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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 A. Stewart, Jr.** at *jstewart@pugh-law.com* or (504) 799-4529. Licensed in Louisiana and Texas (inactive in Texas).

CLAIM FOR TORT INDEMNITY FOUND QUESTIONABLE

Bellard, a plumber, while working on a project sustained personal injuries when a defective attic/ceiling joist broke and caused him to fall. Bellard sued R.S. Bernard and Associates, Inc., the general contractor, among others. Bernard filed a third party demand against Doug Ashy for tort indemnity. Ashy filed exceptions of prematurity, prescription, no right of action and no cause of action. The district court granted Ashy's exceptions of prematurity and prescription. The court of appeal reversed, finding CCP art. 1111 provides that a defendant in a principal action may bring in any person who is or may be liable to him for all or part of the principal demand and was construed by the court of appeal to permit Bernard to bring its tort indemnity claim. Further, the court of appeal found the tort indemnity claim did not prescribe since it did not begin to run until Bernard was cast in judgment which had not happened. The Louisiana Supreme Court granted Ashy's writ application seeking review of the ruling of the court of appeal.

The Supreme Court observed it was questionable whether the facts alleged in the petition could ever support a third party demand for tort indemnity. It cited previous decisions of the Court which held an implied contract of indemnity arises only where the liability of the person seeking indemnification is solely constructive or derivative and only against one who, because of his act, has caused such liability to be imposed. The party seeking indemnification must be without fault. Because a defendant can only be liable for his own share of fault, he cannot be cast in judgment for the fault of any other party or non-party. A suit alleging liability of a defendant arising solely as a result of his own fault cannot support a defendant's claim for tort indemnity. In the case at hand, Bellard made no

allegations in his petition Bernard was liable to him outside of Bernard's negligence or fault. The petition sounded in tort, not contract.

The Supreme Court remanded the matter to the district court to reconsider Ashy's exceptions, including the exceptions of no right of action and no cause of action, in light of its decision. *Bellard v. ATK Construction, LLC*, 2022-01715 (La. 6/27/23), 366 So.3d 1253.

INDEMNITY

Although this decision was not written in the context of a construction dispute, it could affect a claim for indemnity in a construction matter. The Plaintiff, the owner of a warehouse, sued its lessee for damages to the warehouse. The lessee filed a third-party demand against a third-party for indemnity. The trial court granted the motion for partial summary judgment of the third-party seeking dismissal of the tort claims finding they had prescribed, but because a tort indemnity claim and a tort claim are separate causes of action, the tort indemnity claim remained.

The third-party then requested the court dismiss the tort indemnity claim, arguing the Louisiana Supreme Court decision in *Bellard v. ATK Construction, LLC*, 366 So.3d 1253, did not allow a third-party plaintiff to expand its claim by alleging the fault of a third-party defendant. The lessee contended although *Bellard* discussed tort indemnity, the manner in which it did was factually different compared to the case at hand.

In *Bellard*, the court found a party not at fault whose liability stems from the fault of others may recover by way of indemnity. Further, a judgment against a named defendant in a suit for damages wherein the defendant is alleged to be liable to a plaintiff solely due to its own negligence and/or fault can only arise if the defendant is at fault.

The trial court found the owner's original claim against the lessee was contractual in nature. The claim of the lessee against the third-party was for any damages proven by the owner under the contract provisions. The facts presented were different in *Bellard* since there the third-party plaintiff filed a demand against the third-party defendant for tortious conduct not under any contractual provision.

The third-party defendant argued a party cannot shift its contractual liabilities via a third-party claim. The third-party defendant seemingly contended the dismissal of the tort claims influenced the dismissal of the tort indemnity claim which was incorrect. The court found there was a material fact at issue as to the individual acts or omissions of the third-party defendant and while the basis of the action arose from a contract, the tort indemnity claim has its roots in a tort claim insomuch as proving fault. In a footnote, the court noted an implied contract of indemnity, or tort 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.

The motion for summary judgment was denied. *Ridgecrest Realty, LLC v. Graphic Packaging International, LLC*, 20-01351 (W.D.La. 10/25/23), 2023 WL 7026940.

INTEREST ON DELAYED PAYMENTS BEFORE A PUBLIC WORKS PROJECT ALLOWED

Wallace C. Drennan, Inc. filed a Petition for Writ of Mandamus against City of New Orleans for the failure to pay invoices timely. Drennan claimed it was due interest on the invoices at issue under L.R.S 38:2191. The statue provides the public agency, within 45 days following receipt to the certified request, shall pay invoices. Drennan alleged because of the City's failure to timely pay the invoices, it was liable for statutory interest.

The court of appeal discussed the requirements for a Writ of Mandamus. A trial court's decision with respect to a Writ of Mandamus is reviewed under an abuse of discretion standard. Findings of fact are subject to a manifest error standard. Where the are two permissive views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was reasonable. Mandamus is available only when there is no discretion left to the public entity as to whether a payment is due and payable under the terms of the contract. The court of appeal found Drennan was ultimately paid for the work performed. The issue was whether the City had reasonable cause to delay payment, and thus, whether Drennan was entitled to interest.

The court of appeal reviewed the circumstances surrounding payment of the invoices. It found the failure to timely pay the invoices was the result of what could be characterized as the City's internal problems. Drennan was entitled to statutory interest on the payments. There was no discussion with respect to the assessment of attorney's fees as allowed by the trial court for one invoice under L.R.S. 38:2191B. *Wallace C. Drennan, Inc. v. Latoya Cantrell, in her official capacity as the Mayor of the City of New Orleans*, 2023-0193 (La.App. 4 Cir. 10/25/23), _____ So.3d _____, 2023 WL 7013396.

On rehearing, following further discussion of the issues, the court of appeal adopted its earlier judgment. *Wallace C. Drennan, Inc. v. Latoya Cantrell, in her official capacity as Mayor of the City of New Orleans*, 2023-0193 (La.App. 4 Cir. 12/7/23), _____ So.3d _____, 2023 WL 7013396.

CHOICE OF LAW, AND SINGLE BUSINESS ENTERPRISE AND ALTER EGO THEORIES OF LIABILITY

In a complicated decision concerning a choice of law and single business enterprise and alter ego theories of liability, the Louisiana First Circuit Court of Appeal held it would apply the terms of a contract that required it be governed, construed and interpreted in accordance with the law of the state of New Jersey as to parties who were signatories to it. As to non-signatory parties, the court applied Louisiana C.C. art. 3537 which provides an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue. In doing so, the court found the issues as to the signatories to the contract would be determined under Louisiana law. Its law would be the most seriously impaired if not applied.

The court recognized a distinction between the single business enterprise and alter ego theories of liability. Members of an LLC are generally not liable for a debt, obligation or liability of the LLC. In narrowly defined circumstances, however, individual members of an LLC have been subjected to personal liability for obligations for which the LLC would otherwise be solely liable. When individual members of an LLC mismanage an entity or otherwise thwart public policies justifying treating the entity as a separate judicial person, the court may pierce the corporate veil to hold the individual members of the LLC liable for its debts. The court may pierce the corporate veil in two exceptional circumstances: 1) the shareholders acting through the corporation commit fraud or deceit on a third party such that justice demands the corporate veil be pierced to allow the third party to recover from the shareholders personally; and 2) the shareholders disregard the corporate formalities to such an extent the shareholders and the corporation become indistinguishable, i.e., the corporation was operated as the alter ego of the shareholder.

As opposed to the alter ego doctrine which pierces the corporate veil to reach the members of an LLC, the single business enterprise doctrine is a theory for imposing liability on two or more business entities when they act as one. Under the single business enterprise theory, the legal fiction of a distinct corporate entity is disregarded when a corporation is so organized and controlled as to make it merely an instrumentality or adjunct of another entity. When a group of entities constitute a single business enterprise, the assets of each of the affiliated corporations are pooled together to satisfy the claims of creditors. The doctrine permits multiple companies to be treated as a single entity, but still an entity

separate in their part from their human owners, as if all of the different companies within an affiliated group had been organized as just one, all-encompassing corporation or LLC. Considering the facts, the court concluded two of the defendant entities engaged in single business enterprise with the contractually bound entities.

One of the defendants, an individual, was not a business entity, and the single business enterprise theory was inapplicable to him. Similarly, a defendant trust was not a business entity but rather a relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another. The court found the single business enterprise theory did not apply to the trust. This did not, however, preclude a finding the individual and/or the trust were solidarily liable under the alter ego theory of liability if grounds for piercing the corporate veil existed. Under the alter ego theory, a finding that technical formalities were not followed is not enough; there must be something else, some misuse of the corporate privilege or other justification for limiting the recognition of a separate corporate existence under the facts of a particular situation. Where fraud or deceit is absent, other circumstances must be so strong as to clearly indicate the corporation and shareholder operated as one. The court of appeal held it could not say the trial court's decision to pierce the corporate veil of the trust in order to hold the individual personally liable for the debt owed was manifestly erroneous. *Hill International Inc., v. JTS Realty Corporation*, 2021-0157 (La.App 1 Cir. 10/20/22), 370 So.3d 16.

BID FOR A PUBLIC CONTRACT REJECTED

J. Caldarera & Co., Inc. was the apparent low bidder for a project for the Ernest N. Morial Exhibition Hall Authority. The second low bidder, Landis Construction Co., LLC, challenged the responsiveness of Caldarera's bid. The Exhibition Hall Authority interpreted the bid instructions as requiring bid bonds be issued by a company that is licensed to do business in Louisiana and under contract with either a surety company or bond insurer, licensed and residing in Louisiana to serve as its local agent. Caldarera's agent was a Connecticut resident. The Louisiana Fourth Circuit Court of Appeal held the Exhibition Hall Authority's interpretation of the requirement was reasonable and not arbitrary and capricious. The court agreed Caldarera's bid was not responsive. Additionally, Caldarera did not submit a preliminary project schedule and preliminary traffic plans timely.

Caldarera issued a subpoena requesting communications between Landis and the lawyers for the Exhibition Hall Authority. Caldarera challenged the refusal of the Exhibition Hall Authority and Landis to produce the documents. The court of appeal found Landis and the Exhibition Hall Authority were common-interest litigants and were entitled to claim a privilege with respect to the communications. Caldarera argued the public bid law was violated by "favoritism." The court of appeal rejected the argument. The subpoena sought the Exhibition Hall Authority's litigation strategy prior to trial which was privileged information.

Finally, Caldarera contended the Exhibition Hall Authority awarded the contract in executive session in violation of the Open Meeting Law. The court of appeal found the award was made in an open session by unanimous vote after being properly motioned and seconded. *J. Caldarera & Co., Inc. v. Ernest N. Morial Exhibition Hall Authority*, 2018-0988 (LA.App. 4 Cir. 8/7/19), 369 So.3d 32, *writ denied*, 2019-91567 (La. 12/10/19), 285 So.3d 489.

PRESCRIPTION FOR A TORT CLAIM

The Finleys sued DHC for two torts. DHC was joined as a defendant more than one year after the second tort was committed. It filed an exception of prescription. The Finley's argued the doctrice of *contra non valentem* applied. The doctrine, if applicable, suspends the prescriptive period. Specifically, they relied on the fourth category of the doctrine which applies when a cause of action is

not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. The Finleys argued they initially were unaware DHC owned the business at the time of the incident.

