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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
The Honorable Clifton B. Newman
Circuit Court Judge

Circuit Court Case No. 2018-CP-08-02547

Court of Appeals Case No. 2020-000415
Unpublished Opinion No. 2025-UP-072 (S.C. Ct. App. filed Feb. 26, 2025)

Appellate Case No. 2025-001176

Builders First Source-Southeast Group, LLC

Appellant,

versus

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

Respondent.

RESPONDENT ECC CONTRACTING, LLC'S RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals properly affirm the Circuit Court's finding that Builders FirstSource – Southeast Group, LLC's ("BFS" or "Petitioner") contractual indemnity claim failed as a matter of law since BFS sought indemnification for its own negligence and the contractual indemnity provisions did not meet the heightened "clear and unequivocal" standard set forth in Concord and Cumberland?

COUNTER STATEMENT OF FACTS

To avoid repetition and for the sake of brevity, ECC Contracting, LLC ("ECC" or "Respondent") incorporates in full its Statement of Facts contained in ECC's Petition for Writ of Certiorari. However, certain mischaracterizations in BFS's Statement of the Case must be addressed.

This case is not—as BFS frames it—a straightforward indemnity claim by a general contractor seeking reimbursement from a subcontractor for the subcontractor's own alleged negligence. Rather, it is a case in which BFS seeks to recover contractual indemnity from ECC for liability arising from BFS's own negligence. BFS and ECC entered into a subcontract containing indemnity provisions. BFS argues that its contract only seeks indemnity in the event of ECC's negligence, but both the Circuit Court and the Court of Appeals correctly rejected that assertion. As both courts found, the indemnity provisions at issue sought to shift liability for BFS's own negligence without doing so in clear and unequivocal terms. As a result, BFS's contractual indemnity claim properly failed as a matter of law.

ARGUMENT

At the core of BFS's appeal is the flawed premise that it can both rewrite its contract and reframe its pleadings after the fact. BFS's contractual indemnity claims are based on provisions

that attempted to secure indemnification for its own negligence—provisions that were neither clear nor unequivocal, as the law requires. Indeed, BFS conceded this point, and the trial court properly concluded that its contractual indemnity claims failed as a matter of law, which was affirmed by the Court of Appeals. Undeterred, BFS now asserts it can nonetheless pursue indemnity from ECC for ECC's alleged sole negligence. But this argument finds no support in the plain language of the contract or in the allegations of the Complaint. A contractual indemnity provision that is legally invalid cannot be resurrected for a narrower purpose. Courts may not enforce selectively what has been deemed unenforceable in substance, as doing so would amount to judicial revision of the parties' agreement and violate the foundational principle that contracts must be interpreted as a whole. (See, McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("A contract is read as a whole document....").

I. THE COURT OF APPEALS OPINION IS NOT IN DIRECT CONFLICT WITH THE PLEADINGS OR RULES OF CIVIL PROCEDURE

The Court of Appeals properly applied the South Carolina Rules of Civil Procedure and did not deviate from established pleading standards.

A. BFS is Bound by the Allegations of its Operative Pleadings

"It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (*citing* Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964)). "The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." Id. The wording of BFS's pleading leaves little doubt that BFS seeks indemnification for its own negligence.

Here, despite BFS's argument that it seeks only indemnity for ECC's negligence, as the Court of Appeals correctly found, the plain language of BFS's pleadings show that BFS seeks recovery for any sums for which BFS is held liable to Plaintiff or Lennar, rather than only those sums which may be attributable to ECC's sole negligence. In fact, the word 'sole' is not in BFS's Complaint. Instead, BFS seeks the following:

> 34. That BFS is entitled to full contractual and common law indemnification from the ECC Contracting, LLC, for and against **any liability** which the BFS is found to have to the Plaintiffs, Lennar Carolinas, LLC, and/or to the others in the underlying action, and BFS is also entitled to damages for any negligence, as aforesaid, on the part of ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC, and Hurley Services, LLC its attorney fees, costs, and other expenses incurred defending the underlying action, and further entitled BFS to recover from the ECC **any sums** for which BFS may be held liable to the Plaintiffs, to Lennar Carolina, LLCS, and/or to others in such action.

(R. pp. 137, BFS's Complaint ¶34 (emphasis added).

The claims BFS seeks are wholly unsupported by its Complaint. When paragraph 34 asks for full indemnification for any liability and to be reimbursed by ECC for any sums for which BFS may be held liable, BFS is clearly seeking recovery from ECC for the full and complete amount of any verdict rendered against it, including any damages included in the verdict for BFS's own negligence. Settled precedent binds BFS to its operative pleadings seeking "full contractual indemnity" for "any liability" and "any sums" for which BFS may be held liable. BFS may not now take a contradictory position from the statements in its pleadings and argue that it only seeks contractual indemnity and recovery of any amount for ECC's sole negligence.

