

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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, Liollo 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 Hornes 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,

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-03783

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SC Court of Appeals

**ORDER GRANTING SUMMARY
JUDGMENT IN FAVOR OF WS
CONTRACTORS, LLC**

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Defendants.
Builders FirstSource-Southeast Group, LLC, Third-Party Plaintiff, v. Pohlman Quality Contractors; and Pohlman Quality Exteriors, Inc.; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry, Third-Party Defendants.

This matter came before the Court on November 6, 2020 as Presiding Judge of the Ninth Judicial Circuit on WS Contractors, LLC’s (“WSC”) Second Amended Motion for Summary Judgment with respect to the crossclaims of Builders FirstSource-Southeast Group, LLC (“BFS”) (hereinafter the “Motion” or “Motion for Summary Judgment”). For the reasons set forth herein below, WSC’s Motion is GRANTED as to BFS’s crossclaims for contractual indemnification, breach of express and implied warranties, breach of contract, and negligence, and for equitable indemnification.

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at the Retreat at Charleston National Country Club, a thirty-one (31) building townhome community in Mount Pleasant, South Carolina (“the Project”). Plaintiffs allege, among other things, defective/improper installation of framing components, windows and doors, building paper/weather resistive barrier, and related flashings have caused water infiltration and damage to the substrate and other building components at all buildings throughout the Project.

BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that BFS holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is BFS's representative that serves as the "qualifying party" for such licensure in this state. It is undisputed that BFS supplied lumber, provided and installed framing, and house-wrap, windows and doors, related flashings, and caulk as a subcontractor of Colin Campbell Construction ("CCC") for various buildings at the Project. BFS also provided superintendents to oversee installation of such materials for the buildings at the Project. WSC served as a subcontractor of BFS and performed work on Buildings 22 through 31 at the Project that were constructed between 2012 and late 2014. WSC did not perform any work on other buildings at the Project.

According to BFS, WSC executed a BFS "Master Subcontractor Agreement" dated September 24, 2012. The Master Subcontractor Agreement is a BFS form contract bearing "Version – 5/17/06." Notably, this version of the Master Agreement is the same version at issue in the motions for summary judgment filed on behalf of ECC Contracting, LLC, Hurley Services, LLC, and several other movants as well as this Court's other orders granting (in whole or part) summary judgment on such motions.

PROCEDURAL HISTORY

Plaintiffs initiated this suit on July 22, 2016. Plaintiffs brought claims against CCC and BFS in their Amended Complaint filed on May 1, 2017. BFS asserted third-party claims against WSC and BFS's other subcontractors for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence in its Amended Answer and Third-Party Complaint

filed on June 30, 2017. BFS's contractual indemnity claim is based upon the indemnity provisions in the subject Master Subcontract Agreements.

Plaintiffs ultimately amended their Complaint to assert direct claims against WSC. At the time this Motion was before the Court, WSC had settled with Plaintiffs. As part of the settlement, WSC procured an "issue release" from Plaintiffs in favor of BFS; the BFS entities are among the "Issue Releasees" named in the release agreement and the release extinguishes any and all liability of BFS relating to the "acts, omissions, labor, materials, work, or involvement" of WSC and its subcontractors on the Project, whether the work was performed on behalf of BFS or not. BFS is also released from "the scope of work for the Project identified in Exhibit A attached hereto [to the Release] involving Building Numbers 22 through 31, inclusive, and made a part hereof, including, without limitation, the acts, omissions, labor, materials, work, and involvement of Issue Releasees with respect to the scope of work for the Project identified in Exhibit A...."

Accordingly, the only claims pending against WSC in this litigation are BFS's crossclaims.¹ WSC originally brought this Motion for Summary Judgment on BFS's crossclaims on January 22, 2020, and, thereafter, WSC filed two Amended Notices of Motion for Summary Judgment against BFS prior to the Motion as well as a Memorandum in support of its Motion. Counsel for WSC and the other movants appeared as well as counsel for BFS. BFS did not file a memorandum or brief in opposition to WSC's Motion for Summary Judgment. Defendants Hurley Services LLC, ECC Contracting LLC, East Coast Carpentry, L&G Construction Group LLC, Jason Pohlman, Palmetto Trim and Renovations LLC, and AC Construction Inc. filed Motions for

¹ After Plaintiffs added direct claims against WSC and BFS's other subcontractors (who were collectively the Third-Party Defendants), BFS converted its third-party claims to cross-claims, which are contained in BFS's operative pleading, its Answer to Plaintiffs' Fourth Amended Complaint filed on November 13, 2019. BFS's crossclaims rest upon the same allegations and assert the same causes of as the prior third-party claims.

