THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

FINAL REPLY BRIEF OF APPELANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. *Concord & Cumberland*'s Heightened Standard of "Clear and Unequivocal" does not Apply to Appellant's Claim for Contractual Indemnification for Respondents' Negligence.

The Respondents, in their briefs, agree that the contractual language at issue in this case is nearly identical to that in *Concord & Cumberland* and controls Appellant's indemnification claims. However, there is one primary difference that is critical to the application of *Concord & Cumberland* here: instead of seeking indemnity for Appellant's own negligence, Appellant has limited the relief sought to the negligence of Respondents – whether sole or concurrent. This is the exact relief allowed under *Concord & Cumberland*, where, despite the fact that the contract did not meet the clear and unequivocal standard required for the contractor to recover for its own negligence, the court nonetheless allowed indemnification for damages resulting from the work [the subcontractors] performed. See *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 645 (Ct. App. 2018), reh'g denied (Oct. 18, 2018)*. Thus, if Respondents were to be found solely negligent, Appellant Builders FirstSource ("BFS") would be able to pursue its claims for such damages; however, even if BFS were found to be concurrently negligent with Respondents, BFS would still be able to pursue recovery for that portion of damages resulting from Respondents' concurrent negligence.

Because Appellant, as the indemnitee, is not and has not been seeking indemnification from the consequences of its own negligence, but only that of its subcontractors (whether sole or concurrent), it was an error for the Trial Court to apply the heightened standard of clear and unequivocal outlined in *Concord &*

Cumberland. Instead, the Court should have applied general rules of contract interpretation and allowed the Appellant to proceed with its contractual indemnity claim against Respondents.

II. South Carolina Code Section 32-2-10, which renders unenforceable an agreement to indemnify a party against liability for damages caused by that party's sole negligence, is not applicable to the instant action, where the Appellant seeks (a) indemnification against liability for damages occasioned by the negligence of the Respondents, and (b) payment of attorney's fees.

Respondents argue that the contracts which they signed with BFS violate Section 32-2-10 of the South Carolina Code, and preclude recovery of both indemnity and attorney's fees as sought by the Appellant. Both arguments are premised upon a misconstruction of the statute, and should be rejected by this Court.

S.C. Code § 32-2-10 provides:

> Notwithstanding any other provision of law, a promise or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building ... 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).

The provisions of Section 32-2-10 relate exclusively to agreements to indemnify. Those provisions are, therefore, appropriately applicable only where an obligation in indemnity is actually implicated. Moreover, statutes in derogation of the common law are to be strictly construed. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (citing *Epstein v. Coastal Timber Co.,* 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). Under this rule, a statute will "not be extended beyond the clear intent of the legislature." Id. (citing *Crosby v. Glasscock Trucking Co.,* 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000).

The South Carolina 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 Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 646–47, 819 S.E.2d 166, 170 (Ct.App. 2018), reh'g denied (Oct. 18, 2018).* In the absence of such an obligation to pay, to a second party, for loss or damage which that second party incurs to a third party, indemnity is simply not at issue.

A plain reading of the clear provisions of Section 32-2-10 establishes beyond question that the arguments of the Respondents are without merit.

As noted hereinabove, Section 32-2-10 is limited to agreements to indemnify. Moreover, that Section, by its specific provisions, prohibits enforcement only of an agreement to indemnify a promisee against liability for damages occasioned by the sole negligence of the promisee. By contrast, that Section, again by its very specific terms, does not affect the validity of an 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".

Notwithstanding the assertions of the Respondents, the claims of the Appellant, seeking indemnity against liability for damages occasioned by the negligence of those Respondents, are based upon contractual indemnity provisions which are clearly authorized by Section 32-2-10. Moreover, and again contrary to the assertions of the Respondents, Section 32-2-10, in addressing undertakings to indemnify, does not even address, much less prohibit, a separate undertaking by the promisor to defend the interests of the promisee. Attorney's fees incurred by the Appellant are not "loss or damage" which the Appellant has incurred to a third party, and are simply not encompassed within the agreements prohibited by Section 32-2-10.

