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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Judge

Appellate Case No. 2020-000415

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

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

v.

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

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

FINAL BRIEF OF RESPONDENT, CHARLESTON EXTERIORS, LLC

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STATEMENT OF THE CASE

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

A. The Damico Litigation

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

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

ARGUMENT

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

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

> To the fullest extent permitted by Law, the subcontractor shall indemnify, defendant and hold harmless the contractor, the owner, and all of their officers, directors, agents, and employees from and **against any and all claims**, suits, losses, causes of action, damages, liabilities, fines, penalties, and expenses of any kind whatsoever, including, but not limited to, arbitration or court costs and attorney's fees (such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) arising out of or resulting from bodily injury or death of any person, or property damage, including loss of use of property, arising or alleged to arise out of or in any way related to this agreement or the subcontractor's performance of the work or other activities of the subcontractor, **but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor** or anyone for whose acts the subcontractor may be liable. The Contractor's insurance requirements are separate and distinct from the requirement of indemnification hereunder.
>
> **Notwithstanding the foregoing**, to the fullest extent permitted by law, the Subcontractor shall indemnify, defend, and hold harmless, the contractor, the Owner, and all of their officers, directors, agents, and employees (the "indemnitees"), from and against any and all claims, damages, losses, and expenses, including, but not limited to, Attorney's Fees (such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) **arising out of or resulting from bodily injury to, or sickness, disease or death** of, the subcontractor, any agent, employee, or representative of the subcontractor, or any of its subcontractors, **regardless of whether such claim, damage, loss, or expense is caused or is alleged to be caused in whole or in 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.
>
> (R. pp. 534-535)

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

> "Notwithstanding any other provision of law, **a promise or agreement** in connection with the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating, **purporting to indemnify the promisee**, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury or property damage proximately **caused by or resulting from the sole negligence of the promisee,** its independent contractors, agents, employees, or indemnitees **is against public policy and unenforceable.**"

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

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

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

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

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

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

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

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

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

Appellant's Complaint sought to impose upon the Respondent "full contractual and common law indemnification…entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney's fees, costs, and other expenses incurred in defending the underlying action, and further entitling BFS to recover from the ECC[1] any sums for

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

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

A. THE PLAIN LANGUAGE OF BFS SUBCONTRACTS

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

> To the fullest extent permitted by Law, the subcontractor shall indemnify, 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.
>
> (R. 534, lines 1-21)

This language is based on the AIA form indemnification language and the key phrase, for our arguments at the Circuit Court level was "but only to the extent caused in whole or in part by any negligent act or omission of the subcontractor". The South Carolina Court of Appeals issued an opinion in Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 649, (Ct. App. 2018), reh'g denied (Oct. 18, 2018) that specifically recognized that this contract language fails as a matter of law because it does not meet the heightened standard of interpretation for contracts seeking to relieve the indemnitee of the consequences of its own liability.

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

> The duty to defend under this Section 5 is independent and separate from the Duty to indemnify, and **the duty to defend exists regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees**. The duty to defend arises immediately upon presentation of a claim by any party indemnified hereunder and written notice of such claim being provided to subcontractor. **Subcontractor's obligation to indemnify, defend, and hold harmless under this Section 5 will survive the expiration or earlier termination of this agreement until it is finally determined by a Court of competent jurisdiction or arbitration panel that a claim against the contractor, the owner, and any of their officers, directors, agents, and employees for the matter indemnified hereunder is fully and finally barred by the applicable statute of limitations**.
>
> (R. p. 535, lines 7-21)

Again, there is no legal basis for separating a subcontractor's duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement, and BFS claims its attorney's costs and fees as damages in its Complaint. BFS cannot argue that its claims for contractual indemnity are for those sums that are solely attributable to the negligence of Charleston Exteriors when its contractual indemnity provisions clearly calls for Charleston Exteriors to indemnify BFS for 100% of its attorneys' costs and fees regardless of who is found to be at fault, and its pleadings seek to recover full indemnification from Charleston Exteriors. "It is not the function of the court to rewrite contracts for parties". Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002)*(citation omitted).*

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

BFS claims its attorneys' costs and fees as damages in its operative Complaint. "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) *citing* Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964). "The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." Id. BFS seeks "full contractual indemnity" for attorney's costs and fees from ECC, Hurley, and Charleston Exteriors as well as "full contractual indemnity" from ECC, solely, for any and all sums it is required to pay in settlement or judgment. (R. p. 137, lines 3-16). The only way that BFS can achieve such a result is for the Subcontractors to indemnify BFS for its concurrent negligence (assuming BFS was not solely negligent). This is particularly true with regard to the desire to seek indemnification for all funds spent to settle or satisfy a judgment from ECC alone.

C. BFS MISCONSTRUES THE LOWER COURT'S RULING

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

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

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

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

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

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

> we did have supervision duties over that, the jury portion, whether it be 50/50, or 51/49, or 5/95, there's going to be a portion of the concurrent negligence that is solely ECC's and Charleston Exteriors, which is exactly what Concord and Cumberland went through.
>
> (R. 363, lines 6-21)

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

III. RE APPELLANT'S ARGUMENT IV

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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January 20, 2021
Charleston, South Carolina

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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Judge

Appellate Case No. 2020-000415

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

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

v.

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

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

CERTIFICATE OF COMPLIANCE

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

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January 22, 2021