Summary Judgment on similar grounds. The Court held a hearing on the Motions for Summary Judgment on November 6, 2020. Counsel for the movants and BFS appeared and argued the motions before the Court. At the hearing, counsel for WSC also joined in and adopted the arguments made by the attorneys for movants ECC Contracting and Hurley Services.

LEGAL STANDARD

“Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). A party’s “response to the motion must set forth specific facts, *admissible in evidence*, showing there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him.” Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (Ct. App. 1988) (emphasis added). Summary judgment “is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 388, 701 S.E.2d 776, 779 (2010).

I. **BFS’S CROSS-CLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE ARE DISGUISED CLAIMS FOR EQUITABLE INDEMNITY.**

Although BFS did not submit a memorandum of law in opposition to WSC’s Amended Motion for Summary Judgment², during oral arguments on November 6, 2020, BFS conceded that

² It should be noted that BFS, in its memorandum in opposition to Polhman Quality Exteriors’ Second Amended Motion for Summary Judgment, which was heard at the same time as WCS’s Amended Motion for Summary Judgment, conceded that its cross-claims for breach of express and implied warranties, breach of contract, and negligence against Polhman Quality Exteriors were merely disguised claims for equitable indemnification pursuant to the Stoneledge cases cited herein.

its cross-claims against WSC 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. BuildersFirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). Therefore, this Court will grant summary judgment with respect to those claims.

Although BFS consents to the applicability of Stoneledge and the grant summary judgment as to the claims discussed in this section, the doctrine of collateral estoppel also permits this Court to enter summary judgment as to BFS's cross-claims against WSC for breach of express and implied warranty, breach of contract, and negligence due to this Court's prior decisions on point. See Amended Order Granting Charleston Exteriors, LLC and ECC Contracting, LLC's Motions for Summary Judgment in the matter of Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., Case No. 2018-CP-08-02547 (S.C. Com. Pl. Feb. 3, 2020); Order Granting Hurley Services, LLC's and Charleston Exteriors' Motion for Summary Judgment in Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al., Case No. 2016-CP-10-03455 (S.C. Com. Pl. April. 29, 2020). The applicability of the doctrine of collateral estoppel and the import of those decisions are discussed in Section II of this Order which immediately follows.

II. BFS'S CROSS-CLAIM AGAINST WSC FOR CONTRACTUAL INDEMNIFICATION IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit

was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984).

During oral arguments and within its memorandum of law, WSC argued that the indemnification provisions contained in the Master Agreement fail to meet the “clear and unequivocal” standard enunciated by Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), that such provisions violate South Carolina public policy and S.C. Code § 32-2-10, that the terms are unconscionable, and that BFS is collaterally estopped from contending otherwise. This Court agrees.

In three recently decided cases – Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al., case number 2018-CP-08-02547, filed in the Berkeley County Court of Common Pleas (“BFS v. MI Windows”); Six Fifty Six Owners Association, Inc., et al. v. Winsor South, LLC, et al., case No. 2016-CP-10-03455, filed in Charleston County Court of Common Pleas (“Six Fifty Six”); and Pavic v. Carolina Cottage Homes, LLC, et al., case number 2019-CP-10-00772, filed in the Charleston County Court of Common Pleas (“Pavic”) – this court evaluated similar motions for summary judgment brought by BFS’s subcontractors in regard to cross-claims asserted by BFS that were nearly identical to those asserted in this case.

In BFS v. MI Windows, the Honorable Clifton B. Newman held that the indemnity provision in the Master Agreement contains language concerning indemnity and the prospect of BFS’s subcontractors being forced to indemnify BFS for BFS’s negligence, and that such language “is confusing at best and deceptive at worst.” See 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., Civil Action

No. 2018-CP-08-2547, p. 6-7 (the “Newman Order”). As a result, Judge Newman held that the indemnity language in Master Agreement did not meet the “clear and unequivocal” standard required by Concord & Cumberland. Id.

In Six Fifty Six, the Honorable Roger M. Young, Sr. held that BFS’s contractual indemnification claims against its subcontractors were barred by the Newman Order pursuant to the doctrine of collateral estoppel. 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, Civil Action No. 2016-CP-10-3455, p. 3 (the “Young Order”). Judge Young also held that BFS’s cross-claim for contractual indemnity was based on contractual provisions in BFS’s master subcontractor agreement that “are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law.” Id. (citing Concord & Cumberland).

