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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2025-001224
Case No. 2016-CP-10-03783

Opinion No. 2025-6099

The Retreat at Charleston National Country Club Home Owners Association, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime,
Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollio Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado;
Defendants,

Builders FirstSource-Southeast Group, LLC, Petitioner

v.

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

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the Respondents.

PETITIONER's REPLY BRIEF to RESPONDENT HURLEY SERVICES, LLC

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BFS REPLY TO HURLEY

I. Hurley is not a "labor-only" subcontractor and Plaintiffs' expert took issue specifically with 1) the fasteners supplied by Hurley and 2) the manner in which Hurley installed the fasteners used for its installation of the windows.

The majority of the arguments set forth by Respondent Hurley Services, LLC (hereinafter "Hurley" or "Respondent subcontractor") rely upon the patently incorrect notion that "Hurley was a labor-only subcontractor" that did not supply any materials used in construction of the Retreat at Charleston National project. See e.g. Hurley Brief, pp. 1, 2, 4, 5, 6, 7, 9, 11, 13, 14, 16, 19, 20, and 21. Petitioner Builders FirstSource – Southeast Group, LLC's (hereinafter "BFS") will explain below that the only evidence from discovery on the subject is that the Respondent subcontractors, including Hurley, that installed windows were responsible for and did supply the fasteners required for installation of the windows at the project. The deposition testimony of the parties' fact witnesses provides unrefuted evidence that the Respondent subcontractors' that performed window installation, were responsible for supplying the fasteners needed to install the windows. Notwithstanding the unrefuted deposition testimony, the lower courts adopted the arguments of the Respondents wholesale without any evidence supporting their contentions that they were "labor-only" subcontractors or that they did not supply any materials for construction of the Retreat at Charleston National project. The court of appeals' Opinion, was based in part, on such erroneous contentions. BFS has filed a motion to supplement the record to provide the Court with the deposition testimony from discovery that directly contradicts the Respondent subcontractors' "labor-only" arguments.

Equally importantly, Plaintiffs' expert testified to defects in the fasteners supplied by Hurley and the manner in which the fasteners were installed, both of which serve as evidence to support BFS's indemnification cause of action against Hurley.

A. Hurley supplied the fasteners it used for installation of the windows.

Contrary to Hurley's "labor-only subcontractor" arguments, Mr. Bill Crabtree, install sales manager for BFS, testified that the Respondent subcontractors that performed window installation services supplied their own fasteners. See BFS Motion, Exhibit A, Deposition of Bill Crabtree, pp. 60-61, ll. 23-25, 1-3. Neither Hurley's counsel, nor any other Respondent subcontractors' counsel, cross-examined or questioned Mr. Crabtree regarding his testimony that the Respondent subcontractors were responsible for supply of the fasteners needed for installation of the windows.

Moreover, Respondent ECC Contracting, LLC's Rule 30(b)(6) designee, Rod Assis, testified that BFS only supplied the window, tape, and caulk, and the subcontractor supplied the fasteners. See BFS Motion, Exhibit B, Deposition of Rod Assis, p. 42, ll. 16-22. Further, Mr. Assis testified that the subcontractor knows what fastener to use for installation of the windows from review of the manufacturer's instructions, as well as, from review of the South Carolina building code. See BFS Motion, Exhibit B, Deposition of Rod Assis, p. 42, ll. 23-25, p. 43, ll. 1-5. Mr. Assis also testified that the manufacturer's instructions are adhered to the window itself. See BFS Motion, Exhibit B, Deposition of Rod Assis, p. 43, ll. 6-10. Lastly, BFS notes that Mr. Assis testified that whether to install a fastener in every hole or every other hole is set forth in the manufacturer's instructions included on the packaging of the window. See BFS Motion, Exhibit B, Deposition of Rod Assis, p. 43, ll. 11-23.

