was that we were entitled to attorney's fees, pursuant to the specific provisions of our contract." (A. p. 446, ll. 23-25). In other words, BFS sought to be fully indemnified against liability to Plaintiffs and for the costs of its defense.

It is puzzling how or why BFS would now contend that its indemnification cause of action "seeks recovery **only** for damages found to have resulted from its subcontractor's negligence." (Pet. Br. at p. 17). That is not how BFS's indemnity cause of action reads, nor is it how BFS intended for it to be interpreted. BFS sought the broadest form of indemnity through its pleading.

BFS has not amended or withdrawn this pleading or any portion thereof, it remains BFS's operative pleading. Pleadings, like contracts, are evaluated as a whole, and parties are bound by their pleadings and the consequences thereof. Witherspoon v. Stogner, 182 S.C. 413 (1937); Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) ("It is well settled that parties

are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.”); see also Johnson v. Alexander, 413 S.C.196, 202, 775 S.E.2d 697, 700 (2015) (holding parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions).

BFS has been allowed considerable runway in the lower courts to advance arguments inconsistent with its pleading. At the summary judgment hearing before Judge Young, BFS’s counsel first announced: “we are not pursuing recovery of amounts that we have now paid in satisfaction of the Plaintiffs’ claims.” (A. p. 448, ll. 5-7). This came after counsel explained that BFS was originally seeking all amounts it paid the Plaintiffs plus its attorney’s fees. (A. p. 446, l. 12 – A. p. 448, l. 11). Counsel went on to state, repeatedly, that BFS was now just seeking to recover its attorney’s fees. (A. p. 448, ll. 8-11; A. p. 449, ll. 15-17; A. p. 450, ll. 10-17). BFS’s counsel would not tell Judge Young the sum total of BFS’s fees, but he represented it would be a significant number. (A. p. 450, ll. 10-19). Counsel made no indication that it was just seeking to recover that portion of its fees and expenses that were attributable to its subcontractor’s sole negligence. See generally (A. pp. 414-476). To the contrary, the suggestion of counsel, which parallels BFS’s claim and relief sought, was that BFS was seeking to recover *all* of its attorney’s fees from its subcontractors. (Id.). BFS did not intimate what portion of its fees it would assert each of its subcontractors were liable for, or any mechanism for determining respective apportionment among BFS and its various subcontractors. (Id.). BFS maintained its claim for relief in the form of its attorney’s fees, undivided and without any fault analysis, throughout its appellate briefs. (A. pp. 653-714).

The only support BFS offers for its new contention is reference to Paragraphs 122 and 125 of its operative pleading. Paragraphs 122 and 125 relate to Hurley Services and Charleston

Exteriors, LLC's purported obligations to indemnify BFS against liability to Plaintiffs and the damages relating thereto. According to counsel's statement on the record at the circuit court hearing, BFS is no longer seeking such damages. BFS's claim for relief is purportedly limited to its attorney's fees.

In maintaining its claim for damages pursuant to its indemnity cause of action, BFS is necessarily proceeding on Paragraph 126 of its operative pleading, which purports to require Hurley Services to indemnify BFS for all of its attorney's fees and costs without regard to BFS's own negligence. The consequence thereof is that BFS's contract is subject to a heightened standard of review and the Anti-Indemnity Statute.

This Court should reject BFS's argument that its indemnification cause of action is seeking recovery of damages resulting solely from the negligence of its subcontractors and thereby its indemnity provisions escape the heightened standard of review.

B. BFS's indemnity claim rests upon contractual indemnity language that requires Hurley Services to indemnify BFS for its attorney's fees and costs without regard to BFS's own negligence.

BFS's contractual indemnity claim rests upon the language found in Section 5 of its master subcontractor agreement. Additional indemnity provisions are also found in Sections 3 and 8 of the same agreement.

