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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

2021-001050

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

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; 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; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollio Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado…….. Defendants,

Builders FirstSource-Southeast Group, LLC……Third-Party Plaintiff, Appellant,

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry……..Third-Party Defendants,

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman

Quality Exteriors, Inc.; and L&G Construction Group, LLC are the …….....Respondents.

_____

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_____

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STATEMENT OF THE CASE

This Appeal is the result of a long and complex construction defect litigation originally filed by the Plaintiffs on July 22, 2016. In the underlying case, the Plaintiffs, The Retreat at Charleston National Country Club Homes Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime, have sought recovery of damages allegedly occasioned by deficiencies in original construction of the subject project, a multi-family development, located in Mount Pleasant, South Carolina. The complex consists of 32 buildings, containing a total of 129 townhome units.

The Plaintiffs' claims, as asserted against Appellant Builders FirstSource – Southeast Group, LLC ("Appellant" or "BFS"), allege, among other contentions, that the framing and window installation services of BFS were deficient, resulting in water intrusion and corresponding damages. Plaintiffs' forensic expert has also opined that the windows at the project are characterized by inadequate DP ratings, requiring comprehensive replacement of those windows; that installation was performed using incorrect fasteners, which were, both (a) of improper type, and (b) of inadequate length to assure required embedment of the fastener into the framing; and that fasteners were installed at spacing intervals which exceeded those required by the manufacturer's installation criteria.

BFS had contracted with several subcontractors who performed the allegedly problematic work at the project on behalf of BFS, and consequently BFS filed crossclaims or third-party claims, as the case may be, against its many subcontractors, including: ECC Contracting, LLC, Hurley Services, LLC, McDaniel

Construction Co[1], LLC, AC Construction Corp and/or AC Construction Inc., L&G Construction Group, LLC, WS Contractors, LLC, Pohlman Quality Exteriors, Inc., Palmetto Trim and Renovations, LLC, Edward Bruce Witham[2], and East Coast Carpentry Company. The claims of BFS included causes of action in negligence, breach of express and implied warranty, breach of contract, contractual indemnity and equitable indemnity.

Of the above-mentioned subcontractors, eight moved for summary judgment at various times during 2019 and/or 2020. Palmetto Trim filed a motion for summary judgment on December 20, 2019 and an amended motion for summary judgment on October 22, 2020. ECC Contracting, LLC filed a motion for summary judgment on December 20, 2019, and an amended motion for summary judgment on October 15, 2020. East Coast Carpentry filed a motion for summary judgment on January 7, 2020 and an amended motion for summary judgment on October 15, 2020. WS Contractors, LLC filed a motion for summary judgment on January 22, 2020, an amended motion for summary judgment on January 23, 2020, and a second amended motion for summary judgment on October 19, 2020. Hurley Services, LLC filed a motion for summary judgment on August 27, 2020 and an amended motion for summary judgment on October 7, 2020. L&G Construction Group, LLC filed a motion joining the motions for summary judgment

[1] Plaintiffs filed a Stipulation of Dismissal dismissing their claims with prejudice against McDaniel Construction Co, LLC on April 17, 2020. Therein, Plaintiffs stipulated that there are no defects in the work performed by McDaniel Construction Co, LLC on the project that is the subject of this suit. Premised upon Plaintiffs' stipulations, the Honorable Bentley D. Price granted McDaniel Construction Co, LLC summary judgment as to Builders FirstSource-Southeast Group, LLC claims on December 18, 2020. McDaniel Construction Co, LLC is not a party to this appeal.
[2] The Honorable Jennifer B. McCoy Ordered an Entry of Default against Edward Bruce Witham on June 12, 2020. Edward Bruce Witham is not a party to this appeal.

of East Coast Carpentry and WS Contractors on October 21, 2020. Pohlman Quality Exteriors, Inc. filed both a motion for summary judgment and an amended motion for summary judgment on October 22, 2020. And finally, AC Construction filed a motion for summary judgment on October 29, 2020.

All eight subcontractors' motions were heard on November 6, 2020 by the Hon. Jennifer McCoy. Each subcontractor argued its own motion, and the arguments forming the basis for the different motions varied from subcontractor to subcontractor. On May 10, 2021, Judge McCoy issued seven[3] separate Form 4 Orders granting, or granting in part, as the case may be, summary judgment to the subcontractors and requesting that *each* subcontractor submit its own proposed order. As a result, Judge McCoy received eight different proposed orders, one from each subcontractor, with each outlining different legal and factual grounds for an award of summary judgment. Judge McCoy then adopted each of the eight proposed orders over the course of multiple days. On July 7, 2021, the lower court issued orders granting, in part, summary judgment to: ECC Contracting, LLC; AC Construction; Hurley Service, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction. On July 26, 2021, the Court issued an order granting, in part, summary judgment to Palmetto Trim and Renovations. On July 29, 2021, the Court issued orders granting, or, as the case may be, granting in part, summary judgment to: East Coast Carpentry; and WS Contractors.

[3] For reasons that are unclear to Appellant, the lower court never issued an initial Form 4 Order addressing L&G's motion. It did, however, ultimately grant partial summary judgment to L&G in an order dated July 7, 2021.

Appellant Builders FirstSource timely moved for reconsideration of each of the eight orders. On August 23, 2021, the Court issued eight Form 4 Orders denying each of Appellant's motions for reconsideration. Appellant separately filed eight notices of appeal – one for each order – on September 22, 2021. By letter dated October 7, 2021, the Clerk of Court for the Court of Appeals advised the parties to this action that it had consolidated the eight appeals filed by Appellant Builders FirstSource – Southeast Group, LLC ("BFS"). Appellant responded by letter dated October 25, 2021, and later by motion dated November 22, 2021 that it objects to consolidation of the appeals. Nonetheless, by letter dated January 28, 2022, the Court of Appeals reaffirmed the consolidation of the appeals. This brief follows.

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

This brief presents the unique challenge of addressing eight separate court orders, with eight separate arguments, all at once. Between the eight orders, two different contracts are at issue; while six of the orders address one version of contractual language, two of the orders rely on a completely different version of

the contract, with completely different operative contractual language. Some of the orders address the issue 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. 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.

This brief will first address arguments common to all of the orders, and will then attempt to address arguments that may be specific to certain, but not all, Respondents. In order to address even the most common elements of this case, however, Appellant believes that a review of the two different contracts at issue would greatly assist the Court.

The contracts governing the relationships between (1) Appellant and East Coast Carpentry and (2) Appellant and Palmetto Trim contain indemnification language that mirrors each other but predates the indemnification language found in the relevant contracts that Appellant has with the remaining subcontractors. For ease of reference, Appellant will refer to its contracts with East Coast Carpentry and Palmetto Trim as "the 2005 Contracts." The relevant indemnification language in the 2005 Contracts provides as follows:

> [T]o the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend and hold harmless the Indemnitees for,

> and to save the harmless against, any and all Claims (together with reasonable attorneys' fees), ***to the extent of liability resulting from Subcontractor's negligence or willful misconduct*** incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death, or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) omissions resulting from Indemnitee's failure to supervise Subcontractor's operations.

[2005 Subcontract Agreement, Section 6(b)(2)]. (emphasis added).

