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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. 2025-001496
Case No. 2019-CP-10-00772

Opinion No. 2025-UP-082

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

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

AND

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

PETITIONER's REPLY BRIEF

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BFS Reply to Hurley Brief Pavic Appeal

I. BFS properly preserved its genuine issue of material fact argument.

For the first time on appeal, Respondent Hurley Services, LLC (hereinafter "Hurley" or "Respondent subcontractor") argues that Petitioner Builders FirstSource – Southeast Group, LLC's (hereinafter "BFS") failed to preserve its argument that the Record includes evidence that created a genuine issue of material fact, which should have precluded the trial court's grant of summary judgment. See Hurley Brief, p. 30. Hurley bases this argument upon the BFS failure to appeal the trial court's dismissal of BFS's negligence cause of action, and that upon the BFS concession that its negligence cause of action was subject to dismissal pursuant to Stoneledge. Id. at p. 30.

Hurley, in making its argument, fails to appreciate that Hurley's alleged negligence is at the heart of BFS's indemnification claims, both contractual and common law. Hurley's negligence is the sole basis upon which BFS seeks to recover in indemnity from Hurley, whether by contract or by common law. See BFS indemnification cause of action (A. pp. 124-126). The only relevant indemnity provision - the indemnity provision in the first paragraph of Section 5 Indemnity (A. p. 491) - authorizes BFS's recovery in indemnity against Hurley only for such liability or damages, as may be determined to result in whole or in part from the negligent acts or omissions of Hurley. Where, as here, BFS seeks indemnity limited to the negligence of its indemnitee, our courts have determined that BFS's alleged causes of action for negligence, breach of warranty, and breach of contract are merely disguised claims for indemnity. Although the rationale of the Stoneledge opinions may ultimately be subject to further appellate scrutiny, BFS appreciates that such is the current case law in South Carolina, and it did not contest Hurley's argument that its causes of action for negligence, breach of express warranty, breach of implied warranty, and breach of

contract were subject to dismissal. However, BFS has argued vigorously against Hurley's contention that Stoneledge or its rationale required dismissal of the contractual indemnification cause of action. See Transcript, A. pp. 468-469.

Moreover, and contrary to Hurley's new argument, BFS has consistently maintained and properly preserved its argument that the testimony of the Plaintiff's forensic expert, R.T. Mease, PE, creates a genuine issue of material fact which should preclude an award of summary judgment.

BFS, in opposing Hurley's Motion for summary judgment, initially emphasizes that the evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to BFS, present genuine issues of material fact, which preclude summary judgment in favor of Hurley. See BFS Memorandum in Opposition, A. p. 334. Therein, BFS highlighted the deposition testimony of Mr. Mease, who claimed that the windows, associated flashings, and building wrap installed by Hurley around the windows were not proper and constituted building code violations. See Id., A. pp. 335-336; also, Exhibit A to BFS Memorandum in Opposition, A. pp. 352-360.

During BFS's oral arguments before the trial court, counsel for BFS reiterated the fact that Plaintiffs' claims of deficient installation of windows and flashings were supported by the testimony of their primary forensic expert, engineer R.T. Mease. See Transcript, A. pp. 466-467. BFS counsel noted (a) that Mr. Mease testified that alleged deficiencies in the window and associated flashing installations were violations of the relevant building code, (b) that those violations contributed to water intrusion and associated damages, and (c) that any informed subcontractor should know the appropriate installation of those components as it is set forth within the code. See Transcript, A. p. 467. BFS's counsel further noted that, although BFS contests Mr. Mease's findings and opinions, the Mease testimony is nonetheless viable evidence which must

be considered by this Court in determining whether or not there is, in fact, any genuine issue of material facts as to the negligence of Hurley. See Id.

At the conclusion of BFS's oral argument, the trial court noted that it understood that "there is evidence in the record by virtue of Russell Mease, who has identified installation problems." See Transcript, A. p. 481. Moreover, the trial court confirmed that BFS's Memorandum and all of its exhibits were properly before the court, are all part of the record, and all are fully incorporated therein for purposes of the hearing. See Id., A. pp. 481-482. The trial court adopted, signed, and entered an Order prepared by Hurley which stated, in part, "BFS also contends that there are issues of material fact relating to installation of windows by Hurley." See Order, A. p. 7. As clearly reflected by the Order itself, the Court considered and disposed of the alleged genuine issues of material fact. No further challenge was necessary in order to preserve the issue before appellate review.

