THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2016-CP-10-03455
Appellate Case No. 2020-001328

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SC Court of Appeals

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

v.

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

Fabrications, LLC; Rogerio Dos Santos dba Rogerio Santos Construction; Fabio Oliviera dba Four Season Siding; Sunrise Siding; Garcia Roofing, LLC; Espino Roofing, LLC; Migual Painting, LLC, Horacio Jasso; Standard Precast Walls, LLC; Alfonso Rodriguez Vazquez aka Alfonso Rodriguez, Sr.; and John Does 55-75, Defendants,

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

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STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court inappropriately grant summary judgment to Respondents despite the presence of genuine issues of material fact?

II. Did the Trial Court erroneously determine that the doctrine of collateral estoppel bars Appellant's claims for indemnity in the present case?

III. In adopting the Order of Judge Newman, did the Trial Court mischaracterize the language of the parties' contract as confusing and therefore unenforceable?

IV. Did the Trial Court err in holding that the relevant contractual language did not meet the clear and unequivocal standard articulated by Concord and Cumberland?

V. Did the Trial Court incorrectly hold that the contractual language violates the laws and public policy of South Carolina?

STATEMENT OF THE CASE

This litigation arises out of alleged construction defects at Six Fifty Six Coleman Boulevard, a townhome community in Mount Pleasant, SC. Appellant Builders FirstSource – Southeast Group, LLC supplied windows and doors for the nine buildings constructed in 2013 and 2014 known as the "Ryland" phase, and Appellant's subcontractors, Respondents Hurley Services, LLC and Charleston Exteriors, LLC installed the windows and doors. Respondents Hurley Services and Charleston Exteriors performed their installation services pursuant to subcontract agreements entered into with Appellant in 2012. Each Subcontract Agreement is derivative of the Master Subcontract Agreement Version 5/17/06, and each contains a provision that requires the subcontractor to defend and indemnify Appellant from all suits resulting from property damage alleged to have arisen out of the subcontractor's performance of its work. After being served with Plaintiffs' complaint, BFS filed third-party claims and subsequently cross-claims against Hurley Services and Charleston Exteriors for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence.

In the underlying suit, Appellant, Hurley Services, and Charleston Exteriors have each reached individual settlements with the Plaintiffs resolving Plaintiffs' claims against each party for their own respective liabilities. However, Appellant's third-party claims against its subcontractors for defense costs – specifically for attorneys' fees and costs incurred in defending itself against the Plaintiffs' claims of negligence – survived the settlement. Respondent Hurley Services moved for summary judgment against Appellant's claims on January 22, 2020. Charleston

Exteriors joined in said motion on February 21, 2020. After hearing oral argument on the motion, the Trial Court issued an order granting the motion for summary judgment on April 29, 2020. Appellant filed a timely motion for reconsideration, and all parties submitted additional briefs. The Trial Court denied the motion for reconsideration without a hearing by a Form 4 Order on August 27, 2020. This appeal followed.

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

I. The Trial Court Erred in Granting Summary Judgment to Respondents Despite the Presence of Genuine Issues of Material Fact.

The presence of a genuine issue of material fact precludes the Trial Court from granting summary judgment. Here, the genuine issue of material fact is whether Respondent, as a subcontractor for Appellant, negligently performed its work on the Ryland project. The issue is genuine because evidence has been presented supporting the contention that Respondent negligently failed to install caulk on the inboard faces of the window nailing fins. The issue is material to the lower court's ruling because if Respondent *were* negligent, Appellant should have been allowed to pursue its contractual indemnity claim for attorneys' fees against

Respondent for Respondent's negligence even without the presence of contractual language that satisfies the Concord & Cumberland "clear and unequivocal" standard (discussed in greater detail below).

The Plaintiffs' claims, as asserted against Appellant and Respondent, are premised upon alleged deficiencies in installation of windows during original construction of the nine Ryland buildings. In support of those allegations, the Plaintiffs offered testimony of their primary forensic expert, professional engineer Russell T. Mease. Mr. Mease determined that the window installations were defective based upon his finding that they failed to include the application of caulk inboard of any of the four perimeter nailing fins[1] of the windows – which would be contrary to the requirements imposed by the window manufacturer. At the Trial Court level, Respondent represented, incorrectly, that the only deficiency in installation identified by the plaintiffs' expert, Mr. Mease, was the omission of caulk inboard of only the sill nailing fin (rather than all four fins). Respondent has argued further that any failure to install caulk inboard of the sill nailing fin was a result of specific instructions from Builders FirstSource, effectively precluding any Builders FirstSource recovery in indemnity.