Neither Hurley, nor any other Respondent subcontractor, cite any evidence which contradicts Mr. Crabtree's or Mr. Assis' testimony. Further, the Respondent subcontractors, including Hurley, have failed to introduce or cite any evidence to support their contention that they were a "labor-only subcontractor" that did not supply any materials for construction of the project.

Contrary to Hurley's arguments, there are no issues of material fact that Hurley's Work (materials and services) included supply of fasteners required for its window installation at the Retreat at Charleston National project. It was error for the court of appeals to rely upon the baseless notion of Respondents, including Hurley, being "labor-only subcontractors" in support of its rulings. Thus, this Court should reverse and remand BFS's contractual indemnification cause of action to the trial court.

B. Plaintiffs' expert testified that he observed defects in and resulting damages from the fasteners supplied by Hurley and the installation services performed by Hurley.

Conveniently excluded from Hurley's Statement of the Case is the fact that Plaintiffs' expert testified that he found deficiencies in the work performed by Respondent subcontractors, including Hurley, that performed window and door installation services at the project. Plaintiffs' expert witness testified that he observed issues with the window installation that included use of incorrect fasteners, which were, both (i) of improper type, and (ii) of inadequate length to assure required embedment of the fastener into the framing; and (iii) that the fasteners were installed at spacing intervals which exceeded those required by the window manufacturer. See Freeman Deposition, A. p. 1107, ll. 15-25, p. 1111, ll. 22-25. Moreover, Plaintiffs' expert testified that he observed issues with the exterior door installation in that the doors were not installed with a weather lapped configuration with the weather-resistive barrier. See Freeman Deposition, A. p. 1108, ll. 22-25, p. 1109, ll. 1-7, p. 1114, ll. 13-20. As such, Plaintiffs amended their pleading to assert direct claims against Respondent subcontractors, including Hurley. Therefore, BFS asserted cross-claims against Hurley as Hurley was responsible for supplying and installing fasteners pursuant to the window manufacturer's installation instructions and for installing the exterior doors correctly into the building envelope. The testimony of Plaintiffs' expert witness directly implicates

the acts or omissions of Hurley. It was error for the court of appeals to dismiss such evidence as not relevant to BFS's contractual indemnification cause of action against Hurley. Thus, this Court should reverse and remand BFS's contractual indemnification cause of action to the trial court.

II. The "clear and unequivocal" standard does not apply here, because BFS is not seeking indemnity for its own negligence, whether sole or concurrent.

It is only when a party seeks to be relieved from the consequences of its own negligence that our case law requires that the indemnity clause must be set forth in clear and unequivocal terms. See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 763 S.E.2d 19 (2014); Laurens Emergency Med Specialists PA v. MS Bailey and Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003); Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 648, 819 S.E.2d 166, 171 (Ct. App. 2018)(citing Federal Pacific Electric v. Carolina Production Enterprises, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989), noting the indemnity clause was subject to the clear and unequivocal standard because the respondent was seeking indemnification for its "own negligence;" also, citing Laurens, noting the court found strict construction of the indemnity clause was required because the party claimed the clause could relieve it "from the consequences of its own negligence.").

Here, where BFS is seeking indemnity only for any liability or damage that is determined to result from the acts or omissions of Hurley, it was error for the lower courts to subject the relevant indemnity provision to the heightened "clear and unequivocal" standard. Instead, the indemnity provision is to be construed in accordance with the general rules for construction of contracts. See Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 SE2nd 271, 272 (Ct. App. 1993)(citing Federal Pacific). Therefore, this Court must reject Hurley's contentions to the contrary, reverse the court of appeals' Opinion, and remand BFS's contractual indemnification cause of action against Hurley to trial.

III. Plaintiffs' allegations, and even a jury's finding, of BFS's negligence does not preclude BFS from recovering indemnification from Hurley for any liability or damage determined to result from the acts or omissions of Hurley.

