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CONSTRUCTION LAW UPDATE
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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.

CLAIM FOR INDEMITY AND EXCEPTIONS OF PREMATURITY AND PRESCRIPTION

A demand may be made against one who may be liable to a defendant for all or part of the principal demand. A defendant who does not bring in a third-party defendant 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. The court held it would have been imprudent for the defendant not to bring in the third-party defendant. Had it not, the third-party defendant could subsequently argue it was deprived of the means of defeating the action which were not used.

There is a distinction between claiming indemnity and enforcing it. A party can demand indemnity before it is entitled to it by virtue of it being cast in judgment. In this case, the indemnitee had not yet been cast in judgment. The third-party demand for indemnity was not, accordingly, premature.

A claim for indemnity does not accrue or become actionable until the putative indemnitee has been cast in judgment. It is only then that prescription against the claim for indemnity begins to run. Since the indemnitee had not yet been cast in judgment, prescription did not begin to run.

The claim had, accordingly, not prescribed. *Bellard v. ATK Construction, LLC,* 2022-306 (La.App. 3 Cir. 10/26/22), __ So.3d ___, 2022 WL 14727095.

PEREMPTION FOR CLAIMS AGAINST SURVEYORS

The Louisiana Fourth Circuit Court of Appeal held the peremption requirements of L.R.S. 9:2772 do not apply to those performing surveying services who are not licensed surveyors pursuant to L.R.S. 37:682 as required by the statute. The court declined to give the statute an expansive interpretation. L.R.S. 9:5607 has a similar requirement. *State of Louisiana, Division of Administration, Office of Community Development-Disaster Recovery Unit v. Porter*, 2022-0250 (La.App. 4 Cir. 9/7/22), __ So.3d __, 2022 WL 4091995. See also *State of Louisiana, Division of Administration, Office of Community Development-Disaster Recovery Unit v. Porter*, 2022-0250 (La.App. 4 Cir. 9/19/22), ___ So.3d ___, 2022 WL 4299288.

STANDING TO SUE

A shareholder of a corporation has no separate or individual right of action against third persons for wrongs damaging the corporation. That right belongs to the corporation. Income, losses, deductions, and credits, including charitable deductions of an "S" corporation for federal income tax purposes, however, are reported by a shareholder on its individual federal income tax return. These items flow through the corporation to the individual shareholder's tax return.

The plaintiffs argued as a result of the corporation's status as an "S" corporation, the claim as a shareholder to recover an assessed tax delinquency, interest, and penalties, which would normally be a corporation's responsibility but assessed against the shareholder, is a direct suit and not derivative. The federal magistrate judge held the claims were for direct damages to the shareholder, and were separate and apart from damages to the corporation. The shareholder had status to assert the claims. *Sterling Resources Corp. v. Welfont Group, LLC*, 21-2517 (W.D. La. 9/16/22), 2022 WL 4932749. The United States District Judge affirmed the opinion of the Magistrate Judge. *Sterling Resources Corp. v. Welfont Group, LLC*, 21-2517 (W.D. La. 10/3/22), 2022 WL 4921157.

SURETY'S CLAIM FOR REIMBURSEMENT UPON DEFAULT OF A CONTRACTOR

Old Republic Surety Company issued payment and performance bonds for Ron Matthews Construction, Inc. for a project in St. John the Baptist Parish. The owner informed Matthews and Old Republic that it was declaring its contract with Matthews in default and formally terminating Matthews' right to complete the project. Old Republic entered into a takeover agreement with the owner, and retained another contractor to complete the project. It also retained a consultant to assist it with regard to the claims of the owner. Old Republic sued Matthews and the indemnitors under the surety bonds for all losses, costs and expenses and attorneys fees incurred as a result of having issued the bonds, as well as interest and moved for summary judgment. There was no dispute the indemnity agreement applied and clearly required the indemnitor to pay the surety for all losses, costs, expenses and interest.

The defendants contended the amount was excessive and incurred in bad faith. The court stated bad faith means more than mere bad judgment or negligence, and implies the conscious doing of a wrong for dishonest or morally questionable motives. It held that the defendants failed to submit any evidence that Old Republic acted with such motives. Nor did they show that the high completion cost of the project alone would be sufficient proof Old Republic acted in bad faith. The fact the project was completed at a higher cost than the defendants anticipated could not infer bad faith. Indemnity was enforced, and the motion for summary judgment of Old Republic was granted. *Old Republic Surety Company v. Ron Matthews Construction, Inc.*, 09-3218 (E.D. La. 11/4/10), 2010 WL 11739418.

RESOLUTION OF CONTRACT AMBIGUITY

The United States District Court for the Western District of Louisiana was faced with an ambiguity in an amendment to a contract between a general contractor and subcontractor concerning compensation due the subcontractor upon termination by the general contractor of the subcontractor from the project. The amendment was prepared by the subcontractor. The court, after considering the document and testimony of the parties as to the intent of the amendment, found the language was too ambiguous to be clarified. In relying upon Louisiana law, the court concluded the ambiguous clause must be strictly construed against the drafter, i.e., the subcontractor. In doing so, it found the interpretation by the general contractor prevailed. It was shown to be consistent with a range of case law reflecting an industry standard under which fixed price contracts are converted to cost-reimbursable contracts upon termination.