Contrary to the representations of the subcontractors, however, Mr. Mease in fact testified that, notwithstanding the installation criteria imposed by the window manufacturer, no caulk had been installed inboard of *any* of the four perimeter

[1] The following terms will be used throughout this section to describe the four different nailing fins that border the window: the "sill," which runs along the bottom; the "jamb," which runs along each side; and the "head," which runs along the top.

nailing fins (flanges) of the windows at the Ryland buildings. The testimony of Mr. Mease, in addressing window installation issues, included the following:

> Q. As I understand it, your criticism relative to window installation on the Ryland side of the project relates to a document that was produced to us last night, this MI window -- I believe you referred to it as a cut sheet -- that's been marked as Exhibit 100.
>
> A. Yes.
>
> Q. And concerning that sheet, there's a reference there that says, Caulk under mounting fin entire perimeter before fastening. And that detail and statement on the Exhibit 100 is the basis of your opinion that there's something wrong with the installation of the windows as to the MI windows?
>
> A. Yes.

(R. p. 488, lines 3–17.) Mr. Mease continued and explained how he was able to determine the absence of the required sealant under the nailing fins:

> Q. What's your basis for determining that there is not caulk installed under the perimeter fin?
>
> A. Well, last night I went through my pictures and looked at every window fin that was exposed during our investigation and the defense's investigation, and there's no evidence at all of sealant behind the nailing fin. If sealant is placed behind the nailing fin, you always see it in the nail holes, and quite often behind the perimeter as it is squeezed out behind the fin. And there was no evidence of that in any of the windows that were exposed.

(R. p. 488, line 18-p. 489, line 6.) Mr. Mease confirmed his opinion in subsequent testimony as follows:

> Q. Can you definitively opine that there's a complete absence of caulk behind the nailing fins of the windows installed on the Ryland buildings?
>
> A. I have no evidence of it. I was able to see the window corners at the jamb-sill intersection. That's another area where I would typically see sealant exposed from behind the fin. And, again, I have no

evidence that there's any sealant behind these windows, and I believe that to be the case.

(R. p. 491, line 23–p. 492, line 9.)

Moreover, although it is undisputed that the Builders FirstSource installation practices included the substitution of Fortiflash at the sill in lieu of caulking inboard of the sill nailing fin (flanges), it is equally undisputed that the Builders FirstSource installation practices included the application of caulk inboard of the remaining window perimeter nailing fins (flanges) (at jambs and head); that is to say, while Appellant's practice was to use a different material under the lower, sill nailing fin, it was nonetheless Appellant's practice to caulk the remaining three nailing fins bordering the window (and thus, if Respondent deviated from this practice, then Respondent, rather than Appellant, was negligent).

The Builders FirstSource window installation practices were specifically addressed within the testimony of Terry Rosamond, the Builders FirstSource 30(b)(6) designee, as follows:

Q. How were the windows installed at 656?

A. How were they installed? To my understanding, the windows were put in level, plumb and square with sealant behind three -- well, first there's a sill pan created with Fortifiber flashing in the bottom sill and up approximately 6 inches each side. The window is installed with sealant behind the three flanges, two jambs and a head. Then it's put in with fasteners, and I think there's a fastener in every nail slot, best I understand. Then you tape your jamb tape on each side of the jambs. Then you take your head flashing and then pull your house wrap down over the head flashing for the tape.

(R. p. 505, lines 1–15.) Mr. Rosamond continued as follows:

Q. So you set your window in. Walk me through it, really basic. What's next after you set the window? Or did I skip a step? You show

up, the rough opening is there, and it may or may not have been cut. If it's not cut, then the window installer cut it. Then what?

A. Like I said, you create what we call a sill pan in the bottom using the FortiFlash flashing. Normally cut it 12 inches longer than the opening so it can wrap 6 inches up each jamb side. And then on the corners, we normally would put like a butterfly patch on those corners, to seal any of those corners so there's no water penetration. Next step would be to install your window. You'd apply a 3/8 bead of caulk around three sides of the window, the sides, the top and the head. And sometimes they require you to do a skip caulk on the bottom. That's -- a lot of times that's required by the builder which way they want it done.

(R. p. 506, line 18–p. 507, line 13.)