B. The Court of Appeals Correctly Applied South Carolina Rules of Civil Procedure, Rule 8, in conjunction with BFS's Pleading

BFS's argument rests on a mischaracterization of Rule 8 of South Carolina Rules of Civil Procedure, which, while promoting justice and liberal construction of pleadings, does not permit

courts to expand pleadings beyond their plain language. BFS's assertion that its pleading should be construed as asserting an alternative theory of relief under Rule 8 misstates the purpose of that rule and amounts to an improper attempt to revise its pleading after the fact.

The Rules of Civil Procedure do not relieve parties of their obligation to clearly articulate the basis for each claim. Rule 8(a) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," not a vague or ambiguous reference that might be interpreted to suggest alternative theories. Rule 8, SCRCP. BFS did not clearly articulate it was seeking indemnity based solely on its subcontractor's negligence as a distinct ground for relief. Instead, it ambiguously sought contractual indemnity for "any sums" for which BFS may be held liable.

BFS contends that the word "any" should be interpreted in its ordinary sense: "used to express a lack of restriction in selecting one of a specified class." While correct, this definition actually reinforces – rather than undermines – the Court of Appeals' reasoning. The Court of Appeals noted that BFS repeatedly claimed it was seeking recovery for "any sums" for which it might be held liable, rather than those attributable solely to ECC's negligence (Court of Appeals Opinion, p. 3). An unrestricted claim for "any sums" that does not differentiate between BFS's own negligence and that of its subcontractors is precisely why the Court of Appeals concluded that the "circuit court did not err in finding BFS seeks indemnification for its own negligence." (Court of Appeals Opinion, p. 3).

BFS cannot cure the substantive deficiencies in its contractual indemnity claim by invoking Rule 8. Although BFS frames the Court of Appeals' decision as a procedural misapplication of the Rule, the decision is more accurately understood as a substantive determination that BFS's contractual indemnity claim, as pleaded and as informed by the language of its own contract, sought recovery for its own negligence, and, therefore, its contractual indemnity claim failed as a

matter of law. Accordingly, granting BFS's petition for Writ of Certiorari would not serve to correct a misapplication under Rule 8.

II. THE COURT OF APPEALS DID NOT FAIL TO FOLLOW PRECEDENT WHEN IT AFFIRMED THE CIRCUIT COURTS FINDING THAT BFS SOUGHT INDEMNITY FOR ITS OWN NEGLIGENCE AND THUS ITS CONTRACTUAL INDEMNITY CLAIM FAILED AS A MATTER OF LAW SINCE IT DID NOT MEET THE HEIGHTENED "CLEAR AND UNEQUIVOCAL" STANDARD

BFS contends that it is not seeking indemnity for its own negligence, but rather for losses arising solely from its subcontractors' negligence. The Court of Appeals disagreed, finding that BFS's own pleadings and contract language contradicted this claim. This Court should deny BFS's Petition for Writ and affirm this portion of the Court of Appeals' holding.

A. BFS's Contract Does Not Support Its Argument

BFS requests this Court to judicially revise its own subcontractor agreement to provide indemnification for claims arising from the subcontractor's sole negligence. However, this is not what BFS's contract states. As South Carolina law makes clear, parties are free to contract as they see fit, and courts are not empowered to rescue parties from the consequences of the agreements they themselves drafted. *See* Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643 (1975); MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 369 (Ct. App. 2003).

There are two 'master agreements' between BFS and ECC, one from 2008 another from 2015. Given the dates of the work, the 2008 contract should govern. However, it is irrelevant because the relevant indemnity provision is identical in both contracts. There are multiple paragraphs in Section 5 INDEMNITY of the contract, but one relates to property damage. That provision states:

> To the fullest extent permitted by Law, the subcontractor shall indemnify, defendant and hold harmless the contractor, the owner, and all of their officers, directors, agents, and employees from and **against any and all claims**, suits, losses, causes of action, damages, liabilities, fines, penalties,

> and expenses of any kind whatsoever, including, but not limited to, arbitration or court costs and attorney's fees (such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) arising out of or resulting from bodily injury or death of any person, or property damage, including loss of use of property, arising or alleged to arise out of or in any way related to this agreement or the subcontractor's performance of the work or other activities of the subcontractor, **but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor** or anyone for whose acts the subcontractor may be liable. The Contractor's insurance requirements are separate and distinct from the requirement of indemnification hereunder. 2008 Contract between BFS and ECC §5 ¶1 INDEMNITY (*emphasis added*, all caps in the original)

This language is based on the AIA form indemnification language and the key phrase is "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." The South Carolina Court of Appeals issued an opinion in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 176 (Ct. App. 2018), *reh'g denied* (Oct. 18, 2018), that specifically recognized that this contract language fails as a matter of law because it does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own liability. Yet, BFS now asks this Court to disregard that conclusion and rewrite its contract to support indemnification solely for ECC's negligence.

