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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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.

**PETITIONER-RESPONDENT BUILDERS FIRSTSOURCE-SOUTHEAST GROUP,
LLC RETURN TO RESPONDENT-PETITIONER ECC'S BRIEF**

Table of Contents

Table of Authorities	ii
ECC's Questions Presented on Appeal	1
Statement of the Case	1
Standard of Review	2
Argument	2
I. BFS only seeks recovery of attorney's fees as a consequential damage of its indemnification cause of action.....	3
II. An indemnification cause of action under the parties' agreement does not accrue until liability is established.....	4
III. ECC's arguments are abandoned on appeal and contrary to the established precedent of this Court.....	8
Conclusion	10

Table of Authorities

Cases:

<u>Addy v. Bolton</u> , 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971).....	4
<u>A.L.R.3d 867</u> (1974).....	7
<u>Canal Ins. Co. v. Leb. Ins. Agency, Inc.</u> , 504 F.Supp.2d 113, 117 (W.D.Va.2007).....	7
<u>Cent. Wash. Refrigeration, Inc. v. Barbee</u> , 133 Wash.2d 509, 946 P.2d 760, 764 (1997).....	7
<u>Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n</u> , 411 S.C. 557, 568, 769 S.E.2d 847, 852 (2015).....	7
<u>Dent v. Beazer Materials & Servs., Inc.</u> , 993 F. Supp. 923, 941 (D.S.C. 1995).....	10
<u>Dent v. Beazer Materials & Servs.</u> , 133 F.3d 914 (4th Cir. 1998).....	10
<u>Dent v. Beazer Materials & Servs.</u> , 156 F.3d 523 (4th Cir. 1998).....	10
<u>Ellis v. Davidson</u> , 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).....	2
<u>First Gen. Servs. of Charleston, Inc. v. Miller</u> , 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994).....	6
<u>Gadson v. Hembree</u> , 364 S.C. 316, 613 S.E.2d 533 (2005).....	2
<u>Jones v. Builders Inv. Group, LLC</u> , 415 S.C. 321, 330 n.8, 781 S.E.2d 737, 742 n. 8 (Ct. App. 2015).....	5, 6, 9
<u>McCoy v. Greenwave Enters., Inc.</u> , 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014).....	4, 10
<u>McDermott v. City of New York</u> , 50 N.Y.2d 211, 428 N.Y.S.2d 643, 406 N.E.2d 460, 462–63 (1980).....	7
<u>Miller v. Blumenthal Mills, Inc.</u> , 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005)...	2
<u>Montgomery v. CSX Transp., Inc.</u> , 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004).....	2
<u>Nelson v. Charleston County Parks & Recreation Comm'n</u> , 362 S.C. 1, 605 S.E.2d 744 (Ct.App.2004).....	2
<u>Piper v. Am. Fid. & Cas. Co.</u> , 157 S.C. 106, 108 (1930).....	6
<u>Potter v. Spartanburg Sch. Dist. 7</u> , 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct.App.2011).....	9
<u>Rock Hill Tel. Co. v. Globe Commc'ns, Inc.</u> , 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005).....	10
<u>Schmidt v. Courtney</u> , 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003).....	2
<u>Shealey v. Am. Health Ins. Corp.</u> , 220 S.C. 79, 83, 656 S.E.2 nd 461, 462 (1951).....	5
<u>State-Planters' Bank & Tr. Co. v. First Nat. Bank</u> , 76 F.2d 527, 532 (4th Cir. 1935).....	6
<u>Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.</u> , 413 S.C. 630 (Ct. App. 2015).....	3
<u>Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC</u> , 413 S.C. 615 (Ct. App. 2015).....	3
<u>Stuck v. Pioneer Logging Machinery, Inc.</u> , 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983)....	9, 10
<u>Town of Summerville v. City of N. Charleston</u> , 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008).....	2
<u>Walker v. New Amsterdam Casualty Co.</u> , 157 S.C. 381, 154 S.E. 221, 223 (1930).....	6
<u>Waters v. S.C. Land Res. Conservation Comm'n</u> , 321 S.C. 219, 227–28, 467 S.E.2d 913, 917–18 (1996).....	8
<u>Wright v. PRG Real Est. Mgmt., Inc.</u> , 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019).....	2

