STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO. 2016-CP-10-03783

The Retreat at Charleston National Country Club Home Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime,

Plaintiffs,

vs.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; C.R. Campbell Construction Co., Inc; Colin Campbell Construction, LLC; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, individually; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollio Architecture; JC Construction d/b/a JC Construction, LLC a/k/a JC Contractors a/k/a JC Contractors, LLC; Soto & Vasquez Construction, LLC a/k/a Costa de Oliveira Construction, LLC; Solesmar Jesus de Oliveira; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Colleen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin; Carlos Marroquin and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair de Caris; and Mario Salgado,

Defendants.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF HURLEY SERVICES, LLC

This matter came on before me on November 6, 2020, as Presiding Judge of the Ninth Judicial Circuit on the Amended Motion for Summary Judgment of Hurley Services, LLC (Hurley). Builders FirstSource-Southeast Group, LLC (BFS) filed multiple crossclaims against Hurley including claims for equitable and contractual indemnity, negligence, express and implied warranty, and breach of contract.

The Court has carefully considered the arguments of counsel, the memoranda and exhibits which have been filed, and it has also taken judicial notice of all relevant pleadings, decisions of the Circuit Courts which relate to the issue of collateral estoppel, and other known facts.

The parties fully litigated without objection all legal issues which are addressed in this Order.

This is a construction defects suit involving a multi-family development in Mount Pleasant, South Carolina consisting of 31 buildings. In their Fourth Amended Complaint, Plaintiffs allege product defects, installation deficiencies, and a failure to supervise against both BFS and Hurley. Hurley was a labor-only subcontractor to BFS under a Master Subcontract Agreement drafted by BFS. BFS sold and provided for installation windows, doors, weather-resistant materials, and other building components for some of the buildings.

LEGAL STANDARD

Summary judgment is appropriate if the circuit court finds "there is no genuine issue as to any material fact …." Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, "the evidence and all inferences which can be reasonably drawn from

the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-S Mgmt. Co., 381 S.C. 326, 329-30 (2009). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Manley v. Manley, 291 S.C. 325, 329 (Ct. App. 1987). "[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party's case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

EQUITABLE INDEMNITY

The plaintiffs allege installation, supervision, and product deficiencies against both BFS and Hurley, and BFS has filed a crossclaim for equitable indemnity. Based upon the record before me, I believe there are material issues of fact with regard to these issues, and Hurley's Motion for Summary Judgment as to the equitable indemnity claim is denied.

BFS CROSSCLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE

In its oral arguments and memorandum of law, BFS concedes that its crossclaims against Hurley for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity, and that they are subject to

dismissal pursuant to 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). Therefore, the Court will grant summary judgment with respect to those claims.

CONTRACTUAL INDEMNITY

In its Memorandum in Opposition to Hurley's Amended Motion for Summary Judgment, BFS argues that the provisions of its Master Subcontract Agreement are clear, unequivocable, and unambiguous. Whether a contract is ambiguous is a matter of law for the court. McCord v. Laurens County Healthcare System, 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020) (reh'g denied). The construction of a clear and unambiguous contract is a question of law for the court to determine. Hawkins v. Greenwood Dev. Corp., 328 S.C. 385, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

This Court finds that it can decide as a matter of law pursuant to Rule 56(c) SCRCP whether the language of the contract drafted by BFS is unconscionable and unenforceable, fails to meet the clear and unequivocable standard, is against public policy, violates S.C. Code Ann. §32-2-10 S.C. Code, and whether BFS is collaterally estopped from contesting whether its contractual indemnity language meets the clear and unequivocable standard.

PROVISIONS DRAFTED BY BFS ARE UNCONSCIONABLE AND UNENFORCEABLE

BFS drafted two Master Subcontract Agreements as is shown by its logo on the first page of the agreements. One is dated May 14, 2012, and the other, December 18, 2014. The 2012 agreement is the operative agreement.

