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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Berkeley County
Court of Common Pleas
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Unpublished Opinion No. 2025-UP-072 (S.C. Ct.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,

vs.

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 BRIEF

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COUNTER STATEMENT OF THE QUESTION PRESENTED

1. Whether BFS is judicially bound by its pleadings, which sought "full" indemnity for "any liability" and "any sums" incurred, thereby asserting an unrestricted claim that encompasses BFS's own negligence?
2. Whether the Court of Appeals properly applied the "clear and unequivocal" standard to BFS's contractual indemnity claim, where the contract requires subcontractors to provide a defense "regardless of any ultimate liability or negligence" of BFS?
3. Whether under Concord and Cumberland a party is allowed to selectively enforce a legally deficient indemnity provision that is broad enough to implicate the indemnitee's own fault?

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 Respondent – Petitioner, ECC's, Brief filed on February 4, 2026. However, certain mischaracterizations and legal conclusions included in BFS's Statement of Facts must be addressed.

BFS emphasizes that no final judgment has been issued in the underlying *Damico* litigation, suggesting its claims are "not yet fully determined." Pet. Br. p. 2. This is inaccurate. The Circuit Court's dismissal of BFS's contractual indemnity claim was not based on the outcome of the underlying case, but on the legal insufficiency of BFS's indemnity provisions and expansive scope of its own pleadings. Whether a provision satisfies the "clear and unequivocal" standard is a question of law determined by the language of the contract and the scope of the demand, neither of which depends on a final verdict in the underlying action.

BFS entered into a written contract with ECC on February 26, 2008. A. pp. 213-224. The relevant contractual indemnity provision is set forth in Section 5 of the contract. In its Statement,

BFS highlights only the limiting language of the first paragraph of the indemnity clause while omitting the broader framework it drafted within the same section. See Pet. Br. p. 6. As detailed below, when read in its entirety, Section 5 reveals an intent to shift costs to the subcontractor regardless of BFS's own fault.

BFS further argues that the defined term "Work" is "critical" because it purportedly limits the indemnity obligation strictly to the subcontractor's performance. Pet. Br. pp. 5-6. This argument attempts to isolate a single definition while ignoring the contradictory language of the indemnity provisions. BFS cannot use the definition of "Work" to create a "fault-based" limitation that is explicitly nullified by its own "regardless of negligence" indemnity provision.[1]

Contrary to BFS's characterization, this case is not a straightforward request for reimbursement for a subcontractor's negligence. Instead, it is a case in which BFS seeks to recover contractual indemnity from ECC for liability arising from BFS's own negligence. Both the Circuit Court and the Court of Appeals correctly rejected BFS's attempts to re-characterize its claim. As both lower courts found, the plain language of the pleadings and the contractual indemnity provisions sought to shift liability for BFS's own conduct without doing so in the "clear and unequivocal" terms required by South Carolina law. Consequently, BFS's contractual indemnity claim fails 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 to avoid the legal consequences of its own drafting. BFS's contractual indemnity claims arise from provisions that attempt to secure indemnification for its own negligence, provisions that were neither clear nor unequivocal, as the law requires. BFS

[1] To the extent this is an Argument, Respondent would point out that it was not timely raised by Petitioner.

conceded below that its contract does not meet that standard, and the circuit court properly held that BFS's contractual indemnity claims therefore fail as a matter of law. The Court of Appeals correctly affirmed that ruling.

Undeterred, BFS now asserts it can nonetheless pursue indemnity only for ECC's alleged sole negligence. That argument finds no support in the plain language of either the contract or BFS's pleadings. A contractual indemnity provision that is legally invalid cannot be revived by narrowing the theory of recovery after litigation has begun. Nor may Courts selectively enforce what is unenforceable in substance. Doing so would require judicial revision of the parties' agreement and violate the fundamental principle that contracts must be interpreted as a whole and enforced as written.

I. BFS'S PLEADINGS SEEK INDEMNFICATION BROAD ENOUGH TO ENCOMPASS ITS OWN NEGLIGENCE

BFS's contends that its pleadings seek contractual indemnity only for damages caused by ECC's negligence. That assertion is contradicted by the plain language of its own pleadings.

