

⑩

79551

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Consolidated Case No. 2010-CP-10-2271

RECEIVED
MAY 13 2016
SC Court of Appeals

CONCORD & CUMBERLAND HORIZONTAL PROPERTY REGIME; and THOMAS R. MATHER; and BETTY Y. SEGAL; and SIGNATURE CHARLESTON, LLC and WADE ROBINSON; and JAMES C. KIRKPATRICK; and PAUL A. BRIM; and FRED RAPPAPORT and JOYCE RAPPAPORT; and THOMAS R. DEBNAM, AS TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM; and PAMELA L. VAUGHN; and 304 CONCORD & CUMBERLAND, LLC; and 402 CONCORD & CUMBERLAND, LLC; and AVANT & ASSOCIATES, LLC and OAKLAND HOLDING, LLC; and MATTISON J. MACGILLIVRAY and TERESA E. MACGILLIVRAY; and PAMELA R. QUEEN; and STUART REEVES
.....Plaintiffs,

v.

CONCORD & CUMBERLAND, LLC; CONCORD & CUMBERLAND MANAGER, LLC; ESTATES, INC.; ESTATES MANAGEMENT COMPANY; SUPERIOR CONSTRUCTION CORPORATION; WEATHER SHIELD MFG., INC.; THE MUHLER COMPANY, INC.; IN THE WIND, INC.; J. DAVIS ARCHITECTS, PLLC; WALL CRAFT CONSTRUCTION, INC.; WEATHERHOLTZ MASONRY, LLC; PHILIP GASQUE METAL WORKS; KEATING ROOFING AND SHEET METAL, INC.; LOWCOUNTRY TILE CONTRACTORS, INC.; SAFECO INSURANCE COMPANY OF AMERICA; COMPANION PROPERTY AND CASUALTY OF AMERICA; COMPANION PROPERTY AND CASUALTY GROUP; WATTS BUILDERS, LLC; ELIAS DUFFY d/b/a MASONRY PROS; RENAISSANCE STEEL, LLC; AMERICAN DRYWALL CONSTRUCTION, INC.; TURNER ELECTRICAL OF SC, INC.; and METRO WATERPROOFING, INC..... Defendants,


Of Whom,
SUPERIOR CONSTRUCTION CORPORATION is theAppellant,
and
THE MUHLER COMPANY, INC. is theRespondent.

**MOTION BY WEATHER SHIELD MFG., INC. FOR LEAVE
TO FILE BRIEF OF AMICUS CURIAE**

Weather Shield Mfg., Inc. ("Weather Shield") hereby moves this Honorable Court for leave to file a brief of *amicus curiae* in this appeal, pursuant to Rule 213, SCACR. Weather Shield is a party to the underlying action, but is not a party to the appeal filed by Superior Construction Corporation. The basis for this motion is that Weather Shield's *amicus brief* will provide the Court with information and legal analysis that may not be supplied by the parties to the appeal, but will affect the remainder of the litigation, thereby serving the purpose of judicial economy. In addition, it will allow Weather Shield an opportunity to protect its interests in this matter.

For the reasons stated above and in the supporting Memorandum of Law, Weather Shield respectfully requests that this Court grant the motion and allow it to file a brief of *amicus curiae*.

Respectively submitted by,

By: 
Christine Companion Varnado
THE SEIBELS LAW FIRM, P.A.
38 Broad Street, Suite 200
Charleston, SC 29401
843.722.6777
843.722.6781 (fax)
cvarnado@seibelsfirm.com

ATTORNEY FOR WEATHER SHIELD MFG., INC.

Charleston, South Carolina

May 10, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

The Honorable Clifton Newman, Circuit Court Judge MAY 13 2016

SC Court of Appeals

Consolidated Case No. 2010-CP-10-2271

CONCORD & CUMBERLAND HORIZONTAL PROPERTY REGIME; and THOMAS R. MATHER; and BETTY Y. SEGAL; and SIGNATURE CHARLESTON, LLC and WADE ROBINSON; and JAMES C. KIRKPATRICK; and PAUL A. BRIM; and FRED RAPPAPORT and JOYCE RAPPAPORT; and THOMAS R. DEBNAM, AS TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM; and PAMELA L. VAUGHN; and 304 CONCORD & CUMBERLAND, LLC; and 402 CONCORD & CUMBERLAND, LLC; and AVANT & ASSOCIATES, LLC and OAKLAND HOLDING, LLC; and MATTISON J. MACGILLIVRAY and TERESA E. MACGILLIVRAY; and PAMELA R. QUEEN; and STUART REEVES
.....Plaintiffs,

v.

CONCORD & CUMBERLAND, LLC, et al., Defendants,

Of Whom,
SUPERIOR CONSTRUCTION CORPORATION is theAppellant,
and
THE MUHLER COMPANY, INC. is theRespondent.

CERTIFICATE OF SERVICE

I certify that I deposited the **Motion by Weather Shield Mfg., Inc. for Leave to File Brief of Amicus Curiae in Support of Respondent** in the United States Mail, postage prepaid, on May 10, 2016, addressed to the following:

P. Gunnar Nistad, Esquire
Gallivan, White & Boyd, PA
40 Calhoun Street, Suite 315
Charleston, SC 29401


And

Helen F. Hiser, Esquire
McAngus Goudelock & Courie, LLC
PO Box 650007
Mt. Pleasant, SC 29465
Attorneys for The Muhler Company, Inc.

Chris A. Majure, Esquire
Brent Boyd, Esquire
Murphy & Grantland, PA
4406-B Forest Drive
Columbia, SC 29206
Attorneys for Superior Construction Corporation

Alan R. Belcher, Jr., Esquire
Hall Booth Smith & Slover, PC
40 Calhoun Street, Suite 550
Charleston, South Carolina 29401
Attorneys for Safeco Insurance Company of America

May 10, 2016



Erin Magera
Paralegal
Seibels Law Firm, PA
38 Broad Street, Suite 200
Charleston, SC 29401
843-722-6777

THE
SEIBELS
LAW FIRM, P.A.