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties intentions as determined by the contract language. PCS Nitrogen, Inc. v.

Continental Cas. Co., 429 S.C. 30, 39, 837 S.E.2d 662, 666 (Ct. App. 2019) (reh'g denied).

The intention of the parties to a contract is gathered primarily from the contents of the writing itself, or, as otherwise stated, "from the four corners of the instrument" alone. McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). Any uncertainty as to the meaning of any term should be resolved against the party who prepared the contract. Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 683 S.E.2d 814 (Ct. App. 2009). A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. Williams v. Gov't Emps Ins Co., 409 S.C. 586, 762 S.E.2d 705, 710 (2014).

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. Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).

Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (2007) (citation omitted). Among the factors considered by the court in determining whether a contract was tainted by an absence of meaningful choice are the relative disparity in the bargaining power of the party; whether there is an element of surprise in the inclusion of the challenged language; and the conspicuousness of the language or clause. *id.*

Hurley was a local subcontractor in the Charleston area which installed products for

BFS. BFS is the regional division of Builders FirstSource as appears from its name on the contract. Hurley worked on four of the two-story multifamily buildings and was paid a total of $5,319.50. Although BFS emphasizes in its memorandum that Hurley voluntarily entered into two agreements with BFS, and had the right to terminate the agreement under certain circumstances, BFS does not specifically address the issue of unequal bargaining power. There is no evidence that Hurley was sophisticated or was represented by legal counsel.

This Court takes judicial notice of the fact that BFS is a large supplier of building materials and that its Master Subcontract Agreement is so one-sided, that a subcontractor executing the agreement, more than likely lacks any meaningful bargaining power. *Cf.* Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016) (Kittredge & Pleicones, JJ, dissenting) (taking judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller).

The contract provisions are also deceptive. Contract provisions result in unfair surprise when the real meaning of the terms are intentionally obscured by one of the parties. *id.* The master contract was carefully drafted by BFS in a way which would obligate its subcontractors to warrant the design and suitability of products provided by BFS, and further, for subcontractors to indemnify and defend BFS and others from any property damage or personal injury resulting from those products. Referring to the Master Subcontract Agreement, one finds the following:

> "**SECTION 1. Introduction.**
>
> a. **Work.** '[T]his Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to

perform services (the **"Work"**) from time to time for Contractor on any project (the **"Project"**) ....'

SECTION 2. Materials and Workmanship.

Subcontractor agrees to commence Work on Projects upon request by Contractor. Subcontractor agrees to provide all labor, services, equipment, and tools necessary to complete the Work.

c. **Protection of Work.** Subcontractor shall bear all risk of loss or damage to the Work resulting from any cause whatsoever until Subcontractor has completed its Work on the Project and such work has been accepted by Contractor and Owner. Subcontractor shall at all times, and at its expense, protect all of its labor, materials (regardless of who supplied such materials), supplies, tools, and equipment (and those of its employees, agents, and subcontractors) against any damage, injury, destruction, theft, or loss. Subcontractor shall, at its expense, promptly repair or replace damage to the Work or damage to any other components of the Project resulting from the activities of Subcontractor or its employees, agents, or subcontractors.

SECTION 3. Warranty.

"[I]n addition to any other warranty or guarantee expressly made by Subcontractor or implied by Law, Subcontractor unconditionally warrants and guarantees the Work will conform to any specifications provided by Contractor and comply with all Law and Subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns, Owner, as well as the ultimate owner of any structure into which the Work is incorporated. This guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three (3) years for all Work except, (b) ten (10) years for all Work consisting of any structural applications ... 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, property damage to the personal property of the ultimate owners ... and personal injury damages to persons residing at or visiting the properties into which the Work is incorporated ...."

