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 RESPONDENTS' EAST COAST CARPENTRY, LLC AND PALMETTO TRIM AND RENOVATION

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BFS Reply to East Coast Carpentry and Palmetto Trim Joint Brief

Appellant/Petitioner Builders FirstSource-Southeast Group, LLC (hereinafter "BFS") submits the following reply brief in response to the joint brief submitted by Respondent East Coast Carpentry (hereinafter "EastCC") and Respondent Palmetto Trim and Renovation (hereinafter "Palmetto") and sometimes, collectively "Respondent subcontractors."

I. BFS's pleadings seek indemnification only for the negligence (whether sole or concurrent) of its subcontractors.

BFS argued in its opening brief that its indemnification cause of action seeks recovery only against liability that may be imposed on BFS when such liability was in fact the result of the negligence of its subcontractors. See BFS Brief, pp. 5, 15-20. BFS's pleading argument is supported by the language of Paragraphs 133-138, 162-168. See BFS's cross-claim for indemnification at A. pp. 440-441; BFS's third-party claim for indemnification at A. pp. 447-49. BFS also, however, made the alternative argument, that even if the Court construes BFS's pleading to include a claim for indemnity for liability resulting from BFS's own negligence, the language of Paragraphs 133-137 and 162-167 nonetheless at least compel the Court to recognize that such a more expansive claim also includes, perhaps concurrently, a claim for indemnity for any liability imposed based upon the negligence of the subcontractors. This latter claim must survive even if the other supposed claim fails.

In their brief, EastCC and Palmetto attack BFS's contention that its pleading seeks recovery only for liability imposed as a result of the negligence of the subcontractors. Notably, however, EastCC and Palmetto do not respond to what this Court asked the parties to brief when it granted certiorari: *whether, even if a claim for recovery for its own negligence were asserted, the complaint nonetheless also included a claim for recovery for liability resulting from the negligence of the subcontractor.* Whether BFS pled a claim for its own negligence is not dispositive, as long as it

also pled a claim to recover for the negligence of its subcontractor. Because EastCC and Palmetto fail to argue against this position the Court should consider their objections abandoned. See Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) (noting that an issue "not argued in the brief is deemed abandoned and will not be considered by the appellate court.") (citing Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct.App.1993); also, First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).

Nonetheless, EastCC and Palmetto are also incorrect in the argument that they do make: that the Third-Party Complaint seeks recovery from East Coast and Palmetto for damages that were solely the responsibility of BFS. EastCC and Palmetto argue that BFS's relief requested in paragraph 168 of the Third-Party Complaint is "broad and notably devoid of limiting language." Joint Brief, p. 18. EastCC and Palmetto also argue that the "pleading does not limit indemnification to damages caused solely by subcontractors, nor does it exclude liability arising from BFS's own conduct." See Id. EastCC and Palmetto conclude that by seeking the broadest relief possible, BFS pled a claim that encompasses the entirety of any judgment entered against it, including damages attributable to its own independent negligence. See Id.

In support of its arguments, EastCC and Palmetto cite Postal v. Mann for the proposition that "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." Joint Brief, p. 17 (citing 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (citing Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964))). They also cite Witherspoon v. Stogner for the point that "South Carolina courts evaluate pleadings as a whole." Joint Brief, p. 19 (citing 182 S.C. 413 (1937)). Lastly, they cite BEI Beach, LLC v. Christman for the point that "[t]he scope of a claim is determined by considering both the allegations and the relief requested." See Id. (citing 440 S.C. 98, 889 S.E.2d 601 (Ct. App. 2023)).