38 BROAD STREET, SUITE 200
CHARLESTON, SOUTH CAROLINA 29401

843.722.6777
fax 843.722.6781

Erin Magera
emagera@seibelsfirm.com

May 10, 2016

VIA US MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk of Court
P.O. Box 11629
Columbia, SC 29211

RECEIVED

MAY 13 2016

SC Court of Appeals

Re: *Concord & Cumberland, LLC et al*
Charleston County Case No.: 2010-CP-10-2271
Our File No.: 7004-25

Dear Ms. Kitchings:

Enclosed for filing please find original and six copies of Weather Shield's Motion for Leave to File Brief of *Amicus Curiae* and Memorandum in Support of its Motion for Leave to File Brief of *Amicus Curiae*. We would appreciate if you would file the originals and return a filed-stamped copy to us in the enclosed self addressed stamped envelope.

Also enclosed please find our firm's check in the amount of \$25.00 for the required filing fee.

Should you have any questions or require additional information, please do not hesitate to contact me.

With kind regards, I remain

Very truly yours,

SEIBELS LAW FIRM, P.A.


Erin Magera
Paralegal

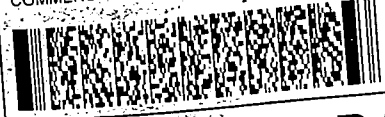
/elm
Enclosure

cc: All Counsel of Record (via US Mail) (w/ encl)

P

\$6:09
US POSTAGE PRIORITY MAIL
COMMERCIAL BASE PRICING

062S0007678448
FROM 29401



stamps.com

05/10/2016

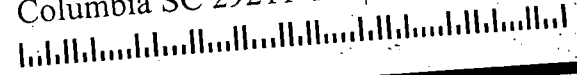
PRIORITY MAIL 2-DAY™

0024

7004-25
CHRISTINE COMPANION-VARNADO
THE SEIBELS LAW FIRM, PA
38 BROAD ST., SUITE 200
CHARLESTON SC 29401

B012

SHIP 7004-25
TO: The Honorable Jenny Abbott Kitchings
South Carolina Court Of Appeals Clerk Of
PO Box 11629
Columbia SC 29211-1629



USPS TRACKING #



9405 5118 9956 3733 7594 12

RECEIVED
MAY 13 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Consolidated Case No. 2010-CP-10-2271

RECEIVED
MAY 13 2016
SC Court of Appeals

CONCORD & CUMBERLAND HORIZONTAL PROPERTY REGIME; and THOMAS R. MATHER; and BETTY Y. SEGAL; and SIGNATURE CHARLESTON, LLC and WADE ROBINSON; and JAMES C. KIRKPATRICK; and PAUL A. BRIM; and FRED RAPPAPORT and JOYCE RAPPAPORT; and THOMAS R. DEBNAM, AS TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM; and PAMELA L. VAUGHN; and 304 CONCORD & CUMBERLAND, LLC; and 402 CONCORD & CUMBERLAND, LLC; and AVANT & ASSOCIATES, LLC and OAKLAND HOLDING, LLC; and MATTISON J. MACGILLIVRAY and TERESA E. MACGILLIVRAY; and PAMELA R. QUEEN; and STUART REEVES
.....Plaintiffs,

v.

CONCORD & CUMBERLAND, LLC; CONCORD & CUMBERLAND MANAGER, LLC; ESTATES, INC.; ESTATES MANAGEMENT COMPANY; SUPERIOR CONSTRUCTION CORPORATION; WEATHER SHIELD MFG., INC.; THE MUHLER COMPANY, INC.; IN THE WIND, INC.; J. DAVIS ARCHITECTS, PLLC; WALL CRAFT CONSTRUCTION, INC.; WEATHERHOLTZ MASONRY, LLC; PHILIP GASQUE METAL WORKS; KEATING ROOFING AND SHEET METAL, INC.; LOWCOUNTRY TILE CONTRACTORS, INC.; SAFECO INSURANCE COMPANY OF AMERICA; COMPANION PROPERTY AND CASUALTY OF AMERICA; COMPANION PROPERTY AND CASUALTY GROUP; WATTS BUILDERS, LLC; ELIAS DUFFY d/b/a MASONRY PROS; RENAISSANCE STEEL, LLC; AMERICAN DRYWALL CONSTRUCTION, INC.; TURNER ELECTRICAL OF SC, INC.; and METRO WATERPROOFING, INC..... Defendants,

Of Whom,
SUPERIOR CONSTRUCTION CORPORATION is theAppellant,
and
THE MUHLER COMPANY, INC. is theRespondent.

**WEATHER SHIELD MFG., INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION
FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE**

Pursuant to Rule 213, SCACR, Weather Shield Mfg., Inc. (“Weather Shield”) requests leave to file a brief of *amicus curiae* in this appeal filed by Superior Construction Corporation (“Superior”) against The Muhler Co. (“Muhler”). Rule 213 provides that a “brief of *amicus curiae* may be filed only by leave of the appellate court granted on motion, or at the request of the appellate court” and a “motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an *amicus curiae* is desirable.” Both Superior¹ and Muhler consent to the filing of an *amicus* brief by Weather Shield.

Although not named in the appeal, Weather Shield is one of three remaining parties to this construction defect case, which concerns the Concord and Cumberland condominium project in Charleston, South Carolina. Most of the original parties have reached settlements and have been dismissed. The residual claims include general contractor Superior’s causes of action for contractual indemnity against Weather Shield, the window manufacturer, and Muhler, the window supplier and installer. The lower court awarded partial summary judgment in favor of both Weather Shield and Muhler against Superior on the contractual indemnity claim, finding as a matter of law that the applicable contracts do not provide indemnification for Superior’s own negligence. (*Ex. A, October 6, 2014 Order, p. 11.*) The court denied Superior’s Motion for Reconsideration which addressed only the rulings as to Muhler. Superior has appealed the award of summary judgment as to Muhler only, claiming that Muhler is contractually obligated to indemnify Superior even if Superior is partially at fault.

Superior’s decision not to appeal the ruling in favor of Weather Shield is presumably based on its concession that the indemnity language in the contract does not obligate Weather

¹ In giving its consent, Superior reserves “all rights to respond or utilize other procedural remedies as warranted.”

