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CONSTRUCTION LAW UPDATE - July 2022

The ***Construction Law Update*** is published by Pugh Accardo for the benefit of its clients having an interest in the construction industry. It includes discussions of Louisiana state and federal court decisions, and legislative developments concerning construction-related matters. For further information on the decisions and legislative developments covered in this newsletter, please contact **John Stewart, Jr.** at *jstewart@pugh-law.com* or (504) 799-4529. Licensed in Louisiana, Texas and Colorado.

PUBLIC WORKS ACT AMENDED CONCERNING THE LOUISIANA UNIFORM BID FORM

The legislature during its 2022 session amended the Public Works Act to provide that if a public entity adds any additional requirements for information to the Uniform Bid Form, unless mandated by state or federal requirements, the requirements shall be void and not considered in the award of the contract. Further, the legislature amended the time when a bidder's information shall be available upon request to no sooner than 9 working days following the bid opening or recommendation of award by the public entity or the design professional, whichever occurs first. The original time limit was 14 days. Acts 2022, No. 774.

TIME FOR PROVIDING PUNCH LISTS FOR PUBLIC PROJECTS

The Louisiana legislature during its 2022 session amended the Public Works Act to provide that punch lists for public projects, if the public entity occupies or uses the public work, shall be furnished to the contractor within 10 days of substantial completion. Within 14 days of providing the punch list to the contractor, the punch list may be amended by the design professional or the public entity. Acts 2022, No. 756.

SUBMISSION OF PRODUCTS FOR PRIOR APPROVAL ON PUBLIC CONTRACTS

The Louisiana legislature during its 2022 session revised the requirements for submission of particular products for approval other than products specified in the contract documents. The revised statute provides that if the prime design professional fails to respond within 7 working days prior to the opening of bids, the submitted product shall be considered approved. Acts 2022, No. 424.

PREJUDICE AS A CONDITION FOR FINDING WAIVER OF ARBITRATION

In a matter involving alleged violations of the Fair Labor Standards Act, the United States Supreme Court considered whether a finding of prejudice to the opposing party is required in order to find that a party has waived its right to arbitration in engaging in litigation for a period of time instead of arbitrating as required by contract. The Court held prejudice is not a requirement for finding waiver. That issue is decided by applying the usual federal rules of waiver which do not include a prejudice requirement. Prejudice is not a condition for finding that a party, by litigating too long, waived its right to stay arbitration or compel arbitration under the Federal Arbitration Act. *Morgan v. Sundance, Inc.,* 142 S.Ct. 1708 (2022). It will be interesting to see if state courts will apply the same rule.

COLLECTION OF A JUDGMENT AGAINST A PUBLIC BODY

The U.S. Court of Appeals for the Fifth Circuit considered an attempt by plaintiffs to obtain payment of a judgment against the New Orleans Sewerage & Water Board in litigation involving the Southeast Louisiana Urban Flood Control Program (SELA). The plaintiffs who were property owners along the path of the project obtained final judgments in state court against the Sewerage & Water Board for a combined total of $10.5 million attempted to obtain payment through a seizure of Sewerage and Water Board property pursuant to a §1983 suit in federal district court. They contended the Sewerage & Water Board's failure to comply with the state court's judgments was a violation of their due process rights and their rights to just compensation for a taking under the Fifth Amendment. The district court found there is no property right to timely payment on a judgment and denied relief. The plaintiffs appealed.

The Fifth Circuit stated it understood the plaintiffs' frustration. Nevertheless, rejecting arguments raised by the plaintiffs and following extensive jurisprudence, the court affirmed the lower court judgment. The Louisiana Constitution bars the seizure of public funds or property to satisfy a judgment against the state or its political subdivisions. Instead, the legislature or a political subdivision must make a specific appropriation in order to satisfy the judgment. Since Louisiana courts lack the power to force another branch of government to make an appropriation, a prevailing plaintiff has no judicial mechanism to compel the defendant to pay. Without any judicial means to recover, plaintiffs are compelled to rely exclusively on the generosity of the judgment debtor. The plaintiffs' case before the district court turned entirely on a purported property interest not recognized in Fifth Amendment jurisprudence. *Ariyan, Incorporated v. Sewerage & Water Board of New Orleans,* 29 Fed.4th 226 (5th Cir. 2022).

CONTRACTOR NOT LIABLE FOR TRIP AND FALL

The Louisiana Court of Appeal for the Third Circuit upheld summary judgment in favor of a contractor finding the evidence submitted by the contractor was persuasive in a trip and fall accident at a construction site. The plaintiff argued although warning signs were placed advising her and other pedestrians of construction in the area, the signs would not have advised there was a tripping hazard. She contended the contractor owed a duty to further warn of the presence of a tripping hazard.

The court held the contractor properly placed construction warning signs ahead of and in the construction zone and these warning signs and the construction activity were obvious and apparent. Moreover, because the defendant was neither required by its contract to provide a pedestrian walkway, and no such area existed at the site in the area where plaintiff fell, nor was it shown to have knowledge of pedestrian activity in the area, it had no duty to further warn of the hazard. The plaintiff who chose to briskly walk through a construction zone, had a duty to see that which she should have seen and was bound to observe whether the chosen path was clear. Summary judgment in favor of the contractor was affirmed. *Smith v. State of Louisiana Through the Department of Transportation and Development*, 2021-192 (La.App. 3 Cir. 3/2/22), ___ So.3d ___, 2022 WL 619846.

PROVISION IN AN INSURANCE POLICY REQUIRING THAT THE INSURED BE NAMED AN ADDITIONAL INSURED ENFORCED

An individual employed by a subcontractor was injured by an individual driving a vehicle who was employed by another subcontractor who was an independent contractor. The injured individual sued the general contractor and its insurer for negligence. The general contractor's policy provided that it, as a condition precedent to coverage for any claims for injury or damage based in whole or in part, upon work performed by independent contractors, must have, prior to the start of the work and the date of the occurrence giving rise to the claim, an indemnity agreement from the independent contractor holding the insured harmless for all liabilities and costs of defense arising from the work of the independent contractor, and must have obtained a certificate of insurance from the independent contractor indicating the insured is named as an additional insured under the independent contractor's policy. The general contractor did not comply with these conditions.

The insurer moved for summary judgment to dismiss the claims against it contending they were excluded under the foregoing policy provisions. The injured individual argued the policy provisions were prohibited by L.R.S. 9:2780.1(B) which declares invalid provisions in construction agreements that require an indemnitor be liable for an indemnitee's own negligence or intentional acts or omissions.

The court of appeal quoted the following language of subjection C:

> [N]othing in this Section shall be construed to prevent the indemnitee from requiring the indemnitor to provide proof of insurance for obligations covered by the contract.

It found while L.R.S. 9:2780.1(B) prohibits certain indemnity agreements, subsection (C) expressly permits additional insured contracts. The court of appeal held the general contractor did not fulfill the requirements of the policy.

The motion for summary judgment of the insurer was granted, and the claims against it were dismissed. *Baudoin v. American Glass and Mirror Works, Inc.,* 20-541 (La.App. 3 Cir. 2/2/22), ___ So.3d ___, 2022 WL 303258, *writ denied,* 2022-00673 (La. 6/22/22), ___ So.3d ___, 2022 WL 2237338.

