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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No. 2025-001495
Opinion No. 2025-UP-078

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

v.

Winsor South, LLC and Jeffrey M. Thomas, individually, and on behalf of a class of construction defendants; Southeastern Recapitalization Group, LLC; WCM Construction, LLC; Jonathan J. Thomas; AC Heating and Air Conditioning Service, Inc.; ACME Doors, Inc.; Alpha Omega Construction Group, Inc.; Atlantic Construction Services, Inc.; Buck Lumber and Building Supply, Inc.; Builders FirstSource, Inc.; Builders FirstSource-Atlantic Group, LLC; Builders FirstSource - Florida a/k/a Builders FirstSource-Florida Design Center, LLC; Builders FirstSource-Southeast Group, LLC; Charlotte Flooring, Inc.; Dirla Tawl Painting, Inc.; East Coast Wall Systems, Inc.; Fogel Services, Inc.; G&S Home Remodeling, LLC; Guaranteed Framing, LLC; J. Mora Brick & Block Mason, LLC; Land/Site Services, Inc.; Landmark Construction Company, Inc.; Lutzen Construction, Inc; New Horizon Shutters, Inc. a/k/a New Horizon Shutters International, LLC; PJ Sanchez Masonry, LLC; Screens Plus, Inc.; Simons Construction Company, LLC; Stucco by Design, LLC; Fine Builders, LLC; Speedtruss, Inc.; AS Construction; Javier Morales Merino; Novac Construction, Inc.; MJG Construction, Inc.; Advance Plumbing, Heating, and Air, Inc.; Ashley Steel, Inc.: Cahill Contracting, LLC; Cohen;s Drywall, Inc.; Bob Porter d/b/a Custom Interior Construction; RB's Trim, Inc.; Sharon's Painting and Construction a/k/a Sharon's Painting, LLC; Davis Tile; Timothy Mitchell; Electrical Design & Construction; Hurley Services, LLC; Charleston Exteriors LLC; Jorge Diaz aka Jorge Louis Paz; San Luis Construction, Inc. nka Roofing America Metal Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vazquez aka Alfonso Rodriguez, Sr.; and John Does 55-75, Defendants,

Of which Builders FirstSource-Southeast Group, LLC is the Appellant and Hurley Services, LLC and Charleston Exteriors, LLC are the Respondents.

PETITIONER'S REPLY BRIEF

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There have been no findings of fact, and a determination regarding the parties' alleged negligence remains outstanding. Thus, BFS would submit that the arguments of Hurley are largely premised upon a series of hypotheticals, and not upon any evidence actually before the Court.

A. BFS stipulated that its indemnification cause of action initially sought recovery only of any liability or damage determined to result from the negligence of the subcontractors, and that notwithstanding its pleading, it is now seeking recovery only of attorney's fees incurred defending against Plaintiff's claims for defective window installation.

Hurley acknowledges in its Brief that BFS stipulated that its indemnification cause of action is now limited to recovery of attorney's fees and costs incurred by BFS in defending against Plaintiffs' suit, and that it is no longer seeking to recover any amounts BFS paid Plaintiffs in settlement of Plaintiffs' claims against it. See Hurley Brief, p. 5. Hurley cites A. pp. 447-449 which is the Transcript of the summary judgment hearing before the trial court. However, Hurley conveniently omits from its citation equally important information that unsurprisingly, does not support Hurley's arguments.

Specifically, Hurley omits the portion of BFS's stipulation which explains BFS's initial claims, i.e. its pleading. BFS's counsel stipulated (a) that BFS's initial claim sought recovery of all damages paid to the Plaintiff, (b) BFS sought such recovery because of its contention that they (the subcontractors) were solely responsible for those damages, and (c) that BFS is also entitled to attorney's fees (as consequential damages from Hurley's breach of its obligation to indemnify), pursuant to the specific provisions of the parties' contract. See A. p. 446, ll. 20-25.