Shield to indemnify Superior for Superior's negligence. This language is found in Section 12² of the sole contract involving Weather Shield and Superior, known as the "2007 Agreement." (*Ex. B.*) On the other hand, Superior's appeal as to Muhler involves both the interpretation of nearly identical language contained in Section 11³ of the 2007 Agreement, as well as Muhler's obligations based on its general construction subcontract executed prior to the construction ("Subcontract"). Thus, an alteration by this Court of the trial court's interpretation of the language in Section 11 of the 2007 Agreement would potentially affect the ruling in favor of Weather Shield to the extent it addresses the same language as is used in Section 12.

² The indemnity language in Section 12 addressing Weather Shield states:

In the event either Superior or Concord and Cumberland, LLC, are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors are defective and/or do not comply with the warranties and representations made herein, Weathershield [sic] agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable attorneys' fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration.

(*Ex. B, 2007 Agreement, p. 4.*)

³ The indemnity language setting forth Muhler's obligations in Section 11 is substantially similar, although not identical, to the indemnity language in Section 12, concerning Weather Shield:

In the event either Superior or Concord and Cumberland, LLC, are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended Contract Documents, or are defectively installed, Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable attorneys' fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration, liability [sic] incurred by either or both as consequence including, but not limited to, costs and attorney's fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.

(*Ex. B, 2007 Agreement, p. 4.*)

The summary judgment rulings of the lower court concerning Muhler's and Weather Shield's indemnity obligations are in many ways intertwined. In particular, the lower court held that "Sections 11 and 12 of the 2007 Agreement simply do not clearly and unequivocally state that either Muhler or Weather Shield is agreeing to indemnify Superior and C&C for their own negligence." (*Ex. A, p. 10.*) This ruling is, in part, based on the finding that "[t]o the extent that the provisions in the 2007 Agreement purport to indemnify Superior and C&C 'unconditionally,' they are unconscionably broad." (*Ex. A, p. 11.*) In interpreting this language, the court explained:

The use of the term "unconditionally" does not, on its face, indicate that either Muhler or Weather Shield intended to indemnify Superior and C&C for their own negligence. At best, the inclusion of the term "unconditionally" in an indemnification provision that also contains restrictions renders that provision ambiguous, which is in direct contrast of clear and unequivocal.


Id. Therefore, Weather Shield has an interest in this Court's interpretation of the language in the 2007 Agreement to the extent that it addresses the same language governing both Muhler's and Weather Shield's indemnity obligations.

Moreover, while Muhler has an interest in ensuring that the lower court's ruling is upheld, its interests in some respects run counter to those of Weather Shield. Arguably, to the extent that Weather Shield's indemnity obligations as to Superior are limited, there is a potential broadening effect on the scope of Muhler's indemnity obligations. In addition, Muhler's and Weather Shield's cross-claims against each other sounding in breach of contract, negligence, and indemnity remain viable in this matter, although they have been stayed by agreement during the pendency of this appeal. The potentially adversarial nature of Weather Shield's position to Muhler's in this regard should not be an impediment in its participation as an *amicus*, however. See *Wyatt By and Through Rawling v. Hanan*, 868 F. Supp. 1356, 1358 (M.D. Ala. 1994) (noting that an *amicus* "may still be adversarial; indeed it must if it is to make its point").

Weather Shield's *amicus brief* is desirable because it will provide the Court with information and legal analysis that may not be supplied by the parties to the appeal, but will affect the remainder of the litigation, thereby serving the purpose of judicial economy. In addition, it will allow Weather Shield an opportunity to protect its interests in this matter.

Therefore, for the reasons stated above, Weather Shield respectfully requests that this Court grant the motion and allow it to file a brief of *amicus curiae*.

Respectively submitted by,

By: 
Christine Companion Varnado
THE SEIBELS LAW FIRM, P.A.
38 Broad Street, Suite 200
Charleston, SC 29401
843.722.6777
843.722.6781 (fax)
cvarnado@seibelsfirm.com

ATTORNEY FOR WEATHER SHIELD MFG., INC.

Charleston, South Carolina

May 10, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Consolidated Case No. 2010-CP-10-2271

CONCORD & CUMBERLAND HORIZONTAL PROPERTY REGIME; and THOMAS R. MATHER; and BETTY Y. SEGAL; and SIGNATURE CHARLESTON, LLC and WADE ROBINSON; and JAMES C. KIRKPATRICK; and PAUL A. BRIM; and FRED RAPPAPORT and JOYCE RAPPAPORT; and THOMAS R. DEBNAM, AS TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM; and PAMELA L. VAUGHN; and 304 CONCORD & CUMBERLAND, LLC; and 402 CONCORD & CUMBERLAND, LLC; and AVANT & ASSOCIATES, LLC and OAKLAND HOLDING, LLC; and MATTISON J. MACGILLIVRAY and TERESA E. MACGILLIVRAY; and PAMELA R. QUEEN; and STUART REEVES
.....Plaintiffs,

v.

CONCORD & CUMBERLAND, LLC, et al., Defendants,

Of Whom,

SUPERIOR CONSTRUCTION CORPORATION is theAppellant,

and

THE MUHLER COMPANY, INC. is theRespondent.

CERTIFICATE OF SERVICE

I certify that I deposited the **Weather Shield Mfg., Inc.' s Memorandum in Support of Motion for Leave to File Brief of Amicus Curiae** in the United States Mail, postage prepaid, on May 10, 2016, addressed to the following:

P. Gunnar Nistad, Esquire
Gallivan, White & Boyd, PA
40 Calhoun Street, Suite 315
Charleston, SC 29401

And

Helen F. Hiser, Esquire
McAngus Goudelock & Courie, LLC
PO Box 650007
Mt. Pleasant, SC 29465
Attorneys for The Muhler Company, Inc.

Chris A. Majure, Esquire
Brent Boyd, Esquire
Murphy & Grantland, PA
4406-B Forest Drive
Columbia, SC 29206
Attorneys for Superior Construction Corporation

Alan R. Belcher, Jr., Esquire
Hall Booth Smith & Slover, PC
40 Calhoun Street, Suite 550
Charleston, South Carolina 29401
Attorneys for Safeco Insurance Company of America

May 10, 2016



Erin Magera
Paralegal
Seibels Law Firm, PA
38 Broad Street, Suite 200
Charleston, SC 29401
843-722-6777

Property”). Concord & Cumberland, LLC (“C&C”) was the original owner and the developer of the property. C&C hired J. Davis Architects, PLLC (“JDavis”) as the architect for the project, and Superior Construction Corporation (“Superior”) as the general contractor for construction of the building shell. Superior was to construct the building shell and then the individual owners of the condominiums would “upfit” their individual units.