REJECTION OF A PUBLIC WORKS BID

Although the most current business records for an entity on file with the Secretary of State were sufficient to establish his signatory authority, the apparent low bidder for a public works project failed to include in its bid written evidence of the authority of its representative to sign the bid on its behalf. The Louisiana First circuit Court of appeal affirmed the relief granted by the trial court enjoining the public entity, its president and the apparent low bidder from entering into a contract for the project. *Boone Services, LLC v. Ascension Parish Government,* 2021-0524 (La.App. 1 Cir. 12/30 /21), ___ So.3d ___, 2021 WL 6329803.

UNLICENSED CONTRACTOR NOT ENTITLED TO SUE FOR BREACH OF CONTRACT

ServPro executed a contract with Glad Tidings for ServPro to perform hurricane damage remedial work. Glad Tidings paid ServPro for part of its work, but not all that was due under the contract. ServPro sued to recover the unpaid funds.

ServPro was not licensed at the time it entered into the contract. In the original complaint, ServPro described the work it performed. In an amended complaint, it removed any mention that it performed contracting services or mold remediation. Glad Tidings moved to dismiss the lawsuit since, at the time the parties executed the contract, ServPro was not licsensed as a contractor, and the contract between the parties was absolutely null. ServPro argued the mitigation work it performed was dewatering which was excepted from the statutory requirement for licensing. The court found ServPro was a contractor as defined by the statute, and as an unlicensed contractor, its contract with Glad Tidings was a nullity. The breach of contract claim was dismissed.

ServPro asserted additional claims for estoppel/detrimental reliance and unjust enrichment. Glad Tidings represented it intended to file a subsequent motion to dismiss to fully address those theories of recovery. The court pretermitted addressing these causes of action until the parties' arguments had been fully briefed. *RACM, LLC v. Glad Tidings Assembly of God Church of Lake Charles*, 03580 (W.D. La. 1/7/22), 2022 WL 90160.

BIDDER FOR PUBLIC WORKS PROJECT FOUND NON-RESPONSIBLE

Lamar Contractors, L.L.C. submitted the lowest bid for a City of New Orleans project. The bid documents required bidders to submit documentation of its good faith efforts to comply with a DBE goal of 35%. The failure to submit documentation would be considered non-responsive. Lamar's initial post-bid documentation showing it solicited ten DBEs to perform the work was inadequate. The City requested that Lamar resubmit the section of the post-bid documents to list all DBEs which were contacted. Lamar submitted an updated DBE form that included a total of 25 DBEs contacted. The City still was of the opinion Lamar's good faith efforts were insufficient, and determined Lamar did not demonstrate the minimum good faith effort and was not responsive to the bid requirements. An informal hearing on Lamar's responsibility was held. The hearing officer found the City was successful in proving that Lamar was not a responsible bidder. Lamar sued. The district court denied its petition for a preliminary injunction and granted the City's motion for summary judgment. Lamar appealed.

The court of appeal held that an initial determination of whether a bidder is responsive is purely ministerial. The public entity must ensure that the bidder has met each and every post-bid requirement and has no ability to waive discrepancies. An apparent low bidder is non-responsive when it does not submit the proper information or documentation as required by the bidding documents within the specified period of time after the bid is opened. A non-responsive bidder has no right to an administrative hearing. The decision to determine whether a bidder is responsible is discretionary.

Lamar did not dispute that its efforts prior to the hearing were insufficient to demonstrate its good faith efforts to meet the City's DBE goal. Rather, Lamar attempted to argue it was somehow denied due process and not afforded an opportunity for a hearing. The informal hearing was held with both the City and Lamar represented. The parties were given the opportunity to present oral arguments, evidence, witness testimony and to cross examine witnesses. However, the court found there was nothing presented at the hearing which refuted the fact Lamar's bid was not responsible because it failed to provide sufficient evidence prior to the City's decision. The court held the City was vested with the power and wide discretion to determine the responsibility of a bidder in awarding a public bid. The court should not substitute its judgment for the good faith judgment of the City. The duty of the court is to determine whether the City acted in a fair and legal manner and not arbitrary in disqualifying a bidder as non-responsible.

There was no evidence in the record to support the position the City's decision to reject Lamar as a non-responsible bidder was arbitrary, unfair or contrary to law. The court of appeal held the denial of Lamar's preliminary injunction and the granting of the City's motion for

summary judgment were proper. *Lamar Contractors, L.L.C. v. City of New Orleans*, 2021-0489 (La.App. 4 Cir. 12/15/21), 334 So.3d 870.

CLAIM FOR FAULTY CONSTRUCTION WORK PRESCRIBED

Leonard A. Robinson and Peggy M. Robinson sued Wendell Hall and W.H. Hall Construction contending they entered into a contract with Mr. Hall to complete repairs on their home caused by an August 2008 storm. They asserted that after a mild storm in 2012 they noticed indications Hall's repair work might have been defective, and requested that Hall fully correct his workmanship. Another storm occurred in 2016. The Robinsons contended their insurance company refused to cover the loss or repair the home as a result of Hall's defective workmanship. They sued Hall in 2017.

Hall Construction filed an exception representing the claims were perempted under L.R.S. 9:2772 and prescribed under Civil Code art. 3492. The basis for the exception of peremption was the lawsuit was filed more than five years after the Robinsons occupied or took possession of the improvement. The statute allows for peremption based upon occupancy or possession, in whole or in part, when suit has been filed more than five years after the improvement has been occupied by the owner when acceptance of the work has not been filed in the mortgage office within six months from the date of occupancy or possession. The court found the petition did not allege the date the acceptance was recorded or the date of occupancy, and the claims were not clearly perempted on the face of the petition. There was no evidence as to acceptance or date of occupancy. The claims were not perempted.

The court, however, found the claims were prescribed under C.C. art. 3493 which provides that for damage caused to immovable property, the one-year prescriptive period for torts of art. 3492 commences on the date the owner of the immovable acquired or should have acquired knowledge of the damage. The commencement of prescription is triggered by the actual or constructive knowledge of damage. The Robinsons acknowledged in the petition they were aware Hall's repair work might be defective in 2012 and certainly by 2015, more than one year prior to the filing of the petition for damages in 2017. The Robinsons' petition was prescribed on its face. Further, the Robinsons introduced no evidence at the hearing to prove that their claims were not prescribed. The judgment of the trial court sustaining the exception of prescription was affirmed. *Robinson v. Hall*, 2021-0393 (La.App. 1 Cir. 2/25/22), __ So.3d ___, 2022 WL 575035.
The court of appeal apparently treated the alleged failure of Hall to properly perform its work as a tort, and not a contractual obligation which would be subject to a ten-year prescriptive period.

REJECTION OF A PUBLIC BID UPHELD

A bid packet was submitted by Lathan Construction, LLC for a public works project advertised by the City of Gonzales. The bid form identified the bidder as Willie Lathan and was signed by Willie Lathan. The name of the authorized signatory of the bidder was identified as Willie Lathan with his title as "owner." Lathan Construction, LLC was not mentioned or identified anywhere on the form. Lathan Construction was properly licensed by the Louisiana State

Licensing Board for Contractors, Willie Lathan was not. The City of Gonzales rejected the bid. Lathan sued for injunctive relief which was denied by the trial court. Both Willie Lathan and Lathan Construction, LLC appealed.

