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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE 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Unpublished Opinion No. 2025-UP-072 (S.C. Ct.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

Petitioner-Respondent,

versus

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

Respondent-Petitioner.

RESPONDENT-PETITIONER'S BRIEF

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STATEMENT OF ISSUES

1. Whether the Court of Appeals erred by applying equitable indemnity accrual principles to a contractual indemnity claim governed by an express agreement?
2. Whether the Court of Appeals erred in failing to distinguish between indemnity against liability and indemnity against loss, where South Carolina law holds that a claim for indemnity against liability accrues, and the statute of limitations begins to run, at the moment the indemnitee incurs a legal obligation or expense?
3. Under the Discovery Rule, did BFS’s cause of action for contractual indemnity seeking recovery of attorney’s fees accrue in December 2015 when BFS answered a Third-Party Complaint and immediately incurred the legal fees for which it now seeks indemnification?

STATEMENT OF THE CASE

This case is a derivative action relating to the construction of single-family residence development known as The Abbey at Spring Grove constructed and developed by Lennar Carolinas. The main action is *Patricia Damico, et al v. Lennar Carolinas, LLC, et al*, case number 2014-CP-08-2424, filed on October 30, 2014 (hereinafter “*Damico* Litigation”).

A. The Damico Litigation (the Underlying Action)

The Abbey located in the Spring Grove development consists of sixty-nine (69) single family residences (hereinafter referred to as “Subject Property” or “the Abbey”). Initially, the Plaintiffs filed the *Damico* Litigation against the general contractor, Lennar Carolinas, LLC

(“Lennar”), Spring Grove Development, Volkmar Consulting Services, LLC, and Manale Landscaping, LLC. The suit alleged deficiencies in site grading and drainage. A. pp. 1-16.

On June 1, 2015, Lennar filed a Motion to Compel Arbitration. A. pp. 19 – 22. Plaintiffs subsequently filed amended pleadings asserting claims for the construction of the homes as well. On November 25, 2015, Lennar answered the First Amended Complaint and asserted a Third-Party Complaint against its subcontractors, including Builders FirstSource Southeast Group, LLC (“BFS”). A. pp. 575 – 628. Lennar served BFS with its Third-Party Complaint on December 1, 2015 via certified mail that was delivered on December 3, 2015. A. pp. 630 - 632. On December 15, 2015, BFS executed the Answer to the Third-Party Complaint, served it by US Mail on December 18, 2015, and it was file stamped by the Clerk of Court on December 21, 2015. A. pp. 633 - 661.

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. A. pp. 663 – 672. On September 19, 2016, the Circuit Court entered an Order denying Lennar’s Motion to Compel Arbitration. A. pp. 673 – 692. On October 26, 2016, the Circuit Court, without further discussion, reasoning or explanation, issued a Form 4 Order denying Lennar’s Motion to Reconsider its Motion to Compel Arbitration.

B. This Litigation

The subject dispute involves BFS, a construction materials supplier, who filed claims against ECC Contracting, LLC (“ECC”) and other subcontractors seeking contractual indemnification for liability and fees and costs incurred in defending a Third-Party Complaint brought by Lennar.

ECC is alleged to have installed windows and doors as a subcontractor to BFS. On December 21, 2018, BFS filed this action against ECC asserting claims for contractual indemnity, equitable indemnity, breach of express and implied warranties, breach of contract, negligence, and contribution. A. pp. 693 – 710. BFS alleges it “has been subjected to liability and has incurred consequential damages in having to expend attorneys’ fees and costs” in defending itself in the *Damico* litigation and sought recovery of those fees under the indemnity provisions of its subcontract agreement with ECC. *Id.*