The contracts that followed with the remaining six subcontractors (referred to collectively as the "Later Contracts") contained completely different indemnity provisions from those found in the 2005 Contracts. In these Later Contracts, indemnity obligations were laid out under the heading "Section 5. Indemnity," which consisted of four paragraphs, although only three are relevant herein. The first paragraph governs indemnification in cases including those arising out of property damage, such as the underlying action. The second paragraph governs indemnification in cases arising out of bodily injury to the subcontractor, its agents, employees, or subcontractors. The third paragraph governs the subcontractor's separate duty to defend. Each is addressed here in turn.

Paragraph One provides, in relevant part, 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.

[Master Subcontract Agreement, Section Five, Paragraph One]. This paragraph expressly permits Appellant to recover from its subcontractor for the negligent acts

or omissions of said subcontractor in cases, such as the one before this Court, arising out of property damage. It bears emphasis that this paragraph is the only paragraph within Section 5 of the Master Subcontract Agreement which specifically provides for indemnification against loss resulting from property damage caused by the neglect or omission of the indemnitor.

Paragraph Two governs the relationship between the parties in cases arising out of claims of bodily injury to the subcontractor, its agents, employees, and/or subcontractors. This case does not arise out of bodily injury, and thus this paragraph is irrelevant and not currently before the Court. Nonetheless, Respondents have taken issue with this paragraph because, in cases involving bodily injury to the subcontractor, its agents, employees, and/or subcontractors, the contract allows Appellant, "to the fullest extent permitted by law," to seek indemnification for losses "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." [Master Subcontract Agreement, Section Five, Paragraph Two]. Thus the provisions of paragraph two, by their specific terms, allow recovery in indemnity only as authorized by law, and, correspondingly, would not impose any indemnity obligation contrary to South Carolina law.

Moreover, (for those reasons discussed herein below), even assuming that this language may potentially be problematic if this were a case arising out of bodily injury, it does not affect Appellant's right to pursue indemnification pursuant to Paragraph One in a case arising out of property damage.

Paragraph Three of the Indemnity Section governs the subcontractor's duty to defend. Paragraph Three provides that:

> 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.

[Master Subcontract Agreement, Section Five, Paragraph Three]. Appellant believes that Paragraph Three needs no further explanation, as the terms are abundantly clear and speak for themselves.

Some, but not all, of the Orders also address the Warranty Section and the Severance Section of these Later Contracts. Appellant will review these additional sections of the contract as appropriate when addressing the relevant arguments.

I. Each of the Eight Trial Court Orders Mistakenly Applied the Clear and Unequivocal Standard Articulated by Concord and Cumberland to the Relevant Contractual Language Even Though Appellant was only Seeking Indemnity for the Subcontractors' Negligence.

One of the things that each of the lower court orders has in common is that each inappropriately applies the heightened standard found in Concord & Cumberland to the contract language at issue because the lower court mistakenly assumed – and sometimes specifically found – that Appellant was seeking to be indemnified for its own negligence. Any such assumption or finding of the lower Court is without evidentiary support.

Typically, courts will construe an indemnification contract "in accordance with the rules for construction, and of contracts generally." Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018). Only when a party seeks contractual indemnification

for its own negligence do our courts require that the language granting that indemnification meet a heightened standard of being “clear and unequivocal." See id. Because Appellant is not seeking indemnification for its own negligence, the heightened standard of “clear and unequivocal” should not have been applied to its contracts.

In Concord & Cumberland, the Court of Appeals considered indemnification provisions which were virtually identical to those at issue in the Later Contracts. In that case, the general contractor, Superior Construction, sought indemnification from its window installation subcontractor, Muhler, against damages arising from both (a) the negligence of the subcontractor, and (b) the concurrent negligence of Superior (the general contractor) itself. The Circuit Court found that the indemnification provisions of the Subcontract Agreement were not sufficiently “clear and unequivocal” as to require Muhler to indemnify Superior for Superior’s own negligence. However, the Circuit Court specifically determined that those indemnity provisions did in fact obligate the subcontractor, Muhler, to indemnify the general contractor, Superior, against claims and damages caused by the negligent acts or omissions of Muhler. The Court of Appeals affirmed the determination of the Circuit Court, noting repeatedly within its opinion, that, although the indemnification provision of the relevant subcontract agreement was not sufficiently clear and unequivocal to require indemnification against the general contractor’s own negligence, such indemnification provision nonetheless obligated the subcontractor to indemnify the general contractor against loss or damage caused by the negligent acts or omissions of the subcontractor. See generally,

Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).

At the crux of Concord & Cumberland was the fact that the general contractor was trying to recover from its subcontractor for the general contractor's own negligence. That is not the case here. Appellant is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification, and corresponding damages, against liability for loss or damage arising from Respondents' negligence. When, as here, a contractor does not seek indemnity for its own negligence, the "clear and unequivocal" standard simply does not apply, and the indemnity provision is not subject to that heightened standard.

Certain orders of the lower court in this case erroneously found that Appellant *was* seeking indemnification for its own negligence. For example, the Order granting partial summary judgment to Hurley Services finds that "[i]n 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." [Hurley Services Order, p. 13]. There is nothing in the Record, including in the pleadings articulating BFS' claims against its subcontractors, that can support the finding of the trial court. In fact, a review of the relevant documents, which Appellant will address momentarily, reveals the exact opposite.

This entire appeal turns on whether Appellant is seeking to be indemnified for Appellant's own negligence or only for the negligence, whether sole or

concurrent, of its subcontractors. As mentioned above, the lower Court repeatedly held that Appellant's pleadings seek indemnification from its subcontractors for Appellant's own negligence, and nearly every subsequent holding flows from that premise: the heightened standard of Concord & Cumberland, the language of 32-2-10, the unconscionability of the agreement, and the issue of collateral estoppel *all matter only if Appellant is seeking to recover in indemnity for, or regardless of, Appellant's own negligence.* As Appellant has reiterated countless times [see, e.g., Transcript of Hearing, p. 37, ll. 20-25], Appellant is not seeking to recover in indemnity for damages that may have been occasioned by its negligence, but only those occasioned by the negligence of its subcontractor – and the pleadings support this position.

An excerpt of Appellant's relevant pleading for contractual indemnification follows.

> 134. That BFS has denied the material allegations asserted against BFS in the Plaintiffs' Fourth Amended Complaint.
> …
> 137. That to the extent, if any, that BFS may be held liable to the Plaintiffs, or to others in this action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of the Cross Claim Defendants, which have damaged BFS, as BFS has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the Plaintiffs' claims.

> 138. That BFS is entitled to full contractual and common law indemnification from the Cross Claim Defendants, for any liability BFS is found to have to the Plaintiffs or to others in this action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of the Cross Claim Defendants, entitling BFS to recover from the Cross Claim Defendants, its attorneys' fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the Cross Claim Defendants any sums for which BFS may be held liable to the Plaintiffs or to others, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims.

[BFS Amended Answer to Plaintiffs' Fourth Amended Complaint, with Cross Claims and Third-Party Claims, pp. 27-28] (emphasis added). Similar language is addressed to the Third-Party Defendants in Paragraphs 163, 167 and 168 [Id. at pp. 35-36]. Broken down in simpler language, the paragraphs say the following:

> 134. BFS denies liability.
>
> 137. If BFS is found to be liable to the Plaintiff, it is *only* because the Cross Claim Defendants (or, as the case may be, the Third-Party Defendants) did something wrong.
>
> 138. Thus, if BFS is liable to the Plaintiffs, the Cross Claim Defendants (or, as the case may be, the Third-Party Defendants) are derivatively and contractually liable to BFS.

