IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2014-001685

Horry Electric Cooperative, Inc. ..... Appellant

vs.

South Carolina Public Service Authority and Southern Electric International, Inc., Defendants,

Of whom South Carolina Public Service Authority is the ..... Respondent

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APPELLANT'S INITIAL REPLY BRIEF

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HEC submits this brief in reply to Santee Cooper's Reply Brief.

(1) Santee Cooper argues that HEC had a duty to investigate the Good Cents program and had HEC investigated, it would have discovered the vapor barrier issue. Santee Cooper has argued that since HEC failed to conduct such investigation, it is not entitled to recover, *i.e.* HEC was negligent for failing to investigate and its negligence bars any recovery by HEC.

For purposes of the motion to dismiss, the allegations of HEC's Amended Complaint must be taken as true. HEC pled as follows:

> "8. **That, upon information and belief, the defendants represented through words, conduct and otherwise that participating new home Good Cents members would, by qualifying for the Good Cents Program, have better insulated and constructed houses and would benefit by receiving the Good Cents rate as well as by using less electricity because of the insulating requirements of the Good Cents Program.**
>
> 9. That, prior to Horry Electric's and South Carolina's entry into the said Agreement, it appears that Santee Cooper and Southern Electric knew use of vapor barrier which was required by the Good Cents Program may cause moisture problems in the coastal areas, as is shown by the attached letter dated October 8, 1986 and the attached letter dated October 22, 1986, marked as Exhibit B and Exhibit C respectively.
>
> 10. That the defendants failed to disclose the information contained in Exhibits B and C to Horry Electric and failed to advise Horry Electric that the vapor barrier should be a recommendation rather than a requirement.
>
> 11. **That the defendants did not disclose to the plaintiff any problem with the vapor barrier requirements of the Good Cents Program but instead South Carolina promoted the Good Cents Program as being an environmental friendly program and a win-win situation for the participating Good Cents members.**
>
> 12. That Horry Electric has been sued in the civil action titled *Ronnie Ferrell, Tammy Vance and David Montorio, on behalf of themselves and all others similarly situated v. Horry Electric Cooperative,* Civil Action No. 2011-CP-26-1266, a copy of the Complaint being attached hereto as Exhibit D.
>
> 13. That the Good Cents Program was a pass through program

and Santee Cooper had the right to audit for Horry Electric's compliance with the requirements of the program.

14. That the fault alleged by the plaintiff in Civil Action No. 2011-CP-26-1266 is imputed fault to Horry Electric, which merely offered its members participation in the pass through Good Cents Program.

15. That a special relationship existed between Horry Electric and the defendants, given the contractual relationships and Horry Electric's participation in a pass through program, which upon information and belief benefits the defendants only."

Whether HEC had a duty to investigate is a question of law for the Court. *See Doe v. Greenville County Sch. Dist.,* 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007) (recognizing that whether a duty exists is a question of law for the courts). This Court must decide whether, under these allegations, there was a duty to investigate and whether the question of a duty should be decided on a motion to dismiss or after a full airing of the facts. However, even if the Court decides that HEC did have a duty to investigate and failed to do so and was negligent, HEC's negligence would only affect its negligence cause of action. Comparative negligence is not a defense to HEC's other causes of action.

(2) Much of Santee Cooper's argument is spent vilifying HEC and its counsel and criticizing their handling of the underlying action. Much of this argument is based upon matters outside the record and should not be considered. Further, Santee Cooper's criticisms are not defenses to HEC's causes of action. Much of Santee Cooper's argument is wrong. By way of example, Santee Cooper argues that HEC failed to submit and/or obtain an order on the statute of repose issue in the underlying action. Actually, proposed orders on the statute of repose were submitted by both sides but Judge Culbertson never signed either order. Furthermore, he issued an order agreeing to rule on pretrial motions based upon arguments in writing. (Order dated __) Multiple motions and memorandums

were filed but Judge Culbertson never ruled on any of these motions. A lawyer cannot make the judge do his job. A lawyer puts his client at risk in pressing the judge for an order. This is really an interesting twist. Santee Cooper who misled its customer, HEC, wants to make HEC out to be the bad guy. Santee Cooper apparently believes that if it is successful in vilifying HEC and its counsel, doing so would somehow divert the Court's attention from the motion to dismiss and whether it should have been granted. HEC will resist responding to in kind and will trust the Court not to be diverted from the issues related to the motion to dismiss.

