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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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

Opinion No. 2025-UP-072

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 WRIT OF CERTIORARI

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Certification

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on May 16, 2025.

Questions Presented

1. When a contractor files a general third-party (or fourth-party) claim against its subcontractor seeking to recover for all damages for which it might be held liable, does such claim include those damages for which the subcontractor is either solely or concurrently responsible?
2. Should the contractor's contractual indemnification claim – specifically as it relates to the damages for which its subcontractor is either solely or concurrently responsible – be construed in accordance with precedent and with the laws governing contracts generally, or should it for the first time be subject to the heightened “clear and unequivocal” standard that would be applicable if the contractor were solely seeking indemnity for its *own* negligence?

Statement of the Case

This is a case about a contractor (Petitioner) at a building site attempting to recover in contractual indemnity from its subcontractor (Respondent) for that subcontractor's negligence on the project. The parties had a contract that provided that if Petitioner was sued as a result of property damage at the project, Respondent would indemnify the contractor *to the extent that the damage was caused by Respondent*. Petitioner has been sued for damage discovered at the property, including damage that was within Respondent's scope of work. Pursuant to the terms of the contract, Petitioner filed a third-party claim against Respondent for contractual indemnity. Thus far, the story follows the standard trajectory of a construction case. However, on summary judgment, the trial court and then the Court of Appeals held that as a matter of law Petitioner cannot pursue its claim against its subcontractor.

Emboldened by the victory of the subcontractors in this case, several other subcontractors on several other projects have similarly sought to be excused from their contracted-for

indemnification obligations to Petitioner, and each time on summary judgment, under a variety of theories, the trial courts and appellate courts have followed the lead of the courts in this case.

A. The Damico Litigation

The issues in the instant action arise from services provided by the Respondents in connection with original construction of multiple single-family residences comprising a development known as The Abbey at Spring Grove, in Berkeley County, South Carolina. The Abbey at Spring Grove residences are the subject of a separate, previously filed lawsuit, captioned Patricia Damico et al v. Lennar Carolinas, LLC et al, civil action number 2014-CP-08-02424, (the “underlying action” or the “Damico Litigation”). In said underlying action, the plaintiff-owners initially asserted claims alleging deficiencies in design, development, and/or construction against, among others, the alleged developer/general contractor, Lennar Carolinas LLC. Lennar, by its answer and third-party complaint, asserted claims against various subcontractors and suppliers involved in original construction, including Petitioner Builders FirstSource-Southeast Group, LLC (hereinafter “Petitioner”), who was alleged to have supplied and installed windows and exterior doors.

Petitioner, as a third-party defendant in the underlying action, filed its initial answer on December 21, 2015. Thereafter, it moved to amend its pleadings, in order to assert fourth-party claims against the window manufacturer and against its then-known installation subcontractors. Before the referenced motion to amend could be heard, the Trial Court considered, and denied, the motion of the general contractor, Lennar, to compel arbitration. The Court’s orders denying that motion and Lennar’s motion to reconsider were appealed to the S.C. Court of Appeals, thus effecting a stay of the proceedings before the Trial Court in the underlying action. While the Court

of Appeals issued its order compelling arbitration between Lennar and the Plaintiffs on June 10, 2020, at all times relevant to this case, the underlying Damico Litigation was stayed on appeal.

It bears note that no final judgment or order has been issued against Petitioner, or against any other party, in the underlying action.

B. The Current Litigation

While the underlying action was stayed on appeal, in order to preserve its still-unasserted claims against the window manufacturer and subcontractor installers, Petitioner filed the instant action on December 21, 2018, asserting, as direct claims against the designated defendants, those claims which it had previously sought to assert as fourth-party claims in the underlying action, i.e., causes of action for (a) contractual indemnity, (b) equitable indemnity, (c) breach of express and implied warranties, (d) breach of contract, (e) negligence, and (f) contribution, respectively.

Respondents, as subcontractors to Petitioner, installed windows and doors in connection with the original construction of some of the subject residences. MI Windows and Doors was dismissed from this suit on July 16, 2019 without prejudice by a stipulation between the parties.

