THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2014-CP-08-02424
Appellate Case No. 2020-000415

Builders FirstSource-Southeast Group, LLC.....Appellant,

v.

MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC.....Respondents.

PETITION FOR REHEARING

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Appellant Builders FirstSource-Southeast Group, LLC (hereinafter "BFS") respectfully petitions this Court for rehearing.

The February 26, 2025 Opinion (herein after "Opinion") (a) erroneously applies the heightened "clear and unequivocal" standard to claims seeking indemnification against liability for the subcontractors' negligence.; (b) erroneously fails to address the first question on appeal, namely, whether genuine issues of material fact preclude summary judgment; (c) overlooks multiple allegations in BFS' pleadings asserting contractual indemnity claims to recover damages resulting from the subcontractors' negligence; and (d) misapprehends the plain language of the contracts.

BFS requests that the Court carefully reconsider and revise the Opinion to be consistent with relevant law.

I. The Opinion erroneously applied the heightened *"clear and unequivocal"* standard to claims seeking indemnity limited to damages resulting from the subcontractors' negligence.

The Opinion found, based upon the Court's misconstruction of the BFS' pleadings, that claims asserted by BFS included contractual indemnification against liability for damages resulting from its own negligence. The Court then determined that the contractual indemnity claims failed as a matter of law, because the contractual provisions were not sufficiently clear and unequivocal. As noted more fully hereinafter, such a broad application of the "clear and unequivocal" standard is contrary to established law, including this Court's own precedent.

In construing and applying indemnification language nearly identical to that at issue in this case, the Court in *Concord & Cumberland*, while precluding the general contractor from recovering indemnity for its own negligence, nonetheless allowed indemnity for damages caused by the subcontractor's concurrent negligence.

The general contractor in *Concord & Cumberland* pled one paragraph of allegations for its contractual indemnity claim:

"104. Superior is entitled by contractual provisions, to the fullest extent permitted by law, full indemnity from the Subcontractors and Suppliers, to include the assumption of Superior's defense, as a result of the allegations and claims made by the Plaintiff, if substantiated."

Notably, the general contractor **did not** limit its contractual indemnity claims against the subcontractors whatsoever. Moreover, the general contractor, by its motion for partial summary judgment, explicitly sought recovery in indemnity against liability for damages occasioned by both the negligence of its subcontractor, and the negligence of the general contractor itself.

The *Concord & Cumberland* Court, prior to its analysis, recognized specifically that "[t]ypically, courts will construe an indemnification contract 'in accordance with the rules for the construction of contracts generally.' " *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 170 (Ct. App. 2018) (*quoting Campbell*, 313 S.C. at 453, 438 S.E.2d at 272. This Court also noted, however, that " 'the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.' " *Id.* (*quoting Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989).

As such, the Court of Appeals, in applying the contractual provision at issue in *Concord & Cumberland* (a provision virtually identical to the provision at issue here), determined that the language of the provision was not sufficiently clear and unequivocal to require the subcontractor to indemnify the general contractor against liability for damages caused by the general contractor's own negligence. Nonetheless, in affirming the ruling of the trial court, the Court specifically determined that the relevant indemnity provision did in fact encompass claims and damages to the

extent caused in whole or in part by any negligence of the subcontractor. *See Concord & Cumberland*, 424 S.C. at 652–53:

> "Specifically, we agree with the *Mautz* and *Braegelmann* courts that the phrase, 'to the extent caused ... in whole or in any part by any negligent act or omission of [Muhler],' limits Muhler's obligation to indemnify to damages and losses but only to the extent they were caused by the negligence of Muhler and its subcontractors. Muhler's indemnity obligation extends to losses Muhler only causes in part, but does not clearly and unequivocally require Muhler to indemnify for the negligence of others that contributed to the same loss."

Thus, despite overt representations by the general contractor that it was seeking indemnity for damages resulting from its own negligence, this Court, in *Concord & Cumberland*, nonetheless allowed the general contractor to recover from its subcontractor for damages resulting from the work of the subcontractor.