Section 5 contains multiple indemnity and duty to defend clauses, which read as follows (with italics added for emphasis):

TO THE FULLEST EXTENT PERMITTED BY LAW, *THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND ATTORNEY'S*

FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY OR DEATH OF ANY PERSON, OR PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT OR THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE 'INDEMNITEES') FROM AND AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, AND EXPENSES, INCLUDING, BUT NOT LIMITED TO, ATTORNEY'S FEES (SUCH LEGAL EXPENSES TO INCLUDE COSTS INCURRED IN ESTABLISHING THE INDEMNIFICATION AND OTHER RIGHTS AGREED TO IN THIS PARAGRAPH) ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTORS, OR ANY OF ITS SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE, WHETHER IT IS OR IS ALLEGED TO BE THE SOLE OR CONCURRENT CAUSE OF THE BODILY INJURY, SICKNESS, DISEASE, OR DEATH OF THE SUBCONTRACTOR, SUBCONTRACTOR'S AGENT, EMPLOYEE, OR REPRESENTATIVE, OR THE AGENT, EMPLOYEE, OR REPRESENTATIVE OF ANY OF ITS SUBCONTRACTORS. THE INDEMNIFICATION OBLIGATIONS UNDER THIS PARAGRAPH SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION, OR BENEFITS PAYABLE BY OR FOR SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFIT ACTS, OR OTHER EMPLOYEE BENEFIT ACTS.

THE SUBCONTRACTOR SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5.

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

(A. pp. 201-202) (emphasis in original).

The so-called “duty to defend provision” is part and parcel of the Section 5 indemnity provision of BFS’s master subcontractor agreement and requires the subcontractor to defend BFS (or ostensibly pay the costs thereof) “regardless of the ultimate liability” of BFS. It is therefore subject to the “clear and unequivocal” standard governing indemnity agreements purporting to relieve the indemnitee from the consequences of its own sole or concurrent negligence. It is also therefore subject to S.C. Code § 32-2-10.

The confusion caused by the conflicting provisions in this Section 5 when compared against each other, much less other sections of the agreement containing indemnity clauses, will be further discussed in Section II, the point being here that BFS’s pleading and the contract upon which it rests – including those specific portions it relies on to pursue its pared down claim – call for Hurley Services to indemnify BFS for its damages, including those that it incurs as a result of its own negligence, thereby triggering a heightened standard of review.

C. BFS's limitation of the relief it seeks to attorney's fees and costs is nevertheless a claim for "damages" pursuant to an indemnity agreement and cause of action and the South Carolina Anti-Indemnity Statute, S.C. Code § 32-2-10, and "clear and unequivocal" heightened standard still apply.

Even if BFS were entitled to rewrite its pleadings to narrow its claim and relief sought (which it should be allowed to do), BFS is still seeking to be indemnified for damages occasioned by its own negligence, thereby subjecting its contract to strict interpretation, which it admits it cannot overcome. BFS's claim still fails.

BFS cites to three cases in support of its argument that it can proceed under ordinary contract interpretation rules as to its claim for its attorney's fees: (1) Concord and Cumberland Horizontal Property Regime v. Concord and Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166 (Ct. App. 2018); (2) Campbell v. Beacon Mfg. Co., 313 S.C. 451, 438 S.E.2d 271 (Ct. App. 1993); and (3) S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 125 S.E.2d 613 (1964). These cases do not support BFS's argument.

First, BFS misstates the court of appeals' holding in Concord and Cumberland Horizontal Property Regime v. Concord and Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166 (Ct. App. 2018) on pages 18 and 19 of its Brief. In Concord and Cumberland, the subcontractor, The Muhler Company, Inc. ("Muhler"), moved for narrow partial summary judgment seeking a limited declaration from the court: that the indemnity provision in the general contractor, Superior Construction Corporation's ("Superior") subcontract, did not require Muhler to indemnify Superior for Superior's own negligence. See 424 S.C. at 645, 819 S.E.2d at 170. In other words, Muhler did not argue that a contractor cannot recover damages attributable solely to a subcontractor's alleged negligence in indemnity when the indemnity claims rests on contractual indemnity terms that are unenforceable, as BFS's subcontractors have argued.

The issue before the court of appeals was specifically confined to whether the language of the subcontract clearly and unequivocally expressed an intent to for Superior to shift liability for its own negligence where it was concurrently negligent. Id. The court held it did not. Id. at 642, 168.