Hurley was a labor-only subcontractor for the installation of doors, windows, and Tyvek provided by BFS. There is no evidence that Hurley provided any materials for the installation of products supplied by BFS. In Section 2(c), BFS drafted the aforementioned language to read that "work" includes materials supplied by others, which in this case is BFS. Under Section 3 WARRANTY, the subcontractor unknowingly warrants to BFS the design and suitability of products BFS supplies and sells and also unknowingly agrees to indemnify BFS and others for those products. Although the indemnification provisions of Section 5 INDEMNITY are printed in bold letters, this indemnification provision was buried in the fine prints of Section 3 WARRANTY.

In finding contract provisions unconscionable in Simpson, the court observed, in pertinent part, as follows:

> "[W]hile certain phrases within other provisions of additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) ... We cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law ...."
>
> Simpson, 644 S.E.2d at 670.

BFS uses the language in Sections 1, 2, and 3 in combination with the indemnity and duty to defend provisions found in the first three paragraphs of Section 5, to assert claims for contractual indemnity and a defense against its subcontractors for materials BFS furnished to the project.

BFS denies asserting claims against Hurley for deficiencies in windows, doors, and other materials it gave Hurley for installation at the project. BFS contends that the word

"materials" as used in Section 3 WARRANTY refers to materials provided by Hurley. However, there is no evidence in the record that Hurley provided any materials for the installation of BFS products. Even if Hurley did provide materials, there is no evidence that any of these materials are defective or deficient.

The language in Section 3 WARRANTY "subcontractor guarantees the work against defects in design ... and materials" only makes sense if the word "design" refers to manufactured materials provided by BFS. Hurley is not responsible for the design of the buildings in the project. BFS, not Hurley, provides structural components. Yet the warranty provisions of Section 3 WARRANTY requires Hurley to give a ten-year warranty on "structural applications". This warranty exceeds the eight-year time limit in the applicable statute of repose found in S.C. Code Ann. §15-3-640.

Thus, it is clear that a disparity in bargaining power and the intentional use of deceptive language buried in fine print of the agreement deprived Hurley of a meaningful choice in the execution of the agreement.

It is equally clear that the Master Subcontract Agreement drafted by BFS is an adhesion contract which is drawn to the fullest extent possible in favor of BFS. BFS has expansive rights and remedies under the agreement it drafted. In contrast, most of the rights and remedies of Hurley are limited or waived. Most paragraphs of the agreement create obligations and liabilities for Hurley or a waiver or limitation of Hurley's rights. The agreement drafted by BFS attempts to transfer all risks associated with the project to its subcontractors, including risks associated with the products and components furnished by BFS.

On November 11, 2019, BFS filed an Answer to Plaintiffs' Fourth Amended Complaint and reasserted multiple crossclaims against Hurley and other subcontractors alleging that Hurley was contractually responsible for the provision of adequate materials and services in connection with its respective undertakings at the project, even though there is no evidence Hurley provided any materials.

Under general principles of state law, an adhesion contract is a standard form contract offered on a "take it or leave it basis" with terms that are non-negotiable. Munoz v. Greentree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (S.C. 2001). Although adhesion contracts are not per se unconscionable, the cumulative effect of these oppressive and one-sided provisions can cross a line which makes the contract unconscionable. Simpson, 644 S.E.2d at 674.

The combination of an absence of a meaningful choice on the part of Hurley, deceptive language, and one-sided provisions in the adhesion contract drafted by BFS renders the warranty/indemnification provisions in Section 3 and the indemnity/duty to defend paragraphs in Section 5 unconscionable and unenforceable. South Carolina courts will not enforce a contract which is violative of public policy or statutory law. Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 606 S.E.2d 752 (2004); D.R. Horton, Inc. v. Builders FirstSource – SE Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018).

THE CLAIMS OF BFS FOR CONTRACTUAL INDEMNITY AND A DEFENSE ARE BARRED BY THE CONCORD & CUMBERLAND HOLDING

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocable when seeking to

recover for an indemnitee's concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018) (reh'g denied). (Affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity crossclaims of contractor based upon the application of the clear and unequivocable standard.)