Hurley argues that by seeking indemnification from Hurley for Hurley's concurrent negligence, BFS is necessarily pursuing recovery for damage caused by BFS's concurrent negligence. Hurley Brief, p. 4. Contrary to its arguments, Hurley is the party with the fundamental misunderstanding regarding concurrent negligence and the application of the heightened "clear and unequivocal" standard.

First, when the trial court granted summary judgment to the Respondent subcontractors, there had been no finding of liability on any party's part, much less on the part of BFS. In the absence of any determination of the respective negligence of BFS and Hurley, there remained a genuine issue of material fact which should have precluded any award of summary judgment. The Court's award of summary judgment in favor of Hurly was thus in error.

Moreover, BFS's right to present its indemnification cause of action, both of common law and by contractual, is not necessarily lessened even if a jury determined that BFS's liability was due in part to BFS's own negligence. This Court has recognized that the general rule at common law – that there is no contribution or indemnity between joint tort-feasors – is subject to many exceptions. See Atl. Coast Line R. Co. v. Whetstone, 243 S.C. 61, 70, 132 S.E.2d 172, 176 (1963)("The *ratio decidendi* of cases granting indemnity [between joint tort-feasors] has frequently been expressed in such general terms as that the indemnitee was not personally at fault; the parties were not in *pari delicto*; the negligence of the indemnitee was merely passive as compared to the negligence of the indemnitor which was active; and the liability of the indemnitee was only secondary as compared to the liability of the indemnitor which was primary.). Whether the general rule applies to a common law claim is a question of law for the court. Id.

Here, the general rule does not apply, as the parties entered into an agreement by which Hurley agreed that it would indemnify and hold BFS harmless from and against any property damage claims "but only to the extent caused in whole or in part by any negligent act or omission of [Hurley]." See relevant indemnity provision set forth in the first paragraph of Section 5, A. p. 1506; see South Carolina Electric & Gas Co. v. Utilities Construction Co., 135 S.E.2d 613 (S.C. 1964)(where this Court held that the joint tortfeasor rule from Whetstone is not applicable where a contractual or legal relationship exists between tortfeasors); see also Stuck v. Pioneer Logging Mach., Inc., 301 S.E.2d 552, 553 (S.C. 1983); McCain Mfg. Corp. v. Rockwell Intern Corp., 695 F.2d 803, 805 (4th Cir. 1982) ("[T]he Whetstone decision is not applicable in cases where a contractual or legal relationship exists between joint tortfeasors.")(citing S.C. Elec. & Gas Co.).

Thus, here, where there is a genuine issue of material fact regarding the parties' negligence, if it is determined that BFS is liable for Plaintiffs' damages, and that any such liability resulted in whole from Hurley's acts or omissions, then BFS would be entitled to recover indemnity from Hurley for any such liability. Moreover, if it is determined that BFS's liability resulted only in part from Hurley's acts or omissions, then BFS would be entitled to recover indemnity from Hurley for any such part of the liability that is determined to result from the negligence of Hurley. Further, if it is determined that BFS's liability resulted in part from BFS's own negligence, if it is nevertheless determined that a part of BFS's liability resulted from Hurley's acts or omissions, then BFS would be entitled to recover indemnity from Hurley for the part of liability determined to result from the negligence of Hurley. It is only when it is determined that the liability did not result from the acts or omissions of Hurley, that BFS would not have a right to recover indemnity from Hurley.

Contrary to the assertions of Hurley, BFS claims in contractual indemnity, seeking recovery of damages occasioned by the concurrent negligence of its subcontractor, do not implicate the clear and unequivocal standard set forth by the Concord & Cumberland court. As noted in Argument II hereof, the heightened standard applies only where a party seeks to be relieved from the consequences of its own negligence, whether sole or concurrent. The Concord & Cumberland court itself allowed recovery, pursuant to an indemnity provision virtually identical in substance to that at issue before this court, by the contractor indemnity, against liability occasioned by the negligence of the subcontractor indemnitor, notwithstanding the admitted concurrent negligence to the contractor. The Concord & Cumberland court in making its determination, cited the Minnesota Court of Appeals, which determined that a nearly identical clause, "...suggests a 'comparative negligence' construction under which each party is accountable 'to the extent' their negligence contributes to the injury". See Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 652, 819 S.E.2d 166, 173 (Ct. App. 2018). (Quoting Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985)). The Hurley contentions to the contrary are not supported by either the relevant indemnity provision, or by the Concord & Cumberland opinion, and should be rejected by this court.