The court of appeals did not do or decide what BFS wants this Court to do in Concord and Cumberland. First and foremost, the court of appeals did not parse out portions of Superior's indemnity claim and damages against Muhler. Muhler effectively did that through the narrowness of the partial summary judgment it sought. Seeing that Muhler did not put the issue the recoverability of the damages resulting from its negligence before the court, the court of appeals did not decide that a general contractor or indemnitee can enforce an unenforceable agreement against a subcontractor or indemnitor to recovery just that portion of its loss that is attributable to its subcontractor or indemnitor's negligence. This was plainly not an issue before the court.

Lastly, the court of appeals did not make any distinction on the applicable standard of review based on the elements of damage the indemnitee was seeking. The court of appeals was informed that Superior settled with the plaintiffs in that case for \$775,000.00 and incurred \$630,000.00 in attorney's fees and expenses. Id. at 644, 169. Superior sought to be indemnified for both amounts. Id. at 645, 169. The court of appeals did not limit the application of the clear and unequivocal standard or its holding to only Superior's claim for indemnity against liability (\$775,000.00), excepting the attorney's fees and expenses (\$630,000.00). See id. generally at 644-647, 169-170.

The other two cases BFS cites to, Campbell v. Beacon Mfg. Co., 313 S.C. 451, 438 S.E.2d 271 (Ct. App. 1993) and S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 125 S.E.2d 613 (1964), are also distinguishable from the case at hand. The court of appeals in Concord and

Cumberland explained that reliance on Campbell is misplaced because the indemnity provision in that case contained “clear” contractual language allowing recovery even where the indemnitee was concurrently negligent. See Concord and Cumberland, 424 S.C. at 649–50, 819 S.E.2d at 172. Campbell reinforces, not undermines, the governing rule that indemnity for an indemnitee’s negligence is enforceable only when the contract clearly and unequivocally expresses that intent. S.C. Electric & Gas Co. v. Utilities Construction Co. predates the enactment of the South Carolina Anti-Indemnity Statute, which was enacted in 1976. 244 S.C. 79, 125 S.E.2d 613 (1964); S.C. Code § 32-2-10. The case was decided under a different framework than now exists.

The lower courts in this case were correct to subject BFS’s master subcontractor agreement to the heightened clear and unequivocal standard of review and the Anti-Indemnity Statute, S.C. Code § 32-2-10, even with BFS’s stated limitation of its claim for relief to its attorney’s fees and costs. South Carolina law is clear that an indemnitee can recover, in indemnity, more than just the amount that the indemnitee pays or is liable to a third-party. In Addy v. Bolton, this Court stated that where the wrongful act of the indemnitor has involved the indemnitee in litigation or places him in such relation with others such that it makes it necessary for the indemnitee to incur expense to protect his interest, the indemnitee may recover damages in the form of legal expenses on an indemnification theory. 257 S.C. 28, 33, 183 S.E.2d 708, 709-10 (1971). This Court reaffirmed this principle more recently in McCoy v. Greenwave Enterprises, Inc.:

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

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

incurred defending itself against the third party's claim.”). As noted above, attorney’s fees and expenses were a substantial part of the damages Superior sought on its indemnity claim in Concord and Cumberland Horizontal Property Regime v. Concord and Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). South Carolina law is also clear that a party may recover attorney’s fees as general damages under South Carolina law when the right thereto is provided by contract or statute. See Rimer v. State Farm, 248 S.C. 18, 27 148 S.E.2d 742, 747 (1966).

The hitch is that when the right to recover attorney’s fees and costs is established by a contractual indemnity agreement and the indemnitee requires the indemnitor to indemnify it for all of its attorney’s fees and costs – i.e., even those that are attributable to the indemnitee’s negligence – that contract must meet the clear and unequivocal standard and must not go so far as to require a indemnitor to indemnify the indemnitee for the indemnitee’s sole negligence or the agreement will not be enforceable under South Carolina law.

As discussed below, BFS’s agreement fails to meet these standards and the lower courts were therefore right in determining the agreement to be unenforceable as a result thereof.

II. The court of appeals correctly held the language of BFS’s agreement does not meet the heightened standard of review and violates South Carolina public policy.

The court of appeals properly held the contractual indemnity provisions at issue, including the interwoven and interdependent duty to defend clauses, were not sufficiently clear and unequivocal such that BFS could enforce the agreement against its subcontractors and recover all of its attorney’s fees and costs as a result thereof.

