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S.C. SUPREME COURT

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. 2025-001176
Case No. 2014-CP-08-02424

Opinion No. 2025-UP-072

Builders FirstSource-Southeast Group, LLC, Petitioner,

v.

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

PETITIONER'S BRIEF

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Questions Presented on Certiorari

1. **When a contractor files a general third-party (of fourth-party) claim against its subcontractor seeking to recover for all damages for it might be held liable, does such claim include those damages for which the subcontractor is either solely or concurrently responsible?**
2. **Should a contractor's contractual indemnification claim – specifically as it relates to 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

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 “BFS” or “Petitioner”), who was alleged to have supplied and installed windows and exterior doors.

BFS, 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 trial 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 BFS, 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, BFS 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 BFS, 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.

BFS 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 BFS's claims. Arguments on the motion were heard before the court on October 18, 2019.

On December 6, 2019, the trial court issued its order granting Respondents' motions for summary judgment. On December 16, 2019, BFS filed a motion for reconsideration. Judge Newman requested oral arguments on the motion for reconsideration, which were heard before the trial court on January 16, 2020. On February 3, 2020, the trial court issued an "Amended Order," again granting Respondents' motions for summary judgment; this order, however, did not address or rule on BFS's December 16, 2019 motion for reconsideration. Therefore, BFS filed a second motion for reconsideration on February 13, 2020, asking that the trial court explicitly to 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, BFS 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 BFS's motion for reconsideration. BFS 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. BFS'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. See A. pp. 552-558. BFS filed a petition for rehearing on March 13, 2025; Respondent ECC also filed a petition for rehearing on March 13, 2025. See A. pp. 561-585. On May 16, 2025, the court of appeals issued an order denying both petitions for rehearing. See A. pp. 559-560. BFS filed its petition for writ of certiorari on June 13, 2025. The Court granted the petition for certiorari by order dated December 16, 2025. See A. pp. 594-595. This brief now follows.

Statement of Facts

Certain parts of BFS's pleadings and BFS's contracts with Respondent subcontractors are relevant to multiple arguments before the Court. For the Court's convenience, relevant portions of these documents are introduced here and then referenced throughout the Argument section.

Respondent subcontractors have argued, and the court of appeals mistakenly held, that BFS's pleadings seek indemnification from its subcontractors for BFS's own negligence. Thus, we must first turn to the original text of the allegations BFS asserted against the Respondent subcontractors.

BFS's operative pleading alleging its indemnification cause of action provides:

29. 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.
30. That the Defendants, ECC Contracting, LLC, Charleston Exteriors, LLC, and Hurley Services, LLC were responsible for provision or materials and/or services in connection with the installation of the windows and doors of the subject structures at The Abbey at Spring Grove Plantation, for proper quality control, and for compliance with the contract documents, industry standards, and requirements of the relevant building codes. In the event that the Plaintiff and/or the Lennar Carolinas, LLC in the underlying action establishes that the materials and/or services provided by the BFS were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event ECC Contracting, LLC, Charleston Exteriors, LLC, and Hurley Services, LLC has failed to properly execute its duties, which have allegedly caused the damages alleged by Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.
31. That the respective subcontracts between Builders FirstSource-Southeast Group, LLC and (a) ECC Contracting, LLC, (b) Charleston Exteriors, LLC, and (c) Hurley Services, LLC provide for contractual indemnification in favor of BFS.
32. That the circumstances herein give rise to a special relationship between Builders FirstSource and ECC Contracting, LLC, Charleston Exteriors, LLC, and Hurley Services, LLC.
33. That to the extent, if any, that BFS may be held liable to the Plaintiffs and/or Lennar Carolinas, LLC, and/or 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 ECC Contracting, LLC, Charleston Exteriors, LLC, and Hurley Services, LLC which have damaged BFS, as Builders FirstSource-Southeast Group, LLC, 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.

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 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 the ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorneys fees, costs, and other expenses incurred in defending this action, and further entitling BFS to recover from the ECC any sums for which BFS may be held liable to the Plaintiffs, to Lennar Carolinas, LLC, and/or to others in such action.

See A. pp. 135-137.

In addition to contesting BFS's pleading, the Respondent subcontractors argued and the lower courts held that the indemnity provision is neither clear nor unequivocal and therefore, BFS's contractual indemnification cause of action failed as a matter of law. Thus, we must next review the parties' contracts.