Appellant's pleading takes as a premise that Appellant has committed no negligence and has no liability. In this world constructed by Appellant's pleading, where Appellant has committed no negligence, the only possible way Appellant could be liable is if the negligence was committed by Appellant's subcontractor and not by Appellant itself. Thus, in this world, and in context, Respondents, as the sole source of the negligence, would be liable to Appellant for all damages, as plead in paragraphs 138 and 168, and Appellant, in seeking indemnity, is seeking recovery only for Respondents' negligence and not for Appellant's own negligence

(because Appellant's negligence is nonexistent). Whether the facts later bear out Appellant's worldview does not affect the analysis of what Appellant's pleadings seek.

Because Appellant's pleadings and consistent representations have been that it is seeking indemnification only for Respondents' negligence, the trial court should not have applied the elevated standard of "clear and unequivocal" articulated by Concord & Cumberland.

However, even if the heightened standard articulated in Concord & Cumberland *did* apply to the contracts at issue (which Appellant does not concede), the indemnification language found in both contracts is sufficiently clear and unequivocal to satisfy the standard and to allow Appellant to recover in indemnity.

A. The language of the 2005 Contracts clearly and unequivocally provides for indemnification in favor of Appellant.

The orders granting summary judgment to East Coast Carpentry and Palmetto Trim on the contractual indemnity claim ruled on the language found in the 2005 Contracts. The sections of the two orders addressing the Concord & Cumberland arguments are identical; both found that the indemnity "language is inherently confusing" and that "the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS's own negligence" (again, the latter statement, even if true, is irrelevant because BFS is not seeking indemnity for its own negligence but only for liability for damages caused by the negligence of its subcontractor). [Order granting East Coast Carpentry Summary Judgment, p. 5; Order granting Palmetto Trim Summary

Judgment, p. 6]. The final holdings both provide that "the indemnity and duty to defend provisions of the Master Agreement . . . are neither clear nor unequivocal and, thus, fail as a matter of law." [East Coast Order, p. 7; Palmetto Trim Order, p. 7].

The language, however, is clear and unequivocal. The Court in both orders quoted from the 2005 Contracts exactly as follows:

> **Section 6. Waiver, Release, and Indemnification**. Subcontractor agrees that Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors. Subcontractor will indemnify, defend, and hold Contractor harmless against any such injuries and claims. Accordingly:
>
> a. Waiver. [omitted because it applies to workers comp]
>
> b. Release and Indemnity.
>
> (1) [Omitted bc applies to personal injury]
>
> (2) For all Claims not covered by (1) above and to the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend, and hold harmless Indemnitees [defined as Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees in (1)] for, and to save them harmless against, any and all Claims (together with reasonable attorneys' fees), to the extent of liability resulting from Subcontractor's negligence or willful misconduct incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) omissions resulting from Indemnitees failure to supervise Subcontractor's operations.

[East Coast Order, p. 5; Palmetto Trim Order, pp. 5-6] (All bracketed text original to the Orders). Once the Orders have finished quoting the above, they conclude, without referencing any specific text, that "This language is inherently confusing insofar as it calls for East Coast to indemnify BFS for BFS's sole negligence while

also claiming to limit the indemnity "to the extent" of East Coast's negligence." [East Coast Order, p. 5; see also Palmetto Trim Order p. 6].

The opening language of Section 6 limits the indemnification obligation to claims "arising from or relating in any way to the performance of the Work," which is a defined term that encompasses only the materials and/or services that the subcontractor undertook to perform or provide for Appellant [See Palmetto Trim Contract, Section 1(a)]; therefore, the language of the contract provides for indemnification in favor of Appellant in the event of claims, such as those here, arising from the subcontractor's work. The indemnification obligation is reiterated later in Section 6(b)(2) where, consistent with the opening language, the contract provides that the indemnification obligation is limited "to the extent of liability resulting from Subcontractor's negligence or willful misconduct . . ." This limitation then modifies and controls the remaining three subsections, labeled (i), (ii), and (iii).

Section 6 of the 2005 Contracts consistently limits the indemnification obligation of the subcontractors to the liability that Appellant may face as a result of the Subcontractor's negligence in its Work. It does not attempt to award Appellant indemnity for Appellant's own negligence, nor is it in any way "inherently confusing." Contrary to the lower court's holdings, the Contracts are clear and unequivocal in providing for indemnity for liability occasioned by the negligence of the subcontractor, and thus, it was inappropriate for the lower court to grant summary judgment to East Coast Carpentry and Palmetto Trim on these grounds.

B. The Later Contracts are sufficiently clear and unequivocal to satisfy Concord and Cumberland.

The remaining six orders all hold that the indemnity provisions of the Later Contracts are not sufficiently clear and unequivocal to satisfy Concord & Cumberland. Certain orders go even further to hold that the warranty provisions of the Later Contracts also violate Concord & Cumberland. While noting again that these provisions are ***not*** subject to the heightened standard of Concord & Cumberland, Appellant addresses each provision below.

1. The indemnity language of the "Section 5. Indemnity" provision is clear and unequivocal.

The lower court's orders that hold that the language of "Section 5. Indemnity" run afoul of Concord & Cumberland follow one of two different rationales. The first, which is articulated by the lower court's order granting summary judgment to Hurley Services, is that the Concord & Cumberland Court considered nearly identical language and found as a matter of law that it was not sufficiently clear and unequivocal to impose an indemnification obligation on the subcontractor for liability caused by the general contractor's own negligence. The lower court then reasoned that because Appellant was likewise attempting to recover for its own negligence on language that had already been ruled insufficient, the Concord & Cumberland precedent barred its recovery. The problem with the lower court's reasoning, however, is that, as explained in detail above, Appellant is *not* seeking to recover for its own negligence but only for the negligence of its subcontractors. Based on the same language that barred the general contractor from recovering for its own negligence, the Concord & Cumberland Court

nevertheless specifically *allowed* the general contractor to recover from its subcontractor for the *subcontractor's* negligence. The lower court here should have come to the same conclusion, allowing Appellant to proceed on its claims to recover against its subcontractor for the subcontractor's negligence.

The second way in which the lower court approached the "Section 5. Indemnity" language was to actually analyze the language itself. In the orders granting partial or complete summary judgment to the remaining Respondents, the Court held that "[t]he indemnification provisions in 'Section 5. INDEMNITY' of the Master Agreement, as set forth above, are ambiguous, conflict with each other . . . 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)." [ECC Order, p. 6]. The Court's logic seems to be that the ambiguities apparently arise because the different paragraphs in the Indemnity Section impose different obligations in different circumstances. For example, the Court notes that Paragraph One imposes an indemnification obligation "ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR," while Paragraph Two imposes an indemnification obligation ""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 [APPELLANT]," and Paragraph Three imposes an obligation to defend "REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF [APPELLANT]." [ECC Order, pp. 5-6]. As explained at the outset of this brief,

these “inconsistencies” are resolved by looking at the context of the paragraphs containing the text.