BFS has expressly conceded its master agreement does not meet the Concord and Cumberland standard in at least one other case and has tacitly done so here by limiting the damages it seeks on its contractual indemnity claim to attorney’s fees and costs and asking the Court to selectively focus its attention on certain clauses within a clause.

A. BFS's argument that its contractual indemnity provisions meet the heightened standard fails because BFS has admitted they do not.

BFS's expressly admitted in the MI Windows case (which involved the same version of BFS's subcontract), that to the extent BFS seeks indemnity from its subcontractors for BFS's concurrent negligence, the contract does not meet the clear and unequivocal standard.

In BFS's motion to reconsider filed on December 16, 2019 in the MI Windows case, BFS admitted:

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

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

(A. p. 328) (emphasis in original).¹¹ BFS expressly admitted that it could not maintain its indemnification claim, to the extent it was based on its sole or concurrent negligence, because its master subcontractor agreement did not meet the Concord and Cumberland test. (Id.).

BFS is bound by its admission in the MI Windows case. See Youn v. Martin, 254 S.C. 50, 58, 173 S.E.2d 361, 365 (1970) (holding that a party is bound by an admission contained in a court filing prepared and signed by his attorney and that an admission in one action may be received in evidence in another action involving a different party).¹²

¹¹ BFS affirmatively sued its subcontractors in MI Windows. (A. p. 327 at caption). BFS was the plaintiff and its subcontractors were the defendants.

¹² While it does not bear on the application of this principle, it is worth note that Hurley Services was a party to the MI Windows case. See (A. p. 327). In fact, it is a party to each of the pending appeals before this Court.

BFS ignores its prior admission that this form of its master subcontractor agreement does not state the subcontractor's obligation to indemnify BFS against its sole or concurrent negligence in clear or unequivocal terms in its Brief.

B. The indemnity provisions, even isolated to the clauses BFS points to, conflict with each other and are confusing.

With no way of denying its indemnity agreement is confusing, unclear, and contradictory, BFS focuses on select language within the indemnity provision and, in this Brief, explains how the reader is supposed to understand the interaction between the clauses. (Pet. Br. at pp. 20-24). This makes Hurley Services' case, in part: if BFS has to explain to the Respondents and the Court what it meant to say and how it meant for various clauses within a single clause to apply and interact with each other, how does the indemnity agreement express BFS intent in clear and unequivocal terms?

BFS's explanation is not satisfactory. BFS first points to the first block of text within Section 5 of its agreement (i.e., the indemnity section). (Pet. Br. at p. 20; A. p. 201). It explains this provision requires Hurley Services to indemnify BFS for its attorney's fees to the extent such damages were incurred on account of the subcontractor's sole or concurrent negligence resulting in property damage from the subcontractor's work. (Pet. Br. at p. 20). BFS says "where the litigation involves third-party property damage claims asserted by the Plaintiffs (sic)," this is the relevant indemnity provision. (Pet. Br. at p. 21). BFS goes on to further explain that the duty to defend language set out in the third and last block of text in Section 5 is meant for a different situation – i.e., where the subcontractor was *not* negligent. (Pet. Br. at pp. 21-22). There is plainly no application language or instruction in the indemnity provision. The first two blocks of language both apply to instances of bodily injury or death, in totally conflicting ways (the first block having some limiting language and the second block manifesting the intent that the obligation is without limitation). (A. pp. 201-202).

BFS contends “the subcontractor’s ‘duty to defend’ is limited to ‘the extent caused in whole or in part by the negligence of the subcontractor.’” (Pet. Br. at p. 21). On the following page BFS says the duty to defend is “always limited” to the extent caused by the subcontractor. (Pet. Br. at p. 22).

That is not the case. The language of the third block of text states that the duty to defend “exists regardless of any ultimate liability or negligence of the contractor.” (A. p. 202). Reference to the immediately preceding block of text, that begins with “notwithstanding the foregoing,” requires the subcontractor to indemnify, defend, and hold harmless BFS from any against any and all claims and damages, including attorney’s fees “regardless of whether such claim, damage, loss, or expense is caused, or is alleged to be caused, in whole or in part, by the negligence of the indemnitees [BFS].” (A. pp. 201-202). The subcontractor’s purported duty to defend is not always limited to the extent such claims, loss, or damages are caused by the subcontractor as BFS now maintains. By its plain terms, BFS’s master subcontractor agreement requires BFS’s subcontractors to defend BFS regardless of BFS’s fault.