The court of appeal held when the information a plaintiff needs to timely file suit is available in the public record, a plaintiff's inaction is unreasonable. Here, the Finleys failed to demonstrate any efforts they took to confirm ownership of the business at the time of the second incident. The information was publicly available on a website. The judgment of the trial court was reversed, and the exception of prescription granted. *Elise Finley v. St. Christina PFU, LLC*, 2023-0365 (La.App. 4 Cir. 6/23/23), 368 So.3d 1176.

PEREMPTION UNDER LRS 9:2772

A homeowner contracted for the elevation of a home and contended the contractor abandoned the project in an unfinished state. She sued the contractor. The contractor filed an exception of peremption under LRS 9:2772 arguing the homeowner occupied the residence more than 5 years before filing the suit. The homeowner argued the statute was ambiguous in that it provided peremption would run five years from acceptance of the work in the mortgage office or, if no such acceptance was recorded, within 6 months from the date the owner has occupied or taken possession of the improvements, in whole or in part, more than 5 years after the improvements has been occupied by the owner.

The court declined to engage in semantics. It found the most relevant inquiry was whether the homeowner filed her action within five years from occupying her home. She did not, and the claim was perempted. The court also found the peremptive period could not be cured by an amendment to the petition and denied the homeowner's request to amend the petition. *Simon v. Mid South Developers, Inc.*, 22-585 (La. 5 Cir. 10/4/23), _____ So.3d _____, 2023 WL 6453725.

LIEN BY A GENERAL CONTRACTOR, CLAIMS FOR EXEMPLARY OR PUNITIVE DAMAGES AND CLAIMS FOR DEFAMATION AND TORTIOUS INTERFERENCE

The United States District Court for the Western District of Louisiana considered a lien filed by a general contractor. The general contractor did not record a notice of the contract prior to commencing work as required by the Private Works Act. The court dismissed the general contractor's claims for enforcement of the liens and held the opposing party was entitled to have the liens cancelled.

The court next considered claims under Louisiana law for exemplary or punitive damages. The court found such damages are not recoverable absent a specific statutory provision authorizing their recovery. There was no Louisiana statute authorizing the damages. The claims were dismissed.

Finally, the court considered the contractor's claims for defamation and tortious interference with its business. The court held the general contractor did not allege facts which would show fault for purposes of defamation or tortious interference under Louisiana law. A claimant, to succeed in a claim for defamation must, among other things, set forth in the petition with reasonable specificity the defamatory statements allegedly published by the defendant. For purposes of a claim for tortious interference with a business relationship, a claimant must prove by a preponderance of the evidence a defendant improperly induced others not to deal with the claimant. The claimant must show the defendant's actions did more than adversely affect the plaintiff's business; there must be a showing a defendant actually prevented the plaintiff from dealing with a third party. Louisiana jurisprudence has viewed this cause of action with disfavor and requires a claimant to prove the defendant was motivated by actual malice. The court did not dismiss the claims but allowed the contractor to amend its claim to cure the deficiencies. *L B H, LLC v. V1 Fiber, LLC*, 23-0436 (W.D. La. 8/11/23), 2023 WL 5193717.

CLAIM AGAINST AN ENGINEER HELD PEREMPTED

The Louisiana Department of Transportation and Development paid 80% of the cost for a project for the Terrebonne Parish Consolidated Government (TPCG). DOTD selected the engineering firm to perform engineering services which then contracted with TPCG for the work. TPCG sued the engineer contending its contract with the engineer required the engineer to list it as an additional insured under its policy and to defend and indemnify it for any and all damages with respect to a lawsuit filed against TPCG. The engineer filed a motion for summary judgment asserting TPCG's claims were barred by the five-year peremptive period of L.R.S. 9:5607 for actions seeking damages against a professional engineer.

The engineer relied upon L.R.S. 9:5607(A)(3) which provides the peremptive period in a claim against an engineer that furnishes services preparatory to construction, but did not perform inspection of the work, commences to run from the date the engineer completed its services. The engineer contended its services were completed when it signed and sealed the last revision to its final set of plans. The engineer argued the demand of TPCG was filed in May, 2020 and its work was completed on September 16, 2013, nearly two years after the five year peremptive period had expired.

TPCG insisted the statutes pertaining to public works projects undertaken by DOTD provided the exclusive time limitation for all work arising out of projects related to a DOTD contractor. It relied upon L.R.S. 48:251.3 which provides any action arising out of or related to a DOTD contract or on a bond furnished by a contractor prescribes five years from the recordation of the acceptance of such contract. According to TPCG, the statue applied because the project was let by DOTD on TPCG's behalf. TPCG asserted the five year prescriptive period as to such actions commenced on the date of acceptance of the work by DOTD. Alternatively, TPCG maintained if L.R.S. 9:5607 provided the applicable time limitation, subsection (A)(1) governed the claims. The subsection, according to TPCG, provided the same time period for claims against engineers as L.R.S. 48:251.3 which was five years from the date of recordation of acceptance. The trial court granted the motion for summary judgment of the engineer.

The court of appeal held L.R.S. 9:5607(A)(3) applied. That statute required any claims against engineers must be filed within five years of the date the person furnishing services has completed the services with regard to actions against that person if the person furnishes such services preparatory to construction but does not perform any inspection of the work. The court of appeal determined the engineer had completed its work more than five years before it was sued.

In arguing L.R.S 9:5607(A)(3) does not apply to the claims against the engineer, TPCG relied upon L.R.S. 48:250 which provides all contracts for the construction of public works let by DOTD on behalf of political subdivisions prescribe five years after recordation of the acceptance of such contract or notice of default of the contractor or other termination of the contractor, whichever occurs first. A representative of the engineer testified in a lawsuit concerning property near the construction site. TPCG contended this equated to the engineer providing inspection and other work on the project. The representative also testified its services in connection with the lawsuit did not involve any design work. The court of appeal found the testimony as to the lawsuit did not constitute inspection of the work so as to bring its claims outside of the scope of L.R.S. 9:5607(A)(3).

Furthermore, the court of appeal held there was no merit to TPCG's argument DOTD statutes pertaining to public works projects override the specific peremptive period provided by L.R.S. 9:5607. The more specific statute controls over a general statute. L.R.S. 9:5607 applies to all actions for damages against a professional engineer arising out of an engagement to provide design services related to any manner of movable or immovable planning, construction, design or building, including, but not limited to, consultation, planning, designs, drawings, specifications, investigation, evaluation, measuring or administration. The legislature determined in adopting the statute no cause of action can

arise regardless of the claim after five years. After the expiration of the five-year peremptive period of the statue, the cause of action no longer existed. The court of appeal found, although the DOTD statute, L.R.S. 48:251.3, applied to the case, the more specific statute, L.R.S. 9:5607, was applicable and created the peremptive period during which TPCG had five years from the date the engineer performed its last work with respect to the project to file an action for damages against the engineer. L.R.S. 48: 251.3 only applies if a cause of action against an engineering service exists. Here, no cause of action against the engineer existed five years after it last performed its work.

The judgment of the district court dismissing the claims against the engineer was affirmed. *Conti Enterprises, Inc. v. Providence/GSE Associates, LLC*, 2022-1249 (La.App. 1 Cir. 10/30/23), _____ So.3d _____, 2023 WL 7125055.

CHANGE ORDER HELD TO BE A FINAL SETTLEMENT

The Louisiana 2nd Circuit Court of Appeal held in a dispute over the application of change order a contract provision which provided that an agreement on any change order would constitute a final settlement of all matters relating to a change in the work which is the subject of a change order rendered the change order at issue a final settlement of the matters relating to it. Unexpressed intentions or desires, not included in the written agreement of the parties did not constitute an ambiguity. No ambiguity was found in the terms of the contract. There was no vice of consent of error. Nor was there evidence of duress. The owner and the contractor were sophisticated parties who negotiated the change order prior to its execution. The judgment of the trial court granting the motion for summary judgment of the contractor to dismiss the claims against it was affirmed. *City of Ruston v. Womack & Sons Construction Group, Inc.*, 55,328 (La.App. 2 Cir. 11/15/23), _____ So.3d _____, 2023 WL 7570765.

INSURANCE COVERAGE FOR DELAY-RELATED EXTENDED GENERAL CONDITIONS

A general contractor sued two of its insurers for extended general conditions costs incurred as a result of delays in completion of a project related to six loss events. The insurers contended the provisions of the policies concerning the cost to repair or replace lost or damaged property only provided payment for the actual cost to repair or replace the lost or damaged property. The insurers agreed, under the terms of the policies, the contractor was entitled to recover general conditions costs actually incurred while completing repairs on the project necessitated by a covered loss event. The insurers argued, however, that is not what the contractor sought. Instead, the contractor claimed entitlement to a daily rate of extended general conditions for each day the contractor asserted final completion of the contract was delayed. The policies provided they did not cover consequential loss and expenses of any kind or delay in completion. The contractor argued cost to repair included overhead.

The court concluded the contractor did not seek reasonable overhead it incurred in the process of repairing or replacing the lost or damaged property. Instead, it asked the court to award it a set daily rate for each day it claimed completion of the project was delayed. The daily rate did not represent actual overhead costs incurred while repairing the damage; rather, it was calculated based on an average of the contractor's overhead costs during the original contract term. The contractor was entitled to recover reasonable overhead costs it incurred while repairing the damage caused by the loss events, but was not entitled to recover a theoretical daily rate for every day it claimed completion of the project was delayed. The contractor admitted the extended general conditions claim was based on the days final completion was delayed, not on actual overhead costs incurred while the damage was repaired which was a claim for damages for delays in completion of the project which was explicitly excluded by the policy. *The McDonnel Group, LLC v. Starr Surplus Lines Insurance Company*, 18-1380 (E.D. La. 9/22/23), 2023 WL 6208563.

SUBMISSION OF EXPERT TESTIMONY CONSIDERED BY THE COURT

Two defendant insurers moved to exclude the testimony of the plaintiff contractor's expert witness, Joe Caldarera. The insurers contended Caldarera's report was replete with impermissible legal assertions and conclusions, Caldarera was not qualified to give many of the opinions he authored, and his methodology was flawed and unreliable.

The court held it must remain vigilant against the admission of legal conclusions and an expert witness may not be used as a substitute for the court in charging the jury regarding the applicable law. The contractor argued specific phrases in Caldarera's report to which the defendant insurers objected, were not legal conclusions, but clearly simply factual statements. The court agreed Caldarera would not be permitted to offer legal conclusions in his testimony, but deferred ruling on whether precise testimony constitutes impermissible legal conclusions until it could hear the parties' arguments at trial.

The insurers contended Caldarera was not qualified to offer expert opinion evidence on insurance claims handling and adjustment. They argued while Caldarera holds an adjuster's license in Louisiana, there is no indication he has any real experience adjusting claims in the role of an adjuster. The rules of evidence do not mandate an expert be highly qualified in order to testify about a given issue. Differences in expertise bear chiefly on the weight to be assigned to the testimony by the trier of fact, not its admissibility. Caldarera testified in his deposition that in his role as an independent building consultant he frequently evaluates and adjusts claims for large insurers and in fact supervises adjusters. Additionally, the contractor presented evidence Caldarera has been performing insurance claim adjustment work since as early as 1982. The court held Caldarera is at least minimally qualified to offer expert testimony on claims handling and adjustment.

