Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **10th day of May, 2024** are as follows:

BY Crichton, J.:

2023-CC-01358 *DANIEL BENNETT VS. DEMCO ENERGY SERVICES, LLC, FEDERATED RURAL ELECTRIC INSURANCE EXCHANGE, COX COMMUNICATIONS, INC., COX COMMUNICATIONS LOUISIANA, LLC AND CABLE MAN, INC.* (Parish of East Baton Rouge)

REVERSED AND REMANDED. SEE OPINION.

SUPREME COURT OF LOUISIANA

No. 2023-CC-01358

DANIEL BENNETT VS. DEMCO ENERGY SERVICES, LLC, FEDERATED RURAL ELECTRIC INSURANCE EXCHANGE, COX COMMUNICATIONS, INC., COX COMMUNICATIONS LOUISIANA, LLC AND CABLE MAN, INC.

On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of East Baton Rouge

CRICHTON, J.

We granted the writ application in this matter to determine whether a cross claim for indemnity and defense asserted before a judicial finding of liability or loss is premature. For the reasons that follow, we find such a claim is not premature. We therefore reverse the court of appeal's ruling, reinstate the trial court's judgment denying the defendant Cable Man's Exception of Prematurity and remand the matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

On June 22, 2022, plaintiff Daniel Bennett was traveling between 60 and 65 miles per hour on Samuels Road in Baton Rouge when he drove over a downed telecommunications line belonging to defendant Cox Communications of Louisiana ("Cox"). The line became caught underneath his vehicle, causing his vehicle to stop abruptly. As a result, plaintiff alleges he suffered bodily injuries to his spine, shoulder, and lower back. Plaintiff thereafter filed this suit, naming several defendants, including Cox and Cable Man, Inc., ("Cable Man").[1] Cable Man is a company that provides contracting services, including maintenance and repair, for telecommunications and broadband companies and was hired by Cox to perform

[1] The other defendants named in the suit, not parties here, were Demco Energy Services, LLC, Federated Rural Electric Insurance Exchange, and Cox Communications, Inc.

maintenance on the subject line. Plaintiff's petition alleges, *inter alia*, that Cable Man and Cox and their respective employees were negligent in hanging, repairing, and/or securing the line, and in their failure to train, monitor and supervise their employees.

In response to the petition, Cox sent Cable Man notice of its indemnification agreement under the Master Construction Agreement ("the Agreement")[2] between Cox and Cable Man, which requires Cable Man (in connection with the work assigned by Cox to Cable Man) to:

> [i]ndemnify, hold harmless, release and defend Cox . . . from and against any and all claims, demands, suits, actions, damages, judgments, settlements, losses, costs (including attorney's fees, expert costs, court costs and all other litigation expenses), expenses and/or liabilities of every kind of character, in any way arising from or related to, in any way whatsoever to Contractor's or Contractor's Personnel performance or failure of performance of any Work or its obligations under this Agreement or any Work Order, including without limitation, (a) damage to property or for injuries or death of . . . any third parties . . .

According to the petition, Cable Man refused the tender.[3]

Cox then filed a cross claim against Cable Man, asserting that pursuant to the terms of the Agreement, Cable Man is required to indemnify, hold harmless, release and defend Cox from all claims brought against it by plaintiff in this matter.[4] Cox also alleged the Agreement obligates Cable Man to indemnify Cox from damages including, but not limited to, attorney's fees, expert costs, court costs, damages, judgments, settlements, losses and "all other litigation expenses."

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[2] The Master Construction Agreement is not in the record before this Court. Although portions of the agreement are set forth in the writ application, opposition, and the parties' briefs, neither party offered it into evidence and it is not attached to any pleading. This is a fundamental oversight and poor trial practice. However, because no party disputes either the specific language of the relevant provisions of the agreement or argued that any other provision that is not excerpted in the submissions is relevant to this dispute, in the interest of judicial efficiency, we decide this matter without a proper record.

[3] At oral argument of this matter, Cox indicated that the indemnification dispute essentially began when it "sent Cable Man a bill," although this is also not in the record.