Paragraph One applies to, among other things, claims, such as the one at bar, for property damage. In those situations, the liability of the subcontractor for indemnification will be limited to the extent that the underlying negligence was caused in whole or in part by the subcontractor. Paragraph Two applies to claims for bodily injury. In such a context, the subcontractor may be liable to indemnify Appellant regardless of the negligence of Appellant if and only “to the fullest extent permitted by law”. These two paragraphs do not contradict each other, because it is abundantly clear when one paragraph governs the situation at issue. No one has attempted to argue that this is a personal injury case, and thus no one can seriously argue that Paragraph Two applies at all to the case at bar.

Appellant maintains that Paragraph Two is irrelevant to this litigation; however, to the extent that the Court would evaluate Paragraph Two in the context of Concord & Cumberland (because it may allow Appellant to recover in personal injury cases regardless of the negligence of Appellant), Appellant would argue that the language is clear and unequivocal. Any party to the contract would understand the plain language before it – that in personal injury cases, an obligation to indemnify would exist, “to the fullest extent permitted by law”, regardless of the negligence of Appellant. To the extent that the Court disagrees, precedent requires that Court sever the offending language, as discussed below, and leave the language governing property damage claims intact. This outcome is still compatible with Appellant pursuing its claims pursuant to Paragraph One.

Finally, Paragraph Three applies to the Duty to Defend, which exists independently of the Duty to Indemnify and regardless of any ultimate liability or negligence of Appellant. The paragraph clearly and unequivocally applies only to the duty to defend, and by the terms of the contract this duty clearly and unequivocally exists regardless of the ultimate negligence of Appellant. There is no confusion as to when this paragraph (as opposed to Paragraph One or Two) would govern a situation, and there is no confusion as to what is expected from the subcontractor under this paragraph. Thus, the paragraph does not violate Concord & Cumberland. To the extent the Court may disagree, it is likewise required to sever the offending language and leave the remainder of the Contract intact.

In the context of Concord and Cumberland, the lower court's orders held only that the "provisions are ambiguous, conflict with each other . . . and do not meet the elevated clear and unequivocal standard." As explained above, these provisions are not required to meet the heightened "clear and unequivocal" standard, but to the extent that the Court would thus analyze them anyway: the provisions are unambiguous; they do not conflict with each other because they explicitly apply to different circumstances; and they clearly and unequivocally set out the obligations of the subcontractors in those different situations. The holdings of the lower court that the indemnity provisions of the contracts violate Concord & Cumberland must therefore be reversed.

2. *The warranty language of the "Section 3. Warranty" provision is clear and unequivocal, and does not conflict with the "Section 5. Indemnity" provision.*

The lower court's orders granting, in part or in full, summary judgment to ECC, Hurley Services, AC Construction, and WS Contractors additionally reference the "Section 3. Warranty" provision, attempting to turn it into an indemnity provision that purportedly conflicts with the "Section 5. Indemnity" provision (the L&G Order also mentions, without analyzing, the Warranty language, although it cites to Section 7 rather than Section 3). The analysis of Section 3 in each of the Orders is incredibly brief and unenlightening. In the Hurley Order, the Court said that "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." [Hurley Order, p. 11]. In the ECC Order, the Court observed only that "Section 3. Warranty" contains a "buried" indemnification provision that conflicts with the indemnity provisions in Section 5. [ECC Order, p. 6; AC Construction Order pp. 8-9; WS Contractors Order, pp. 10-11].

The entirety of the Warranty provision can be found in the Record at [Master Subcontract Agreement, Section 3], but the relevant provisions for this analysis are as follows:

> In 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 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 years for all Work except, (b) ten (10) years for all Work consisting of any structural application of any home, building, or other structure… 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.

In its orders addressed to ECC, AC Construction, and WS Contractors, the lower court highlighted the language in the last sentence that provides that the subcontractor will "Indemnify Contractor and any other party for any costs incurred by any party relating to such demand." The "demand" at issue is a demand that the subcontractor correct the Work under warranty that it performed for Appellant. The term "Work" as used in this section and throughout the Contracts is a defined term that specifically excludes materials provided by BFS and only includes materials and/or services provided or performed by the subcontractor. [Master Subcontract Agreement, Section 1(a)]. Understanding that "Work" relates *only* to materials and/or services provided or performed by the Subcontractor, this provision only requires Subcontractor to correct its own Work (or, as the case may be, any materials that Subcontractor may have provided) ***and to indemnify other parties for costs incurred relating to the demand that Subcontractor correct its own Work***. A contractual provision whereby a subcontractor must indemnify the contractor for damages resulting from the subcontractor's negligence is consistent with Concord & Cumberland.

The lower court's order addressed to Hurley Services can likewise be rebutted by reading the warranty provision in the context of its defined term. In the

Hurley Order, the lower court found that the warranty provision "allow[s] 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.*" [Hurley Order, p. 11] (emphasis added). It is not entirely clear what language the Court relied on when it drew this conclusion, but it is possible that it had in mind the language whereby "Subcontractor guarantees the Work against defects in design, workmanship, and *materials*..." Again, however, the guarantee is limited to the "Work," that is, the materials/services provided by the subcontractor. If a Subcontractor provided materials, the Subcontractor guarantees them against defects in design, workmanship, and materials. If the Subcontractor performed services, "design" may be inapplicable in that specific situation, but the Subcontractor still guarantees its workmanship (and any materials that it does provide in tandem with its services). In this instance, Appellant is not alleging that Hurley supplied the materials in question; thus, by the very terms of the Contract, Hurley is not guaranteeing those materials against defects in design, workmanship, and materials. Because this warranty language does not require Hurley to assume liability for the materials provided by Appellant, it does not violate Concord & Cumberland.

In conclusion, it was an error for the lower court ever to apply the heightened standard of "clear and unequivocal" articulated in Concord & Cumberland to the various contracts at issue because Appellant is not seeking indemnity for its own negligence. It was further error for the Court to analyze the Indemnity and

Warranty provisions and conclude that they were ambiguous, confusing, and failed to meet the clear and unequivocal standard.

II. The Contractual language does not violate South Carolina law and public policy, and the relief sought by Appellant is specifically authorized by Section 32-2-10.

In addition to holding that the Contracts violate Concord & Cumberland, the other element that all of the eight orders have in common is that they all at least mention South Carolina Code Section 32-2-10.

Section 32-2-10 provides that:

> 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. Nothing contained in this section shall affect a promise or agreement whereby the promisor shall indemnify or hold harmless the promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the negligence, in whole or in part, of the promisor, its agents or employees.

(Emphasis added). Section 32-2-10, by its specific language, states simply that an agreement to indemnify a party against liability for damages arising out of that party's sole negligence is against public policy, and thus unenforceable. None of the applicable sections of the contract violates this statute.

A. The 2005 Contracts do not violate Section 32-2-10.

Once again, the orders granting partial summary judgment to East Coast Carpentry and Palmetto Trim analyze an older version of Appellant's contracts.

Notably, the lower court's order granting partial summary judgment to Palmetto Trim does not discuss Section 32-2-10 *at all* but only states, as bullet point number three of its final recitation of its findings, that the contract violates the statute and public policy. [Palmetto Trim Order, p. 7]. The order granting partial summary judgment to East Coast Carpentry contains at least an analysis of the statute, and Appellant will address that analysis here.