Despite citing to this authority, EastCC and Palmetto nonetheless have asked this Court to do exactly what the noted case law prohibits: to consider only isolated provisions of the complaint and to fail to read the complaint together as a whole. Specifically, EastCC and Palmetto argue (without citation or explanation) that this Court should ignore the limiting language set forth in Paragraph 167 because it "states BFS's theory of causation" rather than "defines the scope of BFS's requested relief." Joint Brief, p. 20. On the contrary, Paragraph 167 does both; it alleges that any liability is only vicarious, and thus, alleges that any relief must and will be derived from the wrongdoing of the subcontractors. As argued before, BFS's pleading assumes and alleges that there was no wrongdoing on the part of BFS, and thus, any right to recovery must arise from the negligence of another party. Whether the facts of the case later bear out this constructed worldview is immaterial when analyzing the pleading. What is clear, however, from the case law cited by EastCC and Palmetto, is that the Court cannot ignore this paragraph when analyzing whether BFS was asserting a claim to recover for any liability or damage determined to result from the negligent acts or omissions of its subcontractors. See BEI Beach, LLC v. Christman, 440 S.C. 98, 889 S.E.2d 601 (Ct. App. 2023)(noting "[t]he scope of a claim is determined by considering both the allegations and the relief requested").

Furthermore, in their Joint Brief, EastCC and Palmetto highlight something that was not explicitly argued in the sister briefs filed by ECC and AC: that the allegations the Plaintiffs made against BFS implicated BFS's role as a supplier of materials and its role as a supervisor, and thus, BFS's claim for indemnity in Paragraph 168 is broad enough that it seeks indemnity for BFS's action in those roles, for which Respondents could not possibly be liable. In response, BFS would reiterate what it has just said: "BFS's pleading assumes and alleges that there was no wrongdoing on the part of BFS, and thus, any right to recovery must arise from the negligence of another party."

In other words, any negligence has to be derivative. Thus, for purposes of its pleadings, if BFS is itself not negligent, and if any negligence attributed to it must be derivative, and further, if there are certain allegations for which derivative liability is impossible (because, for example, a jury determines that BFS was solely responsible for Plaintiffs' damage), then the conclusion is simply that where there is no derivative liability, BFS cannot be found to have been negligent. However, in the areas where it is possible for derivative liability to attach (and only in those areas), BFS may be vulnerable to Plaintiffs, and thus, it is in those areas that BFS seeks indemnification from its subcontractors. Again, whether these premises turn out to be true is an issue for discovery and, possibly, a jury, but at the pleading stage, this was an appropriate assertion for BFS to make.

BFS adopts by reference and incorporates herein, its arguments set forth on pages 7-9 in its Reply Brief against AC and ECC.

II. The relevant portions of the 2005 Contracts do not violate Section 32-2-10.

In an attempt to avoid potential liability for their own negligent actions, EastCC and Palmetto argue that the 2005 Contracts contain provisions that violate 32-2-10, and they further argue that if a contract contains any provision that violates Section 32-2-10, the entire contract is void and unenforceable – even the provisions that do not violate Section 32-2-10. This is a misreading of the statute and caselaw.

Section 32-2-10 provides in relevant part that:

> [A] promise or agreement . . . purporting to indemnify the promisee . . . against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee . . . is against public policy and unenforceable. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee . . . against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.

Contrary to the arguments of EastCC and Palmetto, Section 32-2-10 does not invalidate the relevant provisions of the 2005 Contracts; furthermore, even if it there were a provision of the 2005 Contracts that could be held to violate the statute, only the offending portion, and not the entire contract, would be invalid.

A. The 2005 Contracts do not violate Section 32-2-10.

EastCC and Palmetto argue that two provisions of Section 6 of the 2005 Contracts violate Section 32-2-10. Their conclusions are based on either a misunderstanding of the use of defined terms in the 2005 Contracts or a misreading of the plain language of the 2005 Contracts.

First, EastCC and Palmetto accuse BFS of "skip[ping] over the first paragraph of Section 6" (the Indemnification Section) and claim that this opening paragraph makes clear that the goal for the provision is for the subcontractor to be responsible for "all claims," pointing to the lack of "any limiting provision." Joint Brief, p. 22. The very language that EastCC and Palmetto quote, however, contains two crucial limitations: subcontractor liability is limited to "the performance of the Work" and to the "actions or inactions of the Subcontractor . . ." See A. pp. 1455, 1468. As will be argued in further detail below, "Work" is a defined term that encompasses only the materials or labor provided by the subcontractor. See A. pp. 1451, 1464. The scope of the liability is therefore limited to only the materials or labor provided by the subcontractor, which falls well within the scope of Section 32-2-10. If this opening language is supposed to articulate the goal for the entire provision, as appellees argue, then the stated goal can only be that the indemnification obligation of the subcontractors *is* inherently limited.