On August 9, 2019, ECC moved for summary judgment arguing that BFS’s claims were barred by the statute of limitations applicable to contractual claims. A. pp. 711 – 719. ECC further challenged BFS’s contractual indemnity provisions under the “clear and unequivocal” standard. *Id.* BFS did not file a Memorandum in Opposition to ECC’s Motion, but did oppose the motion 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 ECC’s Motion for Summary Judgment with regard to all claims except for Equitable Indemnity and Contribution. A. pp. 785 – 793. The Circuit Court determined that the contract’s indemnification provisions failed to meet the clear and unequivocal standard, and BFS was precluded from seeking contractual indemnification for its own negligence, whether concurrent or sole. *Id.* The Circuit Court further found that BFS’s contractual indemnification claims were time-barred. *Id.* Specifically, the court noted that BFS initiated its action against ECC more than three years after receiving notice of its potential claims. *Id.*

On December 16, 2019, BFS filed a Rule 59(e) Motion and supporting memorandum to Reconsider. A. pp. 794 – 799. On January 15, 2020, ECC filed a memo in opposition to BFS’s

Motion to Reconsider. A. pp. 800 – 804. Judge Newman held oral arguments on January 16, 2020. Judge Newman issued an amended summary judgment order to include more analysis on the Statute of Limitations ruling noting BFS had actual notice of its potential claims against the subcontractors as of the date of its December 15, 2015 answer to Lennar’s Third-Party Complaint. A. pp. 805 – 815. Judge Newman further found the statute of limitations for BFS’s contract related claims began to run upon the filing of the responsive pleading and such claims were time barred. *Id.* BFS filed a Rule 59(e) motion as to the amended summary judgment order, which the circuit court denied. A. pp. 816 – 818.

On March 5, 2020 BFS filed a Notice of Intent to Appeal with the Court of Appeals. A. pp. 819 – 835. On February 26, 2025, the Court of Appeals affirmed the Circuit Court’s interpretation of the indemnity provisions, but vacated the statute of limitations ruling as to contractual indemnity. A. pp. 857 – 865.

ECC filed a petition for rehearing regarding the Court of Appeal’s statute of limitations ruling, which was denied on May 16, 2025. A. pp. 866 – 877. ECC filed a Petition for a Writ of Certiorari regarding this issue on June 30, 2025. A. pp. 878 – 891. This Court granted ECC’s Petition for Writ of Certiorari on December 16, 2025. A. p. 892.

STANDARD OF REVIEW

This Court utilizes the same standard of review as the trial court to review the grant of summary judgment. *Williams v. Jeffcoat*, 444 S.C. 224, 233, 906 S.E.2d 588, 593 (2024) (citing *Knight v. Austin*, 396 S.C. 518, 521, 722 S.E.2d 802, 804 (2012)). Summary judgment is proper when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *See* Rule 56(c), SCRPC; *Knight*, 396 S.C. at 521-22, 722 S.E.2d at 804; *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456,

463, 892 S.E.2d 297, 301 (2023) (eliminating the “mere scintilla” standard and holding the proper standard is the “genuine issue of material fact” standard set forth in the text of Rule 56(c), SCRCPP).

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). “Additionally, the interpretation of a statute is a question of law for the Court to review de novo.” *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021).

ARGUMENT

This case arises from a contractual indemnity dispute between ECC and BFS. The core issue is the application of the statute of limitations to BFS’s contractual indemnity claim, specifically the recovery of attorney fees incurred during the *Damico* litigation.

The Court of Appeals erred by applying equitable indemnity principles to a purely contractual claim. In doing so, it failed to distinguish between the two types of contractual indemnity recognized under South Carolina law: indemnity against liability and indemnity against loss. By treating BFS’s contractual indemnity claims as if they could not accrue until a final

judgment or payment to a third-party, the Court of Appeals improperly vacated the Circuit Court's ruling that BFS's contractual indemnity claims were time barred.

1. THE COURT OF APPEALS ERRED BY APPLYING EQUITABLE INDEMNITY ACCRUAL PRINCIPLES TO A CONTRACTUAL INDEMNITY CLAIM

South Carolina law maintains a distinction between indemnity arising by operation of law (equitable) and indemnity arising from an agreement (contractual). *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 445 S.E.2d 446 (1994); *Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 154 S.E. 106 (1930). Equitable indemnity generally accrues when liability is fixed by judgment or payment. *Id.* By contrast, accrual under a contractual indemnity provision is governed by the terms of the parties' agreement. *Id.* The Court of Appeals' statute-of-limitations analysis collapses this distinction and, in doing so, misapplies controlling precedent.