The lower court held: "Section 6 explicitly calls for East Coast to unconditionally defend and indemnify BFS in subsection (1) and then calls for East Coast to indemnify BFS for BFS' failure to supervise in subsection (2). These provisions explicitly violation of SC Code Ann. §32-2-10 as they require East Coast to indemnify BFS for BFS' sole negligence." This Court may recall that subsection (1) applies only to personal injury cases – in fact, the lower court did not even reproduce the text of subsection (1) in any of its analysis because it knew it was irrelevant to the case (instead of including the text of subsection (1) when it quoted the contract, the lower court instead noted in brackets that the text was "Omitted bc applies to personal injury"). [East Coast Order, p. 5].

Subsection (2), by contrast, contains three separate subsections, including subsection (iii), which states that the subcontractor will indemnify Appellant for claims "to the extent of liability resulting from the Subcontractor's negligence . . . which arise out of or related to . . . .(iii) omissions resulting from Indemnitees failure to supervise Subcontractor's operations." By the very terms of the contract, subsection (iii) is necessarily modified by the language earlier in the sentence that limits East Coast's liability to damages resulting from its own negligence. Even if

this were not the case, subsection (iii) is likewise irrelevant to the current litigation, because Appellant is not seeking indemnification pursuant to subsection (iii), but rather subsection (ii), which provides that the subcontractor will indemnify Appellant for claims "to the extent of liability resulting from the Subcontractor's negligence . . . which arise out of or related to . . . (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work." The language that limits East Coast's liability to its own negligence falls squarely within Section 32-2-10.

After highlighting the language described above, the lower court then went on to discuss D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 810 S.E.2d 41 (Ct. App. 2018). The lower court described that case as follows:

> In D.R. Horton, the 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.

[East Coast Order pp. 6-7]. But this case IS different. In that case, D.R. Horton was seeking to be indemnified for its *own* negligence. In this case, Appellant is not seeking to be indemnified for its own negligence.

Perhaps even more importantly, the lower court seems to have missed the important nuance of the D.R. Horton holding whereby the Court voided the portion of the indemnity provision that allowed the contractor to recover for its own negligence but specifically affirmed and left intact the portion of the indemnity

provision that allowed the contractor to recover from the subcontractor for the *subcontractor's* negligence. The D.R. Horton Court spoke as follows:

> This statute [Section 32-2-10] allows D.R. Horton and BFS to agree that BFS will indemnify D.R. Horton for damages caused by BFS or its subcontractors. To the extent the trial court found that aspect of the agreement to be against public policy, we disagree. However, we agree that the indemnification clause is void as against public policy *to the extent* it purports to require BFS to indemnify D.R. Horton for damages caused by its negligence or the negligence of its subcontractors.

D.R. Horton, 422 S.C. at 152, 810 S.E.2d at 45 (emphasis added). Analogously, to the extent that the indemnity provisions contained in Appellant's contracts provide that the subcontractor shall indemnify Appellant for the subcontractor's negligence, that language is authorized by Section 32-2-10 and public policy, and should not be disturbed by the Court. Any invalid provisions may be severed, as contemplated by D.R. Horton and as explained below, but Appellant must be allowed to pursue its claims against its subcontractors for the subcontractors' own negligence.

B. The Relevant Indemnity Provision(s) of the Later Contracts are Likewise Specifically Authorized by Section 32-2-10.

In addressing the Later Contracts, the orders of the lower court again diverge into at least two completely different sets of analysis depending on which party's attorney wrote the respective proposed order for the Court.

Both of the orders granting partial summary judgment to L&G Construction and to Pohlman Quality Exteriors mention in passing Section 32-2-10 as an alternative sustaining ground for summary judgment but provide absolutely no analysis of the statute. Thus, Appellant is unable to mount a challenge to the lower

court's holdings with any kind of specificity in these two instances and instead incorporates, generally, the arguments against such a holding outlined below.

The order granting partial summary judgment to ECC Contracting contains a discussion of Section 32-2-10 that shows up verbatim in the orders granting complete or partial summary judgment to AC Construction and WS Contractors. The order granting partial summary judgment to Hurley Services makes some of the same arguments and then diverges.

Among these collective four orders, the lower court criticized the first, second, and third paragraphs of the indemnity provision as running afoul of South Carolina Code Section 32-2-10. All three paragraphs are addressed here in turn.

1. *Paragraph One of the Indemnity Provision, which is the only paragraph under which Appellant seeks indemnification for damages in this action, is explicitly authorized by Section 32-2-10.*

In the Order granting partial summary judgment to Hurley Services, the lower court makes a unique finding – one that is not repeated or supported by any of its other orders. In that Order, the lower court held that "The first and second paragraphs in Section 5 INDEMNITY also purport to indemnify BFS for its sole negligence in violation of the statute [Section 32-2-10]." [Hurley Order p. 16]. To Appellant's knowledge, nowhere else has an order concluded that *Paragraph One* in Section 5 allows Appellant to recover in indemnity for its own negligence.

Paragraph One of the Indemnity Provision explicitly does <u>not</u> require Respondent to indemnify Appellant against liability for damages arising out of Appellant's sole negligence. Rather, it limits indemnification only to damages "TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR

OMISSION OF THE SUBCONTRACOR;" thus, Section Five, Paragraph One requires Respondent to indemnify Appellant against liability or damages for *Respondent's* negligence (whether sole or concurrent). This arrangement is the exact type of agreement authorized by the second half of the statute: Section 32-2-10 specifically authorizes agreements 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. The indemnity provision of Section 5 Paragraph One is, therefore, specifically authorized by Section 32-2-10 because by that provision Respondents undertook to indemnify Appellant for Respondents' own negligence (as opposed to Appellant's own negligence). Additionally, a contractual provision authorized by statute cannot logically be against public policy. Thus, the indemnity provision does not violate Section 32-2-10 or public policy, and provides no basis for an award of summary judgment in favor of Respondents.

2. *Paragraph Two of the Indemnity Provision is Not Currently Before this Court, but to the Extent that the Court finds that it may Violate Section 32-2-10, the Court is Compelled to Sever it.*

All four of the orders outlined above hold that Paragraph Two violates Section 32-2-10. Paragraph Two of the Indemnity Provision outlines the subcontractor's indemnification obligations in the event that a personal injury claim is at issue. This is not the case here. Appellants are not seeking to recover under Paragraph Two, and no one on either side of this litigation has even attempted to argue that Paragraph Two governs the relevant claims in this case. It is simply

irrelevant to this case, and Appellant does not believe that it is properly before the Court for review (nor was it properly before the lower court).

Should the Court decide to consider this superfluous provisions, however, the outcome should follow the holding of D.R. Horton, discussed at length above. If the Court finds that Paragraph Two does not comply with Section 32-2-10, then the Indemnity Provision is invalid only *to the extent* that Paragraph Two provides for recovery for Appellant's own negligence. However, *to the extent* that the remainder of the "Section 5. Indemnity" Provision provides for recovery for liability for damages incurred as a result of the subcontractor's negligence, that language must be upheld as valid. The Court can reach this result by severing the purportedly offending language in Paragraph Two. The Court's obligation to sever problematic language as opposed to invalidating the entire contract is discussed further below.

3. Paragraph Three of the Contract is Neither Addressed nor Prohibited by Section 32-2-10.

The lower court's Orders also find that Paragraph Three of the Indemnity Provision violates South Carolina Code Section 32-2-10 because Appellant may seek reimbursement of attorney's fees regardless of any ultimate liability or negligence of Appellant. However, the statute addresses general damages and not recovery of attorneys' fees; thus, the statute does not apply to this portion of the Contract.