BFS entered into separate written contractual agreements with each of the Respondent subcontractors. See A. pp. 213-224, 529-540. BFS entered into a written contract with Respondent ECC on February 26, 2008. See A. pp. 213-224. BFS entered into a written contract with Respondent Charleston Exteriors on October 17, 2012. See A. pp. 529-540. Both of the relevant contracts are "Version 5/17/06," and are virtually identical in form and substance. See Id. For example, both contracts begin with a "**SECTION 1. Introduction.**", which states, in relevant part, that the "Agreement contains the basic terms and conditions under which Subcontractor agrees to provide materials and/or to perform services (the "**Work**")" See A. pp. 213, 529. The term Work, as defined in SECTION 1 as the materials provided and/or services

performed by the Subcontractor, is subsequently used throughout the contracts. See A. pp. 213-224, 529-540. This defined term is critical to an appropriate reading of the contracts, because each Agreement, and all the contractual rights and obligations of the parties, is limited to the Subcontractor's Work.

The relevant indemnity provision is as follows:

SECTION 5. INDEMNITY.

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, 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 DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

A. pp. 218, 534.

Here, where the underlying litigation arises out of alleged construction defects and resulting property damage claims, the Respondent subcontractors have agreed to indemnify BFS "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." A. pp. 218, 534. Thus, contrary to Respondent subcontractors' arguments, the

indemnification provision in the contracts is completely consistent with the relief sought by BFS and explicitly authorized by law.

For the reasons set forth herein and below, BFS request that this honorable Court reverse the lower courts' errant holdings and remand BFS's contractual indemnification claims for liability or damage resulting from the Respondent subcontractors' negligence for trial.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the Trial Court under Rule 56(c), SCRPC, which is that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 611 S.E.2d 922 (2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004). In reviewing a motion for summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). Any triable issues must go to the jury. Mulherin—Howell v. Cobb, 362 S.C. 588, 608 S.E.2d 587 (Ct.App.2005).

On an appeal from an order granting summary judgment on a question of law, this Court reviews the ruling de novo. Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019)(citing Town of Summerville v. City of N. Charleston, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008)). "The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003) (stating that all

ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 605 S.E.2d 744 (Ct.App.2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).

ARGUMENT

I. The court of appeals erred in holding that BFS's contractual indemnification claim sought recovery exclusively for BFS's own negligence and did not encompass a claim specifically for damages caused by the Respondent subcontractor's negligence.

As more fully detailed in sub arguments A and B, the lower courts' determinations concerning the indemnity sought by BFS were inconsistent not only with BFS's pleadings, but also contrary to BFS's redundant representations before both the trial court and the court of appeals. Additionally, and to the extent that the court of appeals determined that the BFS contractual indemnification claims did not encompass indemnity against liability or damage resulting from the negligence of its subcontractors, such a determination was inconsistent with precedent.

The court of appeals determined that, because BFS sought indemnification for "any" sums for which it might be held liable, BFS was seeking indemnification for its own negligence, and thus its entire contractual indemnification cause of action was subject to dismissal. See Opinion,

A. pp. 555-557. In so holding, the court of appeals overlooked that, even if “any” sums included damages caused by the negligence of BFS, it also simultaneously included “any” sums caused by the derivative negligence of the subcontractors. Instead of dismissing the entire contractual indemnification cause of action, the court of appeals should have allowed BFS to proceed on the portion of its contractual indemnification claim by which it seeks to recover from its subcontractors for the negligence of its subcontractors.

A. BFS pled a cause of action that, when read in context, seeks recovery only for liability or damage resulting from the negligence of the Respondent subcontractors.

As an initial matter, BFS maintains that its pleading only seeks indemnification for the negligence of the Respondent subcontractors. Specifically, BFS pled that if it were to be found liable to the Plaintiffs, that any such liability would be the result of the wrongful acts, omissions, negligence, and/or representations of the Respondent subcontractors. See Paragraph 33, A. p. 136. BFS then pled that it was entitled to full contractual and common law indemnification for any liability (i.e., any such liability resulting from the negligence of the Respondent subcontractors) which it is found to have to the Plaintiffs. See Paragraph 34, A. p. 137.

Thus, a fair, impartial, and appropriate reading of the BFS pleading clearly establishes that BFS contends that any liability on its part is the result of the negligent acts or omissions of the Respondent subcontractors, and that BFS is seeking contractual indemnity only against liability occasioned by such Respondent subcontractors’ negligence.

