RECEIVED
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**

FINAL BRIEF OF RESPONDENT, ECC CONTRACTING, LLC

RICHARDSON PLOWDEN & ROBINSON, P.A.
James H. Elliott, Jr. (SC Bar. No 13620)
F. Heyward Grimball (SC Bar. No. 101743)
235 MaGrath Darby, Suite 100
Mt. Pleasant, SC 29464
(843) 805-6550 FAX (843) 805-6588
jelliott@RichardsonPlowden.com
fhgrimball@RichardsonPlowden.com

BEST HONEYCUTT, P.A.
L. Dean Best (S.C. Bar No. 11952)
M. Shanter Chaparro (S.C. Bar No. 102419)
Post Office Box 13466
102 Wappoo Creek Drive, Suite 8 (29412)
Charleston, South Carolina 29422
T: (843) 793-4744
dean@besthoneycutt.com
shanter@besthoneycutt.com

Attorneys for Respondent ECC Contracting, LLC

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND RULES..... **PAGE**

OTHER SOURCES **PAGE**

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 soles 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 party, 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 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, 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 ECC[4] 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 NEGLIGECE 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. S*ee 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.
By: s/F. Heyward Grimball
James H. Elliott, Jr. (SC Bar. No 13620)
F. Heyward Grimball (SC Bar. No. 101743)
235 MaGrath Darby, Suite 100
Mt. Pleasant, SC 29464
(843) 805-6550 FAX (843) 805-6588
jelliott@RichardsonPlowden.com
fhgrimball@RichardsonPlowden.com

&

BEST HONEYCUTT, P.A.
By: s/M. Shanter Chaparro
L. Dean Best (S.C. Bar No. 11952)
M. Shanter Chaparro (S.C. Bar No. 102419)
Post Office Box 13466
102 Wappoo Creek Drive, Suite 8 (29412)
Charleston, South Carolina 29422
T: (843) 793-4744
dean@besthoneycutt.com
shanter@besthoneycutt.com
Attorneys for Respondent ECC Contracting, LLC

RECEIVED
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

RICHARDSON PLOWDEN & ROBINSON, P.A.

By: s/F. Heyward Grimball
James H. Elliott, Jr. (SC Bar. No 13620)
F. Heyward Grimball (SC Bar. No. 101743)
235 MaGrath Darby, Suite 100
Mt. Pleasant, SC 29464
(843) 805-6550 FAX (843) 805-6588
jelliott@RichardsonPlowden.com
fhgrimball@RichardsonPlowden.com

BEST HONEYCUTT, P.A.

By: s/M. Shanter Chaparro
L. Dean Best (S.C. Bar No. 11952)
M. Shanter Chaparro (S.C. Bar No. 102419)
Post Office Box 13466
102 Wappoo Creek Drive, Suite 8 (29412)
Charleston, South Carolina 29422
T: (843) 793-4744
dean@besthoneycutt.com
shanter@besthoneycutt.com

Attorneys for Respondent ECC Contracting, LLC