The *Concord & Cumberland* Court clearly recognized two types of claims present in the general contractual indemnification pleading: a claim for indemnity for damages to the extent caused by the general contractor itself, and a claim for indemnity for damages to the extent caused by the subcontractor. The former is subject to the heightened "clear and unequivocal" standard; ***the latter is not.*** Instead, a claim for indemnity for damages caused by one's subcontractor is to be construed "in accordance with the rules for the construction of contracts generally."

This Court has failed to distinguish between these two types of claims in this case.[1] Here, the Opinion, contrary to the Court's own precedent, has applied the heightened standard to all claims of BFS, when the relevant contractual indemnity provisions should have been evaluated under general rules of contract construction for BFS claims seeking indemnity for the subcontractors' negligence. The Opinion erroneously precludes BFS from any recovery in

[1] As noted extensively in Section III below, a claim for indemnity for damages occasioned by the subcontractors exists even more explicitly in the BFS pleadings than it did in the pleadings at issue in *Concord & Cumberland*.

contractual indemnity, even if the jury determines that the subcontractors have been solely or concurrently negligent in causing the damages at issue.

The rights sought by BFS, under the *relevant* indemnification provision, are no different and no more expansive than those specifically afforded to the general contractor, by this Court, in *Concord & Cumberland.* The Court should amend the Opinion to follow *Concord & Cumberland* and allow BFS contractual indemnity claims for damages occasioned by the negligence of its subcontractors to proceed to trial.

II. The Opinion ignores the first issue on appeal: did the trial court inappropriately grant summary judgment despite the presence of genuine issues of material fact?

The trial court granted summary judgment notwithstanding the fact that discovery remains outstanding and is far from being complete, either in this matter or in the companion *Damico* litigation. The presence of genuine issues of material fact, precluding summary judgment, is the first issue on appeal, and the Opinion ignores the question altogether.

It has been the consistent practice of the court to consider motions for summary judgement **only** following completion of discovery. "[S]ummary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). At this stage in the litigation, there remain significant questions concerning, among other issues, the nature and extent of any construction-related deficiencies in the subject property, the scopes of work as implemented by the respective parties, and the liability, if any, of the parties for the alleged damage claims of the Plaintiff, Damico. All of these issues are subject to further discovery, and any questions of fact must be decided by the trier of fact. For these reasons, the trial court erred by even entertaining the motions for summary judgement, much more ruling on the same.

The Opinion does not address the first question on appeal as submitted by BFS and confirmed by Charleston Exteriors in its Initial Brief. In light of the instructions of our appellate courts, the Opinion must be revised to reverse the Order of the trial court and remand for discovery to be completed regarding the allegations and claims at issue in this litigation and the companion *Damico* litigation.

III. The Opinion overlooked multiple allegations in the pleadings asserting indemnity claims for damage resulting from the subcontractors' negligence.

BFS has repeatedly attempted to draw to the court's attention the fact that it has pled a claim for indemnification for damages resulting from the subcontractors' negligence, and not for damages occasioned by the negligence of BFS. The trial court, and now this Court, has nonetheless overlooked and ignored the relevant allegations for the claims BFS actually asserted.

a. Allegations within the Complaint

At paragraph 2 of the Complaint, BFS alleged that the subcontractors provided materials and/or services in connection with window and/or door installation as the subject residences. At paragraph 3 of the Complaint, BFS alleged that Plaintiffs Damico filed separate litigation seeking recovery of damages allegedly resulting from deficiencies in construction on the subject residences. At paragraphs 4 and 5 of the Complaint, alleged that Lennar Carolinas filed third-party claims against BFS in the Plaintiffs Damico litigation. At paragraph 6 of the Complaint, BFS states that "BFS has denied the material allegations as asserted against it." All of the foregoing allegations are relevant to BFS' indemnification claims for the subcontractors' negligence because it is BFS' contention that the subcontractors, as the parties that actually installed the windows and/or doors allegedly at issue, are the parties at fault for any damage, not BFS.

As such, in its indemnification cause of action against the subcontractors, BFS alleged that "each and every allegation set forth in the preceding paragraphs hereof is hereby re-alleged and reiterated as fully as if set forth herein." Complaint paragraph 29. Therefore, BFS' allegation at paragraph 6, denying the material allegations asserted against it, i.e. that it denies any and all liability, is *repeated, realleged, and reiterated* in the indemnification cause of action against the subcontractors. The trial court and this Court have overlooked this key allegation and contention of BFS which relates directly to its indemnification claim for the subcontractors' negligence.

