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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**

PETITION FOR REHEARING

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**Attorneys for Petitioner/Respondent ECC
Contracting, LLC**

Petitioner/Respondent ECC Contracting, LLC (“ECC”) respectfully requests a rehearing on the Court’s February 28, 2025 Opinion (hereinafter “Opinion”) with regards to the Court’s vacating of the lower court’s ruling that the statute of limitations bars Appellant’s (hereinafter “BFS”) contractual indemnity claim. ECC seeks rehearing for the following reasons:

- 1) The Opinion mistakenly applies claim accrual principles for equitable indemnity claims to BFS’s claim for contractual indemnity;
- 2) The Opinion fails to address the issue of BFS’s legal fees as a separate and distinct character of damages under the terms of the parties’ contract;
- 3) The Opinion fails to recognize the indemnity contract at issue as a contract for indemnity against loss, in which “loss” includes attorney fees;

Thus, ECC requests that the Court reconsider and revise the Opinion to address these issues.

Background Legal Analysis

Our courts have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. See *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, 781 S.E.2d 737, 746 (Ct. App. 2015) (citing *Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112, 154 S.E. 106, 112 (1930)). See also *State-Planters' Bank & Tr. Co. v. First Nat. Bank*, 76 F.2d 527, 532 (4th Cir. 1935) (“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.”) (citing 31 C.J. 435, Sec. 28).

Although a Maryland case, *Pulte v. Parex*, 403 Md. 367 (Md. 2008) explains the distinction between various forms of contractual indemnity quite succinctly:

[I]ndemnity agreements may provide (1) indemnity against *loss or damage*, under which the indemnitee may not recover until it has made payment or otherwise suffered an actual loss or damage within the scope of the indemnity; (2) indemnity against *liability*, under which an action may be brought as soon as the liability is legally imposed, as when judgment is entered, even though no actual loss has yet been sustained (the judgment has not been paid); or (3) **a promise by the indemnitor "to perform a certain act or make specified payments for the benefit of the indemnitee," under which an immediate right of action accrues upon the failure of the indemnitor to perform, regardless of whether any actual damage has been sustained.** [Internal citation omitted.] **The nature of the indemnity will determine not only when a right of action accrues but also the measure of damages that may be recovered.**

Pulte v. Parex, 403 Md. 367, 381-82 (Md. 2008) (italicized emphasis in original; bold emphasis added).

The primary indemnity provision in the parties' contract provides:

To the fullest extent permitted by Law, the [ECC] shall indemnify, defend and hold harmless the [BFS], 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 [ECC]'s performance of the work or other activities of [ECC], but only to the extent caused in whole or in part by any negligent act or omission of [ECC] or anyone for whose acts [ECC] may be liable.

Record on Appeal pp. 170, 205 (emphasis added).

This indemnity language is obviously extremely broad. (The indemnity provisions in the parties' contract were so broad, in fact, that the Court rightly deemed them unenforceable in the Opinion.) Of import, however, is the fact that this language (if it was enforceable) arguably creates obligations based in both "indemnity for liability" **and** "indemnity for loss." As discussed above,

the nature of the indemnity determines when a right of action accrues and, therefore, when the statute of limitations on a claim for contractual indemnity is triggered. To the extent that the Court may view the contracts at issue as contracts for indemnity against liability ECC would renew and incorporate by reference the prior arguments that it has made with regards to the running of the statute of limitations as to contracts for indemnity against liability.

In its complaint against ECC, BFS pled that it is “entitled to full contractual . . . indemnification from [ECC] for and against any liability which [] BFS is found to have to the Plaintiffs, Lenna Carolinas, LLC, and/or to others in the underlying action, and BFS is also entitled to damages for . . . its attorneys’ fees, costs, and other expenses incurred in defending the underlying action.” Record on Appeal p. 137, at ¶34. There is no question that BFS asserted contractual claims against ECC that were based in both indemnity for liability and indemnity for loss.