In an effort to make the Record clear, BFS's counsel reiterated BFS's stipulation:

> "Let me explain to the Court. Although we are no longer seeking indemnification against the losses paid to the Plaintiffs, our contention has been from day one that the losses, to which we have been exposed, were a consequence, not of anything that we did improperly, but specifically as a consequence of the negligence or other

> transgressions of our subcontractors. We have never conceded it. And we are not conceding it today, that we were responsible for those damages. Having said that, we are not pursuing recovery of amounts that we have now paid in satisfaction of the Plaintiffs' claims. So the sole issue here really addresses the extent to which we're entitled to attorney's fees incurred in defending against the allegations. Is that clear to the Court?"

A. p. 447, ll. 20-25, p. 448, ll. 1-11.

After placing BFS's stipulation on the Record, BFS reiterated the stipulation:

> "And, again, just so the Record is clear, our initial claims for indemnification relate to losses which we might be exposed to the Plaintiffs. We're focused on, again, our contention is that those losses relate solely to the transgressions or shortcomings or negligence of our subcontractors. Having said that, we have now resolved those claims and we're only seeking attorney's fees here."

A. p. 449, ll. 8-17.

Further, BFS's counsel explained that, unlike the contractor in Concord & Cumberland, who acknowledged that it was seeking to recover damage caused by its own negligence, BFS is not seeking recovery for damage caused by BFS's own negligence. See A. p. 451, ll. 13-18.

Moreover, Hurley's trial counsel acknowledged and accepted BFS's stipulation and its counsel's Rule 11 certification. Specifically, Hurley's trial counsel stated, "I accept his admission, that they're no longer seeking indemnity with respect settlement amounts paid to the Plaintiffs." See A. p. 467 ll. 23-25.

BFS's stipulation on the Record and Rule 11 certification by BFS's counsel (specifically confirming that the contractual indemnity claims of BFS were premised upon the negligence of Hurley) should have rendered Hurley's arguments, regarding the extent of BFS's indemnification claims moot. The court should, then, have focused solely on the determination of the negligence of the respective parties.

As explained in BFS's Brief and below, the deposition testimony created a genuine issue of material fact regarding whether Hurley correctly installed the windows. Thus, in light of the foregoing, it was error for the lower courts to preclude BFS from presenting its contractual indemnification claim to a jury. Therefore, this Court must reverse and remand BFS's contractual indemnification cause of action to the trial court for a jury to consider the evidence in the Record and whether BFS incurred any attorney's fees determined to result from the negligent acts or omissions of Hurley.

B. BFS is not seeking indemnity for its own negligence, therefore, the heightened "clear and unequivocal" standard of contract construction does not apply to the relevant indemnity provision.

Contrary to Hurley's argument, 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, BFS has stipulated on the Record and its counsel has certified that, since Day 1, BFS has only sought, and is only seeking, recovery of damage for the negligent acts or omissions of the subcontractors. See A. p. 447, ll. 20-25, p. 448, ll. 1-2. Thus, it was error for the lower courts to

apply the heightened "clear and unequivocal" standard to the relevant indemnity provision. Therefore, this Court must reverse and remand BFS's contractual indemnification cause of action to the trial court.

C. BFS's pleading is consistent with what BFS stipulated on the Record.

Hurley argues that BFS's stipulation supports Hurley's contention that BFS's pleading sought unlimited indemnity, not limited to the damages resulting from the negligent acts or omissions of Hurley. See Hurley Brief, pp. 15-16. However, as explained in Section A. above, Hurley conveniently omits from its citations and argument the portion from the motion hearing where BFS's counsel represented redundantly that BFS's claims sought recovery only of damages, including attorneys fees, for Hurley's negligent acts or omissions. See Section A. supra; also, A. p. 446, ll. 20-25, p. 447, ll. 20-25, p. 448, ll. 1-11, p. 449, ll. 8-17, p. 451, ll. 13-18.