[4] In its cross claim, Cox also asserted a third party demand against Phoenix Insurance Company, who provided an insurance policy for Cable Man. This third party demand is not at issue here.

In response, Cable Man filed an Exception of Prematurity, arguing that without a finding of liability or a judgment, the claim for indemnity has not accrued and is therefore premature. Following a hearing, the trial court denied the exception and adopted Cox's memorandum in opposition to the Exception of Prematurity as its reasons for judgment.

Cable Man sought supervisory writs with the Court of Appeal, First Circuit. The court of appeal granted Cable Man's writ application and reversed the trial court ruling, finding Cox's claim for indemnity to be premature:

> . . . [I]t is well-established that claims for indemnity, as well as claims for defense arising under an indemnity agreement, are premature prior to a determination that damages are actually owed and the indemnitee sustains a loss. *See Willis v. Frozen Water, Inc.*, 2015-0900 (La. App. 1st Cir. 12/23/15), 2015 WL 9466625, *3-4 (unpublished), *writ denied*, 2016-0146 (La. 3/14/16), 189 So.3d 1069 (citing *Suire v. Lafayette City-Parish Consolidated Government*, 2004-1459 (La. 4/12/05), 907 So.2d 37, 51). At this time, the lawsuit is still pending against both Cox and Cable Man, and no determination of liability had been made; thus, there is no obligation for indemnity and defense costs. *See Willis*, 2015 WL 9466625 at *4. Stated differently, indemnity (or reimbursement) is not available at this time because Cox has not discharged a liability which Cable Man should have assumed or otherwise suffered any loss or damages. *See Id*.

Bennett v. DEMCO Energy Services, LLC, et al., 23-581 (9/11/23) 2023 WL 5843557 (unpub'd).

This Court thereafter granted defendant Cox's writ application. *Bennett v. Demco*, 23-1358 (La. 1/17/24), 376 So. 3d 839.

LAW AND ANALYSIS

The rule of indemnity is based upon the general obligation to repair the damage caused by one's fault under La. C.C. art. 2315. *Nassif v. Sunrise Homes, Inc.,* 98-3193 (La. 6/29/99), 739 So. 2d 183, quoting *Bewley Furniture Co., Inc. v. Maryland Cas. Co.,* 285 So. 2d 216, 219 (1973). An indemnity agreement is a contract wherein a party (the indemnitor) agrees to protect another (the indemnitee) against damages incurred by the latter as a result of his breach of a duty owed to a

third party. Ronald J. Scalise, Law of Obligations, 6 La. Civ. L. Treatise § 11.27 (2d. ed. 2023).[5] Unless there is a special provision of law to the contrary, indemnity agreements are valid and are not against the public order. A claim for indemnity is ordinarily brought through a third party demand,[6] although can be raised, as in this matter, through a cross-claim pursuant to La. C.C.P. art. 1071.[7]

As stated above, the Agreement between Cox and Cable Man contains an indemnity provision which sets forth an obligation assumed by Cable Man in connection with the work assigned by Cox, in which Cable Man contractually agreed it will indemnify, hold harmless, release and defend Cox and its related companies from "any and all claims, demands, suits, actions. . . ." related to Cable Man's "performance or failure of performance of any Work or its obligations under this Agreement. . ." While the merits of Cox's indemnity claim are not before us, we must determine whether that claim is premature before a legal finding of liability.

We hold that a claim for indemnity raised during the pendency of the litigation and before a finding of liability is not premature. Not only does our finding comport with principles of judicial economy and efficiency, the relevant Code of Civil Procedure articles pertaining to third party practice dictate this result. As discussed

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[5] This Court has also defined indemnity as "reimbursement, and may lie when one party discharges a liability which another rightfully should have assumed." *Reggio v. E.T.I., et al.,* 07-1433 (La. 12/12/08), 15 So. 3d 951 (citing *Nassif, supra*).

