

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 Exteriors, LLC are
Respondents.

APPENDIX VOLUME III

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The South Carolina Court of Appeals

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February 26, 2025

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Re: Builders Firstsource-Southeast v. MI Windows
Appellate Case No. 2020-000415

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in blue ink that reads "Catherine Hannisai, deputy". The signature is fluid and cursive, with the first name "Catherine" being more prominent.

CLERK

cc: The Honorable Clifton Newman

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Builders Firstsource-Southeast Group, LLC, Appellant,

v.

MI Windows And Doors, INC.; ECC Contracting, LLC;
Hurley Services, LLC; and Charleston Exteriors, LLC,
Respondents.

Appellate Case No. 2020-000415

Appeal From Berkeley County
Clifton Newman, Circuit Court Judge

Unpublished Opinion No. 2025-UP-072
Heard March 15, 2023 – Filed February 26, 2025

**AFFIRMED IN PART, VACATED IN PART, AND
REMANDED**

Stephen P. Hughes and William Hewitt Cox, III, both of
Howell Gibson & Hughes, PA, of Beaufort, for
Appellant.

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LLC.

Derek Michael Newberry, of Hall Booth Smith, PC, of Mount Pleasant, for Respondents MI Windows and Doors, Inc. and Hurley Services, LLC.

Christopher Clay Olson, of Gordon & Rees, LLP of Charleston, for Respondent Charleston Exteriors, LLC.

MCDONALD, J.: Builders FirstSource-Southeast Group (BFS) appeals an order granting summary judgment, arguing the circuit court erred in applying a "clear and unequivocal" standard to the analysis of its contractual indemnity language and in finding its claims against certain subcontractors were barred by the statute of limitations. We affirm in part, vacate in part, and remand.

Facts and Procedural History

In developing The Abbey at Spring Grove (The Abbey), a residential community in Berkeley County, Lennar Carolinas (Lennar) contracted with BFS to provide and install windows and doors with associated weatherproofing, flashing, and other necessary components. Two BFS subcontractors, ECC Contracting, LLC (ECC) and Charleston Exteriors, LLC (collectively, Respondents), installed the windows at The Abbey. In 2008, BFS entered a Master Subcontractor Agreement (the Agreement) with ECC. BFS entered an identical Agreement with Charleston Exteriors in 2012.

In October 2014, Patricia Damico and other property owners in The Abbey brought construction defect litigation against Lennar and others (the *Damico* litigation).¹ In November 2015, the property owners amended their complaint to add claims related to the exterior windows. Lennar answered and brought third-party claims against various subcontractors, including BFS. Lennar's action against BFS included claims for indemnification, breach of warranty, breach of contract, negligence, and products liability. BFS answered Lennar's third-party complaint on December 15, 2015.

On December 21, 2018, BFS filed this action claiming Respondents were responsible for "provision of materials and/or services in connection with the

¹ See *Damico v. Lennar*, 437 S.C. 596, 879 S.E.2d 746 (2022), *cert. denied*, 143 S.Ct. 2581 (2023).

installation of the windows and doors of the subject structures" at The Abbey and sued them for equitable indemnification, contractual indemnification, breach of warranty, breach of contract, negligence, and contribution. BFS alleged it "has been subjected to liability and has incurred consequential damages in having to expend attorneys[] fees and costs" in defending itself in the *Damico* litigation.

In 2019, BFS moved to consolidate this matter with *Damico*, asserting the facts in controversy were identical and the cases involved common questions of law. ECC moved for summary judgment, arguing BFS's claims were barred by the statute of limitations applicable to contract claims. ECC further challenged BFS's contractual indemnity claims as meritless under the "clear and unequivocal" standard and alternatively argued BFS lacked standing because its claims were unripe. Charleston Exteriors raised similar dispositive arguments.

After a hearing, the circuit court granted Respondents summary judgment on BFS's claims for negligence, breach of contract, breach of warranty, and contractual indemnification. The circuit court found the Agreement's indemnification provisions were neither clear nor unequivocal; thus, BFS could not seek contractual indemnification from Respondents for its own negligence, whether concurrent or sole. The circuit court further found BFS's claims for contractual indemnification, negligence, breach of contract, and breach of warranty were barred by the applicable statute of limitations because BFS filed its action against the subcontractors more than three years after receiving notice of its potential claims.² As BFS's remaining non-indemnity claims were not separate and distinct from the claims made in *Damico*, the circuit court granted summary judgment on this ground as well. The circuit court found BFS's claims for equitable indemnification and contribution should be consolidated with *Damico*, which at the time of the circuit court arguments had been stayed. The court agreed with BFS that its equitable indemnification claim presented a question of fact and noted the contribution claim had not been challenged at summary judgment.

BFS filed a Rule 59(e), SCRPC, motion, asserting the circuit court erred in applying the statute of limitations to bar some of its claims. In this filing, BFS also addressed the circuit court's interpretation of *Concord & Cumberland Horizontal*

² See S.C. Code Ann. § 15-3-530(1) (2005 & Supp. 2024) (providing a three-year statute of limitations for "an action upon a contract, obligation, or liability, express or implied").

Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 655, 819 S.E.2d 166, 175 (Ct. App. 2018), stating:

This Court's December 6, 2019 Order correctly finds that the indemnity language at issue does not meet the elevated standard of being clear and unequivocal and thus the Plaintiff cannot maintain indemnification claims for Plaintiff's negligence. Nevertheless, pursuant to *Concord and Cumberland* the Plaintiff still has valid indemnification claims for Defendants' negligence.

At the hearing on its Rule 59(e) motion, BFS argued the circuit court should consider whether it lacked jurisdiction to hear the summary judgment motions in light of the *Damico* appeal because all matters affected by the appeal had been automatically stayed. Following this hearing, the circuit court issued an amended summary judgment order, noting BFS had actual notice of its potential claims against the subcontractors as of the date of its December 2015 answer to Lennar's third-party complaint. The circuit court further found the statute of limitations for BFS's contract-related claims began to run upon the filing of this responsive pleading and that these claims were time-barred. The circuit court again found the Agreement's language was confusing and contradictory, and that the indemnity provisions neither clearly nor unequivocally required Respondents to indemnify BFS for its own negligence. BFS filed a Rule 59(e) motion as to the amended summary judgment order, which the circuit court denied.

Analysis

"Rule 56(c) of the South Carolina Rules of Civil Procedure provides that the moving party is entitled to summary judgment 'if the [evidence before the court] show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023) (alterations by the court) (quoting Rule 56(c), SCRCP).

I. Contractual Indemnity and the "Clear and Unequivocal" Standard³

³ The heightened "clear and unequivocal" standard applies when "an indemnitee is seeking indemnification for its negligence, whether sole or concurrent." *Concord & Cumberland*, 424 S.C. at 649, 819 S.E.2d at 172. We addressed this standard and the language of BFS's relevant master subcontractor Agreements in *Builders*

BFS argues the circuit court erred in applying a heightened standard to the Agreement's indemnity language because BFS does not seek indemnification for its own negligence. BFS further contends that in granting summary judgment, the circuit court implicitly found Respondents were not negligent. We disagree.

Our review of BFS's complaint demonstrates it seeks to be indemnified for its concurrent—and perhaps sole—negligence. BFS claims:

30. That the Defendants, [ECC], Charleston Exteriors, LLC, and Hurley Services, LLC were responsible for provision of materials and/or services in connection with the installation of the windows and doors of the subject structures at The [Abbey] for proper quality control, and for compliance with the contract documents, industry standards, and requirements of relevant building codes. In the event that the Plaintiff and/or [Lennar] in the underlying action establishes that the materials and/or services provided by [BFS] were not in compliance with the relevant contract documents, industry standards, and/or building code requirements, then and in that event [ECC], Charleston Exteriors, LLC and Hurley Services, LLC has [sic] failed to properly execute its duties, which have allegedly caused the damages alleged by Plaintiffs and/or [Lennar] in the underlying action.

....

33. That to the extent, if any, that [BFS] may be held liable to the Plaintiffs and/or [Lennar], 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 [ECC], Charleston Exteriors, LLC and Hurley Services, LLC which have damaged [BFS], as [BFS] has been subjected to liability

FirstSource-Southeast Group, LLC v. Palmetto Trim and Renovation, et al., Op. No. 6099 (S.C. Ct. App. filed Feb. 12, 2025) (Howard Adv. Sh. No. 7 at 7). Our decision there provides additional grounds for sustaining the circuit court's analysis of the contractual language in this case.

and has incurred consequential damages in having to expend attorneys['] fees and costs in defending the claims of Plaintiffs and/or [Lennar] in the underlying action.

34. That [BFS] is entitled to full contractual and common law indemnification from [ECC] for and against any liability which [BFS] is found to have to the Plaintiffs, [Lennar], 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], Charleston Exteriors, LLC and Hurley Services, LLC entitling [BFS] to recover. . . . its attorneys['] fees, costs, and other expenses incurred in defending the underlying action, and further entitling [BFS] to recover from the ECC any sums for which [BFS] may be held liable to the Plaintiffs, to [Lennar], and/or to others in such action.

BFS asserts several times in its complaint that it seeks recovery for *any* sums for which it may be held liable to Lennar or the *Damico* plaintiffs, rather than only those sums which might be attributable to Respondents' purported sole negligence. For this reason—and due to the language of BFS's own Agreement—the circuit court did not err in finding BFS seeks indemnification for its own negligence.⁴

II. Statute of Limitations and Contractual Indemnity

BFS next asserts the circuit court erred in finding the statute of limitations on its contractual indemnity claims began to run before it made any payment in the *Damico* litigation and before final judgment was entered against it. We agree.

"[A]n action upon a contract, obligation, or liability, express or implied" must be brought within three years. § 15-3-350(1). "As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant." *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). "Our courts have recognized two types of indemnity

⁴ We further note BFS's argument that the Agreement's indemnity language is clear and unequivocal has been waived by the concession in BFS's Rule 59(e) filing. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal.").

contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss." *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 n.8, 781 S.E.2d 737, 742 n.8 (Ct. App. 2015) (citing *Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112, 154 S.E. 106, 108 (1930)). "In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract." *Id.*

Here, the circuit court erred in finding BFS's claims were barred by the statute of limitations because when BFS answered Lennar's third-party complaint in 2015, it had neither been found liable nor paid any injured party. *See, e.g., Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 568, 769 S.E.2d 847, 852-53 (2015) (Toal, C.J., dissenting) ("[T]he innocent party's right to sue for indemnification does not accrue until it actually sustains damages through either paying an injured party on behalf of the tortfeasor, or incurring attorneys' fees from defending itself in the underlying tort suit. Therefore, there is no justiciable case or controversy until the conclusion of the underlying tort action, regardless of its outcome."). Accordingly, we vacate the circuit court's statute of limitations findings.

III. Jurisdiction to hear Respondents' Summary Judgment Motions

Finally, we reject BFS's argument that the circuit court lacked jurisdiction to hear dispositive motions until the *Damico* litigation was remanded. The authority of a lower court in a case that has been appealed does not involve a question of subject matter jurisdiction. *See Tillman v. Oakes*, 398 S.C. 245, 255 n.3, 728 S.E.2d 45, 51 n.3 (Ct. App. 2012) ("The reference in Rules 205 and 241(a) to the 'jurisdiction' of the lower courts does not refer to subject matter jurisdiction. Rather, the rules govern the circumstances under which the exclusive appellate jurisdiction Rule 205 grants to the appellate court deprives the lower court of the power to address a particular issue, or 'matter,' during the pendency of the appeal."). In this case, the circuit court properly heard and ruled on the challenged motions.

Conclusion

For the foregoing reasons, the circuit court's order is

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

THOMAS and HEWITT, JJ., concur.

The South Carolina Court of Appeals

Builders Firstsource-Southeast Group, LLC, Appellant,

v.

MI Windows And Doors, INC.; ECC Contracting, LLC;
Hurley Services, LLC; and Charleston Exteriors, LLC,
Respondents.

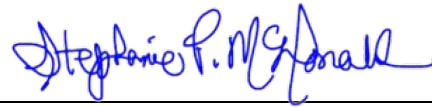
Appellate Case No. 2020-000415

ORDER

Appellant and Respondent ECC Contracting, LLC have both filed petitions for rehearing. After careful consideration, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.



J.



J.



J.

Columbia, South Carolina

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FILED
May 16 2025

000559

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Mar 13 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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.

PETITION FOR REHEARING

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Appellant Builders FirstSource-Southeast Group, LLC (hereinafter “BFS”) respectfully petitions this Court for rehearing.

The February 26, 2025 Opinion (herein after “Opinion”) (a) erroneously applies the heightened “clear and unequivocal” standard to claims seeking indemnification against liability for the subcontractors’ negligence.; (b) erroneously fails to address the first question on appeal, namely, whether genuine issues of material fact preclude summary judgment; (c) overlooks multiple allegations in BFS’ pleadings asserting contractual indemnity claims to recover damages resulting from the subcontractors’ negligence; and (d) misapprehends the plain language of the contracts.

BFS requests that the Court carefully reconsider and revise the Opinion to be consistent with relevant law.

I. The Opinion erroneously applied the heightened “*clear and unequivocal*” standard to claims seeking indemnity limited to damages resulting from the subcontractors’ negligence.

The Opinion found, based upon the Court’s misconstruction of the BFS’ pleadings, that claims asserted by BFS included contractual indemnification against liability for damages resulting from its own negligence. The Court then determined that the contractual indemnity claims failed as a matter of law, because the contractual provisions were not sufficiently clear and unequivocal. As noted more fully hereinafter, such a broad application of the “clear and unequivocal” standard is contrary to established law, including this Court’s own precedent.

In construing and applying indemnification language nearly identical to that at issue in this case, the Court in *Concord & Cumberland*, while precluding the general contractor from recovering indemnity for its own negligence, nonetheless allowed indemnity for damages caused by the subcontractor’s concurrent negligence.

The general contractor in *Concord & Cumberland* 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 occasioned by both the negligence of its subcontractor, and the negligence of the general contractor itself.

The *Concord & Cumberland* Court, prior to its analysis, recognized specifically that “[t]ypically, courts will construe an indemnification contract ‘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*, 313 S.C. at 453, 438 S.E.2d at 272. This Court also noted, however, that “ ‘the basic rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms.’ ” *Id.* (*quoting Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989).

As such, the Court of Appeals, in applying the contractual provision at issue in *Concord & Cumberland* (a provision virtually identical to the provision at issue here), determined that the language of the provision was not sufficiently clear and unequivocal to require the subcontractor to indemnify the general contractor against liability for damages caused by the general contractor’s own negligence. Nonetheless, in affirming the ruling of the trial court, the Court specifically determined that the relevant indemnity provision did in fact encompass claims and damages to the

extent caused in whole or in part by any negligence of the subcontractor. *See Concord & Cumberland*, 424 S.C. at 652–53:

“Specifically, we agree with the *Mautz* and *Braegelmann* courts that the phrase, ‘to the extent caused ... in whole or in any part by any negligent act or omission of [Muhler],’ limits Muhler’s obligation to indemnify to damages and losses but only to the extent they were caused by the negligence of Muhler and its subcontractors. Muhler’s indemnity obligation extends to losses Muhler only causes in part, but does not clearly and unequivocally require Muhler to indemnify for the negligence of others that contributed to the same loss.”

Thus, despite overt representations by the general contractor that it was seeking indemnity for damages resulting from its own negligence, this Court, in *Concord & Cumberland*, nonetheless allowed the general contractor to recover from its subcontractor for damages resulting from the work of the subcontractor.

The *Concord & Cumberland* Court clearly recognized two types of claims present in the general contractual indemnification pleading: a claim for indemnity for damages to the extent caused by the general contractor itself, and a claim for indemnity for damages to the extent caused by the subcontractor. The former is subject to the heightened “clear and unequivocal” standard; ***the latter is not***. Instead, a claim for indemnity for damages caused by one’s subcontractor is to be construed “in accordance with the rules for the construction of contracts generally.”

This Court has failed to distinguish between these two types of claims in this case.¹ Here, the Opinion, contrary to the Court’s own precedent, has applied the heightened standard to all claims of BFS, when the relevant contractual indemnity provisions should have been evaluated under general rules of contract construction for BFS claims seeking indemnity for the subcontractors’ negligence. The Opinion erroneously precludes BFS from any recovery in

¹ As noted extensively in Section III below, a claim for indemnity for damages occasioned by the subcontractors exists even more explicitly in the BFS pleadings than it did in the pleadings at issue in *Concord & Cumberland*.

contractual indemnity, even if the jury determines that the subcontractors have been solely or concurrently negligent in causing the damages at issue.

The rights sought by BFS, under the *relevant* indemnification provision, are no different and no more expansive than those specifically afforded to the general contractor, by this Court, in *Concord & Cumberland*. The Court should amend the Opinion to follow *Concord & Cumberland* and allow BFS contractual indemnity claims for damages occasioned by the negligence of its subcontractors to proceed to trial.

II. The Opinion ignores the first issue on appeal: did the trial court inappropriately grant summary judgment despite the presence of genuine issues of material fact?

The trial court granted summary judgment notwithstanding the fact that discovery remains outstanding and is far from being complete, either in this matter or in the companion *Damico* litigation. The presence of genuine issues of material fact, precluding summary judgment, is the first issue on appeal, and the Opinion ignores the question altogether.

It has been the consistent practice of the court to consider motions for summary judgement only following completion of discovery. “[S]ummary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law.” *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). At this stage in the litigation, there remain significant questions concerning, among other issues, the nature and extent of any construction-related deficiencies in the subject property, the scopes of work as implemented by the respective parties, and the liability, if any, of the parties for the alleged damage claims of the Plaintiff, Damico. All of these issues are subject to further discovery, and any questions of fact must be decided by the trier of fact. For these reasons, the trial court erred by even entertaining the motions for summary judgement, much more ruling on the same.

The Opinion does not address the first question on appeal as submitted by BFS and confirmed by Charleston Exteriors in its Initial Brief. In light of the instructions of our appellate courts, the Opinion must be revised to reverse the Order of the trial court and remand for discovery to be completed regarding the allegations and claims at issue in this litigation and the companion *Damico* litigation.

III. The Opinion overlooked multiple allegations in the pleadings asserting indemnity claims for damage resulting from the subcontractors' negligence.

BFS has repeatedly attempted to draw to the court's attention the fact that it has pled a claim for indemnification for damages resulting from the subcontractors' negligence, and not for damages occasioned by the negligence of BFS. The trial court, and now this Court, has nonetheless overlooked and ignored the relevant allegations for the claims BFS actually asserted.

a. Allegations within the Complaint

At paragraph 2 of the Complaint, BFS alleged that the subcontractors provided materials and/or services in connection with window and/or door installation as the subject residences. At paragraph 3 of the Complaint, BFS alleged that Plaintiffs Damico filed separate litigation seeking recovery of damages allegedly resulting from deficiencies in construction on the subject residences. At paragraphs 4 and 5 of the Complaint, alleged that Lennar Carolinas filed third-party claims against BFS in the Plaintiffs Damico litigation. At paragraph 6 of the Complaint, BFS states that "BFS has denied the material allegations as asserted against it." All of the foregoing allegations are relevant to BFS' indemnification claims for the subcontractors' negligence because it is BFS' contention that the subcontractors, as the parties that actually installed the windows and/or doors allegedly at issue, are the parties at fault for any damage, not BFS.

As such, in its indemnification cause of action against the subcontractors, BFS alleged 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.” Complaint paragraph 29. Therefore, BFS’ allegation at paragraph 6, denying the material allegations asserted against it, i.e. that it denies any and all liability, is *repeated, realleged, and reiterated* in the indemnification cause of action against the subcontractors. The trial court and this Court have overlooked this key allegation and contention of BFS which relates directly to its indemnification claim for the subcontractors’ negligence.

BFS’ indemnification cause of action continues in paragraph 30 where BFS reiterates its contention that the subcontractors performed the window and door installation work that is allegedly at issue. Further, the allegations in paragraph 30 limit BFS’ indemnification solely to those damages resulting from work of the subcontractors which was not in compliance with the relevant contract documents, industry standards, and/or building code requirements. The allegations in paragraph 30 are consistent with the basic principle and definition of indemnity – “‘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) (*quoting Laurens emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers*, 355 S.C. 104,109 (2003) (*quoting Campbell v. Beacon Mfg. Co.*, 313 S.C. 451, 454 (Ct. App. 1993))).

BFS’ indemnification claim continues at paragraph 31 where BFS alleges that “the respective subcontracts between [BFS] and [subcontractors] provide for contractual indemnification in favor of BFS” and at paragraph 32 where BFS alleges that “the circumstances herein give rise to a special relationship between [BFS] and [subcontractors].”

Consistent with the foregoing allegations, BFS' indemnification claim against the subcontractors continues at paragraphs 33 and 34 of the Complaint where BFS alleges that

“to the extent, if any, that BFS 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 [subcontractors] which have damaged BFS, as [BFS], 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.”

and

“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 [subcontractors] entitling BFS to recover from [subcontractors] its attorneys fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from ECC any sums for which BFS may be held liable to the Plaintiffs, to Lennar Carolinas, LLC, and/or to others in such action.”

When properly read in conjunction with the allegations of the entire indemnification cause of action, including the allegations incorporated by reference, there are no allegations in paragraphs 33 or 34 that do not comply with the basic principles of indemnification.