BFS' indemnification cause of action continues in paragraph 30 where BFS reiterates its contention that the subcontractors performed the window and door installation work that is allegedly at issue. Further, the allegations in paragraph 30 limit BFS' indemnification solely to those damages resulting from work of the subcontractors which was not in compliance with the relevant contract documents, industry standards, and/or building code requirements. The allegations in paragraph 30 are consistent with the basic principle and definition of indemnity – " '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 Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 646–47, 819 S.E.2d 166, 170 (Ct. App. 2018) (*quoting Laurens emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers,* 355 S.C. 104,109 (2003) (*quoting Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 454 (Ct. App. 1993))).

BFS' indemnification claim continues at paragraph 31 where BFS alleges that "the respective subcontracts between [BFS] and [subcontractors] provide for contractual indemnification in favor of BFS" and at paragraph 32 where BFS alleges that "the circumstances herein give rise to a special relationship between [BFS] and [subcontractors]."

Consistent with the foregoing allegations, BFS' indemnification claim against the subcontractors continues at paragraphs 33 and 34 of the Complaint where BFS alleges that

> "to the extent, if any, that BFS may be held liable to the Plaintiffs and/or Lennar Carolinas, LLC, and/or to others in the underlying action, such liability would be a direct and proximate result of the wrongful acts, omissions, negligence, and/or representations of [subcontractors] 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 claims of Plaintiffs and/or Lennar Carolinas, LLC in the underlying action."
>
> and
>
> "BFS is entitled to full contractual and common law indemnification from the ECC Contacting, LLC, for and against any liability which the BFS is found to have to the Plaintiffs, Lennar Carolinas, LLC, and/or to others in the underlying action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of [subcontractors] entitling BFS to recover from [subcontractors] its attorneys fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from ECC any sums for which BFS may be held liable to the Plaintiffs, to Lennar Carolinas, LLC, and/or to others in such action."

When properly read in conjunction with the allegations of the entire indemnification cause of action, including the allegations incorporated by reference, there are no allegations in paragraphs 33 or 34 that do not comply with the basic principles of indemnification.

Notwithstanding the allegations set forth in paragraphs 2, 3, 4, 5, 6, 29, 30, 31, 32, 33, and 34 of the Complaint, the trial court held, and this Court affirms, that BFS seeks indemnification from the subcontractors for BFS' own negligence. Specifically, the Opinion states "BFS asserts several times in its complaint that it seeks recovery for *any* sums for which it may be held liable to Lennar or the *Damico* plaintiffs, rather than only those sums which might be attributable to [subcontractors]' purported sole negligence." Page 8, Opinion. However, in order to reach such a determination, this Court ***must necessarily overlook and ignore the allegations set forth in paragraphs 2, 3, 4, 5, 6, 29, 30, 31, 32, 33, and 34 of the Complaint.*** The Court has ignored (a)

that BFS has consistently denied all allegations against it, (b) that BFS has specifically contended that the subcontractors' acts or omissions are the cause of any damages, and (c) that *any* sums which BFS may be held liable are necessarily attributable to the subcontractors' purported negligence under BFS' indemnification claim. Of course, BFS' indemnification cause of action is comprised of allegations at this juncture and BFS must prove its allegations, i.e. establish that the work of the subcontractors caused the damages allegedly at issue in the *Damico* litigation, before any subcontractor may be liable to indemnify BFS for damages resulting from the subcontractor's negligence.

b. Support from the Rules of Civil Procedure

Even if BFS had pled a cause of action seeking indemnification for its own negligence, nothing within the Rules of Civil Procedure precludes BFS from seeking a more expansive recovery than the evidence might support. Rule 8(e)(1), SCRCP states that "no technical forms of a pleading or motions are required." Rule 8(e)(2), SCRCP provides that a party may set forth two or more statements of a cause of action alternatively or hypothetically either in one count or in separate counts. Further, Rule 8(e)(2), SCRCP provides that a pleading is not made insufficient by the insufficiency of one or more of the alternative statements. Moreover, Rule 8(e)(2) continues and provides further that "a party may also state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." Rule 8(f), SCRCP provides "[a]ll pleadings shall be so construed as to do substantial justice to all parties." The Court's Opinion clearly ignores these foregoing basic rules of civil procedure and has effectively penalized BFS for the way in which it pled its indemnification cause of action.

c. Other Stipulations and Certifications on the Record.