Under that interpretation, upon termination, the cost-plus basis for compensation was applied for all work completed through the effective date of termination, and not just after notice of termination as contended by the subcontractor. The subcontractor was not entitled to payment on a lump-sum basis for any work completed. In this case, the subcontractor was terminated three months after the subcontract was executed. It does not appear as though any payments were made to the subcontractor prior to termination. *Keiland Construction, LLC v. Weeks Marine, Inc.*, 2:20-00827 (W.D. La. 11/16/22), 2022 WL 16965122.

RES JUDICATA AND PRECLUSION BY JUDGMENT

Jeff Mercer, LLC was a subcontractor to Austin Bridge and Road, LP for I-49 and Bastrop projects. Mercer sued Austin Bridge in East Baton Rouge Parish claiming it failed to properly compensate it for work performed and completed on the two projects and sought contractual damages. Austin Bridge filed a peremptory exception of *res judicata* under L.R.S. 13:4231 to dismiss the claims. The Louisiana Supreme Court has held in order for *res judicata* to apply, the following elements must be satisfied: 1) the judgment is valid; 2) the judgment is final; 3) the parties are the same; 4) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and 5) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation.

Austin Bridge argued a previous lawsuit Mercer filed against the State of Louisiana, Department of Transportation and Development in Ouachita Parish supported the exception of *res judicata*. That lawsuit involved a Louisville Street project. Mercer, in the Ouachita suit, sought

tort damages from DOTD and specifically named employees of DOTD based on an alleged conspiracy to destroy Mercer's business and its business relationships with contractors. Judgment was entered in favor of Mercer in the Ouachita lawsuit. The judgment was reversed by the court of appeal. It was undisputed that Austin Bridge was not a party to the Ouachita lawsuit.

Austin Bridge argued its objection of *res judicata* was appropriate under the preclusion of judgment provisions of C.C.P. art. 425. The article requires a party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation. There was a split in the circuit courts of appeal as to whether or not the requirement of *res judicata* that the parties to both actions be the same applied for purposes of C.C.P. art. 425 on preclusion by judgment.

The court of appeal in this instance, relied upon the recent decision of the Louisiana Supreme Court in *Carollo v. Department of Transportation and Development,* 2021-01670 (La. 9/9/22), __ So.3d ___, 2022 WL 4113188, in reaching its decision. The Supreme Court in *Carollo* found that C.C.P. art. 425 functions simply as a measure to put litigants on notice at the outset and during the course of litigation – that all causes of action arising out of the transaction or occurrence that was the subject matter of the litigation had to be asserted. It operates in tandem with and is enforced through the objection of *res judicata*. The Supreme Court held because C.C.P. art. 425 is enforced through *res judicata*, all elements of *res judicata* – including identity of parties – must be satisfied for a second suit to be precluded.

The decision in this case focused on the issue of whether the parties were the same. Since the requirement of *res judicata* that there be an identity of parties in both lawsuits was lacking, the Ouachita lawsuit could not serve as a basis for the objection of *res judicata*. Austin Bridge and DOTD were not closely aligned. The judgment of the trial court sustaining the peremptory exception of *res judicata* was reversed. *Jeff Mercer, LLC v. Austin Bridge and Road, LP,* 2022-0423 (La.App. 1 Cir. 11/4/22), __ So.3d __, 2022 WL 16706815.

VALIDITY OF AN ARBITRATION CLAUSE

The Hawneys sued Old South Lighting and Ironworks and Robby Turner with respect to deficiencies in new windows which were installed in their home. The Hawneys contended Old South and Turner were to provide windows with Low-E glass which is used to insulate structures from outside heat so that the increased cost of cooling the structured during the warmer months is mitigated. Old South and Turner filed an exception of prematurity to stay the proceedings pending arbitration.

The court first addressed applicability of the Federal Arbitration Act. It held that law preempts all state arbitration laws when the contractual transactions have some nexus to interstate commerce. Here, the court found there was no nexus. The Hawneys pointed out that all parties to the contract were Louisiana citizens/residents, and their transactions had no effect on interstate commerce. The court held, as a result, the Federal Arbitration Act did not automatically preempt state law for the matter at hand.

The court found the Louisiana arbitration law, L.R.S. 9:4201, et. seq., governed the matter. That law presupposes the existence of a valid contract as a basis for evoking arbitration. The court addressed issues concerning whether the contract was valid. A court can revoke a contract for lack of consent, a vice which rescinds the contract from its inception. Without valid consent, there is no contract to be arbitrated.

The Hawneys contended consent was vitiated by error. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party. Cause is the reason why a party obligates himself. For consent to be vitiated by error, such error must concern the cause of the contract to such a degree that the other party would not have obligated itself but for the error. The court found that was not the situation presented. The Hawneys obligated themselves under the original contract which made no mention of Low-E glass. Rather, the cause of the original contract was the purchase and installation of custom design windows in the Hawneys' home restoration project. The original contract explicitly stated the glass to be installed was clear glass and/or Matlux Sandblast glass. It omitted any mention of a Low-E specification. The court found the primary cause of the contract was to replace the existing glass with new custom windows/doors, and not to install Low-E glass. While an amendment ultimately incorporated the use of Low-E glass, the cause of the original contract remained. Therefore, the Hawneys' consent was not vitiated by error.

The Hawneys also contended their consent was fraudulently induced, and the contract was, therefore, void *ab initio*. The court disagreed. Fraud is a misrepresentation or suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Old South and Turner never misrepresented/suppressed the truth with the intention of obtaining an unjust advantage or causing loss/inconvenience to the Hawneys. The Hawneys did not point out any specific advantage that Old South and Turner obtained by misrepresenting or suppressing information pertaining to the quality of the product. Nor did the Hawneys point to any evidence to prove Old South and Turner intentionally caused them loss or inconvenience. Consent was not, according to the court, vitiated by fraud.

