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**Jul 24 2025**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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

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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.

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

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Petitioner Builders FirstSource-Southeast Group, LLC respectfully submits that this litigation has, from its inception, been characterized by a cascading series of errors by the lower courts. Following an initial misconstruction of the Petitioner's complaint, by which Petitioner sought contractual indemnity from Respondents against liability for damages caused by the negligence of the Respondents, the lower courts compounded that error by their application of an inappropriate standard in review of the relevant contract provision, their failure to consider the relevant statutory provisions as set forth in S. C. Code Ann. § 32-2-10, and their failure to adhere to controlling precedent. The aforesaid errors, and the courts' corresponding subsequent invalidation of the Petitioner's contracts, have resulted in not only a complete denial of the contractual, common law, and statutory rights of the Petitioner, but also a disruption of contractual allocation of risks throughout the construction industry, all of which support a grant of certiorari by this Court.

As more fully detailed in its Petition for Certiorari, and contrary to the assertions of the Respondents, the Petitioner, throughout the course of this litigation, has sought indemnity only against liability for damages caused by the negligent acts or omissions of its subcontractors. See R. pp. 136-137. Such an obligation to indemnify is imposed upon the Respondents by the specific provisions of the first paragraph of Section 5 INDEMNITY of the parties' Agreements (cited by Respondent ECC at pages 8 and 9 of its Return). Moreover, such a contractual allocation of risk has been explicitly authorized by the South Carolina General Assembly by its enactment of South Carolina Code §32-2-10, which states in relevant part that

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

The lower court and the court of appeals, notwithstanding repeated contentions by the Petitioner to the contrary, appears nonetheless to have determined that the Petitioner's claims encompassed recovery in indemnity for damage occasioned by both (a) the negligence of the Respondents, and (b) the alleged concurrent negligence of the Petitioner. The court of appeals then proceeded, contrary to precedent, to apply the heightened "clear and unequivocal" standard in its analysis of the validity of all Petitioner's claims. This more stringent standard should appropriately have been limited only to consideration of claims purportedly seeking indemnity against the Petitioner's own negligence (whether sole or concurrent), and not to the remaining claims, seeking indemnity against damages caused by the sole or concurrent negligence of the Respondents. See Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989); Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). 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). Contractual provisions authorizing indemnity against damages caused by the Respondents' negligence (whether sole or concurrent) should appropriately have been evaluated under rules of contract construction generally, and not under the more stringent clear and unequivocal standard. See Id.

Equally importantly, Respondent ECC is mistaken in its implicit assertion, at page 11 of its Return, that the Concord & Cumberland court held that the "clear and unequivocal" standard applies whenever a party seeks indemnification for damages occasioned by the concurrent negligence of the indemnitor. By its explicit holding in Concord & Cumberland, the court of appeals (consistent with prior precedent and the specific provisions of S.C. Code Ann. § 32-2-10), determined that, although the relevant contractual provision at issue in that case (a provision which all parties and lower courts agree is virtually identical in substance to the contractual provision at

issue in this and the other BFS appellate matters), was not sufficiently “clear and unequivocal” to impose an obligation to indemnify against damages caused by the negligence of the indemnitee, (whether sole or concurrent with the negligence of the indemnitor), the same contractual provision was, in fact, adequate, under general provisions of contract construction, to authorize indemnity against damages caused by the negligence of the indemnitor (whether sole or concurrent). As further explained below, Petitioner submits that the Court should grant certiorari to review the lower courts orders and opinions that conflict with South Carolina law.

### **Argument**

**I. The lower courts and the Respondent, in their selective attention to limited allegations of the Petitioner’s pleadings, and their wholesale exclusion of other equally relevant allegations, have misconstrued the relief sought by Petitioner, and, as a result, fail to apply the appropriate standards in construction of the relevant contractual indemnity provision.**

**a. There is an elephant in the room and the lower courts and Respondents continue to ignore it.**

The lower courts, in their consideration of the Petitioner’s complaint, appear to have focused, exclusively, upon the allegations of Paragraph 34, by which the Petitioner alleged entitlement to “full contractual and common law indemnification,” for and against “any liability which Petitioner is found to have to the Plaintiffs, Lennar Carolinas, LLC, or to others in the underlying action.” See Opinion p. 5.

By contrast, the lower courts gave no consideration to the equally relevant allegations set forth in Paragraph 33 of the complaint, which stated clearly that the Petitioner is seeking recovery for damages which are only attributable to Respondents’ negligence:

**33. That to the extent, if any, that [Petitioner] 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 [Respondents] which have damaged [Petitioner], as [Petitioner] 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.**

R. pp. 136-137 (**emphasis added**).

For reasons not explained by Respondent ECC in its Return, or by the lower courts in their orders and opinions, Respondents and the lower courts continue to ignore the plain and unambiguous allegations of Petitioner's Complaint which provide notice to Respondents that Petitioner's indemnification causes of action are expressly limited to liability for damages directly and proximately resulting from the wrongful acts, omissions, negligence, and/or representations of Respondents. See R. p. 136-137. Petitioner submits that Paragraph 33 is akin to an *elephant in the room* and appropriate consideration of the express limitation of Petitioner's claims is critical to appropriate resolution of all issues presented here.