In its discussion of "Statute of Limitations and Contractual Indemnity," the Court of Appeals correctly acknowledged that claims sounding in contract are governed by the three-year statute of limitations set forth in S.C. Code § 15-3-350(1). However, the Court's analysis then shifts its focus to equitable principles. Relying on *First General Services*, the Court of Appeals stated that "as to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant." A. pp. 857 – 865. On this basis, the Court concluded that the Circuit Court erred because BFS had not yet been found liable or paid an injured party when it answered Lennar's Third-Party Complaint in 2015. *Id.*

That reasoning rests on a flawed premise. *First General Services* addressed common-law equitable indemnity, which arises in cases of imputed fault or special relationships. The decision makes no reference to contractual indemnity and does not purport to govern the accrual of claims arising from a private agreement. Because contractual indemnity is a matter of private risk allocation, parties are free to allocate the burden of defense costs long before a court resolves the

underlying dispute. The judgment-tied accrual rule found in *First General Services* has no application to contractual claims governed by S.C. Code Ann. § 15-3-350(1).

The Court of Appeals reliance upon former Chief Justice Toal’s dissent in *Columbia/CSA-HS* is equally misplaced. As with *First General Services*, *Columbia/CSA-HS* concerned equitable indemnity. The dissent’s observation that “there is no justiciable case or controversy until the conclusion of the underlying tort action” speaks solely to the accrual of equitable indemnity for judgment-based losses; it has no bearing on contractual indemnity claims for attorney’s fees. *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n*, 411 S.C. 557, 769 S.E.2d 847 (2015).

Indeed, Chief Justice Toal’s discussion actually undermines the Court of Appeal’s conclusion. Chief Justice Toal recognized that an indemnity claim accrues when the indemnitee “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.**” *Id.* at 852–53 (emphasis added). Under that reasoning, the incurrence of attorney’s fees itself constitutes damage sufficient to trigger accrual.

By importing equitable principles into this dispute, the Court of Appeals failed to analyze the specific nature of the indemnity obligation BFS actually alleged. BFS’s claim is grounded in a contract that allocates “liabilities” and “expenses,” including attorney fees. Under South Carolina law, these losses began to accrue the moment BFS was required to defend itself.

The Court’s exclusive focus on whether BFS had been found liable or paid a third party improperly imports equitable rules into a contractual context, effectively nullifying the statute of limitations for defense-cost claims. Because BFS’s claim for attorney’s fees accrued when those

fees were first incurred in 2015, and because BFS failed to bring its claim within three years of that date, the claim is barred as a matter of law under S.C. Code Ann. §15-3-350(1).

2. BFS'S CONTRACTUAL INDEMNITY CLAIMS SEEKING THE RECOVERY OF ATTORNEY'S FEES IS A CLAIM FOR INDEMNITY AGAINST LIABILITY THAT ACCRUED WHEN THE FEES WERE INCURRED

The accrual of a contractual indemnity claim depends on the nature of the indemnity promised. Depending on the relevant language, a contract may provide for indemnity against liability or indemnity against loss, or both. *See Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 331, n.8, 781 S.E.2d 737, 746, n.8 (Ct. App. 2015) (citing *Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112, 154 S.E. 106, 112 (1930)). The distinction is critical because it controls when the claim accrues. In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred; whereas indemnity against loss the indemnitee must have made some form of payment before he can assert a breach of the contract. *Id.* “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 & Tr. Co. v. First Nat. Bank*, 76 F.2d 527, 532 (4th Cir. 1935) (quoting, 31 C.J. 435, Sec. 28).

The indemnity provision at issue provides, in relevant part:

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.

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.