A. *Contractual Indemnity*

Appellant, by its crossclaims, is seeking indemnity not against liability for loss or damage arising out of any negligence of Appellant itself. Appellant is, by contrast, seeking indemnity only against liability for loss or damage arising out of the sole or concurrent negligent acts or omissions of the Respondents, in the performance of the Respondents' work. The indemnity claims, as asserted by the Appellant, are, in turn, premised upon rights afforded pursuant to its Master Subcontractor Agreements with the respective Respondents.

"Section 5 Indemnity" of the Master Subcontractor Agreement is comprised of four (4) separate paragraphs. Each paragraph pertains to a specific set of factual circumstances, rights, and obligations of the parties. The Appellant's claims

in contractual indemnity, as asserted in the instant proceedings, are premised upon rights afforded pursuant to paragraph 1 Section 5.

Paragraph 1 (one) of Section 5 sets forth the applicable indemnity language for property damage claims caused by the subcontractor's negligence. By the specific provisions of the first paragraph, the subcontractor has undertaken to defend and indemnify BFS ("to the fullest extent permitted by law") against liability or loss arising out of negligent acts or omissions of the subcontractor in the performance of its work for BFS.

By contrast, the indemnification provisions of the second paragraph of Section 5 relate only to claims "...arising out of or resulting from bodily injury to, or sickness, disease, or death of, the subcontractor, any agent, employee, or representatives of the subcontractor, or any of its subcontractors..." The provisions of the second paragraph (which impose indemnity obligations "to the fullest extent permitted by law") of Section 5 address potential claims entirely distinct from those involved in the instant action, and are irrelevant to this Court's consideration of the propriety of the BFS claims.

The third paragraph of Section 5 deals with the duty to defend, and the fourth paragraph of Section 5 makes clear that the defense and indemnification obligations do not require the subcontractor to indemnify anyone for claims resulting from defects in plan or design.

Respondents attempt to argue that Paragraph two violates S.C. Code § 32-2-10 and therefor all four paragraphs of Section 5 should be struck. Should the Court decide to consider paragraph two, and should it hold that paragraph two

does violate the statute (which Appellants do not concede), the severability provisions of the contract would compel the Court to sever paragraph two and leave the rest of the contract intact. *See Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 65 (Ct. App. 2002) (explaining that "[w]hether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties"). The severability provision of the Master Subcontract Agreement 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 or 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). This language unequivocally reflects the intention 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 simply sever it and leave the remaining provisions intact.

The relevant indemnity provision of the Contract, which is paragraph one, does not violate Section 32-2-10. To the extent that any other provision may violate the statute, the Court should sever it such that the remaining agreement is valid and enforceable.

B. Duty to Defend

By contrast, the provisions of paragraph three of Section 5 impose upon the subcontractor a duty to defend. This duty to defend "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." *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 544, 677 S.E.2d 574, 578 (2009). The provisions of paragraph three of Section 5 are "clear and unequivocal" in imposing upon the subcontractor the duty to defend BFS, and are clearly adequate to satisfy any heightened burden which might be imposed by *Concord & Cumberland.*

Respondents contend that the undertaking to defend, as imposed by paragraph 3 of Section 5, is prohibited by the provisions of Section 32-2-10. However, Section 32-2-10, only prohibits indemnification against liability for damages occasioned by the sole negligence of the indemnitee. Section 32-2-10 does not prohibit, or even address either, indemnity for concurrent negligence or claims for attorney's fees. Equally important, Section 32-2-10, neither addresses nor prohibits what our courts have recognized is a separate obligation to defend. *See 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). And while a duty to indemnify may not be apparent until questions of fact are ultimately resolved at trial, "the existence of a duty to defend may be established by the allegations in the injured party's complaint." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 596, 748 S.E.2d 781, 787 (2013) (quoting *Guar. Nat'l Ins. Co. v. Beeline Stores, Inc.*, 945 F.Supp. 1510,

1514 (M.D.Ala.1996)). Because Section 32-2-10 is silent as to the duty to defend, the imposition of such a duty by Paragraph Three of Section 5 of the Contract does not violate the statute.