Notwithstanding the allegations set forth in paragraphs 2, 3, 4, 5, 6, 29, 30, 31, 32, 33, and 34 of the Complaint, the trial court held, and this Court affirms, that BFS seeks indemnification from the subcontractors for BFS' own negligence. Specifically, the Opinion states “BFS asserts several times in its complaint that it seeks recovery for *any* sums for which it may be held liable to Lennar or the *Damico* plaintiffs, rather than only those sums which might be attributable to [subcontractors]' purported sole negligence.” Page 8, Opinion. However, in order to reach such a determination, this Court ***must necessarily overlook and ignore the allegations set forth in paragraphs 2, 3, 4, 5, 6, 29, 30, 31, 32, 33, and 34 of the Complaint.*** The Court has ignored (a)

that BFS has consistently denied all allegations against it, (b) that BFS has specifically contended that the subcontractors' acts or omissions are the cause of any damages, and (c) that *any* sums which BFS may be held liable are necessarily attributable to the subcontractors' purported negligence under BFS' indemnification claim. Of course, BFS' indemnification cause of action is comprised of allegations at this juncture and BFS must prove its allegations, i.e. establish that the work of the subcontractors caused the damages allegedly at issue in the *Damico* litigation, before any subcontractor may be liable to indemnify BFS for damages resulting from the subcontractor's negligence.

b. Support from the Rules of Civil Procedure

Even if BFS had pled a cause of action seeking indemnification for its own negligence, nothing within the Rules of Civil Procedure precludes BFS from seeking a more expansive recovery than the evidence might support. Rule 8(e)(1), SCRCF states that "no technical forms of a pleading or motions are required." Rule 8(e)(2), SCRCF provides that a party may set forth two or more statements of a cause of action alternatively or hypothetically either in one count or in separate counts. Further, Rule 8(e)(2), SCRCF provides that a pleading is not made insufficient by the insufficiency of one or more of the alternative statements. Moreover, Rule 8(e)(2) continues and provides further that "a party may also state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." Rule 8(f), SCRCF provides "[a]ll pleadings shall be so construed as to do substantial justice to all parties." The Court's Opinion clearly ignores these foregoing basic rules of civil procedure and has effectively penalized BFS for the way in which it pled its indemnification cause of action.

c. Other Stipulations and Certifications on the Record.

Moreover, and equally importantly, BFS, no fewer than three times during oral arguments on the motions for summary judgment, advised the Court and subcontractors' counsel that it was *only* seeking indemnification *for the subcontractors' negligence*. (R. pp. 352, 356-57, 362-63). In its Motion for Reconsideration of the Court's December 6, 2019 Order, BFS pointed out that while BFS may not be able to maintain indemnity claims for its own negligence, BFS was entitled to pursue its contractual indemnity claim against subcontractors based upon the subcontractors' own negligence. (R. pp. 280-281). And BFS reiterated this position in oral arguments on the motion for reconsideration. (R. pp. 383-84). Again, in BFS' filed Memorandum in Opposition to the Proposed Amended Order Granting Defendants' Motion for Summary Judgment, BFS stipulated to the Court that "BFS is not seeking to have [subcontractors] indemnify BFS for BFS's own negligence. BFS is seeking to have [subcontractors] indemnify BFS for [subcontractors]' own negligence." (R. p. 290) (emphasis in original). Despite all of the foregoing stipulations and Rule 11 certifications by BFS counsel on the record that BFS was properly seeking indemnification for the subcontractors' negligence, and not for its own, the trial court, without any explanation, ignored BFS and granted summary judgment as to the contractual indemnity claim on the basis that BFS was seeking to be indemnified for its own negligence.

Because the Court overlooked and ignored the allegations – set forth in paragraphs 2, 3, 4, 5, 6, 29, 30, 31, 32, 33, and 34 of the Complaint, in all of the subsequent stipulations and Rule 11 certifications by BFS counsel in subsequent pleadings, and on the record during hearings – that BFS' indemnification claim is limited to damages resulting from the subcontractors' negligence, this Court should revise its Opinion to reverse the Order of the trial court and remand for discovery to be completed as to BFS contractual indemnity claims for the subcontractors' negligence.

IV. The Opinion misapprehended the plain language in the relevant contracts.

The Opinion in footnote 3 states that “[the Court’s] decision [in *Builders FirstSource-Southeast Group, LLC v. Palmetto Trim and Renovation, et al.*, Op. No. 6099 (S.C. Ct. App. Filed Feb. 12, 2025)] provides additional grounds for sustaining the circuit court’s analysis of the contractual language in this case.” First, many of the issues on appeal in the BFS v. Palmetto Trim matter were not before the lower court here and were not on appeal before this Court in this matter. Nevertheless, because the Opinion here appears to be adopting the rationale of Opinion No. 6099, BFS craves reference to its Petition for Rehearing in BFS v. Palmetto Trim appeal which sets forth in detail the BFS contentions of error.

Returning to the appeal here, as noted by both ECC and Charleston Exteriors in their memoranda² and arguments by counsel during the hearing on their motions for summary judgment,

² The Opinion in footnote 4 appears to suggest that BFS is precluded from arguing that the indemnity provision is clear and unequivocal because of the “concession” in BFS’ Rule 59(e) filing. Contrary to the footnote’s assertion, BFS has **never** contended that the indemnity provision meets the heightened “clear and unequivocal” standard required to recover indemnification for BFS’ negligence. BFS has **only** contended and stipulated that it is seeking indemnification only for damages resulting from the subcontractors’ negligence, and therefore, the indemnity provision need not meet the heightened “clear and unequivocal” standard. Thus, pursuant to *Concord and Cumberland*, BFS should be able to maintain indemnification claims for the subcontractors’ negligence. Moreover, any *issue preclusion* based on an *inconsistent position* should be applied to subcontractors as both subcontractors took the position in their pleadings and conceded during oral argument that **there is only one relevant indemnification provision that relates to property damage at issue in this litigation**. See R. pp. 170 (ECC Memorandum), 245 (Chs Ext Memorandum), 337-338 (ECC oral argument), 341-342 (ECC oral argument), 345 and 347 (Chs Ext oral argument). Further, the subcontractors reiterated that there is only one indemnity provision at issue in this litigation and that the lone relevant indemnity provision is substantially the same as that at issue in *Concord and Cumberland*. See *Id.* at pp. 337-338, 341-342, 345 and 347. And as BFS has tried to explain repeatedly to the trial courts and the Court of Appeals, the *Concord and Cumberland* Court held that the similar indemnity provision while not “clear and unequivocal” nevertheless was sufficient to impose the obligation on the subcontractor to indemnify the contractor for damages resulting from the subcontractors’ negligence, whether sole or in part. Therefore, the Court should apply the inconsistent position issue preclusion against the subcontractors and revise the Opinion to reverse the trial court Order as the parties all agreed and conceded on the record multiple times over that there is only one relevant indemnification provision at issue in this litigation.

there is only one relevant indemnification provision in the contracts at issue: the indemnification provision set forth in the first paragraph of Section 5. The only relevant indemnification provision provides in pertinent part that BFS' ability to recover indemnity is limited

TO THE FULLEST EXTENT PERMITTED BY LAW...AND...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.

(R. p. 291).

The Court here has overlooked that the first paragraph of Section 5 applies to losses arising out of property damage resulting from the negligence of the subcontractor, while the second paragraph of Section 5 applies to bodily injury or property damage sustained by the subcontractor, its employees, agents, or representatives.

Here, there are no claims, much less any allegations, of bodily injury or property damage sustained by the subcontractors. Instead, the claims in this matter are for property damages allegedly sustained by the *Damico* Plaintiffs or Lennar Carolinas and which they allege resulted from defective installation of windows and doors – work performed exclusively by BFS' subcontractors.

The second paragraph of Section 5 deals with potential obligations to indemnify for losses not at issue here, has not been cited by BFS in support of its claims, and is irrelevant to the assertion of these claims.

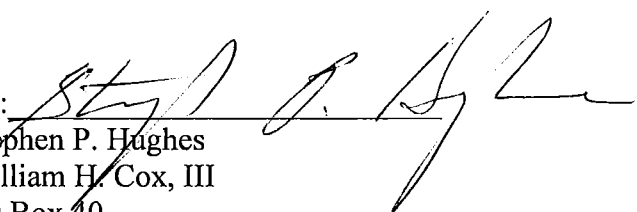
The separate indemnity obligation imposed upon the subcontractor by the first paragraph of Section 5 is explicitly limited to liability for property damage caused by the negligence of the subcontractor. This indemnity provision is expressly authorized by Section 32-2-10 and is what BFS relied upon in its contractual indemnity claims.

For the trial court to claim that these two separate and distinct indemnity provisions are “confusing, conflicting, and neither unclear (sic) or unequivocal” is both irrelevant and simply incorrect. R. p. 17. These two indemnity provisions cover different scenarios and do not contradict each other. Moreover, only the indemnity provision set forth in the first paragraph of Section 5 is relevant to the claims at issue here. Accordingly, the Court should revise its Opinion to reverse the Order of the trial court to be consistent with the aforementioned South Carolina law.

CONCLUSION

Because the February 26, 2025 Opinion (a) erroneously applies the heightened “clear and unequivocal” standard to claims seeking indemnification against liability for the subcontractors’ negligence; (b) erroneously fails to address the first question on appeal, namely, whether genuine issues of material fact preclude summary judgment; (c) erroneously overlooks and ignores not only multiple allegations in BFS’ pleadings, but also repeated representations by BFS counsel, asserting contractual indemnity claims to recover damages resulting from the subcontractors’ negligence; and (d) erroneously misapprehends the plain language of the contracts, the Court should revise its Opinion to reverse the Order of the trial court to allow BFS’ contractual indemnification claims for the subcontractors’ negligence to proceed to trial.

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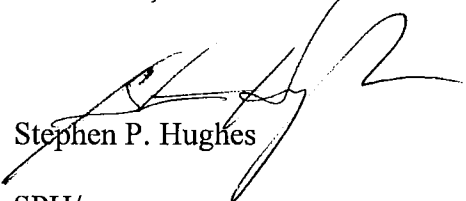
Re: Builders FirstSource Southeast Group, LLC v. ECC Contracting LLC, MI
Windows and Doors, Inc., Hurley Services, LLC, Charleton Exteriors LLC
Civil Action No.: 2020-000415
Our File No.: 11742.1 SPH

Dear Sir or Madam:

Please find enclosed herewith for filing an original and one copy of the *Petition for Rehearing*, together with the Certificate of Service, with regard to the above referenced matter. Also enclosed please find the applicable filing fee in the amount of \$50.00. I would appreciate your filing the Petition for Rehearing and returning a filed clocked copy to me via email at sphughes@hghpa.com, wcox@hghpa.com, and scombites@hghpa.com. If return of the clocked copy must be via U.S. Mail, please advise and I will provide a self-addressed, stamped envelope provided for same.

With kindest regards, I am
Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.


Stephen P. Hughes

SPH/sc
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Mar 13 2025

SC Court of Appeals

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM BERKELEY COUNTY
Court of Common Pleas**

Clifton B. Newman, Circuit Judge

Appellate Case No. 2020-000415

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

Builders FirstSource -Southeast Group, LLC.....**Appellant,**

v.

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

OF WHICH, ECC Contracting, LLC; and Charleston Exteriors, LLC, are....**Respondents**

PETITION FOR REHEARING

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Petitioner/Respondent ECC Contracting, LLC (“ECC”) respectfully requests a rehearing on the Court’s February 28, 2025 Opinion (hereinafter “Opinion”) with regards to the Court’s vacating of the lower court’s ruling that the statute of limitations bars Appellant’s (hereinafter “BFS”) contractual indemnity claim. ECC seeks rehearing for the following reasons:

- 1) The Opinion mistakenly applies claim accrual principles for equitable indemnity claims to BFS’s claim for contractual indemnity;
- 2) The Opinion fails to address the issue of BFS’s legal fees as a separate and distinct character of damages under the terms of the parties’ contract;
- 3) The Opinion fails to recognize the indemnity contract at issue as a contract for indemnity against loss, in which “loss” includes attorney fees;

Thus, ECC requests that the Court reconsider and revise the Opinion to address these issues.

Background Legal Analysis

Our courts have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. See *Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred; whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330, 781 S.E.2d 737, 746 (Ct. App. 2015) (citing *Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112, 154 S.E. 106, 112 (1930)). See also *State-Planters' Bank & Tr. Co. v. First Nat. Bank*, 76 F.2d 527, 532 (4th Cir. 1935) (“Where the contract is not a mere contract to indemnify and save harmless, but a contract to save from a legal liability or claim, the legal liability incurred and not the actual damage sustained is the measure of damage.”) (citing 31 C.J. 435, Sec. 28).

Although a Maryland case, *Pulte v. Parex*, 403 Md. 367 (Md. 2008) explains the distinction between various forms of contractual indemnity quite succinctly:

[I]ndemnity agreements may provide (1) indemnity against *loss or damage*, under which the indemnitee may not recover until it has made payment or otherwise suffered an actual loss or damage within the scope of the indemnity; (2) indemnity against *liability*, under which an action may be brought as soon as the liability is legally imposed, as when judgment is entered, even though no actual loss has yet been sustained (the judgment has not been paid); or (3) **a promise by the indemnitor "to perform a certain act or make specified payments for the benefit of the indemnitee," under which an immediate right of action accrues upon the failure of the indemnitor to perform, regardless of whether any actual damage has been sustained.** [Internal citation omitted.] **The nature of the indemnity will determine not only when a right of action accrues but also the measure of damages that may be recovered.**

Pulte v. Parex, 403 Md. 367, 381-82 (Md. 2008) (italicized emphasis in original; bold emphasis added).

The primary indemnity provision in the parties' contract provides:

To the fullest extent permitted by Law, the [ECC] shall indemnify, defend and hold harmless the [BFS], 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 [ECC]'s performance of the work or other activities of [ECC], but only to the extent caused in whole or in part by any negligent act or omission of [ECC] or anyone for whose acts [ECC] may be liable.

Record on Appeal pp. 170, 205 (emphasis added).

This indemnity language is obviously extremely broad. (The indemnity provisions in the parties' contract were so broad, in fact, that the Court rightly deemed them unenforceable in the Opinion.) Of import, however, is the fact that this language (if it was enforceable) arguably creates obligations based in both "indemnity for liability" **and** "indemnity for loss." As discussed above,

the nature of the indemnity determines when a right of action accrues and, therefore, when the statute of limitations on a claim for contractual indemnity is triggered. To the extent that the Court may view the contracts at issue as contracts for indemnity against liability ECC would renew and incorporate by reference the prior arguments that it has made with regards to the running of the statute of limitations as to contracts for indemnity against liability.

In its complaint against ECC, BFS pled that it is “entitled to full contractual . . . indemnification from [ECC] for and against any liability which [] BFS is found to have to the Plaintiffs, Lenna Carolinas, LLC, and/or to others in the underlying action, and BFS is also entitled to damages for . . . its attorneys’ fees, costs, and other expenses incurred in defending the underlying action.” Record on Appeal p. 137, at ¶34. There is no question that BFS asserted contractual claims against ECC that were based in both indemnity for liability and indemnity for loss.

There is also no question that BFS began to incur attorney fees and defense costs – damages it seeks from ECC in this litigation -- at the very latest when BFS’s counsel executed its answer to Lennar’s third-party complaint on December 15, 2015. *See* Record on Appeal p527; *see also id.* at 364-366. BFS initiated this action on December 21, 2018 – three years and six days after its contractual indemnity claims accrued. *See* Record on Appeal pp. 125-42. Thus, BFS’s claims for “contractual indemnification” should be barred by the three-year statute of limitations. SC. Code § 15-3-530(1). If the Court is unwilling or unable to determine that the statute of limitations was triggered as to all of BFS’s contractual indemnity claims as of December 15, 2015, then, at the very least, BFS’s claims for attorney fees and other defense costs (claims based in “indemnity against loss”) should be barred by the statute of limitations.

**The Opinion Mistakenly Applies Equitable Indemnity Accrual of Claim Principles to
BFS's Contractual Indemnity Claims, and Fails to Distinguish Between Indemnity for
Liability Versus Indemnity For Loss**

In the Opinion's discussion of "Statute of Limitations and Contractual Indemnity," the Court recognizes S.C. Code Section 15-3-350(1)'s three-year statute of limitations for contract actions. However, the Court then quotes *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994), for the premise that, "As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant." The Court then determined that, "the circuit court erred in finding BFS's claims were barred by the statute of limitations because when BFS answered Lennar's third-party complaint in 2015, it had neither been found liable nor paid any injured party."

ECC contends that the Court's reliance upon *First General Services* is misplaced because that case dealt with a claim for common-law, equitable indemnity – not a claim for contractual indemnity. This distinction is incredibly important.

In *First General Services*, the South Carolina Supreme Court, focusing on equitable indemnity, stated:

A. Equitable Indemnity

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Winnsboro v. Wiedeman-Singleton*, 303 S.C. 52 at 56, 398 S.E.2d 500 at 502 (Ct.App.1990), affirmed 307 S.C. 128, 414 S.E.2d 118 (1992). The right is created by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." 303 S.C. at 57, 398 S.E.2d at 503.

Ordinarily, if one person is **compelled to pay damages** because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong had thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury.

Addy v. Bolton, 257 S.C. 28 at 34, 183 S.E.2d 708 at 710 (1971) (quoting *Atlantic Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963)).

Id., 445 S.E.2d at 448 (emphasis added).

The Supreme Court makes no reference to contractual indemnity claims in *First General Services* and clearly limits its discussion to common-law, equitable indemnity. While the Supreme Court did not provide a detailed analysis of “indemnity for liability” versus “indemnity for loss,” the Supreme Court’s determination that, “the statute of limitations generally runs from the time **judgment is entered** against the defendant” addresses the accrual of an equitable claim for indemnity against **liability**. Importantly, the *First General Services* holding has no bearing on the accrual of a contractual indemnity claim based in indemnity against loss – such as BFS’s contractual indemnity claim for attorney fees in the present case.

The Court also relied upon former Chief Justice Toal’s dissent in *Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Liability Joint Underwriting Association*, 411 S.C. 557, 769 S.E.2d 847 (2015), to support its conclusion that BFS’s contractual indemnity claims were not barred by the statute of limitations. As with *First General Services*, the Court’s reliance on the *Columbia/CSA-HS* dissent is misplaced because that case also concerned common-law, equitable indemnity – not contractual indemnity. Former Chief Justice Toal’s conclusion (“Therefore, there is no justiciable case or controversy until the conclusion of the underlying tort action, regardless of its outcome.” *Id.*, 769 S.E.2d at 852-53.) clearly addresses the accrual of an equitable indemnity for **a Judgement**, and has no bearing on BFS’s contractual claims in this case – claims that include claims based in indemnity for **Attorneys’ fees**. Indeed, Former Chief Justice Toal’s analysis with regards to attorney’s fees supports a finding that the statute of limitations has run in this case. *Id.* (“...the innocent party’s

right to sue for indemnification does not accrue until it actually sustains damages through either paying an injured party on behalf of the tortfeasor, **or incurring attorneys' fees from defending itself in the underlying tort suit.**") (emphasis added).

The Court's analysis as to the statute of limitations' application to BFS's claims fails to consider whether the claims are based in indemnity for liability or indemnity for loss – BFS clearly asserted both. The Court's determination ("Here, the circuit court erred in finding BFS's claims were barred by the statute of limitations because when BFS answered Lennar's third-party complaint in 2015, **it had neither been found liable nor paid any injured party.**") focuses solely upon the timing of either an entry of judgment or BFS's satisfaction of the injured party's claims in the underlying action. The Opinion 1) fails to address the existence of certain BFS contractual claims based in indemnity for loss (including claims for attorney fees and defense costs) and 2) disregards S.C. Code Section 15-3-350(1)'s three-year statute of limitations for those claims.

The Opinion disregards the fact that BFS had incurred legal fees in December 2015 – fees that it sought to recover from ECC in this action pursuant to the "indemnity for loss" and "indemnity for liability" provisions in the parties' contract. BFS was explicit in the hearing before Judge Newman that it sought indemnity for attorney fees and refused to waive any claims for attorney fees. See Record on Appeal pp. 364-66. At the hearing on ECC's motion for summary judgment, ECC argued, and Judge Newman agreed, that the legal fees must have been incurred at the very latest on the date that BFS's answer to Lennar's third-party complaint was executed (December 15, 2015), so the statute of limitations should have begun to run at that time.

Further, ECC suspects the Court mistakenly applied equitable indemnity principles when relying upon *Jones v. Builders Investment Group*, 415 S.C. 321, 781 S.E.2d 737 (Ct. App. 2015). In *Jones*, this Court confirmed that, "in a contract for indemnity for loss, the indemnitee must have

made some form of payment before he can assert a breach of the contract.” *Id.* 781 S.E.2d at 742 n. 8. ECC suspects the Court interprets “some form of payment” as satisfaction (in whole or in part) of a claim by injured third party – which suggests the Court based its statute of limitations determined based for indemnity for liability. In addition to its prior arguments on indemnity against liability, ECC contends the “some form of payment” language encompasses BFS’s claims for attorney fees in this case under indemnity for loss. With respect to BFS’s contractual claim for attorney fees and defense costs, the focus should not be on whether it has been subjected to a judgment or satisfied the claims of the injured third party. The focus here should be on indemnity for loss, the broad language of the parties’ contract that forms the basis for BFS’s attorney fee claims, and the fact that BFS incurred legal fees (*i.e.*, “made some form of payment”) in December 2015. The *Jones* holding supports ECC’s position when indemnity for loss principles are applied.

CONCLUSION

Because BFS did not file suit against ECC until December 21, 2018, its contractual claims should be barred by the three-year statute of limitations – the claims for attorney fees, at least. Thus, ECC would seek rehearing and/or the Court’s amendment of the Opinion with regard to the issue of the running of the statute of limitations on BFS’s claims for contractual indemnity, if only as to BFS’s attorney fees and defense costs.

[Signature page to immediately follow]

Respectfully submitted,

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SC Court of Appeals

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM BERKELEY COUNTY
Court of Common Pleas**

Clifton B. Newman, Circuit Judge

Appellate Case No. 2020-000415

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

Builders FirstSource -Southeast Group, LLC,.....**Appellant,**

v.

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

OF WHICH, ECC Contracting, LLC; and Charleston Exteriors, LLC, are....**Respondents**

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing Petition
for Rehearing upon all counsel of record by last known email addresses on this 13th day of
March, 2025.

BEST LAW, P.A.

