THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2019-CP-10-00772
Appellate Case No. 2021-000290

Dag Pavic and Stela Susac-Pavic.....Plaintiffs,

v.

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

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

AND

Builders FirstSource-Southeast Group, LLC, ...Appellant,

v.

MW Manufacturers, Inc.,.....Third Party Defendant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This litigation arises out of alleged deficiencies in construction of the Plaintiffs' residence, located at 1368 Penshell Place, Mount Pleasant, South Carolina, which was completed in 2013. By their First Amended Complaint, filed February 28, 2019, Plaintiffs alleged against Appellant "defective/improper installation of windows and related flashing" during original construction. **R. p. 69.** Appellant then filed crossclaims against its subcontractor, Hurley Services, LLC, which was responsible for the window installation. The BFS crossclaims, alleging breach of contract, breach of implied and express warranties, negligence, contractual indemnity, and equitable indemnity, were premised upon Respondent's alleged negligence in the installation of the windows. **R. pp. 91-97.** Appellant later also filed third-party claims against the window manufacturer, MW Manufacturers Inc. **R. pp. 130-136.**

On October 31, 2019, Plaintiffs and Appellant entered into a stipulation by which the Plaintiffs agreed that they "are not asserting or alleging within the instant litigation against any defendant in this litigation (including but not limited to Builders FirstSource-Southeast Group, LLC), or against any third party defendant in this litigation, any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the windows installed at the subject residence, (identified herein as MW Series 800 Windows), and/or any component part of such windows, and/or in any MW installation instructions or requirements for those windows installed at the subject residence . . . ." **R. p. 261.** Likewise, the stipulation provided that the Plaintiffs were not seeking

recovery against any defendant or third party defendant in connection with such claims.

Based on Plaintiffs' stipulation that they were not alleging any window manufacturing defect, Appellant entered into a separate stipulation with the window manufacturer, MW Manufacturers, Inc., dismissing the manufacturer without prejudice from the litigation. **R. p. 263.** However, Appellant's crossclaims against Respondent remained.

On August 27, 2020, Respondent Hurley Services filed a motion for summary judgment against the crossclaims of Appellant. A hearing was held on the motion for summary judgment on October 1, 2020 before the Hon. Jennifer McCoy. On January 11, 2021, Judge McCoy issued a Form 4 Order granting partial summary judgment and requesting that counsel submit a proposed order. Concerned by the procedural complications of two separate orders, counsel for Appellant submitted correspondence to the Court requesting confirmation "that the Court will issue a subsequent Order comprehensively setting forth the findings of fact and conclusions of law, [. . .] that the issuance of the subsequent Order will serve as the Court's final dispositive Order, and that the date of the dispositive Order will serve as the date for commencement of any post-judgment procedures for the parties." **R. pp. 513-14.** The Court confirmed all of the above. **R. p. 515.** Respondents submitted a proposed order, and on January 22, 2021 Judge McCoy adopted it wholesale (filed January 25, 2021). Appellant timely moved for reconsideration, but by a Form 4 Order dated February 16,

2021, the Court denied Appellant's motion. Appellant filed a Notice of Appeal on March 18, 2021.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the Trial Court under Rule 56(c), SCRCP, which is that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In reviewing a motion for summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). Any triable issues must go to the jury. Mulherin–Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct.App.2005).

On an appeal from an order granting summary judgment, "the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party). Summary judgment is not appropriate where further inquiry into the facts of the case is

desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct.App.2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).

ARGUMENTS

Essential to understanding the issues on appeal is an understanding of the underlying contract that is the source of the claims at issue in this litigation; thus, in accordance with Appellate Rule 208(b)(1)(E), Appellant provides for the Court's benefit this separate statement of facts surrounding the Contract.