Petitioner subsequently filed a motion to stay the instant proceedings, and to consolidate this litigation with the underlying Damico Litigation. Respondents ECC Contracting, LLC, and Charleston Exteriors, LLC, filed motions for summary judgment as to Petitioner's claims. Arguments on the motion were heard before the court on October 18, 2019.

On December 6, 2019, the Court issued its order granting Respondents' motions for summary judgment. On December 16, 2019, the Petitioner filed a motion for reconsideration. Judge Newman requested oral arguments on the motion for reconsideration, which were heard before the Court on January 16, 2020. On February 3, 2020, the Court issued an "Amended Order," again granting Respondents' motions for summary judgment; this order, however, did not address

or rule on Petitioner's December 16, 2019 motion for reconsideration. Therefore, Petitioner filed a second motion for reconsideration on February 13, 2020, asking that the Court explicitly rule on the December 16, 2019 motion for reconsideration. The deadline to file a notice of intent to appeal from the Trial Court's February 3rd amended order was March 4, 2020; thus, Petitioner was forced to file a notice of intent to appeal before the Trial Court ruled on its February 13 motion for reconsideration. On March 5, the Trial Court entered its last order to date, explicitly denying the Petitioner's motion for reconsideration. Petitioner timely filed an amended notice of intent to appeal on March 17, 2020, challenging both the February 3rd Amended Order and the March 5th denial of the motion for reconsideration.

On Appeal, this case was considered by a panel of judges composed of Judge McDonald, Judge Thomas, and Judge Hewitt. Petitioner's Final Briefs were submitted on December 1, 2020, and Oral arguments were held on March 15, 2023. The Court of Appeals issued its order as an unpublished opinion on February 26, 2025, vacating in part and affirming in part the trial court's order. Petitioner filed a petition for rehearing on March 13, 2025; Respondent ECC also filed a petition for rehearing on March 13, 2025. On May 16, 2025, the Court of Appeals issued an Order denying both petitions for rehearing. This Petition for Writ of Certiorari follows.

Argument

- I. In a marked departure from the Rules of Civil Procedure and common law precedent, the Court of Appeals held that Petitioner's general claim for contractual indemnification did not encompass a claim specifically for damages caused by the subcontractor's sole or concurrent negligence.**

The first step in analyzing this case is identifying what type of contractual indemnification claim is before the Court. It is well established that if a party seeks to recover for its own negligence, the language of the contract on which it relies for such recovery must articulate that right to recovery clearly and unequivocally. See generally, Concord & Cumberland Horizontal

Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). However, all other recovery in contractual indemnification – including the right to recover from a subcontractor for that subcontractor’s negligence – is analyzed only in accordance with the rules of contractual interpretation generally; that is to say, the heightened “clear and unequivocal” standard does not apply. Id.

Thus, the question at the heart of this case (and the cases that followed) is whether this Petitioner is trying to recover solely for its own negligence, solely for its subcontractor’s negligence, or potentially for both types of negligence. The answer to that question will determine the appropriate standard or standards to apply to the parties’ contract.

Petitioner plead in its Amended Complaint that if Petitioner were to be found liable to Plaintiff in the underlying action, that such liability would be the result of damages caused by its subcontractors. It then plead that it was entitled to full indemnification for any amounts for which it was found to be liable to the Plaintiff (i.e., if Petitioner is liable, it’s because of the bad work of Petitioner’s subcontractors, so if Petitioner ends up having to pay, then Petitioner’s subcontractors need to pay Petitioner back for that). The Court of Appeals held, without any explanation, that because Petition sought indemnification for “any” amounts for which it may be liable, it was seeking indemnification for its own negligence. Because the Court dismissed the entire contractual indemnity claim on this grounds, the implicit holding was that Petitioner sought recovery *only* for its own negligence, and somehow, in seeking recovery for “any” sums, Petitioner was *not* also seeking recovery for the negligence of its subcontractors.