The defendants, although conceding Caldarera might be minimally qualified to give scheduling opinions, argued the scheduling opinions sought to be offered were not the product of accepted scheduling analysis, but rather are a product of client advocacy. Caldarera used a formula of his own creation called the "Caldarera Formula" to support his expert opinion as to the cost the contractor incurred as a result of the delay in completion of the project caused by the loss events. The court noted ordinarily an experts alleged bias is an issue of credibility and not admissibility. If the defendant insurers believed Caldarera's expert opinions were tainted by bias in the contractor's favor, the appropriate means of challenging the testimony is via vigorous cross-examination at trial.

The court noted in rejecting Caldarera's theory based on the "Caldarera Formula" the contractor was entitled to a set daily rate for each day it asserted completion of the project was delayed as a result of the loss events. Caldarera's opinions based on his formula were not relevant to any remaining claim that would be presented at trial, and would thus be of no help to the jury in its role as fact finder. The insurers' were entitled to have testimony excluded to the extent it is based on the formula. *The McDonnel Group, LLC v. Starr Surplus Lines Insurance Company*, 18-1380 (E.D. La. 9/25/23), 2023 WL 6222427.

PROVISIONS OF AN OCIP WITH RESPECT TO LIMITS HELD TO BE CIRCULAR

An insurer which provided an Owner Controlled Insurance Program (OCIP) was sued. One of the claimants contended the insurer was liable for more than it paid under the occurrence limit because the policy contained coverage beyond that amount. The claim was for property damages resulting from leaks in the sprinkler system. The claimant argued it was possible the applicable policy limit was the aggregate limit. Section III of the policy stated the General Aggregate Limit was the most the insurer would pay for bodily injury and property damages. The policy also stated the amount the insurer would pay for damages was limited as described in the same section of the policy.

The court held the meaning of the term General Aggregate Limit was circular in stating the General Aggregate Limit was the most the insurer would pay for the sum of damages, and, in turn, stating the amount it would pay for damages is limited as described in the same section. A circular definition of a material term in an insurance contract necessarily creates ambiguity, generally requiring construction in favor of coverage.

Additionally, the court held it was not clear from the plain text of the policy why the occurrence limit necessarily limited compensable damages caused by the sprinkler leaks and not the aggregate limit as contended by the insurer. There was no explanation as to when the occurrence limit applied to the exclusion of the aggregate limit.

The court held it was plausible the aggregate limit may apply to the damages resulting from the sprinkler leaks. The insurers motion to dismiss the claim since it had already paid the occurrence limit was premature at that stage of the litigation. The insurer's motion to dismiss was denied. *Allied World National Assurance Company v. Nisus Corporation*, 21-00431 (M.D. La. 8/31/23), 2023 WL 5663150.

PAYMENT FOR STOCKPILED MATERIALS, CONTRACT PROVISION PROVIDING FOR PAY-IF-PAID, PAYMENT UNDER A PAYMENT BOND AND ATTORNEY FEES

The Louisiana First Circuit Court of Appeal held Section 109.06 of the Department of Transportation and Development Standard Specifications required payment to a general contractor for stockpiled materials at the amounts submitted by a subcontractor. Additionally, it held a pay-if paid provision in the contract between the general contractor and a subcontractor did not apply to claims of a sub subcontractor against the general contractor. There was no contract between the general contractor and the sub subcontractor. Therefore, no pay-if-paid provision existed between those parties which conditioned payment to the sub subcontractor on the general contractor's receipt of payment from the DOTD. Also, a statutory payment bond furnished by a surety was not canceled or otherwise rendered null when a release of lien bond was provided.

Finally, although LRS 48:256.11 of the DOTD Public Works Act provides for attorneys' fees in a concursus proceeding brought pursuant to the Act, the proceeding at hand was not a concursus proceeding, and the sub subcontractor could not seek attorneys' fees under the statute. The sub subcontractor, instead, relied upon LRS 9:3902 of the law concerning suretyship to support its argument it was entitled to attorneys' fees under the payment bond. The court declined to apply the more general statute stating if the legislature intentionally chose to award attorney fees for a claim under a payment bond, it would have done so. As a consequence, the legislature intentionally chose to limit the availability of attorneys' fees under LRS 48:256.11 to concursus proceedings. *L&A Contracting Company v. State of Louisiana, through the Department of Transportation & Development*, 2022-1301 (La.App. 1 Cir 8/16/23), 372 So.3d 14, *writ denie*d, 2023 (La. 12/19/23), _____ So.3d _____, 2023 WL 8729230.

PEREMPTION UNDER L.R.S. 9:2772

Arco Builders, Inc. as the general contractor subcontracted the roofing work for a project it undertook in West Carroll Parish, Louisiana to Chemical Insulation Co., Inc. More than seven years after completion Chemical sued Arco to recover amounts it claimed were owed pursuant to the subcontract. Chemical alleged it fully performed the roofing services, but Arco did not pay the full amount owed.

Arco filed a peremptory exception alleging the claims were perempted under L.R.S. 9:2772. Chemical contended the claim was subject to a prescriptive period of ten years under C.C. art. 3457 and

L.R.S. 9:2772 did not apply because the statue only considers actions involving deficiencies in construction, not claims for an unpaid debt.

Chemical relied on the reasons given by the Legislature for the creation of the peremption statute which stated the purpose of section 2772 was to limit the time within which actions may be brought for deficiencies in design, planning, inspection, supervision or construction of improvements to immovable property or for property damage, personal injury or wrongful death arising from any such deficiencies. Chemical contended the title of the statute which referenced a peremptive period for actions involving deficiencies in surveying, design, supervision, or construction of immovables and improvements thereon also means it applies only to claims arising from deficiencies. The trial court granted the exception and dismissed the claims against Arco.

The court of appeal held the plain language of the statute indicates it specifically applies to contractual claims such as that asserted by Chemical. It also held the statute specifically applied to any claims otherwise arising out of a construction project for an immovable brought by the owner or any other person. The word "deficiencies" is not a limitation contained within the clear language of the statute. Further, headings to actions, source notes and cross references are given for purposes of convenient reference and do not constitute a part of the law. The inclusion of the word "deficiencies" in the title of the statute is not a source of law. The decision of the trial court was affirmed. *Chemical Insulation Co., Inc. v. Arco Builders, Inc.,* 55,230 (La.App. 2 Cir. 8/9/23), 369 So.3d 483, *writ denied*, 2023-01235 (La. 11/21/23), _____ So.3d_____, 2023 WL 8049170.

CONTRACTOR LICENSING REQUIREMENTS

In the previous edition of the Update, we discussed the decision in the *Lemoine Company, LLC v. The Ernest N. Morial Exhibition Hall Authority*, No. 2022-0217 (La.App. 4 Cir. 4/12/23), 369 So.3d 39, 2023 WL 2910736. The Louisiana Supreme Court, in a *per curiam* decision stated without further comment: "In light of the unique and extenuating circumstances presented herein, and given the time-sensitive nature of the ongoing project, the court of appeal is reversed. The judgment of the trial court which found the Authority's decision to award the contract to AECOM-Hunt/Broadmoor was not arbitrary and capricious, is reinstated." That was the extent of the decision. *The Lemoine Company, LLC v. The Ernest N. Morial Exhibition Hall Authority*, 2023-00763 (S.Ct. 10/17/23), 372 So.3d 326.

JUDGMENT CONFIRMING ARBITRATION AWARD AFFIRMED

The McDonnel Group (TMG) contracted with French Quarter Apartments Limited Partnership (FQA) to serve as the general contractor for the construction and renovation of the French Quarter Residences. JMA Painters, LLC (JMA) contracted with TMG for painting work. FQA filed an arbitration demand against TMG for allegedly defective workmanship. JMA filed a separate demand for arbitration against TMG asserting claims for uncompensated work. JMA also filed a lawsuit against TMG alleging it failed to pay disputed amounts due on another project for the Jung Hotel. TMG asserted a defense of set-off in the Jung litigation.

Most of the claims with respect to the FQA arbitration were resolved. The claims of JMA proceeded to arbitration. The arbitrators rendered an Interim Award finding JMA was entitled to payment from TMG in the amount of $1,172,960.00, plus attorneys' fees and costs. Shortly thereafter, the arbitrators entered an Order awarding JMA attorney's fees and arbitrator's fees and costs. The arbitrators then entered a Final Award correcting the amount of attorneys' fees and costs.

JMA filed a petition in the district court to confirm the arbitration awards. TMG filed a motion in district court to vacate the awards arguing the arbitration awards erroneously: 1) failed to award TMG contractual set-off; and 2) failed to apply the contractual delay damages waiver. JMA opposed

the motion to vacate contending, among other things, the motion of TMG was untimely. TMG, in support of its motion to vacate, argued in a reply to the opposition to its motion the awards were null because the arbitration panel lost its authority to render an award three months after the matter was submitted to the panel. The district court confirmed the arbitration awards and denied the motion to vacate. TMG appealed.

The court of appeal first considered the argument of TMG the arbitration awards were null because the panel lost its authority to render an award within three months after the matter was submitted to the panel. L.R.S. 9:4213 requires that notice of a motion to vacate, modify or correct an award shall be served on the adverse party or his attorney within three months after the award is filed or delivered as prescribed by law for service of a motion in an action. Compliance with the statute is dependent upon service of a motion to vacate and not on filing the motion. The motion to vacate the award was filed and served more than three months after the date of the Interim Award, but within three months of the Order and Final Award. The court of appeal held it saw no reason to find TMG's motion to vacate was untimely since the Interim Award expressly projected issuing an additional Final Award.

The court of appeal next considered Civil Code art. 3105(A) which provides the power of the arbitrators may continue in force during three months from the date of the submission unless the parties agree to revoke it. The submission and power given to the arbitrators are put at an end by one of the following causes: 1) by the expiration of the time limited, either by the submission or by law, though the award should not be yet rendered; 2) by the death of one of the parties or arbitrators; 3) by the final award rendered by the arbitrators; and 4) when the parties happen to compromise touching the thing in dispute or when the thing ceases to exist. CC art. 3132.

In their contract, the parties agreed to the Construction Industry Arbitration Rules of the American Arbitration Association, and submitted the matter to arbitration before the AAA. The AAA Rules make clear the time for rendering an award can be extended by the parties or AAA, and the parties can waive the right to object. Rule R-40(c). Rule R-42 provides that any party who proceeds with arbitration after knowledge that any provision or requirement of the Rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

There was no indication TMG lodged any objection with the arbitration panel to any delay in issuing its awards. It was only after the award was rendered that TMG raised its complaint the award was null as untimely in its reply memorandum in support of its motion to vacate. The court of appeal held, under the AAA Rules, the argument of TMG was waived. There was no merit in its position the arbitrators lost or exceed their jurisdiction to issue their awards, such that the awards were null.

The court of appeal then considered the arguments of TMG the awards should be vacated because the panel: 1) exceeded its authority; and 2) manifestly disregarded the law. TMG contended the denial of its claim for contractual set-off to TMG and the award of damages to JMA for loss of productivity due to schedule compression compelled the awards be vacated. A manifest disregard of the law refers to error which is obvious and capable of being readily and instantly perceived by an average person qualified to serve as an arbitrator. The doctrine implies the arbitrators appreciate a clearly governing legal principle exists, here the contract provisions, but decide to ignore it. Where there is no allegation or proof of dishonesty, bias, or any conscious attempt to disregard Louisiana law, no showing of manifest disregard of the law is demonstrated. No such showing was demonstrated.

