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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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; Liollio 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.

PETITIONER's REPLY BRIEF TO RESPONDENT POHLMAN

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BFS REPLY TO POHLMAN BRIEF

Petitioner Builders FirstSource-Southeast Group, LLC (hereinafter "BFS") would show, initially, that Respondent Pohlman Quality Exteriors, Inc. (hereinafter "Pohlman") is incorrect in its factual background section of its Brief that "Pohlman provided labor only to install windows on buildings 11 and 21 at the project." Pohlman Brief, p. 5. Pohlman is not correct in the assertion that it provided "labor only." While the "labor-only" argument was not emphasized at the court of appeals, many Respondents, including Pohlman, emphasize the incorrect argument before this Court.

Contrary to Pohlman's and other Respondent subcontractors' arguments, the deposition testimony of the parties' fact witnesses provides unrefuted evidence that the Respondent subcontractors' that performed window installation, were responsible for supplying the fasteners needed to install the windows. The lower courts adopted the arguments of the Respondents wholesale without any evidence supporting their contentions that they were "labor-only" subcontractors or that they did not supply any materials for construction of the Retreat at Charleston National project. The court of appeals' Opinion, was based in part, on such erroneous contention. BFS has filed a motion to supplement the record to provide the Court with the deposition testimony from discovery that directly contradicts the Respondent subcontractors' "labor-only" arguments.

BFS's install sales manager, Bill Crabtree testified:

Q. As far as fasteners, did BFS supply those to the window installer?
A. No, sir.
Q. So they would have supplied their own fasteners?
A. Yes, sir.

See BFS Motion, Exhibit A, Deposition of Bill Crabtree, pp. 60-61, ll. 23-25, 1-3.

Respondent ECC Contracting, LLC's Rule 30(b)(6) designee, Rod Assis, testified:

Q. And Builders FirstSource is supplying you both the window and whatever the fastener – the appropriate fastener is?
A. Just the window, tape, and caulk.
Q. So the actual fasteners are something you would provide?
A. Yes.

See BFS Motion, Exhibit B, Deposition of Rod Assis, p. 42, ll. 16-22.

In addition to installing the windows at buildings 11 and 21, Pohlman's scope of work included installation of the exterior doors at buildings 11 and 21:

Q. Same contractor that installed windows would have done the outside doors?
A. Yes, sir.

See BFS Motion, Exhibit A, Deposition of Bill Crabtree, p. 61, ll. 19-21.

BFS would also note that the Respondent subcontractors, including Pohlman, who installed windows and exterior doors, were responsible for installation of those components pursuant to the manufacturers' installation instructions. See BFS Motion, Exhibit A, Deposition of Bill Crabtree, p. 60, ll. 18-22.

Mr. Assis testified that the subcontractor knows what fastener to use for installation of the windows from review of the manufacturer's instructions, as well as, from review of the South Carolina building code. See BFS Motion, Exhibit B, Deposition of Rod Assis, p. 42, ll. 23-25, p. 43, ll. 1-5. Further, Mr. Assis testified that the manufacturer's instructions are adhered to the window itself. See BFS Motion, Exhibit B, Deposition of Rod Assis, p. 43, ll. 6-10. Mr. Assis also testified that whether to install a fastener in every hole or every other hole is set forth in the manufacturer's instructions included on the packaging of the window. See BFS Motion, Exhibit B, Deposition of Rod Assis, p. 43, ll. 11-23.

Among the primary contentions of Plaintiffs' expert witness Gary Freeman was that the windows were not installed pursuant to the window manufacturer's installation instructions. Specifically, Plaintiff's expert witness took issue with not only the type of fastener, but also with the spacing of the fasteners used by Respondent subcontractors in the installations of the windows.

See Freeman Deposition, A. p. 1107, ll. 15-25, p. 1111, ll. 22-25. Moreover, Plaintiff's expert also took issue with the exterior door installation, contending that the doors were not installed in a weather lapped configuration with the weather-resistive barrier. See Freeman Deposition, A. p. 1108, ll. 22-25, p. 1109, ll. 1-7, p. 1114, ll. 13-20.

To the extent that the Respondent subcontractors did not comply with the manufacturer's installation instructions, any resulting damage could be determined to be the responsibility of the Respondent subcontractor. "Any" such damage is what BFS seeks to recover from the respective Respondent subcontractors. Contrary to the arguments of Pohlman and the errant determinations of the lower courts, BFS's pleading plainly states as much.