Statues and Rules:

South Carolina Code Section 15-3-530.....	4,5,9
41 Am.Jur.2d Indemnity § 2 (1968).....	10
42 C.J.S. Indemnity § 21 (1944).....	10
42 C.J.S. Indemnity § 27.....	5, 6
Rule 208 (b)(1)(E).....	9

The opinion of the court of appeals in this case analyzed many different points of law, and it held correctly on some issues and held incorrectly on others. The opinion errs because, as demonstrated herein, BFS has pled a cause of action in contractual indemnity to recover for any liability and/or consequential damage caused by the negligence of the Respondent subcontractors. Under the circumstances, the relevant contractual provision authorizing such indemnity should have been analyzed in accordance with the general rules of contract construction. Such claims should, moreover, have withstood summary judgment as there have been no findings of fact pertaining to the claims and purported damages of the parties in the underlying action. The court of appeals was in error in failing to recognize the existence of such valid indemnity claims, and in its failure to apply the appropriate standard in analyzing the relevant contract provision relied upon in support of such claims.

The court of appeals, however, was correct that the statute of limitations for a contractual indemnification claim has not begun until the third party's claims in the underlying action are resolved. Here, there has been no resolution of the underlying action, and this Court should therefore affirm the court of appeals' Opinion on the statute of limitations issue.

ECC's Questions Presented on Appeal

- 1. Whether the Court of Appeals erred by applying equitable indemnity accrual principles to a contractual indemnity claim governed by an express agreement?**
- 2. Whether the Court of Appeals erred in failing to distinguish between indemnity against liability and indemnity against loss, where South Carolina law holds that a claim for indemnity against liability accrues, and the statute of limitations begins to run, at the moment the indemnitee incurs a legal obligation or expense?**
- 3. Under the Discovery Rule, did BFS's cause of action for contractual indemnity seeking recovery of attorney's fees accrue in December 2015 when BFS answered a Third-Party Complaint and immediately incurred the legal fees for which it now seeks indemnification?**

STANDARD OF REVIEW

On an appeal from an order granting summary judgment on a question of law, this Court reviews the ruling de novo. Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019)(citing Town of Summerville v. City of N. Charleston, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008)). "The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in the 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). It is only when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, that summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct.App.2004).

ARGUMENTS

In an attempt to characterize the plea for recovery of attorney's fees in this matter as time-barred, ECC argues that the recovery of attorney's fees should be bifurcated from the indemnification claim, and should be analyzed as its own separate cause of action with its own accrual date. As demonstrated herein, however, ECC's arguments are not only without support, but are contrary to established principles of indemnity law.

I. BFS only seeks recovery of attorney's fees as a consequential damage of its indemnification cause of action.

BFS has pled an indemnification cause of action that, when read in context, seeks recovery against liability to a third-party, and any consequential damages, including attorney's fees, determined to have resulted from the negligence of the Respondent subcontractors.¹ Specifically, BFS pled that it **"has been subjected to liability and incurred consequential damages in having to expend attorneys fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action."** See Paragraph 33 of the Complaint, A. pp. 136-37 (emphasis added). Thus, by the plain language of its Complaint, BFS has sought recovery of attorney's fees **only** as a consequential damage of its indemnification cause of action.²

BFS's contractual indemnification cause of action seeking recovery for any liability owed to a third party and any consequential damages incurred defending against the third party's claims complies with and is expressly authorized by law. This Court has long since held that

¹ BFS pled an indemnification cause of action with alternative theories of recovery for indemnity by express written contract and by operation of common law. See Paragraphs 31-34 of Complaint, A. pp. 136-37.

² No party has appealed the ruling of the trial court that BFS's causes of action for negligence, breach of warranty, and breach of contract were dismissed pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615 (Ct. App. 2015) and Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders

“[i]n actions of indemnity, brought where the duty to indemnify is either implied by law or arises under a contract, reasonable attorney fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.” Addy v. Bolton, 257 S.C. 28, 33, 183 S.E.2d 708, 710 (1971)(quoting 22 Am. Jur. (2d), Damages, Section 166, Pages 235-236).