At the hearing and in its Memorandum in Opposition to Hurley's Amended Motion for Summary Judgment, BFS argues that it is not seeking indemnity for loss or damage arising out of any negligence of BFS itself, but rather is seeking indemnity only against liability for damage or loss arising out of the sole or concurrent negligent acts or omissions of its subcontractor, Hurley, in the performance of the subcontractor's work. BFS goes on to assert that the clear and unequivocable standard in Concord & Cumberland does not apply. A review of the indemnification and defense provisions in Sections 3 and 5 and the crossclaims filed by BFS reveal that this argument is without merit.

The indemnity provision buried in the fine print of Section 3 WARRANTY would allow BFS to seek indemnity for personal injuries and property damage arising from the sole negligence of BFS in selecting and selling products which it gives to Hurley for installation. The indemnity provision is jumbled with warranty and guaranty language, and does not meet the clear and unequivocable standard.

Section 5 of the master agreement contains multiple indemnity clauses. The first paragraph of Section 5 INDEMNITY, provides as follows:

> "To the fullest extent permitted by Law, the subcontractor shall indemnify, defendant and hold harmless the contractor, the owner, and all of their

officers, directors, agents, and employees from and **against any and all claims**, suits, losses, causes of action, damages, liabilities, fines, penalties, and expenses of any kind whatsoever, including, but not limited to, arbitration or court costs and attorney's fees (such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) arising out of or resulting from bodily injury or death of any person, or property damage, including loss of use of property, arising or alleged to arise out of or in any way related to this agreement or the subcontractor's performance of the work or other activities of the subcontractor, **but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor** or anyone for whose acts the subcontractor may be liable. The Contractor's insurance requirements are separate and distinct from the requirement of indemnification hereunder."

This language is based on the AIA form indemnification language and the key phrase, for our arguments at the Circuit Court level, was "but only to the extent caused in whole or in part by any negligent acts or omission on the part of subcontractor." The decision in Concord & Cumberland specifically recognized that this language fails as a matter of law because it does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own liability. *id.*

The third paragraph of Section 5 INDEMNITY is as follows:

"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, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES.** THE DUTY TO DEFEND ARISES IMMEDIATELY UPON PRESENTATION OF A CLAIM BY ANY PARTY INDEMNIFIED HEREUNDER AND WRITTEN NOTICE OF SUCH CLAIM BEING PROVIDED TO SUBCONTRACTOR. SUBCONTRACTOR'S OBLIGATION TO INDEMNIFY, DEFEND, AND HOLD HARMLESS UNDER THIS SECTION 5 WILL SURVIVE THE EXPIRATION OR EARLIER TERMINATION OF THIS AGREEMENT UNTIL IT IS FINALLY DETERMINED BY A COURT OF COMPETENT JURISDICTION OR ARBITRATION PANEL THAT A CLAIM AGAINST THE

CONTRACTOR, THE OWNER, AND ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FOR THE MATTER INDEMNIFIED HEREUNDER IS FULLY AND FINALLY BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS."

In their Fourth Amended Complaint, Plaintiffs have alleged that BFS was negligent in supervising its subcontractors and in supplying defective materials. In its crossclaims against Hurley, BFS seeks to recover the amount of any judgment in favor of Plaintiffs arising from its own negligence, and also all costs, expenses, and attorneys fees it incurs in defending the action, even if 100% of defense costs arise from the sole negligence of BFS. BFS is judicially bound by its pleadings. Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

Paragraph 3 of Section 5 INDEMNITY is a disguised indemnity provision for defense costs. By claiming it is not seeking indemnification for its own negligence, BFS is asking the Court to ignore its pleadings and the language which it drafted and to disregard controlling authority. It is clear that BFS is seeking indemnification for its own negligence.

THE CONTRACTUAL INDEMNITY CLAIMS OF BFS ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

This Court has taken judicial notice of two Circuit Court orders which have interpreted BFS's contractual indemnity language. See 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 and the amended 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.