The issue - whether summary judgment was proper in light of the genuine issue of material fact regarding Hurley's negligence – was properly preserved. See BFS Final Brief, A. p. 663 (BFS's sixth statement of the issues on appeal included, "Did the Trial Court inappropriately grant summary judgment to Respondents despite the present of genuine issues of material fact?"). Before the court of appeals, BFS reiterated its contentions regarding Mr. Mease's testimony, arguing that the evidence suggests negligent acts or omissions of Hurley in installation of the windows and related flashings, and at the very least it establishes evidence adequate to preclude summary judgment in favor of Hurley. See Id., A. pp. 685-688.

More important to this Court's determination of this issue, it must be noted that, in its Brief at the Court of Appeals, Hurley never contended that BFS did not properly preserve its genuine issue of material fact argument. Instead, Hurley agreed that there are issues of material fact that

will be decided in connection with BFS's equitable indemnity claim pending before the lower court. See Hurley Final Brief, A. p. 735. Thus, Hurley conceded on appeal that there are genuine issues of material fact, and its current arguments contrary to that concession are without merit, and should be rejected by this Court.

II. Hurley admits that there are genuine issues of material fact regarding its window installation.

As noted under Argument I, Hurley admits that there are genuine issues of material fact regarding Hurley's window installation. See Hurley Brief, p. 33; A. pp 735-736. This admission by Hurley, in and of itself, warrants reversal of the lower courts' Order and Opinion.

III. Hurley is not a "labor-only" subcontractor.

In the other pending appeals before this Court, regarding BFS contractual indemnification claims against its subcontractors, Hurley has argued that it did not supply any materials for construction of the Pavic residence, and that it served only as a "labor-only" subcontractor. See e.g. Hurley Brief, pp. 1, 4. Hurley cites to BFS's discovery responses as evidence to support this contention. However, BFS's discovery responses also provide that discovery is ongoing and that it will rely upon the testimony of Terry Rosamond, Rooster Cannon, and others to establish its claims. See A. pp. 651-653, citing BFS discovery responses set forth at A. pp. 519-524. Today, discovery remains outstanding as Hurley filed its Motion prior to depositions of the foregoing witnesses. Nevertheless, as noted by BFS's installation manager, Bill Crabtree, all of BFS's installation subcontractors, including Hurley, are responsible for supplying fasteners necessary for installation of windows and doors. See BFS Motion to Supplement Record in Appellate Case No. 2025-001224 Builders FirstSource-Southeast Group, LLC v. Palmetto Trim and Renovation. As noted in Argument I, the Plaintiff's forensic expert, R.T. Mease, offered testimony alleging deficiencies in installation of windows and related components. Thus, whether Hurley did or did

not supply fasteners used for installation of the windows, associated flashing, and weather resistant barrier around the windows at the Pavic residence is immaterial to BFS's contractual indemnification cause of action seeking to recover any liability or damage determined to result from Hurley's negligent acts or omissions in installing the windows and associated flashings. Nevertheless, Hurley's "labor-only" contention is yet another example of Hurley's misrepresentations to the lower courts, and of the errant findings by the lower courts in the absence of any supporting evidence.

IV. Plaintiffs' allegations, and even a jury's finding, of BFS's negligence do 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 then urges application of the "clear and unequivocal" standard to the contractual provision allowing indemnity against liability occasioned by Hurley'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.

BFS's right to present its indemnification cause of action, even at common law, is not necessarily lessened even if it is 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.

Moreover, here, the general rule simply does not apply, as the rights of the parties are governed by contract, by which Hurley agreed that it would indemnify and hold BFS harmless from and against any property damage claims "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. 491; 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' acts and omissions, if it is determined that BFS is liable for Plaintiffs' damages, and that any such liability resulted in whole or in part from Hurley's acts or omissions, BFS would then be entitled to recover in indemnity from Hurley for any such liability. Equally importantly, 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, and, if it is also 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.