The very terms of the statute limit its application to agreements for indemnification against liability 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 specifically states that it governs agreements for indemnity against liability for damages. As noted by 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 below; 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 incurred in defending against 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 . . . ." As noted above, Paragraph One of the Indemnity Provision is the exact type of agreement authorized by the statute.

4. The Warranty Provision of the Contract does not Violate Section 32-2-10.

Finally, in a move again unique to the Order addressing Hurley Services, the lower court held that the contract's "Section 3. Warranty" provision violates Section 32-2-10 because, as summarized by the Court, under that section "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." [Hurley Order p. 16].

The lower court has grossly mischaracterized the Contract's Warranty provision, which has already been discussed at length above. Nowhere in Section Three does the language include anything about the "sole negligence" of Appellant. As previously noted, all warranties, guarantees, and indemnity obligations stem from claims regarding defects in "the Work," which is a defined term limited to the materials provided by and/or services rendered by the subcontractor. Because the entire section relates to "the Work" of the subcontractor, it is impossible to reach the Trial Court's conclusion that the Contract forces the subcontractor to warrant materials that may have been selected or sold by Appellant. Due to the definition of "the Work," any recovery based on a breach of the warranty provision would be limited to defects in the materials provided by or the services rendered by the subcontractor; in this case, because Hurley provided labor, recovery based on a breach of warranty is limited to the labor it provided.

To the extent that Section 32-2-10 may apply to a warranty provision, agreements such as this one, where the recovery is limited to the negligence of the indemnitor, are explicitly authorized by the statute. Thus, the warranty provision does not violate Section 32-2-10 nor public policy.

III. Because the Specific Issue Here has not been Addressed by a Court Before, and Because the Cited Judgments are on Appeal, the Doctrine of Collateral Estoppel does not Bar Appellant's Claims for Indemnity in the Present Case.

The Orders granting complete or partial summary judgment to ECC, Hurley, L&G, AC, and WS all hold some version of "[BFS] is collaterally estopped from enforcing the contractual indemnity claims" because of the holdings of different combinations of cases that considered the language at issue in the Later Contracts, all of which are currently on appeal. [Hurley Order, p.15].

The orders cite to different combinations of the following cases: 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).

In the first of these cases, Judge Newman issued an order holding 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***.

[See Amended Order of Judge Newman filed February 3, 2020 in Builders FirstSource – Southeast Group, LLC v. MI Windows and Doors et al., Civil Action No. 2018-CP-08-02547] (emphasis added). This same order was also adopted by Judge Young in Six Fifty Six Owners Association, Inc., et al. v. Windsor South, LLC, et al., Civil Action No. 2016-CP-10-3455. In addition, Judge Young held, in a

single sentence at the end of the order, that the contracts violated South Carolina law and public policy. [Six Fifty Six Order]. In Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, Judge McCoy held that the orders of Judge Newman and Judge Young collaterally estop BFS "from contending that the indemnity provisions contained in its Master Subcontractor Agreement are clear and unequivocable [*sic*] and meet the requirements of South Carolina law." [Pavic Order, p. 11]. Despite the dispositive nature of such a holding, Judge McCoy's Order nonetheless went on to make a variety of other unprecedented holdings about the contract. All three of these orders are currently on appeal.

The doctrine of collateral estoppel is available ***when the same issues of fact or law*** are actually litigated and determined by valid and final judgment. Carman v. South Carolina Alcoholic Beverage Control Com'n, 317 S.C. 1, 451 S.E.2d 383 (S.C. 1994) (emphasis added). The issue before the trial court in this case was ***whether Appellant may recover from its subcontractors pursuant to its contract for the subcontractors' negligence*** (whether sole or concurrent). This issue has not been ruled upon by a single court to date, and thus, it is not subject to collateral estoppel.

As evidenced by the language of the order, Judge Newman only ruled on the issue of whether BFS could recover for *its own* negligence, finding that:

> (a) BFS was seeking to be indemnified for its own negligence, and
> (b) the relevant contract provision was not sufficiently clear and unequivocal to require the subcontractor to indemnify BFS for BFS's own negligence.

However, the issue before this Court is whether Appellant can recover for the negligence of its subcontractor, which is a separate issue from the one ruled

upon by Judge Newman (and consequently, by Judge Young, and later, by Judge McCoy). This issue has not yet been "actually litigated" within the context of collateral estoppel. Here, because Appellant is not seeking to be indemnified against Appellant's own negligence, but only against liability for damages caused by the negligence of its subcontractor, none of the prior orders can, as a matter of law, operate to estop Appellant from seeking indemnification for its subcontractors' negligence in this action.

Counsel for Respondent ECC has tried to evade this distinction in the order it drafted for Judge McCoy in this case by framing the collateral estoppel holding as follows:

> In the present case, the Master Agreement and indemnity provisions that BFS now wishes to assert against ECC 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 ECC 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.

[ECC Order, p. 11; see also, AC Order, p. 7 and WS Order, p. 9, both with nearly identical language]. Counsel for Hurley attempted something similar by stating that "[t]he contractual indemnity terms drafted by BFS have been litigated and directly determined in the prior actions, and collateral estoppel should apply." [Hurley Order, p. 15]. This framing of collateral estoppel by both parties ignores the plain language of South Carolina law, which requires neither that the contractual provisions be identical, nor that the relief sought be identical, but rather that the ***issue*** be identical to the one previously litigated. The issue being litigated

in this case is whether those same contractual provisions, which courts have previously held do not provide for recovery against one's own negligence, nonetheless provide for recovery against the negligence of one's subcontractors.

Additionally, as mentioned before, all three of the orders referred to are currently on appeal, and until they are finally disposed of on appeal, they should not be considered "final" judgments for purposes of collateral estoppel.

Finally, the Orders drafted by parties that were not privy to BFS v. MI Windows, Six Fifty Six, and/or Pavic nonetheless assume that the collateral estoppel arguments made by Hurley and ECC should likewise protect them. [L&G Order, p. 11; WS Order, pp. 6-9; AC Order pp. 5-8]. However, as pointed out by many of the lower court's orders, "the law . . . requires that the party against whom estoppel is applied have . . . 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). Again, not only are the issues completely different between the prior cases and the one at bar, but even if that were not the case, until the final resolution by an appellate court, BFS will not have exhausted its "full and fair" opportunity to litigate those holdings relied upon by the lower court in this case. Thus, collateral estoppel does not bar the claims of Appellant in this case.

IV. The Trial Court Erred Both in Failing to Address the Severability Provision of the Contract and in Holding that it Lacked Authority to Sever Provisions of the Contract.

Appellant argued repeatedly to the trial court that to the extent that the court held that any language in the contract violated South Carolina law, the Court was

obligated to sever that language pursuant to the severance language in the parties' contracts. However, in the eight orders it issued, the court was either silent on the issue of severance or held that it lacked the authority to sever the contract. In its silence, the trial court abdicated its necessary duty; in holding it lacked authority, it misinterpreted the law.