The court held the contract between the parties was valid and the arbitration clause enforceable. The exception of prematurity was sustained staying further proceedings pending arbitration. *Hawney v. Unique Furniture Source, Inc.*, 2022-0268 (La.App. 4 Cir. 11/2/22), __ So.3d __, 2022 WL 16631005.

VENUE FOR AN ACTION AGAINST AN OWNER TO ENFORCE A PRIVATE WORKS ACT LIEN

Cleco and Cabot contracted with Saulsbury to serve as the prime contractor for a project in St. Mary Parish. A dispute arose between Cleco and Saulsbury. Cleco issued a Notice to Demobilize to Saulsbury, effectively terminating Saulsbury from the project. Saulsbury filed a statement of claim and privilege on September 5, 2018 in St. Mary Parish. Cleco sued Saulsbury in October 2018 for damages in Rapides Parish where the contract at issue was executed. In July of 2019, Saulsbury filed suit in St. Mary Parish against Cleco for damages and recognition and enforcement of its privilege against the property pursuant to the Louisiana Private Works Act.

Cabot intervened in Cleco's suit. Cleco and Cabot both filed exceptions of lis pendens to Saulsbury's lawsuit in St. Mary Parish arguing the lawsuit filed in Rapides Parish was the first filed suit and Saulsbury's St. Mary Parish suit should be dismissed.

The Private Works Act does not provide that an action against an owner for the enforcement of a claim or privilege must be filed in any particular parish, in contrast to its requirement the statement of claim or privilege itself must be recorded in the records of the parish in which the work is performed, in this case St. Mary Parish. Analyzing the venue provisions of the Louisiana Code of Civil Procedure, the court of appeal held a plaintiff may bring such an action in any venue provided by the Code of Civil Procedure.

Had Saulsbury been the first to file suit against Cleco concerning the construction project, it would have had the option to file suit in the venue of its choosing pursuant to the Code of Civil Procedure. However, Cleco filed first, and, at its discretion, elected to proceed in Rapides Parish. The court of appeal noted Saulsbury was not without recourse. It is required to file a compulsory reconventional demand against Cleco in the Rapides Parish proceeding, including a claim to enforce a lien or privilege.

The court of appeal rejected Saulsbury's argument venue was mandatory in St. Mary Parish such that its lien enforcement action pursuant to the Private Works Act could not proceed against Cleco in Rapides Parish. There was no error in the trial court's judgment granting the exception of lis pendens in favor of Cleco dismissing the claims filed against it by Saulsbury in St. Mary Parish. *Saulsbury Industries, Inc. v. Cabot Corporation*, 2021-0679 (La.App. 1 Cir. 5/17/22), 342 So.3d 882.

The Louisiana Supreme Court reversed. It held the doctrine of lis pendens applies when two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence between the same parties and the same capacities. In that event, the defendant may have all but the first suit dismissed by excepting thereto. Although Cabot was not an original party to Cleco's suit, it intervened in that litigation. These undisputed facts satisfy the requirements for lis pendens. Cleco and Cabot properly raised the objection by filing declinatory exceptions. The Supreme Court found the first suit was filed by Cleco, therefore, the second lawsuit filed by Saulsbury must be dismissed.

The Code of Civil Procedure requires for purposes of lis pendens the suits be between the same parties. It does not, however, require a determination of when each objecting defendant became a party to each suit. Their mutual involvement in multiple suits arising out of the same transaction or occurrence is sufficient to trigger the application of lis pendens. Once the doctrine is applicable, the first suit determination is simply a matter of confirming which suit was filed first, not which suit was the first to include the objecting party. The court of appeal's interpretation expanded the phrase "first suit" to add "in which the objecting defendant was first named as a party."

An exception of lis pendens should be sustained if a final judgment in the first suit would be *res judicata* of the subsequently filed suit. The Civil Code recognizes that if an exception of list pendens is warranted, but not asserted, the first final judgment rendered in any of the suits shall

be conclusive of all. Here, a final judgment between Cabot and Saulsbury in Cleco's suit would be *res judicata* for their claims in Saulsbury's suit. *Saulsbury Industries, Inc. v. Cabot Corporation,* 22-01162 (La. 11/1/22), 348 So.3d 1267.

DISMISSAL OF CLAIMS AGAINST AN ARCHITECT

The United States District Court for the Western District of Louisiana held that since plaintiff's expert architect's report criticizing the standard of care of the defendant architect was excluded and plaintiffs produced no other expert testimony as to the standard of care, summary judgment would be issued in favor of the defendant architect and other defendants. Plaintiffs failed to controvert the defendant architect's summary judgment evidence on the standard of care. The court previously found the opinions expressed by the plaintiffs' architectural expert were untimely and deficient. *Stewart v. Gruber* 20-1479 (W.D. La. 10/28/22), 2022 WL 16543412.

The court issued an amended ruling with respect to the third-party defendants. The claims against them were dismissed as moot. *Stewart v. Gruber*, 20-1479 (W.D. La. 11/3/22), 2022 WL 16727814.