IV. BFS supervision or BFS holding a general contractor license does not preclude BFS from seeking indemnity from Hurley for any liability or damage determined to result from the acts or omissions of Hurley.

Hurley argues that BFS "was the installation manager, and the holder of an unlimited general contractor's license" and "[a]s such, it also had nondelegable statutory and common law duties to inspect and supervise the work of its subcontractors."

Hurley cites to no evidence to support its erroneous assertion that BFS "was the installation manager" of the project. Moreover, neither the mere fact that BFS may hold an unlimited general contractor's license, nor BFS alleged supervision is sufficient, in and of itself, to support any potential determination that BFS was negligent simply because Hurley is determined to have been negligent.

It is well settled that where a party, through no fault of its own, is exposed to liability to a third party, due to the conduct of another, the exposed party may recover in equitable indemnity against the second party. Specifically, the courts have recognized circumstances whereby a contractor may be at fault vicariously or by imposition of law, while not having breached any duty which would preclude the right to recovery in equity against its negligent subcontractor. South Carolina Electric and Gas Co. v. Utilities Construction Co., 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964) (holding that even though indemnitee was found to be at fault, it was nonetheless entitled to seek equitable indemnity because there was no breach of a legal duty).

Hurley cites S.C. Code Section 40-11-270(E), and the cases of Fields v. J. Haynes Waters Builders, and Fountain v. Fred's, in support of its argument that "BFS alleged supervisory obligations, whether imposed by contract or by statute, necessarily render BFS concurrently negligent if its subcontractor (Hurley) is determined to have been negligent." Hurley argues further that "BFS's effort to recover damages attributable to Hurley's concurrent negligence necessarily means that BFS seeks indemnification for BFS's own negligence." Hurley Brief, p. 5.

There is, however, nothing within Code Section 40-11-270(E), or in either the Fields or Fountain cases, to support either of Hurley's contentions. Those contentions are, in fact, specifically undermined and contradicted not only by the case law cited hereinabove by BFS (South Carolina Electric and Gas, Co. v. Utilities Construction), but also by the determination of

the court of appeals in the matter of Concord & Cumberland (Where the court, pursuant to the relevant contractual indemnity provision, allowed recovery, by the contractor/indemnitee, against its negligent subcontractor/indemnitor, notwithstanding the concurrent negligence of the indemnitee.)

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

Hurley opens its Brief stating Colin R. Campbell Construction, Inc. served as the general contractor for construction of the Retreat at Charleston National project. Hurley Brief, p.1. Hurley also notes that Winston Carlyle Charleston National, LLC was the developer of the project. Id. Hurley states that BFS "sold windows, doors, and other materials to the general contractor and/or developer and contracted to install the materials at the project." Id. Thus, by Hurley's own admission, BFS was a subcontractor to the general contractor. Nevertheless, Hurley's arguments insinuate that somehow the parties were performing work at the project under a license of BFS. Contrary to Hurley's arguments, there is no evidence in the record to establish that the parties were performing work at the project under any license other than that of the general contractor Colin Campbell.

Moreover, as the licensee, Colin Campbell may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee's license group and license classification or subclassification; provided, the licensee provides supervision. See Teseniar 407 S.C. at 97 citing S.C. Code Section 40-11-270(C). Here, with the exception of Plaintiffs, BFS does not believe that any party, including Hurley, is contending that supervision was not provided by the parties. It also bears emphasis that even assuming (despite the absence of any supporting evidence) that BFS were operating as a general contractor in original construction of the project, that nothing, within either Chapter 11, or within the common law of this state, would preclude its assertion of claims in indemnity against a negligent subcontractor.