Under any of the aforesaid circumstances, BFS is seeking indemnity only against liability for damages resulting from its subcontractor's negligence, whether such negligence is solely that of the subcontractor, or concurrent with the negligence of BFS. Under any of these scenarios, the relevant contractual indemnity provision would be construed under rules for construction of contracts generally, and not under the "clear and unequivocal" standard.

BFS recognizes that the assertion of a claim for contractual indemnity seeking recovery against liability for damages caused by the negligence of BFS itself would require that the relevant indemnity provision be subjected to the heightened "clear and unequivocal" standard. However, BFS is not seeking this type of indemnity from Hurley in the instant litigation, and the application of the clear and unequivocal standard is thus inappropriate and inconsistent with precedent.

Our courts have historically recognized that contractual indemnity provisions are to be construed in accordance with rules of construction of contracts generally. See Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989); Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). The exception to this basic rule arises **only** when a party seeks to be indemnified from its own negligent acts, and in such instance, the heightened "clear and unequivocal terms" standard will be applied to the indemnity provision. See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 490, 763 S.E.2d 19, 20 (2014); Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003).

In Concord & Cumberland, the court of appeals acknowledged and attempted to clarify those circumstances under which the respective standards are to be applied. However, here, the court of appeals' opinion runs afoul of and directly contradicts these precedential cases.

In Concord & Cumberland, Superior was a general contractor who hired Muhler as its subcontractor. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643, 819 S.E.2d 166, 168 (Ct. App. 2018). When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to the parties' contract. See Id. at 645, 169. Superior claimed that the contractual provisions required Muhler to indemnify Superior, and that Superior's right to indemnity was not lessened by any concurrent negligence of or causation by Superior. Id. Muhler countered that the relevant contract provisions did not require it to indemnify Superior for Superior's "own wrong-doing." Id. The trial court found, and the court of appeals agreed, that in order for Superior to prevail on a claim seeking indemnity *for its own negligence* (as opposed to indemnity for the negligence of its subcontractor), it was required to show that the contract language granting that right was set forth in clear and unequivocal terms. Id. Further, the court of appeals found that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence. Id. at 646, 170. Notably, the court of appeals in Concord & Cumberland did not hold that the heightened standard applied to Superior's claim seeking indemnification for Muhler's sole or concurrent negligence. Id. Because the court of appeals found that the language in Superior's contract did not meet the heightened standard, it held that the contract did not require Muhler to indemnify Superior for Superior's own negligence and instead affirmed the trial court's decision that *"limited indemnification to damages resulting from the work Muhler performed."* Id. at 645 (emphasis added), 657. Thus, despite overt representations by the general contractor that it was seeking indemnity for

damages resulting from both its own negligence and the negligence of its subcontractor, the court of appeals in Concord & Cumberland nonetheless allowed the general contractor to recover from its subcontractor for damages resulting from the work of the subcontractor.

To arrive at this conclusion, the Concord & Cumberland Court recognized that Superior's contractual indemnification claim encompassed both a claim to be indemnified for its own negligence as well as a claim to be indemnified for the negligence of the subcontractors. Further, the court recognized that the two types of claims are subject to two different standards of review. To the claim for indemnification for Superior's own negligence, the court applied the heightened clear and unequivocal standard and found that the contract could not meet that heightened standard; however, for the second type of claim — Superior's claim to recover for its subcontractor's negligence (whether sole or concurrent) — the Court recognized that the contract provision allowing for such indemnification would be construed "in accordance with the rules for the construction of contracts generally." Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170 (Ct. App. 2018)(quoting Campbell v. Beacon Mfg. Co., 313 S.C. at 453, 438 S.E.2d at 272).

Notwithstanding the clear distinctions drawn by the Concord & Cumberland court, Hurley argues that BFS cannot recover in contractual indemnity, even for the concurrent negligence of Hurley, unless the language of the contract satisfies the heightened "clear and unequivocal" standard. Hurley's argument is contrary to the determination of the Concord & Cumberland Court, which explicitly found that the heightened "clear and unequivocal" standard applies whether a contractor (the indemnitee), sought indemnification for its own negligence, whether sole or concurrent with the negligence of the subcontractor/indemnitor. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646, 819 S.E.2d 166,

170 (Ct. App. 2018). The Concord & Cumberland court further recognized that a contractual provision imposing an obligation to indemnify against liability resulting from the negligence of the subcontractor/indemnitor would be construed in accordance with the rules for construction of contracts generally, and not the heightened "clear and unequivocal" standard.