BFS, contending that it can rewrite the contract to seek merely indemnification for the sole negligence of ECC, would have the inquiry end here without regard to the remainder of Section 5 of the contract. The third paragraph of Section 5 states (all caps omitted for ease of reading):

> 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, the owner, or any of their officers, directors, agents and employees**. The duty to defend arises immediately upon presentation of a claim by any party indemnified hereunder and written notice of such claim being provided to subcontractor. **Subcontractor's obligation to indemnify, defend, and hold harmless under this Section 5 will survive the expiration or earlier termination**

> **of this agreement until it is finally determined by a Court of competent jurisdiction or arbitration panel that a claim against the contractor, the owner, and any of their officers, directors, agents, and employees for the matter indemnified hereunder is fully and finally barred by the applicable statute of limitations**.

2008 Contract between BFS and ECC §5 ¶3 INDEMNITY (*emphasis added*, all caps in the original) (R. pp. 204-206).

BFS cannot argue that its claims for contractual indemnity are for those sums that are solely attributable to the negligence of ECC when its contractual indemnity provisions clearly call for ECC to indemnify BFS for 100% of its attorney's costs and fees regardless of who is found to be at fault, and its pleadings seek to recover everything from ECC. An overreach that runs afoul of South Carolina law.

As this Court has made clear, "It is not the function of the court to rewrite contracts for parties." Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) *(citation omitted).* BFS's Petition for Writ of Certiorari is premised on judicial reconstruction of both its contract and Complaint, and it must be denied.

B. ECC cannot be solely at fault for the claims against BFS

The Statute of Limitations has long passed on any claims that the Plaintiff[1] might have against ECC and no other parties to the case are known to potentially have standing to sue ECC. Thus, there is no way for there to be a Judgment finding that ECC is solely responsible for the claims against BFS.

Further, BFS has admitted that it was responsible for supervising the work performed by its subcontractors. (R. pp. 363, Transcript of October 18, 2019 Hearing on Motion for Summary

[1] Plaintiff references the homeowner Plaintiffs in the underlying litigation Patricia Damico et. al. v. Lennar Carolinas, LLC et. al., 430 S.C. 188 (Ct. App. 2020) *cert. pending,* (the "Underlying Action" or the "Damico Litigation")

Judgment before Judge Newman, pg. 46:14-16). If ECC were to be found to have been negligent, which negligence is denied, such would establish the concurrent negligence of BFS. It is impossible for BFS not to be at least partially responsible for any alleged deficient work of ECC. Thus, any and all deficiencies in ECC's work are concurrent negligence with BFS, which the Court of Appeals has ruled is not covered under BFS's contractual indemnity provision. Accordingly, BFS's attempt to disguise claims of concurrent negligence as sole-negligence contractual indemnity is unavailing and unsupported.

Even if ECC is found to be solely negligent, which it denies, BFS can still seek indemnity from ECC in equity – a claim it still maintains. (R. pp. 19, Judge Newman's Amended Order dated February 3, 2020). Therefore, BFS's request to recast its contractual indemnity claims as one based on subcontractor "sole negligence" is not only improper, but unnecessary.

C. The Court of Appeals' Ruling is consistent with its own Precedent and will not upend the construction industry

Contrary to BFS's alarmist framing, the Court of Appeals did not abrogate or contradict Concord & Cumberland. Rather, it correctly applied existing South Carolina law regarding the enforceability of contractual indemnity clauses that seek to relieve an indemnitee from the consequences of its own or concurrent negligence. South Carolina courts have consistently held that indemnity language for one's own or concurrent negligence must be "clear and unequivocal." This is not a novel standard.

BFS's assertion that the Court of Appeals has effectively rendered "virtually every contract currently in effect…subject to challenge," it is not only hyperbole, but also inaccurate. (BFS's Petition for Writ of Certiorari, p. 14). If any such contracts are indeed vulnerable, it is because they, like the one at issue here, contain indemnity provisions that do not meet the long-standing

"clear and unequivocal" standard for shifting responsibility for a party's own fault. This is a consequence of existing legal principles, not a deviation from them.