Lastly, the fact that subsection E of Section 270 provides that the licensee, Colin Campbell, is fully responsible for any violation of this chapter, Chapter 11, resulting from the actions of unlicensed subcontractors performing work for the licensee has no bearing on BFS's claims against Hurley. The fact that BFS holds an unlimited general contractors license, (which was not used by BFS on the project) and that Hurley is an unlicensed subcontractor, has no bearing on whether Hurley is liable to BFS for Hurley's failure to install the windows as required by the manufacturer's installation instructions. See Teseniar v. Pro. Plastering & Stucco, Inc., 407 S.C. 83, 97, 754 S.E.2d 267, 274 (Ct. App. 2014)(quoting Kennoy v. Graves, 300 S.W.2d 568 (Ky.App.1957) ("The statute involved, and similar ones, are designed to protect the public from being imposed upon by persons not qualified to render a professional service. The reason for the rule denying enforceability [of contracts] does not exist when persons engaged in the same business or profession are dealing at arm['s] length with each other. In the case before us, appellant was in a position to know, and did know, the qualifications of appellee. No reliance was placed upon the existence of a license, as presumptively would be the case if appellee was dealing with the general

public."). Accordingly, here, where BFS and Hurley were operating under Colin Campbell's license, neither Section 40–11–270 nor Section 40-11-370 precludes BFS from bringing claims against Hurley to recover against damage determined to result from Hurley's negligent acts or omissions. To the extent that the court of appeals' footnote citation to Section 40-11-270(E) suggests otherwise, it is in error.

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

V. Hurley's negligence does not automatically make BFS negligent too.

Hurley effectively contends that, because it was a subcontractor of BFS, if Hurley is negligent, then BFS is also necessarily negligent. However, it is entirely possible for Hurley to be negligent without BFS being negligent. Because Hurley was responsible for supplying the fasteners it used for installation of the windows, it is entirely possible that Hurley was not only negligent in its supply of the fasteners, but that Hurley was grossly negligent or reckless in the supply of the fasteners. It is entirely possible that Hurley represented to BFS that it was using the type of fastener called for by the window manufacturer, however, after BFS left the job-site, Hurley instead used a different type of fastener. Similarly, it is entirely possible that Hurley showed BFS that it was installing the correct type of fastener in the correct manner as specified by the window manufacturer installation instructions, however, after BFS left the job-site, Hurley deviated therefrom. As part of the window installation, Hurley is required, by the manufacturer, to install flexible self-adhered membrane flashing on top of the window nailing fins on the jams and head of the windows, which then conceals the fasteners installed by Hurley in the window. These possibilities exist because BFS is not required to supervise and inspect each and every fastener

that Hurley installed at the project. To the contrary, per the parties' contract, Hurley is an independent subcontractor, not an employee of BFS. See Section 6 of the parties' contract, A. p. 1507-1508. Hurley controls its means, manner, and method of construction for performing its Work. Id.

It is entirely possible that a jury could determine that, notwithstanding its supervision or inspection of Hurley's Work, Hurley was negligent and BFS was not as it relates to Hurley's supply of fasteners and/or installation of fasteners, windows, exterior doors, or weather-resistant materials and corresponding flashing components at the project. These considerations present issues of material fact which rendered summary judgment inappropriate, requiring reversal of the court of appeals' opinion.

VI. BFS's pleading is consistent with Plaintiffs' allegations, comports with the evidence in the record, and supports BFS's arguments, not Hurley's.

