

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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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Unpublished Opinion No. 2025-UP-072 (S.C. Ct.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,

vs.

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

Respondent.

**RESPONDENT-PETITIONER ECC CONTRACTING, LLC'S REPLY TO
PETITIONER-RESPONDENT'S RETURN**

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REPLY ARGUMENT

The central issue in this portion of this appeal is straightforward: when did BFS's contractual indemnity claim for attorney's fees accrue? 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 against liability claims as if they could not accrue until a final judgment or payment to a third-party, the Court of Appeals improperly reclassified the claims as indemnity against loss and vacated the Circuit Court's ruling that BFS's contractual indemnity claims were time barred.

I. BFS' ATTEMPT TO CHARACTERIZE ATTORNEY'S FEES AS "CONSEQUENTIAL DAMAGES" DOES NOT ALTER WHEN ITS CONTRACTUAL CLAIM FOR ATTORNEY'S FEES ACCRUED

In its Return, BFS argues that it seeks attorney's fees only as "consequential damages" flowing from its indemnification claim. That characterization does not alter when BFS's contractual indemnity claim for attorney's fees accrued. Regardless of the label, the injury BFS alleges is the incurrence of defense costs.

BFS alleges that it "has been subjected to liability and has incurred consequential damages in having to expend attorneys' fees and costs in defending against the claims" in the underlying litigation. See Pet-Resp. Return p. 3. Thus, the injury BFS identifies is the incurrence of defense costs. Regardless of how BFS labels those damages, the alleged harm is the obligation to pay attorney's fees incurred in defending the underlying action.

Under South Carolina law, the statute of limitations begins to run when the injury occurs, even if the full extent of damages is not yet known. Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996). Attorney's fees incurred in defending litigation constitute a concrete and

measurable injury at the moment they are incurred. The fact that the full extent of those fees may not yet be known does not postpone accrual.

BFS's authorities do not suggest otherwise. The cases BFS cites merely recognize that reasonable attorney's fees incurred defending a claim may be recoverable as part of indemnity damages. Those decisions address the recoverability of attorney's fees, not when a contractual indemnity claim for indemnity against liability accrues for statute of limitations purposes.

Accordingly, BFS's attempt to recharacterize its damages as "consequential" does not change the accrual analysis. Once BFS retained counsel and began incurring defense costs in December 2015, it suffered the very injury for which it now seeks indemnification.

II. THE MASTER AGREEMENT AT ISSUE CREATES INDEMNITY AGAINST LIABILITY, TRIGGERING ACCRUAL WHEN BFS BEGAN INCURRING DEFENSE COSTS

BFS relies on the proposition that an indemnity claim does not accrue until liability is "fixed and established." While that rule may apply to equitable indemnity or contractual indemnity against loss, it does not govern this case. BFS's argument ignores both the plain language of its contract and the long-recognized distinction between indemnity against loss and indemnity against liability.

The Master Subcontractor Agreement does not limit ECC's obligations to reimbursing "losses paid." Instead, it requires ECC to "defend, indemnify, and hold harmless" BFS from "all claims, damages, losses, and expenses, including ... attorney's fees." (A. pp. 750-51). South Carolina law recognizes that the type of indemnity controls when a claim accrues. Jones v. Builders Inv. Grp., LLC, 415 S.C. 321, 331 n.8, 781 S.E.2d 737, 746 n.8 (Ct. App. 2015). Where a contract provides indemnity against liability, the cause of action accrues when the liability is incurred. By contrast, indemnity against loss accrues only after the indemnitee sustains an actual loss, such as

paying a judgment. Piper v. Am. Fid. & Cas. Co., 157 S.C. 106, 112, 154 S.E. 106 (1930). BFS's contract demonstrates that it sought indemnity against liability.

Once BFS was served in the underlying construction defect litigation in December 2015, it was required to retain counsel and began incurring the defense costs it now seeks to recover. At that moment, the liability contemplated by the contract was fixed and established. These expenses were immediate financial obligations, not speculative or contingent damages. As former Chief Justice Toal recognized, the right to seek indemnification arises when a party "actually sustains damages through either paying an injured party ... or incurring attorney's fees from defending itself." 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, 852–53 (2015) (Toal, C.J., dissenting).