Superior entered into a General Contractor Subcontract with The Muhler Company, Inc. (“Muhler”) for All Windows, Entry Doors, Patio Doors & Door and Window Trim (“Subcontract”) to supply and install windows and exterior doors manufactured by Weather Shield, Inc. (“Weather Shield”). While the Subcontract called for the installation of windows, the scope of that installation was limited to setting windows in rough openings which were prepared by Superior and/or its subcontractors. Although Weather Shield’s installation instructions called for its windows to be installed flush with the building’s exterior, restrictions imposed by Charleston’s Board of Architectural Review required that the windows be recessed. C&C, JDavis and waterproofing experts hired by C&C, Sutton-Kennerly Associates (“SKA”), came up with a joint resolution to this design issue, choosing a method by which the windows were flush mounted to wooden “bucks,” that rested in metal sill pans, and fastening that assembly in a recessed configuration to the building’s steel frame.

Muhler employed two different subcontractors, In the Wind, Inc. and Watts Builders, Inc., to install the windows. In the Wind also worked as a direct subcontractor for Superior by preparing rough openings that included the installation of sill pans and bucks within the pans.

CW
2/9/15

In early 2007, the Subject Property began to experience water intrusion issues, including but not limited to leaking at the windows and doors. Weather Shield, Superior and Muhler entered into an agreement, dated June 11, 2007 ("2007 Agreement"), in which C&C is identified as a third party beneficiary, to address the issues of leaking windows. The 2007 Agreement required, among other things, that Superior satisfy any outstanding balances due to Muhler related to the subcontract. Superior acknowledged that it has never paid Muhler the outstanding balances referenced in the 2007 Agreement.

Construction of the building shell was substantially complete in October 2007, at which point all of the condominium units had been sold. Both during and after construction, the windows and doors were tested and various water intrusion issues were noted at the Subject Property.

Subsequently, nearly identical cases were filed by and on behalf of fourteen separately named plaintiffs and the Concord & Cumberland Horizontal Property Regime ("Plaintiffs"). In their complaints, the Plaintiffs alleged water intrusion through the window units themselves and around the windows and doors. The Plaintiffs alleged other water intrusion problems, as well as a number of other construction/design defects or deficiencies. Several of the Defendants filed cross-claims against each other alleging, among other things, claims for contractual indemnification, equitable indemnification, contribution, breach of contract, negligence, and negligent misrepresentation.

After years of litigation, including extensive discovery, the Plaintiffs settled their claims with each of the Defendants. Subsequently, various other subcontractors settled cross-claims with the remaining Defendants, which include C&C, Superior, JDavis, Muhler and Weather Shield. Counsel for Safeco Insurance Company of America,

aw
3 of 15

Superior's, which provided a surety bond to Superior for its work at the Subject Property, has remained active in this case on the basis that they are representing Superior's interests in some of the remaining claims.

Motions

Superior filed a Motion for Partial Summary Judgment against Muhler seeking indemnification for amounts paid to the Plaintiffs to settle its liability with regard to the window and door issues. Superior's claim against Muhler is based on two contracts between the parties: 1) the Subcontract with Muhler, and 2) the 2007 Agreement. Superior filed a similar Motion for Partial Summary Judgment against Weather Shield based solely on the 2007 Agreement. ~~Muhler~~ ^{Superior} also moved for summary judgment against Weather Shield based solely on the 2007 Agreement. Superior alleges that, under both the Subcontract and the 2007 Agreement, it is entitled to recover all amounts it paid to Plaintiffs to settle their window and door claims, even amounts attributable to Superior's own purported negligence.

Muhler and Weather Shield each opposed Superior's motions for partial summary judgment. Muhler argued that neither the Subcontract nor the 2007 Agreement indemnifies Superior for its own negligence. Weather Shield also argued that the 2007 Agreement does not indemnify Superior for its own liability. In addition, both Muhler and Weather Shield argued that the 2007 Agreement is not enforceable because Superior breached certain provisions of that Agreement, and because of impossibility, in that they were prevented from attempting to repair window and door problems as was called for in that Agreement.

cw
4/9/15

Muhler moved for partial summary judgment on the cross-claims alleged by Superior and by C&C. Muhler argued that: 1) neither the Subcontract nor the 2007 Agreement entitle Superior and C&C for their own wrong doing and, in addition, that the 2007 Agreement is not enforceable due to both breach and impossibility; 2) neither Superior nor C&C is entitled to equitable indemnity because neither can prove it has "clean hands"; and 3) C&C is not entitled to contribution because it failed to extinguish Muhler's exposure to Plaintiffs' claims.

Weather Shield moved for summary judgment against Superior and C&C on all of their claims for equitable indemnity and contractual indemnity, and against C&C for its cause of action for contribution. Weather Shield argued that the 2007 Agreement is unenforceable due to Superior's breach of that agreement, and that Superior's and C&C's indemnity claims are foreclosed due to a lack of special relationship, lack of adjudication as to fault, and by Superior's and C&C's "unclean hands." Weather Shield argued that C&C's contribution claim is barred because C&C has not settled any claims against Weather Shield nor has it obtained a release of any claims against Weather Shield. In the alternative, Weather Shield argued that, if the 2007 Agreement is enforceable, any indemnity owed by Weather Shield would be limited only to claims by subsequent Plaintiff owners regarding the windows and doors themselves and related attorneys' fees.

JDavis filed a motion for summary judgment seeking dismissal of the cross-claims brought against it by C&C for contractual indemnity, equitable indemnity, contribution, breach of contract, negligence, and negligent misrepresentation. JDavis also moved for summary judgment against Superior's cross-claim pursuant to the *Spearin* doctrine, which provides that, "when a party supplies plans and specifications for use by

aw
5 9/15

a contractor to follow in constructing a project, said party impliedly warrants the sufficiency of the plans and specifications to construct the project.” *United States v. Spearin*, 248 U.S. 132 (1918).