Lathan argued it was of no consequence that the bid form was submitted under the name of Willie Lathan instead of Lathan Construction, LLC because Mr. Lathan was the sole owner of Lathan Construction, LLC and had the authority to sign and submit the bid. The court of appeal held while Lathan ostensibly established that Willie Lathan was authorized to sign a bid on behalf of Lathan Construction, LLC, that was not determinative of the issue presented, i.e., whether plaintiffs violated a prohibitory law by submitting a bid in a name other than the name found in the official records of the Licensing Board for Contractors. The court of appeal held plaintiffs violated applicable law in submitting a bid in the name of Willie Lathan which is a name other than the name found in the official records of the Licensing Board rendering the bid non-responsive. Dismissal of Lathan's petition for a temporary restraining order and preliminary and permanent injunctions, mandamus relief and declaratory judgment by the trial court was affirmed. *Willie Lathan v. City of Gonzales*, 2021-0825 (La.App. 1 Cir. 2/25/22), __So.3d ___, 2022 WL 575049.

RIGHT TO INDEMNITY

The United States District Court for the Western District of Louisiana held, as a general rule, a party seeking indemnity for a settlement must show actual liability to recover. An exception to the rule is that the indemnitee need show only potential, rather than actual, liability where the action is based on a written contract. An indemnitee also only need show potential liability if the defendant tenders the defense of the action to the indemnitor. *Weyerhaeuser Co. v. Simsboro Coating Services, LLC*, 00905 (W.D. La. 3/1/22), 2022 WL 819559, and (W.D. La. 3/16/22), 2022 WL 614648.

BREACH OF CONTRACT AS A DEFENSE AND AN EXCUSE FOR NON-PERFORMANCE

The United States Court of Appeals for the Fifth Circuit held it is true that where one party substantially breaches a contract, the other party has a defense and an excuse for non-performance. It does not follow, however, that one party's breach excuses the other party from the contract's dispute-resolution provisions. *Parkcrest Builders, LLC v. Liberty Mutual Insurance Company*, 26 F.4th 691 (2022).

APPLICATION OF THE DOCTRINE OF UNCLEAN HANDS

The Louisiana Court of Appeal for the Fifth Circuit in a matter involving oil and gas exploration and production held that the application of the doctrine of unclean hands as a defense to a claim for damages is an equitable doctrine. La.C.C. art. 4 requires courts to apply equitable concepts only when no legislation or custom exists to govern a situation. La.C.C. art. 2323 mandates the allocation of fault. Because legislation existed to address the matter at hand, the

court found that even if the conduct of the defendant corporation's president is imputed to the corporation, the conduct would not serve as a bar to recovery as a matter of law, but rather would be subject to the law of comparative fault of C.C. art. 2323. *Palowsky v. Cork,* 21-435 (La.App. 5 Cir. 3/16/22), 337 So.3d 550, *writ denied*, 2022-00646 (La.6/8/22), ___ So.3d ___, 2022 WL 2062966.

CLAIMS FOR DAMAGES

In considering various contractual claims for damages of a contractor against an owner of a project, the Louisiana Fourth Circuit Court of Appeal held that the omission of an LLC abbreviation after the owner's name in the construction contract when the company was, in fact, a limited liability company, was a misnomer, and had no effect upon the contractor's claim against the LLC. Further, the failure to identify the owner in change orders as an LLC also had no effect on the claims against the limited liability company. The court found change orders, by definition, do not change the identity of the parties to a standard AIA construction contract. Finally, the contractor's contractual claims against the architect were not viable. There was no privity of contract between the contractor and the architect, and the provisions of the construction contract and the architect agreement precluded the creation of a contractual relationship between them. *DLN Holdings, L.L.C. v. Keith Guglielmo,* 2021-0640 (La.App. 4 Cir. 6/29/22), __ So.3d ___, 2022 WL 2339094.

COMPONENT PARTS OF IMMOVABLES ARE IMMOVABLES FOR PURPOSES OF L.R.S. 9:2772

L.R.S. 9:2772 applies to the construction of immovables and improvements to immovable property. In a matter involving the installation of backup emergency generators for several healthcare facilities, the Louisiana Second Circuit Court of Appeal held the generators became parts of the electrical system for the nursing homes. Further, a purchaser for the nursing homes would expect the generators to be conveyed in the sale. The generators were critical to the continuing operation of the healthcare facilities when the original systems failed. Claims involving the installation of the generators peremption were subject to L.R.S. 9:2772. *Management Group Four v. L B Electric, L.L.C.,* 54-550 (La.App. 2 Cir. 6/29/22), ___ So.3d ___, 2022 WL 2335647.

ARBITRATION AWARD CONFIRMED DESPITE THE ALLEGATION THE ARBITRATOR MISINTERPRETED THE CONTRACT

An arbitrator awarded attorneys fees, costs and expenses, as well as damages. The claimant sought confirmation of the arbitration award. The losing party contended the arbitrator misinterpreted the agreement between the parties, arguing court costs, attorneys fees and expenses could only be awarded to the prevailing party. Since the claimant was awarded only a portion of the damages sought, the losing party maintained the claimant did not receive substantially the relief denied, and was not, therefore, the prevailing party, and the award should

not be confirmed. The district court determined the arbitrator had exceeded his authority in awarding attorneys fees. The claimant appealed.

The First Circuit Court of Appeal reversed the district court decision and found the partial denial of the total relief requested did not change the arbitrator's decision that the claimant was the prevailing party. The grounds for challenging arbitration awards that are fairly and honestly made do not include errors of law or fact. An allegation that the arbitrator misinterpreted a contract provision is not subject to judicial correction. District court judges are not entitled to substitute their judgment for that of an arbitrator chosen by the parties. When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's improvident, and even silly, fact finding does not provide a basis for a reviewing court to refuse to enforce the award. The arbitrator's award was confirmed. *Revelry Food Group, LLC v. Nguyen Property Investment, LLC*, 2021-0881 (La.App. 1 Cir. 2/25/22), __ So.3d ___, 2022 WL 575051.

TRIAL OF THE ISSUE OF FRAUD AS AN EXCEPTION TO THE APPLICATION OF L.R.S. 9:2772

The district court granted an exception of peremption under L.R.S. 9:2772 to the claims against a construction company. The statute provides a five-year period for claims against contractors. The claimant alleged fraud as an exception to the statute. The trial court sustained the exception and stated "if there was a necessity for any issues regarding fraud or attorneys fees, it would be handled at a later date."

L.R.S. 9:2772(H)(2), requires that if fraud is alleged, that issue shall be decided by trial separate from and prior to the trial of any or all other issues. If fraud is alleged in non-residential contracts in an action commenced after the expiration of the five-year period, and the court determines that the allegation was brought in bad faith and no fraud is found, then the party who made the allegation shall be liable for court costs and attorneys fees. If fraud is proven then the party that has committed the fraud shall be liable for court costs and attorneys fees.