BFS’s efforts to explain away the inconsistencies within Section 5 are not persuasive. Further the hypotheticals that BFS poses do not cover the scenario where BFS’s subcontractor was not negligent and BFS was (e.g., where the issue arose from materials that BFS selected or supplied, not the installation methods, or, as is the case here, where the subcontractor BFS hired was unlicensed).

BFS should not be permitted to overreach and then save itself from the consequences thereof by imposing limitations that do not exist in its pleadings or contract.

III. BFS's agreement is unenforceable and there is no saving it.

The lower courts were correct in finding that the issues with the indemnity provisions in BFS's master subcontractor agreement precluded BFS's enforcement thereof against its subcontractors. The court of appeals' opinion should be affirmed on this additional ground.

The indemnity provision, including the duty to defend clauses that trace throughout, run afoul of South Carolina law in two important ways. First, as discussed above, they do not meet the heightened standard set forth by Concord and Cumberland and similar cases. Second, and less discussed herein, they violate the Anti-Indemnity Statute, S.C. Code § 32-2-10 (providing that a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building ... purporting to indemnify the promise ... against liability for damages arising out of bodily injury or property damage is against public policy and unenforceable). By requiring its subcontractors to indemnify it against certain liabilities, including bodily injury, sickness, disease, or death of the subcontractor (even where BFS is solely responsible therefore),¹³ and to defend it against all claims, regardless of BFS's own negligence, BFS has implicated the Anti-Indemnity Statute.

The statute provides that any such agreements is "against public policy and unenforceable" as a matter of law. S.C. Code § 32-2-10. Likewise, while Muhler did not make the same arguments on appeal as BFS's subcontractors have here, the conflict between the contractual indemnity provisions here and Concord and Cumberland additionally restrict BFS's enforcement of its subcontract.

"[C]ourts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." White v. J.M. Brown Amusement Co., Inc., 360 S.C. 366, 601

¹³ The outrageousness of this clause alone is an additional sustaining ground.

S.E.2d 342 (2004) (citing Berkebile v. Outen, 311 S.C. 50, 53-54, 426 S.E.2d 760, 762 (1993) stating that “an illegal contract has always been unenforceable”).

The problems with BFS’s indemnity agreement render the agreement wholly unenforceable.

It bears note that, unlike in its other appeals before this Court involving the same form of its agreement, BFS has not preserved a severance argument in this appeal.¹⁴ For the reasons briefed below, as reinforced by the examination of the various parts of Section 5 herein, the offensive clauses of BFS’s subcontractor agreement cannot be severed out because they pervade the agreement, are intertwined, and would amount to a judicial rewriting of the agreement. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 33-36, 644 S.E.2d 663, 673-74 (2007); Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010); Lewis v. Premium Ins. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002); ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011).

The severance analysis weighs even heavier in Hurley Services’ favor where BFS is focused only on the duty to defend language. This issue presented before a Florida appellate court in the case of Barton-Malow Co. v. Grunau Co., 835 So.2d 1164 (Fla. 2d DCA 2002). Barton-Malow, the general contractor, contended the trial court erred by not awarding it the full amount of its defense costs and attorney’s fees. Id. at 1165. Barton-Malow’s six subcontractors cross-appealed arguing that the indemnity provision in Barton-Malow’s subcontract agreement was void

¹⁴ Even if this Court were to opt to sever out or rewrite certain provisions of BFS’s master subcontractor agreement in MI Windows, Pavic, or The Retreat, the same result should not follow in this case. The analysis in this particular appeal ends with the finding that BFS’s indemnity provision does not meet the clear and unequivocal standard and implicates the Anti-Indemnity Statute and therefore is unenforceable.

and unenforceable under Florida law because it did not comply with a specific Florida statute.¹⁵

Id. Barton-Malow did not challenge the trial court's ruling that the indemnity provision is unenforceable pursuant to the applicable Florida statute, but instead contended it was entitled to recover all of its defense costs and attorney's fees because the duty to defend was severable from the duty to indemnify. Id. at 1166.