(3) Santee Cooper, in Argument I. A, has argued that the circuit court judge did not abuse his discretion in refusing to continue the hearing when final approval of the class action settlement was scheduled to be heard some three days later. An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Fields v. Reg'l Med. Ctr. Orangeburg,* 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). The circuit court judge dismissed the claim for equitable indemnification as not being ripe since the class action settlement had not yet been approved and payments made. However, HEC had other damages (litigation fees and expenses in the underlying case) and had pled those other damages. See Amended Complaint ¶32. Those expenses include the defense costs in defending the underlying action. See paragraph 9 hereinbelow, Thus, HEC had damages sufficient to support a claim and the judge's decision was based on an error of law.

There is nothing that requires a party to have all damages quantified at the time suit is commenced. Santee Cooper has cited no authority to support its argument. To have a

viable claim, a party has to have some damages at the time suit is commenced. The circuit court judge knew the settlement had been approved prior to issuing his order but he issued his order anyway. In other words, he dismissed the equitable indemnification claim because the settlement had not been approved, even though he knew it had been approved prior to issuing his order.

(4) Santee Cooper, in Arguments I. B and C, has argued that there was no error in dismissing the equitable indemnification claim without prejudice. According to Santee Cooper, even if it is error, the action has been re-filed and the error was therefore harmless. However, HEC was harmed by having to bring the new action. This action was filed on January 23, 2013. Thus, those members whose homes were substantially complete prior to January 23, 2000 are barred by the Statute of Repose. The new action was filed on October 7, 2014. Those members whose homes were substantially complete prior to October 7, 2001 are barred by the Statute of Repose in the re-filed action. Therefore, if the circuit court judge's order is affirmed and HEC has to proceed on the re-filed action that was filed on October 7, 2014, HEC will lose the right to recover by way of indemnification for payments made to members whose homes were completed between January 23, 2000 and October 7, 2001.

(5) Santee Cooper, in Argument II. A., has argued:

> "The circuit court correctly determined that the equitable indemnification claim was not ripe because HEC had not yet suffered damages from the settlement of the *Montorio* action."

There is no such specific finding by the circuit court judge. However, even if there was, such a ruling would be an error of law. HEC incurred defense costs in the underlying action,

which costs are recoverable from Santee Cooper. By the time Judge Young ruled, a written order approving the settlement agreement had been entered that obligated HEC to make payments of attorney's fees, costs and settlement payments.

(6) Santee Cooper, in Argument II. B., has argued:

> "Approval of the *Montorio* settlement did not render HEC equitable indemnification claim ripe because the effective date would follow approval, and payment would follow the effective date."

Since HEC had other damages including its defense costs in defending the underlying action, Santee Cooper's argument is just wrong. To the extent Santee Cooper's argument is that there was some question as to whether the Montorio settlement agreement would be approved and implemented, that denies reality. The reality is that settlement was a done deal prior to the hearing to have it approved. The parties have signed a written settlement agreement which had received preliminary approval. Under the settlement agreement, class members could get $2,000.00 by simply filling out and filing a form. The lawyers were to get almost $1,000,000.00 as their fee. No objections had been filed within the time to object to the final settlement and the approval of the settlement went through without a hitch. Once the settlement agreement was finally approved, HEC was obligated to pay.

(7) Santee Cooper argued:

> "South Carolina law does not allow the recovery of damages based on a projection that the plaintiff may eventually incur expenses, so until HEC actually incurred damages based on its obligation to pay the *Montorio* settlement, its claim for equitable indemnification in this action would remain unripe."

This is just dead wrong. Damages are frequently projected. Examples include life care

plans, economic losses in wrongful death cases, and future damages in contract cases. There is a charge entitled §13-11, Damages – Future Damages in Ralph King Anderson, Jr.'s book, South Carolina Requests to Charge – Civil.

(8) Santee Cooper argues on page 20 of its brief that this is not a case involving third party practice. However, this is the same type action that could be brought as a third party complaint. HEC tried to assert a third party complaint in the underlying action. When that attempt was unsuccessful, HEC brought a separate action asserting claims that HEC could have and would have asserted in a third party complaint. Santee Cooper concedes that the third party complaint could be filed to recover all or part of HEC's claims against Santee Cooper, which would not be subject to dismissal as being unripe. In the same breath, Santee Cooper argues that the identical claims pursued in a separate action would be unripe. No authority is cited by Santee Cooper as a basis for this contradictory argument by Santee Cooper.

