

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

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2020-000415
Case No. 2014-CP-08-02424

Opinion No. 2025-UP-072

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

v.

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

BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC'S RETURN
TO
ECC CONTRACTING, LLC'S PETITION FOR WRIT OF CERTIORARI

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Counter Statement of Questions Presented

1. Does a claim for indemnity, whether contractual or equitable, begin to accrue only after the conclusion of the underlying tort action against the indemnitee?
2. In an indemnity action, is the statute of limitations the same for the recovery of the consequential damages of attorneys' fees as it would be for the recovery of other types of consequential damages?
3. Even if the issue of recovery of attorneys' fees could be considered independently of the underlying indemnity action, would a breach of contract action for attorneys' fees begin to accrue only after the a party breached the contract by refusing to pay attorneys' fees?

Statement of Facts

This is a case about a contractor Builders FirstSource-Southeast Group, LLC ("BFS") at a building site attempting to recover in contractual indemnity from its subcontractors, including ECC Contracting, LLC ("ECC"), for damages resulting from the subcontractors' negligence on the project. The parties had a contract that provided that if BFS was sued as a result of property damage at a project, the subcontractor would indemnify BFS *to the extent that the damage was caused by subcontractor*. BFS has been sued for property damage discovered at the project, including damage that was potentially caused by ECC. Pursuant to the terms of the contract, BFS filed a third-party claim against ECC for contractual indemnity. Thus far, the story follows the standard trajectory of a construction case. However, on summary judgment, the trial court, and then the court of appeals, held that as a matter of law BFS cannot pursue its claim for contractual indemnity against ECC and other subcontractors. The trial court also held that the BFS claims were time-barred. The court of appeals, however, reversed on the statute of limitations issue, holding that the BFS claims for indemnification – including attorneys' fees – are, in fact, timely, because no judgment has yet been entered against BFS in the underlying construction case. ECC

has petitioned for a writ of certiorari from the holding that the claims were appropriately brought within the statute of limitations.

A. The *Damico* Litigation

The issues in the instant action arise from services provided by the Respondents in connection with original construction of multiple single-family residences comprising a development project known as *The Abbey at Spring Grove*, located in Berkeley County, South Carolina. The Abbey at Spring Grove residences are the subject of a separate, previously filed lawsuit, captioned Patricia Damico et al v. Lennar Carolinas, LLC et al, civil action number 2014-CP-08-02424, (the “underlying action” or the “Damico Litigation”). In said underlying action, the plaintiff-owners initially asserted claims alleging deficiencies in design, development, and/or construction against, among others, the alleged developer/general contractor, Lennar Carolinas, LLC. Lennar, by its answer and third party complaint, asserted claims against various subcontractors and suppliers involved in original construction, including BFS, who was alleged to have supplied and installed windows and exterior doors.

BFS as a third-party defendant in the underlying action, filed its initial answer on December 21, 2015. Thereafter, it moved to amend its pleadings, in order to assert fourth-party claims against its own window supplier, MI Windows and Doors, and against its then-known installation subcontractors. Before the referenced motion to amend could be heard, the trial court considered, and denied, the motion of the general contractor, Lennar, to compel arbitration. The trial court’s orders denying that motion and Lennar’s motion to reconsider were appealed to the court of appeals, thus effecting a stay of the proceedings in the underlying action. While the court of appeals issued its order compelling arbitration between Lennar and the Plaintiffs on June 10, 2020, at all times relevant to this case, the underlying Damico Litigation was stayed on appeal.

It bears note that no final judgment or order has been issued against BFS, or against any other party, in the underlying action.

B. The BFS v MI Windows Litigation

While the underlying action was stayed on appeal, in order to preserve its still-unasserted claims against the window manufacturer and subcontractor installers, BFS filed the instant action on December 21, 2018, asserting, as direct claims against the designated defendants, those claims which it had previously sought to assert as fourth-party claims in the underlying action. BFS subsequently filed a motion to stay the instant proceedings, and to consolidate the litigation with the underlying Damico Litigation. BFS subcontractor defendants ECC Contracting, LLC, and Charleston Exteriors, LLC, filed motions for summary judgment as to BFS' claims. Arguments on the motions were heard before the Honorable Clifton Newman in the trial court on October 18, 2019.