Respondent has been a subcontractor of Appellant for some time. The Master Subcontract Agreement ("Contract") that is the subject of this litigation was entered into on May 14, 2012. **R. p. 486.** Upon its expiration, desirous to maintain their working relationship, the parties entered into a substantially similar contract dated December 18, 2014. **R. p. 498.**

There are two sections of this Contract that Respondents now contest. The first is "Section 3. Warranty." In Section 3, the subcontractor warrants and guarantees "the Work," which is a defined term found in Section 1(a) of the Contract. **R. p. 489.** As defined, the "Work" encompasses only the materials that

the subcontractor agrees to provide and/or the services that the subcontractor agrees to perform. **R. p. 486.** *Thus, in Section 3, the subcontractor warrants and guarantees only the materials that the subcontractor provides and/or the services that the subcontractor performs.* The Warranty provision also provides that the subcontractor will indemnify Appellant for all nonconforming "Work" – which, again, is a defined term, indicating that the indemnification obligation on a demand made pursuant to the Warranty Provision encompasses only the materials and/or services provided by or rendered by the subcontractor.

The second section that Respondent now challenges is "Section 5. Indemnity" Section Five is comprised of four paragraphs, but only three are discussed herein. The first paragraph governs indemnification in cases including those arising out of property damage, such as the underlying action. The second paragraph governs indemnification in cases arising out of bodily injury to the subcontractor (Hurley), its agents, employees, or subcontractors. The third paragraph governs the subcontractor's separate duty to defend. Each is addressed here in turn.

Paragraph One provides, in relevant part, that Appellant may seek indemnification for losses arising out of, among other things, property damage:

> ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

R. p. 491. This paragraph expressly permits Appellant to recover from Respondent Subcontractor for the negligent acts or omissions of said

subcontractor in cases, such as the one before this Court, arising out of property damage. It bears emphasis that this paragraph is the only paragraph within Section 5 of the Master Subcontract Agreement which specifically provides for indemnification against loss resulting from property damage caused by the neglect or omission of the indemnitor.

Paragraph Two governs the relationship between the parties in cases arising out of claims of bodily injury to the subcontractor, its agents, employees, and/or subcontractors. This case does not arise out of bodily injury, and thus this paragraph is irrelevant and not currently before the Court. Nonetheless, Respondents have taken issue with this paragraph because, in cases involving bodily injury to the subcontractor, its agents, employees, and/or subcontractors, the contract allows Appellant to seek indemnification for losses to the fullest extent allowed by law, "REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES." **R. p. 491.** While, for reasons discussed below, this language may potentially be problematic if this were a case arising out of bodily injury, it does not affect Appellant's right to pursue indemnification pursuant to Paragraph One in a case arising out of property damage.

Paragraph Three of the Indemnity Section governs the subcontractor's duty to defend. Paragraph Three provides that:

> THE DUTY TO DEFEND UNDER THIS SECTION 5 IS INDEPENDENT AND SEPARATE FROM THE DUTY TO INDEMNIFY, AND THE DUTY TO DEFEND EXISTS

> REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR.

R. p. 492. Appellant believes that Paragraph Three needs no further explanation, as the terms are abundantly clear and speak for themselves.

There is one final provision in the Contract that neither Respondents nor the Trial Court chose to address (despite Appellant's multiple requests), but that is essential to the outcome of this case: the severability provision. The parties agreed that:

> [t]he provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

R. p. 497. Thus, the Contract requires that, in the event that any one provision should be found invalid, that provision should be severed and the remaining provisions and rights of the parties should be left intact.

Having provided the Court with this summary of the contractual provisions relevant to this case, Appellant now turns to its legal arguments.

I. The Trial Court Erroneously Applied South Carolina Code Section 32-2-10 to the Parties' Contract.

The Trial Court held that "the indemnity and duty to defend provisions of the master subcontractor agreement violate South Carolina public policy and §32-2-10 S.C. Code." **R. p. 14.** The Trial Court additionally concluded that the contract's Warranty provision violates Section 32-2-10 because it "allows BFS to seek indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation." **R. p. 9.** However, the Trial

Court's Order contains neither an analysis of Section 32-2-10 nor any explanation of how these contractual provisions allegedly violate the statute.

S.C. Code Ann. § 32-2-10 provides:

> Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees 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 or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.

(Emphasis added). Section 32-2-10, by its specific language, states simply that an agreement to indemnify a party against liability for damages arising out of that party's sole negligence is against public policy, and thus unenforceable. None of the applicable sections of the contract violates this statute.