Equally importantly, Edward Taylor, the 30(b)(6) designee for Charleston Exteriors, confirmed that the Builders FirstSource subcontractors were advised of these Builders FirstSource installation practices, offering testimony as follows:

Q. And he didn't give you any field instructions before you started the work?

A. Not anything further than what we were already instructed on, how they expect the windows to be installed. There's nothing to add to that. But he inspects everything from the time -- taping the windows, butterflying the corners, to caulking the windows.

(R. p. 513, lines 17–24.) Mr. Taylor walked through the Builders FirstSource window installation instructions in detail which confirmed installation of caulk inboard of the three nailing fins:

Q. Okay. And then what's the next step?

A. Next step is to install the window itself. You've got to caulk. We used a whole tube of caulk on the nail flange, three -- the two sides and the top. Put your shims in the bottom at the sill, set your window, plumb, level, nail your corners. Once you nail off your corners, you nail off the rest of the window, and you have to stop.

(R. p. 514, lines 14 – 22.)

The above evidence, taken together, establishes the following: (1) Appellant's installation criteria, which were to be followed Respondent, included the application of caulk inboard of the three nailing fins of the window at the jamb and head; but, (2) the plaintiffs' retained expert, Russell Mease, determined that such caulking had been omitted, not only inboard of the bottom sill fin, but also inboard of the three remaining perimeter fins of the windows. Such a failure, if proven, would be attributable to the negligence of the installation subcontractors.

It is for losses resulting from such subcontractors' negligence that Appellant is currently seeking to recover attorneys' fees, which appellant incurred as a consequence of the Respondents' breach of its contractual obligations to defend and indemnify. Under the circumstances, the Trial Court's determination of an absence of any genuine issue of material fact is not supported by the record, and is contrary to the specific evidence presented. At the very least, the aforesaid testimony establishes a scintilla of evidence sufficient to present a genuine issue of material fact as to whether Respondent was negligent, such as to entitle Appellant to pursue the recovery that it seeks. Such an issue of material fact should have precluded an award of summary judgment in favor of Respondent.

II. The Doctrine of Collateral Estoppel does not Bar Appellant's Claims for Attorneys' Fees in the Present Case.

The Trial Court held that it was collaterally estopped from considering Appellant's claims for attorneys' fees by the Order of the Hon. Clifton Newman filed February 3, 2020 in the case of Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al, Case No. 2018-CP-08-2547. **(See R. pp. 9-19.)** Addressing the Order, the holding goes on to state that "[s]pecifically, the Court

references and adopts the court's analysis in Paragraphs B and C therein." **(R. p. 3.)**

The case of Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc., et al involved a claim of Builders FirstSource against a subcontractor for indemnification for damages. The order referenced by Judge Young is currently the subject of a separate appeal (See Appellate Case No. 2020-000415).

Paragraph B of Judge Newman's Order, which was adopted by the Trial Court, grants summary judgment on the claims of Builders FirstSource that were considered disguised indemnity claims under Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015). Because the Stoneledge case is still considered good law by our courts, Appellant is not challenging the Trial Court's holding regarding Stoneledge.

Paragraph C of the Order, which was also adopted by the Trial Court, addresses the Builders FirstSource claim for contractual indemnity. The holding of Paragraph C reads:

> As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal ***when seeking to be indemnified for its own negligence***, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear [sic] or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

(R. p. 16 (emphasis added).) Judge Newman believed that BFS was seeking to be indemnified for its own negligence, and thus granted summary judgment.

The Trial Court's determination that it was estopped from allowing Appellant to proceed on its claims by Paragraph C of Judge Newman's Order is without merit. Collateral estoppel requires that: (1) the issue in the current case was actually litigated in the prior action; (2) the issue was directly determined in the prior action; and (3) the issue was necessary to support the prior judgment. Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). The doctrine of collateral estoppel applies only "once a **final judgment** on the merits has been reached in a prior claim." Carrigg v. Cannon, 347 S.C. 75, 79, 552 S.E.2d 767, 770 (Ct. App. 2001) (emphasis added). "Even where all the elements for collateral estoppel are met, it will not be rigidly or mechanically applied, and the application of the doctrine may be precluded where unfairness or injustice results, or public policy requires it." Id.

Judge Newman's Order cannot collaterally estop the Trial Court in this case from allowing Appellant's claims to proceed for two reasons. First, Judge Newman's Order is currently on appeal. **(R. p. 401.)** Collateral estoppel requires that a *final*, prior judgment exists; however, a judgment, subject to reconsideration upon appeal, cannot be considered "final" until the ultimate appellate court has made its determination. The reasoning of the Trial Court to the contrary would potentially endow the lower courts with authority not contemplated by the judicial system, and, correspondingly, deprive the appellate courts of the authority reserved to those bodies.