There is also no question that BFS began to incur attorney fees and defense costs – damages it seeks from ECC in this litigation -- at the very latest when BFS’s counsel executed its answer to Lennar’s third-party complaint on December 15, 2015. *See* Record on Appeal p527; *see also id.* at 364-366. BFS initiated this action on December 21, 2018 – three years and six days after its contractual indemnity claims accrued. *See* Record on Appeal pp. 125-42. Thus, BFS’s claims for “contractual indemnification” should be barred by the three-year statute of limitations. SC. Code § 15-3-530(1). If the Court is unwilling or unable to determine that the statute of limitations was triggered as to all of BFS’s contractual indemnity claims as of December 15, 2015, then, at the very least, BFS’s claims for attorney fees and other defense costs (claims based in “indemnity against loss”) should be barred by the statute of limitations.

The Opinion Mistakenly Applies Equitable Indemnity Accrual of Claim Principles to BFS's Contractual Indemnity Claims, and Fails to Distinguish Between Indemnity for Liability Versus Indemnity For Loss

In the Opinion's discussion of "Statute of Limitations and Contractual Indemnity," the Court recognizes S.C. Code Section 15-3-350(1)'s three-year statute of limitations for contract actions. However, the Court then quotes *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994), for the premise that, "As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant." The Court then determined that, "the circuit court erred in finding BFS's claims were barred by the statute of limitations because when BFS answered Lennar's third-party complaint in 2015, it had neither been found liable nor paid any injured party."

ECC contends that the Court's reliance upon *First General Services* is misplaced because that case dealt with a claim for common-law, equitable indemnity – not a claim for contractual indemnity. This distinction is incredibly important.

In *First General Services*, the South Carolina Supreme Court, focusing on equitable indemnity, stated:

A. Equitable Indemnity

"Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Winnsboro v. Wiedeman-Singleton*, 303 S.C. 52 at 56, 398 S.E.2d 500 at 502 (Ct.App.1990), affirmed 307 S.C. 128, 414 S.E.2d 118 (1992). The right is created by operation of law "in cases of imputed fault or where some special relationship exists between the first and second parties." 303 S.C. at 57, 398 S.E.2d at 503.

Ordinarily, if one person is **compelled to pay damages** because of negligence imputed to him as the result of a tort committed by another, he may maintain an action over for indemnity against the person whose wrong had thus been imputed to him; but this is subject to the proviso that no personal negligence of his own has joined in causing the injury.

Addy v. Bolton, 257 S.C. 28 at 34, 183 S.E.2d 708 at 710 (1971) (quoting *Atlantic Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 132 S.E.2d 172 (1963)).

Id., 445 S.E.2d at 448 (emphasis added).

The Supreme Court makes no reference to contractual indemnity claims in *First General Services* and clearly limits its discussion to common-law, equitable indemnity. While the Supreme Court did not provide a detailed analysis of “indemnity for liability” versus “indemnity for loss,” the Supreme Court’s determination that, “the statute of limitations generally runs from the time **judgment is entered** against the defendant” addresses the accrual of an equitable claim for indemnity against **liability**. Importantly, the *First General Services* holding has no bearing on the accrual of a contractual indemnity claim based in indemnity against loss – such as BFS’s contractual indemnity claim for attorney fees in the present case.

The Court also relied upon former Chief Justice Toal’s dissent in *Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Liability Joint Underwriting Association*, 411 S.C. 557, 769 S.E.2d 847 (2015), to support its conclusion that BFS’s contractual indemnity claims were not barred by the statute of limitations. As with *First General Services*, the Court’s reliance on the *Columbia/CSA-HS* dissent is misplaced because that case also concerned common-law, equitable indemnity – not contractual indemnity. Former Chief Justice Toal’s conclusion (“Therefore, there is no justiciable case or controversy until the conclusion of the underlying tort action, regardless of its outcome.” *Id.*, 769 S.E.2d at 852-53.) clearly addresses the accrual of an equitable indemnity for **a Judgement**, and has no bearing on BFS’s contractual claims in this case – claims that include claims based in indemnity for **Attorneys’ fees**. Indeed, Former Chief Justice Toal’s analysis with regards to attorney’s fees supports a finding that the statute of limitations has run in this case. *Id.* (“...the innocent party’s

right to sue for indemnification does not accrue until it actually sustains damages through either paying an injured party on behalf of the tortfeasor, **or incurring attorneys' fees from defending itself in the underlying tort suit.**") (emphasis added).