Next, Hurley argues that BFS has not amended or withdrawn its pleading or any portion thereof, and it remains BFS's operative pleading. See Hurley Brief, p. 16. BFS has, in fact, not amended its pleading, and that is because, as explained redundantly, BFS's indemnification claims, as to attorneys fees as consequential damages, remain the same as they were pled on Day 1. See A. p. 446, ll. 20-25, p. 447, ll. 20-25, p. 448, ll. 1-11, p. 449, ll. 8-17, p. 451, ll. 13-18.

Hurley then argues that this Court should focus exclusively on select language set forth in the final paragraph of BFS's indemnification cause of action. See Hurley Brief, pp. 15-16 where Hurley emphasizes and argues select language from Paragraph 126, the final paragraph pled in BFS's indemnification cause of action. However, such evaluation of BFS's pleading directly contradicts precedent. Hurley cites to the Witherspoon case where the South Carolina Supreme Court determined that "[p]roper consideration of the pleadings in any cause requires that they be considered as a whole." Witherspoon v. Stogner, 182 S.C. 413, 189 S.E. 758, 759 (1937)(citing

Mortgage Loan v. Townsend, 156 S.C. 203, 152 S.E. 878 (1930); Nix v. Harley, 3 Rich.Eq. 379, 24 S.C.Eq. 379 (Ct. App. of Eq. 1851)). Hurley fails to provide any explanation or citation to any other authority that would justify departure from our precedent requiring that pleadings be evaluated as a whole. Nevertheless, Hurley effectively requests that this Court ignore precedent and only analyze select language from the final paragraph of BFS's indemnification cause of action. See Hurley Brief, pp. 15, 16.

Contrary to Hurley's argument, BFS's indemnification cause of action includes not only Paragraph 126, but also, Paragraphs 119, 120, 121, 122, 123, 124, and 125. See A. pp. 187-189. The court must evaluate BFS's pleading as a whole, and it cannot focus exclusively on the final paragraph in the cause of action. See Witherspoon supra. Paragraphs 120, 121, 122, and 125 plainly and clearly allege that BFS seeks indemnity for Hurley's wrongful acts, omissions, negligence, and/or representations. Specifically, Paragraph 122 provides in part that **"[i]n the event that the Plaintiffs establish that the materials and/or services of [Hurley] were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event [Hurley] [has] failed properly to execute [its] duties, which failure has allegedly caused the Plaintiffs' damages."** A. p. 187 (emphasis added). Moreover, Paragraph 125 provides: **"[t]hat to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of [Hurley], which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims."** A. p. 188 (emphasis added). Even Paragraph 126, which Hurley wishes the Court to focus exclusively on, provides that BFS's entitlement for "full contractual and common law

indemnification" is **"for any negligence, as aforesaid, on the part of the [subcontractors]…."** A. p. 188 (emphasis added).

Hurley fails to engage in any meaningful discussion about how the foregoing allegations are not consistent with BFS's position that its indemnification claims seek recovery of damage resulting only from Hurley's negligent acts and/or omissions. Instead, Hurley effectively concedes its arguments.

In its last argument, Hurley admits that "Paragraphs 122 and 125 relate to Hurley['s] purported obligation to indemnify BFS against liability to Plaintiffs and the damages relating thereto." Hurley Brief, pp. 17-18. Hurley suggests that attorney's fees are not a damage related to an indemnity claim. See Id. Yet, at pages 21-24 of its Brief, Hurley admits that attorney's fees are part of an indemnity claim. Next, Hurley argues that by its stipulation, BFS has necessarily amended its pleadings and therefore only Paragraph 126 is before the Court. See Hurley Brief, p. 18. However, multiple times prior, Hurley argued the opposite, that the Court should disregard BFS's stipulation because BFS has not amended its pleading. See Hurley Brief, pp. 5, 16. This final and unsupported argument by Hurley should require no response. Nevertheless, as explained ad nauseum, BFS alleges and contends that it has only been sued due to the negligent acts or omissions of Hurley, and that it has incurred attorney's fees and defense costs in defending against Plaintiffs' claims for damage resulting from Hurley's negligent acts and/or omissions.