A. *The Indemnity Provision of the Contract is Specifically Authorized by Section 32-2-10.*

The Trial Court first criticized the indemnity provision as running afoul of South Carolina Code Section 32-2-10. However, the indemnity provision of Section 5 Paragraph One, relied upon by Appellant in support of its claims in the underlying action, does not require Respondent to indemnify Appellant against liability for damages arising out of Appellant's sole negligence. Rather, by limiting indemnification only to damages "TO THE EXTENT CAUSED IN WHOLE OR IN

PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACOR," Section Five, Paragraph One requires Respondent to indemnify Appellant against liability or damages for *Respondent's* negligence (whether sole or concurrent). This arrangement is the exact type of agreement authorized by the second half of the statute, underlined above. Section 32-2-10 specifically authorizes agreements 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. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, (422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). The indemnity provision of Section 5 Paragraph One is, therefore, specifically authorized by Section 32-2-10 because by that provision Respondent undertook to indemnify Appellant for Respondent's own negligence (as opposed to Appellant's own negligence). Furthermore, a contractual provision authorized by statute cannot logically be against public policy Id. Thus, the indemnity provision does not violate Section 32-2-10 or public policy, and provides no basis for an award of summary judgment in favor of Respondent.

B. *The Duty to Defend Provision of the Contract is Neither Addressed nor Prohibited by Section 32-2-10.*

The Court's Order also finds that Paragraph Three of the Indemnity Provision violates South Carolina Code Section 32-2-10 because Appellant may seek reimbursement of attorney's fees regardless of any ultimate liability or negligence of Appellant. However, this statute addresses general damages and not recovery of attorneys' fees; thus, the statute does not apply to this portion of the Contract.

The very terms of the statute limit its application to agreements for indemnification against liability for damages. When approaching statutory interpretation, courts must assume that the legislature was aware of the common law, "and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Additionally, when, as here, a statute is "in derogation of the common law," it must be strictly construed. Id.

Section 32-2-10 specifically states that it governs agreements for indemnity against liability for damages. As noted by this Court in Concord & Cumberland, our courts "have consistently defined indemnity as 'that form of compensation in which a first party is liable to pay a second party for loss or damage the second party incurs to a third party." Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646-47, 819 S.E.2d 166 (Ct. App. 2018). Attorneys' fees do not fall within the scope of indemnity because they are not paid by a first party to "a second party for loss or damage the second party incurs to a third party." Rather, they are consequential damages of an indemnity claim. Because Section 32-2-10 must be strictly construed, and because it uses the term "indemnify," a term that "has a well-recognized meaning in the law," it must be read only to apply to agreements governing indemnification; its meaning may not be expanded by the Court to include agreements governing attorneys' fees.

While Section 32-2-10 addresses agreements governing the duty to indemnify, the statute is silent as to agreements imposing a duty to defend. The duty to defend and the duty to indemnify are two separate and distinct contractual obligations. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). "Although these duties are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the judgment, the duty to defend exists regardless of the [indemnitor's] ultimate liability to the [indemnitee]." Sloan Const. Co. v. Cent. Nat. Ins. Co. of Omaha, 269 S.C. 183, 186, 236 S.E.2d 818, 820 (1977).

Finally, even if the Court *were* to determine for some reason that the contractual provision regarding attorneys' fees violated Section 32-2-10, the Court should sever the offending provision, as discussed below; then, Appellant's claim for attorneys' fees would instead be fully encompassed by Paragraph One of the Indemnity Provision. Paragraph One provides that Respondents would indemnify Appellant for all losses, "including, but not limited to . . . attorney's fees" arising out of claims for property damage, but "ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OF THE SUBCONTRACTOR . . . ." Because recovery under Paragraph One is limited to attorneys' fees incurred in defending against the negligence of the subcontractor, it is not covered by the alleged prohibition of Section 32-2-10; in fact, it is specifically authorized by the statute, because the statute says that it does not affect or void "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 . . . ." As noted above, Paragraph One of the Indemnity Provision is the exact type of agreement authorized by the statute.