Most troubling is Hurley's contention that by seeking indemnification for Hurley's concurrent negligence, BFS is necessarily pursuing recovery for its own negligence. Return p. 4. Hurley notably provides no citation following this statement, or any logical syllogism that would compel this conclusion. This argument is contrary to the common law of this state and should be rejected by this Court.

V. 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 although not the general contractor on the Pavic residence, BFS, as the mere holder of an unlimited general contractor's license, had nondelegable statutory and common law duties to inspect and supervise the work of its subcontractors. Hurley Brief, p. 5. Hurley argues that the parties' contract required Hurley to follow the directions of BFS. Hurley also argues, without citing to any evidence, that "BFS admitted responsibility for supervising the work performed by its subcontractors." However, neither the mere fact that BFS may hold an unlimited general contractor's license, nor BFS alleged supervision is sufficient, in and of itself, either (a) to support any potential determination that BFS was negligent simply because Hurley is determined to have been negligent, or (b) to preclude BFS recovery in contractual indemnity for damages resulting from the negligence of Hurley.

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 any damage to Plaintiffs caused

by Hurley necessarily results from BFS's concurrent negligence. See Hurley Brief, p. 5. 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 herein by BFS (South Carolina Electric and Gas, Co. v. Utilities Construction), but by the determination of the court of appeals in the matter of Concord & Cumberland (where the court, pursuant to the relevant indemnity provision – a provision which did not satisfy the "clear and unequivocal" standard - allowed recovery, by the contractor, against its negligent subcontractor, notwithstanding the concurrent negligence of the contractor itself). See 244 S.C. 79 (1964); also 424 S.C. 639 (Ct. App. 2018).

Equally importantly, Hurley cites no authority to support its implicit contention that a general contractor, or any other contracting entity, is precluded from recovery in contractual indemnity for damages occasioned by the negligence of its subcontractor.

For these reasons, the Court should reverse the court of appeals' Opinion and remand BFS's claims for trial, as the respective negligence of the parties is a question of fact to be resolved by the responsible fact finder.

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

Hurley effectively contends that because it was a subcontractor of BFS, if it is negligent, then BFS is necessarily negligent also. However, it is entirely possible for Hurley to be negligent without BFS being negligent. Because Hurley was responsible for installing the flexible self-adhered membrane flashing to the appropriate depth in the rough opening of the framing, and for

appropriate integration of the flashing with the window and the adjacent weather resistant barrier, it is entirely possible that Hurley was not only negligent, but that Hurley was grossly negligent or reckless in the installation of the windows and associated flashing. It is equally possible that Hurley represented to BFS that it was installing the flashing pursuant to the manufacturer installation instructions, and that, after BFS left the job-site, Hurley deviated therefrom. As part of the window installation, Hurley is required to install the window over the flexible flashing installed in the rough opening of the framing, which then conceals the depth of the flashing installed by Hurley. This possibility exists because BFS is not required to supervise each and every piece of flexible flashing 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. 492-493. Hurley controls its means, manner, and method of construction for performing its Work. Id. Because questions of material fact remain outstanding, it is entirely possible that BFS is able to convince a jury that notwithstanding its limited supervision or inspection of Hurley's window installation, that Hurley was negligent and BFS was not as it relates to Hurley's installation of flashing components and weather-resistant materials at the project. Even if a jury determined that BFS was also negligent as it relates to Hurley's flashing installation, a jury would also determine the respective negligence of the parties and the corresponding resulting damages. Only where it is determined that Hurley was not negligent would BFS not be entitled to recover indemnity from Hurley.

VII. The Stipulation should be dispositive of the notion that Hurley may be held liable to BFS for defects with the windows supplied by BFS.