Hurley cannot legitimately contend that "BFS has been allowed considerable runway to advance arguments inconsistent with its pleading." Hurley Brief, p. 17. BFS submits that the opposite is true and that this Court must reject Hurley's arguments which contradict the Record, controlling precedent, and the arguments advanced by Hurley.

D. The parties' contract is clear in imposing an obligation on Hurley to defend and indemnify BFS from Plaintiffs' alleged negligent window installation claim.

Hurley next contends that the "duty to defend provision" is part and parcel of the "Section 5 indemnity provision". Hurley argues further that, because Hurley must defend BFS "regardless of the ultimate liability" of BFS, the provision is effectively an indemnity provision requiring that Hurley indemnify BFS for BFS's own sole or concurrent negligence. Hurley then concludes that the provision is therefore subject to S.C. Code Section 32-2-10. See Hurley Brief, p. 20. However, Hurley's argument would have merit only if the Court were to re-write the parties' contract and add the following additional language to the "duty to defend provision:" that Hurley "must indemnify BFS for BFS's own sole or concurrent negligence." See A. p. 202.

Contrary to Hurley's arguments, the duty to defend provision does not require Hurley to defend or indemnify BFS against a claim resulting solely from BFS's negligence. Instead, it calls for Hurley to defend BFS against a claim under Section 5 regardless of any ultimate liability or negligence of BFS. See. A. p. 202 "**THE DUTY TO DEFEND UNDER THIS <u>SECTION 5</u> IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF [BFS].**" (emphasis in original). There is a chasm of difference between what Hurley argues and what the provision actually provides. Contrary to Hurley's argument, the "duty to defend" provision, as set forth in the third paragraph of Section 5, does not impose any indemnity obligation on Hurley. Instead, it imposes a defense obligation on Hurley. Moreover, the provision expressly provides that "the duty to defend arises immediately upon presentation of a claim by any party indemnified hereunder." See A. p. 202 (emphasis removed from original). Thus, there must first be a claim presented to Hurley by BFS that qualifies BFS to be a party indemnified under <u>Section 5</u>. There are only two provisions in Section 5 that provide BFS a right

to indemnity. See A. pp. 201-202. The first provision, (the only relevant provision for this litigation), is the provision set forth in the first paragraph of Section 5. This paragraph provides BFS a right to indemnity against a third-party's personal injury or property damage claim but only to the extent that the damage resulted in whole or in part from a negligent act of omission of Hurley. See A. p. 201. The second provision, which is not relevant to this litigation, is the provision set forth in the second paragraph of Section 5, and provides BFS a right to indemnity against a personal injury claim suffered and brought by Hurley or one of Hurley's agents, employees, representatives, or subcontractors. See A. pp. 201-202. Contrary to Hurley's arguments, here, where Plaintiffs have filed suit against BFS seeking property damage allegedly resulting from negligent acts or omissions of Hurley, there is nothing illegal about the parties agreeing that Hurley would defend BFS against such a claim.

Hurley cites no authority to support its contention that a "duty to defend" provision is subject to the same heightened "clear and unequivocal" standard which must be satisfied when a party seeks to be indemnified for its sole or concurrent negligence. BFS contends that such a provision is to be interpreted pursuant to the general rules of contract construction.

Nevertheless, if the Court determines that the duty to defend provision (as set forth in the third paragraph of Section 5) is subject to the heightened standard, BFS submits that it is sufficiently clear and unequivocal in imposing the obligation that Hurley defend BFS against Plaintiffs' property damage claim even if a jury ultimately determines that BFS is concurrently negligent.

E. Hurley's Concord & Cumberland arguments are incorrect.

Hurley's Brief next criticizes BFS's arguments regarding Concord and Cumberland. See Hurley Brief, pp. 21-24. In Reply, BFS stands by its prior arguments on Concord and Cumberland set forth in BFS's Brief.

F. Hurley misrepresents BFS's "admission" in BFS v MI Windows appeal.

At page 25 of its brief, Hurley claims that, in a previous preceding before the trial court (in the matter of BFS v. MI Windows), BFS conceded that the contractual provisions, as set forth in Section 5 of its subcontract with Hurley, were not sufficiently "clear and unequivocal" to allow recovery, in indemnity, against liability occasioned by the negligence of the indemnitee.