If this Court grants certiorari in this case, Petitioner will explain to this Court, just as it explained to the Court of Appeals, that its pleadings, read in context, in fact *only* seek indemnity for the alleged negligence of the subcontractors. Petitioner will also point out, again, how at every

stage of this litigation it has insisted on the record that it is only seeking recovery for its subcontractors' negligence. However, at this stage, Petitioner will be content to point out that even the most ungenerous reading of Petitioner's pleadings must encompass its claim for indemnity for the negligence of its subcontractors. When Petitioner is seeking recovery for "any" amounts, the use of the word "any" is meant in the sense of its definition: "used to express a lack of restriction in selecting one of a specified class." The particular recovery is unrestricted: "any" amounts could be those sums attributable to any source of negligence – whether Petitioner's or Petitioner's subcontractors' negligence. But even the most ungenerous reading cannot deduce that "any" amounts inherently excludes sums that are attributable to the subcontractor's negligence. By this Petition, Petitioner seeks the ability to pursue those claims against its subcontractors for the subcontractors' negligence.

A. The Court of Appeals' interpretation of Petitioner's Pleadings is in direct conflict with the Rules of Civil Procedure promulgated by this Court.

This Court should grant certiorari on this case because the decision of the Court of Appeals is in direct conflict with the Rules of Civil Procedure promulgated by this Court. Failing to read a cause of action against the subcontractors for indemnity against damages resulting from their own negligence flies in the face of the rules for pleadings outlined in Rule 8 of the South Carolina Rules of Civil Procedure. For example, Rule 8(f) requires that pleadings be construed "as to do substantial justice to all parties." The most just outcome in this case is one that allows Petitioner to seek recovery against its subcontractors for the negligent work of the subcontractors.

Rule 8(a) allows a party to plead alternative theories of recovery. Rule 8(e)(1) requires parties to be concise, and Rule 8(e)(2) promotes conciseness by allowing parties to plead such alternative theories of recovery in the same count. Notably, when "one of [the theories] if made

independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.” S.C. R. Civ. P. 8(e)(2).

In seeking recovery of “any” amounts, Petitioner maintains it sought indemnity only for the negligence of its subcontractors, but, even if the Court adopts a broader interpretation of Petitioner’s pleadings, it must acknowledge that “any” amounts, if it includes sums resulting from Petitioner’s negligence, must equally encompass sums resulting from the subcontractor’s negligence. Petitioner’s pleading, then, becomes an implicit pleading of alternatives, seeking indemnity for “any” amounts – whether from Petitioner’s negligence, or, alternatively, from the negligence of the subcontractors. Under Rule 8(e)(2), even if Petitioner fails on its alleged plea to recover for its own negligence, the alternative plea for damages related to the negligence of the subcontractor remains fully intact. Instead of being guided by the Rules of Civil Procedure and honoring the remaining claim, the Court of Appeals acted contrary to the Rules when it dismissed the plea for indemnity for the subcontractor’s negligence merely because it found that the alternative claim for indemnity for Petitioner’s own negligence could not stand. Because the Court of Appeal’s Opinion contradicts the rules promulgated by this Court, this Court should grant certiorari to correct the misapplication of Rule 8.

B. The Court of Appeal’s interpretation of Petitioner’s Pleadings is in direct conflict with prior precedent.

This is not the first time that a contractor has sought complete contractual indemnification from its subcontractors before the appellate courts. In Concord & Cumberland, whose analysis on the merits will be discussed in greater detail below, a contractor sought recovery from its subcontractor in contractual indemnity for damages caused by both the contractor *and* the subcontractor. It plead:

104. Superior [the contractor] 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.

(emphasis added). Notably, the general contractor did not limit its contractual indemnity claims against the subcontractors, and when it moved for partial summary judgment, it 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.

Before getting into the merits of Concord & Cumberland, Petitioner draws this Court's attention to the way that the Court of Appeals in that case handled the general contractor's claim for relief. The Court ultimately allowed the general contractor to proceed to seek Indemnity for its subcontractor's negligence while dismissing the claim to the extent that it purported to seek indemnity for the general contractor's own negligence. 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. Here, the Court of Appeals, contrary to its own precedent, has failed to distinguish these two types of claims in Appellant's very similar pleadings. The effect is a completely contrary result to the one in Concord & Cumberland, where in this case Petitioner is precluded from any recovery in contractual indemnity, even if the jury eventually determines that the subcontractors have been solely or concurrently negligent in causing the damages at issue.