On December 6, 2019, the trial court issued its order granting the motions for summary judgment and the motions to stay and consolidate. On December 16, 2019, BFS filed a motion for reconsideration. Judge Newman requested oral arguments on the motion for reconsideration, which were heard on January 16, 2020. On February 3, 2020, the trial court issued an "Amended Order," again granting the motions for summary judgment; this order, however, did not address or rule on BFS's December 16, 2019 motion for reconsideration. Therefore, BFS filed a second motion for reconsideration on February 13, 2020, asking that the trial court to rule on the December 16, 2019 motion for reconsideration. The deadline to file a notice of intent to appeal from the trial court's February 3rd amended order was March 4, 2020; thus, BFS was forced to file a notice of intent to appeal before the trial court ruled on its February 13 motion for reconsideration. On March 5, the trial court entered its last order to date, explicitly denying the motion for

reconsideration. BFS timely filed an amended notice of intent to appeal on March 17, 2020, challenging both the February 3rd Amended Order and the March 5th denial of the motion for reconsideration.

On appeal, this case was considered by a panel of judges composed of Judge McDonald, Judge Thomas, and Judge Hewitt. BFS's Final Briefs were submitted on December 1, 2020, and oral arguments were held on March 15, 2023. The court of appeals issued its order as an unpublished opinion on February 26, 2025, vacating in part and affirming in part the trial court's order. BFS filed a petition for rehearing on March 13, 2025; counsel for ECC also filed a petition for rehearing on March 13, 2025. On May 16, 2025, the court of appeals issued an order denying both petitions for rehearing. BFS filed a timely Petition for Writ of Certiorari on June 13, 2025. ECC requested an extension to file its own Petition for Writ of Certiorari, which the Supreme Court granted, setting June 26, 2025 as the new deadline for ECC's Petition. However, ECC did not actually file and serve its Petition until June 30, 2025 and it also sought a second extension. The Court accepted ECC's Petition on July 2, 2025. BFS files this Return to ECC's Petition for Writ of Certiorari.

Reasons for Denying ECC's Petition for Writ of Certiorari

As an initial matter, BFS notes that ECC's Petition for Writ of Certiorari has not identified any special or important reason why the Supreme Court should grant certiorari on its questions presented, and instead simply argues the merits of its case. Through its Appellate Rules and its case law, this Court has been clear that a party is not entitled to a Writ of Certiorari; rather, the decision whether or not to grant a petition for a Writ of Certiorari rests squarely in the discretion of the Supreme Court. SCACR 242(b). The Rules advise that Certiorari will "be granted only where there are special and important reasons[,]" including:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

SCACR 242(b). See also In re Breast Implant Prod. Liab. Litig., 331 S.C. 540, 543, 503 S.E.2d 445, 447 (1998) (explicitly granting cert on a case because of its “[n]ovel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions”).

ECC’s Petition for Writ of Certiorari should be denied because it has not identified any “special or important reason,” as required by Rule 242, as to why the Supreme Court should rule on its questions presented. Notably, the Petition highlights no novel issue, no conflict between lower courts, no constitutional issues implicated, and no conflict between the court of appeals’ opinion and this Court’s precedent. Instead, the Petition argues merely that the appellate court misapplied already-established law, and spends the entirety of its Petition arguing the merits of its case.

Responding specifically to the arguments on the merits outlined by ECC in its Petition, BFS submits the following arguments in support of the BFS Counter Statement of Questions Presented.

I. A claim for indemnity, whether contractual or equitable, begins to accrue only after the conclusion of the underlying tort action against the indemnitee.

ECC argues that the BFS claims for indemnity against ECC as a subcontractor are time-barred because they began accruing the moment that BFS was sued in the underlying construction defect lawsuit. However, as the court of appeals pointed out, "as to indemnity, the statute of

limitations generally runs from the time judgment is entered against the defendant." First Gen. Servs. of Charleston, Inc. v. Miller, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994). Because no judgment has been entered against BFS in the underlying suit, the statute of limitations has not yet begun to run on its indemnity claims.

ECC argues that the court of appeals' reliance on First General Services for the proposition that "the statute of limitations generally runs from the time judgment is entered against the defendant" was misplaced because the First General Services court considered an equitable cause of action for indemnity rather than a contractual one. ECC, however, does not explain why the distinction is significant and does not point to any case law saying that principles instructive in equitable cases cannot be instructive in contractual cases. Equitable causes of action for indemnity include recovery of attorneys' fees just like contractual ones do, so there is no reason to think that the First General Services court failed to consider how its holding would affect recovery of attorneys' fees. See Town of Winnsboro v. Wiedeman-Singleton, Inc., 307 S.C. 128, 130, 414 S.E.2d 118, 120 (1992) (instructing that "[t]he damages which can be claimed under equitable indemnity may include the amount the innocent party must pay to a third party because of the at-fault party's breach of contract or negligence *as well as* attorney fees and costs which proximately result from the at-fault party's breach of contract or negligence") (emphasis added). And while the First General Services court did not speak in terms of indemnity against liability and indemnity against loss, the distinction is immaterial in this case because, as argued below, BFS has a right to attorneys' fees as consequential damages of its right to indemnity against liability outlined in its contract.