Contrary, however, to the implicit representations by Hurley, BFS, in the MI Windows and Doors case, sought indemnity against liability for damages resulting from the negligence of its subcontractors, and not against liability for damages occasioned by its own negligence. BFS, in that context, while conceding that the provisions of the first paragraph of Section 5 (the only indemnity provision relied upon by BFS in that case), were insufficient to allow recovery for BFS's own negligence. BFS contended that the provisions of the first paragraph were sufficient to authorize recovery, as sought by BFS, against liability occasioned by its subcontractor's negligence.

To the extent that Hurley may claim that BFS, within the MI Windows and Doors litigation, sought recovery in indemnity against damages occasioned by its own negligence, such a claim is patently inconsistent with the BFS position as specifically represented before the court. BFS consistently asserted that it was seeking indemnity only for damages resulting from the negligence of its subcontractor, that the indemnity provision as set forth in the first paragraph of Section 5 was adequate to support recovery in indemnity against the subcontractor's negligence, and that

such recovery was not dependent upon any "clear and unequivocal" imposition of such responsibility upon the subcontractor.

Moreover, the BFS acknowledgement in the MI Windows and Doors litigation was limited specifically to the indemnity provision as set forth in the first paragraph of Section 5, the only provision relevant to the BFS claims.

By contrast, in the instant litigation, BFS claims for attorneys fees were premised not only upon the provisions of the first paragraph of Section 5, but also upon the provisions of the third paragraph of Section 5. The duty to defend provision as set forth in the third paragraph was not argued before, considered by, or resolved by the Court in the MI litigation. It is the position of BFS that the provisions of both the first and third paragraphs of Section 5 are adequate to support its claims for attorneys fees in this litigation. BFS also contends that the duty to defend provisions, as set forth in Section 5, are not subject to the "clear and unequivocal" standard as set forth in the Concord & Cumberland court. Nonetheless, to the extent that this court may determine otherwise, BFS further contends that the duty to defend, as set forth in the third paragraphs, is sufficiently "clear and unequivocal" to satisfy such heightened standard.

Contrary to Hurley's misrepresentations, BFS is not seeking indemnification for its own negligence; BFS has appealed the lower courts' erroneous determinations to the contrary; and BFS has never "admitted" or "conceded" that any of its contract provisions are in violation of South Carolina Law.

G. Hurley misrepresents the language in Section 5 Indemnity.

Hurley mistakenly contends that there is no application language or instruction in Section 5 Indemnity. See Hurley Brief, p. 26. Contrary to the representations by Hurley, the parties'

contract contains one indemnity <u>section</u> – "SECTION 5. INDEMNITY" - not one "indemnity provision." See A. 201-202. Section 5 Indemnity is, in turn, comprised of <u>four</u> separate and distinct paragraphs. See Id. While, the paragraphs are not numbered or subtitled, each of those paragraphs clearly addresses separate and distinct circumstances which may impose separate and distinct indemnity and/or other obligations.

Contrary to Hurley's misrepresentations, here, where the underlying litigation arises out of a third-party's claims for alleged construction defects in and property damage resulting from Hurley's Work, the indemnity provision set forth in the first paragraph of Section 5 Indemnity, (and only the indemnity provision in the first paragraph of Section 5) applies, and provides BFS the right to indemnity, "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." See A. p. 201.

Also contrary to Hurley's misrepresentations, the separate and distinct indemnity provision set forth in the second paragraph of Section 5 Indemnity is not applicable here, because the underlying litigation does not involve any claim "arising out of or resulting from bodily injury to, or sickness, disease, or death of, [Hurley], any agent, employee, or representative of [Hurley], or any of [Hurley]'s subcontractors." See A. pp. 201-202.