[6] A third-party demand is generally brought via La. C.C.P. art. 1111 ("[t]he defendant in a principal action by petition may bring in any person, including a codefendant, who is his warrantor, or who is or may be liable to him for all or part of the principal demand"), and "is a device principally used for making claims of contribution or indemnity in the event that defendant is cast in judgment on the principal demand." *Union Service & Maintenance Co., Inc. v. Powell,* 393 So. 2d 94, 95 (La. 1980), citing *Avegno v. Byrd*, 377 So. 2d 268, 273 (La. 1979).

[7] La. C.C.P. art. 1071 provides:

> A party by petition may assert as a cross-claim a demand against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or a reconventional demand or relating to any property that is the subject matter of the original action. The cross-claim may include a demand that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of the demand asserted in the action against the cross-claimant.

below, this Court has previously found that a claim for indemnity is premature before a determination of judicial liability. However, in light of our ruling today, to the extent any prior jurisprudence can be interpreted otherwise, we now clarify that such a claim for indemnity is not prohibited before a liability adjudication.[8]

We find guidance in Justice Victory's concurrence in *Moreno v. Entergy Corp.,* 10-2281 (La. 2/18/11), 62 So. 3d 704. In *Moreno*, the Court considered whether the court of appeal erred in supplying its own "exception of no cause of action based on prematurity" to a third-party cross claim for indemnity arising out of injuries sustained when a worker came in contact with a power line, in which it found that because there was no legal finding of fault, no cause of action for indemnity had accrued. This Court did not directly address the timing of the claim for indemnity, but instead found error in the court of appeal's granting a *sua sponte* court-supplied exception of prematurity. In his concurrence, Justice Victory discussed the court of appeal's finding of prematurity, but emphasized the primary issue of "whether a third party indemnity claim is premature when the defendant has not yet been cast in judgment." *Id.*, 10-2281, p. 5, 62 So. 3d at 708. Specifically,

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[8] Recognizing that our courts generally do not follow *stare decisis,* this Court has held that a "long line of cases following the same reasoning within this state forms *jurisprudence constante*." *Bergeron v. Richardson, M.D.,* 20-1409, p. 7 (La. 6/30/21), 320 So. 3d 1109, 1114 (internal citation omitted). Furthermore, "[u]nder the civilian tradition, while a single decision is not binding on our courts, when a series of decisions form a "constant stream of uniform and homogenous rulings having the same reasoning," *jurisprudence constante* applies and operates with "considerable persuasive authority." *Id.*, citing James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L.Rev. 1, 15 (1993). Finally, and most notably:

> Because of the fact that "**one of the fundamental rules of [the civil law tradition] is that a tribunal is never bound by the decisions which it formerly rendered: it can always change its mind**," 1 Marcel Planiol, Treatise on the Civil Law § 123, (La. State Law Inst. trans. 1959) (12th ed.1939), **prior holdings by this court are persuasive, not authoritative, expressions of the law**. [] Thus, it is only when courts consistently recognize a long-standing rule of law outside of legislative expression that the rule of law will become part of Louisiana's custom under Civil Code article 3 and be enforced as the law of the state. *See* La. Civ.Code art. 3.

Bergeron v. Richardson, 20-01409, p. 7 (La. 6/30/21), 320 So. 3d 1109, 1115 (emphasis added). We do not find a line of cases sufficiently addressing this issue to demonstrate a *jurisprudence constante*, and therefore are not compelled to follow prior decisions to the contrary.

Justice Victory found error in the court of appeal's conclusion that such a claim for indemnity is premature, pointing to La. C.C.P. arts. 1111 - 1116, which state, as a general matter, that a third party demand is not premature when asserted before a finding of liability.[9] Article 1111 provides that "a defendant in a principal action by petition may bring in any person, including a codefendant, *who is his warrantor, or who is or may be liable to him for all or part of the principal demand.*") (emphasis supplied by Justice Victory). Articles 1112 and 1116 provide the same right to defendants in reconvention and third party defendants. He noted that La. C.C.P. art. 1113, in particular, provides "harsh consequences for a defendant who fails to bring in such a third party defendant":

> A defendant who does not bring in as a third party defendant a person who is liable to him for all or part of the principal demand does not on that account lose his right or cause of action against such person, unless the latter proves that he had means of defeating the action which were not used, because the defendant either failed to bring him in as a third party defendant, or neglected to appraise him that the suit had been brought.