II. The Court of Appeals failed to follow precedent when it erroneously applied the Concord and Cumberland heightened "clear and unequivocal" standard to the entirety of Petitioner's contractual indemnification claim.

A. In applying the heightened "Clear and Unequivocal" Standard to the Entirety of Petitioner's Claims, the Court of Appeals ran afoul of its own precedent.

Up until this decision, one of the main cases governing the treatment of contractual indemnity claims was Concord & Cumberland. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). In that case, Superior was a general contractor who hired Muhler as its subcontractor. When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to its contract. Superior claimed that the contractual provisions required Muhler to indemnify Superior and that Superior's right to indemnity was not lessened by Superior's concurrent negligence. Id. at 645. Muhler countered that the contract did not require it to indemnify Superior for Superior's wrongdoing. Id.

The Trial Court found, and the Court of Appeals agreed, that in order for Superior to prevail on a claim seeking indemnity *for its own negligence*, it would need to show that the contract language granting that right met the heightened standard of being clear and unequivocal. Id. at 649. The Court of Appeals noted that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence (but notably not for Muhler's sole or concurrent negligence). Id.

Because the Court found that the language in Superior's contract did not meet the heightened standard, it held that the contract did not require Muhler to indemnify Superior for Superior's own negligence, and instead affirmed the trial court's decision that "*limited indemnification to damages resulting from the work Muhler performed.*" Concord & Cumberland at 645 (emphasis added). Thus, despite overt representations by the general contractor that it was seeking indemnity for damages resulting from its own negligence, the Court in Concord & Cumberland nonetheless allowed the general contractor to recover from its subcontractor for damages resulting from the work of the subcontractor.

To arrive at this conclusion, not only did the Concord & Cumberland Court recognize that Superior's claims for contractual indemnification encompassed both a claim to be indemnified for its own negligence as well as a claim to be indemnified for the negligence of the subcontractors, but the Court then separately analyzed the two types of claims: to the claim for indemnification for Superior's own negligence, the Court applied the heightened test of clear and unequivocal and found that the contract could not meet the heightened standard; however, for the second type of claim – Superior's claim to recover for its subcontractor's negligence – it then applied the analysis used with contracts generally (i.e., *not* the heightened standard), and under such analysis the Court allowed Superior to recover for damages caused by its subcontractor (regardless of whether Muhler's negligence was sole or concurrent).

The Court of Appeals in this case has taken a situation nearly identical to that presented to it in Concord & Cumberland and has arrived at a diametrically opposed result. Rather than apply the heightened "clear and unequivocal" standard only to the portion of claims allegedly seeking indemnity for Petitioner's own negligence, the Court applied the heightened standard to *every* contractual indemnity claim – including Petitioner's claim to recover for the negligence of its subcontractors. Applying the heightened standard, the Court then determined that Petitioner's contractual indemnity claims failed as a matter of law, because the contractual provisions were not sufficiently clear and unequivocal to pass the heightened test. Such a broad application of the "clear and unequivocal" standard is contrary to established law, including the Court's own precedent.

Nowhere has the Court of Appeals in this case attempted to abrogate or overturn Concord & Cumberland. Nowhere does it criticize its analysis, its holding, or its results. The Court of Appeals in this case believes Concord & Cumberland is still good law, while simultaneously

maintaining that the result it reached in this case – which is completely opposite that in Concord & Cumberland – is *also* good law. The two cases cannot stand simultaneously as precedent. Precedent is supposed to protect those who have taken action in reliance on a past decisions, to require that like cases be decided in a like manner, and to contribute to the integrity of the judicial process. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–64, 142 S. Ct. 2228, 2261–62, 213 L. Ed. 2d 545 (2022). All three of these aims are undermined while Concord & Cumberland and the Court of Appeal's Opinion in this case are allowed to stand. Unless the Supreme Court weighs in, the result of these two opinions is that the legal landscape will be filled with instability, unpredictability, and confusion regarding how to proceed in a situation where appellate courts are divided over whether or not a party may recover from its subcontractor in contractual indemnity for that subcontractor's negligence. The Supreme Court must take this case to clarify the issue and to bring the ruling in this case squarely within the precedent established in Concord & Cumberland.