Moreover, 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, which establishes a three-year statute of limitations on certain claims, 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, attorney’s 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, attorney’s 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 resolution of the third-party

FirstSource-Se. Grp., 413 S.C. 630 (Ct. App. 2015) which holds that such claims would not be independent causes of action from BFS’s equitable indemnity claim.

dispute. Because the claims against BFS in the underlying action are not resolved, the statute has not yet run on its indemnification claims.

II. An indemnification cause of action under the parties' agreement does not accrue until liability is established.

While it concedes that equitable indemnity generally accrues when liability is fixed by judgment or payment, ECC argues, without citation to any relevant authority, that a cause of action in contractual indemnity, specifically inclusive of consequential damages for attorney's fees, runs from the date the indemnitee first incurs attorney's fees. In support of this contention, ECC relies upon what it contends are differing criteria for the accrual of the cause of action in (a) equitable indemnity, and (b) contractual indemnity, respectively.

ECC argues that the parties entered into a contract that is an agreement to indemnify against liability, not an agreement to indemnify against loss. ECC argues that the indemnification cause of action seeking recovery, including consequential damages of attorney's fees, is a claim for indemnity against liability that accrued when the fees were incurred. ECC thus argues that the BFS claims in contractual indemnity, inclusive of its claim for consequential damages of attorney's fees, are barred by the three-year statute of limitations set forth in S.C. Code Ann. 15-3-530(1).

South Carolina recognizes two types of indemnity contracts: indemnity against loss; and, indemnity against liability. Jones v. Builders Inv. Group, LLC, 415 S.C. 321, 330 n.8, 781 S.E.2d 737, 742 n. 8 (Ct. App. 2015) (holding that a contract of indemnity against loss requires proof of actual loss to assert a claim for breach of contract). This is in accord with the general rule. "When a contract is for indemnity against loss, "no action will lie in favor of [indemnitee] until some loss or damage has been sustained by him, either by payment of the whole or some portion

of the claim.” *Shealey v. Am. Health Ins. Corp.*, 220 S.C. 79, 83, 656 S.E.2nd 461, 462 (1951) “Where the contract is strictly one of indemnity, that is, one against loss or damages, the indemnitee cannot recover until he or she has made payment or otherwise suffered an actual loss or damage against which the covenant runs.” 42 C.J.S. Indemnity § 27.

On the other hand, “[w]here the indemnity is against liability, the cause of action is complete and the indemnitee may recover on the contract as soon as his or her liability has become fixed and established, even though he or she has sustained no actual loss or damage at the time he or she seeks to recover.” 42 C.J.S. Indemnity § 26. The requirement that the liability become “fixed and established” has been adopted in South Carolina cases. See, e.g., Walker v. New Amsterdam Casualty Co., 157 S.C. 381, 154 S.E. 221, 223 (1930) (“Where the indemnity is against liability, the cause of action is complete and the indemnitee may recover upon the contract as soon as his liability has become fixed and established, even though he has sustained no actual loss or damage at the time he seeks to recover. Thus, under such a contract, a cause of action accrues to the indemnitee upon the recovery of a judgment against him, and he may recover from the indemnitor without proof of payment of the judgment.”).

Our Courts have thus made clear that, whether under a contract for indemnity against loss or under a contract for indemnity against liability, the liability must first be fixed or established before the cause of action for indemnity accrues. See, e.g., Piper v. Am. Fid. & Cas. Co., 157 S.C. 106, 108 (1930); State-Planters' Bank & Tr. Co. v. First Nat. Bank, 76 F.2d 527, 532 (4th Cir. 1935).

The analysis of the court of appeals is consistent with the foregoing authorities. The court first recognized that: “As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant.” quoting First Gen. Servs. of Charleston, Inc. v.

Miller, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Entry of judgment is, of course, the usual manner in which a liability becomes “fixed and established.” The court of appeals then addresses the two types of indemnity contracts and states: “In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred...”, quoting from Jones v. Builders Inv. Grp., LLC, 415 S.C. 321, 330 n.8, 781 S.E.2d 737, 742 n.8 (Ct. App. 2015). Then in its conclusion, the court of appeals states the circuit court erred because BFS “had neither been found liable nor paid any injured party.” Thus, even though the court did not explicitly employ the “fixed and established” language, its requirement that the liability be incurred, in the sense of BFS being found liable, amounts to the same thing.