TMG contended a provision in its contract with JMA entitled it to withhold any amounts the arbitration panel found JMA may have been owed from the FQA arbitration until the final disposition of certain set-off amounts alleged by TMG in connection with the Jung litigation. TMG asserted the arbitrators erroneously denied their contractual set-off claim and instead found it was not entitled to

legal set-off. The court of appeal held assuming, arguendo, the arbitration panel erred in applying the principles of legal set-off instead of contractual set-off, the record lacked any evidence such an error was anything more than simply an error of law. It could not be concluded the arbitrators manifestly disregarded the law or exceed their authority in undertaking to arbitrate the issues placed before them by the parties.

Finally, TMG argued the arbitrators improperly disregarded the clause of the subcontract for waiver of damages for delay, disruption and/or acceleration and erroneously awarded JMA damages for lost productivity due to schedule compression. TMG argued the arbitrators acknowledged the provision in the subcontract barring delay damages and manifestly disregarded it which they did not have authority to do. The court of appeal held TMG's argument was merely a claim for misinterpretation of the contract which is not reviewable. The misinterpretation of a contract by an arbitration panel is not subject to judicial correction. When no dishonesty is alleged, an arbitrator's improvident, even silly, fact finding does not provide a basis for a reviewing court to refuse to enforce the award. Errors of fact or law do not invalidate a fair and honest arbitration award. This assignment fell outside the permissible grounds for vacating an arbitration award and lacked merit.

The judgment of the district court, confirming the arbitration awards was affirmed. *JMA Painters, LLC v. The McDonnel Group, LLC*, 2022-0732 (La.App. 4 Cir. 7/13/23), 370 So.3d 1130.

RESPONSIBILITY FOR WORK OF AN INDEPENDENT CONTRACTOR AND ULTRA-HAZARDOUS WORK AND A CLAIM FOR NEGLIGENT HIRING

The Louisiana First Circuit Court of Appeal considered the question of whether a general contractor was responsible for the work of an independent contractor and whether the work performed was ultrahazardous. The court held a principal is not liable for the offenses committed by an independent contractor while performing its contractual duties. There are two exceptions to that general rule: 1) where the work performed by the contractor is ultrahazardous; or 2) if the principal reserves the right to supervise or control the work of the independent contractor. Three factors are considered in order to determine whether an activity is ultrahazardous for purposes of the first exception: 1) the activity must relate to land or some other immovable; 2) the activity itself must cause the injury, and the defendant must be engaged directly in the injury-producing activity; and 3) the activity must not require substandard conduct to cause injury. An activity is ultrahazardous if all three factors are present.

The court found the activity, which in this instance was concerned with the operation of and damage to a crane, did not relate to land or any other immovable. Further, the activity in question required substandard conduct to cause injury. Consequently, the activity was not ultrahazardous.

With respect to the second exception for a general contractor's non-liability for acts of an independent contractor, the principal must reserve the right to supervise or control the work of the independent contractor. It is not the supervision and control that is actually exercised that is significant, but it is the right to exercise it that is a primary concern in determining whether a principal may be held liable for the torts of an independent contractor. Here, the general contractor did not exercise any control as to how the crane was operated. The employees solely determined how their work would be done and did not want or need any direction from the general contractor. The employees unilaterally decided to change the plan on how to proceed with a demolition project without the general contractor's knowledge. The fact the general contractor's safety manager inspected the jobsite for safety measures, such as roping off the jobsite and making sure safety hats, shoes, and glasses were worn, did not constitute the exercise of operational control. Neither exception to the general rule of non-liability for an independent contractor applied to the facts. *Lafayette Steel Erector, Inc. v. G. Kendrick, LLC*,

2022-0892 (La.App. 1 Cir. 8/29/23), ___ So.3d _____, 2023 WL 5542571, *writ denied*, 2023-01316 (La. 12/19/23), _____ So.3d _____, 2023 WL 8731953.

In a separate decision, the court considered a claim against the owner of the project for negligent hiring of the general contractor. The court recognized, for purposes of a claim for negligent hiring, the jurisprudence establishes that one who hires an irresponsible independent contractor may be independently negligent. To determine whether a principal is negligent for hiring an irresponsible contractor, the courts must consider the principal's knowledge at the time of the hiring. A claim for negligent hiring is cognizable only if the claimant can show the principal had knowledge when it hired the independent contractor the independent contractor was irresponsible. Negligent conduct that occurs after the hiring is not determinative of the claim. When the principal has previously hired a contractor with good results, and there is no evidence in the record to demonstrate the principal's prior negligent hiring practices, a claim for negligent hiring fails.

Because the court earlier found the general contractor was not negligent and therefore was not negligent in causing the accident, the owner could not be found to have negligently hired the general contractor since it was not irresponsible. Without any fault on the part of the general contractor, there could be no cause-in-fact or legal cause as the basis of any claim against the owner. Additionally, the exceptions to the general rule that principals are not liable for the acts of independent contractors did not apply to the claims against the owner. The general contractor did not exercise any control over the independent contractors it hired on the date of the accident as to how the work with respect to the crane would be performed. Similarly, the owner did not exercise any control over the general contractor or the subcontractors on the project, nor did it assume any duty of supervision and oversight. The individual employees controlled the work, not the owner. The court found the trial court did not err in granting summary judgment in favor of the owner. *Lafayette Steel Erector, Inc. v. G. Kendrick, LLC*, 2022-0895 (La.App. 1 Cir. 8/30/23), _____ So.3d _____, 2023 WL 5601961, *writ denied*, 2023-01322 (La. 12/19/23), _____ So.3d _____, 2023 WL 8732003.

EXCEPTION OF PREMATURITY TO A CLAIM TO ENFORCE A PAY-IF-PAID CLAUSE

A subcontractor filed a claim against a general contractor for payment pursuant to a pay-if-paid clause. The general contractor filed an exception of prematurity contending the obligation had not yet come into existence because it had not received payment for amounts allegedly owed. The subcontractor argued the exception of prematurity was waived because the general contractor sought relief in the form of a stay.

The Louisiana Fourth Circuit Court of Appeal found the stay was for an extension of time to plead pending a decision in another matter. CCP art. 928(A) provides a dilatory exception of prematurity shall be pleaded prior to or in the answer and prior to or along with the filing of any pleading seeking relief other than, among other things, an extension of time to plead. The court of appeal held the exception was not barred and was consistent with art. 928. The court of appeal affirmed the decision of the trial court sustaining the exception. *Land Coast Insulation, Inc. v. Gootee Construction, Inc.*, 2021-0052 (La.App 4. Cir. 9/24/21), 369 So.3d 811; affirmed on rehearing, *Land Coast Insulation, Inc. v. Gootee Construction, Inc.*, 2021-0052 (La.App 4 Cir. 12/1/21), 367 So.3d 5, *writ denied*, 2022-00002 (La. 2/22/22), 333 So.3d 434.

DENIAL OF COVERAGE FOR A BREACH OF CONTRACT CLAIM

The Louisiana First Circuit Court of Appeal held a provision in a liability policy did not apply to any claim or suit for breach of contract precluded coverage for any claims by an owner against a contractor or subcontractor for breach of contract or negligence for alleged defective or incomplete work. Claims for coverage regarding bodily injury, property damage, advertising and/or personal

injury or an occurrence or damage of any type are excluded under the breach of contract exclusion. All of the property damage claims alleged against the insurer in this instance were clearly precluded from coverage since they arose from a breach of contract claim. There might be coverage under the Products-Completed Operations Hazard. *Allen v. Southwest Builders, LLC*, 2022-1344 (La.App 1. Cir 8/24/23), 372 So.3d 32.

CLAIMS AGAINST A ROOFING MANUFACTURER FOUND DEFICIENT

Plaintiffs sued their roofing contractor for damages as a result of post-hurricane repairs. They also sued the manufacturer of the shingles installed by the contractor for damages.

Plaintiffs claimed the manufacturer encouraged the use of its products, declared itself a leading manufacturer, used a website to refer the general public to professionals in there area, and held itself out being founded in 1904. The court held these factual allegations were insufficient to permit a reasonable inference the manufacturers advertisement were certain and definite offers to plaintiff by which their acceptance formed a contract. A newspaper advertisement may constitute an offer, acceptance of which will consummate a contract and complete and create an obligation in the offeror to perform according to terms of the published offer. The advertisement, however, must be certain and definite enough to constitute a legal offer.

The plaintiffs also sued the manufacturer for breach of warranty against redhibitory defects in its product. The court stated the factual allegations must set out the cause of action between the manufacturer as the seller and plaintiffs as they buyer. The court held the facts pled were insufficient to establish plaintiffs purchased the products directly from the manufacturer. *Selim v. Fortay Roofing & Construction, LLC*, 23-00524 (W.D. La. 6/29/23), 2023 WL 4282077.

MOTION TO VACATE, MODIFY OR CORRECT AN ARBITRATION AWARD HELD UNTIMELY

An arbitrator rendered an award. The party against whom the award was rendered moved in district court to correct the award on the grounds there was an evident material miscalculation of figures. The court of appeal found the motion, although it was filed timely, was not served upon the adverse party or his attorney withing three (3) months after the award was filed as required by LRS 9:4213. As a result, the motion to correct the award was untimely, and the party seeking the correction waived any defenses it may have had to confirmation of the award as sought by the prevailing party. The award was confirmed by the court of appeal. *Lou-Con, Inc. v. Trans-Vac Systems, LLC*, 2019-0576 (La.App 4 Cir. 12/4/19), 364 So.3d 80, *writ denied*, 2020-00122 (La. 3/9/20), 294 So.3d 482.

AGREEMENT TO ARBITRATE AND A SUBSEQUENT AGREEMENT

An agreement between a property owner and a contractor provided that all disputes thereunder would be resolved by binding arbitration. A subsequent agreement provided completion dates for incomplete items. The owner filed a lawsuit in state court alleging the work performed by the contractor was defective and incomplete and the contractor failed to meet the specified deadlines. The contractor filed a dilatory exception of prematurity contending the disputes were subject to arbitration. The trial court overruled the exception. The contractor appealed.

The court of appeal held the trial court implicitly found the parties intended for the subsequent agreement to substitute for the original agreement although it did not explicitly indicate it superseded that agreement. The court of appeal found the trial court erred in reading an intent of the parties to have the subsequent agreement supersede the original agreement where it was not evident in the wording of the agreements. The record was devoid of any evidence of the parties' intent to extinguish the original agreement in favor of the subsequent agreement or to substitute the original agreement

with the subsequent agreement. There is a strong presumption in favor of arbitration. Any doubts concerning the scope of arbitration should be resolved in favor of arbitration. The court of appeal reversed the trial court's decision. The owner was required to arbitrate the disputes. *Alford v. CB Construction & Development, LLC*, 2017-1036 (La.App. 4 Cir. 6/6/18), 2018 WL 2716394, *writ denied*, 2018-1133 (La. 10/15/18), 253 So.3d 1301.

INTERRUPTION OF PRESCRIPTION LEFT TO THE JURY TO DETERMINE

Louisiana law provides a one-year liberative prescription period for products-liability actions. Typically, prescription commences to run from the day injury or damage is sustained. The doctrine of *contra non valentem* tolls prescription under any of four circumstances, one of which is where the cause of action is not known or reasonably knowable by the plaintiff. This is termed the "discovery rule."