The Court's analysis as to the statute of limitations' application to BFS's claims fails to consider whether the claims are based in indemnity for liability or indemnity for loss – BFS clearly asserted both. The Court's determination ("Here, the circuit court erred in finding BFS's claims were barred by the statute of limitations because when BFS answered Lennar's third-party complaint in 2015, **it had neither been found liable nor paid any injured party.**") focuses solely upon the timing of either an entry of judgment or BFS's satisfaction of the injured party's claims in the underlying action. The Opinion 1) fails to address the existence of certain BFS contractual claims based in indemnity for loss (including claims for attorney fees and defense costs) and 2) disregards S.C. Code Section 15-3-350(1)'s three-year statute of limitations for those claims.

The Opinion disregards the fact that BFS had incurred legal fees in December 2015 – fees that it sought to recover from ECC in this action pursuant to the "indemnity for loss" and "indemnity for liability" provisions in the parties' contract. BFS was explicit in the hearing before Judge Newman that it sought indemnity for attorney fees and refused to waive any claims for attorney fees. *See* Record on Appeal pp. 364-66. At the hearing on ECC's motion for summary judgment, ECC argued, and Judge Newman agreed, that the legal fees must have been incurred at the very latest on the date that BFS's answer to Lennar's third-party complaint was executed (December 15, 2015), so the statute of limitations should have begun to run at that time.

Further, ECC suspects the Court mistakenly applied equitable indemnity principles when relying upon *Jones v. Builders Investment Group*, 415 S.C. 321, 781 S.E.2d 737 (Ct. App. 2015). In *Jones*, this Court confirmed that, "in a contract for indemnity for loss, the indemnitee must have

made some form of payment before he can assert a breach of the contract.” *Id.* 781 S.E.2d at 742 n. 8. ECC suspects the Court interprets “some form of payment” as satisfaction (in whole or in part) of a claim by injured third party – which suggests the Court based its statute of limitations determined based for indemnity for liability. In addition to its prior arguments on indemnity against liability, ECC contends the “some form of payment” language encompasses BFS’s claims for attorney fees in this case under indemnity for loss. With respect to BFS’s contractual claim for attorney fees and defense costs, the focus should not be on whether it has been subjected to a judgment or satisfied the claims of the injured third party. The focus here should be on indemnity for loss, the broad language of the parties’ contract that forms the basis for BFS’s attorney fee claims, and the fact that BFS incurred legal fees (*i.e.*, “made some form of payment”) in December 2015. The *Jones* holding supports ECC’s position when indemnity for loss principles are applied.

CONCLUSION

Because BFS did not file suit against ECC until December 21, 2018, its contractual claims should be barred by the three-year statute of limitations – the claims for attorney fees, at least. Thus, ECC would seek rehearing and/or the Court’s amendment of the Opinion with regard to the issue of the running of the statute of limitations on BFS’s claims for contractual indemnity, if only as to BFS’s attorney fees and defense costs.

[Signature page to immediately follow]

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing Petition
for Rehearing upon all counsel of record by last known email addresses on this 13th day of
March, 2025.

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VIA EMAIL AND CERTIFIED MAIL

March 13, 2025

Clerk of Court
South Carolina Court of Appeals
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Columbia, SC 29211
ctappfilings@sccourts.org

Re: Builders Firstsource-Southeast v. MI Windows
Appellate Case No. 2020-000415
BH File No.: 01-179

Dear Sir or Madam:

Please find enclosed herewith for filing the original of *ECC Contracting, LLC's Petition for Rehearing*, together with the Certificate of Service, with regard to the above referenced matter. Also enclosed please find the applicable filing fee in the amount of \$50.00. I would appreciate your filing the Petition for Rehearing and returning a filed clocked copy to me via email at dean@bestlawsc.com and dani@bestlawsc.com.

Sincerely,

L. Dean Best

LDB/dlk
Enclosures

cc: All counsel of record (via email only)