The court of appeal held the provisions of the statute were clear and unambiguous. The allegations of fraud were to be tried separate from and prior to the trial of any and all other matters. Accordingly, the trial court legally erred in granting the exception while deferring the issue of fraud. The trial court's decision was vacated, and the matter remanded to the trial court for proceedings consistent with the opinion. *Whitney Bank v. Rayford*, 2021-0406 (La.App. 1 Cir. 12/9/21), 332 So.3d 1243.

GENERAL CONTRACTOR NOT ABLE TO RECOVER UNDER ITS POLICY FOR COSTS OF REMEDIAL WORK IT PERFORMED

Planet Construction, LLC undertook a project in Lake Charles, Louisiana. Planet subcontracted construction of the sprinkler system to S&S Sprinkler, LLC. Planet inspected the premises following Hurricane Laura and remediated the storm damage caused by a sprinkler

system pipe which broke as a result of faulty materials and workmanship of S&S. The broken pipe caused extensive damage. Planet sued its commercial general liability insurer for remediation costs. The insurer moved for summary judgment dismissing the claims against it on the basis coverage was not triggered under its policy.

The policy provided the insurer was legally obligated to pay sums the insured became legally obligated to pay as damages. The insurer argued coverage was not triggered because Planet had not shown it would be liable for the incident to any third party, and was instead seeking coverage for remediation and repair costs that would be covered under a builders risk policy. Planet argued its potential liability arose from the contractual obligation with the owner to promptly remediate and repair any damages. There was no claim filed by the owner against Planet for damages. The court held even though Planet's remediation and repair efforts likely averted a breach of contract claim by the owner, the court could not expand coverage under the policy to cover its protective measures. The motion for summary judgment of the insurer was granted, and the claims against it dismissed. *Planet Construction, J2911 LLC v. Gemini Insurance Co.*, 01075 (W.D. La. 6/13/22), 2022 WL 2125604. The same result was reached by the court with respect to the claim of Planet for coverage under the policy issued to S&S as an additional insured. *Planet Construction J2911 LLC v. Gemini Insurance Co.*, 01075 (W.D. 6/13/22), 2022 WL 2128306.

OBLIGATION OF AN INSURER TO PAY DEFENSE COSTS INCURRED BY AN ADDITIONAL INSURED

The United States District Court for the Eastern District of Louisiana held that a commercial liability insurer had no duty to pay an additional insured's defense costs incurred prior to the tender of its defense. The named insured was a contractor, and the additional insured the owner of the project. The court held the policy of insurance indicated the insured must notify the insurer regarding legal actions or occurrences that may give rise to liability as soon as practicable. The contractor paid the owner both pre- and post-gender defense costs. The court held the insurer was not obligated under its policy to reimburse pre-tender defense costs of its insured or additional insureds. If presented with this situation, indemnity agreements, and their possible coverage, should be considered. *Nucor Steel Louisiana, LLC v. HDI Global Insurance Co.*, 21-1904 (E.D. La. 6/1/22), 2022 WL 1773866.

LIEN UPHELD

A contractor filed a lien related to a residential project. The owner sued to cancel the lien. The owner contended the property description referenced in the lien was not adequate, and the contractor did not reasonably itemize the elements comprising the claim.

The court of appeal found the lien statute requires that the lien reasonably identify the immovable with respect to which the work was performed. The court of appeal found a statement of claim or lien, requires a reasonable identification of the property while various other provisions of the statute required a legal property description or a complete property description.

The contractor provided more than simply a street address. It also included two adjacent lots, a subdivision section, township, and range. Although the lien did not state the identity of the parish, it was in West Monroe, and the lien was filed in Ouachita Parish which was the proper parish. The court of appeal found third parties were clearly on notice of the lien, despite the alleged defects in the property description. The omission of one of the lots on which the house was built did not defeat the requirement for a reasonable identification. The court of appeal held the property description was adequate.

The owner also contended an invoice which was attached to the lien adequately met the statute's requirement for setting forth the amount and nature of the obligation and reasonably itemized the elements. Elements of the work were identified in the lien, but only a single cost was included. The court of appeal held the statute required only a reasonable itemization of the elements comprising the obligation, and it did not find the statute, as written, requires that the itemized list specifically price each component of the work. The invoice broke down the services performed in each room and the total cost of services. The court of appeal held the trial court erred in requiring more than a reasonably itemized list. The judgment of the trial court invalidating the lien was reversed. *Seab v. Furlow*, 54,461 (La.App. 2 Cir. 5/25/22), ___ So.3d ___, 2022 WL 1654060.

INSURER DID NOT OWE A DUTY TO DEFEND AN ASBESTOS CLAIM

In an asbestos contamination lawsuit, the general contractor subcontracted the asbestos abatement work. The subcontractor listed the general contractor as an additional insured under its commercial liability policy. The general contractor filed a cross claim against the insurer. The insurer moved for summary judgment contending all claims against it were excluded under the asbestos exclusion. Summary judgment was granted by the district court in favor of the insurer. The general contractor appealed.

The general contractor contended the insurer was liable to provide a defense. It argued none of the claims against it stated in the petition used the word "asbestos," and coverage was not, therefore, unambiguously excluded. The court of appeal disagreed finding all of the allegations of negligence on the part of the general contractor within the petition were asbestos related. The court of appeal found it could not look at the claims in a vacuum, and it could not be said the claim in the petition of construction negligence and administrative and communication issues were separate and distinct from the asbestos related negligence claims. The claims were, therefore, unambiguously excluded from coverage, and the insurer did not owe a duty to defend the general contractor. Summary judgment dismissing the general contractor's third party demand against the insurer was properly granted. *Choice Foundation v. Law Industries, LLC*, 2021-0431 (La.App. 4 Cir, 3/2/22), 336 So.3d 501, *writ denied*, 2022-00538 (La. 5/24/22, ___ So.3d ___, 2022 WL 1638853.

RESPONSIBILITY OF A CONTRACTOR FOR INJURIES TO AN EMPLOYEE OF ANOTHER CONTRACTOR AND OSHA RULES

Makar Installations, Inc. contracted to build a concrete mezzanine platform. Located above the existing mezzanine was an unguarded overhead ceiling fan. Makar completed its work. During the course of the work, Makar's supervisor asked employees of the owner to turn off the fan. The fan remained on until Makar's supervisor was hit in the head. The fan was turned off the next day. Subsequently, an employee of another contractor, independent of Makar, was injured by the fan. Prior to the injury, the fan had been turned off every day for two months. The injured employee sued Makar for negligence. The district court granted summary judgment in favor of Makar.

The United States Court of Appeals for the Fifth Circuit recognized that a contractor owes a general duty to other independent contractors to refrain from creating an unreasonable risk of harm or a hazardous condition. The plaintiff contended Makar owed a duty to on-sight personnel, including the employees of independent contractors, under the Occupational Safety and Health Administration's multi-employer doctrine. Under that doctrine, OSHA may issue citations to "creating," "exposing," "correcting" and "controlling employers" for a violation of occupational safety and health standards at a multi-employer work site, even if the employer's direct employees are not exposed to the hazard.