In a personal injury matter, the United States Fifth Circuit Court of Appeals found a jury could reasonably determine *contra non valentem* tolled the prescription period until the date argued by the injured party given the injured party's consultations with his doctor. On the other hand, a jury could just as reasonably determine *contra non valentem* tolled prescription until some point in time before the date argued by the injured party when prescription would have accrued. As the record stood, the court held when the prescriptive period expired, and whether *contra non valentem* applies, were questions best left for the jury.

The district court's summary judgment order was vacated, and the matter remanded for further proceedings. *Bruno v. Biomet, Inc.,* 22-30405 (5th Cir. 7/21/23), 74 F.4th 620.

CLAIM FOR DAMAGES FOLLOWING A SECOND HURRICANE

Plaintiff claimed its property was damaged as a result of two hurricanes, Laura and Delta, and sought damages for two separate policy limits of the same policy. The Umpire determined all alleged damages were attributable to Hurricane Laura. The court acknowledged recovery under separate policy limits would be justified in the event the plaintiff had begun repairs following one occurrence and then suffered additional damages from the second. The Plaintiff argued because there was further damage to its property after Hurricane Delta, it should be able to recover the insurance proceeds. The court agreed additional damage would be covered, but did not agree two policy limits would apply.

The insurer's motion for partial summary judgment on the Hurricane Delta claims was granted in part and denied in part. It was granted to the extent plaintiff would be prohibited from recovering two policy limits, but denied to the extent it would be permitted to submit to the jury any additional damages sought and/or exacerbated by Hurricane Delta. *First Assembly of God Church, Inc. of Leesville v. Church Mutual Insurance Co.*, 21-00378 (W.D. La 6/23/23), 2023 WL 4167096.

WAIVER OF LIABILITY PROHIBITED RECOVERY

In the July, 2023 edition of the update, we reported the decision in *White v. DT Williams, LLC*, 2022-1145, (La.App. 1 Cir. 6/2/23), 2023 WL 38662470. The Louisiana Supreme Court granted a writ application, and in a *per curiam* held genuine issues of material fact remained. The rulings of the lower courts were reversed, and the matter remanded to the district court for further proceedings. That was the extent of the decision. *White v. DT Williams, LLC*, 2023-00906, (Louisiana, 11/8/23), _____ So.3d _____, 2023 WL 7383234.

MOTION TO DISMISS AND JOINDER OF OTHER PARTIES IN A CLAIM BY A SURETY AGAINST INDEMNITORS REJECTED

This is a continuation of the saga reported in the article included in the July, 2023 issue of the Update entitled surety's Request for indemnitors to Post Collateral Security. In the decision reported then, the court considered and granted the request of a surety for a preliminary injunction ordering indemnitors to deposit security.

The indemnitors then moved to dismiss the claims or, alternatively, to join required parties under Federal Rule of Civil Procedure, Rule 19(a). They argued for purposes of their motion the surety failed to join several categories of required parties to the action. The parties who were not joined by the surety were owners of other projects with respect to which the surety issued performance and payment bonds and unspecified creditors. As to the project owners, the indemnitors argued they were required to be included as parties because they were in control of funds available to pay for the completion of their contracts and past due amounts that might be owed. The court held the other project owners had nothing to do with the indemnitors' obligations to the surety under the General Agreement of Indemnity at issue.

As to the unspecified creditors, the court found it does not consider the effect a judgment may have on absent parties when evaluating complete relief. Although the indemnitors argued they might be forced to liquidate assets encumbered by senior security interests in satisfaction of an adverse judgment in the matter at hand, the argument is only relevant to the indemnitors' ability to pay a future judgment. It had no bearing on the existence and amount of their obligations to the surety under the General Agreement of Indemnity. The court noted the project owners and the unidentified creditors had not asserted an interest in the subject matter of the instant action. Further, it is the threat of inconsistent obligations, not the possible of multiple litigation that determines consideration under the Rule. The court concluded the indemnitors failed to demonstrate the project owners and creditors were required parties under the Rule. The motion was denied. *Western Surety Company v. Magee Excavation & Development, LLC*, 23-1097 (E.D. La. 6/7/23), 2023 WL 3866856.

WAIVER OF RIGHT TO ARBITRATION AND STAY OF LITIGATION

Industrial Roofing and Construction, LLC sued Pontchartrain Partners, LLC and Western Surety Company, Pontchartrain's Miller Act surety, for payments they did not allegedly tender. Pontchartrain and Western Surety moved to dismiss the claims contending they were subject to mediation and arbitration. Western Surety argued, in the alternative, the litigation should be stayed pending the outcome of mediation and arbitration. Industrial argued Pontchartrain waived its right to mediation and arbitration by failing to engage in those processes, and its Miller Act claim against Western Surety was not bound by the arbitration clause.

The court found in order to find a party has waived its right to arbitration, the party seeking arbitration must have substantially invoked the judicial process to the detriment or prejudice of the other party. Industrial contended Pontchartrain waived arbitration by failing to engage in the mediation and arbitration process. The court found Pontchartrain had not substantially invoked the judicial process to the detriment or prejudice of Industrial. Aside from filing the instant motion to dismiss, Pontchartrain had not utilized the judicial process instead of the mediation and arbitration process. Filing the motion to dismiss did not prejudice Industrial as Pontchartrain only sought to enforce the arbitration clause in the subcontract.

Industrial noted Pontchartrain still had not provided the names of mediators after Industrial sent a demand letter. The subcontract, however, required the American Arbitration Association to

appoint a mediator if the parties could not agree on a mediator, and Industrial indicated it had not communicated with the AAA to do so. The arbitration clause had not been waived.

The court next considered whether to dismiss or stay Industrial's claims against Pontchartrain. The court held although dismissal was not an abuse of discretion, the jurisprudence did not require dismissal when all of a party's claims are subject to arbitration. The court exercised its discretion to stay Industrial's claims against Pontchartrain pending arbitration.

Western Surety was not a signatory to the subcontract that contained the mediation and arbitration clause. The court stayed the litigation of Industrial's Miller Act claims against the surety pending the arbitration of the state law claims against Pontchartrain. *United States of America for the Use and Benefit of Industrial Roofing and Construction, LLC v. Western Surety Company*, 23-2119 (E.D. La. 12/1/23), 2023 WL 8355555.

DISMISSAL OF A CLAIM AGAINST A PROFESSIONAL LIABILITY INSURER WHEN THE CLAIM AGAINST THE INSURED WAS PEREMPTED

Claims against an engineering firm were dismissed as perempted. The claimant contended it could still maintain a action against the engineer's professional liability insurer. The trial court granted summary judgment to the insurer. The court of appeal held because the insured could have no liability to the claimant, it could not be held liable as its professional liability insurer. The judgment of the trial court was affirmed. *Conti Enterprises, Inc. v. Providence/GSE Associates, LLC*, 2022-1248 (La.App. 1 Cir. 11/1/23), _____ So.3d _____, 2023 WL 7175741.

CLAIMS FOR DEFAMATION AND TORTIOUS INTERFERENCE WITH A CONTRACTOR'S BUSINESS

Plaintiff, a broadband and internet service provider, contracted with the defendant to construct a fiber broadband network and internet system at two locations in Louisiana. Disputes arose between the plaintiff and defendant. The plaintiff terminated the contract and sued for alleged breach of the agreement. The defendant filed a counter-claim alleging, among other things, defamation and tortious interference with its contractual relations and with prospective economic relations. The defendant contractor contended the plaintiff committed defamation by publication of false and harmful information to others by claiming the contractor performed poor work, was in breach of its contract and failed to act to complete its work and address any possible punch lists and committed tortious interference with its contractual relations and prospective economic relations. The plaintiff filed a Federal Rules of Civil Procedure Rule 12(b)(6) motion to dismiss the counterclaims of the contractor.

The contractor argued it alleged sufficient facts to support a claim for monetary damages based on business defamation and/or tortious interference with contractual relations. The contractor alleged two separate communications by the plaintiff in which it made false statements and those false statements could only have been made with malice for no other purpose than to cause harm to the contractor by destroying its reputation. The contractor contended one of the items of correspondence confirmed the communications from the plaintiff took place, and plaintiff had been communicating with the contractor's subcontractors. The contractor stated discovery would yield additional information concerning the communications and that it should not be precluded at this stage of the proceeding from discovery of additional facts to support its claims.

Statements, which by their very nature, tend to injure one's personal or professional reputation are considered defamatory per se. Alternatively, a plaintiff can recover damages for tortious interference with business relations upon a showing the defendant improperly influenced others not to deal with plaintiff. The court held, accepting the contractor's allegations as true for purposes of the

motion, the contractor should be allowed to proceed with its claim for defamation and tortious interference and the discovery process. The motion was denied. *LBH, LLC v. V1Fiber, LLC*, 23-00436 (W.D. La. 11/3/23), 2023 WL 7295844.

HOMEOWNER FOUND NOT VICARIOUSLY LIABLE FOR INJURIES SUSTAINED BY AN EMPLOYEE OF A CONTRACTOR AND WAS NOT DIRECTLY LIABLE FOR THE INJURIES

The Louisiana First Circuit Court of Appeal considered whether a homeowner was vicariously or directly liable for injuries sustained by an employee of an electrical subcontractor. As to the issue of vicarious liability for acts of the subcontractor, the court held an employer, here the homeowner, is vicariously liable for the negligence of its employees that occurs within the course and scope of the employees' employment. A principal is generally not liable for the torts of an independent contractor performing its contractual duties. There are two exceptions to the general rule: 1) when the injury results from an ultrahazardous activity; and 2) when the principal reserves the right to supervise or control the work of the contractor.

The distinction between an employment or independent contractor relationship is a factual determination that must be decided on a case-by-case basis. In making the determination, courts consider whether 1) a valid contract exists between the parties; 2) the work is of an independent nature; 3) the contract allows for the work to be done according to the contractor's own methods, without being subject to control and direction except as to the result of the services to be rendered; 4) a specific price for the overall undertaking is agreed upon; and 5) the duration of the work is for a specific time and not subject to termination at the will of either party. In making the determination, the court must look at the degree of control over the work.

After reviewing the parties' evidentiary submissions, the court of appeal found the homeowner established the general contractor was an independent contractor, and the general rule that a principal is generally not liable for the torts of independent contractors performing their contractual duties applied. Further, the work performed was not ultrahazardous. There was no evidence supporting the assertion the homeowner maintained operational control over the creation of the hazard. The control of the homeowner over the work was restricted to the result to be rendered, as opposed to operation control. Thus, the matter did not fall under either of the exceptions to the general rule that a principal is not liable for the torts of an independent contractor.

The court then considered whether the homeowner was directly liable for the employee's injuries. Generally, the owner of a building under construction or renovation does not have custody for purposes of the Civil Code articles establishing the basis for liability of a homeowner for injuries caused by a defect in the home. An exception to the rule occurs when the owner exercises operational control over the contractor's methods of operation or gives express or implied authorization to unsafe practices. There was undisputed evidence the homeowner did not exercise operational control over the work performed. Judgment dismissing the claims against the homeowner was affirmed. *Stonetrust Commercial Insurance Company v. TBT Contracting, Inc. of La.*, 2022-0971 (La.App. 1 Cir. 4/14/23), 366 So.3d 585.

