

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 0900

*JEW*  
*VGW by [Signature]*  
*[Signature]*

BRUCE E. WILLIS, HUSBAND OF/AND TARRAH C. WILLIS,  
INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN,  
ALYSSA WILLIS, BRYCE WILLIS, AND BRAYDEN WILLIS

VERSUS

FROZEN WATER, INC., D/B/A THE ICE HOUSE, EARL J. JOHNSON, AND  
HOUSTON SPECIALTY INSURANCE COMPANY

CONSOLIDATED WITH

ALLSTATE INSURANCE COMPANY

VERSUS

EARL JOHNSON, FROZEN WATER, INC., AND  
HOUSTON SPECIALTY INSURANCE COMPANY

Judgment Rendered: DEC 23 2015

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Appealed from the  
22<sup>nd</sup> Judicial District Court  
In and for the Parish of St. Tammany, Louisiana  
Trial Court Numbers 2013-13853 and 2013-15134 Div. G

Honorable Scott C. Gardner, Judge

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**BEFORE: WHIPPLE, C.J., WELCH, AND DRAKE, JJ.**

**WELCH, J.**

Reddy Ice Corporation (“Reddy Ice”) appeals a judgment sustaining a dilatory exception raising the objection of prematurity and dismissing, without prejudice, its cross-claim against Frozen Water, Inc. d/b/a The Ice House (“Frozen Water”) for defense and indemnification. For reasons that follow, we affirm the judgment of the trial court.

**FACTUAL AND PROCEDURAL HISTORY**

On August 16, 2013, the plaintiffs, Bruce Willis and his wife, Tarrah Willis, individually and on behalf of their three minor children, filed a petition for damages, against Frozen Water; Earl Johnson, an employee of Frozen Water; and Houston Specialty Insurance Company, the liability insurer of Frozen Water. According to the allegations of the plaintiffs’ petition, on July 13, 2013, Tarrah Willis was driving a vehicle northbound on Highway 21 in St. Tammany Parish and was directly behind three other vehicles. Bruce Willis was the restrained front-seat passenger, and their three children were restrained rear-seat passengers. Traveling immediately behind the Willis vehicle was a semi-truck, with a fifty-eight foot box trailer, which was owned by Frozen Water and driven by Mr. Johnson. When the lead vehicle slowed down in order to make a left turn into a gas station, the other vehicles and the vehicle driven by Mrs. Willis also slowed down and eventually came to a complete stop. However, Mr. Johnson failed to reduce his speed and stop in time, and the semi-truck and trailer violently struck the rear of the Willis vehicle, which then caused the Willis vehicle to collide with the vehicle immediately in front of it. As a result of the accident, the plaintiffs and their children were severely injured. Therefore, the plaintiffs sought to recover damages from the defendants.

On July 2, 2014, the plaintiffs filed a supplemental and amended petition to name Reddy Ice and its liability insurer as additional defendants. In the

supplemental and amended petition, the plaintiffs claimed that Reddy Ice was vicariously liable for Mr. Johnson's actions based on the level of control that Reddy Ice exercised over Frozen Water's operations due to the nature of the business relationship between Reddy Ice and Frozen Water. In response, Reddy Ice filed a cross-claim against Frozen Water and its insurer for defense and indemnification based on the provisions of the Independent Distributor Agreement between Frozen Water and Reddy Ice. Specifically, in the Independent Distributor Agreement, Frozen Water agreed to

protect, defend, indemnify and save [Reddy Ice], its officers, directors, employees[,] and joint owners harmless from and against all claims, personal injuries, demands, liabilities, suits[,] and causes of action of every kind and character, including reasonable expense[s] incurred by [Reddy Ice] and reasonable attorney fees, without limit and with regard to the cause or causes[] thereof[,] the negligence of any party or parties, arising in connection or alleged connection with or to have arisen out of or incidental to the performance of [the Independent Distributor Agreement] by [Frozen Water], its agents and employees and its subcontractors, their agents and employees, regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [Reddy Ice], [its] representatives or their employees, agents, invitees or licensees thereof.

In response to Reddy Ice's cross-claim, Frozen Water filed a dilatory exception raising the objection of prematurity on the basis that Reddy Ice's claims for defense and indemnification did not arise until after the underlying lawsuit was concluded and defense costs were paid. By judgment signed on February 13, 2015, the trial court sustained the exception and dismissed Reddy Ice's cross-claim, without prejudice. From this judgment, Reddy Ice has appealed.<sup>1</sup>

### LAW AND DISCUSSION

Louisiana Code of Civil Procedure article 926(A)(1) provides for the dilatory exception raising the objection of prematurity. The dilatory exception is designed to retard the progress of the action rather than defeat it. See La. C.C.P.