The obligations that Respondents contractually undertook to defend and/or indemnify Appellant are clearly and unequivocally set forth within the relevant Master Subcontract Agreements. These obligations do not violate § 32-2-10 or any public policy of the State of South Carolina, and Appellant should be allowed the opportunity to pursue them.

III. The Trial Court Incorrectly Held that the Statute of Limitations on Appellant's Indemnity Claims Began to Run Before a Final Judgment had been Entered Against Appellant or a Payment had been Made by Appellant.

The Trial Court's Amended Order holds, and Respondents argue, that the contractual indemnity claims are barred by the statute of limitations. However, the South Carolina Supreme Court has made it clear that claims for indemnification do not accrue until a judgment is entered. *See First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (S.C. 1994). Because no judgement has been entered, the statute of limitations has not even begun, much less expired, on Appellant's indemnification claims, and thus the Respondents' motions for summary judgment on this ground ought to have been denied. The Trial Court's order determining that the statute of limitations had expired, notwithstanding the absence of any entry of judgment, is clearly contrary to authoritative Supreme Court ruling, and should be reversed.

For purposes of analyzing the statute of limitations argument, the Trial Court differentiated between contracts for indemnity against loss and contracts for

indemnity against liability. However, for indemnity against a liability, the liability must be established by a Court decision; for indemnity against a loss, the loss must be established by an actual payment made. Neither of those instances has happened here, and thus, under either theory, the statute of limitations has not even begun to run on Plaintiff's indemnity claim.

Appellant's contractual indemnity claim includes a plea for consequential damages, including, among other things, attorneys' fees. **(R. p. 136, line 16 – p. 137, line 13)**. For the purpose of ascertaining the statute of limitations, it is the nature of the claim rather than the damages sought that matters; for that reason, S.C. Code Section 15-3-530 speaks in terms of imposing a statute of limitations upon "an action upon a contract" and not, for example, an action seeking attorneys' fees. It is the harm suffered, and not the requested relief, that determines the running of the statute. As explained above, because no judgment against BFS has been entered in the underlying case, the statute has not yet run on the contractual indemnity claim.

Alternatively, should the Court parse Appellant's plea for consequential damages from its contractual indemnity claim, as Respondents have done, a contractual cause of action for attorneys' fees pursuant to the Master Subcontract Agreements still would not be time-barred. "A breach of contract action generally accrues at the time the contract is breached or broken". *Richland-Lexington Airport Dist. v. Am. Airlines, Inc.*, 306 F. Supp. 2d 548, 566 (D.S.C. 2002), aff'd, 61 F. App'x 67 (4th Cir. 2003). In other words, to quote Respondents, the statute of limitations begins to run once "a defendant's damage-causing act is completed,"

and in this context, the "damage-causing act" would be Respondents' refusal to pay attorneys as outlined in the contract. To date, neither ECC nor Charleston Exteriors has communicated to Appellant a refusal to pay Appellant's attorneys' fees; moreover, the earliest possible act that could be construed as an implicit refusal would have been the respective Answers filed by Respondents in this case, which denied BFS's right to said relief. Under Respondents' argument, it is that refusal to abide by the terms of the contract, and not the mere incurrence of attorneys' fees, that began the statute of limitations on BFS's contractual claim for attorneys' fees.

Again, Appellants believe that the fracturing of their right to attorneys' fees as consequential damages from their contractual indemnity claim is inappropriate; however, the result under such an analysis should have lead the trial court to deny Respondents' motion for summary judgment on the statute of limitations issue.

CONCLUSION

Respondents' briefs have not demonstrated why the heightened standard of "clear and unequivocal" should be applied to this Contract; they have not shown that the Contract violates S.C. Code Section 32-2-10; and they have not persuasively outlined how the statute of limitations could have run on Appellant's contractual indemnity claim. For these reasons, Appellant stands by its arguments and relief requested in its opening brief.

SIGNATURE PAGE FOLLOWS

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