Second, EastCC and Palmetto turn to Section 6(b)(2) to argue that subsection 6(b)(2)(iii) requires that the contractor indemnify BFS for its own negligence. However, the text of Section 6(b)(2) establishes that the subcontractor is liable for claims "to the extent of liability resulting

from Subcontractor's negligence or willful misconduct" arising out of a series of situations, including "(iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations." This language is explicitly limited to the "Subcontractor's negligence or willful misconduct," as permitted by Section 32-2-10. See A. pp. 1456, 1468-1469. Moreover, the effect of subsection (iii), which is always limited by the prefatory language of Section 6(b)(2), is for the subcontractors to remain responsible for *their own "omissions"* that may have occurred during BFS's alleged failure to supervise; it does not make them liable for the failure to supervise itself (which is its own cause of action), but only for their own concurrent actions. See Id. Not only is this reading supported by the plain text, but it is an interpretation that gives meaning to all parts of the subsection *and* results in a legal outcome; when such an interpretation is available, courts should adopt it. See, e.g., Crenshaw v. Erskine Coll., 432 S.C. 1, 42, 850 S.E.2d 1, 22–23 (2020) (quoting from C.J.S. that "[a] construction rendering a provision, term, or part meaningless ... should be avoided."); see also Restatement (Second) of Contracts § 203 (1981) (providing that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect").

Because neither of the indemnity provisions highlighted by EastCC and Palmetto require the subcontractors to indemnify BFS for BFS's own negligence, the indemnity provisions do not violate Section 32-2-10.

B. Any portions of the 2005 Contracts that may violate Section 32-2-10 do not invalidate the entire contract; rather, the terms of the statute provide that only the illegal provision is invalid.

EastCC and Palmetto cite to other provisions of the 2005 Contracts that are irrelevant to the indemnity provision applicable to this litigation, arguing that they violate Section 32-2-10. BFS has argued extensively in prior briefs that these provisions are not problematic when properly

read. However, even if these provisions did violate Section 32-2-10, which they do not, they would not affect the integrity of the relevant indemnification agreement within the 2005 Contracts because, contrary to the assertion of appellees, one invalid provision does not invalidate the entire Contract.

Section 32-2-10 speaks in terms of a "promise or agreement" to indemnify another party. EastCC and Palmetto claim that the court in D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC "render[ed] the contract void as against public policy." Joint Brief, p. 23. However, they are mistaken and BFS notes that the D.R. Horton court was very careful not to say that the contract itself was void. Instead, the D.R. Horton court said things like "the indemnification clause is void as against public policy to the extent it purports to require BFS to indemnify D.R. Horton for damages caused by its negligence," or "[t]he indemnification agreement in this case . . . violates the statute," or "the illegal contractual indemnification term ... proves fatal [to the claim]." D.R. Horton, 422 S.C. at 152-53. Contrary to EastCC and Palmetto (and ECC and AC) argument, the D.R. Horton court did not invalidate the entire contract, but rather only it invalidated the specific "agreement" that called for BFS to indemnify D.R. Horton for D.R. Horton's own negligence. Moreover, the D.R. Horton court even noted that to the extent that the indemnification provision allowed D.R. Horton to recover from BFS for BFS's own negligence, that portion of the indemnification provision did not violate public policy. Id. at 152. Because EastCC and Palmetto's arguments replicate ECC and AC's arguments on this issue, BFS adopts by refence and incorporates herein, its arguments set forth on pages 10-13 of its Reply Brief to ECC and AC.

Because the indemnity provision set forth in Section 6(b)(2) of the 2005 Contracts, which is the operative indemnification agreement for BFS with respect to EastCC and Palmetto, does not violate Section 32-2-10 (a statute which in fact explicitly states it cannot be used to strike down

such an indemnification provision), the holding of the court of appeals on this issue should be reversed.