Moreno, 10-2281, p. 5, 62 So. 3d at 708-09 (Victory, J., concurring).

We agree with this reasoning. Practical aspects of third-party practice dictate that a claim for indemnity asserted before a finding of liability is not premature.[10]

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[9] La. C.C.P. art. 1112 provides:

> The defendant in reconvention likewise may bring in his warrantor, or any person who is or may be liable to him for all or part of the reconventional demand, and the rules provided in Articles 1111, and 1113 through 1115 shall apply equally to such third party actions.

La. C.C.P. art. 1115 provides: "The third party defendant may assert against the plaintiff in the principal action any defenses which the third party plaintiff has against the principal demand."

La. C.C.P. art. 1116 provides: "A third party defendant may proceed under Articles 1111 through 1115 against any person who is or may be liable to him for all or any part of the third party demand."

[10] *See also, Pizani v. St. Bernard Parish*, 12-1084 (La. App. 4 Cir. 9/26/13), 125 So. 3d 546 (the court finding the case "squarely presents the unresolved issue raised by Justice Victory in his concurrence in *Moreno* []" and concluding that Justice Victory's position that a third party indemnity claim is not premature is consistent with the legislative history and purpose of La. C.C.P. art. 1111).

In addition to the fact that none of the aforementioned articles require an adjudication of liability before assertion of an incidental claim, the very purpose of these articles is to promote judicial economy and efficiency. "Third party practice was adopted in Louisiana with these purposes in mind: to avoid multiple lawsuits; to facilitate and expedite the trial of litigation; and, wherever possible, consistent with orderly procedure and due regard for the rights of all litigants, to dispose of all phases of an action in a single proceeding." Hon. Max Tobias, Jr., John M. Landis, and Gerald Meunier, La. Practice Series, §10:69 (2023 ed). *See also La. C.C.P. art. 1071 cmt.* ("The addition of the cross-claim serves the interest of judicial economy and convenience as to the other incidental actions.").[11] The fact that the indemnity claim in this matter arises out of a cross-claim rather than a third-party claim does not change our analysis. The principles are the same: to avoid wasting judicial resources on a "circuity of proceeding[s]" and to promote judicial economy, asserting a claim for indemnity prior to a finding of liability is not premature. *See Jeub v. B/G Foods, Inc., et al.,* 2 F.R.D. 238 (D. Minn 1942).

The court of appeal in this matter relies upon *Suire v. Lafayette City-Parish Consolidated Government, et al.*, 04-1459, 04-1460, 04-1466 (La. 4/12/05), 907 So. 2d 37, a case involving a cross claim for indemnification between defendants named in a construction dispute. In *Suire,* this Court found that because no determination of liability had been made, the claim for indemnity was not ripe for adjudication. Notably, however, this Court did not dismiss the claim for indemnity based on prematurity but deferred the claim until the lawsuit was concluded and liability was

[11] In *Smitherman, Lunn, Chastain & Hill v. Killingsworth*, 561 So. 2d 816 (La. App. 2nd Cir. 1990), the court noted that "[a] cross-claim, like an intervention, is an incidental demand which can be asserted against a co-defendant where the demand arises out of the subject matter or relates to the property that is the subject matter of the original action." *Id.,* citing La. C.C.P. arts 1031 and 1071. Quoting the comment to La. C.C.P. art. 1071, the court explained that "[w]here such a demand is properly instituted and cumulated in response to the principal demand, the trial court should "resolve all claims by the parties in one proceeding . . .in the interest of judicial efficiency." [internal citation omitted].

determined. [12] Furthermore, this Court in *Suire* did not distinguish between the right to make a claim for indemnity and the right to collect indemnity. We find such a distinction, for purposes of judicial economy, important.