C. *The Warranty Provision of the Contract does not Violate Section 32-2-10.*

Finally, the Trial Court held that the contract's Warranty provision violates Section 32-2-10 because it "allows BFS to seek indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation." **R. p. 9.**

The Trial Court has grossly mischaracterized the Contract's Warranty provision. The Trial Court quoted excerpts from the Warranty provision, which are reproduced below; the Appellant, however, has added back some of the original contractual language, (which Appellant has underlined), that the Trial Court excluded:

> Section 3. Warranty.
>
> ... subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship described in this Section including, without limitation, property damage to the homes or properties into which the Work is incorporated ...

R. p. 8. As previously noted, "the Work," which is used throughout this section, is a defined term limited to the materials provided by and/or services rendered by the subcontractor. Because the entire section relates to "the Work" of the

subcontractor, it is impossible to reach the Trial Court's conclusion that the Contract forces the subcontractor to warrant materials provided by Appellant. Due to the definition of "the Work," any recovery based on a breach of the warranty provision would be limited to defects in the materials provided by or the services rendered by the subcontractor; in this case, because the Respondent subcontractor did not provide materials but only labor as the window installer, recovery based on a breach of warranty is limited to the labor rendered by the Respondent.

To the extent that Section 32-2-10 may apply to a warranty provision, agreements such as this one, where the recovery is limited to the negligence of the indemnitor, is explicitly authorized by the statute. Thus, the warranty provision does not violate Section 32-2-10 nor public policy.

II. The Trial Court Mistakenly Applied the Clear and Unequivocal Standard Articulated by Concord and Cumberland to the Relevant Contractual Language.

It bears emphasis that typically, courts will construe an indemnification contract "in accordance with the rules for construction, and of contracts generally." Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018) (Campbell v. Beacon Mfg Co., 333 S.C. 451, at 453, 438 S.E.2d 271, at 272).

The Trial Court held that "the indemnity and duty to defend provisions of the master subcontractor agreement are neither clear nor unequivocable [*sic*], and fail as a matter of law." **R. p. 14.** Nowhere in its Order does the Court explain why the provisions would need to be "clear and unequivocal," which is a

heightened standard of contractual interpretation. The Trial Court gave only slightly more context earlier in the Order when it explained that the paragraphs in the Indemnity provision "do not meet the elevated clear and unequivocable [*sic*] standard found in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018)." Concord & Cumberland stands for the proposition that if a general contractor is seeking to be indemnified by a subcontractor for the general contractor's own negligence, the contractual language imposing such an obligation must be clear and unequivocal. See id. Because Appellant is not seeking indemnification for its own negligence, the heightened standard of "clear and unequivocal" should not have been applied to its contract.

In Concord & Cumberland, the Court of Appeals considered indemnification provisions which were virtually identical to those at issue in the instant litigation. In that case, the general contractor, Superior Construction, sought indemnification from its window installation subcontractor, Muhler, against damages arising from both (a) the negligence of the subcontractor, and (b) the concurrent negligence of Superior (the general contractor) itself. The Circuit Court found that the indemnification provisions of the Subcontract Agreement were not sufficiently "clear and unequivocal" as to require Muhler to indemnify Superior for Superior's own negligence. However, the Circuit Court specifically determined that those indemnity provisions did in fact obligate the subcontractor, Muhler, to indemnify the general contractor, Superior, against claims and damages caused by the negligent acts or omissions of Muhler. The Court of

Appeals affirmed the determination of the Circuit Court, noting repeatedly within its opinion, that, although the indemnification provision of the relevant subcontract agreement was not sufficiently clear and unequivocal to require indemnification against the general contractor's own negligence, such indemnification provision nonetheless obligated the subcontractor to indemnify the general contractor against loss or damage caused by the negligent acts or omissions of the subcontractor.

At the crux of Concord & Cumberland was the fact that the general contractor was trying to recover from its subcontractor for the general contractor's own negligence. That is not the case here. Appellant is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from Respondent's negligence. When, as here, a contractor does not seek indemnity for its own negligence, the clear and unequivocal standard simply does not apply, and the indemnity provision is not subject to that heightened standard.