IMMUNITY UNDER THE TWO-CONTRACT THEORY

Luft contracted with TBT Contracting, Inc. as the general contractor for a renovation project. TBT subcontracted the electrical work to Naquin Electrical, Inc. During the course of the project, an employee of Naquin was injured. TBT in a lawsuit for subrogation by the workers' compensation carrier for the electrical subcontractor claimed it was immune from liability for the employee's injuries under the two-contract statutory employer status theory of L.R.S. 23:1061(A)(2) and moved for summary judgment.

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, the principal enters into a subcontract for all or part of the work. The two-contract theory contemplates relationships among 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.

TBT failed to attach a copy of the insurer's petition to its motion for summary judgment by which TBT claimed the insurer judicially confessed the employee was injured while performing the electrical work. A party seeking summary judgment may not reference documents located elsewhere in the record when those documents were not specifically filed in support of or in opposition to a motion for summary judgment. As a result, the court of appeal reversed the judgment of the trial court granting summary judgment in favor of TBT. *Stonetrust Commercial Insurance Company v. TBT Contracting, Inc. of Louisiana*, 2022-0972 (La.App. 1 Cir. 6/20/23), 370 So.3d 494.

CLAIMS PEREMPTED UNDER LRS 9:2772

A contractor contended claims filed against it for the construction of three houses by the owner were perempted under L.R.S. 9:2772. The owner argued the exceptions of peremption and prescription of the contractor should be dismissed by virtue of the fraud exception to the statute. The district court held a trial on the allegations of fraud. It found the owner failed to carry his burden of proving fraud with respect to the construction project. Thereafter, the district court determined the claims against the contractor filed eight years after the owner took possession of the houses and rented them out, were perempted. The owner appealed.

The court of appeal, as to the claims of fraud, held while fraud may result from silence or inaction, mere silence or inaction without fraudulent intent does not constitute fraud. There are three basic elements to an action for fraud against a party to a contract: 1) a misrepresentation, suppression or omission of true information; 2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and 3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to a contract. Existence or absence of fraud is a question of fact that will not be disturbed on appeal absent manifest error. The issue before an appellate court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Where the factfinder's determination is based on his decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous. The court of appeal found the trial court's factual findings as to the issue of fraud were reasonably supported by the record. The owner failed to show the contractor misrepresented or suppressed the truth with the intention to obtain an unjust advantage for the contractor or cause a loss or inconvenience to the owner. There was no error in the trial court's conclusion the owner failed to present sufficient evidence to establish any actions or failures to act by the contractor constituted fraud.

The court of appeal held L.R.S 9:2772 requires no action shall be brought against any person for the construction of immovables, or improvements to immovable property, more than five years after the owner has occupied or taken possession of the improvement in whole or in part. It found the Louisiana legislature enacted the statute to protect building contractors from liability for past construction projects that could extend for an indefinite period of time. The statue provides if an acceptance of the construction or improvements is recorded withing six months of occupancy, the peremptive period begins on the date the acceptance is recorded. If no acceptance is recorded within six months of occupancy, the peremptive period begins on the date of occupancy. No evidence was presented indicating an acceptance of construction was recorded. The owner testified at trial the houses were constructed between September, 2007 and April 30, 2008 and within a few months after completion of construction, the houses were leased and occupied. Therefore, the testimony of the

owner established some time before the end of 2008 the houses were occupied. However, the claim was not filed until 2016, approximately eight years later. Because the owner filed his demand more than five years after he took possession of the houses, there was no error by the trial court in sustaining the contractor's peremptory exceptions. The trial court that dismissed with prejudice the claims filed against the contractor were affirmed. *Whitney Bank v. Rayford*, 2023-0020 (La.App. 1 Cir. 10/31/23), 2023 WL 7144928.

HUD CONTRACT TRUMPS AIA GENERAL CONDITIONS FOR PAYMENT OF RETAINAGE

BRaDD, LLC, as the owner, contracted with Unicorp, LLC to build an apartment complex in Lake Charles. BRaDD and Unicorp signed a HUD contract with a holdback provision of 10% in Article 5. Unicorp filed a motion for partial summary judgment seeking to recover retained funds totaling $3,214,711.00. Unicorp sought to have BRaDD release the retained funds pursuant to the terms of Section 9.8.5 of the General Conditions. BRaDD contended Article 5 of the HUD Construction Contract governed the release of retained funds and Unicorp failed to comply with the requirements of that provision.

Article 2(A)(2) of the HUD Contract provided if any of the provisions of the agreement conflict with the terms contained in the General Conditions, the provisions of that contract would control. Article 5(B) provided for final payment of all unpaid obligations contracted in connection with the work performed under the Contract. Article 5(C) provided for payment of the balance due the Contractor. BRaDD argued the "balance due" included the retainage. Unicorp argued Article 5(C) pertained to final payment only, and not the payment of retainage.

The court of appeal held Unicorp overlooked the difference between Article 5's use of the terms "final payment" and "balance due." Article 5(B) governed Unicorp's request to receive "final payment" while Article 5(C) governed the "balance due" and included retainage. Article 5(C) required payment only if certain conditions were established.

The court of appeal concluded the terms of Section 9.8.5 of the General Conditions conflicted with the terms of Article 5 of the Contract and, therefore, Article 5(C) of the Contract controlled the release of retainage. Unicorp did not prove it satisfied the requirements of Article 5 of the Construction Contract. Accordingly, BRaDD established a genuine issue of material fact existed as to whether Unicorp was entitled to recover the retainage. The judgment of the trial court granting Unicorp's motion for partial summary judgment was reversed. *Unicorp, LLC v. BRaDD, LLC*, 23-229 (La.App 3 Cir. 10/25/23), ___ So.3d _____, 2023 WL 7008039.

CLAIMANT ENTITLED TO RELIEF UNDER A STATUTORY PAYMENT BOND DESPITE A RELEASE OF LIEN BOND

NCMC, LLC entered into a contract with the City of Baton Rouge and Parish of East Baton Rouge. Suretec Insurance Company issued a statutory payment bond for NCMC in favor of the City/Parish. NCMC entered into a subcontract with Professional Application Services, Inc. Professional entered into a sub-subcontract with SATCO, Inc. A payment dispute arose between SATCO and Professional. SATCO filed a lien and sued Professional and Suretec to enforce the lien. Professional filed a release of lien bond issued by US Fire Insurance Company guaranteeing payment of the lien. The clerk of court and recorder of mortgages for East Baton Rouge Parish issued a cancellation of the inscription/recordation of the lien, noting the release of lien bond was placed in lieu of the lien. US Fire was subsequently named as a defendant.

Suretec, which issued the payment bond for NCMC, filed peremptory exceptions of no cause of action and no right of action seeking dismissal of the claims in the lawsuit against it. The trial court

granted the exceptions dismissing the claims against Suretec. SATCO appealed. Suretec contended because US Fire issued a release of lien bond in favor of Professional and the recorder of mortgages cancelled SATCO's lien, SATCO's right of action against Suretec was extinguished as a matter of law and Suretec was relieved of any obligation to SATCO.

The Court of Appeal concluded Suretec had not been released from its statutory bond obligation to SATCO with the deposit of the release of lien bond by Professional and the cancellation of the statement of lien claim by the recorder of mortgages. SATCO's petition stated a cause of action against Suretec, and SATCO had a right of action. The judgment of the trial court was reversed. *SATCO, Incorporated v. Professional Application Services, Inc.*, 2023-0012 (La.App. 1 Cir. 10/19/23), _____ So.3d _____, 2023 WL 6889533.

SUBSTANTIAL COMPLETION VERSUS COMPLETION FOR PURPOSES OF LIQUIDATED DAMAGES

A contractor argued liquidated damages could not be assessed since the project was substantially completed within the stipulated time frame. The relevant contract provision provided for liquidated damages for work upon failure to achieve completion, not substantial completion, within the time frame. The Court of Appeal affirmed the decision of the trial court assessing liquidated damages since all work had not been completed within the time frame set forth in the contract. *Boone Services, LLC v. Clark Homes, Inc.*, 2023-0299 (La.App. 1 Cir. 10/18/23), _____ So.3d _____, 2023 WL 6886072.

RELEASE HELD TO BE A BASIS FOR AN EXPCETION OF RES JUDICATA

Windy Hill Pictures, LLC operates within the film industry securing third-party bridge loans for movie productions. Windy Hill reached out to Nola Holdings, LLC seeking a bridge loan to finance a production. The parties entered into an agreement providing for Windy Hill's total indebtedness of $5,050,000 plus a financing fee. The agreement contained a release which provided the lender released and forever discharged the borrower from any and all claims of every kind and nature, however evidenced or created, whether known or unknown, arising prior to or on the date of the agreement, including, but not limited to, any claims involving the extension of credit or the indebtedness incurred by the borrower or any other transactions evidenced by the agreement. Nola made a series of loans to Windy Hill for the production which totaled $3,050,000

Windy Hill defaulted on the loan. It, evidently, was unable to obtain permanent financing. Nola sued Windy Hill for damages. Windy Hill filed an exception of res judicata, the sole basis for which was the release. While ordinarily premised on a final judgment, the doctrine of res judicata also applies where there is a compromise or a settlement of a disputed claim or matter that has been entered into between the parties.

Nola argued the agreement and release were vitiated by fraud. The court found prior to executing the agreement, Nola was told the entity from which permanent financing was sought would not finance the film. Thus, there was no evidence Nola was fraudulently induced by any such representation. A claim for fraud could not be predicated on unfulfilled promises or statements as to future events. Fraud may be predicated on promises made with the intention not to perform at the time the promise is made. Here, the alleged representations were promissory in nature and were predominantly subject to actions to be performed by third parties. The fact Windy Hill may have misjudged its ability to successfully have the film produced was not actionable fraud.

The court found Nola and Windy Hill were two commercially sophisticated parties who had some history of doing business together on film projects. Nola acknowledged its representative read the

release more than once and he did not seek outside counsel before signing it. Nola conceded the same release clause was contained in two prior versions of the agreement as well as a loan agreement the parties perfected for another film project. Nola's representative reiterated in his deposition the agreement was final and binding. A plain reading of the release revealed no ambiguity. The fact the clause might not typically be found in lending agreements does not render it ambiguous. The court held the exception of *res judicata* was proper.

Nola also sought leave to amend its petition to state a cause of action for post-agreement fraud. Windy Hill did not contend the document released post-release claims. The court allowed Nola leave to amend its petition. *1955 Nola Holdings, LLC v. Windy Hill Pictures, LLC*, 2023-0050 (La. App. 4 Cir. 10/2/23) ____ So.3d _____, 2023 WL 6397866

RECOVERY BY A MEMBER OF JOINT VENTURE AGAINST ANOTHER MEMBER FOR CAPITAL ADVANCED

The McDonnel Group, LLC (TMG) and Archer Western Contractors, LLC (AWC) entered into a joint venture agreement for the construction of the Orleans Parish Sheriff's Office Inmate Processing Center/Templeman III & IV Replacement Administration building. According to the agreement AWC and TMG were to share any profits and any losses accruing to the joint venture from performance of the contract in accordance with their proportional interest in the joint venture. Initially, AWC held a 70% share of the joint venture while TMG held the other 30%. AWC was designated as the managing party giving it charge and supervision over the timely and satisfactory performance of the contract, subject to the superior authority and control of the Executive Committee.