(9) Santee Cooper, on page 21 of its brief, makes the following argument:

> "Finally, to the extent HEC contends that its own attorneys' fees and costs represented damages ripe for adjudication, such fees and costs were not recoverable. HEC argues that the equitable indemnification claim contains allegations of concrete damages because HEC alleged that it had incurred attorneys' fees and costs in defending the *Montorio* action. (Brief of HEC at §V pp.10-11; *see also* Am. Compl. ¶¶17-18, 32; R.__.) However, HEC failed to allege any basis for an award of attorneys' fees, and no statute or contract authorizing the recovery of attorneys' fees exists. . . . To the extent that HEC sought any attorneys' fees already incurred, they were not recoverable as a matter of law."

Here again, Santee Cooper is dead wrong. In *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 414 S.E.2d 118 (1992), the Supreme Court stated:

> "This Court has long recognized the principle of equitable indemnification.

See e.g. Stuck v. Pioneer Loggins Machinery, Inc., 279 S.C. 22, 301 S.E.2d 552 (1983); *Addy v. Bolton,* 257 S.C. 28, 183 S.E.2d 708 (1971); *South Carolina Electric & Gas Co. v. Utilities Construction Co.,* 244 S.C. 79, 135 S.E.2d 613 (1964). The 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. *See Addy v. Bolton,* 257 S.C. 28, 183 S.E.2d 708 (1971); *South Carolina Electric & Gas Co. v. Utilities Construction Co.,* 244 S.C. 79, 135 S.E.2d 613 (1964). The principle of equitable indemnity including attorney fees and costs is not new to American law. In the early part of this century, the Maryland Court of Appeals wrote:

> The general rule is that costs and expenses of litigation, other than the usual and ordinary court costs, are not recoverable in an action for damages, nor are such costs even recoverable in a subsequent action; but, where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relations with others as make it necessary to incur expenses to protect his interest, such costs and expenses should be treated as the legal consequences of the original act.

McGaw v. Acker, Merrall & Condit Co., 111 Md. 153, 73 A. 731 (1909)."

(10) In Argument II. C. 1., Santee Cooper has argued:

"Ripeness may be raised *sua sponte.*"

In Argument II. C. 2., Santee Cooper has argued:

> "HEC was on notice of and had an opportunity to address the ripeness issue. ... Having sought a continuance on the grounds that Santee Cooper would argue that the action was not ripe. HEC cannot credibly contend that Santee Cooper never raised the issue."

Santee Cooper did not raise the issue of ripeness in its motion to dismiss. If it had done so, HEC would have received a written motion outlining the grounds for the motion, as required by Rule 7, SCRCP. In addition, no hearing would have been held for at least 10 days after the motion was filed. This would have given HEC time to study and brief the issue. Here, the Court raised the issue of ripeness, but gave HEC no notice and no

opportunity to study or brief the issue of ripeness. If the Court was going to raise ripeness *sua sponte*, the Court should have notified the parties and allowed a briefing period and oral argument. Since Santee Cooper had not raised ripeness by a motion, HEC had no reason to believe that the circuit court judge would have taken the equitable indemnification issue up *sua sponte*.

(11) Santee Cooper, in Argument III, argued as follows:

> "The circuit court correctly held that all of the claims other than equitable indemnification were barred by the construction statute of repose. Although the circuit court did not expressly dismiss the equitable indemnification claim for this reason, the record supports dismissal of that claim as also barred by the statute of repose. *See* Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000) (stating that an appellate court may affirm the decision of the trial court on an additional sustaining ground for any reason appearing in the record on appeal). Accordingly, this Court should affirm the decision of the circuit court to dismiss the equitable indemnification claim."

(12) The circuit court judge, in holding that the Statute of Repose barred claims other than the equitable indemnification claim, really went astray. The applicable statute of repose bars claims "brought more than thirteen years after substantial completion of such an improvement". S.C. Code Ann. §15-3-644. Santee Cooper did not even move to dismiss on the thirteen year statute. Santee Cooper, on page 31, argued:

> "HEC argues that the circuit court erred in dismissing HEC's causes of action other than for equitable indemnity as barred by the statute of repose because 'this ground was not raised in Santee Cooper's motion to dismiss the other causes of action.' (Brief of HEC at §VIII, p.13.) This argument is without merit. Santee Cooper's first reason for dismissal in its Motion to Dismiss was that 'HEC's Amended Complaint is barred by the statute of repose.' (Mot. Dismiss Am. Compl. At p.4; R.__.) Although the final sentence of the argument contained in the Motion to Dismiss references the claim for equitable indemnity as being barred by the statute of repose, HEC's interpretation is myopic."