II. Attorneys' fees are recoverable as consequential damages of the underlying action and there is no precedent for bifurcating them into a separate claim with a separate statute of limitations.

In an attempt to characterize the claim for recovery of attorneys' fees in this matter as time-barred, ECC argues that the recovery of attorneys' fees should be bifurcated from the indemnification claim and should be analyzed as its own cause of action with its own accrual date. To this end, ECC argues that a claim for attorneys' fees should be treated as a cause of action arising out of a *contract for indemnity against loss* rather than a *contract for indemnity against liability*. This argument encounters two problems: first, attorneys' fees are consequential damages of the indemnification claims, and thus the statute of limitations is determined by the underlying claim; second, even if attorneys' fees could be independently evaluated, they would be evaluated as a breach-of-contract claim, and such claim will not be actionable until ECC breaches the contract by refusing to pay attorneys' fees. The first issue will be addressed here; the second issue will be explained further in Section III.

Case law is clear that regardless of whether an indemnification claim is equitable or contractual, it includes both indemnification for liability *and* recovery of attorneys' fees: “[i]n cases of either contractual or equitable indemnification, reasonable attorney’s fees incurred in resisting the claim indemnified against may be recovered *as part of the damages and expenses.*” McCoy v. Greenwave Enters., Inc., 408 S.C. 355, 359, 759 S.E.2d 136, 138 (2014) (emphasis added). South Carolina statutory law also recognizes this, which is why South Carolina Code Section 15-3-530 speaks in terms of imposing a statute of limitations upon “an action upon a contract” and not, for example, an action seeking attorneys’ fees.

As the McCoy case states, attorneys’ fees incurred are “part of” the indemnification claim; they are not their own separate claim with their own separate statute of limitations. See McCoy 408 S.C. at 359. It is the harm suffered, and not the requested relief, that determines the running of the statute. Thus, regardless of whether the source is contractual or equitable, attorneys’ fees

have the same accrual date as the indemnification claim to which they are attached, an accrual date that does not begin to run until after judgment has been entered against the defendant. Because no judgment against BFS has been entered in the underlying case, the statute has not yet run on the indemnification claims.

III. Even if attorneys' fees could be considered separately, BFS would still have a timely claim.

Should the Court parse BFS's plea for consequential damages for its indemnification claims, as ECC requests, what would remain would be a breach-of-contract cause of action against ECC for failing to pay attorneys' fees associated with the underlying action, as required by the contract. Because ECC has not yet communicated a refusal to pay these fees, the cause of action is still viable.

"A statute of limitations generally begins to run on the date a cause of action accrues, and a breach of contract action usually accrues at the time a contract is breached or broken." State v. McClinton, 369 S.C. 167, 173, 631 S.E.2d 895, 898 (2006). In other words, the statute of limitations begins to run once a defendant's damage-causing act is completed, and in this context, the "damage-causing act" would be the subcontractor's refusal to pay attorneys' fees as outlined in the contract.

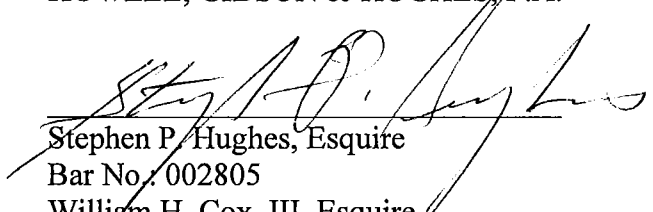
To date, ECC has not communicated to BFS a refusal to pay BFS's attorneys' fees incurred in defending against Plaintiff Damico or Lennar Carolinas, LLC's claims for damages allegedly resulting from deficiencies in the work performed by ECC; moreover, the earliest possible act that could be construed as an implicit refusal would have been the Answer filed by ECC in this case, which denied BFS's right to said relief. Contrary to ECC's argument, the "breach" of the contract would be ECC's refusal to abide by the terms of the contract, and not the mere incurring of attorneys' fees. That "refusal" is what would have begun the statute of limitations on ECC's argued

hypothetical BFS cause of action for attorneys' fees. Notably, application of the discovery rule (for which ECC argues) would not change the result, because BFS had no reason to suspect that ECC was in breach of the contract until, at the earliest, ECC filed its respective Answer to BFS in this case. Accordingly, even under ECC's hypothetical, BFS's claims were timely.

Conclusion

Because ECC has failed to abide by the Rules of 242 and has failed to identify a special or important reason why Certiorari should be granted, and because the law is clear that the accrual date for the BFS indemnification claims, inclusive of their damages, will not run until the completion of the underlying action, the Court should deny the ECC's Petition for Writ of Certiorari.

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