III. The Trial Court Erred in Failing to Address the Severability Provision of the Contract, Which Requires that Offending Provisions be Severed and Legitimate Provisions be Left Intact.

The Trial Court's Order does not address the Contract's severability provision. If it had, the Trial Court would have been compelled to sever any offending provisions of the Contract, leaving the rest of the Contract intact and precluding summary judgment. Although in its motion for reconsideration Appellant specifically requested that the Court address this provision, the Court failed to do so. **R. pp. 436-38.**

Appellant does not concede that any provisions of the Contract contain problematic language; nonetheless, to the extent that the Trial Court took issue with any specific language, it should have simply severed such language and left the remainder of the Contract intact. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

"Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002). The severability provision of the Contract here demonstrates that it was indeed the intent of the parties in this case that any invalid provisions be severed:

> The provisions of this Agreement shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision or portion thereof. It is the intent of the parties that any invalid provision hereof be reformed to the extent necessary to make it enforceable to the maximum extent of the law.

R. p. 497. This language unequivocally reflects the intention of the parties that unenforceable provisions be severed and/or reformed, and thus, to the extent that any portion of the Contract may be invalid, the Trial Court should have honored the intent of the parties and severed any offending provision, leaving the remaining provisions intact.

The Trial Court took issue, for various reasons, with Section Five (Indemnity), Paragraphs Two (Bodily Injury) and Three (Duty to Defend); as well

as with Section Three (Warranty). While Appellant maintains that all of these provisions are valid, the Court could have severed all of them, and Appellant would still be entitled to pursue its claim for contractual indemnity under Section Five Paragraph One (Property Damage), which was never criticized by the Court. Thus, it was an error for the Trial Court to grant summary judgment.

IV. The Parties' Contract was Neither a Contract of Adhesion nor Unconscionable.

The Trial Court vaguely held that "the indemnity and duty to defend provisions of the master subcontractor agreement are unconscionable, ambiguous, unintelligible, conflicting, oppressive, and are unenforceable." **R. p. 14.** The Order also states, without any explanation, that "[t]he master subcontractor agreement between BFS and Hurley is a contract of adhesion." **R. p. 7.**

A contract is considered one of adhesion if it "is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007). While the Master Subcontract Agreement does appear to be a from contract, *Respondent has offered no evidence that the contract was either (1) offered on a take-it-or-leave-it basis, nor that (2) its terms were not negotiable.* On summary judgment, a trial court looking to make a finding on whether a contract was one of adhesion *must* make the finding based on evidence in the record, and not solely on the averments of counsel in their pleadings. See S.C. R. Civ. P. 56. As the record is devoid of any such evidence, the Trial Court's finding was impermissible.

Even if the Trial Court's determination was correct, it would not end the analysis because "[a]dhesion contracts . . . are not per se unconscionable." Simpson, 373 S.C. at 27. "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id. at 24–25.

The Court held that the Contract was unconscionable because it permits "BFS to seek indemnity and a defense from labor-only subcontractors such as Hurley *for materials selected and sold by BFS to third parties*." **R. p. 11.** The Court's conclusion is nonsensical and, to the best of Appellant's understanding, can be reached only by a misconstruction of the Contract's Warranty provision. In the Warranty section, all warranties, all guarantees, and all indemnification undertakings are limited to the materials provided by or the services rendered by the subcontractor. **R. p. 489** – see also definition of "the Work," at **R. p. 486**. Because Respondent did not provide materials, the provisions of this section regarding warrantees and indemnification against defects in design and materials simply do not apply. Thus, it is impossible to conclude that Respondent is guaranteeing or providing indemnification for "materials selected and sold by BFS to third parties." Instead, in this situation, because Respondent provided labor, it has instead warrantied – and agreed to provide indemnification for claims against – its workmanship. This is not oppressive nor unconscionable, as our courts have consistently upheld contracts wherein a party agrees to indemnify a

second party for the first party's own negligence. See Concord & Cumberland, 424 S.C. 639; One Belle Hall, 418 S.C. 51.