The court of appeals rejected Barton-Malow's reference to cases involving the duty to defend and to indemnify in the context of insurance agreements. See id. at 1166. It, instead examined the language of the duty to defend language in the context of the indemnification agreement, in this case and in others, and whether there was an expressed intention therein that the duty to defend be severable from the remainder of the duties in the indemnity provision. Id. at 1166-67. The court found the "indemnity provision intertwines the duty to indemnify and the duty to defend." Id. at 1167. The same analysis would follow here, even if severance was an issue BFS preserved in this appeal or raised to this Court.

BFS's efforts to isolate judicial review or enforcement to certain clauses of its subcontractor agreement and paring down of its claim for relief or sought-after damages does not change the fact that BFS's sole claim – an indemnity claim – rests upon an unenforceable agreement.

¹⁵ The specific statute at issue was a statute that required an indemnity provision between a general contractor and subcontractor to contain a monetary limit on the subcontractor's liability unless the general contractor gives specific consideration for the indemnity provision.

While the same statute is not implicated here, the question does beg: what consideration supports the broad, one way indemnity BFS's subcontractors are providing it?

IV. There is no question of fact precluding summary judgment that if Hurley Services was negligent, BFS was, at a minimum, concurrently negligent. BFS is seeking indemnification for its own negligence.

Having established that BFS is seeking, through its pleading and agreement, to be indemnified for its sole or concurrent negligence, Hurley Services turns to the facts. BFS cannot avoid summary judgment in this case by suggesting that there is a way a trial court could find that Hurley Services was negligent and BFS was not. There is no way this is possible. The court of appeals' decision should be affirmed for this additional reason.

A. BFS is fully responsible for Hurley Services' negligence because Hurley Services was an unlicensed subcontractor of BFS's.

BFS cannot present a tenable factual scenario where this case would only involve Hurley Services' negligence because BFS is responsible for Hurley Services' work as its principal and as the "Licensee" it was working under.

S.C. Code § 40-11-270(E) provides:

Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's licensure group and license classification or subclassification; provided, the licensee provides supervision. **The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.**

(emphasis added). Section 40-11-270(E) is applicable to all "Licensees," not just general contractors who are serving as the general contractor on a specific project.

BFS is correct in stating that S.C. Code § 40-11-270(E) does not, in and of itself, preclude a general contractor's assertion of indemnity claims against a negligent subcontractor.

BFS is not restricted from enforcing its contractual indemnity claim against Hurley Services because of Hurley Services' unlicensed status and S.C. Code § 40-11-270(E). BFS is restricted by the unclear, confusing, conflicting, and illegal indemnity clauses it drafted and put in its master subcontractor agreement. The bearing that this statute has is that it establishes, as a

matter of law, that the clear and unequivocal standard of review applies, because BFS is necessarily seeking to be indemnified against its concurrent negligence (at a minimum).

The undisputed facts also show that BFS was responsible for directing, supervising, and inspecting Hurley Services and its other subcontractors' work at Six Fifty Six Coleman. See, e.g. (Pet. Br. at 32) ("Here, no party is contending that supervision was not provided.").

BFS rehashes the testimony of Plaintiffs' expert engineer, Russell Mease, P.E., with respect to the sealing of the windows BFS supplied and its subcontractors allegedly installed. See (Pet. Br. at pp. 7-9, 28-29). BFS focuses on Mr. Mease's opinion that sealant had not been placed behind the nailing fin of the windows. (Id. at p. 28).

These facts are neither here nor there, because under general agency principles, a principal is held responsible for the tort of its agent, even where the agent's alleged wrongful act was done in violation of the principal's wish and direction, Sams v. Arthur, 135 S.C. 123, 133 S.E. 205, 207 (1926); plus, had BFS been doing its job of supervising its subcontractors' work, it would have known that its subcontractors did not do what Mr. Mease said may not have been done and bore liability as a result thereof.