Despite citing to these specific allegations in the Opinion, the court of appeals erroneously determined that because BFS sought recovery for “any” sums for which it may be liable, it was seeking indemnification for its own negligence. See Opinion, A. p. 557. However, to reach such a conclusion, the court of appeals must focus, exclusively, upon the allegations of Paragraph 34, and by contrast, give

no consideration whatsoever to the equally relevant allegations set forth in Paragraph 33. Importantly, the allegations in Paragraph 33 limit BFS's indemnification cause of action to damages resulting from the Respondent subcontractors' negligence. By the plain language in Paragraph 33, BFS's indemnification cause of action is limited "to the extent, if any, that BFS may be held liable to the Plaintiffs," and to the extent that such liability is "a direct and proximate result of the wrongful acts, omissions, negligence, gross negligence, and/or representations of the [Respondent subcontractors]." See A. p. 136. Thus, for BFS to proceed on its indemnification cause of action against the Respondent subcontractors, it must first, be found liable to the Plaintiffs, AND second, such liability must be a direct and proximate result of the Respondent subcontractors' negligence.

None of the Respondent subcontractors have offered any rebuttal to the fact that the plain and unambiguous allegations of Paragraph 33 expressly limit BFS's indemnification cause of action to liability or damage resulting from the Respondent subcontractors' negligence.

Further, BFS's indemnification cause of action is pled with an alternative statement of recovery for indemnification provided by the common law. See Paragraph 32, A. p. 136 ("That the circumstances herein give rise to a special relationship between Builders FirstSource and [Respondent subcontractors]."); Paragraph 34, A. p. 137 (That BFS is entitled to full contractual **and common law indemnification from [Respondent subcontractors], for and against any liability which BFS is found to have to the Plaintiffs...**")(emphasis added). Because BFS's common law indemnity claim is pled in the same cause of action, it is necessarily premised on the exact same allegations as its contractual indemnity claim. See A. pp. 136-137. Neither the Respondent subcontractors, nor the lower court, nor the court of appeals took issue with BFS's common law indemnity claim for *any* liability proceeding to trial. Further, the court of appeals acknowledged that the trial court agreed that BFS's equitable indemnification claim presented a question of fact which necessarily precluded summary judgment on

such cause of action. See Opinion, A. p. 554. Moreover, neither the lower court nor the court of appeals provides any insight or explanation as to how BFS's common law indemnity claim for *any* liability may proceed to trial, but BFS's contractual indemnity claim for *any* liability may not. Such a result underscores the fact that the trial court's and the court of appeals' selective analysis of BFS's pleading and subsequent determinations were improper and in error.

Contrary to the determination of the court of appeals, BFS sought recovery for "any" amount because the Respondent subcontractors agreed in their contracts to indemnify BFS for "any" liability and damage that is determined to have resulted from the Respondent subcontractors' negligence. See A. pp. 218, 534 (**"TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR ... FROM AND AGAINST ANY AND ALL ... LIABILITIES ... ARISING OUT OF OR RESULTING FROM ... PROPERTY DAMAGE, INCLUDING LOSS OF USE OF PROPERTY, ARISING OR ALLEGED TO ARISE OUT OF OR IN ANY WAY RELATED TO ... THE SUBCONTRACTOR'S PERFORMANCE OF THE WORK ... BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR"**)(emphasis in original).

Just as BFS's common law indemnification claim is allowed to proceed to trial, so too should BFS's contractual indemnification claim premised on the exact same allegations that limit its recovery to liability and damage that is found to have resulted from the Respondent subcontractors' negligence and not from BFS's own negligence. For these reasons, the Court must reverse and remand BFS's contractual indemnification claims to proceed to trial.

B. *Even if* BFS's pleadings could be construed to encompass recovery for BFS's own negligence, by seeking recovery for "any" amount, the pleadings would

nonetheless also encompass claims for damages caused by the negligence of the Respondent subcontractors.

In seeking recovery of "any" amounts, BFS maintains it sought recovery only for liability or damage determined to result from the Respondent subcontractors' negligence. When BFS is seeking recovery for "any" sums, the use of the word "any" is meant in the sense of its definition – it is used to express a lack of restriction in the amount of recovery sought. Thus, "any" used in the context of BFS's contractual and common law indemnity claims, which are limited to liability or damage resulting from the Respondent subcontractors' negligence, is intended to mean any sums attributable to the Respondent subcontractor's negligence.