In South Carolina, "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 and prayers for relief are therefore "conclusive as against the pleader," and a party cannot later adopt a position inconsistent with those facts. Johnson v. Alexander, 413 S.C.196, 202, 775 S.E.2d 697, 700 (2015) (citing Elrod, 243 S.C. at 436, 134 S.E.2d at 416). Because BFS chose the language of its pleadings, it is now bound by the legal consequences of that choice.

BFS'S Third-Party Complaint leaves no uncertainty about the scope of the indemnification it seeks. BFS alleges:

> 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.

(emphasis added). A. p. 137.

This language is broad, unconditional, and notably devoid of limiting language. The pleading does not limit indemnification to damages caused solely by subcontractors, nor does it exclude liability arising from BFS's own conduct. The word "sole" appears nowhere in the operative demand. Instead, BFS sought the broadest possible relief: "full indemnification" for "any liability" and "any sums." By demanding full reimbursement for "any sums" it may be required to pay, BFS has pleaded a claim that encompasses the entirety of any judgment entered against it, including damages attributable to its own independent negligence.

BFS attempts to avoid the consequences of its pleading by relying on Paragraph 33, which states that "to the extent, if any, that BFS may be held liable… such liability would be a direct and proximate result of the wrongful acts…of the Third-Party Defendants." A. p. 136. However, Paragraph 33 merely states BFS's theory of causation; it does not define the scope of the relief sought. The breadth of BFS's indemnity claim is determined by the remedy requested in Paragraph 34, which seeks indemnification for "any liability" and "any sums" BFS may incur.

South Carolina courts evaluate pleadings as a whole. Witherspoon v. Stogner, 182 S.C. 413 (1937). The scope of a claim is determined by considering both the allegations and the relief requested. BEI Beach, LLC v. Christman, 440 S.C. 98, 889 S.E.2d 601 (Ct. App. 2023). When

BFS's Third-Party Complaint is read in its entirety, it plainly seeks indemnification broad enough to encompass BFS's own liability. The Court of Appeals correctly recognized this point, concluding that BFS's pleadings demonstrate that it "seeks to be indemnified for its concurrent—and perhaps sole—negligence." See Opinion, A. p. 556.

The ordinary meaning of the language BFS chose confirms this result. BFS contends that the word "any" means without restriction. Pet. Br. p. 12. That meaning confirms, rather than limits, the scope of BFS's pleadings. As such, "any liability" and "any sums" means liability and damages without limitation. BFS cannot selectively interpret the word "any" to exclude its own negligence while preserving recovery for subcontractor caused damages. Courts apply the plain meaning of the words written, and the language BFS employed contains no internal limitation and no qualifier restricting indemnity to solely subcontractor fault.

Accordingly, BFS cannot narrow its pleadings to avoid the legal consequences of the language it chose. Because BFS pleaded an unrestricted claim for indemnification covering "any liability" and "any sums," its claim necessarily encompasses liability arising from its own conduct. The Court of Appeals correctly recognized this point and properly concluded that BFS seeks indemnification broad enough to include its own negligence. See Opinion, A. p. 557.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE HEIGHTENED "CLEAR AND UNEQUIVOCAL" STANDARD

BFS contends the Court of Appeals improperly applied the heightened "clear and unequivocal" standard when evaluating the indemnity provisions contained in its subcontractor agreements because it was not seeking indemnity for its own negligence. However, the language of the contractual indemnity provisions contradicts this claim. The Court of Appeals faithfully applied longstanding South Carolina precedent governing indemnity provisions that attempt to shift liability for the indemnitee's own negligence. Because BFS's contractual language is broad

enough to encompass liability arising from BFS's own negligence, and because the agreement does not express such intent in clear and unequivocal terms, its contractual indemnity claim fails as a matter of law.

A. The Contractual Indemnity Provision Implicates BFS's Own Negligence,

Section 5 of the agreement contains the relevant indemnity provisions. The property damage clause 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 directly or indirectly employed by 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.

(emphasis added and all caps in the original). A. p. 218.

This language mirrors the AIA form indemnification language. The key phrase "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor" was specifically analyzed by the South Carolina Court of Appeals in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, 819 S.E.2d 166, 176 (Ct. App. 2018). There, the court held that this type of language does not satisfy the heightened "clear and unequivocal" standard required when an indemnity clause potentially shifts liability for the contractor's own negligence. Id. at 653 - 655, 819 S.E.2d at 174 – 175.