The second reason that collateral estoppel is inapplicable to this case is that "the issue . . . actually litigated in the prior case" is different than the issue before the Trial Court in this case. Judge Newman's order specifically holds that:

> 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.

(R. p. 16 (emphasis added).) In the case before this Court, BFS is not seeking indemnification for its own negligent acts or omissions, but rather is seeking attorney's fees pursuant to the clear provisions of its subcontract agreements. Paragraph C of Judge Newman's Order never even considered the contractual language governing attorneys' fees. Thus, the issues are not the same, collateral estoppel has not been triggered, and Judge Newman's order is not relevant to the analysis required by this case.

III. Judge Newman's Analysis, Adopted by the Trial Court, Misunderstood and Misrepresented the Parties' Contract Language.

In adopting Paragraph C of Judge Newman's Order, the Trial Court purportedly adopted Judge Newman's position therein that the contract entered into by Respondent and Appellant is confusing and thus precludes recovery. Respondent has likewise argued that the entire indemnity section – in fact, the entire contract – should be voided because the indemnity section contains provisions that are "confusing," "unclear," "contradictory," and "downright deceptive." **(R. p. 430, lines 9-10.)**

The contracts governing the indemnity claims in this case and in the case before Judge Newman contain nearly identical indemnity provisions. In his order, Judge Newman quoted two different paragraphs of the Contract's indemnity provision, misunderstanding that these two provisions apply to completely separate scenarios, and he reasoned that these provisions somehow contradict each other in a way that renders Appellant's indemnity claims void.

The indemnity provision of the Contract between Appellant and Respondent contains four Paragraphs. Judge Newman's order pulls quotes from two different paragraphs of the indemnity provision. The first section highlighted in the order accurately quotes 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. 547.) This paragraph expressly permits Appellant to recover from Respondent Subcontractor for the negligent acts or omissions of said subcontractor, and is consistent with the Court of Appeal's holding in Concord and Cumberland, which is further discussed below.

Judge Newman's Order then goes on to quote language from a different paragraph of the Indemnity Provision:

> REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE ORIN [SIC] PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.

(R. p. 15.) However, this selection has been taken out of context, and, when read in context, clearly applies only "to the fullest extent permitted by law" and only to losses:

> ARISING OUT OF OR RESULTING FROM **BODILY INJURY** TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS . . . 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. 547 (emphasis added).) Both the case before Judge Newman and the case before the Trial Court involve claims for property damage, not bodily injury. Thus, the second paragraph in the order cited by Judge Newman is irrelevant to this case and should not have factored into its decision. There is no confusion that the indemnity provision relating to property damage limits recoverable indemnity to the negligence of the subcontractor.

None of the paragraphs cited by Judge Newman govern the separate duty to defend, and thus none of the contractual provisions discussed in his Order were actually relevant to the issue before the Trial Court. Despite the fact that the Trial Court was advised that Appellant was seeking attorneys' fees, and that attorneys' fees were governed by a specific paragraph in the Indemnity Section of the Contract, the Trial Court, in adopting Judge Newman's Order, instead chose to focus on and take issue with irrelevant contractual provisions. While Appellant does not concede that such provisions contain any problematic language, nonetheless, to the extent that the Trial Court took issue with these irrelevant paragraphs, it should have simply severed them and left the provision regarding

attorneys' fees intact. See Beach Co. v. Twillman, Ltd., 351 S.C. 56, 65 (Ct. App. 2002) (explaining that "[w]hether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties"). The severability provision of the Contract 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. 553.) 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.

IV. The Language of the Contract does not Violate Concord and Cumberland.

The Trial Court's final holding reads that:

> Builders First Source-Southeast Group, LLC's cross-claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law. See Concord and Cumberland HPR v. Concord and Cumberland, LLC, 2018 WL 3748616 (S.C. Ct. App. 2018).

(R. p. 3.) The Trial Court provided no analysis to support this conclusion; however, Appellant will attempt to address the perceived issues.