C&C opposed Muhler’s, Weather Shield’s, and J. Davis’s motions for summary judgment, arguing that it was entitled to both contractual and equitable indemnification. Superior did not file a formal response to Muhler, Weather Shield’s or JDavis’s motions for summary judgment but addressed their motions in argument before this court.

This Court heard argument on the various motions on July 28 & 29, 2014. All parties were provided an opportunity to make and respond to the arguments and positions of the other parties.

Standard for Summary Judgment

Under Rule 56, SCRCPC, summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Gauld v. O’Shaughnessy Realty Co.*, 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct. App. 2008). “All ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant.” *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). “Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law.” *Keith v. River Consult., Inc.*, 365 S.C. 500, 505, 618 S.E.2d 302, 304 (Ct. App. 2005).

CW
6/9/15

Discussion

Under South Carolina law, parties can agree to indemnify each other for various types of damages or losses; however, neither of the agreements at issue here specifically provides indemnification for an indemnitee's own negligence. Indemnity agreements are strictly construed against the party seeking to be indemnified. *See Fed. Pac. Elec. v. Carolina Prod. Enter.*, 298 S.C. 23, 28-29, 378 S.E.2d 56, 58-59 (Ct. App. 1989); *see also East-Harding, East-Harding, Inc. v. Horace A. Piazza & Assoc.*, 91 S.W.3d 547, 551 (Ark. Ct. App. 2002) (same).

In addition, "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in **clear and unequivocal terms.**" *Laurens Emerg. Med. Spec. v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (emphasis added); *see also Murray v. Texas Co.*, 172 S.C. 399, 402, 174 S.E. 231, 234 (1934) (finding "broad and comprehensive" language was insufficient to prove the contract relieved a party from its own negligence). In order for Superior and C&C to defeat Muhler's and Weather Shield's motions for summary judgment on the contractual indemnity issue, they have to meet the very high standard of eliminating any possibility that the contract language on which they rely can be read to limit indemnification to the indemnitor's own negligence. In other words, in order to prevail on their contract claims, Superior and C&C must demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contract claims as a matter of law.

aw
7/15

A. The Subcontract does not obligate Muhler to indemnify Superior for Superior's own wrong-doing.

The indemnity clause in the initial Subcontract between Muhler and Superior does not indemnify Superior for its own negligence. The Subcontract's indemnity provision is the form clause for AGC Document No. 600, Subcontract for Building Construction, August 1984 by the Associated General Contractors of America. Courts uniformly interpret this language as not providing indemnification for the indemnitee's own negligence. See, e.g., *Braegelmann v. Horizon Dev. Co.*, 371 N.W.2d 644, 646-47 (Minn. Ct. App. 1985) (interpreting the same operative language as not providing indemnification to the general contractor for its own negligence); *Mautz v. J.P. Patti Co.*, 688 A.2d 1088, 1092-1093 (N.J. Super. Ct. App. Div. 1997) (finding virtually identical language did not indemnify indemnitee for its own negligence but instead provided indemnification "only to the extent the [indemnitor's] negligence contributed to the loss"); *Cabo Constr., Inc. v. R.S. Clark Const., Inc.*, 227 S.W.3d 314, 317-18 (Tex. App. 2007) (finding same language did not expressly state that the subcontractor would indemnify the contractor for the contractor's own negligence); *Brown v. Boyer-Washington Blvd. Assoc.*, 856 P.2d 352, 355 (Utah 1993) (limiting similar indemnification language to damages caused in whole or in part by acts of the subcontractor); *MT Builders, LLC v. Fisher Roofing Inc.*, 197 P.3d 758, 765 (Ariz. Ct. App. 2008) (characterizing this form indemnity clause as "a 'narrow form' of indemnification" that "only covers the indemnitee's losses to the extent caused by the indemnitor or a person the indemnitor supervises or is responsible for," and explaining that this language creates "a comparative fault or negligence arrangement whereby the indemnitor's liability is limited 'to the extent' it and its supervisees were at fault");

CW
8 } 19/

Frank, 527 N.W.2d at 81 (construing practically identical language to mean the subcontractor is liable to the general contractor only “to the extent of its own negligence but is not required to indemnify” the general contractor for the general contractor’s own negligence); *Glendale Constr. Servs., Inc. v. Accurate Air Syst., Inc.*, 902 S.W.2d 536, 539 (Tex. Ct. App. 1995) (holding that nearly identical language does not indemnify the indemnitee for its own negligence); *Hagerman*, 741 N.E.2d at 393-394 (similar language in AIA standard construction form contract does not “clearly and unequivocally” provide coverage for indemnitee’s own negligence).

Courts have held that the language “to the extent” in this indemnification clause means that the indemnifying party is liable to the indemnitee “to the extent of its own negligence but is not required to indemnify [the indemnitee] for [the indemnitee’s] negligence.” *Frank v. MSI Constr. Mgrs., Inc.*, 527 N.W.2d 79, 81 (Mich. Ct. App. 1995).

At the hearing, Superior presented a number of cases that it alleged supports its argument that the Subcontract indemnifies it for its own negligence. However, those cases contain language substantially dissimilar to Article 12.1 of the Subcontract which makes them of little use to Superior. In fact, the indemnification clause in the Florida case most heavily relied on by Superior, *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 S.2d 1072 (Fla. Dist. Ct. App. 2003), broadly provided indemnification “from and against all claims, damages, loss and expenses, including but not limited to attorney’s fees, arising out of or resulting from the **performance of the work**,” 853 S.2d at 1076 (emphasis added), whereas the Subcontract only promised to indemnify Superior “from and against all claims, damages, loss and expenses, including but not limited to

CW
9/15

attorney's fees, arising out of or resulting from the **performance of the Subcontractor's Work.**" (Subcontract, ¶ 12.1) (emphasis added).

Unlike the provision at issue in *Camp, Dresser*, here indemnity is limited to the performance of Muhler's work, whether directly or through its own subcontractors.

As a result, I find that this provision does not clearly indicate intent by the parties to indemnify Superior for its own wrongdoing.

B. The 2007 Agreement does not obligate either Muhler or Weather Shield to indemnify Superior or C&C for their own wrong-doing.

Even though the 2007 Agreement contains arguably broader indemnification language than the Subcontract, it does not state clearly and unequivocally that either Muhler or Weather Shield agreed to indemnify Superior and C&C for their own negligence and/or wrong-doing.