- B. The Supreme Court should take this case because the consequence of allowing the ruling of the Court of Appeals to stand will upend the entire construction industry in ways the Court never intended.

The Court of Appeal's Opinion creates new and unprecedented law governing contractual relations between parties. Specifically, it unsettles established South Carolina law regarding the allocation of risk between contractors and their subcontractors, and it upends the recognized contractual requirements for indemnity provisions. In ignoring and abandoning the outcome of precedential cases such as Concord and Cumberland, the Court of Appeal's Opinion has the effect of creating new and harmful law that will cause turbulence to the relationships of parties far beyond this case; virtually every contract currently in effect in the industry is now subject to challenge and left without legal support.

The contractual indemnity provisions to which the Court of Appeals applied the heightened clear and unequivocal standard in this case were boilerplate provisions promulgated by the AIA. This means they are standard terms, and they are present in nearly *every single contract* used in the industry. Never before had a court required these provisions to withstand the heightened clear and unequivocal analysis in order for one party to recover in indemnity from a second party for that second party's negligence; instead courts analyzed them under the rules governing contracts generally, and under that level of scrutiny, the indemnification provisions were found acceptable. Thus, year after year, they were incorporated into contracts.

Now, for the first time, the effect of the holding of the Court of Appeals is that a party's entire contract must meet the clear and unequivocal standard in order for that party to recover in contractual indemnity *at all*. The Court of Appeals has looked at this standard AIA indemnification language and, by this Opinion, has already held that this language fails to meet the heightened standard. As long as this Opinion stands, no contractor who used AIA language will be able to recover in indemnity from any negligent subcontractor for that subcontractor's negligence. Contractors will be left to bear the financial burdens of the mistakes of others, and subcontractors who performed negligently will face no consequences. To further understand the magnitude of the situation, Petitioner points out that one of the Contracts at issue in one of the sister cases to this litigation contains a version of this AIA language that dates back to 2006, which means that nearly 20 years of construction work is implicated in this upheaval.

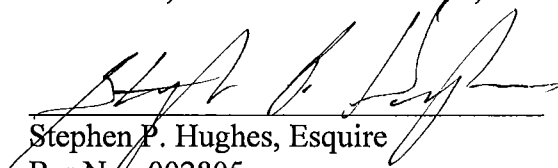
Petitioner does not believe that the Court of Appeals intended to create new law or to upend an entire industry, and thus it asks that the Supreme Court takes this case to clarify (1) that Petitioner has preserved a claim for contractual indemnity for the negligence of its subcontractors;

and (2) that this portion of the claim for contractual indemnity is subject only to the general rules of construction for contracts and not to the heightened “clear and unequivocal” standard.

Conclusion

Because the Opinion of the Court of Appeals in this case contradicts the rules promulgated by this Court, flies in the face of precedent, and will unwittingly upend the entire construction industry, the Supreme Court should grant certiorari in this case and provide guidance to the courts, the parties, and the industry on the correct analysis of contractual indemnification claims.

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PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the Petition for Writ of Certiorari upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 13 day of June, 2025 addressed to the following:

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Appellate Case No. 2020-000415


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SC Court of Appeals

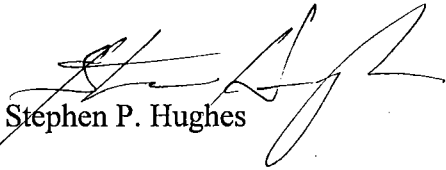
Re: Builders FirstSource Southeast Group, LLC v. ECC Contracting LLC, MI
Windows and Doors, Inc., Hurley Services, LLC, Charleton Exteriors LLC
Civil Action No: 2020-000415
Our File No: 11742.1 SPH

To Whom It May Concern:

Please find enclosed herewith for filing an original and one copy of the *Petition for Writ of Certiorari*, 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 \$250.00. 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


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SPH/sc
Enclosures
cc: Court of Appeals
Counsel of Record