Significantly, the Honorable Clifton Newman found the same version of the BFS Master Agreement which is in issue in this case to be unenforceable as a matter of law because the indemnification clauses are not clear and unequivocable and they violate South Carolina Rules of Contract Construction.

The Honorable Roger Young also ruled that Judge Newman's amended Order constitutes a prior final judgment that determined that the contractual indemnity provisions in BFS's master agreement was unenforceable as a matter of law. BFS has appealed both orders.

To invoke collateral estoppel, a party need not have also been a party to the prior action; the law only requires that the party against whom estoppel is applied have been a party to that action and had a full and fair opportunity to litigate the issue in the prior action. South Carolina Property & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991).

In its Memorandum in Opposition to Hurley's Motion for Summary Judgment, BFS does not take issue with the fact that the same contractual indemnity provisions in this case were considered by the courts in issuing their orders. However, it takes the position that BFS will not have had a full and fair opportunity to litigate the issues decided by Judges Newman and Young until the resolution of any appeals and entry of final judgment. In other words, BFS is contending that these orders are not final judgments for purposes of the application of the doctrine of collateral estoppel.

The appeals from these orders do not undermind their status as final judgments; the

law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's judgment, and thus, will not be a barrier to applying collateral estoppel. See Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189, 61 S.Ct. 513, 515, 85 L.Ed. 725 (1941). (Finding finality of a court's judgment is not lost because appeal is pending until and unless reversed.)

The contractual indemnity terms drafted by BFS have been litigated and directly determined in the prior actions, and collateral estoppel should apply. A final judgment is one that finally determines the rights of the parties. First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 330, 411 S.E.2d 681, 683 (Ct. App. 1991), aff'd 308 S.C. 421, 418 S.E.2d 545 (1992). Moreover, Rule 201(a) SCACR provides that an: "appeal may be taken, as provided by law, from any final judgment or appealable order." BFS could not have appealed these orders unless they were final orders. Thus, this Court finds that BFS is collaterally estopped from enforcing the contractual indemnity claims asserted in the Master Subcontract Agreement which it drafted.

BFS'S CONTRACTUAL INDEMNITY PROVISIONS VIOLATE S.C. CODE ANN. §32-2-10

S.C. Code Ann. §32-2-10 provides, in pertinent part, as follows: "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 ...." (emphasis added).

The Court has carefully considered the contractual indemnity provisions in BFS's Master Subcontract Agreement. All of them violate S.C. Code Ann. §32-2-10, are against public policy, and are unenforceable.

The fine print indemnity language found in Section 3 WARRANTY is jumbled with warranty and guaranty provisions under which Hurley warrants, guarantees, and agrees to indemnify BFS for its sole negligence in selecting and selling materials and building components for installation in the project. The warranty and guaranty provisions are merely disguised indemnity provisions. These provisions clearly violate S.C. Code Ann. §32-2-10.

The first and second paragraphs in Section 5 INDEMNITY also purport to indemnify BFS for its sole negligence in violation of the statute.

The third paragraph in Section 5 INDEMNITY deals with defense costs. BFS placed that paragraph in the same section as two preceding paragraphs dealing with indemnity for attorney's fees.

Paragraph three is in effect a disguised indemnity provision for defense costs. There is no legal basis for separating it from the other indemnity provisions, especially where BFS claims attorney's fees and defense costs in its crossclaims. The attorneys' fees and defense costs are nothing more than continuing consequential damages. Under paragraph three, Hurley is obligated for 100% of attorney's fees and defense costs even if BFS is solely at fault in connection with asserted claims and suits. This provision also

violates S.C. Code Ann. §32-2-10.

All of the warranty, guaranty, and indemnification provisions in Section 3 WARRANTY and the indemnity/defense provisions found in the first three paragraphs of Section 5 INDEMNITY violate S.C. Code Ann. §32-2-10. They also violate the public policy of this state and are unenforceable.

