

HOWELL, GIBSON AND HUGHES, P.A.
ATTORNEYS AT LAW

Post Office Box 40
Beaufort, South Carolina 29901-0040
www.hghpa.com

STEPHEN P. HUGHES
ROBERT W. ACHURCH III *
DAVID S. BLACK
MARY BASS LOHR
THOMAS A. BENDLE, JR.

WILLIAM H. COX, III
NATHAN E. AKERS
ROBERT S. DENNIS

25 RUE DU BOIS
LADY'S ISLAND
BEAUFORT, SOUTH CAROLINA 29907

TELEPHONE: 843 – 522-2400
FAX NUMBER: 843 – 522-2429
WRITER'S DIRECT: 843-522-2426
DIRECT E-MAIL: cfloeder@hghpa.com
PARALEGAL E-MAIL: kwillis@hghpa.com

* Certified Mediator

Catherine L. Floeder (Of Counsel)

October 25, 2021
VIA EMAIL ONLY

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Builders FirstSource - Southeast Group, LLC v. ECC Contracting, Inc.
Appellate Case No.: 2021-001050
Our File No: 11981 2 SPH

Dear Ms. Kitchings:

We are in receipt of the Court's letter dated October 7, 2021, in which the Court advised that it has consolidated the eight appeals filed by Appellant Builders FirstSource – Southeast Group, LLC (“BFS”) on September 22, 2021 in the matter of The Retreat at Charleston National Country Club Home Owners Association, Inc., et al. v. Winston Carlyle Charleston National, LLC, et al. (Civil Action No. 2016-CP-10-03783). *Appellant objects to the consolidation of these appeals* and believes such consolidation to be improper under Appellate Rule 214; Appellant believes the Court may have misapprehended the nature of these separate appeals, which Appellant has further explained herein. For the reasons outlined below, Appellant proposes instead that the Court proceed with one of the individual appeals, namely, BFS v. Hurley Services, LLC, and stay the remaining seven appeals.

The eight appeals filed in connection with this case are the result of eight *separate* orders issued by Judge Jennifer McCoy in the underlying case. As will be further explained in the briefs, eight subcontractors moved for summary judgment against BFS. The subcontractors each argued their own motions before Judge McCoy. Judge McCoy issued eight separate Form 4 Orders granting, or granting in part, summary judgment to the subcontractors and

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requesting that *each* subcontractor submit a proposed order. As a result, Judge McCoy received eight different proposed orders, each outlining different grounds for an award of summary judgment. Judge McCoy then adopted each of the eight proposed orders. Thus, Appellant is appealing eight separate orders, each with distinct legal issues involved.

Consolidation of these appeals would raise several obstacles. First, Appellate Rule 214 provides that the Court may, in its discretion, consolidate multiple appeals from the same order (or multiple orders from different cases). It does not address the situation here, where multiple appeals are being taken from multiple *different* orders in the *same* case.

Second, the issues in the different appeals are so varied that it would be difficult to brief, argue, and decide them together. Specifically, the following challenges, among others, would arise:

- The Court will be asked to decide whether the contracts between Appellant and its subcontractors violate Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). Two different contracts are at issue. While five of the orders address one version of contractual language, three of the orders rely on a completely different version of the contract, with completely different operative contractual language.
- The Court will be asked to decide whether the contracts violate South Carolina Code Section 32-2-10; some of the orders address the statute in the context of attorneys' fees, and others do not.
- Some of the Orders hold that the contractual language is unconscionable and that the contract is one of adhesion and thus unenforceable; others do not.
- Some of the Orders hold that the issues involved in this appeal are barred by collateral estoppel; others do not.
- Some of the Orders address the contract's warranty language; others do not.
- Some of the Orders address the contract's language regarding settlements; others do not.
- One of the Orders rules on the issue of the statute of repose; the rest do not.
- One of the Orders holds that Appellant's equitable indemnity claim fails; the remaining orders preserve the equitable indemnity claim.

- One of the Orders rules on the issue of contractual severance; the rest do not.

Rather than attempt to navigate what will surely become a tangled consolidation, Appellant proposes that, for the sake of ease, clarity, and judicial economy, the Court stay seven of the appeals and address only the most comprehensive order, as this will resolve dispositive issues among many of the remaining orders on appeal. Once the dispositive issues have been addressed and ruled on, the Court can turn to any remaining peripheral claims in the seven stayed appeals. Appellant recommends the order granting partial summary judgment to Hurley Services, LLC as the most comprehensive order and the one that should move forward on appeal at this time.

Appellant would also like to take this opportunity to draw to the Court's attention several other appeals currently pending that deal with similar orders: Builders FirstSource - Southeast Group, LLC v. ECC Contracting LLC, MI Windows and Doors, Inc., Hurley Services, LLC, Charleston Exteriors LLC (Appellate Case No. 2020-000415); Six Fifty Six Owners Association, Inc., et al., v. Winsor South, LLC, et al. (Appellate Case No. 2020-001328); and Pavic v. Carolina Cottage Homes, LLC, et al. (Appellate Case No. 2021-000290). Should the Court be interested, Appellant recommends Pavic as the appellate case addressing the widest range of issues.

In the event that the Court would like additional information regarding the appeals in this Retreat case, Appellant would welcome the opportunity to participate in a status conference.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

s/Catherine L. Floeder

Catherine L. Floeder, Esq.

CLF/clf

cc: All Counsel of Record