III. Here, where BFS does not seek indemnification for its own negligence, the indemnification provision in the 2005 Contracts is not required to be set forth in "clear and unequivocal" terms.

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.").

As discussed, *supra*, BFS is not seeking indemnification for its own negligence, whether sole or concurrent. Thus, the "clear and unequivocal" standard is not triggered. Moreover, the subclause that EastCC and Palmetto take issue with – Section 6(b)(2)(iii) – is at best only peripherally relevant to this litigation, but more importantly, not even that subclause attempts to relieve BFS from the consequences of its own negligence. As previously explained, the black and white text of subsection 6(b)(2)(iii) requires the subcontractors to remain responsible for *their own "omissions"* that may have occurred during BFS's alleged failure to supervise. See A. pp. 1456,

1468-1469. BFS also craves reference to and adopts its arguments set forth on pages 31-33 of its Brief.

EastCC and Palmetto also argue that Section 8(i), which deals only with liens and is not relevant to this litigation, should trigger the heightened clear and unequivocal standard. A plain reading of Section 8(i) however, confirms that the section relates only to liens incurred by the subcontractor in implementing its scope of work, and not to liens incurred by BFS. There is, therefore, nothing in Section 8(i) which would implicate the clear and unequivocal standard.

Even if it did, and BFS maintains that it does not, the heightened standard would only apply to Section 8(i), not to the entire contract. Concord & Cumberland speaks of the heightened standard as applying to a "clause," which, Black's Law Dictionary defines as "[a] distinct section or provision of a legal document or instrument." CLAUSE, Black's Law Dictionary (12th ed. 2024). The parties' contracts, both the 2005 and Later Contracts, are made up of many separate and distinct sections, paragraphs, provisions, and clauses. Even if one could apply the heightened standard to a clause in Section 8, there is no evidence or justification for applying them to the clauses in Section 6.

EastCC and Palmetto continue to make several generic arguments about why the heightened standard should apply; however, these arguments are each identical or nearly identical to those in the ECC and AC briefs. Rather than repeat identical reply arguments here, for the remaining arguments in this section BFS craves reference to its Reply Brief filed in response to the briefs of ECC and AC.

In summary, the parties' 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

EastCC's and Palmetto's contentions to the contrary, reverse the court of appeals' Opinion, and remand BFS's contractual indemnification cause of action to trial.

IV. The Court of Appeals did not honor the meaning of the plain language and defined terms in the 2005 Contracts.

EastCC and Palmetto contend that the 2005 Contracts are ambiguous because "[s]ome language suggests that indemnity is limited to damages caused by the subcontractor, while other provisions impose defense and indemnification obligations even when liability arises from BFS's own supervisory failures or material selections." Joint Brief, p. 37. This is a misreading of the contract.

The language allegedly creating liability even for "BFS's own supervisory failures" is Section 6(b)(2)(iii). As has already been explained in Sections II and III, supra, the text of Section 6(b)(2) establishes that the subcontractor is liable for claims "to the extent of liability resulting from Subcontractor's negligence or willful misconduct" arising out of a series of situations, including "(iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations." Subsection (iii), then, creates liability, which is always limited to the "Subcontractor's negligence" by the language of Section 6(b)(2), for the Subcontractor's own "omissions" that may have occurred during BFS's alleged failure to supervise. EastCC and Palmetto's argument relies entirely upon the subcontractors being liable for the failure to supervise, but this language does not make them liable for the failure to supervise; it only makes them liable for their own concurrent actions or omissions that occurred while BFS was supervising. Subcontractor negligence and failure to supervise are two distinct theories of recovery; the subcontractors can certainly be liable for their negligence independent of any failure of BFS to perform any supervision duty.

The second set of allegedly problematic language is that which creates liability that "arises from BFS's . . . materials selection." East Coast and Palmetto can only construct such language by arguing that Section 6(2)(b)(ii) requires indemnification for "alleged defects in materials provided in connection with the Work." Joint Brief p. 39 (internal quotations omitted). Here, the parties agree that "Work" is a defined term that is limited to materials and services provided by the subcontractor. Joint Brief p. 38.