REQUIREMENTS FOR COMPELLING ARBITRATION

The Louisiana First Circuit Court of Appeal held that before a district court can compel arbitration, it must make two preliminary determinations: first, the trial judge must ensure that a valid arbitration agreement between the parties exists; and second, the judge must decide whether the dispute at issue falls within the scope of the agreement. The court found there was not a valid subcontract between the parties at the time the arbitration proceedings were initiated. It held the ditrict court did not err in granting a preliminary injunction in favor of the party opposing arbitration and enjoining the arbitration proceedings. *South LA Contractors, LLC v. MAPP,* 2022-0024 (La.App. 1 Cir. 9/16/22), __ So.3d ___, 2022 WL 4286561.

REQUIREMENT THAT TWO ENTITIES BE LICENSED AS CONTRACTORS

Expedited Service Partners, LLC (ESP) and Olson Restoration, LLC d/b/a ServPro Disaster Recovery Team Olson (ServPro) sued to recover sums due. ServPro performed water remediation work following Hurricane Laura. ESP was a lessor to ServPro and another entity for power generation equipment for the remediation project. Neither ServPro nor ESP were licensed as contractors under the Louisiana Contractor Licensing Law. The issue was whether they were required to be licensed in order to prosecute their claims.

The court held that entities performing water remediation services were not required to be licensed. The court found there was a genuine issue of material fact as to whether the scope of work undertaken by ESP required it to be licensed. *INPWR, Inc. v. Olson Restoration, LLC*, 21-00821 (W.D. La. 11/9/22), 2022 WL 16845153.

RES JUDICATA AND A CLAIM FOR A SUBSEQUENT ILLNESS

Gistarve Joseph, Sr. sued Avondale Industries for contraction of pneumoconiosis in 1982. In November 1985, Joseph settled his claim against Avondale and executed a restrictive release and discharge with indemnity. In June 2016, Joseph filed a new lawsuit against Huntington Ingalls, Inc. (formerly Avondale) alleging he contracted mesothelioma as a result of exposure to toxic substances. Joseph died on July 27, 2016. His heirs substituted themselves as plaintiffs for Joseph's survival action. Huntington Ingalls filed an exception of *res judicata* arguing the 1985 release barred the survival action.

The court held Joseph intended to release his present and future claims for occupational lung disease of any and every kind and description and any and all other personal injury claims arising out of his employment at Avondale. The court held that Civil Code art. 2004 prohibits the enforcement of contractual clauses that, in advance, exclude or limit liability of a party for intentional or gross fault that causes damages to the other, or that, in advance, excludes or limits the liability of one party for causing physical injury to the other party. The court interpreted art. 2004 as meaning that a compromise or contractual clause is not null because it excludes or limits liability in advance except when a party to the contract relinquishes future rights of action arising from his or her physical injury or from the intentional or gross fault of another party.

The court found that Joseph intended to release his present and future claims for occupational lung disease of any and every kind and description and any and all other personal injury claims arising out of his employment at Avondale. Article 2004 applies to limit settlements for injuries arising out of future tortious conduct, but does not prohibit settlement of past and future damages arising out of tortious conduct that has already occurred. Art. 2004 did not, accordingly, apply to prohibit enforcement of the 1985 release. The survival action seeking damages for Joseph's contraction of mesothelioma fell squarely within the scope of the release. The exception of *res judicata* was sustained with respect to that action. *Joseph v. Huntington Ingalls Incorporated*, 2018-02061 (La. 1/29/20), 347 So.3d 579.

PERFORMANCE BOND SURETY NOT REQUIRED TO RESPOND TO CLAIM BY A GENERAL CONTRACTOR

A general contractor sued its subcontractor and the subcontractor's performance bond surety seeking damages for the failure of the subcontractor to timely complete its work. The surety moved for summary judgment which was granted by the trial court. The general contractor appealed.

The court of appeal held the general contractor neither alleged in its petition nor offered evidence to allow a trier of fact to find that it clearly, directly and unequivocally communicated to either the subcontractor or its surety that the general contractor regarded the subcontract as terminated and advised the surety it must immediately commence performing under the terms of the bond. Summary judgment was affirmed. *DQSI, L.L.C. v. APC Construction, LLC*, 2021-1256 (La.App. 1 Cir. 7/29/22), 347 So.3d 928, *writ denied*, 2022-01514 (La. 10/6/22), 2022 WL 17425920.

CLASSIFICATION OF WORKERS AS EMPLOYEES OR INDEPENDENT CONTRACTORS

The Louisiana legislature in 2021 added a new section to the Revised Statutes dealing with the classification of workers as employees or independent contractors. The new statute, L.R.S. 23:1711.1, states there is a rebuttable presumption of an independent contractor relationship with the contracting party for whom the purported independent contractor performs work if an individual or entity controls the performance, methods or processes used to perform services and meets at least six of the following criteria:

(a) The individual or entity operates an independent business that provides services for or in connection with the contracting party.

(b) The individual or entity represents the provided services as self-employment available to others, including through the use of a platform application to obtain work opportunities or as a lead generation service.

(c) The individual or entity accepts responsibility for all tax liability associated with payments received from or through the contracting party.

(d) The individual or entity is responsible for obtaining and maintaining any required registration, licenses, or other authorization necessary for the legal performance of the services rendered by him as the contractor.

(e) The individual or entity is not insured under the contracting party's health insurance or workers' compensation insurance coverage and is not covered for unemployment insurance benefits.

(f) The individual or entity has the right to accept or decline requests for services by or through the contracting party and is able to perform services for or through other parties or can accept work from and perform work for other businesses and individuals besides the contracting party even if the individual voluntarily chooses not to exercise this right or is temporarily restricted from doing so.