BFS's pleading alleges that any liability of BFS, for the claims asserted by the Plaintiff, were the result of the negligent acts or omissions of the BFS subcontractors, including Pohlman. See A. pp. 440-441, 447-449. BFS alleges further that, because BFS has been subjected to liability due to the alleged negligence of its subcontractors, it is entitled to recovery in indemnity against those subcontractors. See Id. There is nothing within the BFS pleadings by which BFS has sought recovery, in indemnity, for such claims as may ultimately be determined to have resulted from BFS's own negligence, whether sole or concurrent. See Id.

As more fully detailed both in the initial brief of BFS, and hereinafter, the recovery sought by BFS is expressly authorized by and consistent with South Carolina statutory and common law. BFS, by the within action, seeks recovery in indemnity **only** against liability occasioned by the negligence of Respondent subcontractors. BFS's contractual indemnity claims are, in turn, premised upon the single relevant indemnity provision, by which the subcontractors agreed to indemnify BFS only against liability for property damage caused in whole or in part by the negligence of the subcontractor.

Moreover, and as confirmed by Pohlman in its Brief, there remains a genuine issue of material fact regarding whether BFS was in any manner negligent in connection with the installation of windows by its subcontractors. See Pohlman Brief, p. 5 ("At least at this stage, there is a world in which a jury may find BFS negligent for its own actions, or for the actions of the subcontractors they had a duty to 'supervise, inspect, and approve.'"). Thus, it was error for the lower courts to deprive BFS the right to proceed to trial on its contractual indemnification claims against Pohlman. This Court, therefore, must reverse and remand such claims.

1. **The "clear and unequivocal" standard ONLY applies when a party seeks to recover indemnity for his negligence.**

Pohlman argues, erroneously, that BFS, in alleging that it is "entitled to full contractual and common law indemnification...for any liability BFS is found to have to the Plaintiffs" (Paragraph 168 of the BFS Third-Party Complaint), BFS has necessarily sought recovery for damages occasioned by its own negligence. In so arguing, Pohlman has ignored not only this specific language of Paragraph 168, seeking "full contractual and common law indemnification", but also the antecedent language of Paragraph 167 of the BFS Third-Party Complaint.

The quoted Paragraphs 167 and 168 of the BFS Third-Party Complaint, when read in appropriate context and in accordance with principles of pleading, clearly confirm that BFS has sought indemnification only to the extent provided by the relevant provision of its contract, and to the extent authorized by law.

Pohlman claims that the essential question that this Court must address is: "Does the indemnification provision of the Later Contract seek to require the subcontractor (Pohlman) to indemnify BFS for its sole or concurrent negligence." Pohlman Brief, p. 4. Pohlman argues, "[i]f so, the 'clear and unequivocal' standard articulated in Concord v. Cumberland applies." Id. Pohlman, however, in making this argument, has literally put the cart before the horse.

An indemnity provision is ordinarily to be construed in accordance with the general rules for construction of contracts. See Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 SE2nd 271, 272 (Ct. App. 1993)(citing Federal Pacific Electric v. Carolina Production Enterprises, 298 S.C. 23, 378 S.E.2d 56 (Ct. App. 1989). Importantly, it is only when a party seeks to be relieved from the consequences of its own negligence that our case law requires that the indemnity clause must be set forth in clear and unequivocal terms. See Ashley II of Charleston, L.L.C. v. PCS Nitrogen, Inc., 409 S.C. 487, 763 S.E.2d 19 (2014); Laurens Emergency Med Specialists PA v. MS Bailey and Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003); Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 648, 819 S.E.2d 166, 171 (Ct. App. 2018)(citing Federal Pacific, noting the indemnity clause was subject to the clear and unequivocal standard because the respondent was seeking indemnification for its "own negligence;" also, Laurens, noting the court found strict construction of the indemnity clause was required because the party claimed the clause could relieve it "from the consequences of its own negligence.").

Thus, here, where BFS has reiterated on the record that it is seeking indemnity only against liability or damage resulting from the Respondent subcontractors' negligent acts or omissions, it was error for the lower courts to subject the relevant indemnity provision to the heightened "clear and unequivocal" standard. Therefore, this Court must reverse and remand BFS's contractual indemnity claims to proceed to trial.

a. Pohlman ignores all of the pleading limiting BFS's indemnification cause of action and such construction of BFS's pleading contradicts precedent and the Rules of Civil Procedure.