By: s/L Dean Best
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VIA EMAIL AND CERTIFIED MAIL

March 13, 2025

Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: Builders Firstsource-Southeast v. MI Windows
Appellate Case No. 2020-000415
BH File No.: 01-179

Dear Sir or Madam:

Please find enclosed herewith for filing the original of *ECC Contracting, LLC's Petition for Rehearing*, together with the Certificate of Service, with regard to the above referenced matter. Also enclosed please find the applicable filing fee in the amount of \$50.00. I would appreciate your filing the Petition for Rehearing and returning a filed clocked copy to me via email at dean@bestlawsc.com and dani@bestlawsc.com.

Sincerely,



L. Dean Best

LDB/dlk
Enclosures

cc: All counsel of record (via email only)

The Supreme Court of South Carolina

The Retreat at Charleston National Country Club Home Owners Association, Inc., and The Retreat at Charleston National Country Club Horizontal Property Regime, Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.; Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co., LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollo Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira Construction, LLC; Solesmar Jesus De Oliveira; Wilson Lucas Sales d/b/a Miracle Siding; Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC; Givair De Caris; and Mario Salgado; Defendants,

Builders FirstSource-Southeast Group, LLC, Third-Party Plaintiff, Petitioner,

v.

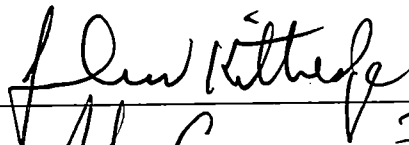
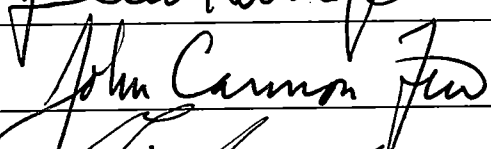
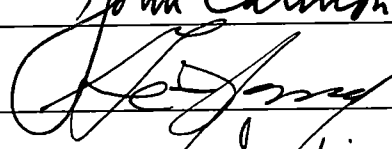
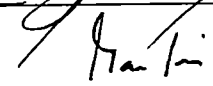
Pohlman Quality Contractors; Pohlman Quality
Exteriors; Palmetto Trim and Renovation; Edward Bruce
Witham; and East Coast Carpentry, Third-Party
Defendants,

Of which Palmetto Trim and Renovation; Hurley
Services, LLC; ECC Contracting, LLC; East Coast
Carpentry; AC Construction, Inc.; WS Contractors, LLC;
Pohlman Quality Exteriors, Inc.; and L&G Construction
Group, LLC are the Respondents.

Appellate Case No. 2025-001224

ORDER

Petitioner Builders FirstSource-Southeast Group, LLC has filed a motion to stay in (1) *Builders FirstSource-Southeast, LLC v. MI Windows* (Appellate Case No. 2025-001176); (2) *Builders FirstSource-Southeast, LLC v. Hurley Services, LLC* (Appellate Case No. 2025-001495); and (3) *Builders FirstSource-Southeast, LLC v. Hurley Services, LLC* (Appellate Case No. 2025-001496), pending this Court's decision in the instant matter of *Builders FirstSource-Southeast, LLC v. Palmetto Trim and Renovation* (Appellate Case No. 2025-001224). The motion to stay is denied.

	_____	C.J.
	_____	J.
	_____	J.
	_____	J.

Verdin, J., not participating

Columbia, South Carolina
September 10, 2025

cc:

Kevin W. Mims
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John Barnwell Fishburne, Jr.
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jul 21 2025

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2025-001224
Case No. 2016-CP-10-03783

Opinion No. 2025-6099

The Retreat at Charleston National Country Club Home Owners Association, Inc., and The
Retreat at Charleston National Country Club Horizontal Property Regime,
Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin
Campbell, individually; Builders FirstSource-Southeast Group, LLC; Builders FirstSource, Inc.;
Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee
Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually; Charleston
Exteriors, LLC; ECC Contracting, LLC; Hurley Services, LLC; McDaniel Construction Co.,
LLC; AC Construction Corp.; AC Construction, Inc.; L&G Construction Group, LLC; Liollo
Architecture; JC Contractors, LLC; Soto & Vasquez Construction, LLC; Costa De Oliveira
Construction, LLC; Solesmar Jesus De Oliveria; Wilson Lucas Sales d/b/a Miracle Siding;
Miracle Siding, LLC; Royal Homes of SC, Inc.; Collen Batissa; Christopher Batissa; Norma
Ferreira Bruno; Mendez Construction, LLC; Juan Garza Ramos, individually; Juan Garza Ramos
d/b/a Juan Constructors; Jessica Marroquin, individually; Jessica Marroquin d/b/a Marroquin
Construction; Carlos Marroquin, individually; Carlos Marroquin Construction; Carlos and
Jessica Marroquin d/b/a Marroquin Construction; Feliciano Cruz Silva; Garcia Roofing, LLC;
Givair De Caris; and Mario Salgado;
Defendants,

Builders FirstSource-Southeast Group, LLC, Petitioner

v.

Pohlman Quality Contractors; Pohlman Quality Exteriors; Palmetto Trim and Renovation;
Edward Bruce Witham; and East Coast Carpentry, Third-Party Defendants,

Of which Palmetto Trim and Renovation; Hurley Services, LLC; ECC Contracting, LLC; East Coast Carpentry; AC Construction, Inc.; WS Contractors, LLC; Pohlman Quality Exteriors, Inc.; and L&G Construction Group, LLC are the Respondents.

MOTION TO STAY

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Attorneys for Petitioner Builders
FirstSource-Southeast Group, LLC

Petitioner, Builders FirstSource-Southeast Group, LLC, respectfully moves this Court for an Order to Stay the following separate, but related appeals:

1. Builders FirstSource-Southeast Group, LLC v. MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC,
 - Supreme Court Appellate Case No. 2025-001176
 - Court of Appeals Case No. 2020-000415
 - Unpublished Opinion No. 2025-UP-072
 - Heard March 15, 2023
 - Filed February 26, 2025
 - Court of Appeals Judges McDonald, Thomas, and Hewitt
 - “BFS Damico Appeal”
2. Builders FirstSource-Southeast Group, LLC v. Hurley Services, LLC and Charleston Exteriors, LLC,
 - Court of Appeals Case No. 2020-001328
 - Unpublished Opinion No. 2025-UP-078
 - i. Heard December 5, 2023
 - ii. Filed March 12, 2025
 - iii. Withdrawn, Substituted, Refiled June 25, 2025
 - iv. Court of Appeals Judges McDonald, Vinson, and Bromell Holmes
 - “BFS Six Fifty Six Appeal”
3. Builders FirstSource-Southeast Group, LLC v. Hurley Services, LLC,
 - Court of Appeals Case No. 2021-000290
 - Unpublished Opinion No. 2025-UP-082
 - i. Heard December 5, 2023
 - ii. Filed March 12, 2025
 - iii. Withdrawn, Substituted, Refiled June 25, 2025
 - iv. Court of Appeals Judges McDonald, Vinson, and Bromell Holmes
 - “BFS Pavic Appeal”

The primary basis for the Stay is to promote and preserve judicial economy. The secondary basis for the Stay is to promote and preserve the issues on appeal.

All of the foregoing appeals, including this one (Appellate Case No. 2025-001224, “BFS Retreat Appeal,”) relate to Petitioner’s claims seeking contractual indemnification from its respective subcontractors for damages allegedly resulting from deficiencies in the work performed by the subcontractors at construction projects in South Carolina.

Petitioner's claims against the respective subcontractors in the separate appeals are based primarily on the same contract provisions that are at issue in this appeal. In fact, Petitioner's claims against Respondent ECC Contracting, LLC in this appeal are based on contractual indemnity provisions identical to those at issue in the BFS Damico Appeal. See Exhibit A, BFS-ECC Agreements in Records on Appeal for BFS Retreat Appeal and BFS Damico Appeal. Additionally, Petitioner's claims against Respondent Hurley Services, LLC in this appeal are based on contractual indemnity provisions identical to those at issue in the BFS Six Fifty Six Appeal and BFS Pavic Appeal. See Exhibit B, BFS-Hurley Agreements in Records on Appeal for BFS Retreat Appeal, BFS Six Fifty Six Appeal, and BFS Pavic Appeal.

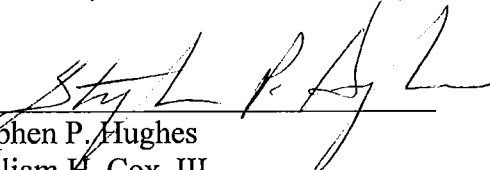
Further, Questions Presented by Petitioner in this BFS Retreat Appeal, while worded slightly differently, are substantively the same as the Questions Presented by Petitioner in the BFS Damico Appeal. See Exhibit C, BFS Petitions for Certiorari in BFS Retreat Appeal and BFS Damico Appeal. Moreover, the same will hold true for Petitioner's Petitions for Certiorari that are, absent any extension, due to be filed with this Court on July 25, 2025 for BFS Six Fifty Six Appeal and BFS Pavic Appeal.

Although the claims and contracts at issue in these separate appeals are substantively identical and most of the Questions Presented by Petitioner are or will be the same, consolidation of the appeals is not appropriate because there are multiple separate and distinct factual and legal issues that exist amongst the separate appeals that do not exist in this appeal. As such, Petitioner submits that consolidation of the appeals would distract from the Court's consideration of those primary issues common to each appeal, and also potentially cause the separate and distinct issues to be overlooked or confused by the Court of the parties.

Petitioner respectfully submits that a Stay of the separate appeals will promote judicial economy by allowing the Court and the parties to focus upon resolution of the significant issues common to each of the referenced appeals. The interests of both this Court and those of the parties are most effectively served by first resolving the issues in the BFS Retreat Appeal, which should resolve the issues common to each of the separate appeals. Additionally, a Stay of the separate appeals will preserve the separate and distinct issues on appeal while also promoting and preserving the primary issues on appeal that exist in all of the appeals.

Counsel for Respondents in BFS Damico Appeal, BFS Six Fifty Six Appeal, and BFS Pavic Appeal agree and consent to the Motion to Stay.

HOWELL, GIBSON & HUGHES, P.A.

By: 

Stephen P. Hughes

William H. Cox, III

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Attorneys for Petitioner Builders

FirstSource-Southeast Group, LLC

Beaufort, South Carolina

July 21, 2025

The Supreme Court of South Carolina

Builders FirstSource-Southeast Group, LLC, Petitioner-
Respondent,

v.

MI Windows And Doors, INC.; ECC Contracting, LLC;
Hurley Services, LLC; and Charleston Exteriors, LLC,
Respondents,

Of Whom ECC Contracting, LLC, is Respondent-
Petitioner.

Appellate Case No. 2025-001176

ORDER

Based on the vote of the Court, both petitions for writs of certiorari filed by the parties are granted. The parties shall proceed to serve and file ten additional copies of the appendix and ten copies of their briefs in the manner provided by Rule 242(i), SCACR.

FOR THE COURT

BY Patricia Howard
CLERK

Columbia, South Carolina
December 16, 2025

cc:

Stephen P. Hughes

William H. Cox III

Christopher C. Olson

L. Dean Best

Mark S. Chaparro

Francis H. Grimball

James H. Elliott Jr.

Derek M. Newberry

The Honorable Jenny Abbott Kitchings

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Jun 13 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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

Opinion No. 2025-UP-072

Builders FirstSource-Southeast Group, LLC.....Appellant,

v.

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

PETITION FOR WRIT OF CERTIORARI

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000596

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Cases:

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Dobbs v. Jackson Women's Health Org.,
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Rules:

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Certification

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

Questions Presented

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

Statement of the Case

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

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

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

A. The Damico Litigation

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

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

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

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

B. The Current Litigation

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

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

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

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

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

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

Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

104. Superior [the contractor] is entitled by contractual provisions, to the fullest extent permitted by law, *full indemnity from the Subcontractors* and Suppliers, to include the assumption of Superior's defense, as a result of the allegations and claims made by the Plaintiff, if substantiated.

(emphasis added). Notably, the general contractor did not limit its contractual indemnity claims against the subcontractors, and when it moved for partial summary judgment, it explicitly sought recovery in indemnity against liability for damages occasioned by both the negligence of its subcontractor, and the negligence of the general contractor itself.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

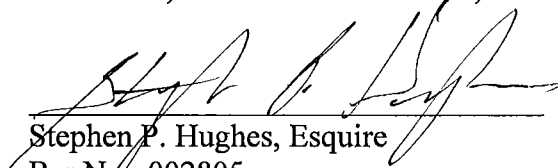
Petitioner does not believe that the Court of Appeals intended to create new law or to upend an entire industry, and thus it asks that the Supreme Court takes this case to clarify (1) that Petitioner has preserved a claim for contractual indemnity for the negligence of its subcontractors;

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

Conclusion

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

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Beaufort, South Carolina
June 13, 2025

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the 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.

PROOF OF SERVICE

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

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Columbia, South Carolina 29201

MEMO

Appellate Case No. 2020-000415


AUTHORIZED SIGNATURE

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South Carolina Supreme Court

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Jun 13 2025

SC Court of Appeals

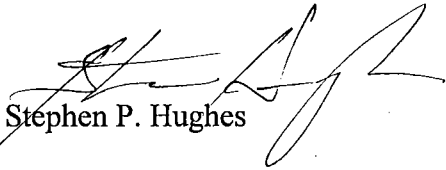
Re: Builders FirstSource Southeast Group, LLC v. ECC Contracting LLC, MI
Windows and Doors, Inc., Hurley Services, LLC, Charleton Exteriors LLC
Civil Action No: 2020-000415
Our File No: 11742.1 SPH

To Whom It May Concern:

Please find enclosed herewith for filing an original and one copy of the *Petition for Writ of Certiorari*, together with the Certificate of Service, with regard to the above referenced matter. Also enclosed please find the applicable filing fee in the amount of \$250.00. I would appreciate your filing the Petition for Rehearing and returning a filed clocked copy to me via email at sphughes@hghpa.com, wcox@hghpa.com, and scombites@hghpa.com. If return of the clocked copy must be via U.S. Mail, please advise and I will provide a self-addressed, stamped envelope provided for same.

With kindest regards, I am
Yours truly,

HOWELL, GIBSON AND HUGHES, P.A


Stephen P. Hughes

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

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Jul 14 2025

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, SCRCF. 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 Plaintiff¹ 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 REQUISITE 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.

**RICHARDSON PLOWDEN &
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**Attorneys for Respondent ECC
Contracting, LLC**

Reply To: Mount Pleasant
fhgrimball@richardsonplowden.com

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

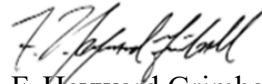
**RE: Builders First Source-Southeast Group, LLC v. D.R. Horton, Inc. Appellate
Case No. 2022-000016
Civil Action No. 2018-CP-08-02547
RPR File No.: 7534-00044**

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

RECEIVED

Jul 24 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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

Opinion No. 2025-UP-072

Builders FirstSource-Southeast Group, LLC.....Appellant,

v.

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

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

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000630

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.

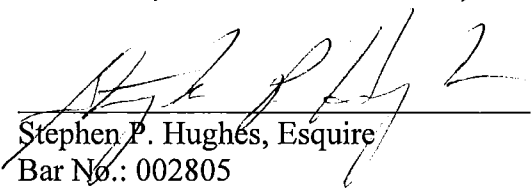
Moreover, Petitioner finds it important to note the fact that Respondents ECC and Charleston Exteriors have argued from the beginning that *there is only one relevant*

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.

HOWELL, GIBSON & HUGHES, P.A.



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Beaufort, South Carolina
July 24, 2025

THE STATE OF SOUTH CAROLINA
In the 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,

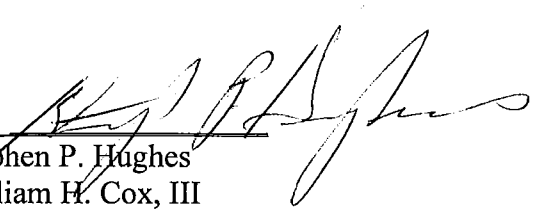
v.

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

PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the ***Builders FirstSource Reply to the ECC Contracting Return to Petition for Writ of Certiorari*** upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 24 day of July, 2025 to all counsel of record.

HOWELL, GIBSON & HUGHES, P.A.

By: 
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63-1403/631

CHECK ARMOR
FRAUD PROTECTION

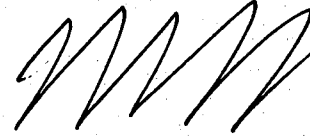
7/24/2025

PAY TO THE
ORDER OF South Carolina Supreme Court

\$ **50.00

Fifty and 00/100*****

DOLLARS

Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

AUTHORIZED SIGNATURE

MEMO

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HOWELL GIBSON & HUGHES PA

10382

South Carolina Supreme Court

Date	Type	Reference	Original Amt.	Balance Due	7/24/2025 Discount	Payment
7/24/2025	Bill	11742 SPH	50.00	50.00		50.00
					Check Amount	50.00

Howell Gibson & Hugh

50.00

HOWELL GIBSON & HUGHES PA

10382

South Carolina Supreme Court

Date	Type	Reference	Original Amt.	Balance Due	7/24/2025 Discount	Payment
7/24/2025	Bill	11742 SPH	50.00	50.00		50.00
					Check Amount	50.00

Howell Gibson & Hugh

50.00

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July 24, 2025

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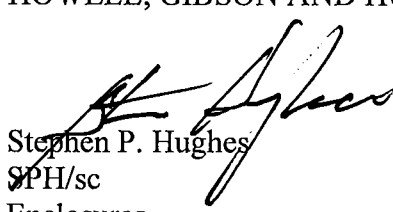
Re: Builders FirstSource Southeast Group, LLC v. ECC Contracting LLC, MI
Windows and Doors, Inc., Hurley Services, LLC, Charleton Exteriors LLC
Civil Action No: 2020-000415
Our File No: 11742.1 SPH

To Whom It May Concern:

Please find enclosed herewith for filing an original and one copy of the ***Builders FirstSource Reply to the ECC Contracting Return to Petition for Writ of Certiorari***, together with the Certificate of Service, with regard to the above referenced matter. Also enclosed please find the applicable filing fee in the amount of \$50.00. I would appreciate your filing the Petition for Rehearing and returning a filed clocked copy to me via email at sphughes@hghpa.com, wcox@hghpa.com, and scombites@hghpa.com. If return of the clocked copy must be via U.S. Mail, please advise and I will provide a self-addressed, stamped envelope provided for same.

With kindest regards, I am
Yours truly,

HOWELL, GIBSON AND HUGHES, P.A



Stephen P. Hughes

SPH/sc

Enclosures

cc: Court of Appeals
Counsel of Record

000641

**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)

Builders First Source-Southeast Group, LLC

Appellant,

versus

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

Respondent.

PETITION FOR A WRIT OF CERTIORARI

RICHARDSON PLOWDEN & ROBINSON, P.A.

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CERTIFICATION OF COUNSEL

Counsel for ECC Contracting, LLC (“ECC”) certifies that the Court of Appeals filed its opinion in this matter on February 28, 2025 (the “Subject Opinion”); that ECC timely petitioned for rehearing; and that the Court of Appeals denied rehearing by order filed May 16, 2025.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in mistakenly applying accrual of claim principles for equitable indemnity to BFS’s claim for contractual indemnity;
2. Did the Court of Appeals err in failing to address the issue of BFS’s legal fees as a separate and distinct character of damages under the terms of the parties’ contract; and
3. Did the Court of Appeals err in failing to recognize the indemnity contract at issue as a contract for indemnity against loss, in which “loss” includes attorney fees.

STATEMENT OF THE CASE

This case is a derivative action relating to the construction of single-family residence development known as The Abbey at Spring Grove constructed and developed by Lennar Carolinas. The main action is *Patricia Damico, et al v. Lennar Carolinas, LLC, et al*, case number 2014-CP-08-2424, filed October 30, 2014 (hereinafter “*Damico* Litigation”).

A. The Damico Litigation (the Underlying Action)

The Abbey located in the Spring Grove development consists of sixty-nine (69) single family residences (hereinafter referred to as “Subject Property” or “the Abbey”). Initially, the Plaintiffs filed the *Damico* Litigation against the general contractor, Lennar Carolinas, LLC (“Lennar”), Spring Grove Development, Volkmar Consulting Services, LLC, and Manale Landscaping, LLC. The suit alleged deficiencies in site grading and drainage.

On June 1, 2015, Lennar filed a Motion to Compel Arbitration. Plaintiffs subsequently filed amended pleadings asserting claims for the construction of the homes as well. On November 25, 2015, Lennar answered the First Amended Complaint and asserted a Third-Party Complaint

against its subcontractors, including Builders First Source (“BFS”). Lennar served BFS with its Third-Party Complaint on December 1, 2015 via certified mail that was delivered on December 3, 2015. BFS served its Answer by US Mail on December 18, 2015, and it was file stamped by the Clerk of Court on December 21, 2015.

On March 30, 2016, Lennar filed an Amended Motion to Compel Arbitration wherein it sought to compel arbitration of its claims against newly added subcontractor defendants. On September 19, 2016, the circuit court entered an Order denying Lennar’s Motion to Compel Arbitration. On October 26, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 Order denying all motions to reconsider. Before BFS could obtain the consent of all parties or leave from the Court to amend its pleading, the *Damico* Litigation was stayed by Lennar’s appeal of the denial of its Motion to Compel Arbitration. Since the stay went into effect, BFS has failed to seek leave from the lower court to amend its pleadings.

B. This Litigation

ECC Contracting, LLC (“ECC”) is alleged to have installed windows and doors as a subcontractor to BFS. On December 21, 2018, BFS filed this action against ECC Contracting, LLC (“ECC”) asserting claims for contractual indemnity, equitable indemnity, breach of express and implied warranties, breach of contract, negligence, and contribution. BFS alleges it “has been subjected to liability and has incurred consequential damages in having to expend attorneys’ fees and costs” in defending itself in the *Damico* litigation.

On August 9, 2019, ECC moved for summary judgment arguing BFS’s claims were barred by the statute of limitations applicable to contract claims. ECC further challenged BFS’s contractual indemnity claims as meritless under the “clear and unequivocal” standard, and, alternatively, argued BFS lacked standing because its claims were unripe. BFS did not file a

Memorandum in Opposition to ECC's Motion, but did oppose the motion at oral arguments. The Honorable Judge Clifton Newman heard the parties' motions on October 18, 2019.