The court of appeals erroneously determined that when BFS seeks recovery for "any" sums, the use of the word "any" is meant to express a lack of restriction in the source of causation. The court of appeals determined that BFS's use of "any" provides that the particular recovery is unrestricted in that "any" amounts could be those amounts attributable to any source of negligence — whether by BFS or by BFS's subcontractor, or by the concurrent negligence of both parties. However, in order to reach such result, the court of appeals must ignore the limiting language of Paragraph 33.

Even assuming the Court adopts a broader interpretation of BFS's pleadings, it must acknowledge that "any" amounts, if it includes amounts resulting from BFS's negligence, must equally encompass amounts resulting from the Respondent subcontractors' negligence, whether sole or concurrent.

If the Court adopts a broader interpretation of BFS's pleadings, it must recognize that parties routinely plead claims seeking damages they may ultimately be unable to recover. Importantly, this overly expansive pleading does not preclude parties' recovery of damages to

which they are otherwise entitled. The propriety of such pleading was implicitly recognized by the court of appeals in its disposition of the Concord & Cumberland case.

In Concord & Cumberland, the general contractor 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 caused by *both* the negligence of its subcontractor, and the negligence of the general contractor itself. Thus, despite the expansive indemnification cause of action as pled by the general contractor, and despite overt representations by the general contractor that it was seeking indemnity for damages resulting from its own negligence, the court of appeals in Concord & Cumberland affirmed the trial court's decision that "*limited indemnification to damages resulting from the work Muhler performed.*" Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 645, 819 S.E.2d 166, 169–70 (Ct. App. 2018) (emphasis added).

Here, even if BFS fails on its "alleged plea to recover for its own negligence," the alternative plea for damages related to the negligence of the Respondent subcontractors should remain fully intact. Therefore, at trial, notwithstanding any potential finding of negligence on the part of BFS, BFS nevertheless is entitled to recover for such damages which a jury may find to have resulted from the negligence of the Respondent subcontractors.

To the extent that the court of appeals determined that the BFS indemnification cause of action did not encompass claims seeking contractual indemnity for damages resulting from the

subcontractors' negligence, (whether sole or concurrent), such determination is inconsistent with the rules for pleadings outlined in the South Carolina Rules of Civil Procedure and contradicts the court of appeals' own precedent. As such, this Court should reverse and remand BFS's contractual indemnification claims for liability and/or damage resulting from the Respondent subcontractors' negligence to proceed to trial.

II. An indemnification provision, which limits indemnification to damages resulting from negligence of the subcontractor/indemnitor, relied upon in support of an indemnification claim should be construed under general rules of contract construction rather than under the heightened "clear and unequivocal" standard.

BFS recognizes that, under common law, asserting a claim for contractual indemnity seeking recovery against liability for damages caused by the negligence of BFS itself would require that the relevant indemnity provision be subjected to the heightened "clear and unequivocal" standard. BFS also recognizes and has admitted on the record that the relevant indemnity provisions at issue here are not sufficiently clear and unequivocal to impose such an obligation upon the Respondent subcontractors. However, BFS is not seeking this type of indemnity from the Respondent subcontractors in the instant litigation, and the application of the clear and unequivocal standard is thus inappropriate and inconsistent with precedent.

As demonstrated hereinabove, BFS has pled a cause of action in contractual indemnity to recover for liability and/or damage caused by the negligence of the Respondent subcontractors. Under the circumstances, the relevant contractual provisions authorizing such indemnity should have been analyzed in accordance with the general rules of contract construction. Such claims should, moreover, have withstood summary judgment as there have been no findings of fact pertaining to Plaintiffs' claims and purported damages. The court of appeals was in error in failing

to recognize the existence of such valid indemnity claims, and in its failure to apply the appropriate standard in analyzing the relevant contractual provisions relied upon in support of such claims.

If the court of appeals appreciated that BFS had in fact pled an indemnification cause of action for the Respondent subcontractors' negligence, it nonetheless erred by applying the heightened "clear and unequivocal" standard to both BFS's contractual indemnification claim for the subcontractor's negligence and BFS's alleged contractual indemnification claim for its own negligence. The court of appeals affirmed the trial court's finding that such claims failed as a matter of law because the indemnity provisions were not sufficiently "clear and unequivocal." Prior to the court of appeals' Opinion, such application of the heightened "clear and unequivocal" standard, had never been made by a South Carolina court.

Our courts have historically recognized that contractual indemnity provisions are to be construed in accordance with rules of construction of contracts generally. 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). The exception to this basic rule arises **only** when a party seeks to be indemnified from its own negligent acts, and in such instance, the heightened "clear and unequivocal terms" standard will be applied to the indemnity provision. See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 490, 763 S.E.2d 19, 20 (2014); Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003).