The clear and unequivocal standard applies whether BFS is seeking indemnification for its sole or concurrent negligence. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland. LLC, 424 S.C. 639, 646, 819 S.E.2d 166, 170 (Ct. App. 2018). When an indemnity clause purports to relieve an indemnitee from the consequences of its own negligence, South Carolina case law requires strict construction of the clause. Id. In other words, if the indemnity clauses in the contract involves the contractor's negligence, even partially, the heightened "clear and unequivocal" standard governs the interpretation of the indemnity clause. If that standard is not met, the indemnity claim fails as a matter of law.

The Court of Appeals, properly following the reasoning in Concord and Cumberland, held that the clear and unequivocal standard applied because BFS sought indemnification that encompassed its own negligence. Since the indemnity provisions in BFS's subcontracts did not meet the clear and unequivocal standard, which BFS conceded, the Court of appeals upheld the Circuit Court's ruling that the indemnity provisions in BFS's contract fail as a matter of law under South Carolina law.

The Court of Appeals' decision is entirely consistent with *Concord & Cumberland*. BFS's claims of conflicting precedent and industry upheaval are without merit, and, BFS's Petition for Writ of Certiorari should be denied.

III. BFS'S PETITION FOR CERTIORARI DOES NOT MEET THE REQUSITE STANDARDS UNDER RULE 242, SCARC.

This Court should deny BFS's Petition for Certiorari because it fails to satisfy the certiorari requirements. Rule 242, SCACR, provides that a writ of certiorari "will be granted only where there are special and important reasons." The following are generally accepted reasons for

permitting certiorari: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the Court of Appeals' decision conflicts with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision below conflicts with a decision of the United States Supreme Court. SCACR, Rule 242 (b).

BFS's Petition for Certiorari lacks any of these reasons granting certiorari. The Court of Appeals decision was unanimous, and does not conflict with prior decisions of this Court. No federal question is involved, and BFS's petition raises no novel or unsettled legal issue, nor does it present a conflict of authority or question of great public importance. Therefore, BFS's Writ of Certiorari should be denied.

CONCLUSION

BFS's appeal hinges on the untenable assertion that it may rewrite both its contract and its Complaint to avoid the legal consequences of its own drafting. The Court of Appeals properly applied longstanding South Carolina precedent and the Rules of Civil Procedure in affirming that BFS's contractual indemnity claims failed as a matter of law. The indemnity provisions at issue did not clearly and unequivocally provide for indemnification of BFS's own or concurrent negligence, as required. Nor do BFS's pleadings support its belated attempt to limit its indemnity claims solely to ECC's alleged negligence. Courts are not in the business of rescuing parties from poorly drafted agreements or pleadings, and Rule 8 cannot be invoked to revive a legally deficient claim.

Moreover, the Court of Appeals' decision does not conflict with existing law or upend settled expectations within the construction industry. Rather, it faithfully applies the established "clear and unequivocal" standard for interpreting indemnity provisions—a standard that BFS's contract plainly fails to meet. Contrary to BFS's claim, the ruling neither departs from precedent nor presents a novel legal question warranting review. BFS's petition does not meet the criteria for certiorari under Rule 242. There is no dissent, no novel question of law, no constitutional issue, and no conflict with Supreme Court

precedent. Simply put, BFS seeks to relitigate factual and legal issues that were thoroughly considered and correctly resolved by the courts below.

For all of these reasons, ECC respectfully submits that the Court should deny BFS's Petition for Writ of Certiorari and affirm the Court of Appeals' holding that the circuit court did not err in finding that BFS seeks indemnification for its own negligence, and, therefore, BFS's contractual indemnity claim fails as a matter of law.

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July 14, 2025

VIA E-MAIL (supctfilings@sccourts.org)
The Honorable Patricia A. Howard
Clerk of Court, S.C. Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: Builders First Source-Southeast Group, LLC v. D.R. Horton, Inc. Appellate Case No. 2022-000016
Civil Action No. 2018-CP-08-02547
RPR File No.: 7534-00044

Dear Ms. Howard:

Enclosed for filing, please find Respondent/Petitioners ECC Contracting, LLC's Return to Petitioner's Petition for Writ of Certiorari in regards to the above-referenced matter. Kindly file the attached and return a recorded copy to me.

Should you have any questions, or require additional information, please do not hesitate to contact me.

Sincerely,

F. Heyward Grimball

FHG/mlj
Enclosures: *As stated herein.*

cc: The Honorable Jenny Abbott Kitchings, Clerk of Court for the SC Court of Appeals (via e-mail at ctappfilings@sccourts.org);
All counsel of record by last known email addresses