Hurley next contends that BFS's pleadings demonstrate that its claims against Hurley include indemnification for losses caused by BFS's own negligence. Hurley Brief, p. 7. This argument relies on Hurley's incorrect notion that it was a labor-only subcontractor. See Section I above explaining how Hurley supplied fasteners for construction. Hurley's argument in this section of its Brief also relies on the incorrect notion that because Plaintiff alleges that BFS was negligent, BFS is necessarily pursuing recovery for its own negligence. However, as explained in Section III, Plaintiffs' pleading does not preclude BFS from seeking indemnity from Hurley for Hurley's negligence.

As explained in Section I of BFS's Brief, BFS's indemnification cause of action, when read in proper context as a whole, and not by isolating and focusing on only one word in the final paragraph, plainly seeks recovery from Hurley only for any liability determined to result from the negligent acts or omissions of Hurley. See BFS Brief, pp. 15-17. Moreover, even under the

incorrect construction of BFS's indemnification cause of action as urged by Hurley, the BFS claims would nonetheless encompass indemnity against liability for damages caused by the negligence of Hurley. It was therefore error for the lower court to preclude BFS from pursuing indemnity for such damage as is determined to result from Hurley's negligent acts or omissions. See BFS Brief, pp. 17-20.

VII. Hurley misrepresents the contents of the parties' contract and continues to argue select words and clauses in isolation or out of context.

Next, Hurley's Brief misrepresents the parties' contract and makes arguments based on select words and clauses taken out of context or reviewed in isolation. See Hurley Brief, pp. 10-15. Section C of Hurley's Brief also relies heavily on Hurley's incorrect notion that it did not supply any materials used in construction for the project. See Id and see Section I above.

A. Work is a defined term and controls the rights and obligations of the parties throughout the contract.

Hurley argues that under the first paragraph of Section 5 that "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...." Hurley Brief, p. 10. Hurley continues that "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." Id. Hurley's argument relies, however, upon a hypothetical which does not exist.

The reality is that Work is a defined term, which even Hurley appears implicitly to acknowledge. Moreover, contrary to Hurley's non-existent hypothetical, the first paragraph of Section 5 expressly limits BFS's right to recover indemnity from Hurley "to the fullest extent permitted by law" and further, "only to the extent caused in whole or in part by a negligent act or

omission of [Hurley]." See A. p. 1506. Hurley's counsel, erroneously, or maybe conveniently, ignored this additional limiting language which coincidentally supports BFS's arguments.

B. Section 3 Warranty does not call for Hurley to warrant materials provided by BFS.

As explained in Section I above, while BFS supplied the windows, Hurley supplied the fasteners used for installation of the windows at the project. See BFS Reply Brief, pp. 1-2. As explained in BFS's Brief in section III.B.1., Section 3 Warranty does not call for Hurley to warrant materials provided by BFS. See BFS Brief, pp. 28-30. Instead, Hurley is only obligated to warrant the materials supplied by Hurley, which in this case would be limited to the fasteners it supplied. Similarly, the ten (10) year warranty for structural application is only implicated if Hurley performed Work involving structural applications. Moreover, whether Hurley agreed to provide such warranty has no bearing upon BFS's right to recover indemnity from Hurley for property damage that is determined to result from Hurley's negligent acts or omissions.

C. BFS is not relying on Section 2 in the assertion of its contractual indemnification cause of action against Hurley, because there is no claim here regarding a failure to protect the materials installed by the parties at the project.

Regarding Hurley's Section 2 arguments, BFS craves reference to and adopts its Section 2 arguments in its Court of Appeals Reply Brief. See A. pp. 1909-1911. Further responding, as the subtitle states, BFS is not relying on Section 2 in the assertion of its contractual indemnification cause of action against Hurley, because here, there are no claims pending regarding a purported failure of the parties to protect the materials from being damaged prior to or during the installation of the materials at the project.

D. BFS is not relying on Section 8(i) in the assertion of its contractual indemnification cause of action against Hurley, because there is no mechanic's lien or claim related thereto pending in this litigation.