(g) The contracting party has the right to impose quality standards or a deadline for completion of services performed, or both, but the individual or entity determines the days worked and the time periods of work.

(h) The individual or entity furnishes the major tools or items of equipment needed to perform the work.

(i) The individual or entity is paid a fixed or contract rate for the work performed and the contracting party does not pay the individual or entity a salary or wages based on an hourly rate.

(j) The individual or entity is responsible for the majority of expenses incurred in performing the services, unless the expenses are reimbursed under an express provision of a written contract between the parties or the expenses reimbursed are commonly reimbursed under industry practice.

(k) The individual or entity can use assistants as deemed proper for the performance of the work and is directly responsible for supervision and compensation.

Penalties for misclassification of employees as independent contractors are provided in L.R.S. 23:1711. An administrative penalty of $500.00 per day for each individual incorrectly classified may be assessed, in addition to any contribution, interest and penalties otherwise due, unless the employer becomes compliant within 60 days of the citation, in which case, the penalty shall be waived for the first offense. After the first offense, a penalty of $1,000.00 per individual misclassified shall be assessed. Thereafter, any such failure of an employer to properly classify an individual as an employee and pay contributions shall be subject to a penalty of $2,500.00 per each individual.

No determination shall be final or effective, and no resulting penalty shall be assessed, unless the administrator first provides the employer with written notification by certified mail of the determination, including the amount of the proposed contributions, interest, and penalties determined to be due and the opportunity to request a fair hearing, of which a record shall be made within 30 days of the mailing of such notice. Upon a final determination that an employer has knowingly or willfully failed to properly classify an individual and failed to pay required contributions, the employer, in addition to the penalties, shall be prohibited from contracting, directly or indirectly, with any state agency or political subdivision of the state for a period of three years from the date upon which the determination becomes final. Acts, 2021, no. 455.

SUMMARY JUDGMENT IN FAVOR OF AN INSURER ON THE DUTY TO DEFEND WAS NOT APPROPRIATE

An insurer alleged its insured's claims against it for a defense under the policy was precluded by virtue of the asbestos exclusion. The Louisiana Fourth Circuit Court of Appeal found summary judgment in the insurer's behalf was inappropriate. Genuine issues of material fact existed concerning the possibility of coverage for allegations which would fall outside the scope of the exclusion. The trial court correctly concluded the insurer had a duty to defend its insured concerning non-asbestos related claims. *Choice Foundation v. Law Industries, LLC,* 2022-0411 (La.App. 4 Cir. 10/26/22), __ So.3d __, 2022 WL 14749103.

COVERAGE UNDER A CGL POLICY

Before a project was completed, the contractor demobilized from the site and ceased work and was sued by the owner for breach of contract. The contractor sued its commercial general liability insurer for coverage for the claims by the owner. The court first examined the issue of whether the claims against the contractor by the owner were an "occurrence" under the policy. An "occurrence" was defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Louisiana courts have interpreted the term to include an unforeseen and unexpected loss. The court noted several courts have made clear that damages stemming from breach of contractual obligations and intentional conduct are not accidents in the sense that the policy contemplates. Here, the owner's claim against the contractor was for breach of contract, and it was clear the acts and omissions allegedly constituting a breach were not the type of unexpected events contemplated by the policy. An "occurrence" was not alleged, and, as a result, the contractor could not defeat summary judgment on that point.

The court next considered whether the damages sought were property damages. The policy defined "property damage" as meaning either physical injury to tangible property, including all resulting loss of use of that property, or loss of use of tangible property that is not physically injured. The court held the contractor did not allege physical injury to any property, and the claims did not constitute physical injury. As to loss of use, the court found damages claimed for the value of lost time by the owner's employees to manage and address issues related to the contractor's abandonment of the property were not damages for the loss of use of property.

Since there was no possibility of coverage, there was also no duty to defend the contractor. There was no coverage under the policy. The insurer was entitled to summary judgment as a matter of law. *Circle C Enterprises, Inc. v. Associated Industries Insurance Company, Inc.*¸ 21-253 (M.D. La. 11/4/22), 2022 WL 16727129.

PEREMPTION

In a matter involving the construction and transportation of a new mobile home, the Louisiana Fourth Circuit Court of Appeal applied the peremptive requirements of L.R.S. 9:2772 to the entity which transported the home and affixed it to a permanent concrete foundation. The statute generally provides a peremptive period of five years for claims arising out of an engagement of planning, construction, design, or building immoveable or movable property against any person performing or furnishing the design, planning, supervision, inspection or observation of construction or the construction of immovables or improvement to immovable property. Although fraud was alleged, there was a lack of evidence of fraud or intentional misrepresentation by the entity. The claims against the entity were based on deficient performance which were perempted.

The court held fraud, as defined in C.C. art. 1953, is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction. The essential elements of intentional misrepresentation are: 1) a misrepresentation of material fact; 2) made with the intention to deceive; 3) causing justifiable reliance with resulting injury. The court found there was a lack of evidence of fraud or intentional misrepresentation. The entity which transported and affixed the home to the concrete structure did not participate in the formation of the plaintiff's contract. This connoted that the plaintiff's claims against the entity were based on allegations of deficient performance which were perempted. *Petkovich v. Franklin Homes, Inc.*, 2021-0448 (La.App. 4 Cir. 9/22/22), __ So.3d __, 2022 WL 4376278.