Following the hearing, the Circuit Court issued an order granting ECC's summary judgment motion with regard to all claims except for BFS's Equitable Indemnity and Contribution claims. Specifically, the Circuit Court found that the indemnification clauses of the BFS' Subcontractor Agreement with ECC were neither clear nor unequivocal, and, therefore, BFS could not seek contractual indemnification from ECC for BFS' own negligence, whether concurrent or sole. Furthermore, the Circuit Court determined that BFS filed its action against its subcontractors more than three years after receiving notice of its potential claims. Thus, BFS's claims for contractual indemnification and its non-indemnity claims (negligence, breach of contract, and breach of warranty) were barred by the applicable statute of limitations. As to BFS's non-indemnity claims, the Court ruled that they were not separate and distinct from the claims made in the *Damico* Litigation and granted summary judgment.

On December 16, 2019, BFS filed a Rule 59(e) Motion and brief memorandum to Reconsider. On January 15, 2020 ECC filed a memo in opposition to BFS's Motion to Reconsider. Judge Newman held oral arguments on January 16, 2020. Judge Newman ruled from the bench that BFS had done nothing to convince him to change his previous ruling, but amended his order slightly to include more analysis on the Statute of Limitations ruling noting BFS had actual notice of its potential claims against the subcontractors as of the date of its December 15, 2015 answer to Lennar's Third-Party Complaint. Judge Newman further found the statute of limitations for BFS's contract related claims began to run upon the filing of the responsive pleading and such claims were time barred. BFS filed a Rule 59(e) motion as to the amended summary judgment order, which the circuit court denied.

On March 5, 2020 BFS filed a Notice of Intent to Appeal with the Court of Appeals. On February 26, 2025, the Court of Appeals issued its Opinion affirmed that the Circuit Court correctly applied the “clear and unequivocal” standard to BFS’ Agreement’s indemnity language and did not err in finding BFS seeks indemnification for its own negligence; and vacated the Circuit Court’s statute of limitations ruling. See Opinion No. 2025-UP-072 (Ct. App. February 26, 2025).

ECC filed a petition for rehearing of the Court of Appeals’ Opinion, which was denied on May 16, 2025. ECC now petitions this Court to grant ECC’s writ of certiorari for review of the Court of Appeals’ Opinion.

ARGUMENT

This case arises from a contractual indemnity dispute between ECC and BFS. The core issue revolves around the application of the statute of limitations to BFS’s claim for contractual indemnity, specifically the recovery of attorney fees.

This Petition should be granted because the Opinion of the Court of Appeals misapplied established principles of contractual indemnity, failed to distinguish between different types of indemnity contracts, and consequently erred in determining the accrual of the statute of limitations for BFS’ claims. Clarification from this Court is essential for consistency and certainty regarding how contractual indemnity claims, particularly those against loss versus liability, in which damages sought include attorney fees, are to be treated under the statute of limitations.

1. THE COURT OF APPEALS ERRED IN APPLYING EQUITABLE INDEMNITY ACCRUAL PRINCIPLES TO BFS’S CONTRACTUAL INDEMNITY CLAIMS AND FAILS TO DISTINGUISH BETWEEN INDEMNITY FOR LIABILITY VERSUS INDEMNITY FOR LOSS, IN WHICH “LOSS” INCLUDES ATTORNEY FEES

A. Background Legal Analysis

Our courts have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. See *Piper v. Am. Fid. & Cas.*

Co., 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred; whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330, 781 S.E.2d 737, 746 (Ct. App. 2015) (citing *Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112, 154 S.E. 106, 112 (1930)). See also *State-Planters' Bank & Tr. Co. v. First Nat. Bank*, 76 F.2d 527, 532 (4th Cir. 1935) (“Where the contract is not a mere contract to indemnify and save harmless, but a contract to save from a legal liability or claim, the legal liability incurred and not the actual damage sustained is the measure of damage.”) (citing 31 C.J. 435, Sec. 28).

Although a Maryland case, *Pulte v. Parex*, 403 Md. 367 (Md. 2008) explains the distinction between various forms of contractual indemnity quite succinctly:

[I]ndemnity agreements may provide (1) indemnity against *loss or damage*, under which the indemnitee may not recover until it has made payment or otherwise suffered an actual loss or damage within the scope of the indemnity; (2) indemnity against *liability*, under which an action may be brought as soon as the liability is legally imposed, as when judgment is entered, even though no actual loss has yet been sustained (the judgment has not been paid); or (3) a promise by the indemnitor "to perform a certain act or make specified payments for the benefit of the indemnitee," under which an immediate right of action accrues upon the failure of the indemnitor to perform, regardless of whether any actual damage has been sustained. [Internal citation omitted.] The nature of the indemnity will determine not only when a right of action accrues but also the measure of damages that may be recovered.

Pulte v. Parex, 403 Md. 367, 381-82 (Md. 2008) (italicized emphasis in original; bold emphasis added).

The primary indemnity provision in the parties' contract provides:

To the fullest extent permitted by Law, the [ECC] shall indemnify, defend and hold harmless the [BFS], 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 [ECC]’s performance of the work or other activities of [ECC], but only to the extent caused in whole or in part by any negligent act or omission of [ECC] or anyone for whose acts [ECC] may be liable.

Record on Appeal pp. 170, 205 (emphasis added).

This indemnity language is obviously extremely broad. (The indemnity provisions in the parties’ contract were so broad, in fact, that the Court rightly deemed them unenforceable in the Opinion.) Of importance, however, is the fact that this language (if it was enforceable) arguably creates obligations based in both “indemnity for liability” **and** “indemnity for loss.”

B. Accrual of Equitable Indemnity Claims versus Contractual Indemnity Claims

In the Opinion’s discussion of “Statute of Limitations and Contractual Indemnity,” the Court recognizes S.C. Code Ann. § 15-3-350(1)’s three-year statute of limitations for contract actions. However, the Court then quotes *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994), for the premise that, “As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant.” The Court then determined that, “the circuit court erred in finding BFS’s claims were barred by the statute of limitations because when BFS answered Lennar’s third-party complaint in 2015, it had neither been found liable nor paid any injured party.”

ECC contends that the Court’s reliance upon *First General Services* is misplaced because that case dealt with a claim for common-law, equitable indemnity – not a claim for contractual indemnity. This distinction is incredibly important.

In *First General Services*, the South Carolina Supreme Court, focusing on equitable indemnity, stated:

A. Equitable Indemnity

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Winnsboro v. Wiedeman-Singleton*, 303 S.C. 52 at 56, 398 S.E.2d 500 at 502 (Ct.App.1990), affirmed 307 S.C. 128, 414 S.E.2d 118 (1992). The right is created by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." 303 S.C. at 57, 398 S.E.2d at 503. Ordinarily, if one person is **compelled to pay damages** because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong had thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury. *Addy v. Bolton*, 257 S.C. 28 at 34, 183 S.E.2d 708 at 710 (1971) (quoting *Atlantic Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963)).

Id., 445 S.E.2d at 448 (emphasis added).

The Supreme Court makes no reference to contractual indemnity claims in *First General Services* and clearly limits its discussion to common-law, equitable indemnity. While the Supreme Court did not provide a detailed analysis of "indemnity for liability" versus "indemnity for loss," the Supreme Court's determination that, "the statute of limitations generally runs from the time **judgment is entered** against the defendant" addresses the accrual of an equitable claim for indemnity against **liability**. Importantly, the *First General Services* holding has no bearing on the accrual of a contractual indemnity claim based in indemnity against loss – such as BFS's contractual indemnity claim for attorney fees in the present case.

The Court also relied upon former Chief Justice Toal's dissent in *Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Liability Joint Underwriting Association*, 411 S.C. 557, 769 S.E.2d 847 (2015), to support its conclusion that BFS's contractual indemnity claims were not barred by the statute of limitations. As with *First*

General Services, the Court’s reliance on the *Columbia/CSA-HS* dissent is misplaced because that case also concerned common-law, equitable indemnity – not contractual indemnity. Former Chief Justice Toal’s conclusion (“Therefore, there is no justiciable case or controversy until the conclusion of the underlying tort action, regardless of its outcome.” *Id.*, 769 S.E.2d at 852-53) clearly addresses the accrual of an equitable indemnity for **a Judgement**, and has no bearing on BFS’s contractual claims in this case – claims that include claims based in indemnity for **Attorneys’ fees**. Indeed, Former Chief Justice Toal’s analysis with regards to attorney’s fees supports a finding that the statute of limitations has run in this case. *Id.* (“...the innocent party’s right to sue for indemnification does not accrue until it actually sustains damages through either paying an injured party on behalf of the tortfeasor, **or incurring attorneys’ fees from defending itself in the underlying tort suit.**”) (emphasis added).

C. Indemnity for Liability versus Indemnity for Loss

The Court of Appeals statute of limitations analysis for BFS’s claims fails to consider whether claims are based on indemnity for liability or indemnity for loss, despite BFS clearly asserting both. The Court of Appeals determination (“Here, the circuit court erred in finding BFS’s claims were barred by the statute of limitations because when BFS answered Lennar’s third-party complaint in 2015, **it had neither been found liable nor paid any injured party.**”) focuses solely upon the timing of either an entry of judgment or BFS’s satisfaction of the injured party’s claims in the underlying action. This disregards the existence of certain BFS contractual claims based in indemnity for loss (including claims for attorney fees and defense costs) and S.C. Code Section 15-3-350(1)’s three-year statute of limitations for those claims.

BFS incurred legal fees in December 2015 – fees that it sought to recover from ECC in this action pursuant to the “indemnity for loss” and “indemnity for liability” provisions in the parties’

contract. In *Jones*, this Court confirmed that, “in a contract for indemnity for loss, the indemnitee must have made some form of payment before he can assert a breach of the contract.” *Id.* 781 S.E.2d at 742 n. 8. ECC suspects the Court interpreted “some form of payment” to mean satisfaction – either in whole or in part - of a claim by injured third party. This suggests the Court based its statute of limitations analysis on indemnity for liability. However, ECC contends that “some form of payment” should also encompass BFS’s attorney fees as part of indemnity for loss. This interpretation is supported by former Chief Justice Toal’s dissent, which the Court of Appeals cited in its Opinion, acknowledging that incurring attorney’s fees can trigger the right to sue for indemnification. *Columbia/CSA-HS*, 769 S.E.2d at 852-53 (“right to sue for indemnification does not accrue until it actually sustains damages through either paying an injured party on behalf of the tortfeasor, **or incurring attorneys’ fees from defending itself** in the underlying tort suit”) (emphasis added).

Accordingly, BFS’s contractual indemnity claim for attorney fees and defense costs should be evaluated under the principle of indemnity for loss and/or the principle of indemnity against liability, taking into account the contract’s broad language and the fact that BFS incurred legal fees (either by becoming liable for or making some form of payment) in December 2015.

2. THE COURT OF APPEALS MISTAKENLY FAILED TO ADDRESS THE ISSUE OF BFS’S LEGAL FEES AS A SEPARATE AND DISTINCT CHARACTER OF DAMAGES UNDER THE TERMS OF THE PARTIES’ CONTRACT

BFS's Complaint explicitly seeks consequential damages for attorney's fees, stating it “has been subjected to liability and has incurred consequential damages in having to expend attorney’s fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.” *See Complaint, Paragraph 33; See also Paragraph 34* (“...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its

attorney’s fees, costs, and other expenses incurred in defending the underlying action... ”).

There is no question that BFS began incurring attorney fees and defense costs – damages it seeks from ECC in this litigation – by December 15, 2015, when its counsel executed its answer to Lennar’s Third-Party Complaint. *See* Record of Appeal p. 527. BFS filed its Complaint against ECC on December 21, 2018 – three years and six days after its contractual indemnity claims accrued. *See* Record on Appeal pp.125-42. As such, BFS’s claims for “contractual and common law indemnification against liability” are barred by the applicable three-year statute of limitations. *See* S.C. Code Ann. § 15-3-530 et seq.¹

Nevertheless, the Court of Appeals’ Opinion overlooks the fact that BFS had incurred legal fees in December 2015 – fees it explicitly seeks to recover under both the “indemnity for loss” and “indemnity for liability” provisions of the parties’ contract. If the Court declines to find that the statute of limitations was triggered for all of BFS’s contractual indemnity claims as of December 15, 2015, then, at a minimum, BFS’s claims for attorney’s fees and defense costs – are barred by the statute of limitations. However, as with any other continuing and progressive damages case, ECC would contend that the statute starts to run for the entire claim when the damages start.

3. ALTERNATIVELY, PER THE DISCOVERY RULE, BFS’ S CLAIMS ACCRUED ON DECEMBER 3, 2015.

Under the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 648 (1996). The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. *Id.* (citing *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993)). Our Courts have

¹ “An action upon a contract, obligation, or liability, express or implied” must be brought within three years. S.C. Code Ann. 15-3-350(1).

“interpreted the “exercise of reasonable diligence” to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist.” *Id.* (citing *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981) (emphasis in the original)). Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Id.* (citing *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207 (Ct.App.1985), *cert. granted*, 287 S.C. 234 (1985), *cert. dismissed*, 288 S.C. 468 (1986)). Accordingly, BFS should have been on notice of its indemnity claims against liability from the date, December 3, 2015, it received Lennar’s Summons and Third-Party Complaint. *See* Lennar’s Affidavit of Service. The fact that BFS “may[could] not comprehend the full extent of the damage [at that time] is immaterial”. *Id.*

Furthermore, under South Carolina law, corporations are barred from representing themselves in Circuit Court. South Carolina law recognizes an individual's ability to appear pro se with leave of the court. *See* S.C. Code Ann. § 40-5-80 (Supp. 2002). Corporations, which are artificial creatures of state law, do not have a right to appear pro se in all instances. *See* S.C. Code Ann. § 40-5-320 (1986). Courts have granted corporations the ability to appear *pro se*, with leave of the court, in civil magistrate's court. *See In re Unauthorized Practice of Law*, 309 S.C. 304, 422 S.E.2d 123 (1992). Courts have explicitly rejected a corporation's ability to appear pro se in a state circuit or appellate court. *Renaissance Enterprises, Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 515 S.E.2d 257 (1999).

BFS cannot argue that it did not know, or at least should not have known, that it would incur attorneys’ costs and fees upon receiving Lennar’s Third-Party Complaint on December 3, 2015. As soon as BFS received Lennar’s Third-Party Summons and Complaint it was on inquiry

notice of its claims against its Subcontractors as of that date. Therefore, the claims filed by BFS - three years and eighteen days later - are barred by the statute of limitations.

CONCLUSION

For the foregoing reasons, ECC Contracting, LLC respectfully requests that this Court to grant ECC's Petition for a Writ of Certiorari and reverse the Court of Appeal's ruling on the statute of limitations regarding contractual indemnity claims.

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The Supreme Court of South Carolina

Builders Firstsource-Southeast Group, LLC, Petitioner-Respondent,

v.

MI Windows And Doors, INC.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC, Respondents,

Of Whom ECC Contracting, LLC, is Respondent-Petitioner.

Appellate Case No. 2025-001176

ORDER

Respondent-Petitioner's motion to allow the late filing of the cross petition in this matter is granted. The cross petition for writ of certiorari is accepted as filed.

FOR THE COURT

BY Patricia A. Howard
CLERK

Columbia, South Carolina
July 2, 2025

cc: Stephen P. Hughes
William Hewitt Cox, III
Christopher Clay Olson
L. Dean Best
Mark Shanter Chaparro
Francis Heyward Grimball
James H. Elliott, Jr.
Derek Michael Newberry

RECEIVED

Aug 01 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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

Opinion No. 2025-UP-072

Builders FirstSource-Southeast Group, LLC.....Appellant,

v.

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

BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC'S RETURN
TO
ECC CONTRACTING, LLC'S PETITION FOR WRIT OF CERTIORARI

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Counter Statement of Questions Presented

1. Does a claim for indemnity, whether contractual or equitable, begin to accrue only after the conclusion of the underlying tort action against the indemnitee?
2. In an indemnity action, is the statute of limitations the same for the recovery of the consequential damages of attorneys' fees as it would be for the recovery of other types of consequential damages?
3. Even if the issue of recovery of attorneys' fees could be considered independently of the underlying indemnity action, would a breach of contract action for attorneys' fees begin to accrue only after the a party breached the contract by refusing to pay attorneys' fees?

Statement of Facts

This is a case about a contractor Builders FirstSource-Southeast Group, LLC ("BFS") at a building site attempting to recover in contractual indemnity from its subcontractors, including ECC Contracting, LLC ("ECC"), for damages resulting from the subcontractors' negligence on the project. The parties had a contract that provided that if BFS was sued as a result of property damage at a project, the subcontractor would indemnify BFS *to the extent that the damage was caused by subcontractor*. BFS has been sued for property damage discovered at the project, including damage that was potentially caused by ECC. Pursuant to the terms of the contract, BFS filed a third-party claim against ECC for contractual indemnity. Thus far, the story follows the standard trajectory of a construction case. However, on summary judgment, the trial court, and then the court of appeals, held that as a matter of law BFS cannot pursue its claim for contractual indemnity against ECC and other subcontractors. The trial court also held that the BFS claims were time-barred. The court of appeals, however, reversed on the statute of limitations issue, holding that the BFS claims for indemnification – including attorneys' fees – are, in fact, timely, because no judgment has yet been entered against BFS in the underlying construction case. ECC

has petitioned for a writ of certiorari from the holding that the claims were appropriately brought within the statute of limitations.

A. The *Damico* Litigation

The issues in the instant action arise from services provided by the Respondents in connection with original construction of multiple single-family residences comprising a development project known as *The Abbey at Spring Grove*, located 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 BFS, 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 its own window supplier, MI Windows and Doors, 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 court of appeals, thus effecting a stay of the proceedings 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 BFS v MI Windows 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. BFS subsequently filed a motion to stay the instant proceedings, and to consolidate the litigation with the underlying Damico Litigation. BFS subcontractor defendants ECC Contracting, LLC, and Charleston Exteriors, LLC, filed motions for summary judgment as to BFS' claims. Arguments on the motions were heard before the Honorable Clifton Newman in the trial court on October 18, 2019.

On December 6, 2019, the trial court issued its order granting the motions for summary judgment and the motions to stay and consolidate. On December 16, 2019, BFS filed a motion for reconsideration. Judge Newman requested oral arguments on the motion for reconsideration, which were heard on January 16, 2020. On February 3, 2020, the trial court issued an "Amended Order," again granting the 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 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 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. BFS filed a petition for rehearing on March 13, 2025; counsel for ECC also filed a petition for rehearing on March 13, 2025. On May 16, 2025, the court of appeals issued an order denying both petitions for rehearing. BFS filed a timely Petition for Writ of Certiorari on June 13, 2025. ECC requested an extension to file its own Petition for Writ of Certiorari, which the Supreme Court granted, setting June 26, 2025 as the new deadline for ECC's Petition. However, ECC did not actually file and serve its Petition until June 30, 2025 and it also sought a second extension. The Court accepted ECC's Petition on July 2, 2025. BFS files this Return to ECC's Petition for Writ of Certiorari.

Reasons for Denying ECC's Petition for Writ of Certiorari

As an initial matter, BFS notes that ECC's Petition for Writ of Certiorari has not identified any special or important reason why the Supreme Court should grant certiorari on its questions presented, and instead simply argues the merits of its case. Through its Appellate Rules and its case law, this Court has been clear that a party is not entitled to a Writ of Certiorari; rather, the decision whether or not to grant a petition for a Writ of Certiorari rests squarely in the discretion of the Supreme Court. SCACR 242(b). The Rules advise that Certiorari will "be granted only where there are special and important reasons[,]" including:

- (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 decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

SCACR 242(b). See also In re Breast Implant Prod. Liab. Litig., 331 S.C. 540, 543, 503 S.E.2d 445, 447 (1998) (explicitly granting cert on a case because of its “[n]ovel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions”).

ECC’s Petition for Writ of Certiorari should be denied because it has not identified any “special or important reason,” as required by Rule 242, as to why the Supreme Court should rule on its questions presented. Notably, the Petition highlights no novel issue, no conflict between lower courts, no constitutional issues implicated, and no conflict between the court of appeals’ opinion and this Court’s precedent. Instead, the Petition argues merely that the appellate court misapplied already-established law, and spends the entirety of its Petition arguing the merits of its case.

Responding specifically to the arguments on the merits outlined by ECC in its Petition, BFS submits the following arguments in support of the BFS Counter Statement of Questions Presented.

I. A claim for indemnity, whether contractual or equitable, begins to accrue only after the conclusion of the underlying tort action against the indemnitee.

ECC argues that the BFS claims for indemnity against ECC as a subcontractor are time-barred because they began accruing the moment that BFS was sued in the underlying construction defect lawsuit. However, as the court of appeals pointed out, "as to indemnity, the statute of

limitations generally runs from the time judgment is entered against the defendant." First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Because no judgment has been entered against BFS in the underlying suit, the statute of limitations has not yet begun to run on its indemnity claims.

ECC argues that the court of appeals' reliance on First General Services for the proposition that "the statute of limitations generally runs from the time judgment is entered against the defendant" was misplaced because the First General Services court considered an equitable cause of action for indemnity rather than a contractual one. ECC, however, does not explain why the distinction is significant and does not point to any case law saying that principles instructive in equitable cases cannot be instructive in contractual cases. Equitable causes of action for indemnity include recovery of attorneys' fees just like contractual ones do, so there is no reason to think that the First General Services court failed to consider how its holding would affect recovery of attorneys' fees. See Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992) (instructing that "[t]he damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence *as well as* attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence") (emphasis added). And while the First General Services court did not speak in terms of indemnity against liability and indemnity against loss, the distinction is immaterial in this case because, as argued below, BFS has a right to attorneys' fees as consequential damages of its right to indemnity against liability outlined in its contract.