The Executive Committee was largely controlled by AWC. The representatives of each party on the Executive Committee had a vote equal to that parties' proportional share. The capital contributions for each party were determined by their proportionate share. The joint venture agreement provided the share of a party defaulting in its contributions may be paid by the non-defaulting party, and such payments would be deemed to be demand loans made by the non-defaulting party to the defaulting party.

Critical cash flow issues developed as a result of the failure of the owner to compensate the joint venture which required the joint venture to obtain additional capital contributions from its constituent parties, AWC and TMG, in order to continue work on the project and compensate subcontractors. TMG failed to contribute additional capital contributions. AWC made the contributions, which TMG refused to pay, as directed by the Executive Committee. AWC sued TMG to recover the contributions TMG failed to make, plus interest and attorney fees. AWC's claims exceeded $6 million dollars in loans to TMG as well as attorneys' fees. TMG claimed AWC's claims were prescribed and it was not entitled to attorneys' fees.

As to prescription, TMG contended AWC's claims were properly classified as an action on money lent and subject to the three-year prescriptive period of Civil Code art. 3494 as opposed to the default ten-year period for breaches of contract as asserted by AWC. The court held the loans made by AWC to TMG for the default capital contributions were sufficiently intertwined with and dependent upon the underlying joint venture agreement such that the action was one for breach for that agreement and not an action on money lent. The ten-year prescriptive period applied. The claims were not, therefore, prescribed and the court denied dismissal based on prescription.

With respect to the claim for attorney's fees, TMG argued that although the joint venture agreement contains a provision allowing for recovery of attorneys' fees, AWC failed to reference that provision in its complaint. The court held AWC's filing of its Second Amended Complaint, which specifically provides for the payment of legal expenses to a non-defaulting party allowed recovery of

attorneys' fees. AWC adequately pleaded a claim for attorneys' fees. The motion of TMG to dismiss the claim was denied. *Archer Western Contractors, LLC v. The McDonnel Group, LLC*, 22-5323 (E.D. La.. 9/14/23), 2023 WL 5974833.

CLAIM FOR UNJUST ENRICHMENT

SWEPI and National Energy Group contracted with Pharaoh Oil & Gas through a reimbursement agreement to perform the clean-up of an oilfield. Pharaoh subcontracted with Beldan for the services SWEPI had retained Pharaoh to perform. SWEPI issued funds to Pharaoh to pay some of Beldan's outstanding invoices, but not all. Pharaoh made a partial payment to Beldan to satisfy part of the debt. Beldan sued Pharaoh for the payments, and alternatively, SWEPI for unjust enrichment. Beldan also asserted claims for consequential damages against Pharaoh resulting from Pharaoh's breach of contract or, alternatively, against both Pharaoh and SWEPI for unjust enrichment. SWEPI moved to dismiss the unjust enrichment claims against it.

SWEPI's main argument was that Beldan had not satisfied the element for an unjust enrichment claim that the action will only be allowed when there is no other remedy at law, i.e., the action is subsidiary or corrective in nature. An action for unjust enrichment is a subsidiary remedy, in that particularly it is not available if the claim is based on a relationship controlled by an enforceable contract.

The United States District Court for the Middle District of Louisiana held it would grant SWEPI's motion to dismiss. Louisiana law allows an unjust enrichment claim to be pled in the alternative when the validity of the contract is in dispute. Here, Beldan's complaint did not allege a dispute as to the existence or validity of its contract with Pharaoh. Because there was an adequate remedy at law available, specifically Beldan's breach of contract claim against Pharaoh, plaintiff had no viable unjust enrichment claim against SWEPI.

Having made the determination there was no dispute concerning the validity of the contract between Pharaoh and Beldan, the court held the existence of that contract precluded Beldan from recovering on unjust enrichment claims against SWEPI. Beldan was not able to seek recovery for unjust enrichment from a third party when there are contractual remedies for the same damages. Beldan was seeking unjust enrichment as an alternative to its breach of contract claim, not alleging separate damages cause by SWEPI's unjust enrichment. Beldan was able to seek those damages from Pharaoh through its breach of contract and for account claims. *Beldan Investments, LLC v. Pharaoh Oil & Gas, Inc.*, 22-62 (M.D. La. 9/14/23), 2023 WL 5989528.

CLAIMS FOR OUTSTANDING CONTRACT BALANCES AND DAMAGES CAUSED BY BREACH OF CONTRACT, DAMAGES FOR DELAYS AND AN EXTENSION OF TIME TO PERFORM WORK

The Sewerage and Water Board entered into two contracts with TKTMJ, Inc. to replace two sewerage pumping stations. Travelers Casualty and Surety Company of America provided performance bonds. Problems arose during construction. The S&WB requested TKTMJ to perform additional work on both stations which resulted in additional costs and delays to the completion dates. TKTMJ filed a petition alleging the S&WB was in breach of both contracts. It prayed for damages for its outstanding contract balances, amounts for additional work performed, damages caused by S&WB breach of contract, damages as a result of delays caused by S&WB and an extension of time required to perform the work. The district court rendered judgment in favor TKTMJ awarding total damages in the amount of $1,719,808.24, plus judicial interest. The reconventional demand of S&WB against TKTMJ and its third party demand against Travelers were dismissed. The S&WB appealed.

The S&WB complained the district court erred in awarding additional costs, delay days and delay damages on the grounds 1) TKTMJ failed to comply with the written notice requirement under the contract to trigger delay damages; and 2) TKTMJ was at fault for the costs and delays. The court of appeal found the contracts did not include a delay or liquidated damages provision in favor of TKTMJ if the S&WB caused a delay in completion of the contract date. As a result, delay damages were allowed pursuant to LRS 38:2216(H).

The S&WB contended TKTMJ was not entitled to delay damages because the contract required TKTMJ to notify S&WB in writing within seven days of any alleged delays that influenced the completion of the work to trigger the delay damages. The court of appeal concluded in the event TKTMJ submitted a change order, or encountered a delay, or needed an extension of time as a result of an action or direction of TKTMJ, or someone other than S&WB, TKTMJ was required to give S&WB written notification in the form of a time-impact analysis to be entitled to add days to completion of the contract, and to give written notification of the delay, within seven days after the beginning of the delays, to avoid paying liquidated damages. It further concluded TKTMJ was not required to give a time-impact analysis or written notification to S&WB in the event S&WB suspended the work, and changed or added work, as required by the Contract Documents.

With respect to one of the projects, S&WB suspended work. The court of appeal held under the terms of the contract, TKTMJ was not required to give written notice to S&WB to seek costs or delays in the completion of the contract date for that project. The court of appeal concluded it was not unreasonable, based on the evidence presented, for the district court to find the delay was due to the actions of S&WB. Thus, the district court did not err in awarding TKTMJ additional costs, delay days and delay damages. Since, with respect to another aspect of the contract, the S&WB ordered TKTMJ to change the flange-to-flange of a mechanical fastening connection. Thus, there was no written notice requirement under the contract as to that issue.

In another instance, Entergy requested additional work that resulted in a delay. Under the contract, TKTMJ was required to submit an impact analysis to the engineer illustrating the influence of this change delay to the completion date to be entitled to an extension of the completion date of the contract and delay damages. The record did not reflect TKTMJ did so. Therefore, the extension of the completion date for the contract was reduced.

The district court classified the installation of expansion joints as additional work and awarded costs to TKTMJ. The record, also supported a finding TKTMJ was given credit for the delay by the district court. Since the work was ordered by S&WB, the court of appeal found no written notice was required by TKTMJ under the contract. Thus, the district court did not err in awarding TKTMJ costs and delay days.

Part of the claim of TKTMJ involved the redesign of a temporary restraining structure. The court of appeal found since that was additional work required by S&WB, no notice requirement under the contract was triggered. Further, the district court did not err in finding the S&WB was at fault for the delay and awarding TKTMJ delay days and delay damages for the redesign.

TKTMJ submitted a proposal which was accepted by S&WB to perform repair work for a wall. The district court found this was additional work S&WB requested TKTMJ to perform. The court of appeal agreed. Thus, written notice under the contract was not required for TKTMJ to recover delay damages.

Adverse weather days were claimed by TKTMJ. Since the contract was silent as to how excessive adverse weather days would be counted, the court of appeal found written notice of the impact of adverse weather days was not required. To the extent TKTMJ did not submit evidence to support the

proposition adverse weather days impacted the critical path of the work, the court of appeal found the district court erred in allowing those non-compensable delay days. The extension of days for completion in that respect was reduced.

The contract provided for liquidated damages in the amount of $500 per day for each day beyond completion date of the contract. TKTMJ was not to be charged liquidated damages if the delay was due to unforeseeable causes beyond its control without fault or negligence on its part. The relief was contingent upon TKTMJ's notifying S&WB in writing of the cause of the delays within seven consecutive calendar days after the beginning of such delay. In addition, the S&WB had discretion to extend the time to start and complete the contract. The record did not reflect that TKTMJ complied with the contract by notifying S&WB in writing of the causes of some of the delays to avoid paying liquidated damages for them. Additionally, TKTMJ failed to prove it was entitled to several non-compensable delays for adverse weather days, and TKTMJ was responsible for some delays past the completion date at $500 per day in liquidated damages. *TKTMJ, Inc. v. The Sewerage and Water Board of New Orleans*, 2020-0154 (La.App. 4 Cir. 12/16/20), 366 So.3d 276.

STATUTORY EMPLOYER STATUS FOUND

The United States District Court for the Western District of Louisiana considered the defense of a general contractor that it was the statutory employer of an injured employee of a subcontractor and was immune from his tort claim. The contractual arrangement between the general contractor and the subcontractor recognized the existence of a statutory employer relationship between the two parties which established a rebuttable presumption of a statutory employer relationship. The burden then shifted to the plaintiff to show the work done by the injured party was not a part of the general contractor's trade, business or occupation. The court held the general contractors trade, business or occupation was the construction of the project on which the injured employee was working at the time of the injury. The work performed by the employee satisfied the test.

The court also found the statutory employer relationship existed via the two contract theory. That theory of defense 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, the principal enters into a subcontract for all or part of the work performed. The principal was the general contractor which entered a contract with the owner, a third party, for the project and then with the subcontractor. Accordingly, the two contract defense theory created a statutory employer relationship between the general contractor and the employees of its subcontractor, regardless of trade or business. The court held the general contractor could not be liable for non-intentional injuries. *Charles Craft v. Max Access, LLC*, 22-05899 (W.D. La. 8/7/23), 2023 WL 5029056.

CLAIMS FOR INDEMNITY AND LIMITATION OF LIABILITY

A general contractor sued a subcontractor for breach of contract for defective work and for liability for failing to provide coverage for indemnity to the general contractor for damages and for limitation of liability. The subcontractor moved for summary judgment.

The subcontractor argued because no claim or action had been asserted against the general contractor, it was not obligated to indemnify the general contractor, and, therefore, the subcontractor was not liable for indemnity. The United States District Court for the Western District of Louisiana found the subcontractor agreed to indemnify the general contractor from and against any claim, cost or expense attributable to damages to or destruction caused by the subcontractor's performance under the subcontract, but that language must be read in the context of the proceeding provision which

referred to the assertion of a claim or institution of a suit or action against the general contractor involving the manner or sufficiency of the performance of the subcontractors work.