Hurley argues that the parties' contract imposes the obligation on Hurley to indemnify BFS for defective windows sourced and supplied by BFS. See Hurley Brief, p. 8. Hurley acknowledges that the Plaintiffs stipulated that they were not asserting claims against any defendant or third-

party defendant for any defect in the development, design, manufacture, production, sale or distribution of the windows installed at their residence. See Hurley Brief, p. 9. Nevertheless, Hurley argues that the Stipulation between BFS and Plaintiffs is not relevant because it does not limit the scope of indemnification the parties' contract imposed on Hurley. See Id. at p. 8. Hurley argues that unlawful terms and exhaustive indemnification terms place Hurley on the hook for any and all damages attributable to any materials, including windows, installed by Hurley whether the damage was caused by the defective product or by negligent installation. See Id.

However, Hurley misrepresents, and the lower courts erroneously misconstrued, the Stipulation. In the Stipulation, BFS contended that the windows were installed by Hurley. See A. p. 260. BFS contended that its claims asserted against the window manufacturer were premised upon deficiencies in design, development, manufacture, production, and sale of the windows as potentially alleged within the Plaintiffs' Third Amended Complaint. See Id. BFS did not and has not contended that its claims against Hurley are premised on defects in design, manufacture, or sale of the windows. See Id.

As explained in BFS's Brief and further clarified below, BFS's pleadings, the parties' contract, evidence in the Record, and controlling law call for this Court to reject Hurley's arguments, reverse the Opinion of the Court of Appeals, and remand BFS's contractual indemnification cause of action against Hurley to the trial court.

VIII. 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. 10. This argument relies on Hurley's incorrect notion that it was a labor-only subcontractor. See Section

III 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 IV, 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, or on the incorrect notion that BFS is seeking to recover for window defects - plainly seeks recovery from Hurley only for any liability determined to result from the negligent acts or omissions of Hurley. See BFS Brief, pp. 13-19. Moreover, even if the BFS cause of action is construed as expansively as is urged by Hurley, such cause of action would necessarily encompass a BFS claim for indemnity against liability for damages caused by Hurley's negligence. It was, therefore, error for the lower courts to preclude BFS from pursuing indemnity for such damage determined to result from Hurley's acts or omissions. See BFS Brief, pp. 17-20.

IX. 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. 13-18.

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, "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. 13. 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." Hurley Brief, p. 13. Hurley's argument ignores relevant language limiting the provision. Thus, Hurley's argument relies upon a hypothetical which does not exist.

The reality is that Work is a defined term, which even Hurley appears superficially to admit. 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. 491. This limiting language, which Hurley's counsel completely ignores, is totally consistent with the arguments asserted by BFS.

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

As explained in Section III above, while BFS supplied the windows, Hurley supplied the fasteners used for installation of the windows at the project. As noted in section III.B.1. of BFS's brief, Section 3 Warranty does not call for Hurley to warrant materials provided by BFS. See BFS Brief, pp. 27-29. Instead, Hurley is obligated only 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 in indemnity from Hurley for property damage that is determined to result from Hurley's negligent acts or omissions in installing the windows and associated flashings and weather barrier.

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. 694-695. 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 Subsection 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.

Subsection 8(i) applies only to the "fullest extent permitted by law," and relates only to liability for damages occasioned by mechanics and materialmen's liens, arising out of the services, labor, equipment, or materials furnished by subcontractors. See A. pp. 495-496. The clear intent of Subsection 8(i) is for the subcontractor to indemnify BFS against damages arising from the failure of the subcontractor to satisfy liens resulting from the subcontractor's failure to pay the subcontractor's own subcontractors or suppliers for the services and materials they provided to the subcontractor in conjunction with the Work performed by the subcontractor. See Id. Subsection 8(h) begins with: "*Subcontractor will promptly pay when due all charges **owed by it**....*" This opening language speaks to the Subcontractor's agreement to pay which is also the title of subsection 8(h). See A. p. 495. Subsection 8(h) also provides that "[i]f Contractor reasonably believes that Subcontractor has failed to pay when due all charges owed by Subcontractor for its labor, services, materials, equipment, tools, and supplies, Contractor may issue joint checks made payable to Subcontractor and other parties owed by Subcontractor or directly to those parties owed by Subcontractor in Contractor's sole discretion." Id. This provision allows BFS to pay any party

to whom the Subcontractor owes payment for such party's labor, services, materials, equipment, tools, and supplies provided to the Subcontractor. See A. p. 495. The indemnity provision in subsection 8(i) further provides that the Subcontractor will hold BFS harmless from any mechanics' or materialmen's liens arising out of the services, labor, equipment, or materials furnished by the Subcontractor or its suppliers or subcontractors.