In Pavic, this Judge held that BFS’s master subcontractor agreement is an adhesion contract; that BFS’s master subcontractor agreement contains multiple indemnity provisions, including multiple provisions in “Section 5. INDEMNITY” and another “buried in the fine print of “Section 3. Warranty”; that the indemnity provisions in BFS’s master subcontractor agreement are unconscionable within the meaning of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644, S.E.2d 663 (2007); that the indemnification provisions in Section 5 of BFS’s master subcontractor agreement are unclear, conflict with each other and the provisions found in Section 3, do not meet the clear and unequivocal standard of Concord & Cumberland, and violate South Carolina public policy and S.C. Code § 32-2-10. See Order of the Honorable Jennifer B. McCoy filed January 25, 2021, in the Charleston County Court of Common Pleas in the case of Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, p. 4-8 (the “McCoy

Order”). In Pavic, I also found and ruled that the Newman Order and the Young Order are final orders that collaterally estop BFS from contesting the findings therein as BFS had a full and fair opportunity to litigate the issues in BFS v. MI Windows and Six Fifty Six, and that the contract terms were “actually litigated, directly determined in the prior [actions], and the issues were essential to the [judgments] such that collateral estoppel should apply. Id. at p. 9-10.

In the present case, the Master Agreement and indemnity provisions that BFS now wishes to assert against WSC as part of its contractual indemnification cross-claim involve the same master subcontractor agreement and indemnity provisions that were at issue in all three cases referenced above (i.e., BFS Master Subcontractor Agreement “[Version 5/17/06]”). Moreover, BFS seeks full contractual indemnification from WSC for any liability BFS is found to have to Plaintiffs or others in this action, which is identical to the relief sought by BFS in BFS v. MI Windows, Six Fifty Six, and Pavic. As such, this Court finds that BFS had a full and fair opportunity to litigate identical issues involving the same exact contract in BFS v. MI Windows, Six Fifty Six, and Pavic, and that, in each of the prior cases, the contract terms were actually litigated, directly determined, and the issues were essential to the judgments rendered therein. Therefore, this Court finds that collateral estoppel bars BFS’s cross-claim against WSC for contractual indemnification.

III. THE TERMS OF BFS’S MASTER SUBCONTRACT ARE NEITHER CLEAR NOR UNEQUIVOCAL.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal 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 unequivocal standard.)

"Section 5. INDEMNITY" of the Master Agreement contain multiple paragraphs dealing with indemnity and the duty to defend. The first paragraph states that BFS may seek indemnification:

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

The next paragraph suggests a duty to indemnify BFS:

"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."

The following paragraph provides that:

"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."

Additionally, the Master Agreement contains an indemnification provision buried in the fine print of "Section 3. Warranty", which provides:

"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 ... including, without limitation, property damage to the homes or properties into which the Work is incorporated ...”

On one hand, BFS Master Agreement contemplates indemnification of all attorneys’ fees incurred in the defense of the BFS as well as all amounts paid in settlement or to satisfy demands – each without any regard to the fault of the subcontractor or any reference to the negligence of BFS; in other areas the Master Agreement refers to indemnification in favor of BFS regardless of the sole or concurrent negligence of BFS; and yet other provisions qualify indemnification to the extent the loss is caused in whole or part by the negligence of Subcontractor. The terms are confusing at best, contradictory at times, and arguably misleading. As such, the Master Agreement’s indemnity clauses are unenforceable as a matter of law.

This Court finds that the indemnification provisions in “Section 5. INDEMNITY” of the Master Agreement, as set forth above, are unclear, conflict with each other and the indemnification provision in the fine print of “Section 3. WARRANTY”, and do not meet the elevated clear and unequivocal standard found in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). As a result, the indemnification provisions of the Master Agreement are unenforceable and WSC is entitled to summary judgment.

IV. BFS’S CLAIMS FOR CONTRACTUAL INDEMNITY ARE BASED ON PROVISIONS WHICH VIOLATE S.C. CODE § 32-2-10 AND, THUS, ARE ILLEGAL AND UNENFORCEABLE.

The Master Agreement between BFS and WSC contains multiple indemnity provision including those which require WSC to indemnify BFS for damages incurred as a result of BFS’s sole negligence in violation of S.C. Code Ann. § 32-2-10.

