

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #032

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the 27th day of June, 2023 are as follows:

PER CURIAM:

2022-C-01715

ZACH BELLARD VS. ATK CONSTRUCTION, LLC, ET AL. (Parish of Lafayette)

REMANDED. SEE PER CURIAM.

Hughes, J., concurs and assigns reasons.

Genovese, J., dissents and would reinstate the trial court's judgment.

SUPREME COURT OF LOUISIANA

No. 2022-C-01715

ZACH BELLARD

VS.

ATK CONSTRUCTION, LLC, ET AL.

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Lafayette

PER CURIAM

This matter presents questions as to prematurity and/or prescription of the third party demand claims filed by R.S. Bernard and Associates, Inc. (“Bernard”) against Doug Ashy Building Materials, Inc. (“Doug Ashy”). For the reasons set forth herein, we remand to the district court for reconsideration of its rulings on the exceptions filed by Doug Ashy.

On April 22, 2019, Zach Bellard (“Plaintiff”) filed a petition for damages for personal injuries he allegedly sustained when a defective attic/ceiling joist broke and caused him to fall, on or about April 23, 2018, while working as a plumber on a construction project (the “Project”) involving renovations to a building located on the campus of The University of Louisiana at Lafayette (“ULL”). In the petition, as amended, Plaintiff named the following defendants: ATK Construction, LLC (“ATK”), Bernard, the Board of Supervisors for the University of Louisiana System, Garden City Construction Co., Inc., United Fire & Indemnity Company, and American Empire Surplus Lines Insurance Company (collectively, the “Defendants”). Among the allegations of Plaintiff’s petition included the assertion that employees at ATK selected, installed, and constructed the relevant attic/ceiling joist, and that Bernard was the general contractor during the phase when the framing of the building was performed, including the framing work performed by ATK as

subcontractor to Bernard's contract with ULL. Plaintiff alleged that his injuries were due to the fault and negligence of the Defendants and that, as a result of their fault and/or obligation to insure, Defendants are individually and solidarily liable to him. Relevant to the present issue, Plaintiff did not allege any contractual privity with the Defendants, including Bernard, or any other source of liability beyond negligence.

On April 1, 2021, over one year and seven months after Plaintiff filed his petition, Bernard filed a third party demand against Doug Ashy. Bernard alleged therein that on June 14, 2017, Bernard entered into a contract with ULL to furnish all labor, materials, equipment, transportation, supervision, permits, etc., necessary to complete "Phase I" renovations to the Project. In order to complete Phase I, Bernard entered into an agreement with ATK, as its subcontractor, to perform the framing and install the ceiling of the Project. Bernard alleged that Plaintiff sustained injuries while working as a plumber for Benny Prejean Service Co., Inc., during Phase II of the Project. Further, it was allegedly discovered that the joist that broke and caused Plaintiff's injury was rotten and/or had some other defect in the board and that the wood was purchased by Bernard from Doug Ashy.

As to liability to Plaintiff and to itself, Bernard asserted: (i) Bernard is entitled to a warranty against redhibitory vices in the wood sold by Doug Ashy under La. C.C. art. 2520, *et seq.*, (ii) Doug Ashy, as the manufacturer/seller of the allegedly defective wood, is responsible for damages in tort under the Louisiana Products Liability Act, La. R.S. 9:2800.51, and (iii) Bernard is not responsible for the alleged incident and is entitled to tort indemnity in this case.

Doug Ashy filed an Exception of Prematurity and an Exception of Prescription, asserting that: (i) the tort indemnity claim is premature because Bernard had not suffered a compensable loss – *i.e.*, Plaintiff had not obtained a judgment or collected on a judgment against it; and (ii) the claims for redhibition and products liability are prescribed because Bernard failed to file its third party demand within

90 days of Plaintiff's demand pursuant to La. C.C.P. art. 1041. Doug Ashy also filed an Exception of No Right and/or No Cause of Action. Following a hearing, the district court granted the Exception of Prematurity and Exception of Prescription and found the Exception of No Right and/or No Cause of Action to be moot as a result of its ruling.

The court of appeal reversed. *Bellard v. ATK Construction, LLC*, 2022-306 (La. App. 3 Cir. 10/26/22), 352 So. 3d 1052. It first emphasized that Doug Ashy was brought in by way of La. C.C.P. art. 1111, which provides that 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.” *Id.* at 1055 (emphasis added). The court opined that harsh consequences could attend the failure to bring in a third party, *see* La. C.C.P. art. 1113,¹ and accordingly construed La. C.C.P. art. 1111's language to permit Bernard to bring its tort indemnity claim. *Id.* As to prescription, the court cited this Court's ruling in *Reggio v. E.T.I.*, 2007-1433 (La. 12/12/08), 15 So. 3d 951, for the proposition that Bernard's tort indemnity claim could not prescribe because it does not begin to toll until Bernard is cast in judgment. *Id.* at 1057. We granted Doug Ashy's writ seeking review of the court of appeal's ruling. *Bellard v. ATfK Construction, LLC, et al.*, 22-1715 (La. 2/7/23), 254 So. 3d 662.