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<sup>1</sup> A judgment sustaining a dilatory exception raising the objection of prematurity and dismissing the claim is a final, appealable judgment. **Pinegar v. Harris**, 2008-1112 (La. App. 1<sup>st</sup> Cir. 6/12/2009), 20 So.3d 1081, 1087-1088; see La. C.C.P. arts. 933(A), 1915(A)(1), and 2083.

art. 923. A suit is premature if it is brought before the right to enforce the claim sued on has accrued. See La. C.C.P. art. 423. The objection of prematurity raises the issue of whether the judicial cause of action has yet come into existence because some prerequisite condition has not been fulfilled. **Eusea v. Blanchard**, 2004-1855 (La. App. 1<sup>st</sup> Cir. 2/11/05), 899 So.2d 41, 43, writ denied, 2003-0210 (3/28/03), 840 So.2d 575. The viability of the exception is determined by the facts existing at the time the lawsuit is filed. *Id.* Stated differently, the dilatory exception raising the objection of prematurity questions whether the cause of action has matured to the point where it is ripe for judicial determination. **Moreno v. Entergy Corporation**, 2010-2268 (La. 2/18/11), 64 So.3d 761, 762-763 (*per curiam*).

Indemnity means reimbursement, and may lie when one party discharges a liability, which another rightfully should have assumed. **Reggio v. E.T.I.**, 2007-1433 (La. 12/12/08), 15 So.3d 951, 955, citing **Nassif v. Sunrise Homes, Inc.**, 98-3193 (La. 6/29/99), 739 So.2d 183, 185. It is based on the principle that everyone is responsible for his own wrongdoing, and if another person has been compelled to pay a judgment which ought to have been paid by the wrongdoer, then the loss should be shifted to the party whose negligence or tortious act caused the loss. **Reggio**, 15 So.3d at 955. Thus, an action for indemnity is a separate substantive cause of action, arising at a different time, independent of the underlying tort, with its own prescriptive period. *Id.*

The purpose of an indemnity agreement is to allocate the risk inherent in the activity between the parties to the contract. **Naquin v. Louisiana Power & Light Company**, 2005-2103 (La. App. 1<sup>st</sup> Cir. 9/15/06), 943 So.2d 1156, 1161, writ denied, 2006-2476 (La. 12/15/06), 945 So.2d 691. However, an indemnitor is not liable under an indemnity agreement until the indemnitee actually makes payment or sustains a loss. **Suire v. Lafayette City-Parish Consolidated Government**,

2004-1459, 2004-1460, 2004-1466 (La. 4/12/05), 907 So.2d 37, 51, citing **Meloy v. Conoco, Inc.**, 504 So.2d 833, 839 (La. 1987).

In **Suire**, the Louisiana Supreme Court addressed the issue of whether a co-defendants' cross-claims against another co-defendant under an indemnity agreement were premature. Therein, the plaintiff sued the City of Lafayette, its contractor (Boh Brothers), and its engineer (Dubroc), seeking recovery for property damage caused to his home by the City's dredging operations. The City and the engineer filed cross-claims against the contractor and then filed motions for summary judgment seeking an immediate defense from the contractor under an indemnity provision contained in the contract between the City and the contractor. Supervisory writ applications were granted by the supreme court to consider, among other things, whether the court of appeal erred in determining that the contractor owed a duty to defend, or pay for defense costs, under the terms of the contractual indemnity provision. **Suire**, 907 So.2d at 51. The supreme court held that the cross-claims by the City and the engineer for defense under an indemnity agreement against a contractor were premature. In doing so, the supreme court explained:

We find that the City's and [the engineer's] claim for defense under the indemnity agreement is premature under settled law, as these parties have not yet sustained any compensable loss. This court has observed that an indemnity agreement is a "specialized form of contract which is distinguishable from a liability insurance policy." **Meloy v. Conoco, Inc.**, 504 So.2d 833, 839 (La. 1987). An indemnitor is not liable under an indemnity agreement until the indemnitee "actually makes payment or sustains loss." *Id.* Thus, this court has held that "a cause of action for indemnification for cost of defense does not arise until the lawsuit is concluded and defense costs are paid." *Id.*; **Morella v. Bd. of Comm'rs of Port of New Orleans**, 2004-0312 (La. App. 4th Cir. 10/27/04), 888 So.2d 321, 325. As this lawsuit is still pending, and no determination of liability has been made, the court of appeal erred in finding that [the contractor] owed a duty to defend, or pay for defense costs, under the terms of the contractual indemnity provision. We therefore reverse the court of appeal's holding that [the contractor] owed a duty as a matter of law to defend the City and [the engineer], and defer this claim until the lawsuit is concluded and liability is determined.