Regarding Hurley's 8(i) arguments, BFS craves reference to and adopts its 8(i) arguments in in its Brief before this Court. See BFS Brief, pp. 35-36. Further responding to Hurley's Section 8(i) argument, Hurley's counsel is either erroneously or conveniently ignoring that the term "its" is referring to the Subcontractor Hurley, not the Contractor BFS. Here, BFS is not Hurley's supplier. BFS is the supplier for the general contractor and/or developer. BFS produced all of its invoices and records relating to the construction of the project. BFS's install manager testified that Hurley supplied its own fasteners for installation of the windows. Hurley has not cited any evidence in the Record to support its erroneous contention that BFS was Hurley's supplier.

E. There are no unconscionable provisions in the parties' contract.

Hurley argues "there are multiple conflicting, deceptive, unconscionable, and oppressive indemnity provisions which were not considered by the court in Concord & Cumberland but would have affected the decision of the court." Hurley Brief, p. 14. Hurley argues that Sections 1, 2, 3, and 8(i) all conflict with the first paragraph of Section 5. Id. Hurley's argument, however, is based on its incorrect assertion that Hurley "furnished no materials to the project except those given to it by BFS, and upon its erroneous construction of the aforesaid sections." See Id. As explained in Section I above, Hurley is incorrect and the only evidence in the Record established that Hurley was responsible for and did supply the fasteners to install the windows at the project. As noted hereinabove, Hurley's interpretation of the various provisions of the parties' contract continues to ignore relevant and pertinent language which coincidentally does not support Hurley's arguments.

F. The first and second paragraphs in Section 5 do not conflict.

Hurley again conveniently ignores relevant language in the parties contract to support its erroneous argument that the first and second paragraphs of Section 5 are in conflict and cannot be

reconciled. Hurley Brief, p. 15. Contrary to Hurley's repeated assertions, the first paragraph of Section 5 provides that Hurley shall indemnify BFS from and against any and all claims "arising out of or resulting from bodily injury or death of any person, or property damage" whereas the second paragraph of Section 5 provides that Hurley shall indemnify BFS from and against any and all claims "arising out of or resulting from bodily injury to, sickness, disease, or death of, the subcontractor, any agent, employee, or representative of the subcontractor, or any of its subcontractors." Thus, the indemnity provisions in the two paragraphs are not in conflict and are reconcilable because the indemnity provision in the first paragraph relates to bodily injury or property damage claims of third-persons whereas the indemnity provision in the second paragraph relates only to bodily injury claims of Hurley or Hurley's agents, employees, representatives, or subcontractors. Not only is the second paragraph in Section 5 not relevant here because this case does not involve bodily injury claims by a third-person, but this case also does not involve bodily injury claims of Hurley or Hurley's agents, employees, representatives, or subcontractors.

Hurley's argument that these two separate paragraphs relating to two separate and distinct set of factual circumstances "should be read together" is without any authoritative support. Moreover, even if the Court were to "rewrite" the parties' contract, (which Hurley and many Respondent subcontractors erroneously contend that BFS has requested that the courts do), by combining the two separate paragraphs into one paragraph as Hurley suggest by "reading them together," the clauses remain abundantly clear that BFS is only entitled to recover indemnity for a property damage claim of a third-party for damage determined to result from the negligent acts or omissions of Hurley. The fact that the parties' contract provides that BFS may seek indemnity from Hurley in a separate unrelated matter involving alleged bodily injury of Hurley, has no bearing on the claims asserted by BFS in this litigation.

G. There is nothing illegal about the third paragraph of Section 5.

Hurley argues that paragraph 3 of Section 5 is a disguised indemnity provision for defense costs in favor of BFS even if BFS is solely at fault. Hurley Brief, p. 15. Hurley also argues that "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." Id. However, Hurley fails to cite to any evidence in the Record where BFS makes such contention.