**b. "Any."**

Respondent ECC argues that, because Petitioner pled in Paragraph 34 for "full indemnification," for "any liability," and for "any sums," Petitioner 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 Petitioner's own negligence." See ECC Return p. 5. The court of appeals appears to agree and finds that "the circuit court did not err in finding BFS seeks indemnification for its own negligence" because "BFS asserts several times in its complaint that it seeks recovery for *any* sums...rather than only those sums which might be attributable to Respondents' purported sole negligence." Opinion p. 5. Assuming, however, that "any" does, in fact, include "all," including potential damages for Petitioner's negligence, neither the Respondent nor the lower courts have explained how Petitioner may proceed with an equitable indemnification claim premised on such basis.

Petitioner directs the Court's attention to the fact that its common law indemnification claim is pled as an alternative theory of recovery in indemnification in the first cause of action. See R. pp. 135-137. Moreover, Petitioner's common law indemnification claim includes the same allegations as Petitioner's contractual indemnification claim. Petitioner draws the Court's attention to the fact that its common law indemnification claim and contractual indemnification claim include the following allegations:

1. Petitioner denies all material allegations asserted against it in the underlying action (See Paragraph 6, R. p. 129),
2. which is re-alleged and reiterated by Paragraph 29 (See R. p. 135), and
3. are expressly limited to liability for damages that are a direct and proximate result of Respondents' negligence. (See Paragraph 33, R. p. 136).

Petitioner submits that just as the lower courts and Respondents agree that Petitioner's common law indemnification claim is allowed to proceed, so too should Petitioner's contractual indemnification claim, which is premised upon the exact same allegations to those supporting the common law indemnification claim. See R. pp. 135-137.

Consistent with the practice of ignoring the *elephant* in the Complaint, neither the lower courts nor Respondents provide any insight as to how Petitioner's common law indemnification claim for *any* liability may proceed, but Petitioner's contractual indemnification claim for damages resulting directly and proximately from the subcontractors' negligence may not.

For these reasons, the Court must grant certiorari to address the *elephant* in the record and correct the errors of the lower courts.

**II. Respondent admits that there is only one relevant provision at issue.**

Respondent ECC reiterates that while “[t]here are multiple paragraphs in Section 5 INDEMNITY” only “one relates to property damage.” See Return page 7 and R. p. 170. Petitioner agrees. Petitioner also agrees with Respondent ECC that this one applicable provision provides that Respondents agreed to indemnify Petitioner “against any and all claims” and “only to the extent caused in whole or in part by any negligent act or omission of [Respondent.]” Return page 8. Petitioner also agrees with Respondent that this specific provision, on which the Petitioner relies for its contractual indemnification cause of action, is “based on the AIA form indemnification language.” *Id.* And this is where the agreement between Petitioner and Respondent ECC ends.

Petitioner strongly disagrees with Respondent that the Concord & Cumberland court found that this specific language “fails as a matter of law.” Return p. 8.

Notably, Concord & Cumberland court did not hold that the heightened standard applied when a contractor is seeking indemnification for the subcontractor’s sole or concurrent negligence. See *Id.* at 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), *reh'g denied* (Oct. 18, 2018). Contrary to Respondent’s incorrect assertion, Concord & Cumberland trial court found that such language “*limited indemnification to damages resulting from the work [the subcontractor] performed.*” *Id.* at 645 (emphasis added). While the Concord & Cumberland court of appeals found that the AIA language did not meet the “clear and unequivocal” standard required for a subcontractor to indemnify a contractor for the contractor’s sole or concurrent negligence, the court nevertheless affirmed the trial court’s order that held that such language was sufficient to require the subcontractor to indemnify the contractor for the subcontractor’s negligence. See *Id.* at 649.

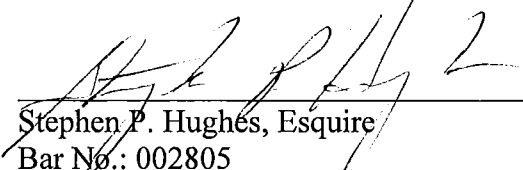
Moreover, Petitioner finds it important to note the fact that Respondents ECC and Charleston Exteriors have argued from the beginning that *there is only one relevant*

*indemnification provision*. See R. pp. 170, 245, 337-338, 341-342, 345, and 347. In fact, Respondent ECC reiterates this point in its Return at page 7. However, in its Return, Respondent ECC argues that the third paragraph of Section 5 INDEMNITY is somehow also relevant and should be considered by the Court. See Return pp. 8, 9. Petitioner submits that Respondent ECC's argument regarding the third paragraph of Section 5 INDEMNITY has been waived by the repeated concessions of Respondent ECC that *there is only one relevant indemnification provision – the first paragraph of Section 5 INDEMNITY*. See Respondent ECC concession at R pp. 170, 337-338, and 341-342. An issue conceded in a lower court may not be argued on appeal. See TNS Mills, Inc. v. S.C. Dep't. of Revenue, 331 S.C. 611, 617 (1998). Alternatively, if the Court considers Respondent ECC's "third paragraph argument," Petitioner would respectfully note that Petitioner has *conceded* too many times to count that its indemnification claims are only seeking recovery for damages caused by Respondents' negligence and its contractual indemnification claims are based only on paragraph one of Section 5 INDEMNITY of the Agreements.

### **Conclusion**

Because the Return of Respondent highlights the fact that Respondents and the lower courts continue to ignore the allegations directly limiting Petitioner's indemnification claims to only damages caused by Respondents' negligence and takes positions similar to the lower courts that directly conflict with each other, the Supreme Court should grant certiorari in this case and provide guidance to the courts, the parties, and the construction industry on the correct analysis of indemnification claims.

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