The Fifth Circuit Court of Appeals, citing a previous decision of the court, found it partially recognized the validity of the multi-employer doctrine, but the decision was limited to "controlling employers," and the court had not yet recognized OSHA's authority to cite "creating," "exposing," or "correcting" employers. Under the circumstances, the court of appeals held the claim still failed because any duty Makar had under OSHA's multi-employer "creating employer" doctrine is materially identical to the "general duty" recognized by Louisiana courts. OSHA's policy statement makes clear that a "exposing employer's" duties are the same as a "creating employer" when it creates a hazard. There was no evidence that Makar was a "correcting employer," i.e., an employer who is engaged in a common undertaking, on the same work site, as the exposing employer and is responsible for correcting the hazard. Plaintiff did not point to any evidence showing Makar had the responsibility for correcting the hazard created by the unguarded fan. Instead, the evidence demonstrated that Makar exercised no control over the fan itself or had the authority to implement corrective measures.

A "creating employer" is defined as an entity that causes a hazardous condition that violates an OSHA standard. The obligation owed by a "creating employer" is not to create volatile conditions. An employer that caused a hazardous condition, and lacks authority to fix the condition cannot be cited when it takes immediate and effective steps to keep all employees away from the hazard and notifies the controlling employer of the hazard. The court found Makar effectively discharged its duty, presumably if it had one. Its warnings and repeated admonitions resulted in the fan being turned off after the first incident. Its actions in warning the owner and another contractor asking for the fan to be turned off, and requesting that the owner remove the fan, ultimately led to the fan's being turned off. Moreover, Makar lacked "authority," "control," or "responsibility" over the fan or any protective measures even while it

was on the jobsite, let alone after it departed. *Donahue v. Makar Installations, Incorporated,* 33 F.4th 245, (5th Cir. 2022).

SURETY NOT LIABLE FOR PENALTIES

The Louisiana Fourth Circuit Court of Appeal held that a surety under a statutory payment bond for a public works project is immune from insurance bad faith penalties under L.R.S. 22:1892 and 22:1973. Those statutes provide for penalties to be assessed against insurers for the failure to timely pay claims.

The court relied primarily upon a provision in the Public Works Act, L.R.S. 38:2241(C), that states sureties and contractors executing payment bonds for public works contracts shall be immune from liability for payment of any claims not required by that Part. The Louisiana Public Works Act does not contain any provisions for penalties with respect to recovery on a statutory bond. *Southern Environmental Management and Specialties, Inc. v. City of New Orleans,* 2022-0018, (La.App. 4 Cir. 5/11/22), __ So.3d ___, 2022 WL 1492511.

INSURANCE COVERAGE FOR DEFECTIVE WORK AND PRESCRIPTION

Kent Design Build, Inc. was hired to build a new Zuppardo's Supermarket in Metairie, Louisiana. It contracted with ADS, LLC of Alabama for all form and finishing work for the concrete slab. ADS poured the slab, and another subcontractor polished it and produced a finished floor. One month later, the concrete began to delaminate causing cracking and blistering of the floor. Kent demanded that ADS remedy the problem. ADS refused, and Kent hired another contractor to fix the concrete or overlay. It sued ADS for damages. Kent also in the lawsuit brought a claim against Landmark American Insurance Company, ADS's insurer. Landmark filed a motion for partial summary judgment contending the claims were excluded from coverage under the work-product provision of its policy and were prescribed.

Kent contended the work-product exclusion was inapplicable because the damage at issue was to the polished floor, not the concrete slab. In other words, ADS's work was not repaired by the overlay, but rather the damage to the polish work was fixed. ADS raised an identical argument, and argued the repair work was performed on a different product or work from the raw concrete slab altogether, namely a new polished floor.

The district court found there were at least two disputed material facts. First, the parties disputed whether Kent "repaired" the slab, the polish, or both. Landmark contended the "overlay" repaired the concrete slab. Kent and ADS argued the polished floor was repaired, not the slab itself. Second, it was not clear whether ADS caused the damage to the concrete flooring. ADS did not concede or agree that it was responsible for any defects in the slab. Because the parties dispute whether ADS's action caused the delamination, Landmark's motion for summary judgment as to coverage was denied. *Kent Design Build, Inc. v. ADS, LLC of Alabama*, 21-324 (E.D. La. 5/5/22), 2022 WL 1421764.

REMOVAL AND BUILDERS RISK INSURANCE

A subcontractor on the Hard Rock Hotel construction project sued the builders risk insurers under policies provided by the owner for damage to its work, equipment and property when the hotel collapsed. The lawsuit was filed by the subcontractor in state court. The builders risk insurers contended there was diversity of jurisdiction between them and the subcontractor, and removed the proceeding to the United States District Court for the Eastern District of Louisiana. The subcontractor moved to remand the matter to state court.

28 U.S.C.A. §1332(c)(1)(A) provides that in any direct action against an insurer on a policy of liability insurance the insurer shall be deemed a citizen of every state which the insured is a citizen. The subcontractor was a citizen of Louisiana and contended diversity did not exist under this rule since its claims were not made under a liability insurance policy, and the statute would not apply. The court agreed, but because of pending issues denied the motion to remand. *Suncoast Products, LLC v. National Fire & Marine Insurance Company*, 21-2143, (E.D. La. 5/4/22), 2022 WL 1403355.

INTENT TO ARBITRATE

A subcontractor sued a general contractor to recover amounts outstanding and owed for work performed on a project. The subcontract required that any controversy or claim would be settled by arbitration conducted in accordance with the Arbitration Rules of Better Business Bureau. The general contractor filed an exception asserting that the subcontractor's claims were premature since it agreed to arbitrate the claims. The subcontractor argued there were no rules entitled, "Arbitration Rules of Better Business Bureau." The parties did acknowledge that there are Better Business Bureau Rules titled, "Rules of Arbitration – Post Dispute," which were not the same as Arbitration Rules of Better Business Bureau.

The court of appeal held the language in the subcontract reflected the parties' intent to subject any dispute arising out of the contract to an arbitrator. It affirmed the trial court judgment in favor of the general contractor ordering that the claims asserted by the subcontractor be submitted to arbitration. *South La. Contractors, LLC v. Kraus Construction, Inc.*, 2021-672 (La.App. 3 Cir. 5/4/22), 2022 WL 1406933.

WAIVER OF SUBROGATION

Bohn Motor, LLC entered into a contract with F.H. Myers Construction Corp., as the general contractor, to restore its facility at 2700 South Broad Street, New Orleans, Louisiana. Myers contracted with Orleans Sheet Metal Works and Roofing, Inc. as a subcontractor. Orleans Sheet Metal entered into a sub-subcontract with B&J Enterprise of Metairie, Inc. to assist with the roof installation. Bohn purchased a builder's risk policy from Navigators Insurance Company and Certain Underwriters in London. The policies contained a $10,000.00 deductible. A fire occurred while the work was being performed. The insurers paid for the damages, and,

together with Bohn, sued Myers, Orleans Sheet Metal and B&J for damages. The insurers claimed they were subrogated to the rights Bohn had to recover their payments. Bohn claimed it was entitled to the amount of the policy deductible. Myers, Orleans Sheet Metal and B&J filed a joint motion for summary judgment which was granted by the trial court. The insurers appealed.

The court of appeal held a subrogee can have no greater rights than those possessed by its subrogor, and is subject to all limitations applicable to the original claim of the subrogor. The general conditions for the project provided for a waiver of subrogation by the owner and contractor of all rights against each other and any of their subcontractors, sub-subcontractors, agents and employees. The waiver of subrogation was stated to be effective as to a person or entity even though that person would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged. The court found Bohn clearly waived its claims against the defendants. As such, it had no rights to which the insurers could be subrogated.