Pohlman does not contest the fact that BFS pled that if it were to be found liable to the Plaintiffs, any such liability would be the result of the wrongful acts, omissions, negligence, and/or

representations of the Respondent subcontractors. See Paragraph 137, A. p. 441; Paragraph 167, A. p. 448. That contention (that any liability of BFS would be the result of the negligence of its subcontractors) is the premise for its claim, in Paragraph 138, for full contractual and common law indemnification. By contrast, nowhere within its pleadings has BFS ever sought indemnity against damages occasioned by its own negligence, whether sole or concurrent. Moreover, and consistent with those pleadings, BFS has repeatedly stressed before the lower courts that it seeks recovery, under the relevant contractual indemnity provision, where it is both (a) found liable to the Plaintiffs, AND (b) such liability is a direct and proximate result of the subcontractor's negligence. See BFS Brief, p. 16.

In support of its erroneous construction of the relief sought by Paragraph 168 of the BFS Third-Party Complaint, Pohlman insists that a claim, seeking recovery for "any liability BFS is found to have to the Plaintiffs" necessarily encompasses a claim for indemnity against liability occasioned by negligence of BFS itself. Pohlman explains that "when considering the pleadings as a whole, which is the analysis this Court will engage in, the pleadings are so broad as to encompass any liability BFS may have for its sole or concurrent negligence, regardless of their subjective belief regarding their liability." As suggested hereinabove, Pohlman, in making its argument, has ignored the antecedent allegation set forth in Paragraph 167, which contended that any BFS liability is premised upon the negligence of its subcontractors.

Thus, while insisting that the pleadings be construed as a whole, Pohlman itself urges this Court to ignore relevant provisions which define and clarify the extent of the relief sought by BFS.

Moreover, and as further explained hereinafter, the construction as urged by Pohlman is completely inconsistent with the only relevant indemnity provision at issue here, the provision

which authorizes recovery only against liability for damages occasioned by the negligence of the subcontractors.

Lastly, BFS would highlight that Pohlman does not contest the fact that BFS's contractual indemnification cause of action is based on the same allegations as its common law indemnification cause of action, and it continues to fail to address how BFS's common law indemnification cause of action for "any" liability may proceed to trial, but BFS's contractual indemnification cause of action for "any" liability may not. See BFS Brief, p. 17. Pohlman's failure to address this argument of BFS should be considered as abandonment of the issue and provides for reversal by this Court independent of any other issues pending appeal.

b. Section 5 Indemnity sets forth separate, plain, lucid provisions regarding the indemnification agreement of the parties.

Pohlman misrepresents to the Court that the " 'Indemnity' provision is one conglomerate provision made up of four paragraphs with differing indemnification language throughout" and that "the provision does not include subtitles, instructions, or any other guide to which Pohlman, or the Court, could conclude which paragraph applies to which particular circumstances in which the parties may find themselves." Pohlman Brief, pp. 7-8. Pohlman argues, without any evidentiary support, that there is "an overarching provision with different standards for indemnification which cannot be reconciled together." Id. at p. 8. Pohlman also argues that the first and second paragraphs of Section 5 Indemnity are "inextricably linked," yet it fails to explain how so. See Pohlman Brief, p. 8.

Contrary to the representations by Pohlman, the relevant subcontract agreement contains one indemnity section – "SECTION 5. INDEMNITY" - not one "indemnity provision." See A. pp. 1519-1520. Section 5 Indemnity is, in turn, comprised of four separate and distinct paragraphs. See Id. While, the paragraphs are not numbered or subtitled, each of those paragraphs clearly

addresses separate and distinct circumstances which may impose indemnity and/or other obligations.

Contrary to Pohlman's misrepresentations, here, where the underlying litigation arises out of a third-party's claims for alleged construction defects in and resulting property damage from Pohlman's Work, the indemnity provision set forth in the first paragraph of Section 5 Indemnity, (and only the indemnity provision in the first paragraph of Section 5) applies, and provides BFS the right to indemnity, "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor." See A. p. 1519.

Also contrary to Pohlman's misrepresentations, the indemnity provision set forth in the second paragraph of Section 5 Indemnity is not applicable here, because the underlying litigation does not involve any claim "arising out of or resulting from bodily injury to, or sickness, disease, or death of, [Pohlman], any agent, employee, or representative of [Pohlman], or any of [Pohlman]'s subcontractors." See A. p. 1519.

Further, and again contrary to Pohlman's misrepresentations, the indemnity provisions set forth in the first and second paragraphs of Section 5 Indemnity are entirely reconcilable as, by its plain and unambiguous language, the indemnity provision in the first paragraph applies only to third-party claims for bodily injury and property damage sustained by a third-party; whereas the indemnity provision in the second paragraph of Section 5 Indemnity applies only to bodily injury claims sustained by Pohlman or Pohlman's agents, employees, representatives, or subcontractors. See A. p. 1519.