To the extent that the provisions in the 2007 Agreement purport to indemnify Superior and C&C "unconditionally," they are unconscionably broad. *See Fisher v. Stevens*, 355 S.C. 290, 296, 584 S.E.2d 149, 152 (Ct. App. 2003) (holding that an overly broad indemnification provision would "offend notions of public policy"). Although *Fisher* involved a so-called exculpatory contract, or waiver, the reasoning applies equally here, where the phrase "unconditionally indemnify" is as objectionably broad, if not broader, as the phrase at issue in *Fisher*, which released "'any person in any restricted area" from liability." *Id.*

Sections 11 and 12 of the 2007 Agreement simply do not clearly and unequivocally state that either Muhler or Weather Shield is agreeing to indemnify Superior and C&C for their own negligence. Although "formulaic language expressly stating that 'X indemnifies Y for Y's own negligence' is not mandatory," the agreement,

ow
10 9/15

however, is required to contain language "**unquestionably showing the parties' intent to indemnify in the event of losses resulting from the indemnitee's negligence.**" *Snohomish Cnty. Pub. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 271 P.3d 850, 854 (Wash. 2012) (emphasis added).

Here, as was the case in *Snohomish County*, the indemnity provision "does not tell a court 'clearly and unequivocally' that the parties considered the effect of the negligence of the indemnitee and intended to indemnify for the indemnitee's own negligence." 271 P.3d at 862. Indemnity provisions promising to indemnify "from and against any and all claims," or where the indemnitor assumed "all responsibility for claims asserted by any person whatever," are "general terms" that are "insufficiently clear and unequivocal," to provide indemnification for the indemnitee's own negligence. *Cox Cable Corp. v. Gulf Power Co.*, 591 So.2d 627, 629 (Fla. 1992).

The use of the term "unconditionally" does not, on its face, indicate that either Muhler or Weather Shield intended to indemnify Superior and C&C for their own negligence. At best, the inclusion of the term "unconditionally" in an indemnification provision that also contains restrictions renders that provision ambiguous, which is in direct contrast of clear and equivocal. Strictly construing the 2007 Agreement, I find that neither Section 11 nor Section 12 covers Superior and C&C for their own negligence.

The Court therefore grants Muhler's and Weather Shield's motions to the extent that they assert that neither the Subcontract nor the 2007 Agreement indemnifies Superior and C&C for their own negligence.

CW
11 of 15

C. C&C is not entitled to equitable indemnity from Muhler or Weather Shield and JDavis not entitled to summary judgment against C&C or Superior.

Superior has withdrawn its cross-claim for equitable indemnity against both Muhler and Weather Shield. However, C&C maintains that it is entitled to equitable indemnity from both Muhler and Weather Shield. Regardless of whether C&C can establish a special relationship with Weather Shield, C&C is not entitled to equitable indemnity from either Muhler or Weather Shield because there is an abundance of evidence that actions by C&C and/or its direct agents actively contributed to the problems with the windows and doors that the Plaintiffs alleged.

“Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second part is not. [citation omitted] If the second party is also at fault, he comes to court without equity and has no right to indemnity. **The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault** and the indemnifying party is the one at fault.” *Vermeer Carolina’s Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999) (emphasis added).

Despite its protestations otherwise, C&C’s fault goes beyond passive fault or a failure to discover latent defects. As noted above and explained in more detail below, C&C hired the architect, JDavis, the general contractor, Superior, and waterproofing experts, SKA and Metro Waterproofing. There is substantial evidence that actions by Superior, JDavis, SKA and Metro Waterproofing contributed to the water intrusion issues, and are responsible for damage caused to the windows and doors themselves.

C&C engaged Richard Andrews of Estates Management to serve as its “owner’s representative.” Mr. Andrews described his role as “working with the contractors,

w
12 9 15

helping them to understand the project, working with architects to ... get projects on the plans and specs and get the products spaced The owner's rep has to make sure that the contractor has the information they need to build the job with ..." In other words, as Mr. Andrews described it, he was a conduit for information from the architect to the contractor. He and Theresa Hodges, another Estates Management employee, worked directly with JDavis and Superior to make sure they had what they "needed to build the job." Mr. Andrews testified that JDavis, SKA and Estates Management were involved in coming up with the design for the installation of the Weather Shield windows on the project. Additionally, Mr. Andrews confirmed that he performed "fairly thorough" walk-throughs of the building prior to processing pay applications.

Mr. Glick reviewed the allegations contained in the Plaintiffs' Amended Complaint and opined that each alleged defect was the result of design deficiencies, contract administration and/or construction. Mr. Glick opined that the architect and general contractor missed numerous opportunities to see and correct obvious issues with the Subject Property, including the windows. "Those are contractual obligations and the contractor didn't do things right and that's well documented and the architect didn't catch things that were wrong and that's documented because we wouldn't be here today. If no one violated the standard of care, we wouldn't be here today." Mr. Glick testified that installation of the Weather Shield windows into a barrier system, as opposed to a drainable system, was not only a violation of the Weather Shield installation instructions, but also a violation of code.

In defense of his own company, Superior, Mr. Clardy testified that the problems lay not so much with Superior's failure to coordinate the work properly but, instead, pointed the finger at the architect and developer:

Majority I think on this project was in a failure of the project to be designed correctly and the contract documents to be complete and clearly show how the project was to be properly constructed That's the design issue I think that performance wound up being significantly integrated to the design problem to the point that it did have a significant ripple-down effect I pretty much agree that it is a step-down process. If the owner and architect don't provide adequate documentation to the contractor, the contractor doesn't provide adequate documentation to the subcontractor, then it's going to be exactly what we got here.

Mr. Lies testified that, during the testing process, they observed water penetration between the window and the buck, "[q]uite often," and attributed that "[p]ossibly due to the waterproofing." JDavis, SKA, and Metro Waterproofing, all hired directly by C&C, were responsible for waterproofing.

Given the substantial evidence by witness testimony, C&C is partially at fault for the conditions the Plaintiffs alleged regarding the windows and doors. C&C therefore comes to the court with unclean hands and is not entitled to equitable relief. Therefore, I find as a matter of law that C&C is not entitled to equitable indemnification.

