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SC Court of Appeals

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.

APPENDIX TO RECORD ON APPEAL

HOWELL GIBSON & HUGHES, P.A. CLARKE, JOHNSON, PETERSON & McLEAN, P.A.

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INDEX

Appendix to Record on Appeal

1. Amended Motion for Partial Summary Judgment of Hurley Services, LLC
as to Crossclaims of Builders FirstSource-Southeast Group, LLC filed
September 17, 2020, excluding attached exhibits which are already a part
of the Record on Appeal.....1

The aforementioned Appendix to the Record on Appeal is submitted to the Court pursuant
to Rule 212(b), SCACR with the consent of both Appellant and Respondent.

HOWELL GIBSON & HUGHES, P.A. CLARKE, JOHNSON, PETERSON & McLEAN, P.A.

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August 4, 2021

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
) C/A NO. 2019-CP-10-00772

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

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.)

**AMENDED MOTION FOR PARTIAL
SUMMARY JUDGMENT OF
HURLEY SERVICES, LLC AS TO
CROSSCLAIMS OF BUILDERS
FIRSTSOURCE-SOUTHEAST
GROUP, LLC**

**TO: STEPHEN P. HUGHES, ESQUIRE AND WILLIAM H. COX, III, ESQUIRE,
ATTORNEYS FOR BUILDERS FIRSTSOURCE-SOUTHEAST GROUP,
LLC**

YOU WILL PLEASE TAKE NOTICE, that the defendant, Hurley Services, LLC, hereinafter "Hurley", pursuant to the provisions of Rule 56 of the South Carolina Rules of Civil Procedure, will move the Court within ten (10) days after service of the within motion or as soon thereafter as the same may be heard for an order granting partial summary judgment in its favor as to crossclaims of Builders FirstSource-Southeast Group, LLC, hereinafter "BFS". The grounds for this motion are as follows:

1. There exists no issue as to any material fact and Hurley is entitled to

judgment dismissing crossclaims for breach of express and implied warranty, negligence, breach of contract, and contractual indemnity as a matter of law.

2. The crossclaims of BFS for breach of express and implied warranty, breach of contract, and negligence are “merely disguised ... claims for equitable indemnity” and fail as a matter of law. See Stoneledge at Lake Keowee Owners’ Ass’n, Inc. v. Builders FirstSource-SE Group, 776 S.E.2d 434, 439 (S.C. Ct. App. 2015).

3. The crossclaim of BFS for contractual indemnity is based on contractual provisions that are neither clear nor unequivocal, and are against public policy and the laws of South Carolina, and, thus fail as a matter of law. See Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 819 S.E.2d 166, 172 (S.C. Ct. App. 2018).

4. The crossclaims of BFS for breach of express and implied warranty, negligence, and contractual indemnity are barred by the doctrine of collateral estoppel.

5. That the master subcontract, including indemnification provisions, is a contract of adhesion which was drafted by BFS and should be strictly construed against BFS and in favor of Hurley.

6. That the master subcontract of BFS is ambiguous, contains conflicting provisions, is unconscionable, gives Hurley no meaningful choices, and the inequality is so gross as to shock the conscience of the court.

7. That BFS provided MW Series 800 windows manufactured by MW

Manufacturing, Inc. for installation in Plaintiffs' residence; that although these windows were subject to a class-action suit and settlement, and BFS filed a third-party complaint against MW Manufacturing, Inc, the master subcontract drafted by BFS provides that Hurley warrant, guarantee, and indemnify BFS for loss or damage caused by these windows which BFS provided to Hurley; that these terms are so oppressive that no reasonable person would make them and if understood, no fair and honest person would accept them.

8. That the master subcontract drafted by BFS violates South Carolina public policy, and South Carolina law, including but not limited to §32-2-10 S.C. Code.

This motion will be based upon the pleadings, master subcontract agreements of BFS dated May 14, 2012, and December 18, 2014, attached as Exhibits A and B, and answers of BFS to Hurley interrogatories attached as Exhibits C and D. The Court will also be asked to take judicial notice of the order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC, 2016-CP-10-3455 , the order of the Honorable Clifton Newman filed February 3, 2020 in the Court of Common Pleas for Berkeley County in the case of Builders FirstSource-Southeast Group, LLC v. M.I. Windows & Doors, Inc., et al. as Civil Action No. 2018-CP-08-2547, and decision of the Court in Gulbankian v. MW Mfrs., Inc., United States District Court, District of Massachusetts, Civil Action No. 10-10392-RWZ (D. Mass. Dec. 29, 2014).

A memorandum of law will also be submitted to the Court in advance of the scheduled hearing in this matter.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Appendix to the Record on Appeal contains all material proposed to be included of any of the parties, and no other material.

SIGNATURE PAGE FOLLOWS

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