Thus, when properly read, subsection 8(i) does not stand for what Hurley's counsel contends – i.e. that the subcontractor must hold BFS harmless from mechanics' or materialmen's liens placed on the project from any non-payment owed by BFS. Equally importantly, and as stated hereinabove, the indemnity obligations of subsection 8(i) are imposed only to the "fullest extent permitted by law," **have not been relied upon by BFS in the pursuit of its contractual indemnity claims in this matter, and are completely irrelevant to the assertion of the contractual indemnity claims here, claims which pertain to Plaintiffs' alleged property damage resulting from deficiencies in installation work performed by Respondent subcontractors.**

Further responding to Hurley's subsection 8(i) argument, BFS would note that 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. The parties have not deposed BFS's fact witnesses, however, those witnesses in other appeals pending before this Court 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. 17. 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 the incorrect notion that Hurley "furnished no materials to the project except those given to it by BFS." See Id. As explained in Section III above, Hurley is incorrect, discovery remains outstanding, and the only testimony on the subject established that Hurley was responsible for and did supply the fasteners to install the windows at the project. However, as noted hereinabove, whether Hurley supplied materials is not relevant with respect to BFS's claim against Hurley for indemnity for negligent installation of windows and associated flashings. Moreover, 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. 17. 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 [Hurley], any agent, employee, or representative of [Hurley], or any of [Hurley's] subcontractors." See A. pp. 491-492. 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 Hurley, but this case also does not involve bodily injury claims of 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, it is abundantly clear that BFS is entitled, under the first paragraph of Section 5, to recover indemnity only 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, in a completely separate and independent paragraph, that BFS may seek indemnity from Hurley in a separate unrelated matter involving alleged bodily injury to 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. 18. 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 any evidence in the Record where BFS makes such contention.

While not relied upon by BFS in the assertion of its contractual indemnification claim, the third paragraph of Section 5, by its terms, provides that "duty to defend under this Section 5 is independent and separate from the duty to indemnify." See A. p. 492. Not once has BFS made a demand on Hurley that Hurley 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. 492, "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 a breach of contract claim against Hurley for failing to comply with any obligation imposed by the third paragraph of Section 5. Therefore, Hurley's arguments regarding the third paragraph of Section 5 are moot and should not be considered by this Court.

X. 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 by the fact finder to have resulted in whole or in part from the negligent acts of omissions of Hurley. BFS is seeking such indemnification from Hurley because that is what the parties agreed to and that is what the parties' contract provides BFS the right to seek. See A. p. 492. Such indemnification agreement is neither "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.

Moreover, while there is no provision in BFS's contract that is illegal, even if Hurley were correct that a clause, provision, or entire section in the parties' contract were violative of Section 32-2-10, the statute, by it express terms, does not render the entire contract void and unenforceable.

In an attempt to avoid potential liability for their own negligent actions, Hurley argues 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 both the statute and caselaw.

Because this case arises from the Plaintiffs' claims of property damage, the claims implicate the indemnity provision set forth in the first paragraph of Section 5 Indemnity of the parties' contracts. This indemnity provision allows BFS to recover from Hurley, "but only to the extent [of losses and subsequent attorneys' fees] caused in whole or in part by any negligent act or omission of the subcontractor." A. p. 491. This indemnity agreement complies with – and is in fact specifically authorized by – Section 32-2-10. Further, this indemnity provision provides a legitimate, licit means of recovery, and nowhere do the Respondents argue otherwise.

Instead, Hurley looks to other provisions of the contract that are not implicated in this litigation, and argues that these provisions violate Section 32-2-10. Hurley argues that "once the at-issue agreement is determined to violate Section 32-2-10, the plain language of the statute provides that the agreement is unenforceable." Hurley Brief, p. 20. By "the agreement," it is clear that Hurley means not just the specific indemnity provision that allegedly violates the statute, but rather that *the entire contract* is unenforceable. See Id. This construction of the statute is contradicted by case law and, equally importantly, by the specific language of the statute itself.