CLAIMS BY A SURETY AGAINST ITS PRINCIPAL AND INDEMNITORS

In a very long decision involving a complicated matter, the United States District Court for the Eastern District of Louisiana held a surety was entitled to reimbursement from the principal and indemnitors under a bond and indemnity agreement. The surety was entitled to reimbursement of a settlement it made with the owner in the amount of $612,000, plus all attorneys fees which had not, as yet, been established by the court. Further, the surety was granted a permanent injunction mandating specific performance of its demand that the principal and indemnitors provide collateral security. A temporary injunction was previously issued by the court requiring that they post collateral security in the amount of $2,563,930. The surety was to advise the court whether the amount of any collateral security previously ordered should be reduced now or upon the concurrence of any event.

There were several holdings of the court concerning the obligations and rights of the surety, a few of which are discussed here. The surety had the right under the indemnity agreement, in its sole discretion, to determine for itself and indemnitors whether any claim, demand or suit brought against the surety or any indemnitor in connection with or relating to the bond would be paid, compromised, settled, tried, defended or appealed. This right is not premised upon there being

any actual liability of the surety under the bond. The indemnity agreement also allowed the surety in its sole discretion to assert or prosecute any right or claim in the name of any indemnitor and to settle any such right. This right accorded the surety is not premised upon there being actual liability under the bond.

In addition to the rights assigned or otherwise granted to the surety under the indemnity agreement, the surety was equitably subrogated to the property of the indemnitors, including the claims of the indemnitors in the litigation. The surety was equitably subrogated to the claims of the indemnitors and could settle their claims. The surety did not act in bad faith in settling the principal's affirmative claims since the indemnity agreement authorized it to do so in its sole discretion and specifically empowered the surety to act as the indemnitors' attorney-in-fact to settle claims as it saw fit. The surety owed no fiduciary duty to the indemnitors with respect to its actions as attorney-in-fact. *Fucich Contracting, Inc. v. Shread-Kuyrkendall & Associates, Inc.*, 18-2885 (E.D. La. 10/31/22), 2022 WL 16552815.

ENTITLEMENT TO STATUTORY EMPLOYER STATUS

In a lawsuit for personal injuries, the Louisiana First Circuit Court of Appeal considered whether an entity could be accorded statutory employer status for purposes of immunity. The court held statutory employer status under the Louisiana Workers' Compensation Law is found in two instances. The first occurs when the principal is in the middle of two contracts referred to as the two-contract theory. The second occurs when there is a written contract recognizing the principal as a statutory employer.

Here, there was an appropriate written contract, but it expired before the injury occurred. There was evidence the parties continued to conduct business in primarily the same manner before and after expiration of the agreement. The court, however, held the agreement clearly and unambiguously stated it would terminate as of a given date which was before the injury. It held, as a result, there was no written contract in effect which recognized the party seeking designation was a statutory employer at the time of the injury, and that party was not a statutory employer of the injured employee under the written contract theory.

The two-contract theory applies when: 1) the principal enters into a contract with a third party; 2) pursuant to that contract, work must be performed, and 3) in order for the principal to fulfill its contractual obligation to perform the work, it entered into a subcontract for all or part of the work performed. The two-contract statutory employer status contemplates relationships between at least three entities: a general contractor who has been hired by a third party to perform a specific task; a subcontractor hired by that general contractor; and an employee of the subcontractor. The purpose behind the theory is to establish a compensation obligation on the part of the principal who contractually obligates itself to a party for the performance of work and who then subcontracts with intermediaries whose employees perform any part of the work. The court held, in this instance, the requirements under the two-contract theory for statutory employer status had been met. Summary judgment in favor of that party was affirmed. *Badeaux v. St. Tammany Parish Hospital Service District No. 1*, 2021-1229 (La.App. 1 Cir. 6/3/22), 343 So.3d 230, *writ denied*, (La. 11/1/22), 349 So.3d 1.

ARBITRATION

The Louisiana First Circuit Court of Appeal held that a sub-subcontract requiring arbitration which was initiated by the general contractor was invalid to the extent the sub-subcontract required arbitration of disputes. The general contractor had no contractual relationship with the sub-subcontractor. Further, the court noted, the sub-subcontract was signed before the prime subcontract was executed, and when the terms of the subcontract were accepted, the sub-subcontractor had already effectively revoked the terms and conditions with respect to arbitration. *South LA Contractors, LLC v. MAPP, LLC*, 2022-0024 (La.App. 1 Cir. 9/16/22), __ So.3d ___, 2022 WL 4286561.

GOVERNMENT CONTRACTOR IMMUNITY AND FAILURE TO WARN CLAIMS

A spouse sued alleging she developed mesothelioma from exposure to asbestos dust brought into the family home on her husband's clothing. Two of the defendants removed the matter to federal court averring they were acting under an officer of the United States, and were entitled to the government contractor immunity defense. The plaintiff/spouse moved for summary judgment on the immunity issue arguing her claims for failure to warn or otherwise protect her husband from asbestos exposure were not subject to the defense.

The court held in order for a defendant to claim the government contractor defense for design defect claims, 1) the government must have approved reasonably precise specifications; 2) the equipment must have conformed to those specifications, and 3) the supplier/contractor must have warned of those equipment dangers that were known to the supplier/contractor, but not to the government. Under a modified test for failure to warn claims, government contractors are immune from liability only when 1) the United States exercised discretion and approved the warnings; 2) the contractor provided a warning that conformed to the approved warnings; and 3) the contractor warned about dangers it knew but the government did not.