II. Attorneys' fees are recoverable as consequential damages of the underlying action and there is no precedent for bifurcating them into a separate claim with a separate statute of limitations.

In an attempt to characterize the claim for recovery of attorneys' fees in this matter as time-barred, ECC argues that the recovery of attorneys' fees should be bifurcated from the indemnification claim and should be analyzed as its own cause of action with its own accrual date. To this end, ECC argues that a claim for attorneys' fees should be treated as a cause of action arising out of a *contract for indemnity against loss* rather than a *contract for indemnity against liability*. This argument encounters two problems: first, attorneys' fees are consequential damages of the indemnification claims, and thus the statute of limitations is determined by the underlying claim; second, even if attorneys' fees could be independently evaluated, they would be evaluated as a breach-of-contract claim, and such claim will not be actionable until ECC breaches the contract by refusing to pay attorneys' fees. The first issue will be addressed here; the second issue will be explained further in Section III.

Case law is clear that regardless of whether an indemnification claim is equitable or contractual, it includes both indemnification for liability *and* recovery of attorneys' fees: "[i]n cases of either contractual or equitable indemnification, reasonable attorney's fees incurred in resisting the claim indemnified against may be recovered *as part of the damages and expenses*." McCoy v. Greenwave Enters., Inc., 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) (emphasis added). South Carolina statutory law also recognizes this, which is why South Carolina 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.

As the McCoy case states, attorneys' fees incurred are "part of" the indemnification claim; they are not their own separate claim with their own separate statute of limitations. See McCoy 408 S.C. at 359. It is the harm suffered, and not the requested relief, that determines the running of the statute. Thus, regardless of whether the source is contractual or equitable, attorneys' fees

have the same accrual date as the indemnification claim to which they are attached, an accrual date that does not begin to run until after judgment has been entered against the defendant. Because no judgment against BFS has been entered in the underlying case, the statute has not yet run on the indemnification claims.

III. Even if attorneys' fees could be considered separately, BFS would still have a timely claim.

Should the Court parse BFS's plea for consequential damages for its indemnification claims, as ECC requests, what would remain would be a breach-of-contract cause of action against ECC for failing to pay attorneys' fees associated with the underlying action, as required by the contract. Because ECC has not yet communicated a refusal to pay these fees, the cause of action is still viable.

"A statute of limitations generally begins to run on the date a cause of action accrues, and a breach of contract action usually accrues at the time a contract is breached or broken." State v. McClinton, 369 S.C. 167, 173, 631 S.E.2d 895, 898 (2006). In other words, 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 the subcontractor's refusal to pay attorneys' fees as outlined in the contract.

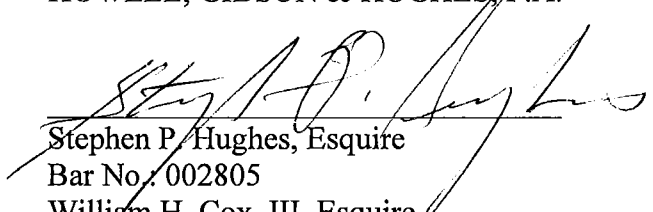
To date, ECC has not communicated to BFS a refusal to pay BFS's attorneys' fees incurred in defending against Plaintiff Damico or Lennar Carolinas, LLC's claims for damages allegedly resulting from deficiencies in the work performed by ECC; moreover, the earliest possible act that could be construed as an implicit refusal would have been the Answer filed by ECC in this case, which denied BFS's right to said relief. Contrary to ECC's argument, the "breach" of the contract would be ECC's refusal to abide by the terms of the contract, and not the mere incurring of attorneys' fees. That "refusal" is what would have begun the statute of limitations on ECC's argued

hypothetical BFS cause of action for attorneys' fees. Notably, application of the discovery rule (for which ECC argues) would not change the result, because BFS had no reason to suspect that ECC was in breach of the contract until, at the earliest, ECC filed its respective Answer to BFS in this case. Accordingly, even under ECC's hypothetical, BFS's claims were timely.

Conclusion

Because ECC has failed to abide by the Rules of 242 and has failed to identify a special or important reason why Certiorari should be granted, and because the law is clear that the accrual date for the BFS indemnification claims, inclusive of their damages, will not run until the completion of the underlying action, the Court should deny the ECC's Petition for Writ of Certiorari.

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August 1, 2025

THE STATE OF SOUTH CAROLINA
In the 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,

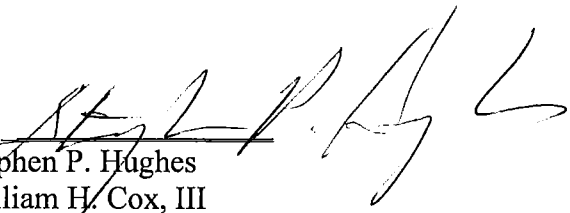
v.

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

PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the ***Builders FirstSource Return to the ECC Contracting Petition for Writ of Certiorari*** upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 1 day of August, 2025 to all counsel of record.

HOWELL, GIBSON & HUGHES, P.A.

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SC Court of Appeals

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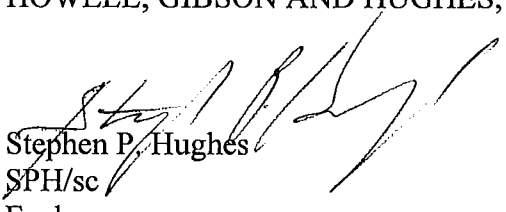
Re: Builders FirstSource Southeast Group, LLC v. ECC Contracting LLC, MI
Windows and Doors, Inc., Hurley Services, LLC, Charleton Exteriors LLC
Civil Action No: 2020-000415
Our File No: 11742.1 SPH

To Whom It May Concern:

Please find enclosed herewith for filing an original and one copy of the ***Builders FirstSource Reply to the ECC Contracting Petition for Writ of Certiorari***, together with the Certificate of Service, with regard to the above referenced matter. I would appreciate your filing the Return to the Petition for Writ of Cert and returning a filed clocked copy to me via email at sphughes@hghpa.com, wcox@hghpa.com, and scombites@hghpa.com. If return of the clocked copy must be via U.S. Mail, please advise and I will provide a self-addressed, stamped envelope provided for same.

With kindest regards, I am
Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.


Stephen P. Hughes
SPH/sc

Enclosures

cc: Court of Appeals
Counsel of Record

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Aug 21 2025

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,

Petitioner/Respondent.

**PETITIONER/RESPONDENT, ECC CONTRACTING, LLC'S, REPLY TO
APPELLANT, BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC'S, RETURN**

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ARGUMENT IN REPLY

ECC's Petition for a Writ of Certiorari should be granted because the Court of Appeals erred by applying equitable indemnity accrual of claim principles to BFS's contractual indemnity claims and failed to distinguish between indemnity for liability versus indemnity for loss. This led the Court of Appeals to incorrectly determine the accrual of the statute of limitations for BFS's claim for attorney's fees and costs. Clarification from this Court is essential for consistency and certainty regarding how contractual indemnity claims against loss, which include attorney's fees, are to be treated under the statute of limitations.

I. The Court of Appeals' Misapplication of Equitable Indemnity Principles to a Contractual Indemnity Claim Constitutes a Special and Important Reason for Granting Certiorari.

BFS argues that the Petition fails to identify a "special or important reason" for this Court's review, claiming there is "no novel issue, no conflict between lower courts, [and] no conflict with the Court of Appeals' opinion and this Court's precedent." This assertion is incorrect. The Court of Appeals' decision conflicts with the Court's precedent regarding the distinction between different types of indemnity.

The Court of Appeals' analysis of the statute of limitations rests on an inaccurate legal premise, and its reliance on First General Services of Charleston, Inc. v. Miller, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994), and former Chief Justice Toal's dissent in Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Liability Joint Underwriting Association, 411 S.C. 557, 769 S.E.2d 847 (2015), is misplaced. The Supreme Court, in First General Services, makes no reference to contractual indemnity claims and clearly limits its discussion to common-law, equitable indemnity. While this Court did not provide a detailed analysis of indemnity for liability versus indemnity for loss, its determination that, "the statute of

limitations generally runs from the time judgment is entered against the defendant” addresses the accrual of an equitable claim for indemnity against liability, not loss. First General Services, 314 S.C. at 444. This body of precedent has no bearing on accrual of a contractual indemnity claim based in indemnity against loss – such as BFS’s claim for attorney fees in the present case. By relying on these cases, the Court of Appeals failed to consider the long-standing rules governing contractual indemnity as outlined in Piper v. Am. Fid. & Cas. Co., 157 S.C. 106, 154 S.E. 106 (1930) and Jones v. Builders Inv. Grp., LLC, 415 S.C. 321, 781 S.E.2d 737 (Ct. App. 2015).

BFS’s argument that the distinction between equitable and contractual indemnity is “immaterial” is baseless and unsupported by case law. While a claim for equitable indemnity may include attorneys’ fees as a component of damages, as seen in Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992), the accrual of that claim is distinct from a contractual indemnity claim for loss. By focusing solely on the entry of judgment or payment to a third party in cases dealing with equitable indemnity claims, the Court of Appeals failed to analyze BFS’s contractual indemnity claim for attorney’s fees under established contractual accrual principles, which is precisely why ECC’s Petition for a Writ of Certiorari should be granted.

II. BFS’s Claim for Recovery of Attorney’s Fees as an Element of Damages Related to Its Contractual Indemnity Claim Accrued When They Were Incurred, Not When a Judgment was Entered.

Unlike common-law indemnity, which is a right created by operation of law, BFS’s claims arise from a specific contract. Our courts have long recognized two distinct types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. See Piper, 157 S.C. at 112. This distinction, which the Court of Appeals failed to apply, is critical because it determines when the statute of limitations begins to run. In a contract for

indemnity against liability, the obligation to indemnify arises when the liability is incurred; in a contract for indemnity against loss, the indemnitee must have made some form of payment or suffered an actual loss. See Jones, 415 S.C. at 330. The Court of Appeals’ Opinion fails to apply this fundamental principle to the contract at issue, which, by its broad language¹, creates a claim for both types of indemnity. By focusing solely on the entry of judgment or payment to a third party, the Court of Appeals’ decision failed to consider the existence of certain BFS contractual claims that are based in indemnity for loss.

BFS elected to include a contractual indemnity provision that calls 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 the same from ECC. (R. pp. 204-206, 2008 Contract between BFS and ECC §5 ¶3 INDEMNITY). This is, by definition, a claim for indemnity against loss. The cause of action for this loss accrued when the loss was incurred, not when a judgment was entered. As former Chief Justice Toal’s dissent in Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Liability Joint Underwriting Association, which is cited by the Court of Appeals itself, correctly noted, the right to sue for indemnification accrues when a party “actually sustains damages through either paying an injured party...or *incurring attorney’s fees from defending itself*.” Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Liability Joint Underwriting Association, 411 S.C. 557, 769 S.E.2d 847, 852-53 (2015) (emphasis added). BFS began incurring attorney fees in December 2015, and the three-year statute of limitations for that specific claim began running at that time.

¹ The indemnity provisions in the contract between BFS and ECC were so broad that the Court of Appeals properly deemed them unenforceable and affirmed the Circuit Court’s holding that BFS’s contractual indemnity claim failed as a matter of law.

BFS's reliance on McCoy v. Greenwave Enters., Inc. is misplaced. While attorney's fees may be a component of damages under an indemnity claim, the critical issue is when those fees or damages begin to accrue. Here, BFS began to incur losses for attorney's fees and costs – damages it seeks against ECC in this litigation – at the very latest when its Answer was drafted and served, thereby triggering the start of the three-year statute of limitations under S.C. Code §15-3-530 et seq. BFS's attempt to conflate the accrual of an indemnity-for-loss claim with an indemnity-for-liability claim demonstrates the very legal confusion that requires this Court's review.

III. The Discovery Rule Provides an Independent Basis for Finding the Claim Time-Barred.

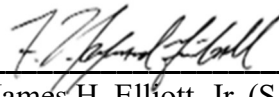
BFS's treatment of the discovery rule is equally unpersuasive. The discovery rule centers on when a cause of action "reasonably ought to have been discovered." A corporation, like BFS, upon receiving a summons and complaint, is legally required to hire counsel and is immediately on notice that it will incur attorney's fees. These damages are not hypothetical; they are a certainty. The fact that the full extent of the damages was not yet known is immaterial. Dean v. Ruscon Corp., 321 S.C. 360, 363–64, 468 S.E.2d 645, 648 (1996).

BFS was served with the Complaint on December 3, 2015. At that moment, it was on notice—both legally and practically—that it would be required to retain counsel and incur attorneys' fees. As a result, the statute of limitations began to run for BFS's contractual indemnity for loss claim. Those damages were certain, not speculative. The fact that the full extent of fees was not yet determined is irrelevant. By BFS failing to file its Third-Party Complaint against ECC within three years, BFS's contractual indemnity claim, which seeks recovery of attorney's fees and costs, is time-barred.

CONCLUSION

For the foregoing reasons, the Court of Appeals failure to distinguish between equitable and contractual indemnity, and its misapplication of the statute of limitations to a claim for indemnity against loss, creates a significant question of law that warrants review. This Court should grant ECC's Petition for a Writ of Certiorari to provide much-needed guidance in this area.

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Aug 21 2025

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
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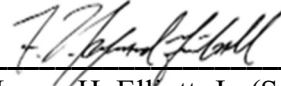
Petitioner/Respondent.

PROOF OF SERVICE

The undersigned does hereby certify that on August 21, 2025, a copy of **Petitioner/Respondent, ECC Contracting, LLC's, Reply To Appellant, Builders First Source-Southeast Group, LLC's, Return** was served by email on all counsel of record.

[SIGNATURE ON FOLLOWING PAGE]

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August 21, 2025

VIA E-MAIL (supctfilings@sccourts.org)

The Honorable Patricia A. Howard
Clerk of Court, S.C. Supreme Court
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Columbia, SC 29201

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Aug 21 2025
SC Court of Appeals

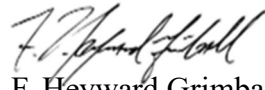
**RE: Builders First Source-Southeast Group, LLC v. MI Windows and Doors, Inc.
et al, Appellate
Civil Action No. 2018-CP-08-02547
Appellate Case No. 2025-001176
RPR File No.: 889-277**

Dear Ms. Howard:

Enclosed for filing, please find **Petitioner/Respondent, ECC Contracting, LLC's, Reply To Appellant, Builders First Source-Southeast Group, LLC's, Return** 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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

SC Court of Appeals

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.

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STATUTES AND RULES

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court inappropriately grant summary judgment to Respondents despite the presence of genuine issues of material fact?
- II. Did the Trial Court misunderstand and mischaracterize the relief requested by Appellant as seeking indemnification for its own negligence rather than for the negligence of its subcontractors?
- III. Because of its misunderstanding of the relief requested, did the Trial Court inappropriately apply a heightened standard of contract construction to the indemnification language in Appellant's contract?
- IV. Did the Trial Court incorrectly hold that the statute of limitations on Appellant's indemnity claims began to run before either a final judgment had been entered against Appellant or a payment had been made by appellant?
- V. Did the Trial Court lack jurisdiction to consider the substantive issues raised by Respondents' motions for summary judgment while the underlying *Damico* case was on appeal?

STATEMENT OF THE CASE

A. The Damico Litigation

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

Builders FirstSource, 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 its own window supplier, MI Windows and Doors, and against its then-known installation subcontractors. Before the referenced motion to amend could be heard, the Trial Court considered, and denied, the motion of the general contractor, Lennar, to compel arbitration. The Court's orders denying that motion and Lennar's motion to

reconsider were appealed to the S.C. Court of Appeals, thus effecting a stay of the proceedings before the Trial Court in the underlying action. While the Court of Appeals issued its order compelling arbitration between Lennar and the Plaintiffs on June 10, 2020, at all times relevant to this case, the underlying Damico Litigation was stayed on appeal.

It bears note that no final judgment or order has been issued against Builders FirstSource, 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 its installers, Appellant Builders FirstSource-Southeast Group, LLC, 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., (a) contractual indemnity, (b) equitable indemnity, (c) breach of express and implied warranties, (d) breach of contract, (e) negligence, and (f) contribution, respectively.

Respondents ECC and Charleston Exteriors, as subcontractors to Builders FirstSource, 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.

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

On December 6, 2019, the Court issued its order granting Respondents' motions for summary judgment. On December 16, 2019, the Appellant filed a motion for reconsideration. Judge Newman requested oral arguments on the motion for reconsideration, which were heard before the Court on January 16, 2020. On February 3, 2020, the Court issued an "Amended Order," again granting Respondents' motions for summary judgment; this order, however, did not address or rule on Appellant's December 16, 2019 motion for reconsideration. Therefore, Appellant filed a second motion for reconsideration on February 13, 2020, asking that the Court explicitly rule on the December 16, 2019 motion for reconsideration. The deadline to file a notice of intent to appeal from the Trial Court's February 3rd amended order was March 4, 2020; thus, Appellant 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 Appellant's motion for reconsideration. Appellant 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.

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),

SCRCP, 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, "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 Trial Court Erred in Granting Summary Judgment to Respondents Despite the Presence of Genuine Issues of Material Fact.

Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. SCRPC 56. In granting summary judgment on Appellant's contractual indemnity claim, the Trial Court has made implicit determinations of fact regarding the negligence of the various parties without any evidentiary support in the record.

Appellant is seeking recovery in contractual indemnity from its subcontractors. In South Carolina, the ability to recover damages from one's subcontractor depends on the source of the negligent conduct that caused the damage. As discussed in greater detail below, if a contractor seeks to have a subcontractor indemnify the contractor for the contractor's own negligence, our courts have held the contractor to an elevated burden – the contractor must show that the contractual language granting that right was “clear and unequivocal.” See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). Whether or not the contract language rises to the level necessary to grant that right has been decided by Courts as a matter of law. See id.

However, there is a second potential source of negligence occasioning the sought-after damages. In South Carolina, a contractor may seek indemnification from its subcontractor for damages resulting from that subcontractor's negligence, whether that subcontractor was the sole source of negligence or whether that subcontractor was concurrently negligent with the general contractor (in the latter scenario, however, recovery would be limited to the proportional share of negligence of the subcontractor). Id. at 645. Such contractual indemnification is not subject to a heightened standard, and the determination – or allocation – of negligence is an issue of fact for the jury.

The Court ruled on an issue of law in determining that Appellant's contract did not allow Appellant to recover indemnification from its Respondent Subcontractors for Appellant's own negligence. However, in dismissing the *entire* contractual indemnity claim, the Trial Court implicitly found that Appellant was likewise unable to recover from its Respondent Subcontractors for the Subcontractors' own negligence. Because this second scenario is not subject to the heightened legal standard, there was no basis for the Court to determine, as a matter of law, that the claim could not survive. And because the issue of whether the subcontractors were in fact negligent is both contested and most properly left for the jury, there was no basis for the Court to determine that the claim could not survive due to a lack of genuine issue of material fact.

The Court's implicit factual determination that the subcontractors were not negligent has not been established by any evidence. No discovery has been done in this case, and very limited discovery has been done in the underlying

Damico litigation. Respondents did not offer any arguments or evidence regarding their negligence or lack thereof. Furthermore, pursuant to SCRCP 56, any issue of fact regarding negligence should have been construed in favor of Appellant, precluding summary judgment on its contractual indemnity claim inasmuch as Appellant seeks indemnification for damages arising out of its subcontractors' negligence.

II. The Trial Court's Ruling is Premised Upon its Mistaken Finding that Appellant is Seeking to be Indemnified for its Own Negligence.

Appellant is seeking indemnification from the Respondent subcontractors only to the extent that the Respondent subcontractors were negligent (whether solely or concurrently). However, rather than address this specific relief requested, the Trial Court's order repeatedly emphasizes that the contracts between Appellant and Respondents do not meet the heightened standard required to provide Appellant with indemnity rights as to Respondents for *Appellant's own negligence*. The cases the Court quotes in section "C" of its analysis all speak of the indemnitee's "own negligence" or "own negligent acts." Likewise, the Trial Court's holding states that:

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal ***when seeking to be indemnified for its own negligence***, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear [sic] or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

(R. p. 17) (emphasis added). This language shows that the Trial Court believed that Appellant was seeking indemnification for its own negligence, and that such

belief was a foundational part of its ruling. However, *Appellant is not seeking indemnification for its own negligence.*

Appellant repeatedly attempted to draw the Court's attention to the fact that it was not seeking indemnification for its own negligence but was only seeking indemnification for the negligence of its subcontractor. In its Complaint, Appellant asserted that it is "entitled to damages for any negligence, as aforesaid, on the part of [subcontractor] . . ." (**R. p. 137, lines 6-8**). Three times during oral arguments on the motion for summary judgment, counsel for Appellant advised the Court that in this case Appellant is asking that its subcontractors indemnify Appellant *for their negligence*. (**R. pp. 352, 356-57, 362-63**). In Appellant's Motion for Reconsideration of the Court's December 6, 2019 Order, Appellant pointed out that while Appellant may not be able to maintain indemnity claims for its own negligence, Appellant was entitled to pursue its contractual indemnity claim against Respondents based upon the Respondents' own negligence. (**R. pp. 280-281**). And counsel for Appellant reiterated that position in oral arguments on the motion for reconsideration. (**R. pp. 383-84**).

Again, in Appellant's filed Memorandum in Opposition to the Proposed Amended Order Granting Defendants' Motion for Summary Judgment, Appellant represented to the Court that "BFS is not seeking to have Defendants indemnify BFS for BFS's own negligence. BFS is seeking to have Defendants indemnify BFS for Defendants' own negligence." (**R. p. 290**) (emphasis in original). Finally, that same Memorandum pointed out to the Court that pursuant to the contract at

issue, Appellant was entitled to seek indemnification for losses arising out of property damage:

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.

(R. p. 291).