The insurers claimed the waiver of subrogaton clause was invalid. In this respect, they argued it was prohibited by the Louisiana Anti-Indemnity Statute, L.R.S. 9:2780.1, C.C. art. 2004, and the lack of privity of Orleans Sheet Metal and B&J to the prime contract. The court of appeal found the Louisiana Anti-Indemnity Statute was not applicable. There was no attempt to shift liability. Rather, the waiver of subrogation provided only an allocation of risk. Similarly, C.C. art. 2004 did not shift liability between the parties. The waiver did not exclude or limit liability of any party for intentional or gross fault. As to the argument of lack of privity on the part of Orleans Sheet Metal and B&J, the court held they were third party beneficiaries to the prime contract. As a matter of law, the mutual waiver of subrogation clause precluded the insurers' claims against them.

Bohn contended the mutual waiver of subrogation was not applicable to its claim for the uninsured portion of the damages. The court of appeal agreed, but Bohn was responsible for the deductible pursuant to a related clause in the contract which required it to be responsible for the deductible. *2700 Bohn Motor, LLC v. F.H. Myers Construction Corp.*, 2021-0671 (La.App. 4 Cir. 4/20/22), ___ So.3d ___, 2022 WL 1165495.

RELIANCE ON A SUBCONTRACTOR'S QUOTE

Healtheon, Inc. entered into a design-build contract for a pump installation project at the NASA Stennis Spacecraft Facility. Alfred Conhagen, Inc., as the mechanical subcontractor, contracted with Healtheon to provide the high pressure water pump system. Healtheon entered into an agreement with Waldemar S. Nelson and Company, Inc. for design engineering services. Ruhrpumpen, Inc. provided Nelson with a budget quote for a pump package which Conhagen relied upon. The budget quote was $734,480.00, but the final quote was $1,793,360.00. Conhagen sued Ruhrpumpen and Nelson contending they were negligent and caused it to rely to its detriment on the initial quote.

Two other quotes were received for the work. There was a broad range in pricing between the quotes with Ruhrpumpen being the lowest price submitted. The design team made an effort to resolve the discrepancies. Representatives of Nelson asked Ruhrpumpen to verify the scope of its pricing with the required parts which was done. Nelson facilitated a meeting with Conhagen and Healtheon to discuss the disparities. Although Nelson believed the quote to be suspect, that information was not relayed to Conhagen. Instead, Nelson represented that Ruhrpumpen's quote was the only quote that matched the desired specifications which justified the price discrepancy. Satisfied with this explanation, Healtheon and Conhagen agreed to submit the proposal using Ruhrpumpen's budget quote.

The team began working with Ruhrpumpen to develop the final specifications. Nelson asked Ruhrpumpen to provide a cost breakdown by component. Ruhrpumpen responded that it did not want to do that because it did not have firm quotes and the price could change. Nelson did not forward this information to Conhagen. Conhagen notified Ruhrpumpen it submitted Ruhrpumpen's quote as part of its proposal.

Ruhrpumpen began to receive quotes for the motors which were much higher than the initial quote. Rather than notify the team of a major price discrepancy, Ruhrpumpen maintained silence and continued with the project. Ruhrpumpen falsely represented to Conhagen that it had not received any quotes from the vendors, and advised Conhagen it would be notified if there was a problem with the final quote. However, Ruhrpumpen never notified Conhagen of any such issues. Finally, Ruhrpumpen submitted a second quote in the amount of $1,793,360.00. Ruhrpumpen explained there was an error with the second quote, but later maintained its second quote was correct. Conhagen built the pump at the approximate cost of $1,672,040.00.

The court of appeal held Louisiana has traditionally allowed recovery in tort for purely economic loss caused by negligent misrepresentation where privity of contract is absent. In order for such a cause of action to arise, there must be a legal duty on the part of the defendant to supply correct information, there must be a breach of that duty, and the breach must have caused the plaintiff damage.

In determining whether a duty is owed where the plaintiff alleges negligent misrepresentation and there is an absence of any privity of contract or fiduciary relationship, the courts consider four factors: 1) whether the tortfeasor could expect that the plaintiffs would receive and rely upon the information; 2) whether the plaintiffs are members of the limited group for whose benefit and guidance the report was contracted and supplied; 3) whether the report was prepared in the context of a business transaction for which the alleged tortfeasor received compensation or pecuniary interest; and 4) whether extending tort liability would serve public policy.

As to the first factor, the court of appeal found Ruhrpumpen could have expected Conhagen to receive and rely upon its budget quote. In analyzing the second factor, the court of appeal found Conhagen was a member of a limited group for whose benefit the quote was composed to guide. As to the third factor, while Ruhrpumpen did not receive immediate compensation for preparing the quote, it had a substantial pecuniary interest in being selected as the supplier of the pump equipment because a substantial purchase order would follow. The

third factor, accordingly, weighed slightly in favor of imposing the duty. Finally, the court found policy considerations applied. Conhagen was a foreseeable third party who was expected to receive and rely upon the quote; obtaining correct quotes from potential subcontractors is critical. Extending liability would, therefore, serve public policy. Ruhrpumpen had a legal duty to supply the correct information to Conhagen. The court of appeal found Ruhrpumpen and its employees negligently, if not intentionally, communicated inaccurate and misleading information in its budget quote.

Nelson acknowledged it had a duty to warn Conhagen of any concerns or discrepancies concerning the pump packages and pricing. Conhagen relied on Nelson's engineering expertise to determine what pump package was best for the job. Nelson believed Ruhrpumpen's bid to be suspect, yet it remained silent in its meetings with Conhagen about any concerns. Specifically, Nelson assuaged Conhagen's concerns about the disparity in pricing by explaining that Ruhrpumpen's package was the only package with the applicable components as stated in the initial specifications. More concerning, Ruhrpumpen communicated directly to Nelson that is prices could change the day the bid was submitted, yet Nelson never relayed that information to Conhagen. Nelson committed a common sense infraction when it failed to warn Conhagen of its concerns regarding a potential price increase. Nelson was found to be negligent.

The court of appeal assigned 80% fault to Ruhrpumpen and 20% fault to Nelson. *Alfred Conhagen, Inc. of Louisiana v. Ruhrpumpen, Inc.*, 2021-0396 (La.App. 4 Cir. 4/13/22), 338 So.3d 55.

TIMELINESS OF OBJECTION TO A PUBLIC BID AWARD

The Orleans Parish Communication District (OPCD) contracted with AT&T Corp. for the modernization of its existing 9-1-1 emergency communication infrastructure. NGA 911, LLC filed a petition for preliminary and permanent injunctions seeking to enjoin and nullify the contract between OPCD and AT&T. The petition alleged OPCD violated the Louisiana Public Bid Law by awarding a public contract to AT&T without a competitive bid.