Further, and again contrary to Hurley's misrepresentations, the indemnity provisions set forth in the first and second paragraphs of Section 5 Indemnity are entirely reconcilable as, by the plain and unambiguous language, the indemnity provision in the first paragraph applies only to third-party claims for bodily injury and property damage sustained by a third-party; whereas the indemnity provision in the second paragraph applies only to bodily injury claims sustained by Hurley or Hurley's agents, employees, representatives, or subcontractors. See A. pp. 201-202.

It bears emphasis that the indemnity provision set forth in the first paragraph of Section 5 (the only provision within Section 5 Indemnity that provides BFS the right to recover indemnity from Hurley for a third-party's property damage claim), is the only indemnity provision upon which BFS relies in the assertion of its indemnification claim.

To claim that these two separate and distinct indemnity provisions cannot be reconciled is simply incorrect; they cover different factual scenarios, and do not contradict each other. The construction and application of these provisions by the court of appeals is inconsistent with controlling South Carolina law, requiring reversal by this Court.

The third paragraph of Section 5 Indemnity provides details regarding defense of an indemnified claim. See A. p. 202. The contractual right to tender defense of an indemnified claim made against an indemnified party under the first paragraph or the second paragraph or to bring a claim for defense expenses incurred against such an indemnified claim – even a right that is not contingent on a finding of fault – does not change either the fact that BFS would have valid contractual indemnity claims for any judgment that may ultimately be entered against it for any damage determined to arise out of the negligent work of Hurley, or the fact that these claims are supported by (and not, as Hurley argues, inconsistent with) the respective contract terms and provisions.

The fourth paragraph of Section 5 provides that defense and indemnification obligations do not extend to design professionals and do not include liability for damages that is caused by defects in plans, designs, or specifications prepared by design professionals. See A. p. 202.

H. The relevant portions of the contract do not violate Section 32-2-10.

In an attempt to avoid potential liability for its own negligent actions, Hurley argues that if a contract contains <u>any</u> 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." See A. p. 201. 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 parties' contract that are not implicated in this litigation. For example, Hurley points to the indemnity provision set forth in the second paragraph of Section 5 Indemnity, which provides for recovery when, among other things, BFS has been subject to claims involving personal injury sustained by Hurley. See A. pp. 201-202. This uninvoked provision, Hurley argues, violates Section 32-2-10, and thus Hurley concludes that the agreement is wholly unenforceable. Hurley Brief, p. 28. 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 interpretation 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, a paragraph 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.

I. BFS has properly preserved the issue of severance.

Hurley next argues that BFS has not preserved a severance argument in this appeal. See Hurley Brief, p. 29. Hurley is mistaken. During oral arguments, BFS submitted that none of the provisions in the contract are illegal. BFS also emphasized, however, that the contract includes a specific severability provision demonstrating the intent of the parties that the court sever any portion of the contract found to be contrary to South Carolina law or otherwise potentially invalid. See A. p. 454, ll. 23-25, p. 455, ll. 1-8. BFS reiterated its alternative severance argument at the court of appeals. See BFS Final Brief and BFS Final Reply Brief before court of appeals, A. pp. 688-689, 711-714. As previously argued at the trial court and the court of appeals, it was error for the court of appeals and the trial court to decline to sever any provision(s) that are determined to be violative of South Carolina law.

J. 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. See Hurley Brief, pp. 31-34. However, it is entirely possible for Hurley to be negligent without BFS being negligent.

BFS contends that Hurley is an independent contractor and responsible for supervising Hurley's employees, subcontractors, and Work performed at any project, including the Six Fifty Six project. See Section 6 of the parties' contract, See A. pp. 202-203 "Subcontractor agrees that it and its employees, agents, and subcontractors (and their employees, agents, and subcontractors) will perform the Work as independent contractors, and not as employees or agents of Contractor. Contractor has no authority to direct, supervise, or control the means, manner, or method of construction of the Work."