BFS now asks this Court to treat the same language as though it clearly limits indemnity to subcontractor negligence. However, the analysis cannot end with Paragraph 1. Section 5 must be read as a whole. Paragraph 3 of the same section provides:

> 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**.

(emphasis added). A. p. 219.

This language requires ECC to defend BFS regardless of BFS's own negligence. Thus, while Paragraph 1 appears to tie indemnity to subcontractor negligence, Paragraph 3 simultaneously obligates ECC to defend BFS even when BFS itself is negligent.

South Carolina law requires contracts to be read as a whole. Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 732 S.E.2d 626 (2012). When Section 5 is read in its entirety, the subcontractor's obligations extend beyond damages attributable solely to the subcontractor's work and reach claims involving BFS's own negligence. That contractual framework therefore implicates BFS's own conduct, triggering the heightened standard governing such indemnity claims.

Even apart from the contractual language, BFS's theory that ECC could be solely responsible for BFS's liability is legally and factually untenable. The Statute of Limitations has long expired on any direct claims that the homeowner Plaintiff in the underlying litigation could

have asserted against ECC, eliminating any procedural path to a finding that ECC alone caused the Plaintiffs damages. Furthermore, BFS admitted it was responsible for supervising the work performed by its subcontractors. A. p. 363. If ECC were negligent, an allegation ECC denies, BFS's supervisory obligations would, at a minimum, give rise to concurrent negligence. As such, BFS cannot plausibly frame this case as involving only subcontractor negligence. Because concurrent negligence is the predictable result, indemnity for that type of liability must be expressed in clear and unequivocal terms, which the contract does not do.

B. Because the Contract Implicates BFS's Negligence, the Indemnity Provision Must Satisfy the Clear and Unequivocal Standard And It Does Not

South Carolina courts strictly construe contractual provisions that purport to relieve a party from the consequences of its own negligence. Federal Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 27, 378 S.E.2d 56, 58 (1989). Such provisions are enforceable only when the parties' intent to shift liability for the indemnitee's own negligence is expressed in "clear and unequivocal" language. Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 409 S.C. 490, 501, 762 S.E.2d 696, 702 (2014).

Importantly, this rule applies whenever the contractual language is broad enough to encompass the indemnitee's negligence. Courts examine the objective language of the contract itself, not a party's later characterization of its claims in litigation. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect.")

Here, both the contractual and BFS's pleadings implicate BFS's own conduct. The subcontract requires ECC to defend BFS regardless of BFS's negligence, and BFS seeks recovery

of all sums for which BFS may be liable in the underlying litigation. Because the contractual framework reaches BFS's own negligence, the clear-and-unequivocal standard governs the enforceability of the indemnity provision. The Court of Appeals therefore applied the correct legal rule when it evaluated the contractual indemnity provisions.

BFS's indemnity provision does not meet the required "clear and unequivocal" standard. Instead, Section 5 contains internally conflicting language. Paragraph 1 appears to limit indemnity to damages caused by the subcontractor's negligence. Yet, Paragraph 3 requires ECC to defend BFS regardless of BFS's own negligence. These provisions pull in opposite directions; one suggesting a limitation to subcontractor fault and the other imposing defense obligations even when the contractor is negligent.

Such contradictory language cannot clearly and unequivocally establish an intent to indemnify BFS for its own negligence. The absence of clarity is precisely the circumstance in which South Carolina courts refuse to enforce indemnity provisions shifting liability for the indemnitee's negligence. For that reason, the Court of Appeals correctly concluded that the indemnity provision fails the clear-and-unequivocal standard.

C. BFS Cannot Avoid The Clear and Unequivocal Standard By Recasting Its Claim

BFS attempts to avoid this result by reframing its claim as one seeking indemnity only for ECC's sole negligence. But that litigation characterization cannot override the language of the contract itself.

As discussed above, Section 5 expressly requires ECC to defend BFS regardless of BFS's negligence. When the contract is read as a whole, the agreement plainly reaches claims involving BFS's own conduct. The governing legal standard therefore applies regardless of how BFS now attempts to characterize its theory of recovery.

Nevertheless, BFS asks this Court to disregard the governing rule and reinterpret the agreement as though it limits indemnity solely to ECC's negligence. South Carolina law does not permit such judicial revision. As this Court has made clear, "[i]t 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).

Because the contract BFS drafted implicates its own negligence yet fails to express in clear and unequivocal terms an intent to shift that liability to ECC, the indemnity provision cannot be enforced as BFS proposes.