Moreover, in her Dissent in Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n, former Chief Justice Toal devoted an entire section to analysis of the “Nature of Indemnification Actions”. See 411 S.C. 557, 568, 769 S.E.2d 847, 852 (2015). Importantly, Justice Toal’s analysis was not limited to any particular sub-set of indemnification actions, and did not draw any distinction between accrual of a cause of action in equitable indemnity and accrual of a cause of action in contractual indemnity. As Justice Toal explained, “[a]n indemnification action is separate and distinct from the underlying tort action, as the damages suffered by the parties involved in each suit are distinct, and the two causes of action accrue at different times. Id. at 411 S.C. 566, 567 (quoting Canal Ins. Co. v. Leb. Ins. Agency, Inc., 504 F.Supp.2d 113, 117 (W.D.Va.2007) (“An indemnity claim does not seek recovery for any direct harm caused by the defendant to the plaintiff—it is clearly distinct from a direct cause of action.”); McDermott v. City of New York, 50 N.Y.2d 211, 428 N.Y.S.2d 643, 406 N.E.2d 460, 462–63 (1980) (“[T]he indemnity claim is a separate substantive cause of action, independent of the underlying wrong....”); Cent. Wash.

Refrigeration, Inc. v. Barbee, 133 Wash.2d 509, 946 P.2d 760, 764 (1997) (“Indemnity actions are distinct, separate causes of action from the underlying wrong and are governed by separate statutes of limitations.”); Maurice T. Brunner, Annotation, *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A.L.R.3d 867 (1974) (“The cause of action for indemnity of one whose liability for a tort is secondary or constructive, against one whose liability for the tort is primary, is separate and distinct from the injured person's cause of action for the tort, and is generally recognized not to be a mere species of subrogation to the tort cause of action.”).

Justice Toal further explained that, for an indemnification action, “there is no justiciable case or controversy until the conclusion of the underlying tort action, regardless of its outcome.” Id. (quoting Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 227–28, 467 S.E.2d 913, 917–18 (1996) (“A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.... It is not enough that a threat of *possible* injury currently exists; the mere threat of a potential injury is too contingent or remote to support present adjudication.” (citations omitted) (internal quotation marks omitted)).

Thus, here, where the underlying action involves the alleged tortious conduct of the parties, and there has been no resolution of the underlying dispute, BFS’s indemnification cause of action has not yet accrued and therefore is not time barred.

III. ECC’s arguments are abandoned on appeal and contrary to the established precedent of this Court.

As noted in Argument II, ECC agrees that an equitable indemnity claim generally accrues when liability is fixed by judgment or payment. ECC contends, however, that a cause of action in contractual indemnity, specifically inclusive of consequential damages for attorney’s fees, runs

from the date the indemnitee first incurs attorney's fees defending against the third-party's claims. ECC argues that principles applicable to a cause of action in equitable indemnity do not apply to a cause of action in contractual indemnity. ECC submits that BFS incurred attorney's fees on December 15, 2015, the day in which the undersigned counsel executed BFS's Answer to Lennar's Third-Party Complaint in the underlying action, and that per the Discovery Rule, BFS knew or should have known of its right to indemnity from ECC on December 15, 2015. ECC thus argues before this Court that the BFS claims in contractual indemnity, inclusive of its claim for consequential damages of attorney's fees, are barred by the three-year statute of limitations set forth in South Carolina Code Section 15-3-530(1) because BFS did not file its indemnification action against ECC until December 21, 2018.

ECC cites no relevant authority to support its conclusory contentions. BFS submits, therefore, that this Court should determine that ECC's equitable principle- and judgment-tied rule arguments abandoned. See Jones v. Builders Inv. Grp., LLC, 415 S.C. 321, 331, 781 S.E.2d 737, 742–43 (Ct. App. 2015)(quoting Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct.App.2011))("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory.") See Rule 208 (b)(1)(E): "the particular issue to be addressed shall be set forth in distinctive type, followed by discussion **and citations of authority.**"(emphasis supplied)