Additionally, the Trial Court should have asked whether the terms of the Contract were "so oppressive that no reasonable person would make them and no fair and honest person would accept them." The evidence here shows that Respondent was so contented with the terms of the contract that it accepted them not only once in 2012, but chose to renew the same terms again in 2014. **R. pp. 486, 498.** Respondent cannot cry foul on terms it repeatedly agreed to because it has now become inconvenient for Respondent to be bound by them.

Finally, to the extent that the Contract may contain terms that the Court finds unconscionable, the unconscionable terms should be severed and the remainder of the contract should be left in place.

V. Because the Specific Issue Here has not been Addressed by a Court Before, the Doctrine of Collateral Estoppel does not Bar Appellant's Claims for Indemnity in the Present Case.

The Trial Court's Order finds that the Appellant's claims are barred by collateral estoppel because identical issues have already been ruled upon in Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al., Civil Action No. 2018-CP-08-2547 and Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455.

The doctrine of collateral estoppel is available when issues of fact or law are actually litigated and determined by valid and final judgment. Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994).

It is thus only when a valid and final judgement on the merits has been reached that the doctrine of collateral estoppel will have any application. Even in those instances where a valid and final judgement has been reached, the doctrine will preclude relitigation only of issues that were in fact actually litigated and determined. Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 495–96, 450 S.E.2d 616, 619 (Ct. App. 1994). Neither criterion is satisfied here, and the doctrine of collateral estoppel is simply not available to preclude litigation of the issues before this Court.

Each of the orders cited by the Respondent is currently pending, for additional consideration, before the South Carolina Court of Appeals. **R. p.p. 35, 51.** Absent an authoritative resolution before our appellate courts, the Appellant will not have been afforded a full and fair opportunity to litigate those issues addressed within the respective orders, and no final judgement will have been rendered.

Equally importantly, and of equal relevance here, each of the orders, as issued by Judges Newman and Young, respectively, is based upon the Court's stated finding that the Appellant, in each action, sought indemnity against liability for damages arising out of the Appellant's own negligence.

Both Judges Young and Newman further determined that the indemnity provisions of the relevant subcontract agreements were not sufficiently clear and unequivocal to impose such an indemnity obligation, and awarded summary judgement on that basis.

The Trial Court's Order notes that other courts "have found that the indemnification provisions fail to meet the clear and unequivocable [sic] standard." **R. p. 12.** In fact, what the other courts actually found was as follows:

> BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question as to BFS seeking indemnification for its own negligent acts or omissions. BFS has failed to 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.

See Amended Order of Judge Newman filed February 3, 2020 in Builders FirstSource – Southeast Group, LLC v. MI Windows and Doors et al., Civil Action No. 2018-CP-08-02547, (emphasis added), **R. p. 19**, which order was also adopted by Judge Young in Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455, **R. p. 30.** As evidenced by the language of the order, Judge Newman only ruled on the issue of whether BFS could recover for its own negligence, finding that:

(a) BFS was seeking to be indemnified for its own negligence, and

(b) the relevant contract provision was not sufficiently clear and unequivocal to require the subcontractor to indemnify BFS for BFS's own negligence.

The Trial Court's Order does not make any finding regarding Appellant's ability to recover in indemnity for its own negligence, because that is not the issue in this case. Instead, the issue before this Court is whether Appellant can recover for the negligence of its subcontractor, which is a separate issue from the one ruled upon by Judge Newman (and consequently, by Judge Young). This issue has not

yet been "actually litigated" within the context of collateral estoppel. Here, because Appellant is not seeking to be indemnified against Appellant's own negligence, but only against liability for damages caused by the negligence of its subcontractor, neither Judge Newman's Order nor Judge Young's Order can, as a matter of law, operate to estop Appellant from seeking indemnification for Respondent's negligence in this action.

The Trial Court's holding regarding collateral estoppel is also problematic because it mischaracterizes the prior rulings as having found that the indemnity provisions generally fail to "meet the requirements of South Carolina law." As discussed above, the holding of Judge Newman was limited to the issue of whether BFS could recover for its own negligence. That Court did not determine that the provisions fail to meet the requirements of South Carolina law. Additionally, no court has ever considered the provisions in light of Section 32-2-10 or any case law other than Concord & Cumberland. Judge Newman did not determine that the indemnity provision violated South Carolina law, but only that, in light of Concord & Cumberland, the indemnity provision was not sufficient to require the subcontractor to indemnify Appellant for its own negligence. When, as here, Appellant is seeking indemnity only for its subcontractor's negligence (whether sole or concurrent), no court has ever held that the indemnity provision is insufficient grounds for recovery, and thus, it is impossible for collateral estoppel to apply to the situation before this Court.