Moreover, and equally importantly, BFS, no fewer than three times during oral arguments on the motions for summary judgment, advised the Court and subcontractors' counsel that it was *only* seeking indemnification *for the subcontractors' negligence*. (R. pp. 352, 356-57, 362-63). In its Motion for Reconsideration of the Court's December 6, 2019 Order, BFS pointed out that while BFS may not be able to maintain indemnity claims for its own negligence, BFS was entitled to pursue its contractual indemnity claim against subcontractors based upon the subcontractors' own negligence. (R. pp. 280-281). And BFS reiterated this position in oral arguments on the motion for reconsideration. (R. pp. 383-84). Again, in BFS' filed Memorandum in Opposition to the Proposed Amended Order Granting Defendants' Motion for Summary Judgment, BFS stipulated to the Court that "BFS is *not* seeking to have [subcontractors] indemnify BFS for BFS's own negligence. BFS is seeking to have [subcontractors] indemnify BFS for *[subcontractors]'* own negligence." (R. p. 290) (emphasis in original). Despite all of the foregoing stipulations and Rule 11 certifications by BFS counsel on the record that BFS was properly seeking indemnification for the subcontractors' negligence, and not for its own, the trial court, without any explanation, ignored BFS and granted summary judgment as to the contractual indemnity claim on the basis that BFS was seeking to be indemnified for its own negligence.

Because the Court overlooked and ignored the allegations – set forth in paragraphs 2, 3, 4, 5, 6, 29, 30, 31, 32, 33, and 34 of the Complaint, in all of the subsequent stipulations and Rule 11 certifications by BFS counsel in subsequent pleadings, and on the record during hearings – that BFS' indemnification claim is limited to damages resulting from the subcontractors' negligence, this Court should revise its Opinion to reverse the Order of the trial court and remand for discovery to be completed as to BFS contractual indemnity claims for the subcontractors' negligence.

IV. The Opinion misapprehended the plain language in the relevant contracts.

The Opinion in footnote 3 states that "[the Court's] decision [in *Builders FirstSource-Southeast Group, LLLC v. Palmetto Trim and Renovation, et al.,* Op. No. 6099 (S.C. Ct. App. Filed Feb. 12, 2025)] provides additional grounds for sustaining the circuit court's analysis of the contractual language in this case." First, many of the issues on appeal in the BFS v. Palmetto Trim matter were not before the lower court here and were not on appeal before this Court in this matter. Nevertheless, because the Opinion here appears to be adopting the rationale of Opinion No. 6099, BFS craves reference to its Petition for Rehearing in BFS v. Palmetto Trim appeal which sets forth in detail the BFS contentions of error.

Returning to the appeal here, as noted by both ECC and Charleston Exteriors in their memoranda[2] and arguments by counsel during the hearing on their motions for summary judgment,

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[2] The Opinion in footnote 4 appears to suggest that BFS is precluded from arguing that the indemnity provision is clear and unequivocal because of the "concession" in BFS' Rule 59(e) filing. Contrary to the footnote's assertion, BFS has **never** contended that the indemnity provision meets the heightened "clear and unequivocal" standard required to recover indemnification for BFS' negligence. BFS has **only** contended and stipulated that it is seeking indemnification only for damages resulting from the subcontractors' negligence, and therefore, the indemnity provision need not meet the heightened "clear and unequivocal" standard. Thus, pursuant to *Concord and Cumberland*, BFS should be able to maintain indemnification claims for the subcontractors' negligence. Moreover, any *issue preclusion* based on an *inconsistent position* should be applied to subcontractors as both subcontractors took the position in their pleadings and conceded during oral argument that **there is only one relevant indemnification provision that relates to property damage at issue in this litigation**. See R. pp. 170 (ECC Memorandum), 245 (Chs Ext Memorandum), 337-338 (ECC oral argument), 341-342 (ECC oral argument), 345 and 347 (Chs Ext oral argument). Further, the subcontractors reiterated that there is only one indemnity provision at issue in this litigation and that the lone relevant indemnity provision is substantially the same as that at issue in *Concord and Cumberland*. See Id. at pp. 337-338, 341-342, 345 and 347. And as BFS has tried to explain repeatedly to the trial courts and the Court of Appeals, the *Concord and Cumberland* Court held that the similar indemnity provision while not "clear and unequivocal" nevertheless was sufficient to impose the obligation on the subcontractor to indemnify the contractor for damages resulting from the subcontractors' negligence, whether sole or in part. Therefore, the Court should apply the inconsistent position issue preclusion against the subcontractors and revise the Opinion to reverse the trial court Order as the parties all agreed and conceded on the record multiple times over that there is only one relevant indemnification provision at issue in this litigation.