A. pp. 764 - 765.

This language reflects an agreement to indemnify against liability. The provision expressly obligates ECC to “defend” BFS and to indemnify BFS for “liabilities” and “expenses,” including attorney’s fees. Consistent with that understanding, BFS expressly pled that it is “entitled to full contractual and common law indemnification for and against liability.” A. p. 705 (Complaint ¶ 34). Specifically, BFS alleges that it “has been subjected to liability and has incurred consequential damages in having to expend attorney’s fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action.” A. p. 704 (Complaint ¶ 33). BFS therefore seeks to recover from ECC its attorney’s fees, costs, and other defense expenses incurred in connection with the underlying litigation. A. p. 705 (Complaint ¶ 34). Once BFS was required to defend itself, it became legally obligated to pay counsel. That obligation, its liability for attorney’s fees, was fixed at the time the fees were incurred. Nothing about that liability was contingent upon the outcome of the underlying litigation or the entry of judgment.

Despite this, the Court of Appeals’ statute-of-limitations analysis fails to distinguish between indemnity against liability and indemnity against loss. Instead, the Court concluded that

BFS's claims were timely because, when BFS answered Lennar's third-party complaint in 2015, it "had neither been found liable nor paid any injured party." A. pp. 864-865. That analysis imports accrual principles applicable to equitable indemnity and disregards BFS's contractual claims for indemnity against liability, most notably its claims for attorney's fees and defense costs, governed by S.C. Code § 15-3-350(1)'s three-year statute of limitations.

BFS began incurring legal liability for attorney's fees no later than December 15, 2015, when it executed its Answer to Lennar's Third-Party Complaint. From that moment forward, BFS was legally obligated to pay counsel and thus sustained the very liability for which it now seeks indemnification. Under South Carolina law, a claim for indemnity against liability accrues when the liability is incurred—not when the underlying litigation concludes or a judgment is entered. *Jones*, 415 S.C. at 330, 781 S.E.2d at 746.

Because BFS knew, or reasonably should have known, by December 2015 that it had incurred legal liability for attorney's fees, the three-year statute of limitations began to run at that time. Nevertheless, BFS waited more than three years to assert its contractual indemnity claims. Accordingly, its claims for contractual indemnification against liability, at least as to attorney's fees and defense costs, are time-barred as a matter of law under S.C. Code Ann. § 15-3-350(1).

3. THE DISCOVERY RULE INDEPENDENTLY BARS BFS'S CONTRACTUAL INDEMNITY CLAIMS

Under 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)). South Carolina 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)). Accordingly, BFS should have been on notice of its contractual indemnity claims against liability from the date it received Lennar’s Summons and Third-Party Complaint. BFS knew for certain on December 3, 2015 that attorney’s fees were unavoidable and liability was beginning immediately. The fact that BFS “may not comprehend the full extent of the damage [at that time] is immaterial.” *Id.*

Furthermore, 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 (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). 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).

As a corporate defendant, BFS could not appear pro se in court and knew, or at least should have known, it would incur attorney’s fees and defense costs immediately upon service of Lennar’s Third-Party Complaint on December 3, 2015. Those damages were not speculative; they were

inevitable. BFS's knowledge that it was incurring compensable defense costs was sufficient to place it on inquiry notice of any contractual indemnity claim against ECC. Because BFS waited more than three years to file suit, its contractual indemnity claims – at least as to attorney's fees and defense costs – are time barred.

CONCLUSION

In sum, the Court of Appeals' decision substituted equitable indemnity accrual principles for rules governing contractual agreements. South Carolina law requires the opposite approach. The parties' agreement expressly created an indemnity against liability that triggered when BFS began incurring attorney's fees in 2015, and the discovery rule independently confirms BFS was on notice of its claim at that same moment. By delaying more than three years to assert contractual indemnity, BFS allowed the statute of limitations in S.C. Code Ann. § 15-3-350(1) to expire. The Circuit Court correctly applied settled law in holding those claims time-barred. This Court should reverse the Court of Appeals and reinstate the Circuit Court's ruling to preserve the clear distinction between equitable and contractual indemnity and to ensure predictability in the enforcement of negotiated risk-allocation provisions.

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