THE COURT IS NOT OBLIGATED TO REWRITE THE BUILDERS FIRSTSOURCE CONTRACTUAL INDEMNITY PROVISIONS.

BFS argues that the provisions of the agreement are independent and severable. All of the contractual indemnity provisions described in this order are either unconscionable and unenforceable, violate S.C. Code Ann. §32-2-10 S.C. Code, or fail to meet the clear and unequivocable standard. There are so many objectionable clauses that run throughout the agreement that it is not possible to sever or reform them. See Smith v. D.R. Horton, Inc., 403 S.C. 10, 16, 742 S.E.2d 37, 41 (Ct. App. 2013) aff'd 417 S.C. 42, 790 S.E.2d 1 (2016) (Kittredge & Pleicones, JJ, dissenting). This Court has no obligation or authority to rewrite the contractual indemnity provisions of BFS. Poynter Inves., Inc. v. Cent. Builders of Piedmont, Inc., 694 S.E.2d 15, 18 (S.C. 2010); Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

After carefully considering the arguments of counsel, the memoranda of law and exhibits submitted by the parties, and taking judicial notice of the pleadings, two Circuit Court orders of the Honorable Roger M. Young, Sr. and the Honorable Clifton Newman, and other known facts, I find and conclude as follows:

1. That there are material issues of fact with respect to the equitable indemnity crossclaim of BFS.

2. That the crossclaims of BFS for breach of express and implied warranties, breach of contract, and negligence, are disguised equitable indemnity claims and are not viable as alternative causes of action.

3. That the Master Subcontract Agreement was drafted by BFS, and any issues relating to the interpretation of the agreement should be construed against BFS.

4. That the Master Subcontract Agreement is a contract of adhesion, and substantially all of the provisions are drawn in favor of BFS.

5. That BFS has attempted in the Master Subcontract Agreement to transfer all risks associated with the project to Hurley, including risks associated with the materials and building components which BFS supplies for installation.

6. That a disparity in bargaining power and deceptive language buried in the fine print of the agreement deprived Hurley of a meaningful choice in the execution of the Master Subcontract Agreement.

7. That all warranties and guarantees found in Section 3 WARRANTY are disguised indemnity provisions.

8. That the duty to defend provisions contained in Paragraph Three of Section 5 INDEMNITY are disguised indemnity provisions for defense costs and attorneys fees.

9. That the warranty, guaranty, and indemnity provisions found in Section 3 WARRANTY are unconscionable and unenforceable.

10. That the indemnity and duty to defend provisions found in Section 5 INDEMNITY are unconscionable and unenforceable.

11. That the contractual indemnity provisions in the Master Subcontract

Agreement do not meet the clear and unequivocable standard and are unenforceable.

12. That BFS is collaterally estopped from contending that its contractual indemnity provisions in the Master Subcontract Agreement meet the clear and unequivocable standard.

13. That the contractual indemnity provisions in the Master Subcontract Agreement violate S.C. Code Ann. §32-2-10.

14. That the Master Subcontract Agreement contains so many provisions that are deceptive and unconscionable, fail to meet the clear and unequivocable standard, violate S.C. Code Ann. §32-2-10, and are against public policy, that it would be impossible to sever and/or reform them without rewriting the Master Subcontract Agreement, which this Court is not obligated to do.

IT IS, THEREFORE,

ORDERED, that the motion of Hurley Services, LLC for summary judgment with respect to the crossclaim of BFS for equitable indemnity is denied;

FURTHER ORDERED, that the motion of Hurley Services, LLC for summary judgment with regard to the crossclaims of BFS for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity be and it is hereby granted.

AND IT IS SO ORDERED.

[Document Prepared for Electronic Signature]

Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso , plaintiff, et al VS Winston Carlyle Charleston National LLC , defendant, et al

Case Number: 2016CP1003783

Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764