Furthermore, even if BFS were not legally imputed with any alleged negligence of Hurley Services, the facts before the lower court were that there was no genuine issue of material fact that Hurley Services was not negligent. The inference that BFS attempts to create that Hurley Services may have been negligent is not genuine or reasonable.

The only issue Mr. Mease expressed was that there may not have been caulk behind three of the four window nailing fins. (A. p. 573). Mr. Mease stated that neither he nor the defense experts removed any window from a rough opening in the Ryland Phase of the project. (A. p. 249). The windows that were inspected by Mr. Mease and the other experts had peel-and-seal

flashing tape that completely covered the jamb fins along either side of the window and the head fin at the top of the window. (A. pp. 249-250). Accordingly, the only opinion Mr. Mease offered as to the installation of the windows on the Ryland Phase (with any foundation, however weak it may have been), was that he did not see caulk squeezed out from behind a window's sill fin or extrude through a sill fin nail hole.

The undisputed fact is that BFS instructed its subcontractors *not to apply caulk* at the one fin Mr. Mease could see, i.e., the sill fin locations, as a best practice so that any incidental water could weep out of the window and wall assembly. (A. pp. 255-259). BFS's briefing below admitted the substitution of flashing tape behind the sill flange in lieu of caulk was BFS's standard practice. (A. p. 681).¹⁶

There is no evidence that Hurley Services deviated from the applicable standard of care or BFS's or the window manufacturer's instructions in installing the subject windows. In good faith, BFS should fairly admit that, and the fact that even assuming hypothetically that the three remaining sides of the windows were uncaulked, that it bears liability therefore. BFS was responsible for and was, in fact, supposed to direct, supervise, and inspect Hurley Services and its other subcontractors' installation work. It is disingenuous to infer that Hurley Services was negligent, when there is no evidence thereof, and it is unreasonable to infer any factual scenario where Hurley Services was negligent and BFS was not. BFS has not created a factual issue sufficient to survive summary judgment. Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 462, 892 S.E.2d 297, 301 (2023).

¹⁶ BFS's motion for reconsideration before the circuit court also admitted "it is undisputed that the Builders FirstSource installation practices included the substitution of Fortiflash at the sill in lieu of caulking inboard of the sill nailing fin (flanges)..." (A. p. 351).

The circuit court and court of appeals applied the proper standards of review in this case as BFS's new assertion that it is seeking to recover damages arising solely from its subcontractor's own negligence is factually untenable.

V. The lower courts were correct in holding that a trial court order is “final” for purposes of collateral estoppel. However, since Judge Young and the court of appeals independently analyzed the subject agreement and facts of this case, this issue does not affect the result of this case.

Both the circuit court and the court of appeals conducted their own independent analysis of BFS's master subcontractor agreement. It only added to their conclusion that prior orders from other circuit court judges had reached the same result. This issue does not affect the outcome of this case but this portion of the court of appeals' decision should also be affirmed because there is no conflict in South Carolina appellate courts as to whether a trial court's order that is subject to appeal is “final” for the purposes of collateral estoppel. Further, the United States Supreme Court has spoken directly on the issue.

The court of appeals' opinion in this case was unpublished. However, a month prior to BFS filing its petition for a writ of certiorari in this case, the court of appeals published a decision in Retreat at Charleston Nat'l Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC, 445 S.C. 566, 595-96, 915 S.E.2d 736, 751-52 (Ct. App. 2025), one of the related cases involving this form of BFS's master subcontractor agreement and the issues that present in this appeal, including the collateral estoppel question.¹⁷

The court of appeals in The Retreat reaffirmed this rule, holding:

¹⁷ A year prior thereto, the court of appeals also filed an unpublished opinion in Patel v. Patel, Case No. 2021-000084, 2024 WL 2049874 (Ct. App. May 8, 2024) (unpublished), finding “the circuit court did not err by concluding Judge Griffith's order was final even though it was pending on appeal and that collateral estoppel therefore barred Vidhya's claims in this action.” Id. at *1.

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

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was “actually litigated and determined by a valid and final judgment” in a previous action, “regardless of whether the claims in the first and subsequent suits are the same.” *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) (quoting *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008)). Where the “illegality of the contract has been actually litigated and directly determined in the prior action and that issue was essential to the judgment,” the application of offensive collateral estoppel is appropriate. *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). The party invoking collateral estoppel need not have also been a party in the prior action; the law requires only that the party against whom estoppel is applied have been a party with a full and fair opportunity to litigate the issue. *Id.* (“Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action”).