Furthermore, in Stuck, this Court acknowledged that the modern trend surrounding indemnity law was to **look to principles of equity**. Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983) (emphasis added). The Court then said, "According to **equitable principles**, a right of indemnity exists whenever the relation between the parties is

such that **either in law or in equity** there is an obligation on one party to indemnify the other ...” Id. The fact that the phrase “[a]ccording to equitable principles” modifies **both** “in law” AND “in equity” makes clear that the Court intended for equitable principles to apply to both contractual (“in law”) and equitable (“in equity”) indemnification rights. This reading is further supported by the Court’s citation to two widely-accepted legal encyclopedia for support: American Jurisprudence and Corpus Juris Secundum. Id. The cited section from American Jurisprudence discusses both equitable and contractual indemnity obligations, and the cited section from Corpus Juris Secundum exclusively discusses contractual indemnification issues. See 41 Am.Jur.2d Indemnity § 2 (1968) and 42 C.J.S. Indemnity § 21 (1944). Thus, even though the case before it was one dealing with equitable indemnity, the Court nonetheless was influenced by and cited to the law surrounding contractual indemnity as well. Stuck, 279 S.C. at 24. The reasonable conclusion is that it was never the intention of the Court so completely to bifurcate contractual and equitable indemnity such that the principles applicable to one could never inform the other.

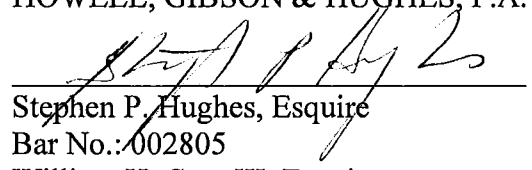
No subsequent case law authored by this Court establishes or supports any purported distinction between accrual of a cause of action in equitable indemnity versus accrual of a cause of action in contractual indemnity. Instead, South Carolina courts recognize that principles generally applicable to causes of action in indemnity are equally applicable to a determination of the accrual of cause of action, whether in contractual or inequitable indemnity. See e.g., Rock Hill Tel. Co. v. Globe Commc'ns, Inc., 363 S.C. 385, 389, 611 S.E.2d 235, 237 (2005); McCoy v. Greenwave Enters., Inc., 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014); Dent v. Beazer Materials & Servs., Inc., 993 F. Supp. 923, 941 (D.S.C. 1995), aff'd sub nom. Dent v. Beazer Materials & Servs., 133 F.3d 914 (4th Cir. 1998), and aff'd, 156 F.3d 523 (4th Cir. 1998).

Thus, contrary to ECC's conclusory argument, the court of appeals did not err in applying equitable principles to BFS's contractual indemnification cause of action, as such application has been acknowledged, adopted, and applied by this Court and other South Carolina courts to all indemnification causes of action, regardless of whether equitable or contractual, since 1983.

CONCLUSION

Just as BFS's common law indemnification cause of action is allowed to proceed to trial, so too should BFS's contractual indemnification cause of action premised upon the exact same allegations, limiting recovery to liability and consequential damage found to have resulted from the Respondent subcontractors' negligence, and not from BFS's own negligence. For these reasons, the Court must reverse and remand BFS's contractual indemnification cause of action to proceed to trial.

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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

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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.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing *Petitioner*
Builders FirstSource-Southeast Group, LLC Return to Respondent ECC's Brief upon all
counsel of record by last known email addresses on
this 6th day of March, 2026.

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SC Court of Appeals

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March 6, 2026

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RECEIVED
Mar 06 2026
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 2025-001176
Our File No: 11742.1 SPH

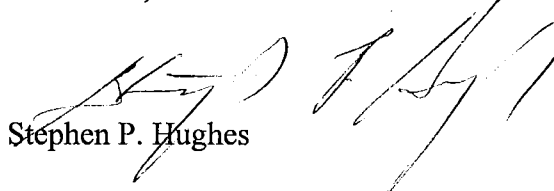
Dear Ms. Howard:

Please find enclosed herein for service upon you the *Petitioner-Respondent Builders FirstSource-Southeast Group, LLC Return to the Respondent-Petitioner ECC's Brief* served on behalf of Builders FirstSource-Southeast Group, LLC, in connection with the above captioned matter.

If you should have any questions regarding this matter, please feel free to contact me.

With kindest regards, I am
Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.


Stephen P. Hughes

SPH/sc
Enclosures