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.

The statute speaks specifically in terms of a "promise or agreement...to indemnify". Moreover, South Carolina courts, when interpreting the term "agreement" as used in the statute, have treated it to mean "the agreement to indemnify for the promisee's own negligence", rather than "the entire contractual agreement. This treatment is evident from D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152, 810 S.E.2d 41, 45 (Ct. App. 2018). It is important to note, initially, that the DR Horton court was considering an indemnity provision set forth within a single paragraph of an overall contract. That single paragraph was comprised of several clauses, each of which addressed separate circumstances under which the subcontractor was required to indemnify the contractor. See D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 148, 810 S.E.2d 41, 43 (Ct. App. 2018). The DR Horton court determined that one of those separate clauses was in fact void as against public policy. See Id. at 422 S.C. at 152. However, notwithstanding that determination, the DR Horton court specifically recognized the validity of the remaining subclauses within the indemnity paragraph, **despite the fact that the separate clauses were set forth within a single paragraph.** Thus, the DR Horton court, and specifically contrary to the assertions of the Respondents, did not invalidate the entire contract, and did not, in fact, invalidate even the remaining provisions of the indemnification provision, set forth within the same paragraph as the subclause found to be void. D.R. Horton, 422 S.C. at 152-53. The DR Horton court further clarified the limitation of its ruling, noting that "the indemnification **clause** is void as against public policy to the extent that it purports to require BFS to indemnify DR Horton for damages caused by its negligence." See D.R. Horton, 422 S.C. at 152-53.

The DR Horton court, rather than invalidating the entire contract, limited its holding to one specific subclause within a more expansive indemnification provision, allowing enforcement of the remaining indemnification provisions which were not determined to violate the statute.

Critically, the DR Horton court noted that, to the extent that the indemnification provision allowed general contractor D.R. Horton to recover from BFS, the subcontractor, for BFS's own negligence, that portion of the indemnification provision did not violate public policy. See D.R. Horton, 422 S.C. at 152. D.R. Horton was precluded from any recovery, not because of any invalidation of the entire contract, but because the underlying award was without any findings of fact as to the basis for the award, and it would have been pure speculation as to whether the award included any damages resulting from the work of BFS. See Id. at 153. One can image that under different facts, however, D.R. Horton would have been allowed to recover under the "indemnification clause" that the court acknowledged *did not* violate public policy.

The D.R. Horton court's separation, within the contract, of the indemnity subclause ("agreement") that violated the statute, from the indemnity "agreement" that did not, is compelled by the very language of Section 32-2-10. The statute prohibits only "agreements" by which the promisor undertakes to indemnify the promisee against liability for the promisee's own sole negligence. It states further that nothing within the statute shall affect an "agreement" whereby the promisor agrees to indemnify the promisee for the *promisor's* own negligence. For our purposes, this means that an "agreement" to indemnify BFS against BFS's own sole negligence would be unenforceable, *but at the same time*, Section 32-2-10 cannot "affect" a simultaneous "agreement" whereby Hurley indemnifies BFS for Hurley's own negligence. The contract at issue may or may not contain a separate agreement (set forth within an entirely separate and distinct paragraph of Section 5) to indemnify BFS for BFS's own negligence, but *even if it does*, the

separate agreement under the first paragraph cannot be affected by the statute – by the statute's own terms, this agreement must stand. For this reason, the D.R. Horton court similarly recognized that there was a portion of the contract's indemnity agreement that survived its Section 32-2-10 analysis.

Because the indemnity provision set forth in the first paragraph of Section 5, which is the only relevant indemnification provision in the parties' contract, 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.

XI. 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. 21-26. 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. 705-707. 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. See A. pp. 651-657.

XII. 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 31-35.

XIII. 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 35-38.

Conclusion

It was error for the trial court to grant, and for the court of appeals to affirm summary judgment on BFS's indemnification cause of action against Hurley as there is a genuine issue of material fact regarding the parties' alleged negligence, and BFS is only seeking indemnification from Hurley for any liability or damage determined to result from Hurley's negligent acts or omissions.

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