Here, there was no claim, suit, action or proceeding against the general contractor giving rise to liability the subcontractor should have assumed which was required to trigger the subcontractor's contractual obligation to indemnify the general contractor. Thus, the subcontractor's motion to dismiss the claim for indemnity was granted, but without prejudice in the event the indemnity provision was triggered.

The subcontractor contended the language of two work orders which were issued following the subcontract limited any potential liability against it to $1,000.00. The court found the preamble to the subcontract stated the contract controlled and governed the work by the subcontractor, and may be used in conjunction with written work orders between the parties, however, the subcontract provided nothing contained in any work order could be construed to change or amend the terms and conditions of the subcontract. The court held the subcontract expressly prohibited modification or abrogation of its terms by work orders. That portion of the motion for summary judgment of the subcontractor was denied. The motion was also denied as to the issue of defective work. *Planet Construction J2911 LLC v. Gemini Insurance Co.,* 21-01075 (WD.La. 7/20/23), 2023 WL 4675387.

CLAIMS FOR BREACH OF CONTRACT, SUIT ON AN OPEN ACCOUNT AND UNJUST ENRICHMENT

In the sequel to its decision of June 5, 2023 reported in our July 2023 Construction Law Update, the United States District Court for the Eastern District of Louisiana, following a trial, considered the claims of a contractor for water mitigation services. The court determined in its earlier decision it could not then determine the validity of the alleged contract.

24/7 Restoration Specialist, LLC is a Texas limited liability company, and provides emergency water mitigation and dewatering services to property owners affected by disasters such as hurricanes or floods. It holds no Louisiana contractor's license, mold remediation license or home improvement license. Zachary Young owned property located in Luling, Louisiana which was the subject of the work performed by 24/7. There was no contract for the work performed by 24/7 for Young, only an Authorization for Repair and Payment. The Authorization allowed 24/7 to proceed with emergency cleaning and/or restoration services required to restore the water damaged property. It did not contain a scope of work, cost or estimated time of completion. 24/7 performed the work and provided Young with an invoice which was subsequently reduced to $57,511.00. Young did not pay the charges. 24/7 sued for recovery under breach of contract, open account and unjust enrichment.

The court held the Authorization was ambiguous since it did not articulate a defined scope of work, an estimated time of completion, a definite price or any method of determining price. In an effort to determine the parties' intent, the court considered parol evidence. Based on that evidence, the court found the Authorization was not a valid and enforceable contract. It failed to state an object that was lawful, possible and/or determinable. The claim for breach of contract was dismissed. Since there was no contract, and the Authorization was a nullity under Louisiana law, the claim under the Open Account statute was dismissed.

The court held a claim for unjust enrichment is based upon the equitable principal a person who has been enriched without cause at the expense of another person is bound to compensate that person. To prove unjust enrichment, five elements must be present: 1) an enrichment; 2) an impoverishment; 3) a connection between the enrichment and resulting impoverishment; 4) an absence of justification or cause for the enrichment and impoverishment; and 5) the lack of another remedy at law.

The court found Young was enriched by the work performed by 24/7, and 24/7 was impoverished. There was a direct connection between the work performed and 24/7's impoverishment and no justification. Since the court declared the Authorization a nullity, there was no other remedy at law to adequately compensate 24/7 for its work. Thus, Young was bound to compensate 24/7 for the work performed under principles of equity.

Under unjust enrichment principles, Civil Code art. 2298 provides the amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less. The court found the amount 24/7 was impoverished was indeterminable. 24/7 presented no evidence from which the court would be able to determine its cost of labor or materials. A court may not award speculative damages. The court found it must measure compensation owed to the extent Young benefited from the work by 24/7. After considering all of the evidence, the court determined Young was enriched in the amount of $35,909.00. 24/7 was entitled to judgment in that amount on its unjust enrichment claim. *24/7 Restoration Specialist, LLC v. Zachary Young*, 22-1948 (E.D. La. 7/31/23), 2023 WL 4865340.

OBJECTIONS TO REMOVAL AND ARBITRATION REJECTED

An insured sued a group of foreign insurers contending they failed to adequately investigate and timely pay its insurance claim by severely undervaluing the damages sustained by a covered event, *i.e.* Hurricane Ida in August, 2021. The insurers removed the matter to federal court pursuant to 28 U.S.C. §§ 1411 and 1446 on the grounds there was a valid arbitration agreement in the insurance policy in dispute that fell under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the federal court, thus, had original jurisdiction under 9 USC §§ 202, 203 and 205. The insurance policy contained an arbitration clause which stated all matters in difference between the insured and the insurers in relation to the insurance, including its formation and validity, and whether arising during or after the period of insurance, shall be referred to arbitration. The arbitration clause specified the arbitrators may not award exemplary, punitive, multiple, consequential, or other damages of a similar nature. The insurers moved to compel arbitration and dismiss the claims against it, or, alternatively, stay litigation pending arbitration.

The insured contended the insurers waived their removal rights based on the language of the policy, and waived their rights to remove bad faith claims by virtue of the exclusionary language. The United States District Court for the Eastern District of Louisiana held the insured did not allege any facts or cite any legal authority to support its position the insurers waived their rights to removal based on the exclusionary language in the arbitration clause. For a contractual clause to prevent a party from exercising its right to removal, the clause must give a clear and unequivocal waiver of that right. The insured failed to show the defendants clearly and unequivocally waived their rights to removal.

The insured also contended the insurers waived their right to arbitrate its bad faith claims as a result of the same exclusionary provisions in the arbitration clause. The court, followed other jurisprudence which held that at most the provisions limited the damages which an arbitrator might order in the event the insured was to prevail at arbitration. The court found the insurers had not waived their right to arbitrate the bad faith claims.

The insured next argued its bad faith claims do not implicate the arbitration clause because bad faith, punitive claims and damages do not arise from the contract of insurance, but rather from the insurers' violation of statutory duties. The court, again following earlier authority, found the insured's bad faith claims fell within the scope of the arbitration clause at issue. The substance of the bad faith claims arose from alleged failures of the insurers to adequately adjust, investigate and pay the claims. The court stayed the pending litigation while the arbitration panel had determined whether penalties and fees were warranted under Louisiana law.

Finally, the insured argued the motion to compel arbitration should be denied as premature because the parties did not timely opt-out of the court's Hurricane Ida Streamlined Settlement Program and, as such, the parties were subject to the Streamlined Settlement Program. The court found as it previously held, even when parties fail to timely opt-out of the Streamlined Settlement Program, there are instances when mandating the parties to abide by the Program would hinder rather than promote the swift and just resolution of a matter. The court concluded the clear language of the arbitration clause, as well as binding precedent, required the court to grant the motion to compel arbitration.

Although Louisiana law ordinarily prohibits enforcement of arbitration clauses concerning insurance disputes, the United States Fifth Circuit Court of Appeals has held the Convention supersedes state law. *Ten G, LLC v. Certain Underwriters at Lloyd's London*, 22-4426 (E.D. La. 7/25/23), 2023 WL 4744170.

CONTRACTUAL DATE FOR COMPLETION OF A PROJECT AND DISMISSAL OF FRAUD CLAIMS

The United States District Court for the Western District of Louisiana considered the issue of the completion date for a project in the context of a claim for delay damages. The claim was made by Arcadis U.S., Inc. which entered into an agreement with Ansell Healthcare Products, LLC whereby Arcadis agreed to contract with a demolition contractor and supply project management for the demolition of a former battery manufacturing facility in Shreveport. Arcadis entered into a subcontract with Stryker Demolition & Environmental Services, LLC for the demolition work. A standard form of contract created by Arcadis with fill in the blanks was used for purposes of its subcontract with Stryker.

The subcontract provided for two dates with respect to the completion. June 3, 2019 was as the agreed upon date for substantial completion. The other date was identified in Project Schedule B for a required completion date of December 31, 2019. The court found the subcontract was ambiguous as to the required project completion date. In resolving the issue, the court relied upon Civil Code art. 2056 which provides in the case of doubt that cannot otherwise be resolved, a provision in a contract must be interpreted against the party who furnished its text. A contract executed in a standard form of one party must be interpreted in favor of the other party.

The court found art. 2056 known as the *contra proferentem rule* applied. Neither party presented evidence the subcontract was jointly drafted or truly negotiated as to the standard provisions of the contract. Accordingly, the Civil Code impels interpretation of the subcontract against Arcadis since it was an Arcadis standard form with fill in the blanks. Arcadis relied upon, for purposes of its claim, the date specified for substantial completion which was earlier than the later required completion date. The court held December 31, 2019 established the contract time. December 31, 2019 was the deadline to complete the project. *Arcadis U.S., Inc. v. Stryker Demolition & Environmental Services, LLC*, 20-0471 (W.D. La. 6/29/23), 2023 WL 4280924.

The court also considered, in a separate ruling, a motion for partial judgment of Arcadis to dismiss the fraud claims of Stryker. Stryker submitted a change order request for additional compensation for work relating to the removal of hazardous roofing material which, unknown to it, were heavily and pervasively saturated with water and included a second roof. Arcadis rejected the change order request. Stryker filed a lien in the amount of $388,587.00 for concealed conditions for the removal, transportation, and disposal of the materials. It also filed a counter-claim against Arcadis for fraudulent misrepresentation under Louisiana Civil Code art. 1953. Stryker alleged Arcadis, despite superior knowledge of the existence of two roofing systems and heavy saturation of the materials, misrepresented, suppressed or omitted true information regarding actual conditions. The counter-claim was a response to the Arcadis claim for additional costs as a result of alleged delays during project implementation as discussed above.

The court held Stryker did not allege fraud by affirmative misrepresentations, but rather Arcadis committed fraud by silence or omission regarding the roofing and other materials and other alleged sit conditions. Under Louisiana law, fraud by silence or suppression of the truth requires a duty to speak or disclose information. No duty to speak or disclose exists unless there is a fiduciary relationship or some type of special relationship of confidence or trust. The relationship at issue was held to be a customary arms-length business transaction between sophisticated parties in the construction/demolition industry. Stryker had not asserted any plausible facts that could create a fiduciary or special relationship with Arcadis such that there would be a duty on its part to disclose. The subcontract allocated responsibility and the risk for inspecting the site conditions to Stryker. Parties such as Arcadis and Stryker are free to contractually allocate responsibilities and risk of varying site conditions in their construction contracts. Stryker agreed in its contract it was familiar with the conditions at the site as pertinent to or which may affect the work and that it had been granted the right to conduct, and had conducted, all investigations it deemed appropriate to determine it could fulfill the requirements of the contract. Stryker assumed the risk of all conditions and regardless of such conditions or the expense or difficulty of performing the work and contracted to complete the work for the stated price without further recourse to Arcadis. The subcontract specifically stated information on the site and local conditions at the site furnished by Arcadis were not guaranteed by Arcadis to be accurate, and was furnished only for the convenience of Stryker.

The motion for judgment on the pleadings of Arcadis was granted. Stryker's fraud claims asserted in its counter-claim were dismissed. *Arcadis U.S., Inc. v. Stryker Demolition & Environmental Services, LLC*, 20-0471 (W.D. LA. 7/5/23), 2023 WL 4356403.