Despite all of these representations that Appellant was properly seeking indemnification for the subcontractors' negligence, and not for its own, the Court, without any explanation, ignored Appellant and granted summary judgment as to the entire contractual indemnity claim on the basis that Appellant was seeking to be indemnified for its own negligence. The problem is that the Court's analysis should not have ended there. Rather, as in Concord and Cumberland, discussed below, the Trial Court should have next considered the indemnity claims that were based on the *subcontractor's* own negligence, and should have allowed such contractual indemnity claims against the subcontractor for the subcontractor's own negligence to survive summary judgment.

III. The Trial Court Inappropriately Applied the Heightened Standard of "Clear and Unequivocal" Articulated in Concord and Cumberland to the Relevant Indemnification Language in Appellant's Contract.

Because the Trial Court mistakenly interpreted Appellant's claims as seeking indemnity for Appellant's own negligence, it erroneously applied the heightened standard of "clear and unequivocal" as articulated in Concord and Cumberland to the relevant contractual indemnity provisions in Appellant's contracts.

A. Concord and Cumberland

An understanding of the 2018 Court of Appeals decision in Concord and Cumberland is essential to the issues before this Court. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 172 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). In that case, Superior was a general contractor who hired Muhler as its subcontractor. When Superior was sued by the Concord and Cumberland Horizontal Property Regime, it looked to Muhler for indemnification pursuant to their contract. The contract provided, in relevant part, that:

To the fullest extent permitted by law, **the Subcontractor shall indemnify and hold harmless** the Owner, the Architect, **the Contractor** (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, **arising out of or resulting from the performance of the Subcontractor's Work provided that**

- (a) any such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, **to the extent caused or alleged to be caused in whole or in any 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, **regardless of whether it is caused in part by a party indemnified hereunder.**

Id. at 643-44 (emphasis added). Superior claimed that these provisions required Muhler to indemnify Superior and that Superior's right to indemnity was not lessened by Superior's concurrent negligence. Id. at 645. Muhler countered that the contract did not require them to indemnify Superior for Superior's wrongdoing. Id.

The Trial Court found, and the Court of Appeals agreed, that in order for Superior to prevail on a claim seeking indemnity *for its own negligence*, it would need to show that the contract language granting that right met the heightened standard of being clear and unequivocal: Id. at 649. The Court of Appeals noted that this heightened standard applied regardless of whether Superior was seeking indemnification for its own sole negligence or for its own concurrent negligence. Id. Because the Court found that the language 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 "*limited indemnification to damages resulting from the work Muhler performed.*" Id. at 645. This merits repeating: Superior could not collect indemnification from Muhler for damages arising out of Superior's own negligence; however, Superior *could* collect indemnification from Muhler for damages arising out of Muhler's own negligence – regardless of whether Muhler's negligence was sole or concurrent.

B. Misapplication to Claims at Issue

The parties in this case have agreed that the contractual language at issue is nearly identical to that in Concord and Cumberland. The only difference is that instead of seeking indemnity for Appellant's own negligence, Appellant has limited the relief sought to the negligence of its subcontractors. This is the exact relief allowed under Concord and Cumberland, which "limited indemnification to damages resulting from the work [the subcontractor] performed." Id. at 645. Therefore, the Trial Court should not have granted summary judgment on Appellant's contractual indemnification claim.

But the Trial Court did grant summary judgment, and it did so by applying an erroneous, heightened standard of contract construction to Appellant's contracts. This Court in Concord and Cumberland acknowledged that "typically, courts will construe an indemnification contract in accordance with the rules of the construction of contracts generally," and it is only "when an indemnity clause purports to relieve an indemnitee from the consequences of its own negligence [that] our case law requires strict construction of the clause." Concord & Cumberland, 424 S.C. at 647 (internal quotations omitted). 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, it was an error for the Court to apply the heightened standard of clear and unequivocal outlined in Concord and Cumberland. Instead, the Court should have interpreted the contract "in accordance with the rules of the construction of contracts generally." The parties contracted for a series of rights, and one such right was that Appellant was entitled to seek indemnification for losses arising out of property damage to the extent caused by the negligence of the subcontractor. The Trial Court should not have dismissed this right on summary judgment.

C. Appellant's Contract

The Contracts governing the indemnity claims in this case were executed by Appellant and ECC Contracting, and by Appellant and Charleston Exteriors, in 2008 and 2012, respectively. The indemnity language is the same in both. In its order, the Trial Court quoted two different paragraphs of the Contract's indemnity provision, misunderstanding that these two provisions apply to completely

separate scenarios, and the Trial Court apparently assumes, without stating, that these provisions somehow contradict each other in a way that renders Appellant's indemnity claims void.

The indemnity provision of the Contract between Appellant and Respondent contains four Paragraphs. The Trial Court's order pulls quotes from two different paragraphs of the contract. The first section highlighted in the order accurately quotes that Appellant may seek indemnification for losses arising out of, among other things, property damage:

ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.

(R. pp. 204, 534). This paragraph expressly permits Appellant to recover from Respondent Subcontractors for the negligent acts or omissions of said subcontractors, and is consistent with the Court of Appeal's holding in Concord and Cumberland.

The Trial Court's order then goes on to quote a different paragraph of the Indemnity Provision. This selection has been taken out of context, and applies only to losses

ARISING OUT OF OR RESULTING FROM BODILY INJURY TO, OR SICKNESS, DISEASE, OR DEATH OF, THE SUBCONTRACTOR, ANY AGENT, EMPLOYEE, OR REPRESENTATIVE OF THE SUBCONTRACTOR, OR ANY OF ITS SUBCONTRACTORS . . .

(R. pp. 204, 534) (emphasis added). This case involves claims for property damage, not bodily injury. Thus, the second paragraph in the order cited by the

Trial Court is irrelevant to this case and should not have factored into its decision. Instead, the applicable indemnity provision in this case is the first paragraph, which, consistent with Concord and Cumberland, limits recoverable indemnity to the negligence of the subcontractor.

IV. 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 further holds 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.

The Trial Court thought it relevant, for purposes of analyzing the statute of limitations argument, to differentiate 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.

Furthermore, even assuming that the payment of attorneys' fees constituted a "loss" sufficient to trigger the running of the statute of limitations, the only attorneys' fees that would be barred would be those few dates outside the statute of limitations. Because Appellant filed this action on December 21, 2018, a three-year statute of limitations would bar attorneys' fees accrued prior to December 21, 2015 – the date on which Appellant filed its answer in the Damico Litigation. Thus, only attorneys' fees incurred prior December 21 of 2015 could potentially be barred. Plaintiff still has a viable claim for all attorneys' fees incurred after December 21, 2015.

V. The Trial Court Lacked Jurisdiction to Hear Respondents' Summary Judgment Motion Because the Underlying Damico Litigation was on Appeal.

Because the underlying Damico Litigation was appealed before Appellant had the opportunity to assert claims against additional subcontractors, including Respondent subcontractors, Appellant filed this action in order to protect the timeliness of those claims. Appellant then requested a stay of the claims asserted herein until such time as the Damico Litigation came back down from the Appellate Court and the claims could be consolidated with that litigation. The reason a stay and consolidation was appropriate was because the Trial Court did not have the jurisdiction to rule on any substantive issues in this case while the underlying Damico Litigation was on appeal.

"Lack of subject matter jurisdiction can be raised at any time . . . and can be raised sua sponte by the court." Badeaux v. Davis, 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct. App. 1999). Additionally, "[l]ack of subject matter jurisdiction may not be waived, even by consent of the parties." Id.

Because the underlying action was on appeal, all matters affected by the appeal, including those in Respondents' summary judgment motion, should have been automatically stayed. The Trial Court was without jurisdiction to make substantive determinations affecting the underlying Damico case. For this reason, Appellant has argued from the beginning that the Trial Court must stay the proceedings until they may be consolidated with the underlying case. The Trial Court's summary judgment order should be voided for lack of jurisdiction, and the case should be consolidated with the Damico litigation.

CONCLUSION

Because the Trial Court inappropriately granted summary judgment in spite of the existence of genuine issues of material fact; because the Trial Court misconstrued or misunderstood that Appellant was seeking indemnification only for their subcontractors' negligence; because the Trial Court improperly applied a heightened standard of contract construction to the Appellant's indemnity claims; and because the Trial Court incorrectly determined that the Appellant's claims were barred pursuant to the statute of limitations, this Appellant respectfully requests that this Court reverse the Trial Court's order granting summary judgment to Respondents. Additionally, and/or in the alternative, because the Trial Court did not have jurisdiction to rule on claims affecting the substantive

issues of motions relating to an underlying case that was stayed on appeal, Appellant respectfully requests that this Court void the Trial Court's order granting summary judgment and require the entry of an order consolidating this case with the underlying Damico Litigation.

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December 1, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

DEC 04 2020

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

SC Court of Appeals

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.

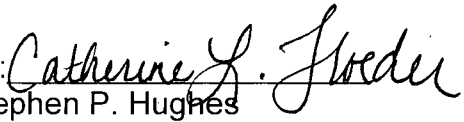
CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Briefs of Appellants comply with
Appellate Court Rule 211(b).

SIGNATURE PAGE FOLLOWS

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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.

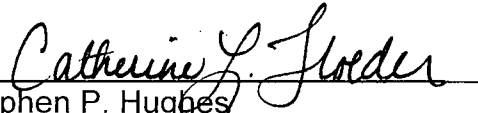
Again, Appellants believe that the fracturing of their right to attorneys' fees as consequential damages from their contractual indemnity claim is inappropriate; however, the result under such an analysis should have lead the trial court to deny Respondents' motion for summary judgment on the statute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

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December 1, 2020

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SC Court of Appeals

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM BERKELEY COUNTY
Court of Common Pleas**

Clifton B. Newman, Circuit Judge

Appellate Case No. 2020-000415

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

Builders FirstSource -Southeast Group, LLC,.....**Appellant,**

v.

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

OF WHICH, ECC Contracting, LLC; and Charleston Exteriors, LLC, are....**Respondents**

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COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Is Appellant's subcontract with respondents illegal and unenforceable?
- II. Addressing Appellant's Arguments I, II, and III:
 - a. Do Appellant's subcontracts support its arguments?
 - b. Is Appellant bound by the allegations of its operative pleading?
 - c. Did Appellant misconstrue the lower court's ruling?
 - d. Does the relief requested by Appellant demonstrate that it seeks to recover, with its contractual indemnity claims, for nothing but liability created by the Concurrent Negligence of Appellant and its Subcontractors?
- III. Addressing Appellant's Argument IV:
 - a. Did the Trial Court correctly hold that the statute of limitations on Appellant's indemnity claims began to run when liability was incurred?
 - b. In the alternative, per the discovery rule did Appellant's claims accrue on December 3, 2015?
 - c. Does Appellant's final paragraph arguing against the statute of limitations misconstrue Respondent's arguments, the Trial Court's ruling, the relevant dates, and South Carolina caselaw?
- IV. Addressing Appellant's Argument V:
 - a. Did the Trial Court have jurisdiction to consider the substantive issues raised by Respondents' motions for summary judgment while the underlying *Damico* case was on appeal?
 - b. In the alternative, if the Trial Court did not have jurisdiction, does Appellant lack standing to bring this litigation, thus requiring this case to be remanded with instruction to dismiss?

INTRODUCTION

The crux of this appeal is a two-fold inquiry into the ability of Appellant Builders FirstSource-Southeast Group, LLC (“BFS”) to bring claims derivative of *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”) against its subcontractors ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC (collectively as “Subcontractors”) in an action that the Respondents, ECC Contracting, and Charleston Exteriors, LLC (together as “Respondents”) contend is a day late and a dollar short. The day late: an action filed three years and six days after the last possible moment liability attached and their claims accrued; the dollar short: an action of claims for Contractual Indemnity, Breach of Warranty, Breach of Contract, and Negligence which are explicitly barred by the *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 776 S.E.2d 434, (Ct. App. 2015) and *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) holdings and based on contractual indemnity provisions which expressly violate the Anti-Indemnity Statute, SC Code Ann. § 32-2-10. BFS does not contest that the *Stoneledge* ruling bars most of their claims. Transcript of October 19, 2019 pg. 44:5-9 (**R. p. 361, lines 5-9**). Further, BFS does not contest the *Concord and Cumberland* holding but instead assert that they are seeking to recover for their subcontractors’ sole negligence only, which they contend is allowed. Transcript of October 19, 2019 pg. 33:22-34:7 (**R. p. 350, line 22-p. 351, line 7**). Thus, the primary issues on appeal stem from (1) BFS’s contention that it is entitled to recover in indemnity for its subcontractors proportional share of fault for any settlement or

judgment resolving the claims against it and (2) BFS's contention that it can seek to recover consequential damages more than three years after they began to accrue.

Because BFS has failed to identify any basis upon which this Court should reverse the circuit court's grant of summary judgment in ECC Contracting, LLC's favor on this issue, the circuit court's determination should be affirmed.

STATEMENT OF THE CASE

This case is both derivative of the *Damico* litigation already on appeal and the first appeal of a growing number of cases involving a dispute between BFS and its subcontractors over contractual indemnity. For our purposes, the below explanation of related cases is limited to those known to be relevant to this appeal at this time. Other cases may become relevant.

A. The Damico Litigation (the Underlying Action)

Several Homeowners at the Abbey located in the Spring Grove development (the "Plaintiffs") filed the *Damico* Litigation against the general contractor, Lennar Carolinas, LLC ("Lennar"), against Lennar, Spring Grove Development, Volkmar Consulting Services, LLC, and Manale Landscaping, LLC for alleged deficiencies in the site grading and drainage. Lennar asserted cross-claims against Co-Defendants and third-party claims against its subcontractors. There are sixty-nine (69) single family homes in the Abbey located in the Spring Grove development (the "Subject Property" or the "Abbey"). The Plaintiffs brought the suit individually and acting derivatively on behalf of the Spring Grove HOA.

On June 1, 2015, Lennar filed a Motion to Compel Arbitration. On November 23, 2015, an amended complaint was filed, and the scope of the Plaintiffs' allegations was

expanded to include more vertical construction defects. The Plaintiffs also withdrew their allegations on behalf of the HOA and brought putative class allegations on behalf of all homeowners at the Subject Property. In turn, in Lennar's answer, to Plaintiffs' complaint, filed November 25, 2015, Lennar asserted cross-claims and third-party claims against additional subcontractors for the Project, including BFS. Lennar served BFS with its third-party complaint on December 1, 2015 via certified mail that was delivered on December 3, 2015. BFS served its answer by US Mail on December 18, 2015, and it was file stamped by the clerk of court on December 21, 2015.

On March 30, 2016, Lennar filed an Amended Motion to Compel Arbitration wherein it sought to compel arbitration of its claims against newly added subcontractor defendants as well.

On September 19, 2016, the circuit court entered an Order denying Lennar's Motion to Compel Arbitration. On October 26, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 Order denying all motions to reconsider. Before BFS could obtain the consent of all parties or leave from the Court to amend its pleading, the Underlying Action was stayed by Lennar's appeal of the denial of its Motion to Compel Arbitration. Since the stay went into effect, BFS has failed to seek leave from the lower court to amend its pleadings.

B. This Litigation

On December 21, 2018, BFS filed this action asserting claims for contractual indemnity, equitable indemnity, breach of express and implied warranties, breach of contract, negligence, and contribution against Hurley Services, LLC ("Hurley"), ECC Contracting, LLC ("ECC"), Charleston Exteriors, LLC, ("Charleston Exteriors")

collectively with ECC as “Respondents”) and MI Windows and Doors. Respondents’ timely answered. Hurley did not respond and was placed into default, but later the entry of default was set aside.¹ BFS moved to stay and to consolidate this case with the Damico Case on August 6, 2019. ECC moved for summary judgment on August 9, 2019. Charleston Exteriors moved for summary judgment on August 20, 2019. The Respondents filed Memoranda in Support on October 10 and 11, 2019. BFS did not file a Memorandum in Opposition to the Respondents’ Motions but did oppose the motions at oral arguments. The Honorable Judge Clifton Newman heard the parties’ motions on October 18, 2019. On December 6, 2019, the Court issued an order granting Respondents motions with regard to all claims save for Equitable Indemnity and Contribution. On December 16, 2019, BFS filed a Rule 59(e) Motion and brief memorandum to Reconsider. On January 15, 2020 ECC filed a memo in opposition to BFS’s Motion to Reconsider. Judge Newman held oral arguments on January 16, 2020. Judge Newman ruled from the bench that BFS had done nothing to convince him to change his previous ruling, but Amended his order slightly to include more analysis on the Statute of Limitations ruling.

STATEMENT OF FACTS

Ultimately, this appeal arises from the construction and development of the Abbey and the alleged defects in that project. BFS is alleged to have supplied and installed the windows and doors on the Subject Property in the *Damico* Litigation. BFS in turn alleged that the Respondents (and Hurley) installed the windows and doors at the Subject Property. The work in this case and the *Damico* Litigation was performed under the same Master Subcontract Agreements. The Agreements are “Hub and Spoke”² type agreements where

¹ Hurley Services was not party to the motion below.

² This is not a term of art but merely a description counsel has come up with to explain how the master trade

the baseline contract does not commit anyone to anything (and, arguably, does not meet the basic requirements of a contract but that issue is not on appeal) until a purchase order is issued, accepted, and payment is made, but the Agreement sets the terms of the relationship in the event it is consummated/continued.

STANDARD OF REVIEW

This Court utilizes the same standard of review as the trial court to review the grant of summary judgment. *See e.g., Knight v. Austin*, 396 S.C. 518, 722 S.E.2d 802 (2012). In determining whether any triable issues of fact exist, “the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 804-805 (2009). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. *Manley v. Manley*, 291 S.C. 325, 329, 353 S.E.2d 312, 316 (Ct. App. 1987). “[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

agreement picks up purchase orders as the contractor-subcontractor relationship rolls forward.

ARGUMENT

I. APPELLANT’S SUBCONTRACTS VIOLATE THE ANTI-INDEMNITY STATUTE, S.C. CODE ANN § 32-2-10:

At the heart of BFS’s appeal is the contention that it can re-write its contract and its pleadings. The relevant indemnity provision, which is provided in Section 5 of the contract between BFS and ECC, states (all caps omitted for ease of reading):

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.

Notwithstanding the foregoing, 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 (the “indemnitees”), from and against any and all claims, damages, losses, and expenses, including, but not limited to, 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 to, or sickness, disease or death** of, the subcontractor, any agent, employee, or representative of the subcontractor, or any of its subcontractors, **regardless of whether such claim, damage, loss, or expense is caused or is alleged to be caused in whole or in party, by the negligence of any of the Indemnitees**, it being the expressed intent of the contractor and the subcontractor that in such event the subcontractor is to indemnify, defend, and hold harmless the Indemnitees from the consequences of their own negligence, whether it is or is alleged to be the sole or concurrent cause of the bodily injury, sickness, disease, or death of the subcontractor, subcontractor’s agent, employee, or representative, or the agent, employee, or representative of any of its subcontractors, the indemnification obligations under this paragraph shall not be limited by any

limitation on the amount or type of damages, compensation, or benefits payable by or for Subcontractor under Workers Compensation acts, Disability Benefits Acts, or other employee Benefit acts, the subcontractor shall procure liability insurance covering its obligations under this Section 5.

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.**

The Defense and indemnification obligations under this agreement are not intended to and shall not require the subcontractor or others to indemnify or hold harmless a Registered Architect, Licensed Engineer, or an agent, Servant, or Employee of a Registered Architect or licensed Engineer from Liability for damage that is (1) caused by or results from: (a) defects in Plans, Designs, or Specifications prepared, approved, or used by the Architect or Engineer; or (b) the Negligence of the Architect or Engineer in the Rendition or conduct of Professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract, and (2) arises from personal injury or death, property injury, or any other expense that arises from personal injury, death, or property injury.

2008 Contract between BFS and ECC §5 INDEMNITY (**R. pp. 218-219**) (*emphasis added*, all caps in the original).

There is nothing in South Carolina law that separates a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement. Indeed, the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10 speaks solely of "damages" while limiting the ability of the Indemnitor to indemnify the Indemnitee. The Anti-Indemnity statute bars indemnity agreements wherein the

Indemnitee seeks to be indemnified from “...damages arising out of bodily injury or property damage...” proximately caused by the indemnitee’s sole negligence. SC Code Ann. §32-2-10. Further, BFS claims its attorney’s costs and fees as damages in its complaint. BFS’s Summons and Complaint ¶ 34 (**R. p. 137, lines 3-16**). BFS cannot argue that its claims for contractual indemnity are for those sums that are solely attributable to the negligence of ECC.

Section 5 explicitly calls for ECC to pay BFS’s attorney’s fees “regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees.” 2008 Contract between BFS and ECC §5 INDEMNITY (**R. pp. 218-219**) (*emphasis added*, all caps in the original). This is an explicit violation of SC Code Ann. §32-2-10 as it requires ECC to indemnify BFS for BFS’s sole negligence. The fact that it limits the claimed damages to attorney’s fees, as opposed to a judgment cost, is immaterial. Additionally, the middle paragraph calls for the Subcontractors to “indemnify, defend, and hold harmless” BFS “...regardless of whether such claim, damage, loss, or expense is caused or is alleged to be caused in whole or in part, by the negligence of any of the Indemnitees.” This provision also obviously and explicitly violates SC Code Ann. §32-2-10.

Respondents and the court touched on but did not explicitly make this point in the arguments and rulings below. However, Respondents raise the matter now as an alternative sustaining ground for the lower court’s decision. *Brunson v. Long*, No. 2005-UP-450, 2005 WL 7084268, at *3 (S.C. Ct. App. July 15, 2005) *citing I’On L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (“The trial court did not consider this

particular issue, but because the matter is raised as an additional or alternative sustaining ground, we may consider") (emphasis added).

As BFS should well know, and as this Court rightly ruled, indemnification provisions calling for the Indemnitor to indemnify the Indemnatee "for damages caused by its [the Indemnatee's] negligence or the negligence of its subcontractors" are void as against public policy. *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152 (Ct. App. 2018). This Court went on to hold that "[A]n illegal contract is unenforceable." *Id.* (citing *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In *D.R. Horton*, this Court held that the indemnification agreement "purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10" and went on to conclude that "[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton." *Id.* This case is no different.