D. BFS Conceded Its Indemnity Provision Is Not Clear and Unequivocal

Furthermore, BFS has conceded that the relevant contractual language does not satisfy the clear-and-unequivocal standard. A. pp. 279 – 284. Having made that concession, BFS cannot now argue the opposite on appeal. It is a fundamental principle of appellate review that issues conceded below may not be revived on appeal. See TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 ("An issue conceded in a lower court may not be argued on appeal."). A party may not adopt one position in the trial court and a contradictory position in the appellate court. This rule protects both judicial integrity and the adversarial process.

BFS now argues that the clear-and-unequivocal standard should not apply because it seeks indemnity only for ECC's sole negligence. But that position is inconsistent with the concession it made in the circuit court. Having acknowledged that the contractual indemnity language does not clearly and unequivocally shift liability for its own negligence, BFS cannot now argue that the provision may nonetheless be enforced under a narrower theory.

BFS's current argument depends on persuading this Court that its indemnity provision either does not implicate its own negligence or satisfies the heightened clear-and-unequivocal

standard. But BFS previously acknowledged that the contractual language does not meet that standard. That concession is binding. Because BFS admitted the dispositive legal deficiency in its own contract, its indemnity claim fails regardless of how it now attempts to characterize its pleadings.

E. Concord and Cumberland Confirms the Court of Appeals' Decision

BFS repeatedly asserts that under Concord and Cumberland a contractor may pursue indemnity against a subcontractor for subcontractor's negligence even when the indemnity clause itself fails the clear-and-unequivocal standard, and, therefore, the general rules of contract construction should apply to its claims. This argument mischaracterizes both the holding and scope of that decision.

In Concord and Cumberland, the subcontractor, The Muhler Company, Inc. ("Muhler"), moved for partial summary judgment seeking a a narrow declaration: that the indemnity provision did not require it to indemnify the general contractor, Superior Construction Corporation ("Superior"), for Superior's own negligence. Concord and Cumberland, 424 S.C. at 645, 819 S.E.2d at 170. The issue before the Court of Appeals was therefore specifically confined to whether the contractual language clearly and unequivocally expressed an intent to shift liability for the contractor's own negligence where the contractor's concurrent negligence was implicated. The court held it did not.

What the court in Concord and Cumberland did not decide is equally important. The question of whether a contractor could recover damages attributable solely to subcontractor negligence despite an otherwise unenforceable indemnity agreement was neither raised nor addressed. The subcontractor in that case did not dispute its obligation to indemnify the contractor for damages caused by its own workmanship. BFS's reliance on Concord and Cumberland as a

mechanism to bypass the "clear and unequivocal" standard is misplaced. That case did not approve the selective enforcement of internally inconsistent or legally deficient indemnity provisions. By applying the heightened standard to BFS's expansive pleadings and broad contractual language, the Court of Appeals in this case did not depart from precedent; it applied it.

F. Alternative Sustaining Grounds:

As alternative sustaining grounds, Respondent respectfully incorporates by reference the additional arguments and legal conclusions addressed by the Court of Appeals in Builders 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). Those arguments were raised and considered below and were expressly relied upon by the Circuit Court in reaching its decision. Because those additional grounds independently support the ruling below, this Court may affirm the decision of the Court of Appeals on those bases as well.

CONCLUSION

BFS's appeal rests on an attempt to recast both its contract and its pleadings to avoid the consequences of its own drafting. The indemnity provisions in Section 5 require subcontractors to defend BFS regardless of BFS's negligence, while BFS's Third-Party Complaint seeks indemnification for "any liability" and "any sums" BFS may incur. When read together, these provisions necessarily implicate BFS's own conduct and trigger South Carolina's heightened clear-and-unequivocal standard for indemnity agreements. BFS concedes that its contract does not satisfy that standard. Under longstanding South Carolina precedent, that failure alone defeats its contractual indemnity claim. The Court of Appeals faithfully applied these settled principles and correctly held that BFS's contractual indemnity claim fails as a matter of law. Accordingly, Respondent ECC respectfully requests that this Court affirm the decision of the Court of Appeals.

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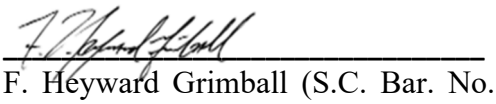

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