Hurley's arguments are not in response to any action by BFS, but are rather, represented by Hurley and the other Respondent subcontractors. By its terms, the third paragraph of Section 5 provides that "duty to defend under this Section 5 is independent and separate from the duty to indemnify." Not once has BFS made a demand on Hurley that it indemnify BFS pursuant to the third paragraph of Section 5. That is because the third paragraph of Section 5 does not provide BFS any right to indemnity. It is a provision relating to defense of an indemnified claim. See A. p. 1507, "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." For BFS to have the right to tender its defense to Hurley under the third paragraph of Section 5, there must first be a claim to which BFS is entitled to be indemnified. Further, BFS must provide written notice of the indemnified claim to Hurley.

Here, BFS has not asserted, in this litigation, a breach of contract claim against Hurley for failing to comply with any obligation imposed by the third paragraph of Section 5. BFS asserted that claim only in separate litigation. See Builders FirstSource-Southeast Group, LLC v. American Safety Indemnity Company, et. al., civil action number 2019-CP-10-004725. Moreover, BFS and Hurley settled BFS's claim regarding the third paragraph of Section 5 and a Stipulation of

Dismissal was filed ending the action on March 3, 2025. Therefore, Hurley's arguments regarding the third paragraph of Section 5 are moot and should not be considered by this Court.

VIII. S.C. Code Ann. Section 32-2-10 expressly authorizes the agreement upon which BFS seeks indemnification from Hurley in this action.

S.C. Ann. Section 32-2-10 expressly provides

> Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.

S.C. Code Ann. § 32-2-10.

Contrary to Hurley's repeated erroneous contentions, BFS is seeking contractual indemnification from Hurley only for any liability or damage that is determined to have resulted in whole or in part from the negligent acts of omissions of Hurley. BFS is seeking such indemnification from Hurley pursuant to a valid contractual provision by which Hurley undertook to indemnify BFS. See A. p. 1506. Such indemnification agreement is not "illegal" or "unenforceable", nor is it "deceptive" or "unconscionable." The statute provides that the parties may enter into such an agreement and that is what the parties did here.

The BFS arguments in opposition to the Hurley contentions are more fully set forth in Argument V of the BFS Brief in Reply to Respondents AC and ECC. BFS craves reference to its arguments therein and adopts the same as fully as set forth herein.

IX. The parties' contract is not unconscionable.

In Section III of Hurley's Brief, Hurley argues that the parties' contract is one of adhesion and that it is unconscionable. See Hurley Brief, pp. 17-23. In response, BFS craves reference to and adopts its arguments in opposition thereto set forth in its Reply Brief to the court of appeals.

See A. pp. 1906-1912. Also, in light of Hurley's "kitchen sink" of purportedly "oppressive" and "unconscionable" terms, BFS craves reference to its prior argument in opposition thereto set forth at pages 10-16 in its Reply to Hurley's Return in Opposition to BFS's Petition for Certiorari in Appellate Case No. 2025-001496 Builders FirstSource-Southeast Group, LLC v. Hurley Services, LLC. See A. pp. 655-657 in Appellate Case No. 2025-001496.

X. There are no illegal provisions, but the Court is free to sever any provision with which it takes issue.

Regarding Hurley's Severance arguments, BFS reiterates its arguments on severance as set forth in its Brief on pages 36-40.

XI. BFS claims are not barred by collateral estoppel.

Regarding Hurley's collateral estoppel argument, BFS reiterates its arguments on collateral estoppel as set forth in its Brief on pages 40-43.

Conclusion

In conclusion, BFS would show that Hurley supplied and installed the fasteners required for installation of the windows, and that Plaintiffs' expert testified that he observed deficiencies both in the fasteners supplied by Hurley and in the manner in which Hurley installed them at the project. It was error for the trial court to grant and the court of appeals to affirm summary judgment against BFS on its indemnification cause of action against Hurley as there is a genuine issue of material fact regarding the parties' alleged negligence, and as BFS is seeking indemnification from Hurley only for any liability or damage determined to result from Hurley's negligent acts or omissions.

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