A. The Court had an obligation to honor the severability provision of the Contract(s)

BFS does not concede that any provisions of its contracts contain problematic language; nonetheless, to the extent that the Trial Court took issue with any specific language, it should have simply severed such language and left the remainder of the Contract intact. See One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co., 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) ((1) holding that allegedly unconscionable language in contract's warranty provision ought to be severed, due, in part, to presence of severability clause; and (2) declining to invalidate entire contract).

South Carolina law provides that "[c]ourts have discretion … to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive." Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880–81 (Ct. App. 2020). "Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties." Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). The presence of a severability clause should be treated as strong evidence of the parties' intent to sever unenforceable language. See Doe, 430 S.C. at 615, 846 S.E.2d at 880-81 (determining that

parties intended their contract to be severable where contract contained severability clause, and holding trial court erred in concluding illegal provision of contract was not severable).

The severability provision of the Contract here 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.

[Master Subcontract Agreement, Section 9, Paragraph (f); 2005 Contract, Section 9, Paragraph (f).] This language, which is present in both the 2005 Contracts and the Later Contracts, unequivocally reflects the intention of all 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 Court should honor the intent of the parties and sever any offending provision, leaving the remaining provisions intact.

As discussed above, the lower court appeared to take issue, for various reasons, with "Section 5. Indemnity," Paragraphs Two (Bodily Injury) and Three (Duty to Defend); as well as, in some instances, "Section 3. Warranty." While BFS maintains that all of these provisions are valid, the Court could sever all of them, and BFS would still be entitled to pursue its claim for contractual indemnity under Section Five Paragraph One (Property Damage).[4] Thus, it was an error for the Court to grant summary judgment on the contractual indemnity claims.

[4] As discussed above, only one of the eight orders goes so far as to say, in passing, that Paragraph One is problematic. Because the order makes no argument, nor can Appellant fathom any, as to why this is so, Appellant will not address it here.

B. The Order granting partial summary judgment to Hurley Services misapplied the law when it came to the mistaken conclusion that the court lacks the "authority" to sever parts of the contract.

In the Order granting partial summary judgment to Hurley Services, the lower court cites Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc., 694 S.E.2d 15, 18 (S.C. 2010), and claims that it has no authority to rewrite contractual indemnity provisions. As discussed above, there is ample precedent giving courts authority and instruction to sever contracts.

The Court is correct that South Carolina law does not allow courts to blue-pencil and revise contractual provisions that are against public policy. See Poynter. However, the Trial Court fails to recognize that BFS is not asking for any provision to be rewritten. BFS is only asking that, to the extent necessary (which BFS contends is not), the Court sever any offending provisions and give credence to the parties' intention: appropriate application of the applicable indemnity provision.

Moreover, the Poynter case involved an overly broad non-compete agreement. The issue before the Court of Appeals was whether the trial court had authority to decrease a geographical limitation imposed by the parties' contract. The Poynter Court determined that it would violate public policy to allow a court to decrease the geographical limitation agreed upon by the parties, by which action the Court would have effectively rewritten the parties' contract. The Poynter Court held that in South Carolina, the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms and therefore, that the trial judge erred in rewriting the territorial

restriction in the parties' contract. See Poynter, 387 S.C. at 588, 694 S.E.2d at 18 (2010).

Here, we are not dealing with a non-compete agreement, but a contract for construction services. Moreover, the agreement specifically includes an indemnity provision which has been recognized as valid by the Concord & Cumberland Court. More importantly, Appellant is not asking the Court to re-write the content of its contract, but it is asking the Court to honor the intentions of the parties and for Hurley to do the same. Due to the extensive amount of case law condoning and requiring severance of invalid provisions, the lower court should have followed precedent and severed any invalid provisions of the parties' Contract.

V. The Parties' Contract was Neither a Contract of Adhesion nor Unconscionable

Four of the eight lower court orders conclude that the contract is unconscionable and therefore unenforceable. Those orders are the ones granting full or partial summary judgment to Hurley, ECC, WS, and Palmetto Trim. The orders that make no finding as to unconscionability are those granting partial summary judgment to L&G, AC, Pohlman, and East Coast Carpentry. Notably, L&G and AC were parties to the same "Later Contracts" as Hurley, ECC, WS, and Palmetto. It is wildly inconsistent that the trial court would conclude that the same contract was unconscionable and unenforceable against some subcontractors but not against other, similarly-situated subcontractors. This – as well as the many other inconsistencies facing the Court on this consolidated appeal – highlights the problematic nature of the proceedings at the lower court level.

Of the four orders that hold that the contract is unconscionable, only one even attempts to explain why. The Palmetto Trim Order does not discuss it, and the ECC and WS Orders only discuss unconscionability in the context of summarizing Judge McCoy's holding in Pavic, but the orders never apply it to the current case. Only the author of the Hurly Order reiterates, for the purposes of this case, the arguments that Hurley made in the Pavic case.

The Hurley Order holds that the Contract is a contract of adhesion and that it is unconscionable and oppressive. "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." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). Neither Hurley Services nor the lower court pointed to any evidence to support the conclusion that (1) the subcontractor lacked meaningful choice, nor (2) that the terms of the contract are so oppressive that no reasonable person would make them.

Hurley voluntarily entered into the Master Subcontractor Agreement in May 2012, and found the terms favorable enough that it entered into a second one in December 2014. Hurley was free to terminate the May 2012 agreement, but instead chose to execute a second agreement incorporating identical terms in December 2014. The agreement is written such that Hurley is free to provide services thereunder, at its discretion, on a case by case basis, and there is no evidence that Hurley was not equally free to contract with other entities to provide

similar services. In fact, Hurley is not obligated to perform any services under the May 2012 agreement unless it accepts a Work Order. Even then, Hurley is free to terminate its performance obligations as to any Work Order should BFS amend terms of the Work Order that materially increases the cost or difficulty of performance for Hurley. Any finding that the Contract is unconscionable is simply not supported by the provisions of the Contract itself or the actions of Hurley.

The Court cites to Simpson v. MSA of Myrtle Beach, Inc.,. 373 S.C. 14, 644 S.E.2d 663, 670 (2007), to bear the entire weight of its holding. But Simpson does not make for a clean comparison. In that case, the court was considering the language of an arbitration agreement, which is subject to a unique set of state and federal considerations, weights, and presumptions that are completely inapplicable to the indemnification provisions at issue in this case.

The Hurley Order cites that, in finding an agreement unconscionable, the Simpson Court considered important the absence of meaningful choice from the contract, the disparity in bargaining power, and the inconspicuous nature of the challenged language. The Order then goes on to state that "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." [Hurley Order, p. 6]. However, it is equally true that there is no evidence that Hurley was ***not*** sophisticated or represented by legal counsel, and any trial court determination to the contrary is simply unfounded.

The Hurley Order then takes judicial notice of the fact that the "Master Subcontract Agreement is so one-sided, that a subcontractor executing the

agreement, more than likely lacks any meaningful bargaining power." [Hurley Order, p. 6]. The Court cited Smith v. D.R. Horton, where that court took judicial cognizance of the fact that a modern buyer of a residential home is normally in an unequal bargaining position as against the multi-state seller. 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016). The Court's analogy was both erroneous and inappropriate, inasmuch as the typical residential home purchaser has relatively little, if any, experience when dealing with large corporate building contractors. By contrast, the record here clearly demonstrates significant and longstanding business dealings between Hurley and BFS over the course of a number of years. Moreover, those business dealings were mutually beneficial to both Hurley and BFS. Thus, Smith v. D.R. Horton does not provide the authority for such "judicial notice," and it was inappropriate here.