OPCD contended, among other things, the request of NGA for a preliminary and permanent injunction was not timely. Following earlier jurisprudence, the court of appeal held that an unsuccessful bidder on a public contract who wishes to obtain relief must seek injunctive relief at a time when the grounds for attacking the wrongful award of the contract were known or knowable to the bidder and when corrective action as a practical matter can be taken by the public body. OPCD did not advertise the project, and no public bid occurred. NGA became aware of the contract when OPCD, AT&T and the City of New Orleans held a joint press conference to announce the project. Shortly thereafter, NGA filed its petition for a preliminary and permanent injunction. The record was void of any information that AT&T began significant work on the project prior to NGA seeking injunctive relief. The court of appeal found NGA timely sought injunctive relief.

OPCD also argued the trial court erred in denying its exception of unauthorized use of summary procedures. A preliminary injunction is essentially an interlocutory order issued in a

summary proceeding incidental to the main demand for permanent injunctive relief. A preliminary injunction may be issued merely on a *prima facia* showing by the petitioner that he is entitled to the relief sought and that he would suffer irreparable injury. A permanent injunction requires a preponderance of the evidence to support its issuance. A preliminary injunction hearing cannot be converted to a permanent injunction hearing absent a stipulation of the parties to the contrary. The court of appeal found that the trial court erred by cumulating the actions for preliminary and permanent injunctive relief and by granting permanent injunction absent a full evidentiary hearing. There were no stipulations between the parties agreeing to dispose of the entirety of the case during the preliminary injunction proceeding. The matter was remanded to the trial court for further proceedings. *NGA 911, LLC v. Orleans Parish Communication District*, 2021-0287 (La.App. 4 Cir. 1/27/22), 337 So.3d 984.

MOTION TO VACATE, MODIFY OR CORRECT AN ARBITRATION AWARD AND A MOTION TO CONFIRM THE AWARD

A homeowner and his contractor agreed to settle a dispute among them as to the balance due for the work to be paid to the contractor. The arbitrator rendered a decision in favor of the contractor for the balance due in the amount of $28,688.00, which included a reduction for incompleted work. The arbitrator also awarded the contractor $10,000.00 in attorneys fees and $1,830.00 in interest on the unpaid invoices. The homeowner filed a motion to vacate, modify or correct the arbitration award, claiming the arbitrator was evidently partial or had so imperfectly executed his powers that a mutual, final, and definite award could not be made. The contractor responded with a motion to confirm the arbitration award contending that none of the exclusive statutory grounds for vacating, modifying or correcting the award existed. The trial court denied the homeowner's motion, and granted the contractor's motion to confirm the arbitration award. The homeowner appealed.

The court of appeal held a court may vacate, modify or correct an arbitration award based only on the exclusive grounds specified in L.R.S. 9:4210 and 4211 which do not include errors of law or fact. L.R.S. 9:4210 provides that a trial court shall vacate an arbitration award where the arbitrator was evidently partial or corrupt, or where the arbitrator exceeded his powers or so imperfectly executed them that he did not make a mutual, final, and definite award. A court is not, however, entitled to substitute its judgment for that of the arbitrator. A court's determination is limited to whether the party challenging the award has proven one or more of the specific statutory grounds for invalidation.

To constitute evident partiality, it must clearly appear the arbitrator was biased, prejudiced, or personally interested in the dispute. Proof of evident partiality requires more than an appearance of bias. A challenging party must show that a reasonable person would have to conclude that an arbitrator was partial to the other party. The court of appeal held the homeowner failed to produce evidence showing that a reasonable person would have to conclude that the arbitrator was evidently partial to the contractor. The fact the arbitrator ruled against the homeowner on punch list items was not evidence that he was partial to the contractor. The court of appeal held it could not substitute its judgment for the arbitrator's judgment. The assignment of error was without merit.

Neither the parties' contract nor the agreement requiring arbitration provided for the recovery of attorneys fees by a prevailing party, but attorneys fees may be awarded if allowed by statute. Here, the arbitrator awarded attorneys fees to the contractor under the Louisiana Open Account Statute, L.R.S. 9:2781. The statute allows the award of attorneys fees if a debtor fails to pay an open account within 30 days after the claimant sends written demand therefor correctly setting forth the amount owed. An open account is any account for which a part or all of the balance is past due whether or not the account reflects one or more transactions and whether or not at the time of contracting the parties expected future transactions. Citation and service of a petition shall be deemed written demand for purposes of the statute. Nowhere in the statute are construction accounts or contracts specifically excluded.

Here, the court of appeal found the reconventional demand of the contractor against the homeowner was deemed a written demand under the statute, and the homeowner did not pay the contractor within 30 days of that written demand. The court of appeal held the arbitrator did not exceed his powers in awarding attorneys fees to the homeowner under the Open Account Statute.

The homeowner also contended the arbitrator exceeded his powers in awarding interest because the contract between the parties did not provide for it. The grounds for vacating, modifying or correcting an arbitrator's award do not, however, include errors of law or fact. Even in the absence of a contractual or statutory provision authorizing such, and even if an error of law or fact existed, the arbitrator's interest award did not meet one of the exclusive grounds for vacating, modifying or correcting an award.

The homeowner, next, argued the arbitration award contained a material miscalculation in the amount awarded, and a court is required to modify or correct an arbitration award containing an evident material miscalculation. L.R.S. 9:4211 provides a trial court shall modify or correct an arbitration award where the award contains an evident material miscalculation of figures. The miscalculation consisted of a difference of $80.00 which was awarded to the contractor. The court of appeal modified the arbitration award to correct the evident mathematical error, and rendered judgment in an amount of the balance due which was $80.00 less than the award, plus attorneys fees awarded and interest. *Dearmond v. E. Jacob Construction, Inc.*, 2021-0981 (La.App. 1 Cir. 4/8/22), __ So.3d __, 2022 WL 1055594.

A PLAUSIBLE CLAIM FOR INDEMNITY STATED

Oakwood Shopping Center, LLC leased retail space to Village Mart, LLC. Village Mart entered into a contract with Perrier Esquerre Contractors, LLC for construction of the buildout. Perrier entered into a subcontract with Barry Jacob Hart d/b/a/ BDC Painters. While Eduardo Avila, an employee of BDC, was painting the store, he fell from a ladder and sustained a head injury. Avila sued Oakwood and Village Mart. Village Mart filed third party complaints against Perrier and BDC claiming they were responsible for defending, indemnifying, and holding Village Mart harmless from any and all claims brought by Avila. Perrier moved to dismiss the claims on the grounds Village Mart had not alleged any facts showing it was entitled to

indemnification and defense. Issues of contractual indemnity and implied indemnity were considered by the court.

Village Mart based its argument for contractual indemnity on the contractual provisions which required Perrier to provide contractor's general liability insurance and to obtain an endorsement to its general liability insurance policy to cover its obligations. The Village Mart contract with Perrier did not include an indemnity provision or require Perrier to name Village Mart as an additional insured. The court was not persuaded by Village Mart's arguments to support contractual indemnity. Given the lack of explicit language that there was an indemnity obligation, the court found it was unreasonable to assume Perrier intended to indemnify and defend Village Mart for the claims against it. Because the Village Mart and Perrier contract did not include an indemnity provision, the court found the parties did not intend for Perrier to contractually indemnify and defend Village Mart.