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

The rationale behind this rule is that if cases on appeal were not viewed as final judgments for collateral estoppel purposes, parties could simply refile in trial court while an appeal is pending and hope for a different result, thus subjecting courts (and parties) to inefficient duplicative litigation. *See generally Warwick Corp. v. Maryland Dep't of Transp.*, 573 F. Supp. 1011, 1014 (D. Md. 1983) (“Such a consequence would also be laughable. If a judgment was denied its *res judicata* effect merely because an appeal was pending, litigants would be able to refile an identical case in another trial court while the appeal is pending, which would hog-tie the trial courts with duplicative litigation.”), *aff'd Warwick Corp. v. Maryland Dep't of Transp.*, 735 F.2d 1359 (4th Cir. 1984). **That appeals were pending at the time of the circuit court's rulings in these eight cases in no way changes the result: the prior findings have preclusive effect unless and until those dispositive findings are reversed.** The indemnity clauses in the Later Contracts are the same clauses from the same agreement at issue in *MI Windows & Doors*,

Pavic, and Six Fifty-Six Owners' Association. Because BFS had previously litigated the enforceability of its contractual indemnity provisions, the circuit court properly applied collateral estoppel.

455 S.C. at 595-96, 915 S.E.2d at 751-52 (bold emphasis added; remaining emphasis in original).¹⁸

The United States Supreme Court case the court of appeals cited in The Retreat, Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 61 S.Ct. 513, 85 L.Ed. 725 (1941) remains good law.¹⁹

Judge Newman, in *MI Windows*, was analyzing the same form of the master subcontractor agreement that is at issue in this case, particularly Section 5. Judge Newman, like Judge Young, determined that the agreement violated S.C. Code § 32-2-10, public policy, and Concord and Cumberland's "clear and unequivocal" standard and therefore was unenforceable.

¹⁸ Rule 201(a) of the South Carolina Appellate Court Rules also supports the finality of an appealed order or judgment. See Rule 201 (a) SCACR (stating that "[a]ppeal may be taken, as provided by law, from any final judgment or appealable order."). The status of the prior orders as a final judgment is what makes the orders appealable in the first instance.

See also Tillman v. Tillman, 420 S.C. 246, 249, 801 S.E.2d 727, 759 (Ct. App. 2017) ("A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution.").

¹⁹ While not bearing any precedential effect, it is noted that the sole Fourth Circuit decision arising from a South Carolina case, F.D.I.C. v. Prince George Joint Venture, Case No. 92-1594, 1993 WL 172864 at *3 (4th Cir. May 24, 1993) (unpublished) ("The South Carolina district court correctly found that the first element was satisfied because the Texas district court judgment granting summary judgment to the FDIC was a final judgment on the merits in a prior suit. Even an appeal of the Texas judgment would not detract from its decisiveness and finality.").

Courts in Alabama, Maryland, Massachusetts, Connecticut, Minnesota, Missouri, Oklahoma, and Oregon have applied the same or similar rule. See Ex Parte Chesnut, 208 So. 3d 624 (Ala. 2016); Commonwealth v. Hernandez, 481 Mass. 582 (Mass. 2019); Shirley P. v. Norman P., 329 Conn. 648, 650 (Ct. 2018); Ward v. El Rancho Manana, Inc., 945 N.W.2d 439 (Ct. App. Minn.); Brown v. Brown-Thill, 437 S.W.3d 344 (Mo. Ct. App. W.D. 2014); Williams Prod. Mid-Continent Co. v. Patton Production Corp., 2012 OK Civ. App. 50, 277 P.3d 499 (Ct. of App. Okla. Div. 3 2012); Berg on behalf of Estate of Higbee v. Benton, 297 Or. App. 323, 443 P.3d 714 (Ct. App. Or. 2019).

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

The court of appeals’ decision should be affirmed on this additional ground.

Conclusion

For all the reasons stated above, this Court should affirm the court of appeals’ decision.

Respectfully Submitted,

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