A. Concord and Cumberland

An understanding of the 2018 Court of Appeals decision in Concord and Cumberland is essential to the issues before this Court. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). In that case, Superior was a general contractor who hired Muhler as its subcontractor. When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to their contract. The contract provided, in relevant part, that:

> To the fullest extent permitted by law, **the Subcontractor shall indemnify and hold harmless** the Owner, the Architect, **the Contractor** (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees 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 Subcontractor's Work provided that**
>
> (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, **to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor** or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, **regardless of whether it is caused in part by a party indemnified hereunder.**

Id. at 643-44 (emphasis added). Superior claimed that these provisions required Muhler to indemnify Superior and that Superior's right to indemnity was not lessened by Superior's concurrent negligence. Id. at 645. Muhler countered that the contract did not require it to indemnify Superior for Superior's wrongdoing. Id.

The Trial Court found, and the Court of Appeals agreed, that in order for Superior to prevail on a claim seeking indemnity *for its own negligence*, it would need to show that the contract language granting that right met the heightened standard of being clear and unequivocal. Id. at 649. The Court of Appeals noted that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence. Id. Because the Court found that the language did not meet the heightened standard, it held that the contract did not require Muhler to indemnify Superior for Superior's own negligence, and instead "limited indemnification to damages resulting from the work Muhler performed." Id. at 645.

B. The contractual language governing payment of attorneys' fees meets the heightened "clear and unequivocal" standard articulated by Concord and Cumberland.

Respondent has argued, and the Trial Court appears to have held, that the Builders FirstSource claims for attorneys' fees are based upon provisions that violate Concord and Cumberland.

Notably, the Concord and Cumberland case did not explicitly address whether the "clear and unequivocal" standard applied to indemnification claims for attorneys' fees as well as to indemnification claims for liability owed to a third party. Thus, the instant action is distinguishable from Concord and Cumberland in that Builders FirstSource is not seeking indemnity for payments made in satisfaction of the plaintiffs' claims, to the extent that such claims may arise out of the negligent acts and omissions of Builders FirstSource itself. Builders FirstSource is seeking

only recovery of attorney's fees and costs, expended in defending against the plaintiffs' claims, arising out of the performance of the subcontractors' work.

Even if the Court were to apply the "clear and unequivocal" standard to contractual language governing attorneys' fees, the contractual provisions at issue here meet that heightened burdened. The language of the contract provides that the duty to defend is "...independent and separate from the duty to indemnify, ***and the duty to defend exist regardless of any ultimate liability or negligence of the contractor*** . . . ." **(R. p. 548 (emphasis added).)** The contractual provision is thus clear in imposing an obligation to defend regardless of the negligence of Builders FirstSource.

"Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in an indemnity clause that clearly shows the parties' intent to absolve the indemnitee of the consequences of its own concurrent negligence." Concord & Cumberland, 424 S.C. at 657. By imposing the duty to defend "regardless of any ultimate liability or negligence of the contractor," the Contract "clearly shows the parties' intent to absolve [Appellant] of the consequences of its own concurrent negligence." Thus, this language meets the heightened "clear and unequivocal" standard, and summary judgment was not proper.

V. The Contract Provisions Violate Neither South Carolina Law nor Public Policy.

The Trial Court's holding goes beyond Concord and Cumberland and finds that the language of the contract also violates "public policy and the laws of South

Carolina." The Trial Court did not identify to what public policy, or to what laws, it was referring. Additionally, Judge Newman's Order does not address public policy or any other laws besides the common law articulated by the Concord and Cumberland case (discussed above).

One of the arguments that has been advanced below by Respondent is that the Contract violates South Carolina Code § 32-2-10. However, this statute addresses general damages and not recovery of attorneys' fees. Specifically, Section 32-2-10 prohibits contracts that indemnify the indemnitee "for damages arising out of bodily injury or property damage proximately caused by or resulting from the sole negligence of the promisee . . . ." In this case, the "damages arising out of . . . property damage" are those damages for which Appellant would have been responsible to the Plaintiff.

Furthermore, the very terms of the statute limit its application to agreements to indemnify 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 governs agreements for indemnity. 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, 424 S.C. at 646–47. 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 above; 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 caused by 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 . . . ." Paragraph One of the Indemnity Provision is the exact type of agreement exempted by the statute.

The obligations imposed on the subcontractors here, to defend the interests of Builders FirstSource, are clearly and unequivocally set forth within the relevant Master Subcontract Agreements. These obligations do not violate § 32-2-10 or any public policy of the State of South Carolina, and the Court should not have granted summary judgment against these claims.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse the decision of the Trial Court and allow Appellant to proceed on its indemnification claims for attorneys' fees against Respondent.

[Signature page follows]

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