Because the indemnity provisions in Section 5 of the contracts between BFS and ECC require ECC to indemnify BFS for BFS's sole negligence, BFS's contracts are illegal, and thus unenforceable. Therefore, Respondents respectfully assert that no further inquiry is necessary with regard to the failure of BFS's contractual indemnity claims.

II. ADDRESSING APPELLANT'S ARGUMENTS I, II, AND III:

Sections I, II, and III of BFS's arguments all focus on the lower court's dismissal of the contractual indemnity claim. At the heart of all three argument subsections, is the contention that BFS is seeking to be indemnified only for the sole negligence of its subcontractors.³ BFS asserts that the trial court erred by dismissing the "entire contractual indemnity claim" and that such was an error of law contending that the question of whether

³ BFS also refers to its Subcontractors "own negligence" and "own sole negligence"

or not the liability of BFS was the result of the sole negligence of Respondents is a genuine issue of material fact precluding grant of summary judgment on their claims for “full contractual and common law indemnification...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney’s fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from the ECC⁴ any sums for which BFS may be held liable to the Plaintiffs, to Lennar Carolinas, LLC, and/or to others in such action.” BFS’s Complaint ¶ 34 (**R. p. 137, lines 3-16**). BFS’s position is unsupported by its contracts, its pleadings, South Carolina case law, the lower court’s order, and the relief it requests as is set forth below.

A. APPELLANT’S CONTRACT DOES NOT SUPPORT THEIR ARGUMENTS

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 stated in full above, 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

⁴ This is not a typo. For reasons unknown, BFS seeks indemnity for all judgement/settlement costs from ECC alone.

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 (R. p. 218, lines 1-21) (*emphasis added*, all caps in the original).

This language is based on the AIA form indemnification language and the key phrase for ECC's arguments at the circuit court level was "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.

However, BFS, contending that it can rewrite the contract and its pleadings to seek merely indemnification for the sole negligence of ECC, would have the inquiry end here without regard to the remainder of this 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 (R. p. 219, lines 7-20) (*emphasis added*, all caps in the original).

Again, there is no legal basis for separating a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement, and BFS claims its attorney's costs and fees as damages in its complaint. 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 calls for ECC for 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. "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*).

B. APPELLANT IS BOUND BY THE ALLEGATIONS OF ITS OPERATIVE PLEADING.

BFS claims its attorney's costs and fees as damages in its operative complaint. "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.* BFS seeks "full contractual indemnity" for attorney's costs and fees from ECC, Hurley, and Charleston Exteriors as well as "full contractual indemnity" from ECC, solely, for any and all sums it is required to pay in settlement or judgment. BFS's Complaint. ¶34 (**R. p. 137, lines 3-16**). The only way that BFS can achieve such a result is for the Subcontractors to indemnify BFS for its concurrent negligence (assuming BFS was not solely negligent). This is particularly true

with regard to the desire to seek indemnification for all funds spent to settle or satisfy a judgment from ECC alone.

C. APPELLANT MISCONSTRUES THE LOWER COURT’S RULING.

BFS contends that the Court made an “implicit factual determination that the subcontractors were not negligent”. This is patently incorrect. It is a misreading of the opinion, requiring the Court to come to a conclusion that is not a logically supported by any of the arguments presented to the circuit court. Instead the lower court *explicitly* found that the contracts BFS seeks to enforce contain language including the “prospect of these Defendants being forced to indemnify BFS for the negligence of BFS.” Amended Order ¶6 (R. p. 12, lines 21-23). Thus, as Judge Newman ruled in *Concord and Cumberland*, BFS must demonstrate that the contract “can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee’s own negligence.” *Concord & Cumberland*, at 645, 819 S.E.2d at 175 (Ct. App. 2018). Judge Newman went on to rule that BFS could not meet this high burden.

Not only is this explicit finding supported by the contract language, but it is also supported by the procedural posture of the case. The Statute of Limitations has long passed on any claims that the Plaintiffs might have against the Respondents and no other parties to the case are known to potentially have standing to sue the Respondents. Thus, there is no way for there to be a Judgment finding that Respondents are solely responsible for the claims against BFS. In the event that BFS settles the claims against it, it will have an undivided unexplained settlement amount that it is seeking to recover from four other parties. The exact procedural posture as the Superior Construction was in the *Concord and Cumberland* (and as D.R. Horton was in *D.R. Horton, Inc. vs. Builders FirstSource-*

Southeast Group, LLC) made all the worse (for BFS) by the fact that it has claims against three subcontractors and the window manufacturer.

D. THE RELIEF APPELLANT REQUESTS CLEARLY DEMONSTRATES THAT IT SEEKS TO RECOVER ON ITS CONTRACTUAL INDEMNITY CLAIMS FOR NOTHING BUT LIABILITY CREATED BY THE CONCURRENT NEGLIGENCE OF APPELLANT AND ITS SUBCONTRACTORS.

BFS contends that the circuit court erred by “implicitly” ruling that BFS’s contracts do not allow BFS to recover for the Subcontractor’s “own negligence”. Disregarding the dispute over the implicit findings, or lack thereof, of Judge Newman’s Amended Order, Counsel for BFS implicitly admitted in the original oral arguments that he sought to recover solely for the concurrent negligence of BFS and ECC stating:

If ECC goes out there and, you know, recklessly installs different fasteners, after we've provided them with the fasteners they were suppose[d] to install[l], or they do something, you know, whatever it is fraudulently, that's on them. We didn't participate in that fraud and undertake that. That would be their sole negligence and their wrongdoing. And to the extent that there was concurrent negligence, because we did have supervision duties over that, the jury portion, whether it be 50/50, or 51/49, or 5/95, there's going to be a portion of the concurrent negligence that is solely ECC's and Charleston Exteriors, which is exactly what Concord and Cumberland went through.

Transcript of October 19, 2020 pg. 46:6-21 (**R. p. 363, lines 6-21**).

Counsel for BFS lays out two scenarios. In the first, ECC is clearly solely negligent for all claims and BFS would be entitled to indemnity from ECC in equity— a claim it still maintains. *Id.* See also Judge Newman’s Amended Order dated February 3, 2020 (**R. pp. 10-20**). In the second scenario, counsel for BFS contends that there is both concurrent and sole negligence. *Id.* However, it is logically impossible for one party to be solely negligent and at the same time for both parties to be concurrently negligent. Either the indemnity

obligation stems from the sole negligence of the indemnitor or both the indemnitee and the indemnitor are concurrently negligent.

Counsel for BFS admits that BFS had supervision duties related to the work of the Subcontractors. Transcript of October 19, 2020 pg. 46:14-16 (**R. p. 363, lines 14-16**). Further, BFS has sued three subcontractors as well as the window manufacturer. *See generally* BFS's Summons and Complaint (**R. pp. 125-142**). It is, quite simply, impossible for us to be dealing with anything but concurrent negligence. BFS cannot recover from all of these parties without recovering purely for damages created by the concurrent negligence of BFS, its subcontractors, and the window manufacturer. There is no way that ECC will be found solely negligent and solely responsible for the sums BFS seeks to recover in indemnity.

In short, BFS's contract, pleadings, oral arguments, and Judge Newman's order all contemplate BFS seeking to recover in indemnity for damages resulting exclusively from the concurrent negligence of the parties. BFS admits that its contract language does not meet the heightened "clear and unequivocal" standard. The lower court's ruling should be affirmed.

III. ADDRESSING APPELLANT'S ARGUMENT IV:

A. THE TRIAL COURT CORRECTLY HELD THAT THE STATUTE OF LIMITATIONS BARS ALL OF APPELLANT'S CLAIMS SAVE FOR CONTRIBUTION AND EQUITABLE INDEMNITY.

Our courts have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112, 154 S.E. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must

have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330, 781 S.E.2d 737, 746 (Ct. App. 2015). “Where the contract is not a mere contract to indemnify and save harmless, but a contract to save from a legal liability or claim, the legal liability incurred and not the actual damage sustained is the measure of damage.” 31 C.J. 435, sec. 28.

In this case BFS has pled that it is entitled to full contractual and common law indemnification from against Liability. BFS’s Summons and Complaint ¶ 34 (**R. p. 137, lines 3-16**). BFS began to incur liability for attorney’s costs and fees – damages it seeks from ECC in this litigation -- at the very latest when its answer was drafted and executed by Counsel on December 15, 2015. *See* BFS’s Answer to Lennar’s Third-Party Complaint (**R. pp. 409-437**). This case was filed December 21, 2018 – three years and six days after the claims accrued. *See* BFS’s Summons and Complaint (**R. pp. 125-142**). Thus, BFS’s claims for “contractual and common law indemnification against liability”, as well as its claims for negligence, breach of contract, breach of express and implied warranty, are barred by the three year statute of limitations. SC. Code § 15-3-530, *et seq.*

B. AS AN ALTERNATIVE SUSTAINING GROUND, PER THE DISCOVERY RULE, APPELLANT’S CLAIMS ACCRUED ON DECEMBER 3, 2015.

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 648 (1996). The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. *Id.* (*citing Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993)). Our Courts have “interpreted the “exercise of reasonable diligence” to mean that the injured party must act with some promptness where the facts and

circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist.” *Id.* (citing *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981) (emphasis in the original)). Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Id.* (citing *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207 (Ct.App.1985), *cert. granted*, 287 S.C. 234 (1985), *cert. dismissed*, 288 S.C. 468 (1986)).

Pursuant to the discovery rule, claims accrue “from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct,” thus, BFS should have been on notice of its indemnity claims against liability from the date it received Lennar’s Summons and Third-Party Complaint, December 3, 2015. *See* Lennar’s Affidavit of Service (**R. pp. 404-407**); *Id.* (citing *Johnston v. Bowen*, 313 S.C. 61, 437 S.E.2d 45 (1993)). The fact that BFS “may[could] not comprehend the full extent of the damage[at that time] is immaterial”. *Id.* (citing *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207 (Ct.App.1985), *cert. granted*, 287 S.C. 234 (1985), *cert. dismissed*, 288 S.C. 468 (1986)).

Under South Carolina law, corporations are barred from representing themselves in circuit court. South Carolina law recognizes an individual's ability to appear pro se with leave of the court. *See* S.C. Code Ann. § 40-5-80. Corporations, which are artificial creatures of state law, do not have a right to appear pro se in all instances. *See* S.C. Code Ann. § 40-5-320 (1986). Courts have granted corporations the ability to appear *pro se*, with leave of the court, in civil magistrate's court. *See In re Unauthorized Practice of Law*, 309 S.C. 304, 422 S.E.2d 123 (1992). Courts have explicitly rejected a corporation's ability to

appear pro se in a state circuit or appellate court. *Renaissance Enterprises, Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 515 S.E.2d 257 (1999). Thus, BFS cannot argue that it did not know, or at least should not have known, that it would incur attorney's costs and fees on the date it received Lennar's Third-Party Complaint. BFS received Lennar's Third-Party Summons and Complaint on December 3, 2015 and was on inquiry notice of its claims against the Subcontractors on that date. Thus, the claims filed three years and eighteen days later are barred by the statute of limitations.

C. APPELLANT'S FINAL PARAGRAPH ARGUING AGAINST THE STATUTE OF LIMITATION MISCONSTRUES ECC'S ARGUMENTS, THE LOWER COURT'S RULING, THE RELEVANT DATES, AND SOUTH CAROLINA CASE LAW

In its final paragraph arguing against ECC's statute of limitations defense, BFS writes, "even assuming that the payment of attorney's fees constituted a 'loss' sufficient to trigger the running of the statute of limitations, the only attorney's fees that would be barred would be those few dates outside the statute of limitations." App. Brief p. 15. This is incorrect for several reasons. First of all, the contract at issue is one of indemnity against liability not loss. The issue is when the liability for legal services rendered accrued. That was, at the absolute latest, on December 15th, 2015 when counsel for BFS executed the answer in question. That the clerk of court received the pleading in question in the mail on December 21, 2015 and dutifully filed the same that day is wholly irrelevant to the date on which legal fees were accrued and liability attached. *See also, Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, Civil Action No.: 8:15-cv-01964-JMC (D.S.C. April 24, 2018) (interpreting South Carolina case law to predict that because the discovery rule applies to contract actions, South Carolina courts would not apply continuing claims doctrine to actions based on contract.); *Maher v. Tietex Corporation*, 331, S.C. 371, 500 S.E.2d 204 (Ct. App. 1998)

(“The objective test in South Carolina's discovery rule is sufficient to allow plaintiffs the opportunity to discover and act upon the original breach, without need for application of the 'continuing wrong' doctrine in this situation.”); *OneBeacon Am. Ins. Co. v. Narragansett Elec. Co.*, 87 Mass. App. Ct. 417, 429, 31 N.E.3d 1143, 1153 (Mass. App. 2015) (“accrual of an action for defense costs is not postponed until their full extent can be determined.”). BFS’s attorney’s fees and costs are continuing and progressive consequential damages – not dissimilar from the water intrusion damages plaintiffs so often claim in construction defect litigation. *See Dineen v. Pella Corp.*, No. 2:14-CV-03479-DCN, 2015 WL 6688040, at *6 (D.S.C. Oct. 30, 2015) *quoting* *Suarez v. City of Tampa*, 987 So.2d 681, 686 (Fla.Dist.Ct.App.2008) (“When a defendant's damage-causing act is completed, the existence of continuing damages to a plaintiff, even progressively worsening damages, does not present successive causes of action accruing because of a continuing tort.”). The relevant inquiry is when did BFS have inquiry notice of its claims not when will they stop.

BFS further contends that “because Appellant filed this action on December 21, 2018, a three-year statute of limitations would bar attorney’s fees accrued prior to December 21, 2015 – the date on which Appellant filed its answer in the Damico litigation.” App. Brief p. 15. First of all, this is a material misstatement of the manner in which the statute of limitations operates. BFS would have the Court believe that the plaintiffs in any case may recover any damages incurred within three years of the date of filing, regardless of whether plaintiffs knew or should have known of their claims 3, 4, 5, 10, or infinity years before suit is filed. This legal reasoning would erase the discovery rule from South Carolina jurisprudence and effectively erase the statute of limitations in

construction defect litigation particularly in the 99% of construction defect cases where no repairs are initiated until after litigation has been filed and resolved. Taken to its logical conclusion, by BFS's reasoning, a homeowner could video record their windows leaking for a decade, sue, repair their home during the litigation and recover 100% of their alleged damages.

In short, BFS's arguments must fail because BFS disregards the nature of the contract for indemnity it seeks to enforce; disregards the discovery rule; and disregards the fundamental undermining of the statute of limitations that is inherent to its arguments. The ruling of the circuit court should be affirmed.

IV. ADDRESSING APPELLANT'S ARGUMENT V:

A. THE TRIAL COURT DID NOT LACK JURISDICTION TO CONSIDER THE SUBSTANTIVE ISSUES RAISED BY RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT WHILE THE UNDERLYING *DAMICO* CASE WAS ON APPEAL.

BFS contends that the Court lacks subject matter jurisdiction because of the *Damico* litigation. BFS cites no South Carolina case law or South Carolina Rules of Civil Procedure in support of this proposition. BFS's argument is incorrect. Subject matter is unaffected by an appeal, instead the lower court retains jurisdiction for all matters unaffected by the appeal. *Goodson as Tr. of Residuary Beneficiaries Tr. of Estate of Goodson v. Wilmeth*, No. 2017-000966, 2019 WL 978384, at *2 (S.C. Ct. App. Feb. 27, 2019) (*citing* Rule 241, SCACR ("The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.")). If anything, BFS' argument highlights the fact that they could have brought this action at any point prior to December 21, 2018 in the underlying matter.

B. IN THE ALTERNATIVE, IF THE TRIAL COURT DID LACK JURISDICTION, THEN APPELLANTS LACK STANDING TO BRING THIS LITIGATION AND THE ENTIRE CASE SHOULD BE REMANDED WITH INSTRUCTION

In the alternative, if BFS is correct that the lower court lacks subject matter jurisdiction, then the lower court lacked subject matter jurisdiction at all times. If that is the case then this entire case should be remanded with instructions for the lower court to dismiss all claims without prejudice.

CONCLUSION

For the foregoing reasons, ECC respectfully submits that the Court should affirm the ruling of the trial court dismissing BFS's claims for Indemnity, Breach of Warranty, Breach of Contract, and Negligence.

Respectfully submitted,

January 20, 2021

**RICHARDSON PLOWDEN & ROBINSON,
P.A.**

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Jan 20 2021
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Judge

Appellate Case No. 2020-000415

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

Builders FirstSource -Southeast Group, LLC,.....**Appellant,**

v.

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

OF WHICH, ECC Contracting, LLC; and Charleston Exteriors, LLC, are....**Respondents**

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

January 20, 2021

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court inappropriately grant summary judgment to Respondents despite the presence of genuine issues of material fact?
- II. Did the Trial Court mistakenly determine that the Appellant's lawsuit sought indemnification from Respondent for Appellant's own negligence?
- III. Because of its misunderstanding of the relief requested, did the Trial Court inappropriately apply a heightened standard of contract construction to the indemnification language in Appellant's contract?
- IV. Did the Trial Court incorrectly hold that the statute of limitations barred the Appellant's indemnification claims based on the statute of limitations?
- V. Did the Trial Court lack jurisdiction to consider the substantive issues raised by Respondents' motions for summary judgment while the underlying *Damico* case was on appeal?
- VI. Is the Appellant's Subcontract illegal and unenforceable under S.C. Code Ann. § 32-2-10?

STATEMENT OF THE CASE

The case on appeal is the offspring of a separate lawsuit which is currently pending in Berkeley County. See *Patricia Damico, et al. v. Lennar Carolinas, et al.* 2014-CP-08-2424. (“D’amico Litigation”). The D’amico Litigation commenced on October 23rd, 2014 when certain individual homeowners filed suit alleging construction defects against a laundry list of contractors and material suppliers. Neither Charleston Exteriors, LLC or Co-Respondent ECC are parties to the D’amico Litigation and, therefore, have not participated as parties to that lawsuit.

A. The Damico Litigation

The Abbey at Spring Grove (the “Abbey”) is a 69-home residential community situated in Berkeley County, South Carolina. The Abbey was developed by Lennar Carolinas during 2012 and 2013. To be precise, the Abbey is a portion, or phase, of a larger development known as Spring Grove Plantation.

The Respondent, Charleston Exteriors, performed window installation at the Abbey pursuant to a subcontract agreement with Appellant Builders-FirstSource Southeast Group (“BFS”). It has been alleged by BFS that Respondent Charleston Exteriors installed windows on approximately 12 to 18 of the residences at the Abbey.

Fellow Respondent ECC Contracting (“ECC”) also installed windows at the Abbey pursuant to an identical subcontract agreement with BFS. The subcontracting scopes of work for Charleston Exteriors and ECC are believed to be quite similar, with each of these defendants installing windows on specific homes within the Abbey.

The Plaintiffs in the D’amico Litigation initially made allegations against Spring Grove Plantation Development, Inc., Lennar Carolinas, and a handful of subcontractors involved with sitework, foundation and structural trades.

On November 23rd, 2015, Plaintiff D'amico amended the original Complaint to include new allegations and add additional parties including Respondent BFS. The Amended Complaint included allegations related to the building envelope and vertical construction. The Amended Complaint caused Lennar Carolinas to file an Answer two days later on November 25, 2015. In its Answer to Plaintiffs' Amended Complaint, Lennar asserted cross-claims and third-party claims against additional subcontractors for the Project including Builders FirstSource ("BFS"). Lennar served BFS with its third-party complaint by placing it Certified U.S. Mail on December 1, 2015. Records from the USPS indicate that it was delivered on December 3, 2015. BFS served its Answer by US Mail on December 18, 2015, and it was file stamped by the clerk of court on December 21, 2015.

On March 30, 2016, Lennar filed an Amended Motion to Compel Arbitration ("Lennar's Motion to Compel"), wherein it sought to compel arbitration of its claims against newly added subcontractor defendants as well.

On September 19, 2016, the circuit court entered an Order (the "Order") denying Lennar's Motion to Compel arbitration. On October 26, 2016, the circuit court issued a Form 4 Order (the "Form 4 Order") denying Lennar's Motion to Reconsider its Motion to Compel Arbitration.

***B. Builders First-Source Southeast Group v. MI Windows and Doors, Inc.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC
(This Litigation)***

On December 21, 2018 BFS filed this action asserting claims for contractual indemnity, equitable indemnity, breach of express and implied warranties, breach of contract, negligence, and contribution against MI Windows & Doors, Inc., Hurley Services, LLC ("Hurley"), ECC Contracting, LLC ("ECC"), and Charleston Exteriors, LLC. ("Respondents" shall refer collectively to Respondent Charleston Exteriors, LLC and Respondent ECC Contracting, LLC)

The Respondents timely answered. Hurley failed to file a timely answer and default was entered, but subsequently lifted.

BFS moved to Stay and to consolidate this case with the Damico Case on August 6, 2019. ECC moved for summary judgment on August 9, 2019. Charleston Exteriors moved for summary judgment on August 20, 2019. The Respondents filed Memoranda in Support on October 10 and 11, 2019. BFS did not file a Memorandum in Opposition to the Respondents' Motions but did oppose the motions at oral arguments. The Honorable Judge Clifton Newman heard the parties' motions on October 18, 2019.

On December 6, 2019, the Court issued an opinion granting Respondents' Motions for Summary Judgment with regard to all claims save for Equitable Indemnity and Contribution. On December 16, 2019, BFS filed a motion and brief memorandum to reconsider. On January 15, 2020 ECC filed a memo in opposition to BFS's Motion to Reconsider. Judge Newman held oral arguments on January 16, 2020. The Honorable Clifton Newman issued an Order Denying Reconsideration on March 5th 2020.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRPC." Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). "Summary judgment is appropriate if the circuit court finds "there is no genuine issue as to any material fact" Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, "the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 329–30 (2009). The purpose of summary judgment is to obviate delay where there is no material issue of fact involved. Manley v. Manley, 291 S.C. 325, 329 (Ct.