There is nothing in South Carolina law that separates a subcontractor’s duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification

agreement. Indeed, the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10 speaks solely of “damages” while limiting the ability of the Indemnitor to indemnify the Indemnitee. The Anti-Indemnity statute bars indemnity agreements wherein the Indemnitee seeks to be indemnified from “...damages arising out of bodily injury or property damage...” proximately caused by the indemnitee’s sole negligence. SC Code Ann. §32-2-10. Further, BFS claims its attorney’s costs and fees as damages in its complaint.

Section 5 of the Master Agreement, as set forth above, explicitly calls for WSC to pay BFS’s attorney’s fees “regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees.” Section 8.i. of the Master Agreement also provides for indemnification of attorneys’ fees and expenses and amounts paid in settlement without regard to the fault of BFS. These terms explicitly violate SC Code Ann. §32-2-10 as they require WSC to indemnify BFS for BFS’s sole negligence. Under South Carolina law, recoverable damages may include attorneys’ fees when so provided by contract or statute. See Rimer v. State Farm Mut. Auto. Ins. Co., 148 S.E.2d 742, 746 (S.C. 1966). However, when recovery of attorneys’ fee is by contract, the contractual terms providing for indemnification of such damages must still comply with South Carolina law and, here, the Master Agreement fails to do so.

Additionally, the middle paragraph of Section 5 of the Master Agreement, as shown above, calls for the Subcontractors to “indemnify, defend, and hold harmless” BFS “...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.” This provision also obviously violates SC Code Ann. §32-2-10.

As BFS should well know, indemnification provisions calling for the Indemnitor to indemnify the Indemnitee “for damages caused by [the Indemnitee’s] negligence or the negligence of its subcontractors” are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152 (Ct. App. 2018). Further, our Court of Appeals has held that “[A]n illegal contract is unenforceable.” Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, this Court held that the indemnification agreement “purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10” and went on to conclude that “[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.” Id. This case is no different.

Because the indemnity provisions of Master Agreement between BFS and WSC require WSC to indemnify BFS for BFS’s sole negligence, the Master Agreement is illegal, and thus unenforceable and WSC is entitled to summary judgment.

V. BECAUSE WSC HAS PROCURED AN ISSUE RELEASE IN FAVOR OF BFS, IT NECESSARILY FOLLOWS THAT BFS IS UNLAWFULLY SEEKING TO RECOVER FROM WSC IN INDEMNITY FOR BFS’S SOLE NEGLIGENCE.

WSC is uniquely situated in this action because WSC has settled and entered into a release agreement with the Plaintiffs. As part of that settlement and release, WSC procured an “issue release” from Plaintiffs in favor of BFS with respect to the entire scope of work performed by WSC and its subcontractors. That issue release provides in pertinent part as follows:

In consideration of the receipt of the Settlement Amount, Releasors hereby release, acquit, and forever discharge Builders FirstSource, Inc., Builders FirstSource Southeast Group, Winston Carlyle Charleston National, LLC, Colin R. Campbell Construction, Inc., C.R. Campbell Construction Co., Inc., Colin Campbell Construction, LLC, and their respective owners, parents, subsidiaries, directors, officers, shareholders, members, managers, principals, employees, agents, heirs, assigns, and Colin Campbell, individually (hereinafter collectively “Issue Releasees”) relating to or arising from (a) the scope of work for the Project identified in Exhibit A attached hereto involving Building Numbers 22 through 31, inclusive, and made a part hereof, including, without limitation, the acts, omissions,

labor, materials, work, and involvement of Issue Releasees with respect to the scope of work for the Project identified in Exhibit A, and (b) the acts, omissions, labor, materials, work, or involvement of the Settling Defendants and Releasee(s) identified in Paragraph 2 at the Project known as The Retreat at Charleston National Country Club.

Issue Release, ¶ 6.

Given the scope of this release, Plaintiffs have released BFS from its own acts and omissions and WSC's acts and own omissions relative to the scope of work performed by WSC at the Retreat Project. BFS will not and cannot bear any liability to Plaintiffs in this action on account of WSC's acts and omissions or the scope of work performed by WSC for BFS because BFS has been released from such. Notably, aside from WSC no other BFS subcontractor movant has produced evidence of such an issue release for the benefit of BFS in this action.