All the Court has to do is to determine who is right on this issue is look at what Santee Cooper said in its memorandum. Santee Cooper argued:

> "HEC's Amended Complaint is barred by the statute of repose. Based on HEC's Amended Complaint and the documents attached to it, the homes at issue were built from 1988 through 2003. The statute of repose bars claims arising more than 8 years prior to commencement of the action. *See* S.C. Code Ann. §§15-3-640 (barring 'actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property' if brought more than 8 years 'after substantial completion of the improvement'); 15-3-640(4) (including within scope of statute actions 'to recover damages for economic or monetary loss'); and 15-3-640(6) (including within scope of statute actions for 'indemnification for damages sustained on account of an action described in this section'). *See also Posey v. Bldg. Materials Corp. of Am. (In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prods. Liab. Litig.),* MDL No. 8:11-mn-02000-JMC, CA No.: 3:11-cv-02784-JMC, 2013 U.S. Dist. LEXIS 44137, at 12 (D.S.C. Mar. 27, 2013) (finding complaint filed in 2011 based on shingle replacement in 1999 was 'well beyond the eight-year statute of repose,' but allowing claim to proceed because plaintiff showed repose period had been extended by certain warranties), and *Langley v. Pierce,* 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993), *quoted in Florence Cty. Sch. Dist. V. Interkal, Inc.,* 348 S.C. 446, 453, 559 S.E.2d 866 , 869 (Ct. App. 2002) ('[A] statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body.') The Complaint was not filed until January 23, 2013, well after the 8-year statute of repose period. HEC's claim for equitable indemnity is thus barred by the statute of repose."

No analysis is made related to the thirteen year statute of repose. No mention is made of the thirteen year statute of limitations. There is no discussion of the thirteen year statute of repose. If Santee Cooper was going to move to dismiss based on the thirteen year statute of limitations, he was obligated to state that in a written motion. See Rule 7(b)(1), SCRCP. It is obvious that Santee Cooper did not move on the thirteen year statute. Santee Cooper did not raise the thirteen year statute of limitations and it was error for the circuit court judge to rule on it.

(13) Santee Cooper, in Argument V. A., has argued:

> "While HEC makes the conclusory assertion that it is without fault and is being sued only on a theory of imputed liability, this is not a well-pled factual allegation but is instead an unsupported legal conclusion."

However, HEC made no "unsupported legal conclusions". What HEC said in its Amended Complaint was:

> "16. That the plaintiff is not liable for causing damage to the plaintiffs in Civil Action No. 2011-CP-26-1266 and upon information and belief, the plaintiff will be exonerated from any liability for those damages.
>
> 17. That Horry Electric has incurred attorney's fees and costs in defending Civil Action No. 2011-CP-26-1266 for which the defendants are liable.
>
> 18. That, to the extent Horry Electric is exonerated from liability to the plaintiffs in Civil Action No. 2011-CP-26-1266, Horry Electric is informed and believes that the defendants are or may be liable to it for the expenses including attorney's fees and costs and any settlement costs incurred by Horry Electric in protecting its interest in Civil Action No. 2011-CP-26-1266."

Santee Cooper cited no authority for this argument that HEC had made "unsupported legal conclusions". The question of fault is a factual question. The question of fault must be submitted and decided by the jury. After all, the Court does not decide who ran the red light and is liable, the jury does.

(14) The statute of limitations cannot bar HEC's claims for negligence, breach of express and implied warranty and civil conspiracy. HEC had no valid cause of action to assert until the underlying action was commenced and HEC began to incur damages in the form of defense costs.

CONCLUSION

For the reasons stated in HEC's Brief and Reply Brief, the Orders of Judge Young should be reversed and HEC should be permitted to proceed against Santee Cooper on all causes of action.

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March 2, 2015

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PROOF OF SERVICE

I, Sherry W. Wise, of Pope D. Johnson, III, Attorney at Law, hereby certify that I have served B. Rush Smith, III, attorney for Respondent, with the following pleadings by mailing a copy of same, postage prepaid and return address clearly indicated, to him at the following address this 2nd day of March, 2015.

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Appellant's Initial Reply Brief

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March 2, 2015

(Via Hand Delivery)
Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
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RE: Horry Electric Cooperative, Inc. v. South Carolina Public Service Authority
Appellate Case No. 2014-001685

Dear Ms. Kitchings:

Enclosed herewith are the original and a copy of the Appellant's Initial Reply Brief regarding the above-referenced action. Please file the original and clock and return the additional copy to me.

With a copy of this letter to B. Rush Smith, III, attorney for the Respondent, I am serving a copy of the Initial Reply Brief upon him.

Sincerely,

Pope D. Johnson, III

PDJIII/sww
Enclosures

cc: B. Rush Smith, III, Esquire