While both Doug Ashy and Bernard focus their arguments to this Court on prematurity and prescription of Bernard's third party claims, we observe it is questionable whether the facts alleged in the petition could ever support a third party claim for tort indemnity. As this Court recognized in *Nassif v. Sunrise Homes, Inc.*:

¹ La. C.C.P. art 1113 provides, in pertinent part:

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 apprise him that the suit had been brought.

An implied contract of indemnity arises only where the liability of the person seeking indemnification is solely constructive or derivative and only against one who, because of his act, has caused such constructive liability to be imposed. *Bewley Furniture Co., Inc. v. Maryland Cas. Co.*, 285 So.2d 216, 219 (La.1973). Thus, ***because the party seeking indemnification must be without fault, a weighing of the relative fault of tortfeasors has no place in the concept of indemnity.*** *Id.*

739 So. 2d 183, 185 (emphasis added). *See also Bewley Furniture Co. v. Maryland Cas. Co.*, 285 So. 2d 216, 219–20 (La. 1973) (“It has long been held in Louisiana that a party not actually at fault, whose liability results from the faults of others, may recover by way of indemnity from such others.”) (collecting cases). Under the principles of comparative fault in this state, a judgment against a named defendant in a suit for damages wherein the defendant is alleged to be liable to plaintiff solely due to its own negligence and/or fault can only arise if the defendant is at fault, regardless of whether other defendants are named or not named as parties to the suit. *See* La. C.C. art. 2323 (“ In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault ***of all persons*** causing or contributing to the injury, death, or loss shall be determined, ***regardless of whether the person is a party to the action or a nonparty.***”) (emphasis added). Furthermore, because a defendant can only be liable for its own share of comparative fault under La. C.C. art. 2324(B),² it cannot be cast in judgment for the fault of any other party or nonparty. Accordingly, a suit alleging liability of a defendant arising solely as a result of its own fault cannot support a defendant’s claim for tort indemnity.

In the instant case, Plaintiff makes no allegations in his petition, as amended, that Bernard is liable to him outside of Bernard’s negligence or fault. The petition sounds in tort, not contract. We accordingly remand to the district court to

² La. C.C. art. 2324(B) provides, in pertinent part:

A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person’s insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

reconsider Plaintiff's exceptions, including the Exception of No Right and/or No Cause of Action, in light of the foregoing. *Moreno v. Entergy Corp.*, 2010-2268 (La. 2/18/11), 64 So. 3d 761, 762 (a court may consider an exception of no cause or right of action on its own motion or *sua sponte*).

REMANDED.

SUPREME COURT OF LOUISIANA

No. 2022-C-01715

ZACH BELLARD

VERSUS

ATK CONSTRUCTION, LLC, ET AL

On Writ of Certiorari to the Court of Appeal, Third Circuit, Parish of Lafayette

Hughes, J., concurring.

The conundrum here is whether Bernard has a separate cause of action against Doug Ashy, or whether, at trial, Bernard simply puts on evidence to show that the fault in this matter lies with Doug Ashy. If the plaintiff chooses not to join Doug Ashy, and the trier of fact allocates most or all of the fault pursuant to Civil Code article 2323 to Doug Ashy, then so be it. Bernard is only liable for its own share of fault.

The main concern is the misapplication of Code of Civil Procedure article 1041. This procedural article is not a substantive rule of prescription. It provides only when a demand is not barred, as an exception to the rule; it does not provide a rule for when a cause of action is prescribed. Its purpose is to *extend* prescription when the main demand is filed at the 11th hour. It cannot be used to shorten a prescriptive period. For example, if the main demand was filed one month after the accident, and the incidental demand was filed six months later, it would be absurd to suggest the incidental demand was prescribed just because it was filed more than 90 days after the main demand, when prescription on the main demand had not yet run. Article 1041 only comes into play when the prescriptive period for the main

demand has run. The purpose of the article is to extend access to the court and avoid unfairness in a difficult time frame, not short-sheet litigants out of court.

Louisiana has fact pleading. It is the duty of the court to apply the appropriate law. Bernard may have a totally separate, non-derivative claim against Doug Ashy that is not dependent upon plaintiff's claim against Bernard. It may be solely for the cost of a defective piece of lumber, or perhaps additional construction costs related to the break-down of the joist. At this point we do not know when, how, or by whom the alleged defective joist was discovered. These facts are necessary to determine prescription.

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