Finally, the author of the Order takes the reader through a wild goose chase through multiple provisions of the Contract to attempt to support the proposition that the Contract "obligates 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." [Hurley Order, p. 6]. To the extent that this argument seems out-of-place, that is because this portion of the text of this Order has been copied from Hurley's brief in the Pavic appeal.

Hurley's argument, as adopted by the lower court in its Order, is that the Contract is unconscionable because, despite the very conspicuous "Section 5. Indemnity" provisions, one can allegedly piece together from Sections 1, 2, and 3

a separate, clandestine indemnification obligation by which the subcontractor must indemnify BFS for materials selected and/or supplied by BFS. It is the allegedly "secret" nature of this obligation that makes the contract unconscionable.

Throughout Sections 1, 2, and 3, the obligations placed on the subcontractor are limited to the "Work" of the subcontractor. In order to reach its conclusion, the Hurley Order attempts to redefine "Work" to include not only work or materials performed or supplied by the subcontractor but also any materials designed, selected, or provided by Appellant. Appellant has addressed this argument already in the context of the Concord & Cumberland and Section 32-2-10 analysis. Because the Hurley Order reiterates the arguments here, quoting at length from the Contract, Appellant will again refute them.

The plain meaning of the term "Work" is clear from the face of the contract. Section 1(a) of the Contract provides as follows:

> **a. Work**. This 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**").

[Master Subcontract Agreement, p. 1 (emphasis in original)]. This is the *only* definition of "the Work" found in the Contract. Because this is a master subcontract agreement between the parties, it was drafted to cover the rights and relationships of the parties for any project for which Appellant hired Hurley. For the Project at issue in this case, the parties agree that Hurley did not provide the materials in question. Thus, the Work in this instance does not include materials provided by others, but only any materials and/or services that *may have been* provided or performed by Hurley.

The Hurley Order then quotes from Section 2, which provides:

> **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.

[Master Subcontract Agreement, p. 2]. The Order's argument and analysis regarding this section is only one sentence long: "In SECTION 2(c), BFS drafted the contract language to read that 'work' includes materials supplied by others, which in this case is BFS." However, nowhere does the above language attempt any further definition of the term "Work." In fact, the only mention of "materials" at all is the section that the Order underlines, which provides that the Subcontractor undertakes to protect the materials, regardless of who supplied them. This simply means that if and when Appellant provides its subcontractors with the materials for installation, and the materials are physically in the subcontractor's care, the subcontractor is responsible for protecting the materials from damage, injury, etc. This undertaking has no effect on the definition of the term "Work." Nonetheless, the Order holds that this undertaking to protect materials within the subcontractor's care is unconscionable. However, South Carolina law is clear that a bailee must

use ordinary care to protect the materials with which it is provided, and there is nothing unconscionable about such an obligation. Hadfield v. Gilchrist, 343 S.C. 88, 98, 538 S.E.2d 268, 273–74 (Ct. App. 2000).

The Hurley Order then turns and quotes in detail from the warranty provision, which has been discussed at length above. Here, the Court holds that "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." [Hurley Order, p. 8]. For purposes of the unconscionability argument, the problem appears to be that the subcontractor both warrants the products and agrees to indemnify BFS "unknowingly." However, as discussed at great length above, pursuant to Section 3 of the Contract the subcontractor neither warrants products BFS supplies nor indemnifies BFS for issues with those products – and it cannot do these things "unknowingly" if it does not do them at all.

The Hurley Order goes on to find that "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," and "Hurley is not responsible for the design of the buildings in this project." [Hurley Order, p. 9]. Appellant was not responsible for the design of the buildings in this project either, so that part of Hurley's argument is irrelevant. Furthermore, because "the Work" is a defined term that specifically excludes materials provided by BFS and only includes materials and/or services provided or performed by the subcontractor, the Court's reading of the sentence is impossible.

However, if we substitute "the Work" with its definition, the sentence now reads that "Subcontractor guarantees the materials and/or services provided or performed by the Subcontractor against defects in design, workmanship, and materials." As explained above, if a subcontractor provided materials, the Subcontractor guarantees them against defects in design, workmanship, and materials. If the Subcontractor performed services, "design" may be inapplicable in that specific situation, but the Subcontractor still guarantees its workmanship (and any materials that it does provide in tandem with its services). Because this warranty language does not require a subcontractor to assume liability for the design of any materials provided by Appellant, it is not a secret indemnity provision and it does not make the agreement unconscionable.

The Order does not stop there, however. The second warranty provision that the Hurley Order highlights provides that "[t]his guarantee will commence upon the Subcontractor's completion of the Work and will continue for a minimum of (a) three years for all Work except, (b) ten (10) years for all Work consisting of any structural application of any home, building, or other structure…" [Hurley Order, p. 7]. The Order takes issue with the fact that although BFS provided the product, Hurley guarantees "all Work consisting of any structural application." [Order, p. 9]. Again, the definition of "Work" matters here. This contractual language provides that the subcontractor is guaranteeing the materials and/or services provided or performed by the subcontractor consisting of any structural application. If the subcontractor did not provide a material, it is not guaranteeing that material, but

only the services and/or materials that the subcontractor *did* perform or provide. Again, there is nothing secret nor unconscionable about this provision.

CONCLUSION

Because the lower court erroneously applied the heightened "clear and unequivocal" standard to language by which Appellant sought recovery against its subcontractors for its subcontractors' negligence; because the lower court mistakenly held that South Carolina Code Section 32-2-10 barred Appellant's recovery for its subcontractors' negligence; because the lower court incorrectly held that identical issues had been ruled upon by previous court decisions that therefore estopped Appellant from pursuing its claims; because the lower court either failed to address the Contract's severance clause or alternatively mistakenly held that it was without the authority to do so; and because the lower court misinterpreted the Contract as unconscionable and one of adhesion, Appellant hereby requests that this Court REVERSE the holdings in all eight orders issued by the lower court.

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Jennifer B. McCoy, Circuit Court Judge

2021-001050

The Retreat at Charleston National Country Club Home Owners Association, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime, Plaintiffs, v. Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; 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; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollio Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado; Defendants,

Builders FirstSource-Southeast Group, LLC, Third-Party Plaintiff, Appellant,

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry, Third-Party
Defendants,

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing "Initial Brief of Appellant" and Appellant's "Designation of Matter" upon all counsel of record via electronic mail only, to counsels' last known email address on this 28th day of February, 2022 addressed to the following:

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February 28, 2022
VIA EMAIL ONLY

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

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

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; 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; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollio Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado…….. Defendants,

Builders FirstSource-Southeast Group, LLC……Third-Party Plaintiff, Appellant,

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry……...Third-Party Defendants,

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the …….....Respondents.

Appellate Case No.: 2021-001050

Dear Ms. Kitchings:

I have enclosed herewith, for filing on behalf of the Appellant, the following:

(a) Initial Brief of Appellant;

(b) Appellant's Designation of Matter;

(c) Certificate of Service.

I would appreciate your filing the above and returning a filed, clocked copy to me by email. Should you have any questions, please feel free to contact me.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

s/ Stephen P. Hughes

Stephen P. Hughes
SPH/kw

Enclosure(s)

cc: All Counsel of Record