Where the parties disagree, however, is whether the definition of "Work" is relevant to subsection 6(b)(2)(ii). This subsection, when read in context with the language of subsection 6(b)(2), provides that the indemnification obligation exists "to the extent of liability resulting from Subcontractor's negligence or willful misconduct . . . aris[ing] out of . . . (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work . . ."

First, subsection (ii) is always limited by the prefatory language of Section 6(b)(2), which limits the subcontractors' indemnification obligation "to the extent of liability resulting from Subcontractor's negligence or willful misconduct." If the "materials" in question were materials supplied by BFS, then there could be no implication of Subcontractor negligence or willful misconduct vis-à-vis those materials, and thus, no indemnification obligation.

Second, and equally importantly, EastCC and Palmetto misleadingly quote from section 6(b)(2)(ii). They speak repeatedly only of the "materials provided in connection with the Work." The text, however, clearly speaks of "*services or materials* provided in connection with the Work." This is important because the definition of "Work" itself includes the exact words "services" or "materials" and limits them to those provided by the subcontractor. Thus, the use of the terms "services" or "materials" in Section 6(b)(2)(ii) to speak about "the Work" harkens back to the same use of those words in the definition of Work. A cannon of statutory interpretation that is instructive

here is that identical words used in different parts are assumed to have the same meaning. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 86, 126 S. Ct. 1503, 1513, 164 L. Ed. 2d 179 (2006). Thus, "services or materials" in both the definition section and in Section 6(b)(2)(ii) refer only to those services or materials provided by the subcontractor. Limiting the definition of "materials" to those supplied by the subcontractor serves the goal of a harmonious reading of the contract, which was urged by EastCC and Palmetto.

The contractual interpretations put forward by BFS in this section have additional persuasive value: when faced with an interpretation that voids a contract and one that reads it lawfully, courts should choose the interpretation that renders the contract lawful. Restatement (Second) of Contracts § 203 (1981) (providing that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect"). Because the interpretations offered by EastCC and Palmetto are unsupported by the text and attempt to render the contract unlawful, the Court should reject their interpretations and adopt those proposed by BFS.

V. Any offending contractual language could be properly severed.

EastCC and Palmetto argue that severance is inappropriate because indemnification obligations are found in Sections 3, 6, and 8(i). Only the indemnification obligation imposed by Section 6, which provides for indemnification for claims arising out of property damage, is implicated in this litigation. BFS has argued repeatedly that Section 6, whose indemnification obligation is always limited to "the actions or inactions of the Subcontractor," is consistent with South Carolina statutory and common law. While BFS also maintains that the other sections are likewise lawful, if the Court disagrees, the Court can effectively sever the provisions and leave the remaining indemnification provision intact.

East Coast and Palmetto's arguments against severance are completely identical to those articulated in ECC's and AC's briefs. Thus, for further arguments regarding the availability of severance, BFS craves reference to its arguments in its reply brief responding to ECC and AC. BFS also reiterates its arguments on severance from its initial Brief at pages 36-40.

VI. The contractual provisions are neither oppressive nor unconscionable.

East Coast and Palmetto argue as an alternative sustaining ground that the 2005 Contract is unconscionable. Their brief fails to back up this allegation with any substantial argument. In order to carry their burden that the contract at issue is unconscionable, the appellees would need to show that the 2005 Contracts demonstrate "a lack of meaningful choice coupled with unreasonably oppressive terms." Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022). A contract's "terms are unconscionably oppressive and one-sided when they are such that no reasonable person would make them and no fair and honest person would accept them." 315 Corley CW LLC v. Palmetto Bluff Dev., LLC, 444 S.C. 521, 533, 908 S.E.2d 892, 898 (Ct. App. 2024), reh'g denied (Nov. 13, 2024), cert. granted (June 25, 2025) (internal quotations omitted).