**Suire**, 907 So.2d at 51.

Based on **Suire**, Frozen Water contends that Reddy Ice's claim for defense and indemnity is premature and that the trial court correctly sustained its dilatory exception raising the objection of prematurity. Reddy Ice maintains that its cross-claim was not premature and should not have been dismissed because La. C.C.P. art. 1071 permits the assertion of cross-claims prior to a liability determination and the language of the indemnity agreement does not make Reddy Ice's right to defense and indemnification contingent upon a liability determination.

Louisiana Code of Civil Procedure article 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. [Emphasis added.]

We agree with Reddy Ice that the clear language of La. C.C.P. art. 1071 allows a cross-claim to be asserted by any party who *may be* liable to him for all or part of the main demand. Indeed, **Suire** did not prohibit the filing of a cross-claim for indemnification and defense; it only determined that such a claim was premature since no determination of liability had been made. However, the fact that a cross-claim may be allowed under La. C.C.P. art. 1071 does not mean that the cross-claim is not subject to defense by means of an appropriate exception by the other party in response to the cross-claim. See generally La. C.C.P. art. 921.

As to the issue of the prematurity of a cross-claim for indemnification and defense costs, we find **Suire** to be controlling.<sup>2</sup> Based on the application of that

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<sup>2</sup> As an intermediate appellate court, we are bound to follow the decisions of the supreme court when a question is not specifically regulated by statute and the supreme court has made the only available definitive ruling and the last expression of law as to the issue. **Cavalier v. State, ex rel. Dept. of Transp. and Development**, 2008-0561 (La. App. 1<sup>st</sup> Cir. 9/12/08), 994 So.2d 635, 641.

decision to this case, we are constrained to conclude that the cross-claim of Reddy Ice against Frozen Water for indemnity and costs of defense is premature. This lawsuit is still pending against both Frozen Water and Reddy Ice, and no determination of liability has been made; thus, at this time, there is no obligation for indemnity and defense costs. Stated differently, indemnity (or reimbursement) is not available at this time because Reddy Ice has not discharged a liability which Frozen Ice should have assumed or otherwise suffered any loss or damages. See Reggio, 15 So.3d at 955. Accordingly, Reddy Ice's cause of action for indemnity and defense is not ripe for adjudication, and we find no error in the ruling of the trial court in sustaining the dilatory exception raising the objection of prematurity and dismissing, without prejudice, Reddy Ice's cross claim for defense and indemnity.<sup>3</sup>

### CONCLUSION

For all of the above and foregoing reasons, the February 13, 2015 judgment of the trial court sustaining Frozen Water's dilatory exception raising the objection of prematurity and dismissing Reddy Ice's cross-claim, without prejudice, is affirmed.

All costs of this appeal are assessed to the defendant/appellant, Reddy Ice Corporation.

**AFFIRMED.**

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<sup>3</sup> Our decision herein is limited to the issue of prematurity of a *cross-claim* for indemnification and defense costs. Since the issue of the prematurity of a *third-party* demand for indemnification and defense is not at issue herein, we need not address the conflicting jurisprudence on that issue, which the parties cited and relied on in support of their position in this case. Cf. Delaune v. U.S. Fidelity and Guar. Co., 506 So.2d 795, 796 (La. App. 1<sup>st</sup> Cir. 1987); Burns v. McDermott, Inc., 95-0195 (La. App. 1<sup>st</sup> Cir. 11/9/95), 665 So.2d 76, 79; Therrell v. Rowan Companies, Inc., 2009-1546, 2009-1547, 2009-1548 (La. App. 1<sup>st</sup> Cir. 12/22/10)(*unpublished*); Therrell v. Rowan Companies, 2009-2144 (La. App. 1<sup>st</sup> Cir. 12/22/10) (*unpublished*); Bates v. Alexandria Mall I, LLC, 2009-0361 (La. App. 3<sup>rd</sup> Cir. 10/07/09), 20 So.3d 1207, 1210; Dean v. Entergy 2010-0887 (La. App. 5<sup>th</sup> Cir. 10/19/10) (*unpublished*); Pizani v. St. Bernard Parish, 2012-1084 (La. App. 4<sup>th</sup> Cir. 9/26/13), 125 So.3d 546, 552-555; see also Moreno, 64 So.3d at 764-766 (Victory, J. concurring).