The court found the defendants had not met their burden of identifying evidence creating a genuine dispute of material fact as to whether the federal government had a hand in the decision of whether to issue warnings related to asbestos. Rather, the record indicated no government discretion was exercised. The court held the defendants were not entitled to immunity for plaintiff's failure to warn claims.

This was true also for plaintiff's claims premised on the defendant's failure to implement additional safety measures to prevent the spread of asbestos. The Walsh-Heely Act provides that no employee shall be exposed to asbestos in excess of a specified limit unless he is protected therefrom by respiratory equipment approved for the purpose by the United States Bureau of Mines of the United States Department of the Interior and operated in accordance with the recommendations of its manufacturer. The Walsh-Healy Act includes a catch-all provision that it expresses only minimum safety and health standards and provides that compliance with the standards expressed therein will not relieve anyone from any obligation to comply with any more strict standard stemming from any other source whatsoever. The government expressly stated the safety requirements it specified are minimum and do not relieve contractors of their obligation to comply with stricter standards. Compliance with the minimum health and safety requirements of

the Walsh-Healy Act does not give rise to immunity under the government contractor immunity defense. Plaintiff's motion for summary judgment was granted. *Crossland v. Huntington Ingalls, Inc.*, 20-3470 (E.D. La.10/19/22), 2022 WL 11082387.

NO DUTY ON THE PART OF AN ARCHITECT AND CONTRACTOR FOR PERSONAL INJURIES

An architect and contractor contracted to perform work with respect to 201 St. Charles Place which included upgrading the lid on an underground utility vault. Almost one year after completion of the work, an individual employed by Cox Communications allegedly sustained back injuries when he attempted to open the vault. The architect and contractor were sued. The claims asserted the issues with the vault lid were caused by inadequate cleaning and maintenance. The trial court dismissed the claims on motions for summary judgment.

The court of appeal held that there was no evidence either the architect or the contractor was contractually or otherwise tasked with maintaining, cleaning and/or inspecting the vault lid after completion of the work. Further, while the building owner maintained they failed to inform it of any special maintenance instructions, there was no evidence such special maintenance instructions existed. The architect and the contractor did not owe a duty to the injured worker. *Varnado v. 201 St. Charles Place, LLC*, 2022-0038 (La.App. 4 Cir. 6/29/22), 344 So.3d 241.

RIGHT OF A CONTRACTOR TO PAYMENT UPON SUBSTANTIAL COMPLETION

In a dispute between an owner and a contractor over the contractor's claim the project was substantially completed and it was entitled to the remaining balance of the contract price, the Louisiana First Circuit Court of Appeal held a contractor or subcontractor may recover the contract price even though defects and omissions are present after he has substantially performed the building contract. "Substantial performance" means that the construction is fit for the purposes intended despite the deficiencies. However, where the owner presents evidence of the cost of completion of the work and correction of defective work, the contract price may be reduced by that amount. The factors to be considered in determining whether there is substantial performance include the extent of the defect or non-performance, the degree to which the purpose of the contract is defeated, the ease of correction, and the use or benefit to the owner of the work already performed.

To recover damages from a contractor for defective workmanship, the owner must establish: 1) defects exist; 2) faulty materials or workmanship caused the defects; and 3) the cost of repairing the defects. If the owner meets this burden of proof, the remedy is to reduce the contract price in an amount necessary to perfect or complete the work according to the terms of the contract.

The court of appeal affirmed the decision of the district court that although the owner complained of defective work, there was no evidence of damage. There was no testimony concerning the cost of repairing any deficiencies. The owner failed to establish the cost of correcting any defects, and could not recover therefor. The court found the contract work was substantially complete. There was no merit in the owner's assertion the trial court erred in

awarding full payment of the contract price. *Garcia Roofing Replacement, LLC d/b/a Garcia Roofing v. McCain*, 2022-0233 (La.App. 1 Cir. 9/16/22), __ So.3d ___, 2022 WL 4285825.

AUTHORITY OF AN ARBITRATOR

On motions to confirm and vacate an arbitration award in a complicated construction dispute, the Louisiana First Circuit Court of Appeal held, following prior jurisprudence, that errors in factual or legal conclusions by the arbitrator will not invalidate an otherwise fair and honest arbitration award. The court of appeal acknowledged that it may have reached different conclusions as to the interpretation of the subcontract at issue or amount of damages. However, a court may not substitute its conclusions for those of the arbitrator. When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's improvident, even silly, fact finding does not provide a basis for a reviewing court to refuse to enforce the award. *Coastal Industries, LLC v. Arkel Contractors, LLC*, 2021-0906 (La.App. 1 Cir. 9/1/22), ___ So.3d ___, 2022 WL 3974108, *writ denied*, 2022-01489 (La. 11/22/22), 2022 WL 1710261.

REFUND OF CHARGES

Sampy, a homeowner, contracted with Atkins to stencil a brick driveway at his home. Sampy's homeowner's association advised him he could not have a stamped concrete driveway. Sampy sued Atkins for the deposit of $3,880.00 for the work. The trial court found Sampy was due a refund for unpurchased concrete and non-refundable materials. It also found Atkins was entitled to cancellation charges, non-refundable materials themselves, charges for a survey and charges for labor, travel and fuel. Sampy appealed.