As to the motion for summary judgment filed by JDavis, I find that the deposition testimony of Mr. Glick alone shows that there exist genuine issues of material facts that would make the granting of summary judgment improper.

Conclusion

Muhler's and Weather Shield's motions for partial summary judgment are GRANTED to the extent that they seek to have the Court find as a matter of law that neither the Subcontract nor the 2007 Agreement clearly and unequivocally provides

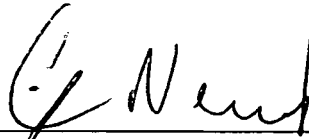
aw
14 9/15

indemnification for Superior's and/or C&C's own negligence. Muhler's and Weather Shield's motions for summary judgment are GRANTED to the extent that they seek to have the Court find that C&C is not entitled to equitable indemnity. Except to the extent specifically granted herein, all other motions for summary judgment filed by Muhler and Weather Shield are hereby DENIED.

The motions for summary judgment filed by Superior against Muhler and Weather Shield are hereby DENIED.

The motions for summary judgment filed by JDavis against C&C and Superior are hereby DENIED.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Clifton Newman", written over a horizontal line.

Clifton Newman
Presiding Judge

Columbia, South Carolina

September 25, 2014

AGREEMENT

This Agreement is entered into this the 11th day of June, 2007, by and between WEATHER SHIELD MFG., INC. ("Weathershield"), THE MUHLER COMPANY, INC. ("Muhler") and SUPERIOR CONSTRUCTION CORPORATION ("Superior").

WHEREAS, Weathershield has manufactured windows and doors that were supplied to The Muhler Company, Inc., which Muhler subsequently supplied to the Owner and installed, as a subcontractor to Superior on a construction project known as the Concord and Cumberland Condominiums at Concord and Cumberland Streets in Charleston, South Carolina (the "Project"). The Owner of the Project is Concord and Cumberland, LLC (the "Owner");

WHEREAS, during the construction process, testing was performed on certain windows and doors manufactured by Weathershield. The results of the tests indicated that some of the windows tested failed AAMA 502-2, Voluntary Specification for Field Testing of Windows and Sliding Glass Doors, Test Method B;

WHEREAS, Weathershield has represented to Superior that it has now inspected certain window and door units at the Project;

WHEREAS, Muhler and Weathershield have each continually represented that it is able and willing to perform remedial work on all windows and doors on the Project so that the windows are in compliance with Weathershield's applicable warranties;

WHEREAS, Weathershield and Muhler have represented to Superior that the remedial work they will undertake to the windows and doors shall bring the windows and doors in compliance the applicable warranty of Weathershield and in new condition;

WHEREAS, Muhler, Weathershield and Superior agree to resolve any product non-compliance issues upon the following terms and conditions:

1. That any and all testing conducted on the windows and doors to date, the resolution of the issues raised by the testing and completion of the remedial work by Muhler and/or Weathershield, nor this Agreement has amended or affected any party's contractual rights and responsibilities except to the extent specifically stated in this Agreement.



2. Neither Superior nor the Owner of the Project has released or waived any right arising under the applicable warranties and law of the state of South Carolina regarding Muhler, Weathershield or the Weathershield products installed or to be installed on the Project.

3. Muhler and Weathershield agree that the facts discovered during the window testing do not create a claim, or state any facts that would have included any right or obligation under any applicable statute of limitations. Any or all applicable statutes of limitation shall not begin to run until the Certificate of Substantial Completion is issued for the Project or discovery of problems with the windows and doors, whichever occurs last. In the event of any future claim regarding the windows or doors by any person or entity, Muhler and Weathershield waive the right to assert that these events accrued any obligation under any statute of limitations. Any issue related to the accrual and expiration of the statute of limitations shall be decided without reference to the facts and inferences discussed herein.

4. Muhler and Weathershield agree that the Owner is third-party beneficiary of this Agreement and shall be treated in the same manner with the same benefits that Superior has under this Agreement.

5. Weathershield agrees to test two (2) additional sets of windows to ensure there are no defects in material, workmanship, or design and certify the same to Superior, the Owner. Weathershield will pay for any failed test, and Superior will pay for any test that is successful. Pursuant to the terms and condition of the applicable Weathershield warranty, Weathershield furthermore agrees to remedy any defects in the design, manufacture, and workmanship of any Weathershield product installed or to be installed at the Project. Pursuant to the terms of the Subcontract Agreement, Muhler agrees to remedy any defects in the installation of the windows. This remedial work is guaranteed by Weathershield and Muhler not to materially alter the cosmetic appearance of the products. Muhler agrees that the Owner and Architect have to approve the cosmetic appearance of the windows, which shall not be unreasonably withheld. Muhler

and Weathershield agree and represent that all remediation activities and work can and will be completed in a manner that does not delay the installation of the exterior veneer of the structure and will not necessitate the removal of any exterior or interior veneer or finishes.

6. Muhler and Weathershield shall and do warrant and represent that the tested windows and doors have been replaced with compliant windows and doors, or satisfactorily remedied in place, such that the windows and doors installed or to be installed are in new condition. Muhler and Weathershield also warrant and represent that all windows and doors installed, singly and/or in combination, or to be installed have been evaluated in relation to the test results, and are represented and warranted to be free of any defects in accordance with the terms and conditions of Weathershield's applicable representations and warranties.

7. Muhler warrants and represents that all windows and door units installed or to be installed conform to the shop drawings and the Contract Documents.

8. Weathershield represent and warrant that the windows and doors supplied to the Project meet the design pressure ratings set forth in those certain engineering drawings prepared by Weathershield, dated April 3, 2006, and Superior, the Owner, and the Architect acknowledges were accepted such engineering drawings.

9. Muhler and Weathershield agree that in the event of any future window or door failure or defect in installation, that Weathershield will repair or replace any defective window or door, and Muhler will repair any other component of the building damaged in the process of repairing or replacing such window or door installation. Muhler's obligation to make such repairs shall for the time set forth in the Subcontract Agreement, but in no event shall Muhler be obligated to make repairs to the installation more than eight (8) years after substantial completion of the Project.