App. 1987). “[S]ummary judgment is [used] to expedite disposition of cases [that] do not require the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452 (2001). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party cannot simply rest on the mere allegations or denials contained in the pleadings, but rather must come forward with specific facts showing that there is a genuine issue for trial. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571 (Ct. App. 2001). Summary judgment should be granted when there is a failure of the nonmoving party to make a showing sufficient to establish the existence of an essential element of that party’s case. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

While the parties to an appeal are generally bound by the record and issues adjudicated at the lower court level, a Respondent may raise alternative sustaining grounds which further support a lower court’s decision. See I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419-21, 526 S.E.2d 716, 723-24 (2000) (“The trial court did not consider this particular issue, but because the matter is raised as an additional or alternative sustaining ground, we may consider it”). Under the present rules, a respondent - the "winner" in the lower court - may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions. Cf. Fairway Ford, Inc. v. County of Greenville, 324 S.C. 84, 476 S.E.2d 490 (1996) (illustrating Court's "firm policy" of declining to reach constitutional issues when it is not necessary to resolve a case).

A respondent may abandon an additional sustaining ground under the present rules - just as a respondent could under the former rules - by failing to raise it in the appellate brief. Maxey v. R.L. Bryan Co., 295 S.C. 334, 336 n.2, 368 S.E.2d 466, 467 n.2 (Ct. App. 1988); May v. Hopkinson, 289 S.C. 549, 558, 347 S.E.2d 508, 513 (Ct. App. 1986); see also Rule 208(b)(1)(B), SCACR ("ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal").

The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419-21, 526 S.E.2d 716, 723-24 (2000).

Consequently, it is not always necessary for a respondent - as the winning party in the lower court - to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review. This approach is in keeping with the view, as expressed in Rule 220(c), SCACR, that an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies. E.g., Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88 (1995) (appellate court may affirm for any reason appearing in the record); State v. Johnson, 278 S.C. 668, 301 S.E.2d 138 (1983) (same). I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419-21, 526 S.E.2d 716, 723-24 (2000).

ARGUMENT

I. BFS'S CONTRACTS VIOLATED SC CODE § 32-2-10

At issue is BFS's "Master Subcontractor Agreement" with both Respondents. Specifically, the Respondents would contend that these agreements contain indemnification provisions which are violative of South Carolina public policy and must, therefore, fail. The relevant Indemnity Section 5 of the contract between BFS and ECC states (Bold Emphasis Added):

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.

Notwithstanding the foregoing, 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 (the "indemnitees"), from and against any and all claims, damages, losses, and expenses, including, but not limited to, 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 to, or sickness, disease or death** of, the subcontractor, any agent, employee, or representative of the subcontractor, or any of its subcontractors, **regardless of whether such claim, damage, loss, or expense is caused or is alleged to be caused in whole or in part, by the negligence of any of the Indemnitees**, it being the expressed intent of the contractor and the subcontractor that in such event the subcontractor is to indemnify, defend, and hold harmless the Indemnitees from the consequences of their own negligence, whether it is or is alleged to be the sole or concurrent cause of the bodily injury, sickness, disease, or death of the subcontractor, subcontractor's agent, employee, or representative, or the agent, employee, or representative of any of its subcontractors, the indemnification obligations under this paragraph shall not be limited by any limitation on the amount or type of damages, compensation, or benefits payable by or for Subcontractor under Workers Compensation acts,

Disability Benefits Acts, or other employee Benefit acts, the subcontractor shall procure liability insurance covering its obligations under this Section 5.

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.**

The Defense and indemnification obligations under this agreement are not intended to and shall not require the subcontractor or others to indemnify or hold harmless a Registered Architect, Licensed Engineer, or an agent, Servant, or Employee of a Registered Architect or licensed Engineer from Liability for damage that is (1) caused by or results from: (a) defects in Plans, Designs, or Specifications prepared, approved, or used by the Architect or Engineer; or (b) the Negligence of the Architect or Engineer in the Rendition or conduct of Professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract, and (2) arises from personal injury or death, property injury, or any other expense that arises from personal injury, death, or property injury.

(R. pp. 534-535)

South Carolina's Anti-Indemnity Statute can be summarized as forbidding a contractor, or "promisee", from requiring a lower tier subcontractor, or "promisor", to indemnify the promisee for the promisee's sole negligence. S.C. Code Ann. § 32-2-10.

"Notwithstanding any other provision of law, **a promise or agreement** in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, **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.**"

The Code speaks solely of “damages” while limiting the ability of the Indemnitor to indemnify the Indemnitee. In its Complaint, BFS claims its attorney’s costs and fees as damages. (R. p. 137 3-16). Section 5 of the Master Subcontractor Agreement (“Agreement”) explicitly calls for Respondent to pay BFS’s attorney’s fees “regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees.” (R. 534-535). The language used in the Agreement explicitly asks for the Respondent to pay these sums regardless of fault which, by direct implication, seeks to create an obligation for Respondent to pay BFS’s attorneys fees for BFS’s sole and exclusive negligence. Additionally, the middle paragraph calls for the Subcontractors to “indemnify, defend, and hold harmless” BFS “...regardless of whether such claim, damage, loss, or expense is caused or is alleged to be caused in whole or in part, by the negligence of any of the Indemnitees.” (R. 534). The Agreement, therefore, violates SC Code Ann. § 32-2-10.

Respondents and the Court touched on but did not explicitly make this point in the arguments and rulings below. However, Respondents raise the matter now as an alternative sustaining ground for the lower court’s decision. Brunson v. Long, No. 2005-UP-450, 2005 WL 7084268, at *3 (S.C. Ct. App. July 15, 2005) citing I’On L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406 (2000) (“The trial court did not consider this particular issue, but because the matter is raised as an additional or alternative sustaining ground, we may consider it.”).

To the extent that BFS may dispute Respondent’s right to assert alternative sustaining grounds, Respondents would simply assert that while it is true as “Chief Judge Alex Sanders famously wrote, ‘[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.’” Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 331, (2012) citing Langley v. Boyter, 284 S.C. 162, 181,

(Ct.App.1984), *quashed on other grounds*, 286 S.C. 85, (1985). “This rule is not without exception, and [the Higher Courts] can set aside our preservation rules to find a contract illegal because [they] “will not ‘lend [our] assistance’ to carry out the terms of a contract that violates statutory law or public policy.” Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 331, (2012) *citing* Ward v. W. Oil Co., 387 S.C. 268, 274 (2010). In a case which is likely familiar to the Appellants, this Court rightly ruled, indemnification provisions calling for the Indemnitor to indemnify the Indemnitee “for damages caused by its [the Indemnitee’s] negligence or the negligence of its subcontractors” are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 152 (Ct. App. 2018). This court went on to hold that “[A]n illegal contract is unenforceable.” *Id.* *citing* Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64 (Ct. App. 2002). In that case, this Court held that the indemnification agreement “purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10” and went on to conclude that “[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.” *Id.* This case is no different.

BFS’s contracts are illegal and thus unenforceable. Respondents respectfully assert that no further inquiry is necessary with regard to the failure of Appellant’s contractual indemnity claims.

II. RE: APPELLANT’S ARGUMENTS I, II, AND III:

Due to the similarity of the issues raised by Appellant in Arguments I, II, and III, the Respondent Charleston Exteriors would like to address each in this section. Arguments I, II, and III (“Sole Negligence Arguments”) lies BFS’s position that, in its lawsuit against Charleston Exteriors, it was only seeking indemnity for those damages which were caused by the sole negligence of its subcontractors. The Appellants contend that the lower court failed to understand

both the relief sought in their Complaint, as well as the terms of the Master Subcontractor Agreement which, in turn caused the court to further err by ignoring the question of fact which might be created if the lower court considered whether or not Charleston Exteriors was solely negligent. This is a novel position, as the transcripts will illustrate that the Appellant did not raise this issue at any point during the Motion for Summary Judgment or during the Motion to Alter or Amend. By making the argument now, the Appellant is seeking to undermine “....the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.” E.g., Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court); State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991) (same); Sumter Building & Loan Ass'n v. Winn, 45 S.C. 381, 23 S.E. 29 (1895) (same). I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)

BFS asserts that the trial court made an error of law by dismissing the “entire contractual indemnity claim.” The Appellant further contends that the lower court’s error of law caused it to fail to consider a potential question of fact. The question of fact is illusory, however, and only exists for consideration in a world where the Appellant’s contractual indemnification clause does not violate S.C. Code Ann. § 32-2-10.

Appellant’s Complaint sought to impose upon the Respondent “full contractual and common law indemnification...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney’s fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from the ECC¹ any sums for

¹ Charleston Exteriors contends to the contrary of ECC’s position that this is a typo. It is only reasonable to assume that BFS is seeking the same relief from Charleston Exteriors and Hurley Services.

which BFS may be held liable to the Plaintiffs, to Lennar Carolinas, LLC, and/or to others in such action.” (R. p. 137, lines 3-16). BFS’s position is unsupported by its contracts, its pleadings, South Carolina case law, and the relief it requests as is set forth below.

A. THE PLAIN LANGUAGE OF BFS SUBCONTRACTS

The lower court considered the Master Subcontract Agreement and its specific treatment of property damage. That provision states:

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 for whose acts the subcontractor may be liable. The Contractor’s insurance requirements are separate and distinct from the requirement of indemnification hereunder.

(R. 534, lines 1-21)

This language is based on the AIA form indemnification language and the key phrase, for our arguments at the Circuit Court level was “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, (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.

In order to consider the Appellant's arguments, the Court is being asked to rewrite the terms of the Agreement in a manner which is totally incongruent with BFS's interpretation and attempted enforcement of those same terms. The Appellant would have the court believe that the terms seek merely indemnification for the sole negligence of Charleston Exteriors. Further reading of the contract terms illustrate that BFS is seeking much more than monetary relief for damages caused by their subcontractors alleged negligence. The third paragraph of Section 5 (R. p. 535) 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.**

(R. p. 535, lines 7-21)

Again, there is no legal basis for separating a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement, and BFS claims its attorney's costs and fees as damages in its Complaint. BFS cannot argue that its claims for contractual indemnity are for those sums that are solely attributable to the negligence of Charleston Exteriors when its contractual indemnity provisions clearly calls for Charleston Exteriors to indemnify BFS for 100% of its attorneys' costs and fees regardless of who is found to be at fault, and its pleadings seek to recover full indemnification from Charleston Exteriors. "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*).

B. BFS IS BOUND BY THE ALLEGATIONS OF ITS OPERATIVE PLEADING

BFS claims its attorneys' costs and fees as damages in its operative Complaint. "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. BFS seeks "full contractual indemnity" for attorney's costs and fees from ECC, Hurley, and Charleston Exteriors as well as "full contractual indemnity" from ECC, solely, for any and all sums it is required to pay in settlement or judgment. (R. p. 137, lines 3-16). The only way that BFS can achieve such a result is for the Subcontractors to indemnify BFS for its concurrent negligence (assuming BFS was not solely negligent). This is particularly true with regard to the desire to seek indemnification for all funds spent to settle or satisfy a judgment from ECC alone.

C. BFS MISCONSTRUES THE LOWER COURT'S RULING

BFS contends that the Court made an 'implicit factual determination that the subcontractors were not negligent'. This is incorrect. It is a misreading of the opinion, requiring the Court to come to a conclusion that is not logically supported by any of the arguments presented to the court. Instead the lower court *explicitly* found that the contracts BFS seeks to enforce contain language requiring the Defendants to indemnify BFS for the negligence of BFS. (R. p. 12, lines 21-23). Thus, as Judge Newman ruled in *Concord and Cumberland*, BFS must demonstrate that the contract "can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence." Concord & Cumberland Horizontal Prop.

Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 645 (Ct. App. 2018), reh'g denied (Oct. 18, 2018). Judge Newman went on to rule that BFS could not meet this high burden.

Not only is this explicit finding supported by the contract language, but it is also supported by the procedural posture of the case. The Statute of Limitations has long passed on any claims that the Plaintiffs might have against the Respondents – no other parties to the case are known to potentially have standing to sue the Respondents. Thus, there is no way for there to be a Judgment finding that Respondents are solely responsible for the claims against BFS. In the event that BFS settles the claims against it, it will be in the exact procedural posture as Superior Construction was in *Concord and Cumberland*, made all the worse (for BFS) by the fact that it has claims against three subcontractors and the window manufacturer.

D. THE RELIEF BFS REQUESTS CLEARLY DEMONSTRATES THAT IT SEEKS TO RECOVER ON ITS CONTRACTUAL INDEMNITEE CLAIMS FOR NOTHING BUT LIABILITY CREATED BY THE CONCURRENT NEGLIGENCE OF BFS AND ITS SUBCONTRACTORS

BFS contends that the Circuit Court erred by “implicitly” ruling that Appellant’s contracts do not allow Appellant to recover for the Subcontractor’s “own negligence”. The Phrase “Indemnitor’s own negligence” has, according to Westlaw, only appeared in Judge Newman’s order granting summary judgment in the Concord and Cumberland case (though it is mentioned in the appeal but does not show up because of the brackets used to explain foreign Court’s). Notwithstanding the foregoing, Counsel for BFS implicitly admitted in the original oral arguments that he sought to recover solely for the concurrent negligence of BFS and ECC or Charleston Exteriors.

If ECC goes out there and, you know, recklessly installs different fasteners, after we've provided them with the fasteners they were suppose[d] to install[l], or they do something, you know, whatever it is fraudulently, that's on them. We didn't participate in that fraud and undertake that. That would be their sole negligence and their wrongdoing. And to the extent that there was concurrent negligence, because

we did have supervision duties over that, the jury portion, whether it be 50/50, or 51/49, or 5/95, there's going to be a portion of the concurrent negligence that is solely ECC's and Charleston Exteriors, which is exactly what Concord and Cumberland went through.

(R. 363, lines 6-21)

Counsel for BFS lays out two scenarios. In the first scenario, the subcontractor is solely negligent for all claims and BFS would be entitled to indemnity in equity from that subcontractor – a claim it still maintains. (R. pp. 10-20). In the other scenario, Counsel for BFS contends that there is both concurrent and sole negligence – it is logically impossible for one party to be solely negligent and for both parties are concurrently negligent. Either the indemnity obligation stems from the sole negligence of the indemnitor or both the indemnitee and the indemnitor are concurrently negligent. Counsel for BFS admits that BFS had supervision duties. (R. p. 363, lines 14-16). Further, BFS has sued three subcontractors as well as the window manufacturer. It is, quite simply, impossible for us to be dealing with anything but concurrent negligence. (R. pp. 125-142). BFS cannot recover from all of these parties without recovering purely for damages created by the concurrent negligence of BFS, its subcontractors, and the window manufacturer. There is no way that Charleston Exteriors or ECC will be found solely negligent and solely responsible for the sums BFS seeks to recover in indemnity should a judgment ever attach to BFS.

III. RE APPELLANT'S ARGUMENT IV

A. THE TRIAL COURT CORRECTLY HELD THAT THE STATUTE OF LIMITATIONS BARS ALL OF APPELLANT'S CLAIMS SAVE FOR CONTRIBUTION AND EQUITABLE INDEMNITY.

Our courts have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. Piper v. Am. Fid. & Cas. Co., 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the

indemnitee must have made some form of payment before he can assert a breach of the contract. Jones v. Builders Inv. Grp., LLC, 415 S.C. 321, 330 (Ct. App. 2015). “Where the contract is not a mere contract to indemnify and save harmless, but a contract to save from a legal liability or claim, the legal liability incurred and not the actual damage sustained is the measure of damage.” State-Planters' Bank & Trust Co. v. First National Bank (quoting, 31 C.J. 435, sec. 28).

In this case BFS has pled that it is “entitled to full contractual and common law indemnification from against Liability”. (R. 137, line 3-16). BFS began to incur liability for attorney’s costs and fees – damages it seeks from Charleston Exteriors in this litigation at the very latest when its Answer was drafted and executed by Counsel. (R. pp. 409-437). BFS’s Answer was executed and served more than three years prior to the filing of the present action. (R. pp. 125-142). Thus, BFS’s claims for “contractual and common law indemnification against Liability” are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

BFS’s attorney’s fees and costs are continuing and progressive consequential damages – not dissimilar from the water intrusion damages Plaintiffs so often claim in construction defect litigation.

B. AS AN ALTERNATIVE SUSTAINING GROUND, PER THE DISCOVERY RULE APPELLANT’S CLAIMS ACCRUED ON DECEMBER 3, 2015.

According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. Dean v. Ruscon Corp., 321 S.C. 360, 363–64 (1996). The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. Id. citing Johnston v. Bowen, 313 S.C. 61 (1993). Our Courts have “interpreted the ‘exercise of reasonable diligence’ to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience

on notice that a claim against another party might exist.” *Id.* citing Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301 (1981)(emphasis in the original). Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Id.* citing Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207 (Ct.App.1985), *cert. granted*, 287 S.C. 234 (1985), *cert. dismissed*, 288 S.C. 468 (1986).

Pursuant to the discovery rule, claims accrue “from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct” thus BFS should have been on notice of its indemnity claims against liability from the date, December 3, 2015, it received Lennar’s summons and Third-Party Complaint. (R. pp. 404-407); *Id.* citing Johnston v. Bowen, 313 S.C. 61 (1993). The fact that BFS “may [could] not comprehend the full extent of the damage [at that time] is immaterial”. *Id.* citing Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207 (Ct.App.1985), *cert. granted*, 287 S.C. 234 (1985), *cert. dismissed*, 288 S.C. 468 (1986).

Under the Laws of South Carolina, corporations are barred from representing themselves in Circuit Court. South Carolina law recognizes an individual's ability to appear *pro se* with leave of the court. See S.C. Code Ann. § 40-5-80 (Supp. 2002). “Corporations, which are artificial creatures of state law, do not have a right to appear *pro se* in all instances. See S.C. Code Ann. § 40-5-320 (1986). We granted corporations the ability to appear *pro se*, with leave of the court, in civil magistrate's court. See In re Unauthorized Practice of Law, (309 S.C. 304, (1992)). We explicitly rejected a corporation's ability to appear *pro se* in a state circuit or appellate court. Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649 (1999).” Doe v. McMaster, 355 S.C. 306, 313 (2003). Thus, BFS cannot argue that it knew, or at least should have known, that it would incur attorneys' costs and fees on the date it received Lennar’s Third-Party

complaint. BFS received Lennar's Third-Party Summons and Complaint on December 3, 2015 and was on inquiry notice of its claims against the Subcontractors on that date. Thus, the claims filed three years and eighteen days later are barred by the statute of limitations.

C. APPELLANT'S FINAL PARAGRAPH ARGUING AGAINST THE STATUTE OF LIMITATION MISCONSTRUES OUR ARGUMENTS, THE LOWER COURT'S RULING, THE RELEVANT DATES, AND SC CASE LAW

In its final paragraph arguing against ECC's statute of limitations defense, BFS writes, "even assuming that the payment of attorneys' fees constituted a 'loss' sufficient to trigger the running of the statute of limitations, the only attorneys' fees that would be barred would be those few dates outside the statute of limitations." This is incorrect for a several reasons: first of all, the contract at issue is one of indemnity against liability not loss. The issue is when the liability for legal services rendered accrued. That was, at the absolute latest, on December 15th, when opposing counsel executed the Answer in question. That the clerk of court received the pleading in question in the mail on December 21, 2015 and dutifully filed the same that day is wholly irrelevant to the date on which legal fees were accrued and liability attached.

Appellant further contends that "because Appellant filed this action on December 21, 2018, a three-year statute of limitations would bar attorneys' fees accrued prior to December 21, 2015 – the date on which Appellant filed its answer in the Damico litigation." This is a material misstatement of the manner in which the statute of limitations operates. Appellant would have the Court believe that the Plaintiffs in any case may recover any damages incurred within three years of the date of filing, regardless of whether Plaintiffs knew or should have known of their claims 3, 4, 5, 10, or infinity years before suit is filed. This is contrary to the well settled discovery rule in South Carolina.

D. IN THE ALTERNATIVE, IF APPELLANT IS CORRECT ON THE ACCRUAL OF THEIR CLAIMS FOR CONTRACTUAL INDEMNITY, THEN SAID CLAIMS HAVE NOT ACCRUED AND SHOULD BE DISMISSED FOR LACK OF STANDING

In the alternative, if BFS is correct that the lower court lacks subject matter jurisdiction to rule on the Respondents' Motions for Summary Judgment, then the lower court lacked subject matter jurisdiction when this action was initially brought by BFS.

CONCLUSION

For the foregoing reasons, Respondent Charleston Exteriors, LLC respectfully submits that the Court should affirm the ruling of the trial court granting Charleston Exteriors' Motion for Summary Judgment.

HARPER LITTLE, PLLC

s/ C. Clay Olson (SC BAR 17007)

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January 20, 2021
Charleston, South Carolina

RECEIVED
Jan 22 2021
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Judge

Appellate Case No. 2020-000415

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

Builders FirstSource -Southeast Group, LLC.....**Appellant,**

v.

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

OF WHICH, ECC Contracting, LLC; and Charleston Exteriors, LLC, are....**Respondents**

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent comply with Appellate Court
Rule 211(b).

January 22, 2021

s/ C. Clay Olson
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The South Carolina Court of Appeals

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January 26, 2021

Mr. Derek Michael Newberry, Esquire
111 Coleman Boulevard
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Mt. Pleasant SC 29464

Re: Builders Firstsource-Southeast v. MI Windows
Appellate Case No. 2020-000415

Dear Counsel:

Our records reflect that no respondents' initial brief and designation of matter for respondents MI Windows and Doors, Inc. and Hurley Services, LLC have been filed. Therefore, the appeal shall proceed forward with no brief from these respondents.

Very truly yours,

A handwritten signature in blue ink, appearing to read "J. A. Kitchings", is written over the typed name "Jenny A. Kitchings".

CLERK

cc: Catherine Laird Floeder, Esquire
Stephen P. Hughes, Esquire
Mary Bass Lohr, Esquire
William Hewitt Cox, III, Esquire
L. Dean Best, Esquire

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Mark Shanter Chaparro, Esquire
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