In this regard, then-Associate Justice Weimer's concurrence in *Reggio v. E.T.I., et al.*, 07-1433 (La. 12/12/08), 15 So. 3d 951, is instructive. In *Reggio*, this Court considered whether a third party claim for indemnity, filed three years after the main demand was served, had prescribed. This Court held that prescription does not commence on a claim for indemnity until a party has sustained a loss, either through payment, settlement, or an enforceable judgment. Therefore, the indemnity claim in *Reggio* had not prescribed because there had not yet been a "loss." Justice Weimer concurred, emphasizing the distinction between the right to "claim" indemnity and the right to "collect" indemnity, explaining:

> Generally, a person cannot exercise his right of action until the corresponding cause of action accrues. However, a solidary obligor may exercise his right of action for indemnity before the cause of action accrues. LSA-C.C. art. 1805. Subrogation is the source of indemnification, and '[s]ubrogation takes place by operation of law . . . [i]n favor of an obligor who pays a debt he owes with others or for others and who has recourse against those others as a result of the payment.' LSA-C.C. art. 1829(3); [internal citation omitted].

Id. at 960-61.

In other words, asserting a claim for indemnity, arising out of the same facts and circumstances, is not premature before a judicial finding of liability. The right to collect on an indemnity agreement is determined upon judgment or finding of liability or loss, but there is no prohibition on asserting a claim for indemnity in the

[12] This Court answered a certified question in *Meloy v. Conoco, Inc.*, 504 So. 2d 833 (La. 1987), finding a cause of action for indemnification for cost of defense does not arise until the lawsuit is concluded and defense costs are paid. However, it highlighted that it is the terms of the indemnity agreement which governs the obligations of the parties, concluding that "the indemnitor's obligation for cost of defense cannot be determined until there has been a judicial finding that the indemnitee is liable or that the charges against it were baseless."). *Id.* at 839.

same proceeding.[13] Again, to require a party to file a separate indemnification action after a finding of liability runs afoul of our well-established principles of judicial efficiency.[14]

CONCLUSION

For the reasons assigned herein, the court of appeal's ruling is reversed and the trial court's ruling denying the Exception of Prematurity is reinstated. The matter is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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[13] *See also Burns v. McDermott, Inc*., 95-0195 (La. App. 1st Cir. 11/9/95), 665 So. 2d 76, 79 (under *Meloy v. Conoco, Inc.,* 504 So. 2d 833, 839 (La. 1987), although indemnity claim cannot be resolved until fault is determined, no prohibition exists from asserting the claim prior to fault determination)).

[14] Several federal courts have historically found the same. For example, in *Jeub v. B/G Foods, Inc., et al.,* 2 F.R.D. 238 (D. Minn 1942), the court considered the federal counterpart to our La. C.C.P. art. 1111 (a "defendant in a principal action . . . may bring in any person . . . who is or may be liable to him for all or part of the principal demand."), Rule 14 of the Federal Rules of Civil Procedure, to determine whether a third party demand made prior to a finding of loss is premature:

> **The apparent purpose of Rule 14 is to provide suitable machinery whereby the rights of all parties may be determined in one proceeding**. Manifestly, if Swift and Company is liable over to B/G Foods, Inc., for any or all damages sustained by reason of the tortious act alleged, no cogent reason is suggested why the original defendant should not avail itself of this rule. Otherwise, B/G Foods, Inc., would be required to await the outcome of the present suit, and then if plaintiffs recover, to institute an independent action for contribution or indemnity. **The rule under consideration was promulgated to avoid this very circuity of proceeding**. Neither is any good reason suggested why the determination of the entire controversy in one proceeding will prejudice the rights of any of the parties.

(emphasis added). *See also Taylor Deggs, individually and o/b/o the minor children of Stephen Deggs, deceased v. Aptim Maintenance, LLC, et al.*, 2021 WL 1206592 (M.D. La. 3/30/21) (the court denying a Motion to Dismiss Third Party Demand for indemnity (asserted pursuant to a Master Construction Agreement), "in the interest of efficiency," deferring the determination of indemnification obligations until after a liability determination), citing *Borman v. Shamrock Energy Sols.*, LLC, No. CV 17-11720, 2019 WL 670402, at *5 (E.D. La. Feb. 19, 2019) (denying third party defendants' Motion to Dismiss because the court could not determine the enforceability of defendants' defense and indemnity obligations at that time).