10. In exchange for the payment by Superior of all amounts due Muhler in accordance with the Subcontract Agreement and in accordance with the terms of the Memorandum of Understanding executed by Superior and Muhler on June 7, 2007, Muhler agrees that it will complete the installation of all uninstalled products and accessories promptly upon execution of this Agreement to allow for the timely installation of the exterior veneer, mechanical rough-ins and interior finishes pursuant to the current Construction Schedule.

11. In the event either Superior or Concord and Cumberland, LLC, are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended Contract Documents, or are defectively installed, Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable attorneys' fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration, liability incurred by either or both as consequence including, but not limited to, costs and attorneys' fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.

12. In the event either Superior or Concord and Cumberland, LLC, are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors are defective and/or do not comply with the warranties and representations made herein, Weathershield, agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable attorneys' fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration.

13. Muhler and Weathershield state that in return for this Agreement, it accepts as sufficient consideration, the decision by Superior not to pursue litigation against Muhler and Weathershield with respect to the discovered window and door defects.

14. Weathershield furthermore agrees that the warranty applicable to the windows and doors installed in the Project shall be for a period of twenty (20) years from the date of substantial completion of the Project, as opposed to the date of original purchase, and shall cover for the full twenty (20) years any products or parts determined to contain defects in material or workmanship transferable to subsequent owners.

15. Weathershield furthermore agrees that should it be determined that any of the windows or doors or installation contain defects in material or workmanship, that it will replace the units in accordance with this Agreement. Weathershield further agrees that any replacement parts will match the original or be the closest equivalent thereto. Weathershield furthermore confirms that the general provisions of the warranty are altered to include this document as an additional warranty. Should there be any dispute or inconsistencies between the applicable warranty and this Agreement, the language of this Agreement shall prevail. The parties acknowledge that this Agreement is intended to expand the warranty and in no way will be interpreted to limit it. Weathershield furthermore warrants these products are merchantable.

16. Except with respect to glass, paint, and hardware replacement parts or components, Weathershield agrees that it will provide replacement for any parts or products at one hundred (100%) percent of the listed price for the parts or products for a minimum of eight (8) years from the date of substantial completion. Weathershield also agrees that should there be the necessity for any replacement or repair of their product, that they shall bear any and all shipping costs.

17. Muhler and Weathershield state and acknowledge that this Agreement shall not act as a bar of Superior or Owner's right to demand arbitration in accordance with Paragraph 24 for any delay costs they have incurred related to the performance failures and installation of the windows and doors, if negotiations should fail.

18. Muhler and Weathershield agree to promptly negotiate or mediate any claim or dispute with Superior or the Owner relating to any delay costs incurred by the Owner or Superior, including, but not limited to, additional financing costs or extended general conditions costs incurred as a result of the windows and doors supplied by Weathershield for the Project and the installation undertaken by Muhler.

19. This Agreement shall be confidential and not disclosed by any party other than to the parties' legal and accounting professionals and respective sureties, except as required by law, although it may be filed in the circuit court proceeding in the event either party seeks the enforcement thereof.

20. The prevailing party in any enforcement action shall be entitled to recover their attorney's fees and costs incurred in the enforcement action;

21. The PARTIES agree that they have executed this Agreement on their own knowledge and their own investigation of the facts, and that this Agreement is not executed in reliance upon any statement of any person connected with, representing or represented by any of the entities hereby released.

22. The PARTIES declare that they have carefully read this Agreement, that they have been fully advised in connection with this Agreement by legal counsel of their own choice, that this Agreement has been fully explained to them prior to its execution and that they understand its terms and legal effect, and they sign this Agreement of their own free act.

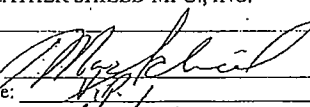

23. The PARTIES have each had the opportunity to participate in the drafting of this Agreement, which is the result of negotiations among the PARTIES. It is, therefore, specifically agreed that, in the event of any dispute with respect to the proper interpretation of any term of this Agreement, no one party shall be deemed to be the drafter.

24. The PARTIES agree that this Agreement contains the Entire Agreement between the PARTIES and the terms hereof are contractual in nature and not merely recitals and shall not be modified or amended except by written instruments signed by all the PARTIES or their representatives.

25. The PARTIES each acknowledge that the payment specified herein is not an admission of liability, but only a payment to resolve a dispute.

26. This Agreement shall be governed by the laws of the State of South Carolina in its interpretation and enforcement. Any and all claims or disputes arising out of or related to this Agreement shall be resolved by arbitration administered by the American Arbitration Association under the Construction Industry Rules of Arbitration. It is acknowledged that this Agreement is the product of mutual negotiation and it shall not hereafter be interpreted or enforced more strictly against any party hereto.

27. This Agreement may be executed in counterparts; facsimile signatures shall be as binding as an original.

SUPERIOR CONSTRUCTION CORPORATION By: _____ Title: _____ Date: _____	WEATHER SHIELD MFG., INC. By:  Title:  Date: 6/11/07
THE MUHLER COMPANY, INC. By: _____ Title: _____ Date: _____	

I, the undersigned Notary Public, hereby certify that _____ personally appeared before me and acknowledged that he is the _____ of Superior Construction Corporation, and that by authority duly given that he executed the foregoing document on behalf of and as the act in deed of Superior Construction Corporation

State of North Carolina

County of _____

Witness by hand and notarial seal, this the _____ day of _____, 2007.

Notary Public

My commission expires:

[NOTARY SEAL]

I, the undersigned Notary Public, hereby certify that Mark A. Schield personally appeared before me and acknowledged that he is the Vice President of Weather Shield Manufacturing, Inc., and that by authority duly given that he executed the foregoing document on behalf of and as the act in deed of Weather Shield Manufacturing, Inc.

State of Wisconsin

County of Taylor

Witness by hand and notarial seal, this the 11th day of June, 2007.

Lucas R. Meyer
Notary Public

My commission expires:

Permanent

[NOTARY SEAL]

I, the undersigned Notary Public, hereby certify that _____
personally appeared before me and acknowledged that he is the
_____ of The Muhler Company, Inc., and that by authority duly
given that he executed the foregoing document on behalf of and as the act in deed of The
Muhler Company, Inc.

State of North Carolina

County of _____

Witness by hand and notarial seal, this the _____ day of _____,
2007.

Notary Public

My commission expires:

[NOTARY SEAL]