THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Aug 21 2025
S.C. SUPREME COURT

Appeal from Berkeley County
Court of Common Pleas
The Honorable Clifton B. Newman
Circuit Court Judge

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

Court of Appeals Case No. 2020-000415

Unpublished Opinion No. 2025-UP-072 (S.C. Ct. App. filed Feb. 26, 2025)

Appellate Case No. 2025-001176

Builders First Source-Southeast Group, LLC

Appellant,

versus

MI Windows and Doors, Inc., ECC Contracting, LLC, Hurley Services, LLC, and Charleston Exteriors, LLC,

Petitioner/Respondent.

PETITIONER/RESPONDENT, ECC CONTRACTING, LLC'S, REPLY TO APPELLANT, BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC'S, RETURN

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ARGUMENT IN REPLY

ECC's Petition for a Writ of Certiorari should be granted because the Court of Appeals erred by applying equitable indemnity accrual of claim principles to BFS's contractual indemnity claims and failed to distinguish between indemnity for liability versus indemnity for loss. This led the Court of Appeals to incorrectly determine the accrual of the statute of limitations for BFS's claim for attorney's fees and costs. Clarification from this Court is essential for consistency and certainty regarding how contractual indemnity claims against loss, which include attorney's fees, are to be the treated under the statute of limitations.

I. The Court of Appeals' Misapplication of Equitable Indemnity Principles to a Contractual Indemnity Claim Constitutes a Special and Important Reason for Granting Certiorari.

BFS argues that the Petition fails to identify a "special or important reason" for this Court's review, claiming there is "no novel issue, no conflict between lower courts, [and] no conflict with the Court of Appeals' opinion and this Court's precedent." This assertion is incorrect. The Court of Appeals' decision conflicts with the Court's precedent regarding the distinction between different types of indemnity.

The Court of Appeals' analysis of the statute of limitations rests on an inaccurate legal premise, and its reliance on First General Services of Charleston, Inc. v. Miller, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994), and 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), is misplaced. The Supreme Court, in First General Services, makes no reference to contractual indemnity claims and clearly limits its discussion to common-law, equitable indemnity. While this Court did not provide a detailed analysis of indemnity for liability versus indemnity for loss, its 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, not loss. First General Services, 314 S.C. at 444. This body of precedent has no bearing on accrual of a contractual indemnity claim based in indemnity against loss – such as BFS's claim for attorney fees in the present case. By relying on these cases, the Court of Appeals failed to consider the long-standing rules governing contractual indemnity as outlined in Piper v. Am. Fid. & Cas. Co., 157 S.C. 106, 154 S.E. 106 (1930) and Jones v. Builders Inv. Grp., LLC, 415 S.C. 321, 781 S.E.2d 737 (Ct. App. 2015).

BFS's argument that the distinction between equitable and contractual indemnity is "immaterial" is baseless and unsupported by case law. While a claim for equitable indemnity may include attorneys' fees as a component of damages, as seen in Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992), the accrual of that claim is distinct from a contractual indemnity claim for loss. By focusing solely on the entry of judgment or payment to a third party in cases dealing with equitable indemnity claims, the Court of Appeals failed to analyze BFS's contractual indemnity claim for attorney's fees under established contractual accrual principles, which is precisely why ECC's Petition for a Writ of Certiorari should be granted.

II. BFS's Claim for Recovery of Attorney's Fees as an Element of Damages Related to Its Contractual Indemnity Claim Accrued When They Were Incurred, Not When a Judgment was Entered.

Unlike common-law indemnity, which is a right created by operation of law, BFS's claims arise from a specific contract. Our courts have long recognized two distinct types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. See Piper, 157 S.C. at 112. This distinction, which the Court of Appeals failed to apply, is critical because it determines when the statute of limitations begins to run. In a contract for

indemnity against liability, the obligation to indemnify arises when the liability is incurred; in a contract for indemnity against loss, the indemnitee must have made some form of payment or suffered an actual loss. See Jones, 415 S.C. at 330. The Court of Appeals' Opinion fails to apply this fundamental principle to the contract at issue, which, by its broad language[1], creates a claim for both types of indemnity. By focusing solely on the entry of judgment or payment to a third party, the Court of Appeals' decision failed to consider the existence of certain BFS contractual claims that are based in indemnity for loss.

BFS elected to include a contractual indemnity provision that calls for ECC to 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 the same from ECC. (R. pp. 204-206, 2008 Contract between BFS and ECC §5 ¶3 INDEMNITY). This is, by definition, a claim for indemnity against loss. The cause of action for this loss accrued when the loss was incurred, not when a judgment was entered. As former Chief Justice Toal's dissent in Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Liability Joint Underwriting Association, which is cited by the Court of Appeals itself, correctly noted, the right to sue for indemnification accrues when a party "actually sustains damages through either paying an injured party...or *incurring attorney's fees from defending itself*." Columbia/CSA-HS 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, 852-53 (2015) (emphasis added). BFS began incurring attorney fees in December 2015, and the three-year statute of limitations for that specific claim began running at that time.

[1] The indemnity provisions in the contract between BFS and ECC were so broad that the Court of Appeals properly deemed them unenforceable and affirmed the Circuit Court's holding that BFS's contractual indemnity claim failed as a matter of law.

BFS's reliance on McCoy v. Greenwave Enters., Inc. is misplaced. While attorney's fees may be a component of damages under an indemnity claim, the critical issue is when those fees or damages begin to accrue. Here, BFS began to incur losses for attorney's fees and costs – damages it seeks against ECC in this litigation – at the very latest when its Answer was drafted and served, thereby triggering the start of the three-year statute of limitations under S.C. Code §15-3-530 et seq. BFS's attempt to conflate the accrual of an indemnity-for-loss claim with an indemnity-for-liability claim demonstrates the very legal confusion that requires this Court's review.

III. The Discovery Rule Provides an Independent Basis for Finding the Claim Time-Barred.

BFS's treatment of the discovery rule is equally unpersuasive. The discovery rule centers on when a cause of action "reasonably ought to have been discovered." A corporation, like BFS, upon receiving a summons and complaint, is legally required to hire counsel and is immediately on notice that it will incur attorney's fees. These damages are not hypothetical; they are a certainty. The fact that the full extent of the damages was not yet known is immaterial. Dean v. Ruscon Corp., 321 S.C. 360, 363–64, 468 S.E.2d 645, 648 (1996).

BFS was served with the Complaint on December 3, 2015. At that moment, it was on notice—both legally and practically—that it would be required to retain counsel and incur attorneys' fees. As a result, the statute of limitations began to run for BFS's contractual indemnity for loss claim. Those damages were certain, not speculative. The fact that the full extent of fees was not yet determined is irrelevant. By BFS failing to file its Third-Party Complaint against ECC within three years, BFS's contractual indemnity claim, which seeks recovery of attorney's fees and costs, is time-barred.

CONCLUSION

For the foregoing reasons, the Court of Appeals failure to distinguish between equitable and contractual indemnity, and its misapplication of the statute of limitations to a claim for indemnity against loss, creates a significant question of law that warrants review. This Court should grant ECC's Petition for a Writ of Certiorari to provide much-needed guidance in this area.

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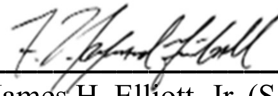

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August 21, 2025
Mount Pleasant, South Carolina