VI. Given the Validity of the Contract, Genuine Issues of Material Fact Preclude Summary Judgment.

The Trial Court held that:

> Although BFS contends that there are material issues of fact because of alleged installation deficiencies on the part of Hurley, those alleged deficiencies have no bearing on whether the language of the contract is against public policy, violates §32-2-10 S.C. Code, is unconscionable, and fails to meet the clear and unequivocable [*sic*] standard.

R. p. 13. Because Appellant has now established that the language of the Contract is not against public policy, does not violate Section 32-2-10, is not unconscionable, and is not subject to the "clear and unequivocal" standard, Appellant now turns to the issues of fact that preclude summary judgment.

Summary judgment is proper if "...there is no genuine issue as to any material fact", and the moving party is "entitled to judgment as a matter of law." Rule 56(c) SCRCP. As demonstrated hereinafter, the testimony offered on behalf of the plaintiffs by their retained expert, Russell T. Mease, PE, is sufficient to establish a genuine issue of material fact, precluding summary judgment in favor of Respondent.

The windows and associated flashings at the Plaintiffs' residence were installed by Respondent, pursuant to obligations undertaken by Respondent under the Master Subcontractor Agreement executed with Appellant.

Plaintiffs' expert, Mr. Mease testified that he identified deficiencies in the installation of the windows at the Plaintiffs' residence. Specifically, Mr. Mease determined that

> (a) the flexible Fortiflash rough opening flashing at the windows had not been properly weather lapped outboard of the woven building wrap installed beneath the window sill; **R. p. 446, line 10 – p. 447, line 11; R. p. 448, lines 6 -19**;
>
> (b) the flexible Fortiflash material had not been installed to a sufficient depth within the window

rough opening framing and the material did not appear to turn up the vertical leg of the jamb, rendering the flashing ineffective; **R. p. 449, line 23 – p. 450, line 11**;

(c) the head flashing of the windows had not been properly integrated (weather lapped) with a building wrap above the windows. **R. p 451, line 25 – p. 452, line 12**.

Mr. Mease further contended that the aforesaid failures constituted violations of Section 703.8, of the International Residential Code, 2006 Edition. He further opined that the aforesaid purported deficiencies in window flashing installations, coupled with the omission of a proper sealant joint around window perimeters, had resulted in water intrusion and associated damages at or around window locations. **R. p. 453, lines 2-15.**

Mr. Mease also testified that appropriate integration of window flashings and adjacent weather resistant barrier were addressed within the relevant building code, and that such procedures should have been known to the window installation subcontractor. **R. p. 454, lines 11-19.**

As noted above, Plaintiffs have alleged that the windows were installed improperly and that the Plaintiffs have sustained or will sustain damages resulting from the improper window installation. Plaintiffs have imputed fault associated with the improper window installation, by Respondent, to Appellant. Thus, the evidence and all inferences which can be reasonably drawn therefrom, viewed in the light most favorable to Appellant, clearly suggest negligent acts or omissions by Hurley in its installations of the windows and related flashings, causing the water intrusion and associated damages at the subject residence. At

the very least, the testimony of Mr. Mease establishes a scintilla of evidence adequate to preclude summary judgment in favor of Respondent.

CONCLUSION

Because (1) the Contract between Appellant and Respondent does not violate South Carolina law nor public policy, is not unconscionable, and contains a severability clause that allows valid contractual provisions to remain in force even after invalid provisions are severed; (2) the issues before the Court have not been previously ruled on and are not subject to collateral estoppel; and (3) issues of fact preclude summary judgment, Appellant respectfully requests that this Court REVERSE the decision of the Trial Court.

HOWELL, GIBSON & HUGHES, P.A.

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July 28, 2021