In Concord & Cumberland, the court of appeals acknowledged and attempted to clarify those circumstances under which the respective standards are to be applied. However, here, the court of appeals' opinion runs afoul of and directly contradicts these precedential cases.

In Concord & Cumberland, Superior was a general contractor who hired Muhler as its subcontractor. Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC,

424 S.C. 639, 643, 819 S.E.2d 166, 168 (Ct. App. 2018). When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to their contract. See *Id.* at 645, 169. Superior claimed that the contractual provisions required Muhler to indemnify Superior, and that Superior's right to indemnity was not lessened by any concurrent negligence of or causation by Superior. *Id.* Muhler countered that the relevant contract provisions did not require it to indemnify Superior for Superior's "own wrong-doing." *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* (as opposed to indemnity for the negligence of its subcontractor), it was required to show that the contract language granting that right was set forth in clear and unequivocal terms. *Id.* Further, the court of appeals found that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence. *Id.* at 646, 170. Notably, the court of appeals in Concord & Cumberland did not hold that the heightened standard applied to Superior's claim seeking indemnification for Muhler's sole or concurrent negligence. *Id.* Because the court of appeals 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.*" *Id.* at 645 (emphasis added), 657. Thus, despite overt representations by the general contractor that it was seeking indemnity for damages resulting from both its own negligence and the negligence of its subcontractor, the court of appeals 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, the Concord & Cumberland Court recognized that Superior's contractual indemnification claim 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. Further, the court recognized that the two types of claims are subject to two different standards of review. To the claim for indemnification for Superior's own negligence, the court applied the heightened clear and unequivocal standard and found that the contract could not meet that heightened standard; however, for the second type of claim — Superior's claim to recover for its subcontractor's negligence — the Court recognized that the contract provision allowing for such indemnification would be construed “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 v. Beacon Mfg. Co., 313 S.C. at 453, 438 S.E.2d at 272).

Here, the trial court erred by precluding BFS from proceeding to trial on its claims seeking contractual indemnity from the Respondent subcontractors' negligence. IF BFS were found to be liable for Plaintiffs' damages, the jury would then determine if the liability resulted from BFS's negligence, the negligence of the Respondent subcontractors, or both. IF the jury determined that Plaintiffs' damages resulted from both BFS's negligence and the negligence of the Respondent subcontractors, BFS should have been allowed to proceed on its contractual indemnification claim for such damages as are found to result from the Respondent subcontractor's negligence. Such a result is not novel in South Carolina. See e.g. Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993)(where indemnitor security company was required to indemnify indemnitee warehouse lessee for any liability it may have to warehouse owners for fire set by security company employee even if lessee was negligent and thus contributed to its own damage since security company agreed to indemnify the lessee for damages arising “in whole or in part” from acts of its employees, and it remained undisputed that damage arose “in part” from employee's act of setting fire.); S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 135 S.E.2d 613 (1964) (affirming judgment for full recovery of contractual indemnity for

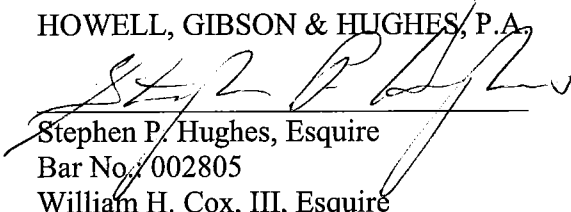
damages arising from defective construction based on contract requiring indemnity for “any and all claims for damages to persons and/or property arising out of or in any way connected with the performance of any work covered by this contract”).

As set forth above, the contract provisions at issue limit the Respondent subcontractor’s obligation to indemnify BFS for damages resulting from the negligent acts or omissions of the Respondent subcontractor. See A. pp. 218, 534. As it relates to BFS’s indemnification cause of action *limited to damages resulting from the Work the Respondent subcontractors’ performed*, the indemnity provisions should have been construed in accordance with rules for construction of contracts generally, and not under the heightened clear and unequivocal standard. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. at 645, 647.

CONCLUSION

Because the Opinion of the court of appeals in this case ignored BFS’s pleading asserting a contractual indemnification claim against the Respondent subcontractors seeking to recover only for liability resulting only from the subcontractors’ negligence, the Supreme Court should reverse and remand BFS’s contractual indemnification cause of action to the trial court.

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