The court of appeal found Atkins had no contractual obligation with the homeowner's association and no duty to inquire with it. The duty rested solely with Sampy to inquire about the acceptability of a proposed change to his property. The contract did not have an unlawful clause such that it would be declared an absolute nullity. A contract to install a stamped concrete driveway does not have an unlawful clause because it is prohibited by a homeowner's association. Nor was it a relative nullity as urged by Sampy. A contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made. The homeowner's association building restriction regarding the stamped driveways was not for the protection of private parties. The fact the contract was not performed was due to Sampy's failure to contact his homeowner's association prior to contracting with Atkins. The judgment of the trial court was affirmed. *Sampy v. Atkins Property Management, LLP*, 22-148 (La. App. 3 Cir. 10/12/22), __ So.3d ___, 2022 WL 6866253.

CLAIM FOR INDEMNITY

In two decisions involving the same matter but different motions to dismiss, the United States District Court for the Middle District of Louisiana in a products liability case reviewed the requirements of indemnity under Louisiana law. It held that in the absence of an express contractual provision, a claim for legal indemnity, sometimes referred to as tort indemnity, arises only when the fault of the person seeking indemnification is solely constructive or derivative, and

may only be had against one who, because of his act, has caused such constructive liability to be imposed. Such an implied indemnification claim should not be dismissed for lack of a contractor-subcontractor or employer-employee type relationship where the party seeking indemnity has alleged that any liability that it may have is only technical. The court should dismiss a claim for indemnity if there is no foreseeable combination of findings, viewing the allegations of the pleadings in the light most favorable to the party seeking indemnity, that could result in that party being cast in judgment for mere technical or passive fault.

The issues were presented to the court on Federal Rule 12(b)(6) motions to dismiss which test the sufficiency of the complaint against the legal standard that requires a short and plain statement of the claim showing that the pleader is entitled to relief. The parties seeking indemnity claimed they were exposed to liability because the party from whom indemnity was sought, among other things, breached the standard of care in designing and installing a sprinkler system. The party from whom indemnity was sought argued if the claimants were found liable, it would be attributable solely to their actual fault, precluding a claim for indemnity. The court held while that might ultimately prove to be the case, such a determination turns on factual findings that could not be made with respect to a Rule 12(b)(6) motion. At that stage, the court is only concerned with whether the claimant alleged a plausible basis for entitlement to legal indemnity. The motions to dismiss were denied. *Allied World National Assurance Company v. Nisus Corporation*, 00431 (M.D. La. 7/12/22), 2022 WL 2708746; *Allied World National Assurance Company v. Nisus Corporation*, 00431 (M.D. La. 8/17/22), 2022 WL 3453523 (reversing its decision in *Allied World National Assurance Company v. Nisus Corporation*, 21-00431 (M.D. La. 7/12/22), 2022 WL 2712172). Determinations as to whether a party seeking indemnity was guilty of actual fault, as opposed to technical or constructive liability, could be determined on a motion for summary judgment if there is no contested issue of material fact; otherwise, the issue would have to be decided at trial.

CONTRACTOR'S LICENSE NOT REQUIRED

Following Hurricane Laura, Glad Tidings Assembly of God Church of Lake Charles contracted with ServPro of Saginaw for carpet removal, drywall work, contents storage and disposition, ceiling tile and grid removal, pew removal, glue removal, woodwork, air scrubber usage, water remediation, structural drying, and selective demolition. ServPro sued Glad Tidings for breach of contract and open account. The United States District Court for the Western District of Louisiana initially dismissed the lawsuit on the basis ServPro was not a licensed contractor. ServPro moved for reconsideration of the dismissal.

ServPro argued the contract was only for water remediation, for which it was not required to hold a contractor's license. ServPro submitted an affidavit from the executive eirector of the Louisiana State Licensing Board for Contractors wherein he concluded the scope of work identified in the agreement was classified as "dewatering" per the Licensing Board standards, which did not require a license. The court held the breach of contract claim must be reinstated. The contract was solely for water remediation/dewatering. *RACM, LLC v. Glad Tidings Assembly of God Church of Lake Charles*, 03580 (W.D. La. 8/8/22), 2022 WL 3162186.

TAXES DUE FOR THE SALE OF DIRT

Willow Bend Ventures, LLC operated a burrow pit in St. John the Baptist Parish. The St. John the Baptist Parish Tax Collector assessed Willow Bend a total of $1,605,244.42 for taxes for sales of the dirt from the pit and penalties and interest. Willow Bend filed a petition for redetermination of the assessment with the Board of Tax Appeals. It alleged that because the dirt sold from its pit was used for Corps of Engineers projects, the sales at issue were not retail sales as defined in L.R.S. 47:301(10)(g) and, thus, were not subject to sales and use tax. Retail sales under the statute do not include a sale of a corporeal moveable property which is intended for future sale to the United States Government or its agencies when title to such property is transferred to the United States Government or its agencies prior to incorporation into a final product.

The Board found the tax payer had not met its burden of proof where there is no evidence to tie the purchases to a Corps of Engineers contract. Willow Bend failed to show the sales at issue fell within the scope of the exclusion. It failed to make a minimal showing the exclusion at issue encompassed the purchases or sales at issue. The statute excludes taxes due on those sales where the invoices reference an identifiable Corps of Engineers project with a known approved Corps contractor. Sales with generic references to towns or places without anything more to tie an invoice to an identifiable Corps contract are insufficient to be encompassed within the scope of the exclusion.

Willow Bend did not point to any specific sales or contracts, but rather generally contended all of its sales were connected to a Corps of Engineers project. The court of appeal held it could not find the Board was manifestly erroneous in its determination. The Board did not err. *Willow Bend Ventures, LLC v. Collector, St. John the Baptist Parish*, 18-660 (La.App. 5 Cir. 8/14/19), 340 So.3d 213.