there is only one relevant indemnification provision in the contracts at issue: the indemnification provision set forth in the first paragraph of Section 5. The only relevant indemnification provision provides in pertinent part that BFS' ability to recover indemnity is limited

TO THE FULLEST EXTENT PERMITTED BY LAW...AND...ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

(R. p. 291).

The Court here has overlooked that the first paragraph of Section 5 applies to losses arising out of property damage resulting from the negligence of the subcontractor, while the second paragraph of Section 5 applies to bodily injury or property damage sustained by the subcontractor, its employees, agents, or representatives.

Here, there are no claims, much less any allegations, of bodily injury or property damage sustained by the subcontractors. Instead, the claims in this matter are for property damages allegedly sustained by the *Damico* Plaintiffs or Lennar Carolinas and which they allege resulted from defective installation of windows and doors – work performed exclusively by BFS' subcontractors.

The second paragraph of Section 5 deals with potential obligations to indemnify for losses not at issue here, has not been cited by BFS in support of its claims, and is irrelevant to the assertion of these claims.

The separate indemnity obligation imposed upon the subcontractor by the first paragraph of Section 5 is explicitly limited to liability for property damage caused by the negligence of the subcontractor. This indemnity provision is expressly authorized by Section 32-2-10 and is what BFS relied upon in its contractual indemnity claims.

For the trial court to claim that these two separate and distinct indemnity provisions are "confusing, conflicting, and neither unclear (sic) or unequivocal" is both irrelevant and simply incorrect. R. p. 17. These two indemnity provisions cover different scenarios and do not contradict each other. Moreover, only the indemnity provision set forth in the first paragraph of Section 5 is relevant to the claims at issue here. Accordingly, the Court should revise its Opinion to reverse the Order of the trial court to be consistent with the aforementioned South Carolina law.

CONCLUSION

Because the February 26, 2025 Opinion (a) erroneously applies the heightened "clear and unequivocal" standard to claims seeking indemnification against liability for the subcontractors' negligence; (b) erroneously fails to address the first question on appeal, namely, whether genuine issues of material fact preclude summary judgment; (c) erroneously overlooks and ignores not only multiple allegations in BFS' pleadings, but also repeated representations by BFS counsel, asserting contractual indemnity claims to recover damages resulting from the subcontractors' negligence; and (d) erroneously misapprehends the plain language of the contracts, the Court should revise its Opinion to reverse the Order of the trial court to allow BFS' contractual indemnification claims for the subcontractors' negligence to proceed to trial.

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March 13, 2025

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Re: Builders FirstSource Southeast Group, LLC v. ECC Contracting LLC, MI Windows and Doors, Inc., Hurley Services, LLC, Charleton Exteriors LLC
Civil Action No.: 2020-000415
Our File No.: 11742.1 SPH

Dear Sir or Madam:

Please find enclosed herewith for filing an original and one copy of the ***Petition for Rehearing***, together with the Certificate of Service, with regard to the above referenced matter. Also enclosed please find the applicable filing fee in the amount of $50.00. I would appreciate your filing the Petition for Rehearing and returning a filed clocked copy to me via email at sphughes@hghpa.com, wcox@hghpa.com, and scombites@hghpa.com. If return of the clocked copy must be via U.S. Mail, please advise and I will provide a self-addressed, stamped envelope provided for same.

With kindest regards, I am
Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

Stephen P. Hughes

SPH/sc
ENCLOSURES