BFS's accrual theory is also inconsistent with the very indemnity provision it drafted. The Master Subcontractor Agreement imposes a duty to defend, which necessarily arises when a claim is asserted. A duty to defend creates an immediate financial obligation to retain counsel and incur attorney's fees. By definition, such an obligation arises long before the underlying litigation concludes. Under BFS's interpretation, however, the statute of limitations would not begin to run until the underlying litigation is resolved, potentially many years after the defense costs were incurred. That interpretation conflicts with the structure of the indemnity provision itself. A contractual duty to defend triggered by the assertion of a claim necessarily creates contemporaneous liability for defense costs.

Furthermore, assuming *in arguendo* that ECC accepted and had not disputed BFS' Indemnity claim, the contractual indemnity provision gives ECC the right to defend BFS during the litigation. See for instance D.R. Horton, Inc. v. Builders FirstSource-Southeast Group, LLC, No. 2010CP1010355, 2014 WL 12783398, at *4 (S.C.Com.Pl. Sep. 05, 2014)(" The parties plainly

agreed that BFS, not DRH, would defend any lawsuit alleging property damage caused by BFS's work. The Contract not only obligates BFS to defend any suits alleging property damage associated with defects in its work, it also gives BFS the right to defend any such claims. The Contract does not provide that DRH can defend itself, control the defense, select the attorneys of its choice, provide no notice to BFS, and nonetheless require BFS to indemnify it.”); see also D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC, 422 S.C. 144, 153, 810 S.E.2d 41, 46 (Ct. App. 2018)(“The inclusion of the illegal contractual indemnification term, along with an unreasoned award for damages only, proves fatal to D.R. Horton's claim for indemnification.”)

If BFS’ indemnity provision(s)/contracts were legal and enforceable, the contractual indemnity provision is both the right to defend/indemnify and the obligation to do so for the subcontractor. There must be harmony between when the right and the obligation arise. Under ECC’s interpretation of the law, both would arise when the claim against BFS is made. Under BFS’s interpretation, the subcontractor would not have the right to defend at all because the obligation would not arise until the defense was concluded. Such a result would create equitable and legal problems for enforcing or honoring a valid indemnity demand.

Once BFS retained counsel and began incurring defense costs, it incurred the liability for which it now seeks indemnification. The statute of limitations therefore began to run at that time. BFS cannot simultaneously rely on a contractual duty to defend while arguing that its contractual indemnity, specifically indemnity against liability claim, for attorney’s fees and costs will not accrue until the claims against BFS in the underlying litigation conclude.

III. BFS’S MISCHARACTERIZES ECC’S ARGUMENT AS ABANDONED

BFS contends that ECC failed to preserve, or has abandoned, its argument regarding the distinction between indemnity against loss and indemnity against liability. That contention is both

factually and legally incorrect.

Throughout this litigation, ECC has consistently maintained that the Master Agreement creates an indemnity against liability claim, not a claim for equitable indemnity. The Court of Appeals' decision to apply accrual principles derived from equitable indemnity cases, thereby extending the statute of limitations, is precisely the legal error ECC seeks to correct in this appeal.

BFS also asserts that ECC provides "no relevant authority" to support its position that principles governing equitable indemnity do not control contractual indemnity claims. The record demonstrates otherwise. ECC's brief relies on well-established South Carolina precedent recognizing the distinction between equitable and contractual indemnity, as well as the separate distinction between indemnity against loss and indemnity against liability. These authorities include Jones v. Builders Investment Group, LLC, Piper v. American Fidelity & Casualty Co., and State-Planters' Bank & Trust Co. v. First National Bank.

These cases recognize two critical principles that BFS attempts to obscure: first, that indemnity arising by operation of law differs from indemnity arising from an express contractual agreement; and second, that contracts providing indemnity against liability and those providing indemnity against loss carry different accrual triggers for purposes of the statute of limitations. ECC's argument simply applies these long-settled distinctions to the contractual language at issue here.

Accordingly, BFS's assertion that ECC's position is unsupported or abandoned ignores both the record and the controlling authorities cited in ECC's brief.

CONCLUSION

The damages BFS seeks to recover, attorney's fees incurred in defending the underlying litigation, began accruing in December 2015. Under settled South Carolina law, that injury

triggered the running of the statute of limitations. The Master Subcontractor Agreement drafted by BFS creates indemnity against liability and imposes an immediate duty to defend. Once BFS began incurring defense costs, the liability contemplated by the contract arose, and the cause of action accrued. Because BFS began incurring those expenses in December 2015, but waited more than 3 years to file its Third-Party Complaint, so its contractual indemnity claim is time barred. Therefore, this Court should reverse the Court of Appeals decision as to this issue.

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