A claim for implied indemnity arises only when the fault of the person seeking indemnification is solely constructive or derivative, from failure or omission to perform some legal duty, and may only be had against one who, because of his act, has caused such constructive liability to be imposed. A party who is actually negligent or at fault cannot recover under a theory of implied indemnity. The court found Village Mart stated a plausible claim for indemnity from Perrier in denying any wrongdoing associated with the acts, and stating that any fault attributed to it was constructive and derived from Perrier's and/or BDC's acts/omissions. Village Mart represented it was not involved in the actual buildout, and, instead, hired Perrier as its general contractor for the buildout, and in that role, Perrier was involved with the actual operations of the buildout and had hands-on involvement and/or custody, or garde, of the physical circumstances and conditions of the space in which Avila fell.

The court found the evidence might support a finding that BDC, not Perrier, caused Village Mart to be constructively liable, but that did not mean Village Mart at this stage of the proceeding had not alleged a plausible basis for an entitlement to legal indemnity from Perrier in addition to BDC. Village Mart's specific allegations that Perrier, the general contractor for the buildout, had hands-on involvement and control over the job, was sufficient to support a plausible claim of relief where plaintiffs alleged among other things failure to properly control the workspace. The motion to dismiss the claims for indemnity was denied. *Avila v. Village Mart, LLC*, 20-1850 (E.D. La. 10/14/21), 2021 WL 4804052.

DELAYS CAUSED BY MATTERS BEYOND THE CONTROL OF THE CONTRACTOR

The Louisiana Court of Appeal for the First Circuit held that a contractor whose work was delayed in completing the project was the result of factors beyond the contractor's control. A flood had stalled construction throughout the area. The contract provided the contractor would not be liable for any loss or damage resulting from delay caused by occurrences beyond his control, labor difficulties, labor or material shortages, governmental regulation, the elements, or other acts of God. *Pinnacle Builders, Inc. v. Gilbert*, 2021-0335 (La.App. 1 Cir. 12/22/21), __ So.3d ___, 2021 WL 6066030.

LIABILITY OF A PARISH GOVERNMENT FOR DAMAGES RELATING TO THE DESIGN OF A DRAINAGE SYSTEM FOR A SUBDIVISION

In reviewing state statutes concerning the liability or non-liability of a parish government for discretionary acts, the Louisiana First Circuit Court of Appeal found, considering the facts, the St. Tammany Parish Government, together with several of its employees, could not be liable for the flooding of the Penn Mill Lakes Subdivision as a result of inspections, the issuance of building permits, and the approval of construction, including drainage and flood control facilities. The actions were discretionary, and immunity would apply unless they constituted criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct. The court found that there was no evidence of such misconduct.

The court also found the homeowners association was the owner of the green space in the subdivision, including the ponds/lakes. Although it was the owner, genuine issues of material fact existed as to who had the responsibility for operating and/or maintaining the ponds/lakes, whether the ponds/lakes were an integral part of the subdivision's drainage system, and whether there was a pre-existing drainage servitude in favor of the St. Tammany Parish Government with respect to the ponds/lakes. *Markiewicz v. Sun Construction, L.L.C.,* 2020-1211 (La.App. 1 Cir. 6/22/21), 328 So.3d 487, *writ granted in part and per curiam issued,* 2021-01703 (La. 11/23/21), 328 So.3d 66. The matter was remanded the court of appeal solely to clarify whether it intended to affirm the trial court's ruling granting St. Tammany Parish Government's motion for summary judgment on the issue of discretionary immunity as to all defendants, including St. Tammany Parish Government. In all other respects, the writ was denied, *writ denied,* 2021-01071 (La. 11/23/21), 328 So.3d 80.

DENIAL OF CLAIM BY A SUBCONTRACTOR FOR PAYMENT BY SURETY

L.R.S. 48:256.5(B) provides that a subcontractor in order to assert a claim under a payment bond for a DOTD project shall after the maturity of his claim and within 45 days after the recordation of final acceptance of the work by the Department or notice of default of the contractor or subcontractor, record the original sworn statement of the amount due him in the office of the recorder of mortgages for the parish in which the work is done and file a certified copy of the recorded sworn statement of the amount due showing the recordation data, with the undersecretary of the DOTD. It was undisputed the subcontractor who sued the surety which provided the payment bonddid not file a copy of its claim in the mortgage records as required by the statute. The United States District Court for the Middle District of Louisiana granted the motion for summary judgment of the surety dismissing the claim. *Warren Paving, Inc. v. Coastal Bridge Company, LLC,* 20-412 (M.D. La. 9/30/21), 2021 WL 6144614.

APPLICATION OF THE LOUISIANA ANTI-INDEMNITY ACT

Following a slip and fall at the JP Morgan Chase, N.A. Bank in Metairie, Louisiana, Dennis Ruello filed suit against JP Morgan for personal injuries. Ruello alleged his foot came in

contact with a sprinkler head at the edge of the Bank's lawn causing his fall. In a succession of third party demands, SMS sued AMR. SMS asserted it entered into a contract with AMR under which AMR was required to perform full maintenance of irrigation systems at the Bank, and required AMR to indemnify SMS from any and all claims relating to AMR's work. Further, the agreement required that AMR procure general liability coverage and name SMS as an insured on that policy.

AMR moved for summary judgment on both claims contending they should be dismissed under the Louisiana Anti-Indemnity Act (LAIA), L.R.S. 9:2780.1. The Act prohibits any provision in a construction contract which requires the indemnification of an indemnitee from and against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the indemnitee. It also voids contractual provisions that require an indemnitor to procure liability insurance covering the acts or omissions of the indemnitee except under limited conditions.

The first issue was whether the contract between SMS and AMR was a construction contract within the meaning of the LAIA. The Act defines a construction contract, among other things, as an agreement for the maintenance of a building or structure or other improvement to real property. The agreement between SMS and AMR was to perform landscape at the bank, including, for example, AMR's obligation to mow and trim the Bank's lawn to certain specifications, prune and shape vegetation, and perform weed removal and pest control. In addition, AMR was to perform irrigation services which required that AMR would be responsible for the maintenance of the irrigation systems. The court found under Louisiana law the landscaping of trees, bushes, and other vegetation constitutes an improvement to real property. Further, the agreement required AMR to perform full maintenance of existing irrigation systems. The maintenance of a water line is included within the definition of a construction contract under the LAIA. The court determined the agreement was a construction contract within the meaning of the Act.

Next, the court found, relying on jurisprudence under the Louisiana Oilfield Indemnity Act, because there had not yet been a determination as to SMS's liability or fault, AMR's motion for summary judgment on SMS's claim for indemnification was premature. Whether an indemnitee is free from fault, and the issue is outside the scope of the LAIA, can only be determined after trial on the merits.

The LAIA renders null, void, and unenforceable, provisions in construction contracts that require an indemnitor to procure liability insurance covering the acts or omissions of an indemnitee, except in limited circumstances. The agreement between SMS and AMR provided that AMR was to bear the sole cost and expense of the policy which placed the provision outside any of the statutory exceptions to the Act that might render the insurance provision enforceable. Further, the agreement did not exclude coverage for SMS's own negligence from the scope of insurance to be obtained. The court held the agreement requiring AMR to maintain liability insurance naming SMS as an additional insured was void under the Act. *Ruello v. JP Morgan Chase Bank, N.A.*, ___ F.Supp.3d ____, (E.D. La. 2021), 2021 WL 2291146.