East Coast and Palmetto point to only two provisions of the 2005 Contracts on which they rely for the argument that the entire contract is unconscionable. The first allegedly unconscionable provision is Section 6, which governs indemnity, and, as discussed above explicitly and in multiple places limits the indemnification obligations to the negligence, willful misconduct, acts, or omissions of the subcontractors. This limitation on indemnification does not operate to BFS's benefit but only to the subcontractors' benefit, and thus it is not oppressive; because the provision is fair – the culpable party will pay for the damage it caused, and only that damage – it cannot be the basis for an oppressive and unconscionable contract.

The second provision of the 2005 Contracts that EastCC and Palmetto allege renders the contracts unconscionable is Section 8(a), which, notably, is not implicated in this litigation. This section, which EastCC and Palmetto have dubbed a "pay when paid" provision, cannot be the basis for finding the entire 2005 Contract unenforceable. Even if Section 8(a) were found to be unenforceable under Section 29-6-230, courts have invalidated the specific "pay when paid" provision, *not* the entire contract. See J&H Grading & Paving, Inc. v. Clayton Constr. Co., Inc., 441 S.C. 272, 278, 892 S.E.2d 558, 562 (Ct. App. 2023) (holding that "the 'pay when paid' *provision* of the Subcontract was unenforceable") (emphasis added).

For the remainder of its argument, EastCC and Palmetto incorporate the arguments made against the Later Contracts. They have not, however, even attempted to meet their burden to show that the language from the Later Contracts is identical to that in the 2005 Contracts. Additionally, BFS has already dedicated many pages to arguing why the provisions of the Later Contracts are not unenforceable when properly read (see BFS Brief, pages 28-36, where BFS goes section-by-section explaining why the warranty, indemnity, and waiver of lien provisions of the Later Contracts are not illegal and oppressive), and to the extent that EastCC and Palmetto *can* make identical arguments, BFS herein incorporates its responses from its opening brief and reply briefs to the parties to the Later Contracts.

VII. BFS's Cause of Action is not Barred by the Statute of Repose

EastCC and Palmetto argue that the indemnification claims of BFS are barred by the statute of repose. South Carolina Code Section 15-3-640 establishes an eight-year statute of repose in actions arising out of construction defects. Section 15-3-670, however provides that the statute of repose is not available as "a defense to a person guilty of fraud, gross negligence, or recklessness."

Specifically, the statute provides that, "the violation of a building code . . . may be admissible as evidence of fraud, negligence, gross negligence, or recklessness." Id.

Plaintiffs have alleged against BFS a cause of action in "Negligence/Gross Negligence." See ¶ 73 of Plaintiffs' Third Amended Complaint. As long as Plaintiffs are allowed to continue to seek recovery from BFS for the work of BFS's subcontractors that falls outside the statute of repose on the "gross negligence" exception, BFS may proceed with its third-party claims against EastCC and Palmetto for the same conduct and for the same reason. Contrary to EastCC and Palmetto's assertions, it does not matter whether the cause of action under Section 15-3-640 is one for negligent construction under subsection 2 (like the Plaintiffs' cause of action against BFS) or for indemnification under subsection 6 (like BFS's cause of action against appellees); section 15-3-670 makes the statute of repose defense unavailable to a party under both types of actions.

Here, EastCC and Palmetto were responsible for installation of windows and doors at the Retreat at Charleston National project. Plaintiffs' expert witness Gary Freeman testified that the windows were not installed pursuant to the window manufacturer's installation instructions. Specifically, Mr. Freeman took issue with not only the type of fastener, but also with the spacing of the fasteners used by Respondent subcontractors, including EastCC and Palmetto, in the installations of the windows. See Freeman Deposition, A. p. 1107, ll. 15-25, p. 1111, ll. 22-25. Moreover, Mr. Freeman also took issue with the exterior door installation, contending that the doors were not installed in 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. Mr. Freeman's deposition testimony is evidence of building code violations and therefore, neither EastCC nor Palmetto may invoke the statute of repose as a defense.

CONCLUSION

For the reasons outlined herein, and for the reasons articulated in its opening brief, BFS respectfully requests that this Court reverse the holdings of the lower courts in this case.

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