It bears emphasis that the indemnity provision set forth in the first paragraph of Section 5 Indemnity is the only indemnity provision upon which BFS relies in the assertion of its claims in this litigation. BFS would further note that the indemnity provision set forth in the first paragraph

of Section 5 Indemnity is the only provision within Section 5 Indemnity that provides BFS the right to recover indemnity from Pohlman for a third-party's property damage claim, such as Plaintiffs' claims here. Lastly, BFS would highlight the fact that Pohlman does not dispute these two facts which BFS has repeatedly emphasized at every stage of the litigation.

To claim that these two separate and distinct indemnity provisions cannot be reconciled is simply incorrect; they cover different factual scenarios and do not contradict each other. Accordingly, the Court must reverse the court of appeals' Opinion to be consistent with the aforementioned South Carolina law.

2. BFS has not asked the Court to "blue pencil" the contract; instead, BFS asks the Court to apply basic rules of contract construction to the plain and defined language in the contract.

Pohlman's final argument is that "[s]everance in the manner BFS begs of the Court would require the Court to take out individual words, lines, and/or paragraphs, creating a mash-up of sentences and paragraphs containing no meaning." Pohlman Brief, p. 8. This is yet again another material misrepresentation of BFS's argument.

Initially, and most obviously, the indemnity provisions of Paragraphs One and Two, respectively, are set forth in completely separate and distinct paragraphs. Each separate paragraph in turn addresses separate and distinct circumstances under which obligations in indemnity may arise. As highlighted hereinabove, the indemnity provision of the first paragraph (the only indemnity provision upon which BFS relies), applies to claims for property damages, and imposes an obligation upon the Respondent to indemnify only against liability for damages caused by the negligence of the subcontractor. Contrary to the court of appeals' determination and Pohlman's argument, the second paragraph of Section 5 deals only with potential obligations to indemnify against liability for bodily injury, etc., sustained by Pohlman or Pohlman's employees, agents, or

subcontractors. The factual circumstances addressed by the second paragraph of SECTION 5 are not at issue here. BFS has never cited the second paragraph in support of its claims. That paragraph is irrelevant to the assertion of the BFS claims, and need not, and should not, have been considered by the court of appeals.

The indemnity provision set forth in Paragraph 1 of Section 5 is completely consistent with the relief sought by BFS- indemnity against liability occasioned by the negligence of its subcontractors. It is further consistent with and supported by the specific provisions of Code Section 32-2-10, and with the prior determinations by the court of appeals in the Concord & Cumberland matter.

Under the circumstances, to the extent that this court should deem any other provision of Section 5 to be unenforceable, such provisions could be ignored without affecting in any particular the continued viability and enforceability of the indemnity provisions set forth in Paragraph 1 of Section 5. Contrary to the assertions of Pohlman, Paragraph 1 could be enforced in its present form, without any modification, revision, or addition. There is, thus, no substance to the unsupported Pohlman contention that the enforceability of Paragraph 1 would require this court to engage in (blue penciling), by the addition of terms which were never agreed upon by the parties.

Moreover, the contracts also include severability provisions that explicitly state:

"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 of 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."

See A. pp. 1460, 1473, 1488, 1500, 1512, 1525.

In light of the format of the contracts and the severability provisions, there can be no dispute that the parties intended that any unenforceable provision be severed and that the remainder

of the contract be left intact and in effect. See Doe v. TCSC, LLC, 430 S.C. 602, 615, 846 S.E.2d 874, 880-81 (Ct. App. 2020)(The presence of a severability clause should be treated as strong evidence of the parties' intent to sever any unenforceable language.)

Accordingly, to the extent that this Court takes issue with the second paragraph of Section 5, it must honor the intent of the parties and sever it accordingly.

Conclusion

In conclusion, it was error for the court of appeals to ignore BFS's contractual indemnification claim for any liability or damage resulting from the Respondent subcontractors' negligence; it was error for the court of appeals to apply the heightened "clear and unequivocal" standard because BFS is not seeking indemnity for its own negligence; it was error for the court of appeals to not give proper evaluation to the defined terms and provisions of the contracts and determine that the contracts were unconscionable; it was error for the court of appeals to analyze provisions that were separate and distinct and conclude that they were ambiguous, confusing, and failed to meet the clear and unequivocal standard; it was error for the court of appeals to decline to sever the few purportedly offensive provisions; it was error for the court of appeals to conclude that the parties were collaterally estopped from litigating the issue of contractual indemnity for damages resulting from the Respondent subcontractors' negligence.

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