As part of the window installation, Plaintiff contends that BFS and Hurley are required, by the manufacturer, to install sealant caulk behind all four (4) nailing flange fins of the window. BFS contends that the manufacturer authorized BFS and Hurley to install the windows with sealant caulk behind only the window's head nailing flange fin and the window's left and right jam nailing flange fins. The parties have not deposed Hurley, so no party may point to any direct evidence to support how Hurley contends it installed the sealant caulk or windows. Instead, Hurley's counsel argues, without direct evidence, that Hurley installed the windows pursuant to BFS's installation protocol and therefore, if Hurley is determined to be negligent, it will be because of Hurley's adherence to BFS's inappropriate installation protocol, i.e. omission of sealant caulk behind the window's sill nailing flange fins. However, Hurley's argument relies on one potential set of facts: that Hurley complied with BFS's installation protocol. There is also the possibility that, consistent with Plaintiff's expert witnesses' testimony, that Hurley failed to install sealant caulk behind any of the window nailing flange fins, not just only the sill nailing flange fin. These possibilities exist because Hurley is an independent subcontractor. It is entirely possible that a jury could determine that, notwithstanding BFS's limited supervision or post-installation inspection of Hurley's window installation, Hurley was negligent and BFS was not as it relates to Hurley's installation of sealant

caulk or lack thereof behind the windows. These considerations present issues of material fact which rendered summary judgment inappropriate, requiring reversal of the court of appeals' opinion.

Regarding Hurley's errant contention that BFS was the general contractor by way of holding an unlimited general contractor's license, BFS reiterates its prior arguments on this subject, relevant South Carolina law, including S.C. Code Ann. Section 40-11-270. See BFS Brief, pp. 31-34. As noted therein, while BFS may be held liable to a third-party regarding Hurley's negligent acts or omission, such liability does not preclude BFS from recovery of indemnity from Hurley for Hurley's negligent acts or omissions. See Id.

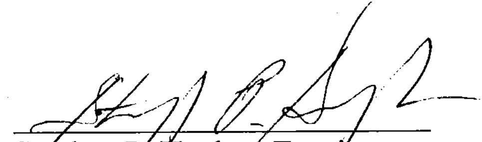
Hurley's arguments regarding BFS's supervision and the fact that BFS was "supposed to direct, supervise, and inspect Hurley Services and its other subcontractors' installation work" is without citation to any evidence in the Record. Instead, Hurley cites to BFS's Brief and BFS's counsel's argument that certainly no party is contesting supervision. Moreover, the only evidence in the Record is that Hurley, not BFS, was responsible for supervision and control of Hurley's Work. See Section 6 of the parties' contract, A. pp. 202-203.

K. Regarding collateral estoppel, BFS reiterates and adopts its arguments set forth in its Brief at pp. 24-27.

Conclusion

In conclusion, it was error for the court of appeals to ignore BFS's contractual indemnification claim for damages resulting from Hurley's negligence; it was error for the court of appeals to apply the heightened "clear and unequivocal" standard to the various contracts at issue because BFS is not seeking indemnity for its own negligence; it was error for the court of appeals not to give proper evaluation to the defined terms and provisions of the contracts; it was error for the court of appeals to analyze provisions that were separate and distinct and conclude

that they were ambiguous, confusing, and failed to meet the clear and unequivocal standard; it was error for the court of appeals to decline to sever the few purportedly offensive provisions; it was error for the court of appeals to conclude that the parties were collaterally estopped from litigating the issue of contractual indemnity for damages resulting from Hurley's negligence.



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Re: Builders FirstSource - Southeast Group, LLC v. Hurley Services, LLC
and Charleston Exteriors, LLC
Appellate Case No. 2025-001495

Dear Ms. Howard:

Please find enclosed herewith for filing the ***Petitioner's Reply to Respondent Hurley Services'*** with regard to the above referenced matter. I would appreciate your filing the Reply and returning a filed clocked copy to me via email at sphughes@hghpa.com, wcox@hghpa.com, and scombites@hghpa.com. If return of the clocked copy must be via U.S. Mail, please advise and I will provide a self-addressed, stamped envelope for same.

If you should have any questions regarding this matter, please feel free to contact me.

With kindest regards, I am

HOWELL, GIBSON AND HUGHES, P.A

/s/Stephen P. Hughes

Stephen P. Hughes

Enclosures