Based on the undisputed facts, this Court finds that BFS is seeking to recover in indemnity for its sole negligence with respect to issues in the instant litigation that have nothing to do with WSC. That is the necessary conclusion because Plaintiffs have released BFS for anything have to do with the entire scope of work performed by WSC and its subcontractors at the Retreat Project. The allegations of BFS's cross-claims also do not restrict BFS's recovery in indemnity to losses to the extent caused by the subcontractor's negligence; the allegations are, like the Master Agreement's indemnity clauses, much broader. The Master Agreement's indemnification clauses fail to meet South Carolina's applicable rules of construction, including, without limitation, the clear and unequivocal standard, that apply in this context. Furthermore, the Master Agreement is violative of Section 32-2-10 of the SC Code of Laws which prohibits indemnification for claims based on the indemnitee's sole negligence. The issue release procured by WSC in favor of BFS serves as a unique and independent ground to find that BFS is seeking to recover in indemnity

against WSC for its sole negligence and its cross-claim must be dismissed on summary judgment as a matter of law.

VI. BFS'S REMAINING CROSS-CLAIM FOR EQUITABLE INDEMNITY ALSO FAILS AS A MATTER OF LAW AGAINST WSC BECAUSE OF THE IMPACT OF THE ISSUE RELEASE PROCURED BY WSC FOR BFS.

Under South Carolina law, there can be no equitable indemnity among mere joint tortfeasors. See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 518 S.E.2d 301, 307 (S.C. App. 1999). As discussed above, by virtue of the "issue release" from Plaintiffs in favor of BFS with respect to the entire scope of work performed by WSC and its subcontractors, it necessarily follows that if this Court ever finds BFS in any way liable to Plaintiffs with respect to the Retreat Project, that liability must flow from something done not by WSC and its subcontractors, but instead from the acts or omissions of BFS or others acting on its behalf. Therefore, if following any trial of this case the court ultimately finds BFS liable to Plaintiffs in this action, BFS would necessarily be a tortfeasor, share some degree of fault, and have unclean hands, which would, as a matter of law, serve to bar any recovery in equitable indemnity against WS Contractors. See id.

Because the issue release procured by WSC in favor of BFS extinguishes any and all liability of BFS that in any way relates to WSC and its work, this Court concludes as a matter of law that any prospective liability of BFS to Plaintiffs relative to the Retreat Project would necessarily be derived from BFS's negligence or fault without any reference to WSC. The issue release is dispositive of the matter and the Court hereby grants summary judgment to WSC against BFS's cross-claim for equitable indemnity.

CONCLUSION

After carefully considering the pleadings in the case, the arguments of counsel, the memoranda of law and exhibits submitted by the parties, the Court finds and concludes as follows:

1. That the cross-claims of BFS against WSC for breach of express and implied warranties, breach of contract, and negligence are disguised equitable indemnity claims, are not viable as alternative causes of action, BFS is collaterally estopped by prior decisions from relitigating this issue, and BFS has conceded as much to the Court.
2. That the doctrine of collateral estoppel further precludes re-litigating final orders where courts of this state have determined that the indemnity provisions contained in BFS's Master Agreement fail to meet the clear and unequivocal standard, violate South Carolina public policy, and/or fail meet the requirements of South Carolina law.
3. That the indemnity and duty to defend provision of the BFS Master Agreement are unclear, unconscionable, unintelligible, conflicting, and are unenforceable.
4. That the indemnity and duty to defend provisions of the BFS Master Agreement are neither clear nor unequivocal and, thus, fail as a matter of law.
5. That the indemnity and duty to defend provisions of the BFS Master Agreement violate South Carolina public policy and S.C. Code § 32-2-10, and thus, are illegal and unenforceable.
6. That the BFS's cross-claim for equitable indemnity against WSC fails as a matter of law because the "issue release" which WSC obtained for BFS's benefit absolves and releases BFS from all liability stemming from any acts or omissions of WSC; therefore, any prospective liability of BFS to Plaintiffs relative to the Retreat Project would necessarily be derived from BFS's negligence or fault without any reference to WSC.

IT IS, THEREFORE, ORDERED that the amended motion by WS Contractors, LLC for summary judgment with regard to the cross-claims of Builders FirstSource-Southeast Group, LLC for contractual indemnification, breach of express and implied warranties, breach of contract, negligence, and equitable indemnity be and is hereby **GRANTED**. To the extent the court's initial Form Order stated WSC's Motion for Summary Judgment was granted "in part," that is now amended as set forth herein to include all claims.

AND IT IS SO ORDERED.

The Honorable Jennifer B. McCoy
Judge, Ninth Judicial Circuit

Charleston, South Carolina

2021



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